

Chapter 10

CAS 2014/A/3832 & 3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (FIS)*, Award of 19 June 2015

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Abstract Vanessa Vanakorn’s participation in the women’s grand slalom at the 2014 Winter Olympics was tainted by controversy. Allegations of the manipulation of her qualification results surrounded the skier’s presence at Sochi where she represented Thailand, finishing last in her chosen event. Subsequently, the governing body for the sport, the International Ski Federation, suspended Vanakorn for four years for various breaches of the FIS’s betting and anti-corruption regulations. Vanakorn appealed to CAS. The CAS award presents some interesting discussion on legal technicalities such as the standing of an athlete in such a case and on the applicable standard of proof to be used by the investigating body. In substantive terms, the CAS award also revealed that what had happened in the qualification process was not, on the evidence presented, an occasion of result manipulation and, at best, was an incident of questionable “field of play” management. In sum, Vanessa Vanakorn, a celebrated classical musician by profession, successfully defended her amateur sporting reputation at CAS and thus can call herself, for now and ever more, an Olympian.

Keywords Match-fixing • Result manipulation • Skiing • Legal standing • Standard of proof • Field of play

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10.1 Introduction

Dopers apart, the Olympics has a colourful history of cheating. Arguably the most audacious example occurred at the 1976 Olympics when, in the fencing rotation of the modern pentathlon, Russia's Boris Onischenko was found to have wrapped an intricate wiring system into the leather handle of his épée enabling him, at the press of a button, to manipulate the electronic scoreboard so as to register a 'hit' on his opponent without ever having to make contact with that opponent. Probably the most shameful example of cheating was at the 2000 Paralympics in Sydney when Spain won gold at the basketball tournament. The classification in question—intellectual disability—required that squad members have an IQ of less than 75. Only two of the 12 members of the team had the level required. One of the most recent instances of cheating came during the group stages of the women's doubles badminton tournament at the London Olympics of 2012. Players from China and South Korea attempted to lose in order to manipulate the subsequent knockout draw. The farce began when Chinese top seeds Wang Xiaoli and Yu Yang showed little interest in beating Korea's Jung Kyung-eun and Kim Ha-na to finish top of their group. Coming second would have meant avoiding compatriots and second seeds Tian Qing and Zhao Yunlei at least until the final. The Koreans responded in kind deliberately knocking the shuttle cock out of play or into the net, much to the crowd's derision.

The participants in all three examples were subsequently disqualified for, and disgraced by, their actions, but of enduring interest is the motivation underpinning all three. First, in 1976 Onishchenko was a three-time world champion and twice Olympic silver medallist but he was considerably older, at 38, than his opponents. Accordingly, he was desperate for one last chance to win Olympic gold, which would secure his continued preferential treatment in his day job as a member of the Red Army.¹ The origins of the Spanish scandal of 2000 appeared to lie in Spanish Paralympic sports administrators' desire fraudulently to secure greater state funding for their sport by linking it to the reflected national glory for Spain of success at the Games; indeed, Spain had their most successful Paralympics in Sydney, winning 107 medals to finish third in the medals table after Australia and Britain.² The action of the Chinese and Korean badminton pairs was, more

¹See generally Burnton S, 50 Stunning Olympic moments No. 18: Boris Onischenko Cheats, GB Win Gold, 14 March 2012. <http://www.theguardian.com/sport/london-2012-olympics-blog/2012/mar/14/50-stunning-olympic-moments>. Accessed 18 January 2016.

²Despite immediate suspicion in the Spanish media, the scandal was only fully revealed in the months after the 2000 Paralympics by a whistle-blower on the team who felt shamed by the episode. See Tremlett G, The Cheats, 16 September 2004. <http://www.theguardian.com/sport/2004/sep/16/gilestremlett.features11>. Accessed 18 January 2016. Subsequently, the head of the Spanish Federation for Mentally Handicapped Sports at the time was found guilty of fraud and ordered by a Madrid court to return the government subsidies which the federation received for the Paralympians. See Tomlinson S, Man that Led Shameful Spanish Basketball Team who Pretended to be Disabled to Win Paralympic Gold Found Guilty of Fraud, 14 October 2013. <http://www.dailymail.co.uk/sport/othersports/article-2459172/Spanish-basketball-team-pretended-disabled-win-Paralympic-gold-guilty-fraud.html>. Accessed 18 January 2016.

straightforwardly, a desire, supported by their coaches, to give themselves a better chance to win the competition by taking an easier path to the final.

The various motives outlined above can be easily understood (if not followed) by anyone who has participated *at an* Olympics: Onischenko's desperation to make the most of what was likely a unique, final opportunity to compete and medal at an Olympics; the Spanish athletes' aim to bask in the glory, nationally, reputationally and financially of being a member of a successful Olympian team; the adherence by the Chinese and Korean badminton teams to the letter if not the spirit of the Games in seeking a better path to the final. It is therefore wholly unsurprising that such motives can also be identified in athletes seeking to qualify *for an* Olympics. This contribution focuses on one such qualification process and namely the process by which Vanessa Vanakorn was permitted to take to the starting gate at the women's grand slalom skiing event at the Winter Olympics of 2014 held in Sochi, Russia.

10.2 Case History and Context

Sixty seven competitors finished the women's grand slalom event at Sochi in mid-February 2014. In last place, representing Thailand and a full 50s behind the gold medallist Tina Maze of Slovenia, was Vanessa Vanakorn. Slovenia features heavily in this story because Vanakorn qualified for Sochi through four hastily staged races in Krvavec, Slovenia, just days before the deadline for Olympic qualification in January 2014. Subsequently, in March 2014, the Ski Association of Slovenia (SAS) reviewed the four races and forwarded a report to the International Ski Federation (FIS).³ On 6 November 2014, a FIS hearing panel (FIS HP) found to its comfortable satisfaction that the results of the four races that took place on 18 and 19 January at Krvavec were manipulated to Vanakorn's advantage and thus in breach of various regulations in the FIS's Betting and Anti-Corruption Violation Rules (FIS BAC Rules). The FIS HP banned Vanakorn from skiing at FIS-sanctioned events for 4 years. On 18 November 2014, the FIS Council, acting on the FIS HP's Decision, annulled the four race results. Accordingly, without the points earned in the Slovenian races, Vanakorn should not, as the FIS informed the IOC, have been deemed eligible to participate at the 2014 Winter Olympics at Sochi. Vanakorn appealed both FIS decisions to CAS in December 2014 and the matter was heard in Lausanne on 3–4 March 2015.

Before that CAS award is analysed, two points of context are noteworthy, both of which ensured that Vanakorn's lengthy ban garnered significant media attention.

First, Vanessa Mae was born in 1978 in Singapore to Thai and Chinese parents and moved to England at the age of four after her mother married a British lawyer.

³FIS or Fédération Internationale de Ski is the governing body for the sports of Alpine skiing, Cross-Country skiing, Ski Jumping, Nordic Combined, Freestyle skiing and Snowboarding at the worldwide level, and has its registered office in Oberhofen/Thunersee, Switzerland.

She is a violin virtuoso and was a child prodigy in classical music. At just eight, she became the youngest pupil at the Central Conservatory of Music in Beijing. At 13, she released her first album, *Violin*, and became the youngest soloist to record both Beethoven and Tchaikovsky concertos. She has since amassed worldwide record sales in excess of 10 million. She claims to have skied from a young age but only began to take it seriously from 1999 onwards when, on meeting her current partner, a ski instructor, she began to ski more frequently. In 2010, Mae, a British citizen, announced an ambition to represent her step-father's country of birth (Thailand and thus taking his name, Vanakorn) as a downhill skier at the 2014 Winter Olympics in Sochi, Russia.⁴

The idea of a world famous violinist and enthusiastic if amateur skier seeking Olympic glory piqued the interest of the media. This interest intensified when the FIS HP found that, in their view, Vanakorn had, in effect, cheated and possibly even bought her way to Olympic qualification. The alleged manipulation of results by Vanakorn also fed into the wider concerns in international sport and law enforcement about match-fixing and match manipulation with reports emanating from Slovenia that the initial report by SAS on the four races at Krvavec in January 2014 had also been forwarded to the national police.⁵

This wider global concern about match-fixing in sport was epitomised in 2014 by the launch in September of the Council of Europe's Convention on the Manipulation of Sports Competitions.⁶ Article 3(4) of that Convention, which defined the 'Manipulation of Sports Competitions' appeared, at first instance, perfectly to encapsulate Vanakorn's misconduct on the ski slopes of Slovenia in January 2014

Manipulation of Sports Competitions means an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others.⁷

Nevertheless, when the CAS Panel released its award in June 2015, it concluded largely in favour of Vanakorn, annulling the FIS HP's decision to impose a

⁴Craig O, Vanessa-Mae: I Want to be an Olympic Skier, 8 August 2010. <http://www.telegraph.co.uk/news/celebritynews/7932222/Vanessa-Mae-I-want-to-be-an-Olympic-skier.html>. Accessed 18 January 2016.

⁵Telegraph Sport & Press Agencies, Vanessa Mae was Allowed to Ski at 2014 Winter Olympics after Results Fiddled, 11 July 2014. <http://www.telegraph.co.uk/sport/othersports/winter-olympics/10962001/Vanessa-Mae-was-allowed-to-ski-at-2014-Winter-Olympics-after-results-fiddled.html>. Accessed 18 January 2016.

⁶Details of Treaty No. 215, *Council of Europe Convention on the Manipulation of Sports Competitions*, available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/215>. Accessed 18 January 2016.

⁷See similarly the definition used in Article 2.2 of IOC's Code on the Prevention of the Manipulation of Competitions as approved by the IOC Executive Board on 8 December 2015 and available at http://www.olympic.org/Documents/Commissions_PDFfiles/Ethics/olympic_movement_code_on_the_prevention_of_the_manipulation_of_competitions-2015-en.pdf. Accessed 18 January 2016.

four year ban by observing

148. The Panel emphasizes that it fully supports the fight against match-fixing/result manipulation/corruption, which is a major threat to sport, and considers that such fight must be conducted relentlessly by the various sports bodies, at national and international level.

149. However, in the case at hand, there is no reliable and convincing evidence which links the Appellant herself to corruption for having intervened directly (or indirectly) in manipulating the results.

150. The way the organisation and the running of the Competitions were handled exposes itself to criticism. There are some doubts on certain sequences of events, which remain unclear, but for corruption to occur, there must be deliberate circumvention of the law and illegal acts, which were not demonstrated by FIS to the comfortable satisfaction of the Panel in the case at hand.⁸

The reasons why the appointed CAS Panel (chaired by Prof Dr Martin Schimke of Germany as supported by a Canadian attorney, Patrice Burnet, and an English solicitor, Mark Hovell) held largely in favour of Vanakorn—a concurrent appeal by Vanakorn against the FIS Council’s decision of 18 November was dismissed—are now examined.

10.3 Facts and Procedure

Vanakorn’s life-long passion and profession lies in classical music but, as noted earlier, she viewed skiing as her life-long hobby. Typical of a high achiever professionally, she aimed high in her ambitions for her favourite pastime, seeking international recognition. Realistically she knew that she would never likely qualify for a British Olympic team, which, for the 2014 Winter Games, had strict selection criteria based around eligible participants achieving a top-30 place in the FIS World Cup standings during the qualification period—at the time Vanakorn was ranked at 3166 in the world in giant slalom.⁹ Moreover, ‘enthusiastic amateurs’ had effectively been prohibited from competing at the Winter Olympics following a change to the rules emanating from the ‘Eddie the Eagle’ phenomenon at the 1988 Winter Games.

Eddie Edwards was a British skier who in 1988 became the first competitor to represent Britain in Olympic ski jumping. He finished last in the 70 and 90 m events but his enthusiasm, quirky personality and ‘underdoggedness’ ensured him a celebrity status. The Olympic authorities were not as impressed. In response, and partly because of safety concerns for participants—the conditions for the 90 m jump at the 1988 Games were quite windy and there were genuine concerns for

⁸CAS 2014/A/3832 & 3833, *Vanessa Vanakorn v. Fédération Internationale de Ski (Vanakorn v. FIS)*, Award of 19 June 2015.

⁹Williams O, Violinist Vanessa Mae set to Compete at Winter Olympics, 20 January 2014. <http://www.bbc.co.uk/sport/winter-olympics/25802907>. Accessed 18 January 2016.

Edwards' safety on landing—the so-called 'Eddie the Eagle Rule' was established by the IOC in 1990, meaning an athlete had to be in the top 30 % of international competitors, or the top 50, whichever was fewer.¹⁰ The rule meant, for instance, that Edwards would never again compete at an Olympic Games.

Nevertheless, while attending the 2009 Ski World Championships in Val d'Isère, Vanakorn noticed that there was an exception to the above rule for 'exotic' skiers, i.e. an exception to promote the participation of skiers from nations which could be considered 'developmental' in terms of skiing tradition and resources. In brief, under the applicable Olympic qualification rules for Sochi 2014, countries with no skier ranked in the world's top 500 (Thailand had no such skier) could still send one man and one woman to the Games—to compete in slalom and giant slalom—if those athletes met a second set of criteria; namely that "those athletes came within a maximum of 140 FIS points (the lower the points, the better the ranking) through competing at sanctioned FIS competitions in the respective events on the Olympics FIS points List published on 20 January 2014".¹¹

On 6 and 7 January 2014, Vanakorn competed in two FIS races at Funaesdalen in Sweden accumulating FIS points of 193.45 and 218.63, respectively, followed by a competition in Italy on 11 January in which her FIS Points stretched to 269.44 and thus well outside the 140 FIS Points threshold for Olympic qualification.¹² Undeterred, Vanakorn instructed her coach and agent to organise four giant slalom competitions before the 20 January cut off point. Vanakorn's coach and agent arranged the races in Slovenia, obtained the backing of the Thai Olympic Committee and asked the FIS officially to record the races on its FIS race Calendar for that month. Bizarrely (and there is much that was bizarre about the events of January 2014 in Krvavec) one of the races was listed as the 'Thai Junior National Championships'. As it happens, Vanakorn, at the time aged 35, making her 18 years older than the majority of the entrants, finished last but as she was the only one of the six, eventual finishers in that national junior championship who had Thai citizenship, she was declared champion.¹³

At the end of the four races at Krvavec, Vanakorn managed to achieve just below 140 FIS Points and thus qualified for the Sochi Games. In March 2014, however, the executive of the Alpine Sub-Committee of SAS began to carry out a review of the Krvavec races. On 11 July 2014, the SAS decided to suspend 4 named individuals involved in the organisation of the races. Further, on receipt of the SAS's report, the FIS initiated a disciplinary hearing against the four named individuals and others involved in the organisation of the races and including Vanakorn. On the grounds of the manipulation of race results and "complete

¹⁰Pye S, Reappraising Eddie 'the Eagle' Edwards, 4 February 2014. <http://www.theguardian.com/sport/2014/feb/04/reappraising-eddie-eagle-winter-olympics-ski-jumping>. Accessed 18 January 2016.

¹¹CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 11.

¹²Vanakorn's race history can be found through the search facility at <http://data.fis-ski.com/global-links/search-a-athlete.html>. Accessed 18 January 2016.

¹³CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 14.

disregard” for the integrity of sport, this FIS HP barred Vanakorn from any participation in FIS-sanctioned events for four years and further referred the matter to the FIS Council, recommending to the Council that the results of the Krvavec races be expunged and any points awarded to participants be deleted. On 18 November 2014, the FIS Council duly followed the HP’s recommendation, further noting that Vanakorn should not have taken part in the 2014 Sochi Games and that the IOC should be informed in order to take further action, including barring Vanakorn from participation at future Games.¹⁴

On 1 December 2014, Vanakorn filed a statement of appeal to CAS pursuant to her right of appeal under Article 9 of the FIS BAC Rules and in line with Articles R47 and R48 of the CAS Code.¹⁵ The preliminaries to be considered by the CAS Panel (on jurisdiction, admissibility and scope of review and applicable law) were largely uncontroversial,¹⁶ save in one point raised, in a relatively mean spirited manner, by the FIS. The FIS argued that Vanakorn lacked legal interest (*intérêt à agir*) in, and thus the standing (*locus standi*) to, objecting to their decisions on two grounds.¹⁷ First and with particular relevance to the FIS HP’s decision, the FIS pointed out that Vanakorn had decided to stop ever competing again in FIS-sanctioned competitions even on becoming re-eligible to compete on serving her ban. Moreover, and with particular regard to the FIS Council’s Decision, given she did not win a medal at the Winter Olympics of 2014, the determination by the FIS Council that she should not have participated at Sochi “could no longer have any practical relevance in view of the lapse of time”.¹⁸

At the hearing, Vanakorn confirmed that she did in fact intend to resume her skiing career and therefore her interest in appealing against her existing four year ban imposed by the FIS HP was evident. The CAS Panel agreed and similarly they concurred that, if the core element of the FIS Council Decision was confirmed (the deletion of the results of the Krvavec race) this would have an impact on her career accumulation of FIS points, crucial to her prospective qualification for races and competitions. Most importantly, on the issue of legal standing, the Panel

¹⁴*Ibid.*, paras 26–27.

¹⁵There were two separate filings, against the FIS HP (CAS 2014/A/3832) and the FIS Council Decision (CAS 2014/A/3833). With agreement by the parties, the CAS Office consolidated the proceedings.

¹⁶For example, pursuant to Article R57 of the CAS Code, the Panel noted that the matter would be considered *de novo*, *Vanakorn v. FIS*, para 67 and pursuant to Article R58 of the CAS Code, the Panel deemed that the applicable regulations in case at hand were primarily the FIS rules and, subsidiarily, Swiss law, *Vanakorn v. FIS*, paras 68–70. The FIS regulations in question satisfied the legal basis requirement pursuant to CAS jurisprudence on establishing a clear, predictable connection between the incriminated behaviour and sanction, see CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, paras 84–88 and citing *inter alia* CAS 2007/A/1363, *TTF Liebherr Ochsenhausen v. ETTU*, Award of 5 October 2007.

¹⁷Citing CAS 2010/A/2091, *Dennis Lachter v. Derek Boateng Owusu*, Award of 21 December 2011, para 13 and CAS 2009/A/1880 & 1881, *FC Sion & E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club*, Award of 1 June 2010, para 152.

¹⁸CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 64.

highlighted that Vanakorn could, as with virtually all athletes sanctioned on similarly grounds, “avail herself of a legal interest to rehabilitate her reputation which can be deemed tarnished by the FIS HP Decision concluding and declaring that she was either an active or knowing participant in a manipulation”.¹⁹

10.4 Parties’ Submissions and Arguments

Vanakorn’s submission can be distilled into four points.²⁰

First, she argued that given the seriousness of the allegations—the manipulation of competition results—the standard of proof “must come very close” to the criminal standard of beyond a reasonable doubt and accordingly hearsay evidence and indirect proof should not be admissible.

Second, she argued that it is accepted and frequent practice for beginners or novices to lower their FIS points average by selecting and even organising their ‘own’ FIS races. These “easy” races, she admitted, may even be specifically “tailored” to the needs of an individual racer. Further, Vanakorn also acknowledged that it is “natural” that those who need the race will pay the expenses of the organising local ski association or ski club. All of the above, Vanakorn boldly stated, is exactly what she, with the backing of the Thai Olympic Committee did at Krvavec in January 2014 and it was, she reiterated, a practice “not only common, but...definitely not against the FIS rules and regulations”.²¹

The third plank of her argument moved to a denial of some of the key allegations made against her by various witnesses at the Krvavec races. These allegations, relating to some if not all of the four races, were threefold in nature and alleged: (a) that Vanakorn started outside of the starting gate and thus manipulated her finishing time; (b) that there were doubts regarding the number of competitors who were officially listed as competing in and/or their registered finishing times and those who actually competed the course in real time; and (c) that Vanakorn had asked, even ordered, some of the participants, who she had paid to compete, to ski slowly. All three contentions were forcefully denied by Vanakorn who questioned the reliability of the witnesses and pointed out to the Panel that the registration of the timing or finishing position of other participants in the races in which she competed was not her responsibility and was not, in any event, of any advantage to her.

The final argument made by Vanakorn was one in which she alluded, somewhat conspiratorially, to the fact that the initial SAS investigation was tainted by the

¹⁹Ibid., para 63.

²⁰Ibid., para 72.

²¹Ibid.

fact she appeared to be an innocent victim of ‘political manoeuvring’ or jealousy between various clubs on the SAS Alpine Committee. There were also suggestions by Vanakorn that the FIS had subsequently and unduly influenced witnesses to the proceedings.²²

The FIS’s response was threefold in nature.²³

First, the FIS highlighted to CAS that the various circumstances surrounding the organisation of the Krvavec races, although not clear violations of the rules, must objectively be considered as unusual and highly suspicious. The FIS’s ‘suspicions’ related to the extremely hurried organisation of the races, which resulted in the race taking place in foggy weather conditions not normally considered safe for FIS races. In fact, the fog on the course was so dense that, according to the FIS “it was not possible to control whether the competitors passed all the gates correctly”. The effective mislabelling of one of the races as a National Junior Championship also illustrated, according to the FIS, that the spirit of its rules, and the integrity of its sport, were stretched to their limits in the effort to lower Vanakorn’s points total to an average of 140.

The FIS then went on to argue that certain practices at Krvavec did however stray into race manipulation contrary to FIS BAC Rules, including the orders to certain participants to slow down and the ‘phantom’ or inaccurate recording of participants’ finishing positions and times.²⁴ Arguably, the most serious allegation directed against Vanakorn was witness evidence to the effect that she was seen to have started from outside the starting gate on at least two occasions and that the starting wand appeared deliberately to have been left open and then triggered manually only when Vanakorn was already on the course. The manual triggering of the starting gate, it was suggested, indicated that the irregular start took place with Vanakorn’s knowledge.²⁵ All of the above, the FIS submitted, was reinforced by the fact that a number of the officials on duty at Krvavec had been sanctioned by the FIS HP because they disregarded their duties as chief of race, referee, starter, time keeper, technical delegate and members of the race jury. These officials, the FIS observed, had not challenged that FIS HP decision.

²²These allegations were dismissed summarily by the CAS Panel—Ibid., paras 99–102. No convincing evidence was supplied to support the accusations and in any event the Panel noted that any procedural irregularities that might have occurred previously would be largely cured by the *de novo* powers of the Panel pursuant to Article R57 CAS Code.

²³CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 73.

²⁴And specifically a violation of Article 3.2.1 of the FIS BAC Rules: “Fixing or contriving in any way or otherwise improperly influencing, or being a party to fix or contrive in any way or otherwise improperly influence, the result, progress, outcome, conduct or any other aspect of an Event or Competition.”

²⁵An irregular start constituted a violation of Article 613.5 of the International Ski Competition Rules (ICR). Under Article 205 ICR all participants are taken to have constructive knowledge of all ICR rules and technicalities, including those relating to proper starting procedures.

10.5 Panel's Rationale and Award

Before assessing the substantive issue of whether or not to annul the various FIS decisions declaring that Vanakorn had been involved in the manipulation of results, the Panel had to deal briefly (and usefully) with the applicable standard of proof in 'integrity' cases of this kind.²⁶ According to Article 4(1) of the FIS BAC Rules, the applicable standard of proof was that of 'comfortable satisfaction' which the regulation went on to interpret as a "standard which is greater than the mere balance of probability but less than proof beyond a reasonable doubt". The CAS Panel at hand noted that, although 'comfortable satisfaction' is a standard that is widely applied by CAS Panels in disciplinary as well as in match-fixing/corruption proceedings,²⁷ the Panel still had to "more precisely determine the standard of proof within this bandwidth given the application of the typical standard applicable in civil proceedings ('balance of probability') and of the one applicable in criminal proceedings ('proof beyond reasonable doubt') can lead to very important different conclusions depending on the facts, and the available evidence, of a particular case".²⁸

In its analysis of the present case and with regard to the standard of proof and the assessment of evidence, the Panel was guided by three principles

- Corruption is, by its nature, concealed as the parties involved will seek to use evasive means to ensure that they leave no trail of their wrongdoings²⁹;
- The paramount importance of fighting corruption of any kind in sport also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities³⁰;
- In assessing the evidence the Panel would bear in mind that the athlete had been charged with serious offences... [and thus]... the Panel...considered that it needed to have a high degree of confidence in the quality of evidence.³¹

The CAS Panel then moved to consider whether Vanakorn was, as the FIS alleged, either an active and knowing participant in the manipulation of results or, at the very least, whether as a FIS competitor she ought to have known that the Krvavec races were being manipulated for her benefit.³² The Panel quickly identified the

²⁶CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, paras 89–98.

²⁷Citing CAS 2009/A/1920 *FK Pobeda and others v. UEFA*, Award of 15 April 2010, para 85; CAS 2010/A/2172, *Oriekhov v. UEFA*, Award of 18 January 2011, para 53; CAS 2011/A/2426, *Amos Adamu v. FIFA*, Award of 24 February 2012, para 88 and CAS 2011/A/2490, *Daniel Köllner v. Association of Tennis Professionals and others*, Award of 23 March 2012, paras 85–87.

²⁸CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 93.

²⁹*Ibid.*, para 96, citing CAS 2010/A/2172, *Oriekhov v. UEFA*.

³⁰*Ibid.*, citing CAS 2009/A/1920, *FK Pobeda v. UEFA*.

³¹*Ibid.*, para 98, citing CAS 2011/A/2490, *Köllner v. ATP*.

³²*Ibid.*, paras 103 et seq.

four key accusations against Vanakorn: the suspicious circumstances surrounding the organisation of the Krvavec races³³; the irregular starts³⁴; that some participants were asked to ski slowly³⁵; and the manipulation of the results lists.³⁶

On the first point, the Panel noted that, although there were some unusual circumstances surrounding the holding of the Krvavec races—most egregiously the labelling of one race as the Thai Junior National Championships—nothing in the organisational process violated the FIS rules, as the FIS itself had admitted. Moreover, the Panel noted that, although the FIS nevertheless considered the organisation of Krvavec races as violating the ‘spirit of sport’, it was of the view that “if anything had to be blamed in the case at hand, it is rather the system put in place by FIS to organise competitions and not [Vanakorn] for having ‘used’ it for her own benefit”.³⁷ In this, the Panel went on to observe that it had learned that it is common that some non-European national federations ask and pay ski clubs or other national federations to organise races for them and sometimes to do so for the specific benefit of an individual racer and that this practice “is part of the DNA of the FIS race sanction system”.³⁸

Furthermore, and using an estoppel-based argument, the Panel stated that the FIS was at all times well aware of the holding of the Krvavec races; had in part facilitated them in advance by publishing their occurrence on its website on 14 January 2014; and had appointed a Technical Delegate to oversee the races, who testified that he did not witness any irregularities. This led the Panel to conclude that since the FIS had given “its imprimatur to the event and the way it was to be organised, it can hardly blame [Vanakorn] for using the existing rules to her advantage”.³⁹

As regards the irregular starts, the Panel stated that the evidence from witnesses was inconsistent. At most Vanakorn testified that she may on one occasion have opened the starting wand unintentionally but that she had nevertheless always followed the starter’s instructions.⁴⁰ Consequently, the Panel was not comfortably satisfied that Vanakorn had in fact committed any irregular start. Moreover, the Panel was not in any event convinced that an irregular start could qualify or equate to a charge of result manipulation or match-fixing. The matter was, at best, the

³³Ibid., paras 104–115.

³⁴Ibid., paras 116–123.

³⁵Ibid., paras 124–126.

³⁶Ibid., paras 127–129.

³⁷Ibid., para 109.

³⁸Ibid., para 110.

³⁹Ibid., para 111.

⁴⁰Ibid., para 121. The starter did not give any testimony at CAS.

Panel held, a ‘field of play’ issue for the Technical Delegate to resolve,⁴¹ and from which CAS Panels generally abstain.⁴²

Inconsistencies in witness evidence also led the Panel to dismiss the allegations against Vanakorn as regards the suggestion that some participants had been asked to ski slowly. There was no evidence to suggest that Vanakorn personally or her entourage had approached the other participants. There was some evidence that the starter had warned at least one participant to slow down but this may have been a warning given the bad weather conditions. Overall, the Panel did not have the necessary confidence in the evidence given by the FIS to conclude that any instructions given to ski slowly were imparted for the purpose of manipulating race results.⁴³

Finally, there were the allegations against Vanakorn that ‘mistakes’ on the results list were deliberate manipulations made in order to have a favourable impact on the calculation of Vanakorn’s FIS Points.⁴⁴ The Panel was comfortably satisfied that the results lists of the race did contain some errors but that these were merely administrative in nature and not the consequence of any manipulation by the organisers and/or Vanakorn’s entourage.

In conclusion therefore, the Panel held that it was not comfortably satisfied that either Vanakorn personally or any member of her entourage fixed, contrived or otherwise improperly influenced the organisation or outcome of the Krvavec races and thus the FIS HP’s decision of 6 November for breach of FIS BAC Rules made against Vanakorn was annulled.⁴⁵ As regards the FIS Council decision of 18 November 2014, the Panel noted that on the same date the FIS Council had held that the chief of Krvavec race, the referee, the starter, the technical delegate and chief of timing had all been sanctioned. The FIS Council, as permitted to do so under its FIS BAC Rules, had exercised its discretion to declare the results of the Krvavec races so tainted by maladministration that all accompanying results and qualification points therefrom should not stand. The CAS Panel, noting that none of the officials involved had challenged the FIS Council’s decision against them,

⁴¹Ibid.

⁴²See for example, CAS 2010/A/2090, *Aino-Kaisa Saarinen & Finnish Ski Association v. FIS*, Award of 7 February 2011, para 35. Abstinence by CAS from ruling on field of play decisions is not a matter of jurisdiction, but of arbitral self-restraint. The rationale for such self-restraint includes supporting the autonomy of officials; avoidance of the interruption to matches in progress; seeking to ensure the certainty of outcome of competition; the relative lack of perspective and/or experience of appellate bodies compared with that of match officials. In sum, the doctrine at any rate applies to prevent rewriting the results of the game or of sanctions imposed in the course of competition. The doctrine is disappplied upon proof that decisions otherwise falling within its ambit were vitiated by bias, malice, bad faith, arbitrariness or legal error. No evidence of bad faith in this respect was given, see CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 133.

⁴³Ibid., para 126.

⁴⁴Ibid., para 127.

⁴⁵Ibid., paras 130–133 and 147.

and recognising that Vanakorn personally was not guilty of any manipulation, agreed that the FIS Council had reasonably exercised its discretion in this regard and thus Vanakorn's appeal in this respect was dismissed.⁴⁶

10.6 Commentary and Conclusion

In overall review, there are two technical points of interest from the Vanakorn CAS award.

The first relates to an athlete's legal interest or standing in challenging a disciplinary sanction and particularly, but not exclusively, one which is of serious consequence, as relating to, for instance, doping or match-fixing. There is a tendency to think of the athlete and the accompanying sanction solely in terms of the direct professional and economic impact—as in the athlete's ineligibility to compete and earn (prize) money from their trade. And yet, the reputational impact (and indirect economic impact in terms of losing sponsors, etc.) on a professional sports person of, in effect, being tarnished with the accusation of fraudulent work practices ought not to be underestimated. Moreover, neither should the reputational impact on an amateur athlete of being labelled a cheat—and the Vanakorn award is a rare example of an amateur athlete pursuing a CAS appeal—be forgotten.⁴⁷ This is why, in considering Vanakorn's standing to take the case, the Panel's reference to an athlete's "legal interest to rehabilitate her reputation" is noteworthy and welcome.⁴⁸ Indeed, the reaction of another participant at the Sochi Games—Claudia Pechstein—to allegations of doping has illustrated starkly to the International Skating Union (ISU) and to CAS itself how powerfully motivating an athlete's interest in rehabilitating their reputation can be, to the extent that the legal basis of global sport's system of dispute resolution is now being challenged in national courts.⁴⁹

The second technical point of interest is the Panel's elaboration and guidelines on the use of the 'comfortable satisfaction' standard of proof. Although, as the Panel notes, the hybrid standard is used widely by international governing bodies and CAS Panels in disciplinary as well as in match-fixing/corruption proceedings, the exact location of the term in the bandwidth between the normal civil and

⁴⁶Ibid., paras 134–140 and 147.

⁴⁷Although technically an amateur athlete, Vanakorn is an extremely wealthy professional violinist and reportedly had the capacity to pay more than £135,000 (€180,000) in legal costs to successfully appeal to CAS. See Hope N, Vanessa-Mae: IOC rule that skier can be called an Olympian, 4 January 2016. www.bbc.co.uk/sport/winter-sports/35218889. Accessed 18 January 2016.

⁴⁸CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 63.

⁴⁹CAS 2009/A/1912, *P. v. International Skating Union (ISU) & CAS*, Award of 25 November 2009, as reviewed by David McArdle in McArdle 2013. See also Duval and Van Rompuy 2016.

criminal standards of proof has always been somewhat elusive. The Vanakorn Panel's guidelines in this regard are again noteworthy and welcome.⁵⁰

The key substantive question in this CAS case was however less technical and, in some ways, very straightforward: how was it possible for a ski racing novice, in her mid-thirties and without any prior competitive ski or other competitive sport history, to accomplish the qualifying standard for the Olympic Winter Games only a few months after beginning training?⁵¹ Vanakorn's first officially listed race on the FIS's website was at the New Zealand championships in August 2013—she did not finish. Between then and Krvavec she raced a further 10 times. She registered FIS points in eight of those 10 races with an average of just over 253 FIS Points—way outside the 140 qualification cut off for the Sochi. Further, the momentum gained by Vanakorn from her 'success' at Krvavec meant that within a year of skiing competitively in the giant slalom, her world ranking fell from 3166 in the various FIS points lists for 2013/2014 to a low of 1785 in the 2014/2015 equivalents.⁵²

The FIS's blunt reply to the above question was that Vanakorn and her entourage had likely used her private wealth to cheat, manipulating results, fixing races and paying off organisers, officials and other competitors along the way. The FIS's attitude in this regard can be seen as analogous to the reaction to the aforementioned behaviour of the Spanish 'Paralympic' basketball team and sports administrators of 2000, who, blinded by the prospect of Olympic glory, trampled on the integrity of their sport. In addition, the FIS's reaction to what they perceived as an attack on the integrity of their sport, and their imposition of a lengthy ban, must also be understood in light of what might be called the 'moral panic'⁵³ that became associated with match-fixing in sport globally in 2014—and has also been alluded to earlier in this piece. The most welcome aspect of this CAS award is therefore that the Panel did not 'panic' and on undertaking a meticulous review of the evidence pared down the events at Krvavec to their nub in order to assess whether with comfortable satisfaction such events could be deemed, as the FIS held them to be, manipulative in purpose, nature and outcome.

The evidence did not support the FIS's contention. In the Panel's opinion the events at Krvavec could not be equated to or conflated with match-fixing. At most, some administrative errors and field of play violations occurred for which the officials in charge (who were likely 'smitten'⁵⁴ and thus distracted by the presence of

⁵⁰CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, paras 96–98.

⁵¹*Ibid.*, para 104.

⁵²At the time of writing, 15 January 2016, Vanakorn's FIS Points average is 249.29. She is ranked 2969th in the world. Vanakorn's race history can be found through the search facility at <http://data.fis-ski.com/global-links/search-a-athlete.html>. Accessed 18 January 2016.

⁵³This term used in sociological and criminological research refers generally to an extreme social response (usually played out in the media) to the belief that the moral condition of society is facing an acute threat from a particular social condition or recent social phenomenon or the immoral, socially deviant behaviour of a specific group of persons.

⁵⁴CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 145.

a world famous musician) had been sanctioned and the race results duly expunged from FIS records. Vanakorn, similar in age to Onishchenko at the Montreal Games of 1976, shared his desire for one final chance at being an Olympian but there the analogy ended. She did not cheat to realise her objective. She did not, for example, have an ‘Onishchenko wire’ in the handle of her ski pole through which she should raise or lower the starting gate on demand. In fact, although it was obvious that the Krvavec races were organised for the sole purpose of allowing Vanakorn to qualify for the Olympics at short notice, FIS regulations permitted such events.⁵⁵ Further, no other competitor at the Krvavec races appeared to have been paid to compete (slowly or otherwise). The only payments that the Panel found to have been made were to the amount of € 6055 which Vanakorn paid to the local ski club for the organisation of the races—an amount which the Panel deemed ‘not unreasonable’.⁵⁶

Reasonable though the payment may have been, the Panel admitted the fact that such a practice existed was still somewhat surprising, observing

“In contrast to most other competitions and sports, where approaching and/or paying organisers may create a suspicion of wrongdoing, in the present case, as the system is built around such possibilities, these simple facts can certainly not be an indication of wrongdoing, let alone conclusive evidence of corruption or illegal activity. The Panel wonders whether the FIS should consider exercising enhanced oversight over such races”.⁵⁷

The analogy here is similar to the aforementioned debacle at the women’s badminton competition at the London Olympics. There, the faulty design of the group stages was a factor in the abject displays of the Chinese and Korean teams—echoing the infamous Germany v Austria game at the FIFA World Cup of 1982 which saw Algeria eliminated at the first group stage. In short, the fundamental *cause* of the farrago at the 1982 World Cup, the 2012 London Olympics and on the ski slopes at Krvavec lay with the poor regulatory oversight and foresight of the governing body; and the *effect* of this poor oversight and foresight would ultimately impact most adversely on the integrity of the sport as a whole and less on the individuals who exploited it. In this, a lasting outcome of the Vanakorn award may be the tightening up of the regulations permitting skiers from ‘developing’ nations appearing at the Olympics, thus echoing the fallout from the behaviour of the Spanish Paralympic basketball team of 2000, which led to the withdrawal of intellectual disability classifications for the Athens and Beijing Paralympics to the detriment of hundreds of innocent Paralympians globally.⁵⁸ Cheating in sport—be it doping, fixing, etc.—is rarely a victimless crime.

⁵⁵Ibid., para 144.

⁵⁶Ibid.

⁵⁷Ibid., para 110.

⁵⁸The tightly regulated classification returned, in part, for London 2012; see Jinkinson B and Hammond C, How the Paralympics Checks Intellectual Disability, 30 August 2012. <http://www.bbc.co.uk/news/magazine-19371031>. Accessed 18 January 2016.

Finally, given that the FIS Council's decision was upheld by CAS and the points associated with the Krvavec races wiped from the record books, it remained open for the IOC to declare that Vanakorn should not have competed at the Sochi Games. Possibly fearing another CAS application,⁵⁹ but likely in an effort to draw a line under the matter that had dragged on for two years, the IOC announced in January 2016 that it had decided not to annul Vanakorn's Sochi results. Vanakorn expressed delight at the news and, undaunted, said that she expected to return to competitive skiing in March 2016 with the long-term ambition of qualifying for the 2018 Winter Olympics in PyeongChang, South Korea.⁶⁰

In conclusion then, in mid-January 2014 Vanessa Vanokorn was a world famous violist and an enthusiastic amateur skier. 1 month, € 6000, 4 Slovenian slaloms and 2 further runs at Sochi later, she was, and now will be forever, an Olympian. To paraphrase Pierre de Coubertin from all those years ago; it is the taking part that counts.

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⁵⁹CAS 2014/A/3832 & 3833, *Vanakorn v. FIS*, para 64.

⁶⁰Hope N, Vanessa-Mae: IOC rule that skier can be called an Olympian, 4 January 2016. <http://www.bbc.co.uk/sport/winter-sports/35218889>. Accessed 18 January 2016.