

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SEMENYA v. SWITZERLAND

(Application no. 10934/21)

JUDGMENT

Art 1 • Jurisdiction of States • Applicant not within respondent State's jurisdiction, given absence of territorial link between Switzerland on the one hand, and the applicant, the adoption by World Athletics of the regulations governing her personal situation and their effects on her on the other • Applicant's civil-law appeal to Federal Supreme Court (FSC) against award by Court of Arbitration for Sport (CAS) created, by way of exception, a jurisdictional link with Switzerland with regard to Art 6 • Absence of exceptional circumstances capable of establishing territorial link in respect of complaints under Art 8, 13 and 14
Art 6 § 1 (civil) • Fair hearing • Appeal to FSC against CAS award rejecting complaint by professional athlete with differences of sex development, concerning non-State regulations requiring her to lower her natural testosterone level in order to compete in women's category in international competitions • Right to fair hearing requiring particularly rigorous examination where CAS's mandatory and exclusive jurisdiction was imposed on sportsperson by governing body, and dispute concerned "civil" right or rights corresponding, in domestic law, to fundamental rights • FSC's review limited to compatibility of CAS award with substantive public policy, a concept it interpreted very restrictively • Failure to conduct particularly rigorous examination of applicant's complaint

Prepared by the Registry. Does not bind the Court.

STRASBOURG

10 July 2025

This judgment is final but it may be subject to editorial revision.



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In the case of Semenya v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Marko Bošnjak,
Síofra O'Leary,
Arnfinn Bårdsen,
Gabriele Kucsko-Stadlmayer,
Mattias Guyomar,
Faris Vehabović,
Mārtiņš Mits,
Pauliine Koskelo,
Tim Eicke,
Jolien Schukking,
Erik Wennerström,
Raffaele Sabato,
Andreas Zünd,
Diana Sârcu,
Kateřina Šimáčková,
Davor Derenčinović,
Sebastian Răduleţu, *judges*,

and Abel Campos, *Deputy Registrar*,

Having deliberated in private on 2 April 2025,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant, who is a South African international-level athlete, specialising in middle-distance races, complained that she was obliged to decrease her natural testosterone level in order to be allowed to take part in the female category of international competitions, as a result of the "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" ("the DSD Regulations") issued by the International Association of Athletics Federations (IAAF – now called World Athletics), a Monegasque private-law association, and that her legal actions challenging those regulations before the Court of Arbitration for Sport (CAS), which has its seat in Switzerland, and then the Federal Supreme Court had been rejected. In her application to the Court, the applicant relied on Article 3 of the Convention, Article 6 § 1, Article 8 taken alone and in conjunction with Article 14, and Article 13.

PROCEDURE

2. The case originated in an application (no. 10934/21) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for

the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a South African national, Ms Mokgadi Caster Semenya ("the applicant"), on 18 February 2021.

3. The applicant was represented by Ms S. Sfoggia, a lawyer practising in Paris. The Swiss Government ("the Government") were represented by their acting Agent, Mr A. Scheidegger, of the Federal Office of Justice.

4. On 3 May 2021 the Government were given notice of the application.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 11 July 2023 a Chamber of that Section composed of Pere Pastor Vilanova, President, Yonko Grozev, Georgios A. Serghides, Darian Pavli, Peeter Roosma, Ioannis Ktistakis, and Andreas Zünd, judges, and Milan Blaško, Section Registrar, delivered a judgment in which it dismissed, by a majority, the Government's preliminary objection that the Court lacked jurisdiction *ratione personae* and *loci*; declared admissible, by a majority, the complaint concerning Article 14 in conjunction with Article 8, and the complaint concerning Article 13 in relation to Article 14 in conjunction with Article 8; declared inadmissible, by a majority, the complaint concerning Article 3 of the Convention; held, by four votes to three, that there had been a violation of Article 14 of the Convention in conjunction with Article 8; held, by four votes to three, that there had been a violation of Article 13 of the Convention in relation to Article 14 in conjunction with Article 8; and held, by six votes to one, that there was no need to examine separately the complaints under Article 8 of the Convention taken alone or the complaint under Article 6 § 1. The concurring opinion of Judge Pavli, the partly concurring, partly dissenting opinion of Judge Serghides, and the joint dissenting opinion of Judges Grozev, Roosma and Ktistakis were annexed to the judgment.

6. On 9 October 2023 the Government requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. On 6 November 2023 a panel of the Grand Chamber accepted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. Síofra O'Leary's term as President of the Court came to an end. Marko Bošnjak succeeded her in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Síofra O'Leary, Gabriele Kucsko-Stadlmayer and Mārtiņš Mits continued to sit following the expiry of their terms of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4.

9. The applicant and the Government each filed observations on the admissibility and the merits of the case (Rule 59 § 1). In addition, third-party comments were received from the United Kingdom Government; Mr Volker Türk, the United Nations High Commissioner for Human Rights; World Athletics; Athletics South Africa; the Canadian Centre for Ethics in Sport; the Human Rights Centre of Ghent University; the International Commission

of Jurists, Organisation Intersex International Europe and the European Region of International Lesbian, Gay, Bisexual, Trans and Intersex Association, jointly; the South African Human Rights Commission; Mr Antoine Duval, Mr Cesare P.R. Romano and Mr Faraz Shahlei, jointly; Human Rights Watch and Ms Katrina Karkazis and Ms Payoshni Mitra, jointly; Dr Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Ms Melissa Upreti, President of the Working Group on discrimination against women and girls, and Mr Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, jointly; the Vlaamse Ombudsdienst; Women Sport International, the International Association of Physical Education and Sport for Girls and Women and the International Working Group for Women in Sport, jointly; and the World Medical Association and Yale University's Global Health Justice Partnership, jointly, all of which had been given leave by the President of the Chamber or of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 and Rule 71 § 1).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 15 May 2024.

There appeared before the Court:

(a) *for the Government*
Mr A. SCHEIDEGGER, *Acting Agent*,
Ms C. EHRICH,
Ms D. STEIGER LEUBA,
Mr N. MEIER,
Ms I. RYSER, *Advisers*;

(b) *for the applicant*
Ms S. JOLLY KC,
Ms C. MCCANN, *Counsel*,
Mr C. DARGHAM,
Mr C. SAYAO,
Mr G. NOTT,
Mr P. BRACHER, *Advisers*.

The applicant was also present.

The Court heard addresses by Mr Scheidegger, Ms Jolly KC and Ms McCann, as well as their replies to questions put by judges.

THE FACTS

11. The applicant was born in 1991 and lives in Pretoria.

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a South African international-level athlete, specialising in middle-distance races. Among other achievements, she won the gold medal in the women's 800 m race at the Olympic Games in London (2012) and Rio de Janeiro (2016), and she is also a three-time world champion over that distance (Berlin 2009, Daegu 2011, and London 2017).

13. In 2009, in the context of the World Championships being held in Berlin, IAAF-appointed doctors conducted a physical examination of the applicant, including her genital areas, and performed a blood test with a view to determining her biological sex. The IAAF subsequently informed her that she would have to decrease her testosterone level below 10 nmol/L if she wished to be eligible to compete in the female category at international athletics competitions in her preferred events.

14. The applicant was prescribed oral contraceptives in order to decrease her testosterone level. She submitted that she experienced serious side effects from the hormone treatment.

15. Despite those side effects, the applicant won the women's 800 m race at the World Championships in Daegu (2011) and the Olympic Games in London (2012).

16. On 1 May 2011 the IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition came into force. These Regulations provided that, in order to be eligible to compete in the female category, a female athlete had to either have a blood testosterone level lower than 10 nmol/L or, if her testosterone was equal to or higher than that amount, to be able to demonstrate that she had an androgen resistance such that having androgen levels within the normal male range did not provide her with any competitive advantage. The Regulations also established a three-level medical assessment: initial clinical examination of the athlete; a preliminary endocrine assessment carried out on urine and blood samples; and full examination and diagnosis.

17. On 24 July 2015, in an interim award delivered in the *Dutee Chand v. Athletics Federation of India (AFI) and IAAF* (CAS 2014/A/3759) case, the CAS temporarily suspended those Regulations.

18. Dutee Chand, an Indian athlete, had lodged a request for arbitration with the CAS against a decision of the IAAF in which, on the basis of the above-mentioned Regulations, it had revoked her eligibility to participate in the female category of competition in the light of her increased level of testosterone. Based on various scientific opinions and expert reports, the CAS had concluded that it had not been sufficiently proven that a female athlete with a testosterone level above the maximum permitted enjoyed such an unfair performance advantage over her competitors that it was necessary to exclude her from competing in the female category. In its view, the link between an increased testosterone level and increased athletic performance

had not been sufficiently established. It therefore suspended the Regulations for a maximum period of two years during which the IAAF had the opportunity to provide other evidence and expert analysis demonstrating, in particular, the performance advantage that hyperandrogenic female athletes enjoyed as a result of their testosterone level over non-hyperandrogenic female athletes, in the absence of which the Regulations would be declared null and void.

19. Consequently, the applicant stopped taking her hormone treatment.

20. In 2016 the applicant once again won the Olympic gold medal in the women's 800 m race, and in 2017 she became world champion again in the same distance.

21. On 23 April 2018 the IAAF issued the Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) ("the DSD Regulations"; see paragraphs 70-79 below). The Regulations provided, in particular, that, in order to be eligible to compete in the female category at international competitions in certain events (400 m, 400 m hurdles, 800 m, 1,500 m and 1 mile races, and all the other races over distances between 400 m and 1 mile), or to have recognised a world record at non-international competitions, a "Relevant Athlete" had to meet each of the following conditions: be recognised at law "either as female or as intersex (or equivalent)"; to reduce her blood testosterone level to below 5 nmol/L for a continuous period of at least six months; and thereafter maintain her blood testosterone level below 5 nmol/L continuously (whether she was in competition or not) for so long as she wished to remain eligible to compete in the female classification in the relevant events at international competitions (or have a world record recognised in a relevant event at non-international competitions).

22. The applicant refused to comply with the Regulations since they required her to submit to hormone treatment with poorly understood side effects.

II. THE PROCEEDINGS BEFORE THE CAS

23. On 18 June 2018 the applicant lodged a request for arbitration with the CAS, which has its seat in Lausanne, challenging the DSD Regulations. She submitted that they were in conflict with higher rules, such as the IAAF Constitution, the Olympic Charter, Monegasque law and international human rights law applicable to Monaco. She argued that they were discriminatory on grounds of birth or natural physical, genetic or biological characteristics, of sex (against women), of gender and of physical appearance, and that they discriminated against female athletes who competed in certain events. The applicant also submitted that the Regulations were not "necessary" in order to guarantee fair competition in the female category, that they were not "reasonable" in that they had no logical connection to that aim, and that they

were not "proportionate" having regard to their detrimental consequences on female athletes with a difference of sex development ("DSD"). On the latter point, the applicant referred to the exclusion of the athletes concerned from competition, the interference with their bodily integrity caused by the intrusive examinations and associated psychological harm and the resulting stigmatisation, the public intrusion, judgment and humiliation, and the physical and mental harm caused by the pharmacological or surgical interventions used to reduce testosterone levels.

24. On 25 June 2018 the South African athletics federation (Athletics South Africa, "ASA") also applied to the CAS, which joined the cases on 29 June 2018.

25. On 23 July 2018 the CAS informed the parties of the names of the three arbitrators on the panel which would examine the case.

26. While the proceedings were ongoing, the IAAF amended the list of DSDs covered by the DSD Regulations, with the result that they now apply only to 46 XY DSD athletes. Athletes with XX chromosomes but a testosterone level equal to or greater than the permitted level under the DSD Regulations are therefore no longer subject to them.

27. At the close of the exchange of written pleadings, a hearing took place in Lausanne from 18 to 22 February 2019. The applicant gave evidence in person.

28. In addition to the applicant's own statement, five other witness statements submitted by her were added to the case file, including those of the gynaecologist and doctor who had supervised her while she was taking oral contraceptives to reduce her testosterone level, and one from the athlete Dutee Chand (see paragraphs 17-18 above). Thirty-two statements by medical, scientific and legal experts were also included in the case file, fifteen of which had been requested by the applicant, eight by ASA and nine by the IAAF.

29. On 30 April 2019 the CAS rejected the requests for arbitration in a 136-page reasoned award in English.

30. In its award, the CAS began by stipulating that, in ruling on the dispute, it would, unless otherwise specifically provided, "apply the IAAF's Constitution and Rules in conjunction with the Olympic Charter and in subsidiary, where necessary, Monegasque law". On this point, the award provides as follows:

> "**VII. Applicable Law**
>
> 421. Article R45 of the Code [of Sports-related Arbitration] provides as follows:
>
> 'The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.'
>
> 422. In both their oral and written submissions, the parties have expressly referred to and relied upon the Olympic Charter, the IAAF Constitution, as well as the IAAF Rules and Regulations, including the DSD Regulations. In subsidiary arguments, the parties

also mutually rely upon the law of Monaco (and, on various points, ASA relies on various National laws of Korea and Russia).

423. Moreover, during final submissions, the Panel asked the parties if they would consent to the Panel exercising power under Article R45 of the Code. The IAAF declined to provide such consent at the time. During subsequent post-hearing written submissions, the IAAF modified its position by suggesting that it would consent to a limited exercise of that power. The Claimants did not agree to the power under Article R45 being exercised on a limited basis as proposed by the IAAF. Accordingly, in the absence of unanimous agreement between the parties, the power under Article R45 is inapplicable.

424. Accordingly, in deciding this dispute and unless otherwise specifically mentioned, the Panel finds no reason to deviate from the law agreed upon by the parties and will apply the IAAF's Constitution and Rules in conjunction with the Olympic Charter and in subsidiary, where necessary, Monegasque law."

31. On the merits, the CAS held as follows:

"**A. Introduction**

454. Ms. Semenya is a woman. At birth, it was determined that she was female, so she was born a woman. She has been raised as a woman. She has lived as a woman. She has run as a woman. She is – and always has been – recognised in law as a woman and has always identified as a woman.

455. As an athlete, she says that she was born to run. She has undoubtedly had outstanding success in her career as an elite middle-distance runner, winning multiple Olympic, World, Commonwealth and regional championship titles. She is, today, a strong and dignified woman and one of the most famous and accomplished female athletes in the history of the sport.

456. The IAAF is entrusted with enacting regulations to facilitate and ensure the fair and principled administration of the sport of athletics for the benefit of all athletes. To this end, the IAAF has for some years, if not decades, struggled to deal with a problem that the IAAF believes must be solved. While children manifest similar athletic ability pre-puberty, this changes significantly post-puberty. Later in this Award, some of those changes are discussed but, at this point, suffice to say that post-puberty, generally speaking, male athletes outperform female athletes and, at elite level, this difference is insurmountable. Accordingly, in order to enable women to compete at elite level, with all of the benefits that result from such competitions and success in such competitions, it has been considered necessary to provide for what the IAAF calls 'a protected class' of female athletes. Without the protection of restricted entry to that class, the IAAF says, women athletes would be at risk of being denied the right to compete and succeed at the highest levels. It would follow that women athletes would cease to compete in events where that protection is not available. Accordingly, the 'protected class' must exist, and some workable and effective condition(s) must be established to regulate who may, and may not, participate within it.

457. The answer, at first, seems to be logical and straightforward: restrict entry to that 'protected class' to female athletes and deny entry to male athletes, who have their own category in which to compete. In short, require like to compete against like. However, that straightforward answer assumes that sex is binary for all purposes, which it is not. It is not so simple. While elite competitive athletics has been divided into discrete binary categories of male and female, a neat and discrete boundary between male and female does not exist in nature. The male/female categorisation at the heart of

competitive athletics thus does not map perfectly onto the diverse spectrum of sex characteristics that exists in natural human biology.

458. In recent years, a further complicating factor has begun to emerge. Laws governing the assignment of legal sex have begun to evolve in a number of jurisdictions around the world. ...

459. The IAAF has tried to find a solution to this dilemma and has put forward a number of solutions, all of which have been deemed inappropriate. The DSD Regulations are the latest iteration of the IAAF's struggle to enact an effective and legally defensible means of reconciling the binary male/female classification in competitive athletics with the variegated spectrum of biological sex characteristics that exist in nature and the increasingly complex and diverse national laws governing legal sex.

460. This case therefore involves a collision of scientific, ethical and legal conundrums. It also involves incompatible, competing, rights. It is not possible to give effect to, or endorse, one set of rights without restricting the other set of rights. Put simply, on one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and not against male athletes and to achieve the benefits of athletic success, such as positions on the podium and consequential commercial advantages. This right of competition is often described (although not so easily defined) as the right to compete on a 'level playing field'.

461. In the present case it is not in dispute that it is necessary to have a 'protected class' of female athletes. It is common ground that competitive athletics is (and should be) divided into separate male and female categories. ... However, the issue of how to regulate the right to participate in the 'protected class' is complex. In strictly biological terms, not all individuals' bodies fit neatly and unambiguously into a single binary male/female classification. Complex questions of biology therefore arise, necessitating consideration of issues of genetics, endocrinology and gynaecology.

462. It is common ground that any rules regulating who may participate in the female category must be rational, objective and fair. The IAAF insists that it does not challenge or call into question the sex or gender of Ms. Semenya or DSD athletes in general. Rather, in a consideration of eligibility to compete in certain events as a female, it refers to what it terms the 'sports sex' of women athletes, invoking the existence of certain DSD and the level of endogenous testosterone to introduce a further qualification or eligibility requirement for entry into certain events in the female category. ...

463. In considering the issues in this case, it is important to bear in mind that the labels 'male' and 'female' may mean different things in different contexts. For example, these words may refer to a person's legal sex (i.e. their sex in the eyes of the law), their subjective gender identity (i.e. how they identify themselves) or some specific aspect of their individual physiology (for example their gonadic characteristics or their hormonal profile). The different meanings that attach to the same words in different contexts explain, in part, why rules governing eligibility to participate and compete in the female category generate such controversy and strength of feeling. A rule that seeks to define 'maleness' or 'femaleness' for one purpose can easily be perceived (rightly or wrongly) as an attempt to define – or to challenge – a person's 'maleness' or 'femaleness' for other purposes or in other contexts.

464. [N]othing in this Award is intended to question, determine or pass judgment upon any aspect of any person's sex or gender. Instead, this Award is solely concerned with deciding the specific legal issues that arise for determination of the lawfulness of the DSD Regulations as challenged by Ms. Semenya and ASA.

...

B. The *Chand* decision

...

C. The factual and scientific issues in this case

473. A number of complex factual and scientific issues emerged during the proceeding. ...

474. The factual and scientific issues can broadly be grouped by reference to the following questions:

- What is the role of testosterone in male/female sporting ability?
- What is the role of DHT [dihydrotestosterone] in male/female sporting ability?
- What are the main characteristics of an athlete with a DSD such as 5-ARD?
- Can it be said, as advanced by the IAAF, that an athlete who has a female legal sex and a female gender identity nevertheless has a 'male sports sex'?
- Did the athletes whose data were the subject of BG17 provide informed consent for those data to be used for the purposes of that study?
- Do women with a 46 XY DSD such as 5-ARD have an athletic advantage over other female athletes?
- If so, what is the magnitude of that advantage?

475. The evidence on these questions was provided by a number of eminent experts in an array of scientific disciplines. The challenges made to the independence of some of those experts are rejected. The Panel is satisfied that each expert used his or her best endeavours to express their own genuinely held views. ...

476. Some matters were not ultimately in dispute as between the experts called by the parties; some matters remained in dispute. ...

D. What is the role of testosterone in male/female sporting ability?

488. The role of testosterone in determining sporting ability was a major focus of each party's submissions and evidence. A fundamental feature of the Claimants' case is that there is no single determinant in defining sex as male or female and no single determinant for sporting ability. In respect of the latter, the Claimants contend that natural genetic variation can provide many examples of enhanced athletic ability that has led to outstanding success for particular individual athletes or groups of athletes.

489. It is accepted by all parties that circulating testosterone has an effect from puberty, in increasing bone and muscle size and strength and the levels of haemoglobin in the blood. After puberty, the male testes produce (on average) 7 mg of testosterone per day, while the female testosterone production level stays at about 0.25 mg per day. The normal female range of serum testosterone (excluding cases of PCOS [Polycystic ovary syndrome]), produced mainly in the ovaries and adrenal glands, is 0.06 to 1.68 nmol/L. The normal male range of serum testosterone concentration, produced mainly in the testes, is 7.7 to 29.4 nmol/L.

490. The DSD Regulations require athletes with 5-ARD and athletes with other 46 XY DSD who wish to compete in the female category to reduce their testosterone levels to within the normal female range and to maintain those levels within that range. It is not in dispute that 5 nmol/L represents a level that no 46 XX woman would exceed (save for rare cases involving CAH [Congenital adrenal hyperplasia], which the IAAF intends to remove from the scope of the DSD Regulations, and potentially a small fraction of women with PCOS, who may occasionally have levels of testosterone marginally above that level).

491. Testosterone may not be the only factor that results in an increase in lean body mass, higher levels of haemoglobin and increased sporting ability, but the expert evidence explains that it is the primary factor. ...

492. There was ultimately no dispute among the parties' expert witnesses that testosterone was *at least* a primary factor ... the overwhelming majority view was that testosterone is the primary driver of the physical advantages and, therefore, of the sex difference in sports performance, between males and females.

493. Having considered all of the scientific evidence adduced by the parties, the Panel accepts this conclusion.

E. What is the role of DHT in male/female sporting ability?

494. This question arose in the context of the scientific evidence concerning the effects of 5-ARD. Individuals with 5-ARD have the same levels of testosterone as normal adult males. They do not, however, have the same levels of DHT. The question, therefore, is what role (if any) DHT has on sporting ability and physical performance. As noted above, while there was a degree of agreement among the experts regarding certain DHT-related issues, they could not reach agreement concerning whether levels of endogenous DHT affect physical performance (and, if they do, what the magnitude of that effect may be).

495. The Panel has carefully considered the evidence adduced by the parties' experts on this point, which only came into focus at a relatively late stage in the proceedings. On the basis of that evidence, the Panel is unable to exclude the possibility that DHT may have some effect on physical performance and sporting ability. The Panel is satisfied, however, that such an effect (if it exists at all) is at most modest compared to the effect of testosterone. In reaching this conclusion, the Panel considers that while DHT is included in the World Anti-Doping Agency Prohibited List, the weight that can be attached to this factor is small in light of paucity of examples of exogenous DHT actually being used for performance enhancing purposes.

496. The majority ... are satisfied that endogenous DHT has either no effect on athletic performance or, at most, has a modest effect, of a different order of magnitude to the effect of endogenous testosterone.

F. What are the main characteristics of an athlete with a 46 XY DSD (in particular 5-ARD)?

497. [...] all 46 XY DSD such as 5-ARD are forms of genetic mutation that can affect testosterone levels. Individuals with 5-ARD have what is commonly identified as the male chromosomal sex (XY and not XX), male gonads (testes not ovaries) and levels of circulating testosterone in the male range (7.7-29.4 nmol/L), which are significantly higher than the female range (0.06-1.68 nmol/L).

498. In individuals with 5-ARD, the deficiency in 5-alpha reductase affects the conversion of the male foetus's testosterone into DHT, with the result that the external genital tissues do not develop normally. At birth, depending on physical examination

of external genitalia and often in consultation with the parents and other experts, such a person may be assigned the female sex or the male sex. While the enzyme deficiency affects the development of male gonads in utero, following the onset of puberty circulating testosterone has the same virilising effect on the body of an individual with 5-ARD as it does on males without 5-ARD. The testes produce normal male levels of testosterone. According to the IAAF's expert evidence, a reported 58-63% of 5-ARD persons who were assigned the female sex at birth change to the male sex when these secondary sex characteristics develop at puberty.

499. 5-ARD has tissue-specific effects (e.g. in respect of genital formation) and not general effects. The virilising effects of circulating testosterone after puberty on muscle size and strength, bone size and strength and serum haemoglobin concentration are not affected. Individuals with 5-ARD are all fully androgen sensitive. Therefore, all individuals with 5-ARD experience the virilising effect of their circulating testosterone. That is, for these athletes, the question of partial or complete androgen insensitivity is not relevant, although it is relevant to other 46 XY DSD athletes with high levels of circulating testosterone.

500. It is not disputed that a person, whether a man or a woman, with 5-ARD is a person who is XY, with testes and not ovaries and levels of endogenous circulating testosterone in the male range. What is in dispute is whether these differences, and particularly testosterone levels, do in fact affect body composition, muscle mass and haemoglobin levels to the same or similar extent as in the male adult population and whether such differences have an impact on sports performance. The Panel addresses these disputed issues further below.

G. Can it be said, as advanced by the IAAF, that a woman can have a 'male sports sex'?

...

502. As explained above, the sport of athletics is divided in a binary fashion: male and female. The existence and legitimacy of that division is not challenged. ...

507. While the parties' submissions concerning the validity of the concepts of 'biological males' and 'male sport sex' provide important context to the arguments for and against the DSD Regulations, the Panel notes that the validity of these concepts and the appropriateness of the IAAF's terminology do not themselves require determination as matters of fact. The Panel, therefore, does not consider it necessary specifically to determine whether the IAAF's invocation of the concept of a 'male sport sex' possessed by 'biological males' and a 'female sport sex' possessed by 'biological females' is valid and/or proper. Instead, the Panel considers it appropriate to focus on whether women with 46 XY DSD such as 5-ARD have an athletic advantage over other female athletes and, if so, whether the magnitude of that advantage is capable of subverting fair competition in certain athletic events.

H. Did the athletes whose data were the subject of BG17 provide informed consent for those data to be used by the IAAF for the purposes they are now relied on?

...

I. Do women with a 46 XY DSD such as 5-ARD have an athletic advantage over other female athletes? If so, what is the magnitude of that advantage?

517. The role of evidence and scientific assessment to support regulatory decision-making is obviously of great importance. This has resulted in detailed focus on the evidence relied upon by the IAAF to support the DSD Regulations, in particular the

evidence concerning the existence and extent of the alleged athletic advantage that female athletes with 46 XY DSD enjoy over other female athletes without such DSD. The evidence adduced by the IAAF in respect of this issue comes from a variety of sources. It includes scientific evidence regarding the physiological effects of conditions such as 5-ARD and the relationship between endogenous testosterone, DHT and athletic performance; observational data regarding the correlation between endogenous testosterone levels and athletic performance in two World Championships; and statistical evidence contrasting the incidence of certain 46 XY DSD in the general adult population with the markedly more prevalent incidence of those conditions amongst elite female athletes in certain athletic disciplines. The reliability, meaning and effect of much of this evidence is strongly contested by the Claimants, whose experts provided detailed counter-evidence in response.

518. Both Ms. Semenya and ASA strongly attack the evidence relied upon by the IAAF. ...

535. The Panel has carefully considered all of the scientific evidence adduced by the parties in these proceedings. On the basis of that analysis, the majority of the Panel accepts that the preponderance of the evidence is that female athletes with 5-ARD and other 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sport performance ability, for example, by action in the body to increase muscle mass and size and levels of circulating haemoglobin.

536. The majority of the Panel further concludes that that enhanced performance ability translates in practice to a significant performance advantage in certain athletics events covered by the DSD Regulations. ...

537. In reaching this conclusion, the majority of the Panel highlights in particular the notable statistical over-representation of female athletes with 5-ARD [...]. In the majority of the Panel's view, those statistics provide compelling evidence that the physical characteristics associated with 5-ARD give female athletes with that condition a significant and frequently determinative performance advantage over other female athletes who do not have a 46 XY DSD. The contrast between the rare incidence of 5-ARD in the general population and the overwhelming success that women with 5-ARD have achieved [...] provides powerful evidential support for the conclusion that female athletes with 5-ARD have a significant performance advantage.

538. In reaching this conclusion, the majority of the Panel does not purport to quantify precisely the exact percentage of the performance advantage that elite female athletes with 46 XY DSD have over other female athletes. The Panel's task is to examine the evidence before it and to consider whether the totality of that evidence provides adequate support for the IAAF's claim that female athletes with a 46 XY DSD enjoy a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition within the female category. Having examined and considered the totality of the evidence, the majority of the Panel concludes that the evidence supports that proposition. ...

J. The legal issues regarding the validity of the DSD Regulations

539. ... A number of issues fall to be determined as to the validity of the DSD Regulations, which can be considered under the following headings:

- Where does the burden of proof lie?
- Do the DSD Regulations constitute discrimination?
- Are the DSD Regulations necessary?

- Are the DSD Regulations reasonable and proportionate?

(i) Where does the burden of proof lie?

540. It is common ground that the Claimants bear the legal burden of establishing that the DSD Regulations discriminate on the basis of a protected ground. It is not in issue that if there is discrimination, then the burden of proof shifts to the IAAF to demonstrate, on the evidence, that the DSD Regulations are necessary, reasonable and proportionate.

...

(ii) Do the DSD Regulations constitute discrimination?

...

543. The [International Olympic Committee (IOC)]'s Fundamental Principles of Olympism provide that the enjoyment of the rights and freedoms set forth in the Olympic Charter 'shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, natural or social origin, property, birth or other status'. Article 4(4) of the IAAF Constitution similarly provides that the IAAF's objects include 'striv[ing] to ensure that no gender, race, religious political or other kind of unfair discrimination exists, continues to exist, or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender, race, religious or political views or any other irrelevant factor.'

...

547. The Panel has carefully considered the IAAF's submission and the Claimants' response thereto. The Panel concludes that the Claimants have discharged their onus of establishing prima facie differential treatment based on protected characteristics, which the IAAF must therefore establish is necessary, reasonable and proportionate. The Panel's reasons for this conclusion may be summarised as follows:

(a) It is not disputed that the DSD Regulations only apply to athletes who are recognised at law either as female or intersex (see Regulation 2.3(a)). Athletes with a male legal sex are therefore not affected by the DSD Regulations (save to the limited and indirect extent that the DSD Regulations provide that Relevant Athletes may compete in the male category in Restricted Events, and therefore the pool of athletes eligible to compete in the male category is theoretically marginally wider than it was before the DSD Regulations were enacted).

(b) It is similarly not disputed that within the class of individuals who are legally recognised as female or intersex, the DSD Regulations impose certain eligibility restrictions and conditions on a subset of individuals on the basis of certain biological characteristics possessed by those individuals (namely having one of the DSDs listed in Regulation 2.2(a)(i), having circulating blood testosterone level over 5 nmol/L, and having a sufficient degree of androgen sensitivity for those levels of testosterone to have a material androgenising effect).

(c) Accordingly, the DSD Regulations are expressly intended to, and do in fact, impose conditions and restrictions on a particular group of individuals on the basis that those individuals (i) are not legal males; and (ii) all possess certain natural biological characteristics that other females and intersex individuals do not possess. Conversely, the DSD Regulations do not impose any conditions or restrictions on individuals who have a male legal sex, or who have a female or intersex legal sex and who do not possess the biological characteristics enumerated in Regulation 2.2(a).

(d) Since the DSD Regulations establish conditions and restrictions that are targeted at a subset of the female/intersex athlete population, and do not impose any equivalent conditions or restrictions on male athletes, the Panel considers that the Regulations are prima facie discriminatory on grounds of legal sex. Similarly, since the DSD Regulations create conditions and restrictions that are targeted at a group of individuals who have certain immutable biological characteristics (namely a 46 XY DSD coupled with a material androgenising effect arising from that condition), and which do not apply to individuals who do not have those characteristics (e.g. 46 XX individuals with or without DSDs) it follows that the DSD Regulations are prima facie discriminatory on grounds of innate biological characteristics.

548. The conclusion that the DSD Regulations are prima facie discriminatory is merely the starting point, and not the end, of the Panel's legal analysis. In particular, it is common ground that a rule that imposes differential treatment on the basis of a particular protected characteristic is valid and lawful if it is a necessary, reasonable and proportionate means of attaining a legitimate objective. It is to these questions that the Panel must therefore now turn.

(a) The arguments concerning the validity of the process by which the DSD Regulations were created

...

(b) The arguments concerning the compatibility of the DSD Regulations with various domestic and international human rights laws

...

(iii) Are the DSD Regulations necessary?

556. There is no dispute that ensuring fair competition in the female category of elite competitive athletics is a legitimate objective for the IAAF to pursue. This point was common ground in *Chand* and is common ground in the present case. The Panel accepts that this is an important and legitimate objective. The more difficult (and disputed) question is whether the DSD Regulations are necessary for this purpose.

557. The Panel begins its consideration of this question by observing that once it is recognised that it is legitimate to have separate categories of male and female competition, it inevitably follows that it is necessary to devise an objective, fair and effective means of determining which individuals may, and which may not, participate in those categories. The Panel understands this point to be common ground.

558. The Panel accepts the IAAF's submission that reference to a person's legal sex alone may not always constitute a fair and effective means of making that determination. This is because, as explained above, the reason for the separation between male and female categories in competitive athletics is ultimately founded on biology rather than legal status. The purpose of having separate categories is to protect a class of individuals who lack certain insuperable performance advantages from having to compete against individuals who possess those insuperable advantages. In this regard, the fact that a person is recognised in law as a woman and identifies as a woman does not necessarily mean that they lack those insuperable performance advantages associated with certain biological traits that predominate in individuals who are generally (but not always) recognised in law as males and self-identify as males. It is human biology, not legal status or gender identity, that ultimately determines which individuals possess the physical traits which give rise to that insuperable advantage and which do not.

559. On true analysis, therefore, the purpose of the male-female divide in competitive athletics is not to protect athletes with a female legal sex from having to compete against athletes with a male legal sex. Nor is it to protect athletes with a female gender identity from having to compete against athletes with a male gender identity. Rather, it is to protect individuals whose bodies have developed in a certain way following puberty from having to compete against individuals who, by virtue of their bodies having developed in a different way following puberty, possess certain physical traits that create such a significant performance advantage that fair competition between the two groups is not possible. In most cases, the former group comprises individuals with a female legal sex and a female gender identity, while the latter group comprises individuals with a male legal sex and male gender identity. However, this is not true of all cases. Natural human biology does not map perfectly onto legal status and gender identity. The imperfect alignment between nature, law and identity is what gives rise to the conundrum at the heart of this case.

560. Once it is recognised that the reason for organising competitive athletics into separate male and female categories rests on the need to protect one group of individuals against having to compete against individuals who possess certain insuperable performance advantages derived from biology rather than legal status, it follows that it may be legitimate to regulate the right to participate in the female category by reference to those biological factors rather than legal status alone. Since those biological factors do not correspond perfectly with legal sex in every case, the Panel accepts the IAAF's submission that it is sometimes necessary to devise eligibility conditions that are not exclusively based on legal sex. The Panel stresses, however, that the necessity criterion can only be established where the evidence establishes to the requisite degree of proof that the biological factor which is the subject of the regulation confers a sufficiently significant performance advantage in each athletic discipline that is covered by the regulation. In other words, if a certain biological factor is shown to confer a substantial performance advantage in Event A but is not shown to confer a substantial performance advantage in Event B, then a regulation that purported to regulate eligibility to participate in Event B by reference to that biological factor would not be necessary.

561. Ms. Semenya argues that genetic difference and outstanding success is by no means uncommon in elite sport. Indeed, it is generally and rightly celebrated. Her evidence supports the submission that a 46 XY DSD is a form of genetic mutation that is not qualitatively different form [*sic*] other genetic differences that are accepted in sport and which in many instances may be determinative of athletic success. She submits that human diversity should be celebrated through inclusiveness and points to her own success in overcoming adversity through strength and perseverance.

562. The Panel points out that there is no challenge whatsoever to Ms. Semenya's character or her outstanding achievements throughout her career. Rather, the IAAF's position is that the evidence demonstrates that the performance advantage that 5-ARD athletes enjoy by virtue of their elevated endogenous testosterone is the same as the performance advantage that the hormone confers on all male athletes. Accordingly, the IAAF says, female athletes who enjoy that male performance advantage must reduce their levels of testosterone so that the IAAF can meet its commitment to equal treatment of the sexes, including enabling them to compete in equal number in finals, on podiums and in winning championship medals. The IAAF submits that this is why the female category was designed and exists. It is to the benefit of the female athletes, the sport and the stakeholders, as well as the wider society.

563. The IAAF says that all but one of the many different factors that contribute to sport performance – including training, coaching, nutrition and medical support, as well as many genetic variations – are equally available to men and women. It submits that

the sole factor that is available only to men is exposure to adult male testosterone levels and that it is this exposure that produces the physical advantages that males have over females in sport performance. The IAAF submits that if the purpose of the female category is to prevent athletes who lack that testosterone-derived advantage from having to compete against athletes who possess that testosterone-derived advantage, then it is necessarily 'category defeating' to permit any individuals who possess that testosterone-derived advantage to compete in that category.

564. The majority of the Panel accepts the logic of the IAAF's submission, subject to the IAAF demonstrating that the degree of the performance advantage caused by elevated testosterone levels is so great as to require athletes who lack that advantage to be protected against having to compete against athletes who possess it. For the reasons explained above, the Panel accepts that the criteria that regulate who may compete in the 'protected' female category must align with the reason for establishing that 'protected' category in the first place. If the 'protected' category's existence is founded on the significant impact of particular performance-related biological characteristics, in specific events, then it is legitimate to regulate participation in the 'protected' category in those events by reference to those characteristics.

...

569. ... In the Panel's view, the necessity of the DSD Regulations turns on the question identified in *Chand*, namely whether the degree of the performance advantage that Relevant Athletes enjoy by virtue of their elevated testosterone levels is so significant as to require the imposition of restrictions on their eligibility to compete against other female athletes who do not enjoy that testosterone-based advantage. The answer to this question turns on a disputed issue of science (*viz*. the existence of and magnitude of the performance advantage) and an evaluative assessment (*viz*. whether that magnitude is so great as to warrant the imposition of restrictions on the ability of such athletes to compete in the female category).

...

571. The present Panel has taken careful note of the evidence and the opinions advanced by the various experts. In particular, the Panel has noted the criticisms of the basis for the use of testosterone levels and the conclusions of the IAAF's experts as to the effects of those levels on athletic performance. After reading the evidence and hearing the experts give concurrent evidence, which greatly assisted the Panel, and taking account of the submissions of the parties, the majority of the Panel concludes that it is satisfied that:

- Testosterone levels are significantly higher in male athletes than in female athletes, after puberty;
- Testosterone impacts and enhances athletic performance by acting on muscle strength and size and on circulating haemoglobin levels;
- Circulating testosterone has its effect in the human body whether the source is exogenous or endogenous;
- The target of testosterone action is sex neutral; its mechanism of action is the same in male and female bodies;
- The different levels of circulating testosterone in the male and female population give rise to an advantage in athletic performance which means that male athletes significantly outperform female athletes;

- 46 XY 5-ARD athletes have levels of circulating testosterone at the level of the male 46 XY population and not at the level of the female 46 XX population;
- This gives 46 XY 5-ARD athletes a significant sporting advantage over 46 XX female athletes.

...

575. The majority of the Panel, therefore, concludes that it is satisfied that androgen sensitive female athletes with 46 XY DSD enjoy a significant performance advantage over other female athletes without such DSD, and that this advantage is attributable to their exposure to levels of circulating testosterone in the adult male range.

576. In respect of the second issue (*viz*. whether that magnitude is so great as to warrant the imposition of restrictions on the ability of such athletes to compete in the female category) ... it can be accepted that the relevant male performance advantage should not be limited to one of 10-12%. Rather, a lower percentage advantage may still be sufficiently significant as to render competition meaningless.

...

579. In considering whether the degree of the performance advantage is so great as to require the imposition of restrictions on the ability of athletes with 46 XY DSD to compete against other female athletes, the majority of the Panel pays particular regard to the extent to which [...] demonstrates that the elevated testosterone levels that such athletes possess can create an insuperable advantage over other female athletes who do not have a 46 XY DSD condition.

580. On this basis, the majority of the Panel accepts that the IAAF has discharged its burden of establishing that regulations governing the ability of female athletes with 46 XY DSD to participate in certain events are necessary to maintain fair competition in female athletics by ensuring that female athletes who do not enjoy the significant performance advantage caused by exposure to levels of circulating testosterone in the adult male range do not have to compete against female athletes who do enjoy that performance advantage.

...

(iv) Are the DSD Regulations reasonable and proportionate?

...

583. As framed by Ms. Semenya, the criterion for reasonableness is whether the restrictions imposed by the DSD Regulations are rationally connected to their objective of ensuring fair competition for female athletes in elite athletics. It is relevant to note that the Regulations do not apply to all events but only to those Restricted Events for which evidence is relied on to demonstrate a practical performance advantage. The answer to this specific question – namely whether there is a reasoned basis for the DSD Regulations – is therefore in the affirmative for the same reasons that the majority of the Panel outlined in determining that they are necessary.

584. The majority of the Panel therefore concludes that the DSD Regulations are necessary and reasonable. The area that has given rise to the greatest difficulty is that of proportionality. ...

a. The effect of the DSD Regulations on society generally

...

b. The effects of testosterone-suppressing medical treatment

590. The Claimants submit that, in order to be eligible to compete in a Restricted Event, Relevant Athletes must undergo testosterone-suppressing treatment that is both medically unnecessary and has serious and potentially dangerous side effects. The Claimants argue that this is a factor of very great significance when it comes to an assessment of the reasonableness and proportionality of the impugned Regulations.

591. In response, the IAAF emphasises that the DSD Regulations do not require any athlete to undergo any surgery in order to comply with the requirements in the Regulations. Further, the IAAF submits that hormonal treatment is a recognised standard of care for athletes with various 46 XY DSD conditions (such as 5-ARD patients with a female gender identity) and for male-to-female transgender patients. The side effects of such treatment are generally limited and the effects of the treatment are quickly reversible when the treatment ends.

592. The Panel proceeds, as did the parties, on the basis that the DSD Regulations can be evaluated in the context of hormonal treatment using contraceptive pills, recognising that such treatment is not as efficient in inhibiting testosterone as the use of GnRH agonists, while withdrawal of the latter is likely to have greater side effects. If oral contraceptives were not capable of achieving the result of maintaining the level of testosterone below 5 nmol/L – thus requiring an athlete to turn to GnRH agonists or gonadectomy in order to compete – a different analysis of proportionality would need to be undertaken.

593. The evidence from those experienced in treating individuals with DSD is that ordinary doses of oral contraceptives are efficient in reducing testosterone to normal female levels. ... However, the evidence of such treatment on elite athletes is extremely limited; it consists principally of evidence concerning Ms. Semenya's use of oral contraceptives to reduce her testosterone levels. There are no current guidelines to instruct how a clinician would use oral contraceptives to reduce testosterone levels in a woman with a 46 XY DSD to less than 5 nmol/L and keep it at that level, but there are expert clinicians who have done so ...

594. Ms. Semenya does not only rely upon the significant detriment to and violation of the equality rights of the women to whom the DSD Regulations apply. She also relies upon her own evidence, and that from and concerning other DSD athletes, as to the side effects – both mental and physical – of being having [*sic*] to reduce the level of endogenous testosterone with hormonal treatment. While taking oral contraceptives, Ms. Semenya suffered a range of side effects including weight gain, feverish symptoms and consistent abdominal pain. As a result, she felt constantly unwell and was unable to focus mentally, which impeded her training and performance.

595. The Panel accepts the Claimants' evidence that the use of oral contraceptives to reduce testosterone levels can cause a range of unwanted side effects. Those side effects potentially affect all of the women who take them, both XX and XY DSD women. The Panel notes that expert evidence adduced by the Claimants describes different adverse effects that may result from the various pharmacological and surgical methods to reduce testosterone, including decreased bone density, significant weight gain, hypotension, renal dysfunction, electrolyte abnormalities and venous thromboembolism, as well as the social, mental and psychological problems encountered by women with DSDs. Thus, the expert evidence supports Ms. Semenya's evidence as to the side effects that she says that she experienced.

596. The evidence of the side effects experienced by [...] athletes with 46 XY DSD concerned reactions experienced when bringing their testosterone levels down to below 10 nmol/L. There was no (or no sufficient) evidence before the Panel to enable any conclusion to be drawn as to whether those side effects would increase if the maximum

permitted level were further decreased to 5 nmol/L. The Panel proceeds on the assumption that, at the very least, the side effects would be as strong as those experienced by Ms. Semenya and others.

597. The evidence of Ms. Semenya was, of its nature, anecdotal but real. However, it is not possible for the Panel to conclude that all of the symptoms that she encountered while attempting to reduce her levels of testosterone were due to the medication, or that they could not otherwise be controlled, or that they would continue, or that other athletes [...] would experience exactly the same side effects (different women react differently to different forms of oral contraceptive), or that another form of oral contraceptive, if prescribed, would result in the same side effects.

598. In any event, there is also the evidence of clinicians who say that the side effects are not different in nature to those experienced by the many thousands, if not millions, of other XX women, who take oral contraceptives. Those clinicians also say that care would be taken to individualise treatment to minimise side effects when using such oral contraceptive treatment to manage the testosterone levels of women with 46 XY DSD. As to the social, mental and psychological problems, these have not been shown to be attributable simply and exclusively to the use of oral contraceptives. Further, the evidence did not establish the length of time that the symptoms occurred and whether they could all be attributed directly to the taking of the medication.

599. In the majority of the Panel's view, requiring 46 XY DSD athletes to take oral contraceptives to lower testosterone in order to compete in the female category in Restricted Events at International Competitions is not, of itself, disproportionate. In the circumstances, the majority of the Panel is of the view that, on the present evidence, the side effects that may be experienced by such athletes [...] as a result of taking an oral contraceptive do not outweigh the need to give effect to the DSD Regulations in order to attain the legitimate objective of protecting and facilitating fair competition in the female category.

c. The effect of requiring Relevant Athletes to undergo intimate medical examinations and assessments of virilisation

600. The Claimants submit that the requirement to undergo intimate personal examination to determine the extent of virilisation if an athlete does have high levels of testosterone is another form of sex or gender testing and is both subjective and inappropriate. It can also be highly intrusive and is an infringement of bodily integrity that can result in psychological harm. This harm would be repeated were an athlete to appeal to the CAS, where further examination may be required, and further detailed discussion of her body would take place. The Claimants also submit that psychological harm may arise from an athlete being labelled as having a DSD and from learning that they have such a condition.

601. The Panel acknowledges the potential consequences described and notes that being subjected to an examination of virilisation may be unwelcome and distressing even when conducted with due care and sensitivity. At the same time, the Panel also notes that all athletes are tested for testosterone for doping control purposes, which include identifying whether athletes have taken exogenous testosterone. If the results of those tests show a high level of testosterone in a sample provided by a female athlete with a 46 XY DSD who is unaware of that condition, further investigation to establish that the athlete has a DSD is likely to be necessary in order to exonerate her of doping. This investigation of itself will likely inform the athlete of her DSD condition, whether or not the DSD Regulations are in place. Accordingly, in assessing the proportionality of the DSD Regulations the Panel has regard both to the likelihood that Relevant Athletes will undergo undesired examinations and to the possibility that such

examinations may in some cases yield the discovery of medical information that is capable of assisting athletes to reach informed decisions about possible necessary medical treatments and of exonerating them from any erroneous finding that they have taken exogenous testosterone.

602. In addition, Ms. Semenya submits that the requirement for an assessment of virilisation to be carried out introduces an unacceptable element of arbitrariness into the process for determining whether an athlete is required to reduce their testosterone levels as a condition of being allowed to compete in Restricted Events. In particular, she says, there is no objective test for virilisation that is capable of being applied in a consistent manner across all cases covered by the DSD Regulations. Instead, the process of assessing virilisation necessarily depends upon the subjective views of the clinician tasked with carrying out the assessment. Accordingly, she submits it is inevitable that the DSD Regulations will be applied in an arbitrary and inconsistent manner.

603. The Panel notes that the eligibility restrictions established under the DSD Regulations only apply where an athlete has a testosterone level over 5 nmol/L and experiences a material androgenising effect from that enhanced testosterone level. The determination whether such material androgenising effect exists is entrusted to the IAAF medical manager and an Expert Panel comprised of suitably qualified independent medical experts who are experienced in such assessments. There is a recognised scale of degree of virilisation. [F]or an expert, the assessment of the degree of androgen sensitivity is not difficult to evaluate, using physical examination and laboratory evaluation. Further, and importantly, the DSD Regulations provide that the benefit of any doubt will be resolved in favour of the athlete.

604. Having regard to all these factors, the majority of the Panel therefore concludes that the provisions in the DSD Regulations dealing with the assessment of virilisation do not render the DSD Regulations disproportionate.

d. The risk that the confidentiality of Relevant Athletes will be compromised

605. The Panel does accept that the IAAF has been successful in preserving the confidentiality of DSD athletes covered by the predecessor to the DSD Regulations. Nevertheless, the exclusion of athletes from Restricted Events in International Competitions where, for example, the athlete has qualified in National Competitions would be likely to render confidentiality meaningless in some cases. In those situations, it would not be difficult for an informed observer to infer from the absence of that athlete at subsequent International Competitions that the athlete has a relevant 46 XY DSD and has declined (or been unable) to reduce their endogenous testosterone to within the prescribed level. The Panel considers this is likely to be an inevitable detrimental effect of the DSD Regulations as they are currently framed. The Panel does not consider that this factor of itself renders the DSD Regulations disproportionate having regard to the countervailing legitimate interests pursued by the Regulations. It nevertheless has regard to the likelihood of some harm arising from the inferential disclosure of confidential medical information in reaching its overall conclusion as to the proportionality of the Regulations.

e. The application of the DSD Regulations to only the Restricted Events

606. The IAAF says that it accepted the observations in Chand that it should apply restrictions only where the evidence of a significant performance advantage arising from enhanced testosterone levels in athletes with 46 XY DSD was clear and compelling. Much of the IAAF case, and the evidence in support, centered around one event, the 800m. The Claimants submit that the Restricted Events were selected arbitrarily. They point out that events for which there was evidence of advantage in

BG17 (such as the hammer throw and pole vault) were not included within the category of Restricted Events, while the 1500m and 1 mile events – where the evidence of advantage was less significant – were included. Nevertheless, the Claimants also focused their evidence and submissions on the 800m and there was no specific and targeted focus on the empirical basis for the inclusion of other events within the definition of Restricted Events. This is understandable, as the focus was the event most pertinent to Ms. Semenya.

607. The IAAF did provide some evidence relating to all of the events included within the category of Restricted Events. It says that of the [...] identified DSD athletes, [...] competed in track events over distances between 400m and one mile. The IAAF explains that the decision not to include other events was based on the fact that the available evidence indicated that the number of 46 XY DSD athletes competing at elite international level in those events was currently not sufficient to warrant their inclusion in the category of Restricted Events. The IAAF contended that this cautious and conservative approach to the Restricted Events was intended to ensure that the DSD Regulations imposed the minimum possible restrictions necessary to ensure a level playing field within the female category. According to the IAAF, this reflects the IAAF's conscientious attempt to ensure that the DSD Regulations do not impose any greater restrictions than are necessary and proportionate.

608. On the basis of the evidence presented to the Panel, the IAAF's decision to include the 1500m and 1 mile events within the list of Restricted Events seems to be based, at least in part, on speculation that athletes who compete in the 800m also compete successfully in the 1500m and 1 mile. However, there were no submissions by the Claimants directed specifically to the inclusion of these two events within the category of Restricted Events.

609. The Panel has some concern about the inclusion of two events within the category of Restricted Events on the basis (at least in part) of a speculative assumption that since female athletes who compete successfully in the 800m often also compete successfully in those longer events, it must follow that 46 XY DSD athletes are likely to enjoy a significant performance advantage over other female athletes in those two events. Nevertheless, the majority of the Panel considers that the IAAF has provided a rational overall explanation for how the category of Restricted Events has been defined. The scope of the Restricted Events therefore cannot be described as arbitrary. While the Panel has concerns about the adequacy of the evidentiary basis for including the 1500m and one mile events within the list of Restricted Events, it is mindful that it does not have the power to rewrite the DSD Regulations or to amend the list of events covered by the Regulations. Instead, it is required to make an assessment of the overall proportionality of the DSD Regulations. Having regard to the evidence adduced by the parties, the majority of the Panel does not consider that the scope of the Restricted Events *in toto* is disproportionate.

f. The rationale and effect of the 5 nmol/L threshold

610. A further issue of concern relates to the level of endogenous testosterone permitted under the DSD Regulations. The upper level of testosterone permitted in the Hyperandrogenism Regulations, as considered in *Chand*, was 10 nmol/L. The rationale for that former limit was that 10 nmol/L is at the lower end of the normal male range. The upper level in the DSD Regulations has been lowered to 5 nmol/L. The IAAF's explanation for the change is that it has determined a level by reference to XX female levels of testosterone. Thus, this lower threshold represents a level that is significantly higher than the upper limit of the normal range for the female XX population (0.06 to 1.68 nmol/L), adjusted upwards to allow for increased levels of testosterone in female

XX athletes with PCOS. The IAAF points out that individuals with levels above 5 nmol/L will either have a testosterone-secreting tumour in the adrenal glands or ovaries, be taking exogenous testosterone, or be a male-to-female transgender athlete or a 46 XY DSD individual who is not suppressing their testosterone levels. The IAAF has not provided any further concrete explanation for why the level was lowered or why it is not, for example, 7.7 nmol/L (which is the accepted lower limit of the normal male range).

611. There are statements in the IAAF's evidence as to a performance advantage when the level of an individual's endogenous testosterone increases from 5 nmol/L to 10 nmol/L. There is some evidence that exogenous doses to increase women's circulating testosterone to 7.3 nmol/L resulted in 4.4% increased muscle mass and 12-26% increased muscle strength and that increasing endogenous testosterone from 0.9 to 5, 7 and 10 nmol/L increased circulating haemoglobin by 6.5%, 7.5% and 8.9% respectively. The Panel is therefore satisfied that the decision to reduce the testosterone threshold from 10 nmol/L to 5 nmol/L was not arbitrary.

g. The ability of the athlete to maintain a level of testosterone below 5 nmol/L

612. There is, however, another issue that was really only given prominence in the parties' final submissions, after the completion of the evidence and hot tubs. The issue concerns the question of unintentional fluctuations in the levels of endogenous testosterone when Ms. Semenya was taking hormonal medication to bring her testosterone levels to below 10 nmol/L. There was evidence that heavy training causes a reduction in testosterone levels, leading to further reductions in the level of testosterone than the reduction caused by treatment alone. However, the level and extent of training is not constant and the common practice of 'tapering' training prior to a major competition could lead to fluctuations and an unintentional increase in the level of endogenous testosterone despite full compliance with the prescribed medication. Spikes in Ms. Semenya's testosterone level were recorded while she was taking the treatment consistently. In particular, there was evidence that during the period that Ms. Semenya consistently took oral contraceptives to lower her testosterone levels to below 10 nmol/L in accordance with the agreed treatment regime, her testosterone levels (which included tests during periods of training) showed significant fluctuation, ranging from 0.5 to 7.85 nmol/L, although still below 10 nmol/L (as was then required).

613. Ms. Semenya suggested that such spikes could result in an athlete inadvertently breaching the 5 nmol/L maximum level under the DSD Regulations even if the treatment regime of oral contraceptives designed to reduce the level of testosterone sufficiently was followed diligently. A number of theoretical scenarios were advanced. They included the difficulty in keeping the level consistently below 5 nmol/L, even when medication was taken regularly, because of the possibility of temporary, inadvertent and unavoidable spikes above that level. Another scenario was the accepted propensity of some women to forget to take the medication on a given day and the possibility of unintentional fluctuation for that reason. Another was the difficulty for an athlete to monitor their testosterone levels when the results of a test, which may record a fluctuation or uncontrolled spike, would not be available to them until some days later. Further, individual metabolism and other gastro-intestinal issues could ... affect testosterone levels, as could what were described as potential pharmacokinetic effects on the absorption or metabolisation of oral contraceptives if taken with supplements or other medications.

614. The IAAF's response is that, even with fluctuations, Ms. Semenya's level of testosterone consistently remained below 10 nmol/L (the maximum limit at the time) during the period when she was fully complying with the prescribed treatment. In the

Panel's view, this nevertheless raises a very important question for the issue of proportionality, having regard to the new maximum level of 5 nmol/L. If a Relevant Athlete takes the medication as prescribed to lower testosterone and fully complies with that treatment and still has fluctuations over the maximum permitted level, that would, under the DSD Regulations in force at the time of the hearing, still disqualify her from competing in a Restricted Event. It would be an impossible burden for the athlete to demonstrate that such unintentional fluctuations did not impact her performance. Further, in order to monitor for fluctuations, the athlete would have to monitor herself continuously, during training and during rest periods, presumably at her own cost. It seems inevitable that the athlete would not know the results of that testing until some days after each test. As a result, it is likely that she would take part in competitions without being able to know for certain whether her testosterone level is below the prescribed threshold on the day of the competition. A delay between testing and notification of the results of that testing would inevitably mean that the athlete could not respond to any fluctuations (such as a spike in testosterone caused by pre-competition tapering) that occur immediately before competitions. There is therefore a real risk that an athlete may suffer disqualification – and all of the detrimental consequences this entails – despite using her best endeavours to comply conscientiously with the DSD Regulations.

615. For the purposes of the proportionality assessment, a balance must be struck between countervailing factors. On one hand is the imposition of a new maximum threshold of 5 nmol/L which was rationally selected because it represents the highest level well above the normal female range (allowing for athletes with PCOS). On the other hand, there are the side effects of using medication to lower testosterone levels coupled with the risk of inadvertent fluctuations above the 5 nmol/L threshold and, potentially, the difficulty for an elite athlete in competition to keep their testosterone consistently below 5 nmol/L, to monitor that level adequately in real time and to pay for that monitoring.

616. The matters of compliance are clearly very important. If the DSD Regulations cannot be implemented fairly in practice, that could render them disproportionate at a later stage, since a regulation which is impossible or excessively difficult to apply fairly cannot be characterised as a proportionate interference with the rights of those who are subjected to it.

617. The Panel does not, of course, have direct evidence of compliance with the DSD Regulations, which have not yet been implemented. Nevertheless, the Panel does have concerns as to the maximum level of 5 nmol/L and the practical ability of female athletes with 46 XY DSD to ensure that their levels of testosterone do not exceed that level. These matters will necessarily require oversight by the IAAF to ensure that this requirement is workable in practice.

618. As to implementation by the IAAF, the Panel only has what is set out in the DSD Regulations and the evidence of the experts, some of whom would be examples of those of relevant expertise who would be called upon to make relevant assessments. The IAAF has identified a worldwide pool of experts for this purpose. These are medical experts who have to determine androgen sensitivity as part of their regular clinical medicine practices. Some of those gave evidence before the Panel which demonstrated a high level of care and sympathetic approach to the treatment of 46 XY DSD women. The bona fides of that approach and the fact that the benefit of the doubt is given to the athlete, as well as a practical approach in monitoring compliance with respect to the maintenance of a level of 5 nmol/L, are of crucial relevance to the Panel in weighing the factors for the consideration of proportionality.

619. However, the matters raised concerning potential difficulties in complying with the DSD Regulations were speculative (apart from agreement as to the possible difficulty with absorption of the hormone if the athlete had a gastro-intestinal infection) and without evidence or evidentiary support with respect to compliance with the 5 nmol/L requirement. That level chosen by the IAAF did have evidentiary support and explanation. The task for the Panel is to consider the DSD Regulations as promulgated and not yet implemented. Hypothetical consequences of the way in which the DSD Regulations might be implemented do not provide an evidentiary basis for a conclusion that they are presently and on their face disproportionate.

h. Conclusion on reasonableness and proportionality

620. The majority of the Panel concludes that, on the evidence before it, the IAAF has shown that the DSD Regulations are reasonable and proportionate on their face. Nevertheless, the Panel has some grave concerns as to the future practical application of the DSD Regulations. While the evidence has not established that those concerns are justified, or that they negate the conclusion of ex facie proportionality, this may change in the future unless constant attention is paid to the fairness of how they are implemented. In this regard, reference is made to the matters discussed above.

621. Ms. Semenya has raised matters regarding the difficulty of complying with the requirements imposed under the DSD Regulations that, if established, could lead to a different conclusion as to the proportionality of the DSD Regulations. However, as the case stands, those matters have not been established on the evidence and the majority of the Panel considers that the side effects of hormonal treatment, while significant for each athlete who suffers from them, are not sufficient to outweigh the matters identified by the IAAF in support of the DSD Regulations. The IAAF should, however, take notice of the Panel's concerns.

622. The matters of particular concern to the Panel which prompted it to inquire whether the parties would consent to the application of Article R45 included the matters discussed above regarding difficulties of implementation of the DSD Regulations and the significance of those difficulties in the context of a maximum permitted level of testosterone of 5 nmol/L rather than 10 nmol/L. The Panel notes the strict liability aspect of the DSD Regulations and repeats its concern as to an athlete's potential inability to remain in compliance with the DSD Regulations in periods of full compliance with treatment protocols, and, more specifically, the resulting consequences of unintentional and unavoidable non-compliance.

623. In addition, the evidence of actual (in contrast to theoretical) significant athletic advantage by a sufficient number of 46 XY DSD athletes in the 1500m and 1 mile events could be described as sparse. The IAAF may consider deferring the application of the DSD Regulations to these events until more evidence is available.

624. The Panel is precluded by reason of the lack of authorisation by the parties from making a decision *ex aequo et bono*. It nevertheless considers it appropriate to highlight its concerns with aspects of the DSD Regulations which arose from the submissions and evidence adduced by the parties in these proceedings. The Panel strongly encourages the IAAF to address the Panel's concerns in its implementation of the DSD Regulations. In that regard, the Panel notes the assertion by the IAAF that the DSD Regulations are a 'living document'. At the same time, the majority of the Panel observes that it may be that, on implementation and with experience, certain factors, supported by evidence, may be shown to affect the overall proportionality of the DSD Regulations, either by indicating that amendments are required in order to ensure that the Regulations are capable of being applied proportionately, or by providing further

support for or against the inclusion of particular events within the category of Restricted Events.

K. Conclusion on validity of the DSD Regulations

625. The Panel is faced with regulations that are dealing with an agreed binary division of athletes for competition, namely male and female, in a world that is not so neatly divided. It is not the role of the Panel to decide whether or not to implement regulations such as the DSD Regulations. That is a matter for the IAAF. The Panel's task is to determine whether the DSD Regulations, which are discriminatory, are necessary, reasonable and proportionate. That decision must be made on the basis of the case as advanced by the parties, that is, on the basis of the evidence adduced and the submissions made. The Panel appreciates the difficulties for all parties that much of the evidence that the parties might have wished to adduce was unfortunately, as of today, simply not available. The Panel is also mindful of the principles of natural justice and procedural fairness, which means that the Panel cannot make findings on matters which the parties have not addressed, or not had an opportunity to address.

626. For the reasons explained above, the majority of the Panel finds that the DSD Regulations are discriminatory but that on the evidence currently before the Panel such discrimination is a necessary, reasonable and proportionate means of achieving the aim of what is described as the integrity of female athletics and the upholding of the 'protected class' of female athletes in certain events."

III. THE PROCEEDINGS IN THE FEDERAL SUPREME COURT

32. On 28 May 2019 the applicant lodged a civil-law appeal with the Federal Supreme Court seeking to have the CAS award of 30 April 2019 set aside. She submitted, among other points, that the award violated substantive public policy, within the meaning of section 190(2)(e) of the Federal Act on Private International Law (*Loi fédérale sur le droit international privé*, "PILA"). Relying on several constitutional guarantees, she submitted that the contested award breached the prohibition of discrimination, claimed to be a victim of a breach of her personality rights, in that the award violated several fundamental rights, and complained of a violation of her human dignity. She also applied for *ex parte* interim measures (*mesures superprovisionnelles*) and interim measures (*mesures provisionnelles*) and requested that her appeal be given suspensive effect.

33. In a decision of 31 May 2019, the President of the First Civil-Law Division of the Federal Supreme Court (*la première Cour de droit civil du Tribunal fédéral*) ordered the IAAF, on an *ex parte* basis, to immediately suspend application of the DSD Regulations in respect of the applicant in order to maintain the status quo until a decision on the application for interim measures was taken. In a decision of 29 July 2019, the President of the First Civil-Law Division rejected the requests for interim measures and for the appeal to have suspensive effect.

34. In a judgment of 25 August 2020, notified on 7 September 2020, the Federal Supreme Court dismissed the appeal, concluding that the impugned

award was not incompatible with substantive public policy within the meaning of section 190(2)(e) PILA.

35. Examining the admissibility of the applicant's appeal, the Federal Supreme Court held, first, that she had standing to appeal within the meaning of section 76 of the Federal Supreme Court Act ("FSCA"). In that respect, it observed that she was particularly affected by the contested award, since the DSD Regulations, which the CAS had endorsed, imposed on her certain obligations if she wished to take part in specific events at international athletics competitions, and that she therefore had "a current, personal and legitimate interest in having the award set aside". The Federal Supreme Court also considered that Article 5.5 of the DSD Regulations, according to which no right of appeal lay from a CAS decision, was without effect in respect of the applicant since that right could only be waived by an express declaration.

36. Before examining the complaints before it, the Federal Supreme Court specified the following as regards the legal framework of the dispute, the role of the court and the scope of its power of review in the area of international arbitration (translation by the Registry):

> "5.1.1. The DSD Regulations were issued by the IAAF, a Monegasque private-law association. An athlete habitually residing in South Africa and her national federation, also a private-law association, challenged the validity of those regulations by bringing arbitral proceedings against the IAAF before the CAS. The CAS is neither a domestic court nor another institution of Swiss public law, but an entity emanating from the International Council of Arbitration for Sport, a private-law foundation (see *Mutu and Pechstein v. Switzerland*[, nos. 40575/10 and 67474/10,] § 65, 2 October 2018). In the proceedings before it, the Panel of the CAS did not examine the validity of the DSD Regulations by reference to Swiss law, applying instead the IAAF's Constitution and Rules, the Olympic Charter and also Monegasque law (award, paragraph 424). The fact that the CAS has its seat in Switzerland is therefore the only link with Switzerland.
>
> 5.1.2. In its leading judgment of 27 May 2003 in *Lazutina*, the Federal Supreme Court, having examined the issue in detail, concluded that the CAS was sufficiently independent for the decisions it delivered in cases which concerned that body's interests to be regarded as proper judgments comparable with those of a national court (ATF [*arrêts du tribunal fédéral* – Federal Supreme Court Judgments] 129 III 445 at 3.3.4). That case-law has since been confirmed many times ...
>
> In its judgment in *Mutu and Pechstein* (cited above), the European Court of Human Rights (ECtHR) was also called upon to rule on the independence and impartiality of the CAS. It began by reiterating that the right of access to a court, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR), was not necessarily to be understood as access to a court of law of the classic kind, integrated within the standard judicial machinery of the State. Article 6 § 1 ECHR did not therefore preclude the establishment of arbitral tribunals in order to settle certain pecuniary disputes between individuals (*Mutu and Pechstein*, cited above, §§ 93 et seq.).
>
> Since the professional speed skater Claudia Pechstein had had no choice other than to accept the arbitration clause, the ECtHR found that recourse to arbitration had been compulsory, in that she had had no option but to refer her dispute to an arbitral tribunal. While this type of arbitration was not prohibited, the arbitral tribunal had to afford the safeguards under Article 6 § 1 of the Convention, in particular those of independence

and impartiality (*Mutu and Pechstein*, cited above, §§ 95 and 114 et seq.). Examining whether the CAS could be regarded as an 'independent and impartial tribunal established by law' within the meaning of that provision, the ECtHR held that the CAS had the appearance of a tribunal established by law and that it was genuinely independent and impartial (*Mutu and Pechstein*, cited above, §§ 149 and 159), which it has had cause recently to confirm (*Platini v. Switzerland* (dec.), no. 526/18, § 65, 11 February 2020).

5.1.3. With those clarifications, it must be borne in mind that the appellants were able to bring their disputes against the IAAF before the CAS, which is not only an independent and impartial tribunal with full power to review the facts and the law, but also a specialised body.

5.2. At this juncture it is appropriate to point out the role of the Federal Supreme Court when hearing an appeal against an international arbitral award and the scope of its power of review.

5.2.1. An appeal in connection with international arbitration may only be lodged in respect of one of the exhaustively enumerated grounds set out in section 190(2) PILA (section 77(1)(a) FSCA). Sections 90 to 98 FSCA, among other provisions, may not be relied on in this type of appeal (section 77(2) FSCA), thus excluding, in particular, any plea as to the arbitrary application of the law. A substantive review of an international arbitral award carried out by the Federal Supreme Court is confined to the question whether the award is compatible with public policy (*ordre public*) (ATF 121 III 331 at 3a). ...

5.2.2. The Federal Supreme Court ... makes its ruling on the basis of the findings as established in the contested award (section 105(1) FSCA). It may not rectify or complement of its own motion the arbitrators' findings of fact even if the establishment of the facts was manifestly inaccurate or in violation of the law (section 77(2) FSCA, which precludes the application of section 105(2) FSCA). The findings of the arbitral tribunal in respect of the conduct of the proceedings, whether they concern the parties' submissions, the facts alleged or the parties' legal arguments, the statements made in the proceedings, the requests for evidence, the content of a witness statement or an expert's report or even information gathered during a visual inspection, are also binding on the Federal Supreme Court (ATF 4A_322/2015 of 27 June 2016, at 3 and cases cited).

...

5.2.4. ... In the area of arbitration, the ECtHR has acknowledged that the member States enjoyed considerable discretion in regulating the question on which grounds an arbitral award should be quashed (*Suovaniemi v. Finland* (dec.), no. 31737/96, 23 February 1999). It has also considered that the PILA – of which section 190 regulates the grounds for setting aside an international arbitral award – reflected a choice of legislative policy which addressed the wish of the Swiss legislature to increase the attractiveness and effectiveness of international arbitration in Switzerland and that the development of Switzerland's position as a venue for arbitration could be regarded as a legitimate aim (*Mutu and Pechstein*, cited above, § 97, and *Tabbane v. Switzerland* (dec.), no. 41069/12, §§ 33 and 36, 1 March 2016).

In the case of sports arbitration, the ECtHR was of the view that it was certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which was able to give a ruling swiftly and inexpensively. High-level international sports events were held in various countries by organisations based in different States, and they were

open to athletes from all over the world. Recourse to a single and specialised international arbitral tribunal facilitated a certain procedural uniformity and strengthened legal certainty (*Mutu and Pechstein*, cited above, § 98; see also *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, § 179, 28 January 2020); all the more so where the awards of that tribunal could be appealed against before the supreme court of a given country, in this case the Swiss Federal Supreme Court, whose ruling was final. The ECtHR therefore held that a system envisaging recourse to a specialised body, like the CAS, at first instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution to meet the requirements of Article 6 § 1 ECHR (*Mutu and Pechstein*, cited above, § 98). [The Federal Supreme Court then went on to summarise the decisions in *Platini*, cited above, and *Bakker v. Switzerland* ((dec.) [Committee], no. 7198/07, 3 September 2019).]

5.2.6. In the light of the principles set out above, it is to be accepted that the specific rules which govern appeals against international arbitral awards – that is, in particular, the restriction on the admissible grounds (exhaustive list in section 190(2) PILA), a substantive review of the award being confined to compatibility with the restrictive concept of public policy (section 190(2)(e) PILA), the strict requirements with respect to submissions and to grounds for complaints, and, more generally, the Federal Supreme Court's limited power of review – are compatible with the ECHR guarantees. It follows that the Federal Supreme Court cannot be said to act as a court of appeal above the CAS or to be capable of freely reviewing the merits of the international arbitral awards delivered by that judicial body."

37. The Federal Supreme Court then made reference to what was meant by the notion of public policy within the meaning of section 190(2)(e) PILA:

"9.1. An award will be incompatible with public policy if it undermines essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system (ATF 144 III 120 at 5.1, and 132 III 389 at 2.2.3). This is the case where it violates fundamental principles of substantive law to such an extent as to no longer be reconcilable with the relevant legal order and value system (ATF 144 III 120 at 5.1). It is not sufficient for a ground relied on by an arbitral tribunal to be incompatible with public policy; it is the consequences of the award which must be incompatible with public policy (ATF 144 III 120 at 5.1). Incompatibility of the award with public policy, as provided for in section 190(2)(e) PILA, is a notion that is even more restrictive than that of arbitrariness. ... According to the case-law, a decision is arbitrary where it is manifestly unjustified, it seriously undermines a norm or a clear and undisputed legal principle, or offends in a shocking manner against a sense of justice and equality; it is not sufficient that another solution may appear possible, or even preferable (ATF 137 I 1 at 2.4, and 136 I 316 at 2.2.2, and the references cited therein). For there to have been incompatibility with public policy, it is not sufficient that evidence was incorrectly assessed, that a factual finding was manifestly false or that a legal rule was clearly breached ... It is extremely rare for an international arbitral award to be set aside on this ground (ATF 132 III 389 at 2.1).

In order to assess whether an award is compatible with public policy, the Federal Supreme Court will not be able to review as it sees fit the legal assessment already carried out by the arbitral tribunal on the basis of the findings in its award. The only issue of importance in respect of the decision to be delivered under section 190(2)(e) PILA is the question whether the consequences of this legal assessment performed by the arbitrators within their sole discretion are compatible with the jurisprudential definition of substantive public policy (judgment 4A_157/2017 of 14 December 2017, at 3.3.3).

It should be borne in mind that the Federal Supreme Court, when examining an appeal against an award delivered by an arbitral tribunal with its seat in Switzerland and entitled to apply Swiss law on a supplementary basis, must treat the examination of the way in which that law has been applied with the same objectivity it would employ when examining any other law, and that it must not yield to the temptation to examine in full cognisance whether the pertinent provisions of Swiss law have been interpreted and/or applied correctly, as it would do if it were examining a civil-law appeal against a domestic judgment ... This is especially so where, as in the present case, Swiss law was not even applicable as a supplementary body of law in the arbitral proceedings.

9.2. It should be noted at this point that a violation of the ECHR or the Constitution is not one of the exhaustively enumerated grounds listed in section 190(2) PILA. It is thus not possible to rely directly on a violation of those instruments. The underlying principles contained in the provisions of the ECHR or the Constitution may however be taken into account under the head of public policy in order to give effect to this concept ...

The plea of a breach of public policy is thus inadmissible in so far as its aim is simply to have established that the contested award was at odds with the various ECHR and Constitution guarantees on which the appellant relies, all the more so since Swiss law was not applicable to the arbitral proceedings before the CAS."

38. Turning to the applicant's complaint that the CAS award was incompatible with public policy in that it undermined the principle of the prohibition of discrimination, the Federal Supreme Court expressed its doubts as to whether it was admissible in the following terms:

"9.4. In the interim measures order of 29 July 2019, the President of this Court observed that the allegedly unacceptable discrimination in the present case had arisen from a set of regulations issued by a private-law association. She added that it was doubtful that the prohibition of discriminatory measures could come within the scope of the restrictive concept of public policy where the discrimination could be attributed to a private entity and had occurred in relations between private persons.

It is true that the Federal Supreme Court has consistently emphasised in its case-law that the prohibition of discrimination is a matter of public policy (see, for example, ATF 144 III 120 at 5.1; 138 III 322 at 4.1; 132 III 389 at 2.2.1; and 128 III 191 at 6b), however, this was primarily with a view to providing protection to individuals *vis-à-vis* the State.

In this connection, it is to be noted that, under Swiss constitutional law, the case-law considers that the task of guaranteeing the prohibition of discrimination (Article 8 § 2 of the Swiss Constitution) falls to the State and does not, in principle, produce a direct horizontal effect on relations between private persons ..., an opinion shared by various authors ... It is also far from evident that the prohibition of discrimination by a private-law party could come within the scope of the essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system.

The appellant has submitted, however, not without relevance, that the relations between an athlete and a world sports federation have certain similarities with those between a private person and a State. It is true that the Federal Supreme Court has established that competitive sport is characterised by a very hierarchical structure whether at international or national level. Being on a vertical axis, the relations between the athletes and the organisations which deal with various sports can thus be

distinguished from horizontal relations between parties to a contractual relationship (ATF 133 III 235). That being said, it is doubtful that this suffices to allow an athlete to rely on the prohibition of discrimination in the context of a civil-law appeal against an arbitral award on the grounds of a breach of public policy ...”

39. Without ruling on that question, the Federal Supreme Court held that the CAS award did not constitute discrimination in breach of public policy. The reasoning of the judgment in that regard is as follows:

“9.5. According to the definition in the case-law, discrimination, within the meaning of Article 8 § 2 of the Constitution, means treating a person differently because they belong to a particular group which, historically or in present-day social reality, is or has been excluded or denigrated ... The principle of non-discrimination does not, however, preclude all distinctions based on one of the criteria set out in Article 8 § 2 of the Constitution, but rather provides the basis on which unacceptable differentiation may be suspected ... Put another way, distinguishing does not necessarily mean discriminating against. Any inequality resulting from such a distinction would, however, require particular justification ... In the area of the equality of the sexes, a difference in treatment is only permissible if it is based on biological differences which categorically exclude treating the sexes in an identical manner (ATF 126 I 1 at 2, and cases cited).

9.6.1. In the present case, the CAS found, after an in-depth and reasoned examination, that the eligibility conditions established by the DSD Regulations were prima facie discriminatory, because they led to a difference in treatment based on a person’s legal sex and natural biological characteristics, but that they were a necessary, reasonable and proportionate means of achieving fairness and the upholding of the ‘protected class’, and ensuring fair competition.

9.6.2. As to the necessity of the regulations in issue, the Panel reasoned as follows, as summarised above in the Facts part of the present decision (see B.c.e.): it reiterated, first, that ensuring fair competition in the female category of competitive athletics was a legitimate objective, and that, once it was recognised that it was legitimate to have separate male and female categories, it was necessary to devise criteria to determine which individuals belonged in which category. In this connection, it accepted that reference to a person’s legal sex alone might not always constitute a fair and effective means of making that determination, which was why it could be legitimate to regulate the right to participate in a competition in the female category by reference to biological factors rather than legal status alone. The fact that a person was recognised in law as a woman and identified as a woman did not necessarily mean that she lacked those insuperable performance advantages associated with certain biological traits that predominated in individuals who were generally (but not always) recognised in law as males and self-identified as males. It was human biology, not legal status or gender identity, that ultimately determined which individuals possessed the physical traits which gave rise to that insuperable advantage.

The Panel accepted that the criteria which governed the right to compete in the ‘protected class’ had to be aligned with the reason for establishing that female category in the first place. If the existence of the ‘protected class’ was founded on the significant impact of particular performance-related biological characteristics, in specific events, then it was legitimate to regulate the right to belong to the ‘protected class’ by reference to those characteristics.

The Panel also accepted that testosterone was the primary driver of the physical advantages and, therefore, of the sex difference in sports performance, between males

and females. On the basis of the scientific evidence adduced by the parties and examination of the various experts, the Panel accepted that androgen-sensitive 46 XY DSD female athletes had a significant performance advantage and that this resulted from their having levels of testosterone in the normal male range. Finally, it concluded that regulations governing the ability of female athletes with 46 XY DSD to participate in certain events were necessary to maintain fair competition in female athletics.

For the same reasons, the Panel concluded that the DSD Regulations were reasonable.

9.6.3. As regards the proportionality review, the Panel, as summarised above (see B.c.f.), conducted a comprehensive examination of the DSD Regulations, analysing, from the proportionality perspective, various elements such as the side effects of taking oral contraceptives, the requirement for 46 XY DSD athletes to undergo intrusive personal examinations, issues of confidentiality, the list of 'Restricted Events', the maximum permitted testosterone level and the ability of athletes to maintain their level of testosterone below 5 nmol/L. In order to assess whether the DSD Regulations were proportionate, the Panel considered it necessary to weigh up the various interests at stake. In particular, it observed that, even if significant, the side effects of the hormonal treatment were not sufficient to outweigh the aims pursued by the IAAF. Having carried out its examination, the Panel concluded that the DSD Regulations were a reasonable measure.

...

9.8.1. The appellant's argument ... calls for a preliminary observation by this Court. It must be noted that the plea of incompatibility with substantive public policy, within the meaning of section 190(2)(e) PILA and related case-law, is inadmissible in so far as it aims only to establish the incompatibility of the contested award with a norm of Swiss law, even if a constitutional norm. It follows that the considerations regarding the scope of Article 8 § 2 of the Constitution and the requirements flowing from it in terms of Swiss domestic law are irrelevant. The Court is also unable to agree with the appellant when she simply transposes the case-law on Article 8 § 2 of the Constitution to the international-arbitration context. In so doing, she is basing her complaint on Swiss constitutional law, which was not applicable to the proceedings in the CAS. In reality, the only question to be answered is whether the conclusion reached by the CAS renders the contested award incompatible with substantive public policy.

9.8.2. That being said, the following findings of the Panel should be reiterated:

– testosterone is the primary driver of the physical advantages and, therefore, of the sex difference in sports performance, between males and females (award, paragraphs 492 et seq.);

– female 46 XY DSD athletes have the male chromosomal sex (XY), male gonads (testes not ovaries) and levels of circulating testosterone in the male range (award, paragraph 497);

– androgen-sensitive female 46 XY DSD athletes enjoy a significant performance advantage, and this advantage is attributable to their exposure to levels of circulating testosterone in the adult male range (award, paragraph 575);

– that performance advantage may not be of the order of 10-12% but it is sufficient to enable 5-ARD athletes consistently to beat female athletes with no DSD (award, paragraph 574).

These findings of fact are binding on the Federal Supreme Court. The Panel's reasoning as regards the necessity of the Regulations, based on the facts as found in the

exercise of its sole discretion, cannot be criticised. In this respect, the Court cannot agree with the appellant's attempt to play down the insuperable nature of the advantage enjoyed by female 46 XY DSD athletes.

The Court is also unable to agree with the appellant's submission that the contested award was a violation of public policy on the ground that the list of 'Restricted Events', which was endorsed by the Panel, constituted a disproportionate interference with the rights of 46 XY DSD athletes. In the first place, it is extremely doubtful that this fact, taken alone, could be sufficient for a finding of a breach of public policy. Secondly, the appellant's submission that the Panel had found the evidence concerning 46 XY DSD athletes having a performance advantage in the 1,500 m and 1 mile events 'insufficient' is incorrect (appeal, paragraph 221). While the CAS expressed concerns over the inclusion of these two events in the DSD Regulations and indicated that the IAAF could consider deferring the application of these regulations to them, it concluded, however, that the IAAF had provided the evidential basis for all the 'Restricted Events' as well as a rational overall explanation of how this category had been defined. In these circumstances, the Federal Supreme Court is unable to find that the conclusions of the CAS breach public policy.

9.8.3.1. As to the assessment carried out by the CAS under the principle of proportionality, this Court would begin by noting that the Panel, at the close of arbitral proceedings which lasted five days and during which it heard representations from a very large number of experts, delivered a detailed award running to no less than 165 pages, which dealt not only with very complex scientific issues but also with extremely sensitive legal issues. In this context, the CAS carried out a comprehensive examination of all the complaints raised by the parties. Furthermore, the arbitrators took into account all the evidence and did not overlook any circumstance of importance. While it is true that the Panel was not able, on the basis of the evidence available to it, to provide a response to all of the numerous issues raised by the present case, it did not fail to examine certain decisive elements concerning the DSD Regulations. It certainly carried out a careful weighing-up of all the different interests at stake. On the one hand, the CAS took into account the interest in ensuring fair competition in the female category in athletics and the upholding of the 'protected class', with a view to allowing female athletes without DSD to excel at the elite level. On the other hand, it took into consideration the side effects that oral contraceptives could have on the health of 46 XY DSD athletes, the interference based on the intrusive physical examinations they had to undergo to measure their androgen sensitivity, the issues related to confidentiality and the ability of 46 XY DSD athletes to maintain their level of testosterone below the maximum permitted level.

9.8.3.2. It remains to be determined whether the conclusion of the Panel was in breach of public policy, that is, the essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system. This question must be answered in the negative: the conclusion of the contested award is neither unjustified nor even unreasonable.

9.8.3.3. In this connection, it should be emphasised that the concern to ensure, in so far as possible, equality in sport is an entirely legitimate interest. It is, however, true, as the appellant has pointed out, that, according to the case-law, there exists no public policy specific to the domain of sport, that is, a '*lex sportiva*' (judgment 4A_312/2017, cited above, at 3.3.2.). This does not, however, mean that special consideration should not be paid to the specific context of the present case, namely competitive sport, in the assessment of the weighing-up of the interests performed by the Panel and the conclusion that it reached.

It is important to note that the ECtHR itself attaches particular weight to fairness in sport. In a judgment of 18 January 2018, the ECtHR acknowledged that ‘efforts to ensure equal and meaningful competition in sports [were] also linked to the legitimate aim of “protection of the rights ... of others”‘ (*National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, § 166, 18 January 2018). ...

That judgment ... confirmed that the aim of ensuring fair competition in sport was an important one capable of justifying serious interferences with athletes’ rights. Of course, the present case raises a different issue to that of doping; it is not in dispute that 46 XY DSD athletes have not cheated. That being said, it must not be overlooked that the degree of natural advantage that they have is so great that it allows them, over distances of between 400 m and 1 mile, to systematically beat female athletes with no DSD.

In that connection, and despite what the appellant submitted, in a criticism of a predominantly general and abstract nature and relying in addition on a ground which she appears not to have raised before the CAS, fair play and fairness in competitions are not only affected by issues linked to doping, corruption and other external forces. The natural characteristics of athletes belonging to a particular group may also undermine the fairness of competitions. When issuing regulations, the aim of sports federations is to ensure fair and equal competition ... The creation of separate categories thus has the aim of creating a level playing field. It is for this reason that, in certain sports, several categories have been created on the basis of biological factors. For example, boxers are categorised based on their weight. Similarly, in the majority of sports, including athletics, women and men compete in separate categories, the latter having a natural physical advantage over the former.

Separating athletes into female and male categories requires, however, the fixing of limits and distinguishing criteria. But attempting to categorise men and women in a binary manner, as is the case in the area of athletics, necessarily raises certain classification difficulties. The present case is a perfect illustration of this. In this connection, it is interesting to note in passing that Australian law, to which the IAAF referred in its observations, expressly provides that it is not unlawful to prohibit intersex persons from participating in certain sporting competitions ... It is obvious that athletes will never have an equal chance of success in real life. For example, a tall athlete will have an advantage if he plays basketball, as will an athlete with big feet who is a swimmer. That said, it is not the task of the Federal Supreme Court to compare, *in abstracto*, the different disciplines to assess whether particular athletes have such an advantage as to render the notion of sporting competition meaningless. It is above all for the sports federations to determine to what extent particular physical advantages may undermine fair competition ... and, if necessary, to set legally permissible eligibility criteria in order to remedy that situation. It is therefore to no avail that the appellant has attempted to draw parallels between her situation and that of athletes practising other sports or athletic disciplines.

9.8.3.4. The aim pursued by the IAAF, namely, to ensure fair competition, which the appellant herself acknowledged was a public-interest aim (appeal, paragraph 214), is not the only interest at stake. As the Panel pointed out, the present case involves conflicting private interests: those of female 46 XY DSD athletes and those of female athletes with no DSD. It should be reiterated on this point that when the latter compete against female 46 XY DSD athletes they are at a disadvantage and have little chance of success. The statistics in that regard speak for themselves. The Court is unable to agree with the appellant’s submission that the upholding of the ‘protected class’ aimed only to protect the economic interests of other female athletes, finding it too reductive. The

very reason for the 'protected class' is to allow female athletes to benefit from the same opportunities as male athletes in order to incentivise them to make the sacrifices needed to excel at elite-level athletics. Success at the elite international level allows female athletes to make themselves known and also to become role models that young female athletes from not only their home countries but also the entire world can look up to. The desire to excel at the elite sporting level is therefore not motivated by financial interests alone. Sport is not simply a commercial opportunity; it does not exist only to make money ... When an athlete takes her mark on the starting blocks, what she is seeking, above all else, is the personal satisfaction of beating her opponents ...

9.8.3.5. The IAAF issued the DSD Regulations in an attempt to reconcile the interests of 46 XY DSD athletes, those of other female athletes and the requirements linked to competitive sport. In doing so, it did not opt for the solution chosen in Australian law, under which intersex persons are excluded from taking part in any competitive sporting activity in which the strength, stamina or physique of the competitors is relevant. Instead it opted for a less radical solution under which the participation of female 46 XY DSD athletes in certain athletic events ('Restricted Events') at international competitions is permitted, subject to certain requirements. The Panel did express, several times, certain concerns it had. Nevertheless, after meticulously examining the DSD Regulations, it concluded that they were a proportionate measure. In that context, no circumstance of importance was overlooked, the Panel having taken into account the effects oral contraceptives could have on the health of 46 XY DSD athletes, the interference based on the intrusive physical examinations they had to undergo, and the issues related to confidentiality. In respect of these particular aspects, this Court considers it important to highlight certain points made by the CAS.

In respect of the side effects of taking oral contraceptives, the Panel acknowledged that they were significant and that the appellant had experienced some of them when taking the contraceptive pill. It did not accept, however, that all of the side effects experienced by the appellant when attempting to reduce her testosterone level had been caused by the hormonal treatment, that those side effects could not have been managed in another way, that they would continue ... or that another type of contraceptive pill, had it been prescribed, would have had similar side effects. The Panel added that those side effects, by their very nature, were no different from those experienced by the thousands, if not millions of other women with XX chromosomes who took oral contraceptives. Furthermore, it indicated that no (sufficient) proof existed to allow it to conclude that reducing the maximum permitted level of testosterone from 10 to 5 nmol/L would lead to an increase in side effects. This Court is bound by the CAS's finding that an increase in those side effects had not been proven. The appellant's complaint about the CAS's failure to investigate whether the withdrawal symptoms resulting from the use of the hormonal treatment were temporary, whether 46 XY DSD athletes were going to have to take higher doses of oral contraceptives than would normally be prescribed, whether certain side effects would be more marked if the dose was higher, or whether contraceptives had any other effect on athletic performance, amounts to general and abstract criticism and is therefore inadmissible. Moreover, in putting forward arguments on the basis of the rules on the burden of proof, the appellant has lost sight of the fact that the Federal Supreme Court, when examining a civil-law appeal against an international arbitral award, is prevented from examining questions of that nature, since those rules do not come within the scope of substantive public policy within the meaning of section 190(2)(e) PILA (judgment 4A_616/2015 of 20 September 2016, at 4.3.1, and cases cited).

With regard to the physical examinations to determine the extent of virilisation, the Panel acknowledged that these were very intrusive and that being subjected to such an

examination could be unwelcome and distressing, even when it was conducted with due care and sensitivity. At the same time, it also noted the possibility that such examinations could in some cases be of benefit to athletes, by bringing to light medical information that could assist athletes who had been unaware of having a DSD to reach informed decisions about possible necessary medical treatments, and that could also exonerate them from any suspicion of doping.

The Panel also accepted that the IAAF had been successful in preserving the confidentiality of athletes covered by the previous regulations. Nevertheless, it observed that it would not be difficult for an 'informed observer' to infer from the absence of an athlete at an international competition that she had a DSD, and considered that this was likely to be an inevitable detrimental effect of the DSD Regulations.

The Panel expressed concerns as to the practical ability for 46 XY DSD athletes to maintain their level of testosterone below 5 nmol/L. It considered, nevertheless, that potential difficulties in the application of the DSD Regulations were essentially speculative, and added that its task was to consider the DSD Regulations as promulgated and not yet implemented. Nonetheless, the CAS pointed out that the DSD Regulations could prove to be disproportionate at a later stage if it was impossible or excessively difficult to apply them. Accordingly, it must be noted that the CAS did not definitively endorse the DSD Regulations but, on the contrary, expressly reserved the right to re-examine, should the need arise, the proportionality of these regulations as applied in a particular case. In this connection, the Court observes that the appellant mentioned in her written submissions that the IAAF had taken into account the concerns expressed by the Panel and had revised the DSD Regulations in order to allow the waiving, under certain conditions, of the disqualification of an athlete who had inadvertently breached the maximum permitted level of testosterone.

9.8.3.6. Having examined the various interests at stake, it cannot be said that one set of rights should prevail over another. It should be reiterated that 46 XY DSD athletes are not required to reduce their testosterone level by undergoing hormonal treatment unless they wish to take part in one of the 'Restricted Events' in the female category in an international competition. Consequently, the conclusion reached by the Panel after a careful weighing-up of the different interests at stake is neither unjustified, that is, arbitrary, nor, *a fortiori*, in breach of public policy."

40. As to the applicant's allegation that she was the victim of a breach of her personality rights, the Federal Supreme Court found as follows:

"10. Remaining within the context of her allegation of a breach of public policy, the appellant complained in addition that there had been a violation of her personality rights on account of the unjustified interferences with her bodily integrity, her identity, her private sphere and her economic freedom.

10.1. In the area of high-level sports, the Federal Supreme Court has acknowledged that personality rights (Articles 27 et seq. of the Swiss Civil Code ['the CC', RS 210] encompass the rights to health, bodily integrity, reputation, respect for one's profession, the practice of sport and, as regards sport at the professional level, the right to personal and economic development (ATF 134 III 193 at 4.5). Depending on the circumstances, an infringement of the personality rights of an athlete could be in breach of substantive public policy (ATF 138 III 322 at 4.3.1 and 4.3.2). According to the case-law, however, a finding of a violation of Article 27 § 2 CC does not automatically breach substantive public policy; it must also be demonstrated that there has been a serious and clear violation of a fundamental right (ATF 144 III 120 at 5.4.2).

[Bodily and psychological integrity:]

10.2. In respect of the alleged violations of her bodily and psychological integrity, the appellant complained about both the obligation to undergo intrusive and humiliating physical examinations to measure a female athlete's sensitivity to androgens and the obligation on her to take oral contraceptives to decrease her level of testosterone below the maximum permitted level. It is clear that such measures seriously interfere with the bodily integrity of 46 XY DSD athletes. Nevertheless, the Court cannot agree with the appellant's submission that those interferences were such that they impaired the very essence of the right to bodily integrity, making any justification for them impossible.

As regards the intrusive physical examinations, it must be noted that they will be carried out by duly qualified medical experts and will not be performed if an athlete refuses them. The similarities that the appellant has attempted to demonstrate between a body search performed by a security officer and the circumstances of the present case are not relevant, the type of examinations, the context in which they are carried out and the persons permitted to perform them being in no way comparable. Furthermore, the Panel noted the possibility that such examinations could in some cases be of benefit to athletes, by bringing to light medical information that could assist those who had been unaware of having a DSD to reach informed decisions about possible necessary medical treatments, and that could also exonerate them from any suspicion of doping. Lastly, the Court notes that, independently of the existence of the DSD Regulations, the body of a professional female athlete already comes under regular scrutiny in the context of efforts to combat doping. All these factors allow the extent of the interference with the right to bodily and psychological integrity to be put into perspective, although it remains substantial.

As far as taking oral contraceptives is concerned, it is true that, in the present case, there was no medical need to do so. This was not disputed by the CAS or the parties. However, the Court cannot agree with the appellant when she submits that the present case is 'similar' to cases of involuntary treatment or when she simply transposes to the present case the federal case-law, derived from Swiss constitutional law, concerning the involuntary treatment of people suffering from schizophrenia. It is one thing for an athlete to decide, however reluctantly, to submit to the IAAF's requirements in order to be able to participate in certain competitions and, therefore, to agree, on the basis of a consent that she did not give entirely freely, to take oral contraceptives to reduce her level of testosterone. It is quite another for treatment to be forced on a person against his or her will. While it is true that, in the present case, the athlete's consent, since it was not completely freely given, cannot by itself justify the interference with bodily integrity, this does not mean that overriding public interests or the need to protect the rights of others could not justify the interference.

As regards the effects of taking oral contraceptives, as summarised above (at 9.8.3.5), the appellant, in a criticism which is general and abstract in nature, criticised the Panel's assessment of the seriousness of the hormonal treatment. That criticism cannot be taken into account as it is incompatible with the nature of an appeal in matters of international arbitration.

It follows from the above that while the taking of oral contraceptives may lead to significant side effects and is not based on completely free and informed consent, such as to amount to a serious interference with the right to bodily integrity of the athletes concerned, the Court is, however, unable to find that the measure in issue impairs the very essence of that right without any possible justification.

That being said, it should be reiterated, once again, that the DSD Regulations are a necessary and proportionate means of achieving the aims pursued by the IAAF. In this

connection, the findings of this Court as to the necessity and proportionality of the disputed regulations, under the principle of the prohibition of discrimination, apply here, *mutatis mutandis*. It follows that the contested award does not appear to breach public policy from the standpoint of the right to bodily integrity either.

[Personal identity:]

10.3. The appellant's arguments with regard to the right to respect for social identity and gender fail. The aim of the DSD Regulations is not to 'redefine' or question the sex or gender identity of female 46 XY DSD athletes. They simply set out eligibility requirements aiming to ensure fair competition and equality of opportunity for all female athletes. In any event, there are no grounds for finding a serious and clear case of a violation.

[Private sphere:]

10.4. In respect of the protection of the private sphere, the Panel noted that it would not be difficult for an informed observer to deduce that the DSD Regulations apply to a particular athlete. It considered that this was likely to be a detrimental effect of the DSD Regulations, but nevertheless concluded that they were a necessary and proportionate measure. Such a conclusion does not breach public policy. In that connection, the Court reiterates, *mutatis mutandis*, its considerations in respect of the principle of the prohibition of discrimination.

[Economic freedom:]

10.5. As to economic freedom, it is to be noted that the new eligibility rules restrict the possibility for the appellant to take part in the 'Restricted Events' at international competitions, whereas until now she had been completely free to do so. In so doing, the DSD Regulations, as endorsed by the CAS, infringe on her economic freedom. However, for a restriction on economic freedom to be considered excessive within the meaning of the case-law of the Federal Supreme Court, the individual submitting to the obligation must be subjected to arbitrariness on the part of the other party, or his or her economic freedom must be removed completely or limited to such an extent that the individual is at risk of losing his or her means of subsistence (judgment 4A_312/2017, cited above, at 3.1, and cases cited). It must be noted, however, that the eligibility conditions do not make it impossible for the appellant to take part in the 'Restricted Events'. Furthermore, she is able to compete in other events not covered by the DSD Regulations, even at international level. It is therefore not possible to hold that the appellant's subsistence is at real risk. The DSD Regulations are in any event an appropriate, necessary and proportionate means of achieving the aims pursued, thus justifying the interference with economic freedom. The foregoing considerations in respect of the necessity and proportionality of the measure under the principle of the prohibition of discrimination can also be applied here.

For the remainder, in contrast to what was submitted by the appellant, her situation is not comparable to that of the Brazilian football player, Matuzalem, who was faced with a ban on all football-related activity unless he paid a fine exceeding 11 million euros, plus interest, within a strict time-limit to his former club (ATF 138 III 322). In that case, FIFA [Fédération Internationale de Football Association] was attempting to facilitate enforcement of an arbitral award. The measure aimed to protect, directly, the interests of the club in recovering from the defaulting player the payment of damages and, indirectly, the interests of the sport federation in securing contractual compliance by football players. Examining whether the measure had been proportionate from the standpoint of public policy, the Federal Supreme Court questioned whether such a measure would facilitate the recovery of the sum awarded in damages if the player did

not dispose of the necessary funds to pay it, given that a ban on all football-related activity deprived the player of the possibility of earning money, by exercising his or her profession, in order to satisfy the creditor's claims. It considered that the disciplinary sanction had not been necessary to achieve the aim pursued, since the creditor could have sought enforcement of the award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RS 0.277.12). Lastly, it considered that the abstract interest in enforcing contractual compliance by football players with their duties to their employers was clearly less important ('*eindeutig weniger gewichtig*') than the football player's interest in not being subjected to a ban which was unlimited in time and geographically.

The situation in the present case is substantially different, since the DSD Regulations, as endorsed by the CAS, constitute an appropriate, necessary and proportionate means of achieving the legitimate aims pursued, namely, fair competition and the upholding of the 'protected class'. The Court is unable to qualify such interests as 'clearly less important' than the rights of 46 XY DSD athletes."

41. Lastly, the Federal Supreme Court held as follows in relation to the alleged violation of the applicant's human dignity:

"11. Finally, the appellant submitted that the contested award had violated her human dignity, which indisputably comes within the ambit of public policy.

11.1. In the first part of this plea, the appellant argued that the award contributed to gender stereotypes. In her view, the CAS's reasoning had infringed her human dignity, since only women possessing biological characteristics corresponding to the stereotype of a woman were allowed to compete freely in the 'protected class', that is to say, real women (appeal, paragraph 189). It must be noted, however, that the award does not seek to call into question whether 46 XY DSD athletes are female or to determine whether they are sufficiently female. The question is not what constitutes a woman or an intersex person. The only issue to resolve is to determine whether the laying-down of certain eligibility rules, with the aim of ensuring fairness in sport and equality of opportunity, which apply only to certain women who have an insuperable advantage owing to certain natural biological characteristics, may constitute a violation of human dignity.

The Court is unable to find that the conclusion reached by the CAS, based on the reasoning criticised by the appellant, is, *per se*, incompatible with human dignity. In such a specific context as that of competitive sport, it is possible to accept that biological characteristics can, exceptionally and with the aim of ensuring fairness in sport and equality of opportunity, transcend the legal sex or gender identity of a person. Otherwise, the very idea of a binary division between men and women, which exists in the vast majority of sports, would lose its meaning. That being so, restricting the access of female 46 XY DSD athletes, who naturally possess an insuperable advantage in relation to other women, to certain events, does not appear to infringe their human dignity.

11.2. In the second part of her plea, the appellant complained that female 46 XY DSD athletes were being used as 'human guinea pigs'.

The Federal Supreme Court has accepted that administering medical treatment to an individual against his or her will amounted to a 'serious breach' of personal liberty and struck at the core of his or her dignity (ATF 130 I 16 at 3). That said, one should not lose sight of the fact that female 46 XY DSD athletes are not being forced to take the contraceptive pill. They retain the right to refuse this 'treatment'. While it is true that such a refusal will make it impossible for the athlete to take part in certain athletics

competitions, the Court is unable to find that such a consequence, by itself, infringes a person's human dignity.

In addition, the present case does not concern testing the effects of a new, totally unknown, drug on a group of persons. Therefore, the references to 'degrading pharmacological tests' or to the notion of 'human guinea pigs' appear to be inappropriate.

11.3. It follows that the complaint based on a violation of human dignity must be rejected."

42. The Federal Supreme Court concluded as follows:

"12. It follows from the foregoing examination carried out by this Court within the limits imposed on its jurisdiction by the case-law, that the impugned award is not incompatible with substantive public policy within the meaning of section 190(2)(e) PILA, from whichever angle it is examined."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Articles 8 and 190 of the Federal Constitution of the Swiss Confederation

43. Articles 8 and 190 of the Federal Constitution provide as follows:

Article 8 – Equality before the law

"1. Every person is equal before the law.

2. No person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability.

3. Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value.

4. The law shall provide for the elimination of inequalities that affect persons with disabilities."

Article 190 – Applicable law

"The Federal Supreme Court and the other authorities shall apply the federal acts and international law."

B. Personality rights

44. Articles 27 to 38 of the Civil Code provide for the "protection of personality rights". Articles 27 and 28 provide as follows:

Article 27

"1. No person may, even in part, waive the enjoyment or exercise of his or her civil rights.

2. No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals."

Article 28

"1. Anyone who suffers an unlawful interference with their personality rights may apply to the courts for protection against any person who has participated therein.

2. An interference will be unlawful unless it is justified by the consent of the victim, an overriding private or public interest or statute."

45. The Federal Supreme Court has stated that Article 28 § 1 of the Civil Code permits anyone who has suffered an unlawful interference with their personality rights to bring a legal action for protection against any person who has participated therein, and that this right applies to all the essential values of the person that are inherent in his or her very existence and that may be subject to interference. It has also stated that in the area of high-level sports, the personality rights provided for in Articles 27 et seq. of the Civil Code encompass the rights to health, bodily integrity, reputation, respect for one's profession, the practice of sport and, as regards sport at the professional level, the right to personal and economic development (ATF 134 III 193 at 4.5). In its judgment of 25 August 2020 in respect of the present case (at 10.1, see paragraph 40 above), referring to that case-law, the Federal Supreme Court examined the applicant's case in the light of the right to respect for one's bodily and psychological integrity, identity, private sphere, economic freedom and human dignity.

C. International arbitration

46. Under section 77(1) of the Federal Supreme Court Act of 17 June 2005 ("FSCA"), regarding international arbitration, a civil-law appeal is admissible against decisions of arbitral tribunals – including the CAS (*G. v. International Federation for Equestrian Sports and Court of Arbitration for Sport*, ATF 119 II 271 of 15 March 1993) – under the conditions provided for in sections 190 to 192 of the Federal Law on Private International Law of 18 December 1987 ("PILA").

47. Chapter 12 of the PILA (sections 176-94) contains the provisions relating to international arbitration, including the following (version applicable at the material time):

Section 176

"(1) The provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time when the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland.

(2) The provisions of this chapter shall not apply if the parties have excluded its application explicitly in writing and agreed to the exclusive application of the cantonal rules of procedure concerning arbitration.

(3) The arbitrators shall determine the seat of the arbitral tribunal if the parties or the arbitration institution designated by them fail to do so."

Section 190

"(1) The award shall be final when communicated.

(2) It can be challenged only:

(a) if a sole arbitrator was designated unlawfully or the arbitral tribunal was constituted unlawfully;

(b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction;

(c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;

(d) if the equality of the parties or their right to be heard in adversarial proceedings was not respected;

(e) if the award is incompatible with public policy (*ordre public*).

(3) An interlocutory award may only be challenged on the grounds stated in subsection 2, points (a) and (b); the time-limit for lodging an appeal shall run from the communication of that award."

Section 191

"Appeal lies only to the Federal Supreme Court. The procedure shall be governed by section 77 of the Federal Supreme Court Act of 17 June 2005."

48. The Federal Supreme Court rules on the basis of the facts of the case as established by the previous authority. It may not rectify or complement of its own motion the arbitrators' findings of fact even if the establishment of the facts was manifestly inaccurate or in violation of the law (section 77(2) FSCA in conjunction with section 105(2)).

49. The Federal Supreme Court has held on many occasions that the list of grounds enumerated in section 190(2) PILA is exhaustive (ATF 4A_370/2007 of 21 February 2008, at 5.3.2; 4A_198/2012 of 14 December 2012, at 3.1; and 4A_320/2009 of 2 June 2010). The Federal Supreme Court's substantive examination of an international arbitral award is therefore limited to whether the award was compatible with public policy. This concept is more restrictive than that of the prohibition of arbitrariness (ATF 121 III 331 at 3a). According to its practice, a decision is arbitrary where it is manifestly unjustified, it seriously undermines a rule or a clear and undisputed legal principle, or offends in a shocking manner against any sense of justice and fairness. It is not sufficient that another solution might be possible, or even preferable (ATF 137 I 1 at 2.4). Nor is it sufficient that evidence was incorrectly assessed, that a factual finding was manifestly false or that a legal rule was clearly breached (ATF 144 III 120 at 5.1).

50. An arbitral award is incompatible with public policy within the meaning of section 190(2) PILA where it undermines essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system. There is a distinction between procedural public policy and substantive public policy (ATF 144 III 120 at 5.1, and ATF 132 III 389 at 2.2.1).

51. Procedural public policy guarantees the parties the right to an independent judgment on the submissions and factual situation before an arbitral tribunal in a manner consistent with the applicable procedural law. It will be breached where fundamental and widely recognised principles have been contravened, leading to an intolerable inconsistency with the sense of justice, such that the decision appears incompatible with the values recognised in a State governed by the rule of law (ATF 132 III 389 at 2.2.1).

52. According to the settled case-law of the Federal Supreme Court, an award is incompatible with substantive public policy where it breaches fundamental principles of substantive law to such an extent as to no longer be reconcilable with the legal order and the system of prevailing values; those principles include contractual compliance, respect for the principle of good faith, the prohibition of abuse of rights, the prohibition of measures which are discriminatory or spoliatory, and the protection of persons lacking in legal capacity. This list of examples provided by the Federal Supreme Court to define what is covered by substantive public policy is not exhaustive. It has already added to the list other fundamental principles which did not appear on it, such as the prohibition of forced labour and respect for human dignity (ATF 144 III 120 at 5.1). As underlined by the Federal Supreme Court in the present case (paragraph 40 above), depending on the circumstances, an infringement of the personality rights of an athlete could be in breach of substantive public policy (ATF 138 III 322 at 4.3.1 and 4.3.2). However, a finding of a violation of Article 27 § 2 of the Civil Code does not automatically breach substantive public policy; it must also be demonstrated that there has been a serious and clear violation of a fundamental right (ATF 144 III 120 at 5.4.2).

53. In the case brought by a Brazilian football player against FIFA, the Federal Supreme Court reiterated that, as a fundamental legal interest, human personality rights had to be protected by law. It observed that in Switzerland they were protected at the constitutional level under the fundamental guarantee of personal freedom, which, in addition to the rights to bodily and mental integrity and freedom of movement, protected all the basic prerogatives that were vital for personal development. Economic freedom, which guaranteed the rights to freely choose one's profession and to free access to a (private) economic activity and to practise it, also came under this protection (*Francelino da Silva Matuzalem v. Fédération Internationale de Football Association [FIFA]*, ATF 138 III 322 of 27 March 2012, at 4.3.1).

54. In the above case, which concerned a dispute between a football club ("club A") and a professional football player over his having terminated his contract without just cause, the CAS had ordered the player and his new football club ("club B") to pay, jointly and severally, compensation in the amount of almost 12 million euros, plus interest, to club A. Since the award had not been enforced and club B had been declared bankrupt, the FIFA Disciplinary Committee, on a request by club A, subsequently ordered the football player to pay the amount due within ninety days or face being banned from all football-related activities. The Federal Supreme Court, on the basis of section 190(2)(e), set aside the CAS award upholding that decision. It found as follows: that the ban in question had had the effect of depriving the football player of the revenue which would have allowed him to pay the sum owed; that it had not been necessary, since club A could have sought enforcement of the award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958; and that the ban had been unlawful in so far as the interests FIFA had been seeking to protect could not justify the serious infringement of personality rights to which it had given rise, as the abstract interest in enforcing contractual compliance by football players with their duties to their employers was clearly less important than the ban, unlimited in time and geographically, preventing the football player from engaging in all football-related activity. In the Federal Supreme Court's view, the threat of such a ban constituted a flagrant and serious breach of personality rights; if the compensation were not paid, the award would not only result in the appellant being exposed to the capriciousness of his former employer, but also to a curtailment of his economic freedom to such an extent that his subsistence would be at real risk, without this being justified by an overriding interest of FIFA or its members. It concluded that the CAS award constituted a manifest and serious violation of personality rights and was incompatible with public policy.

55. In order to assess whether an award is compatible with public policy, the Federal Supreme Court is not able to review as it sees fit the legal assessment already carried out by the arbitral tribunal on the basis of the findings it made. The only issue of importance in respect of the decision to be delivered under section 190(2)(e) PILA is the question whether the consequences of the legal assessment performed by the arbitrators within their sole discretion are compatible with the definition in the case-law of substantive public policy (ATF 4A_157/2017 of 14 December 2017, at 3.3.3).

56. In view of the exhaustive nature of the grounds for complaint enumerated in section 190(2) PILA, a party to arbitral proceedings may not complain directly, in the context of an appeal to the Federal Supreme Court, of a violation of the Convention by the arbitrators. However, underlying Convention principles may be relied on, if applicable, in order to secure the guarantees invoked on the basis of section 190(2) PILA (ATF 142 III 363

at 4.1.2). In so doing, the Federal Supreme Court applies the Convention indirectly in this type of case (ATF 4A_370/2007 of 21 February 2008, at 5.3.2).

57. As reiterated above, the Federal Supreme Court makes its ruling on the basis of the findings as established in the contested award (section 105(1) FSCA). The findings of the arbitral tribunal in respect of the conduct of the proceedings, whether they concern the parties' submissions, the facts alleged or the parties' legal arguments, the statements made in the proceedings, the requests for evidence, the content of a witness statement or an expert's report or even information gathered during a visual inspection, are also binding on the Federal Supreme Court (ATF 4A 322/2015 of 27 June 2016, at 3). The Federal Supreme Court's role, when determining a civil-law appeal against an international arbitral award, is not to rehear the case, as a court of appeal would, but simply to examine whether the admissible complaints about the award are well founded or not (ATF 4A_386/2010 of 18 July 2012, at 3.2).

58. In several judgments, the Federal Supreme Court has considered that, although it had been called upon to examine an appeal against an award delivered by an arbitral tribunal which was entitled to apply Swiss law on a supplementary basis, it had to treat the examination of the way in which that law had been applied with the same objectivity that it would employ when examining any other law, and that it should not yield to the temptation to examine in full cognisance whether the pertinent provisions of Swiss law had been interpreted or applied correctly, as it would do if it were examining a civil-law appeal against a domestic judgment (ATF 4A_318/2018 of 4 March 2019, at 4.5.1). As the Federal Supreme Court observed in its judgment of 25 August 2020 in the present case, this finding was all the more valid where Swiss law had not even been applicable as a supplementary body of law in the arbitral proceedings.

59. In a judgment of 22 March 2007 (4P_172/2006), the Federal Supreme Court found that professional athletes generally had no other choice but to have recourse to arbitration in the event of a dispute with the sports organisation which governs their sport. In that case, a professional tennis player had been sanctioned in a decision by the ATP (Association of Tennis Professionals) Tour anti-doping tribunal. The ATP's anti-doping rules provided for the possibility of appealing against that body's decisions to the CAS, and the applicant had signed a clause consenting, *inter alia*, to the exclusive jurisdiction of the CAS, including in respect of any dispute arising from a decision of the anti-doping tribunal. In particular, the Federal Supreme Court pointed out the following (at 4.3.2.2):

> "... Competitive sport is characterised by a very hierarchical structure whether at international or national level. Being on a vertical axis, the relationship between the athletes and the organisations which deal with various sports can thus be distinguished from horizontal relationships between parties to a contractual relationship (ATF 129 III 445 at 3.3.3.2, p. 461). This structural difference between the two types of relationship is not without influence on the meeting of the minds which leads to the formation of

any agreement. In principle, where two parties do business on an equal footing, each one expresses its intention without being bound to submit to the wishes of the other. This is generally the case in international commercial relations. The situation is very different in the field of sport. Leaving aside the case – which is rather academic – where a well-known athlete, on account of his or her fame, would be in a position to dictate conditions to the international federation governing the relevant sport, experience shows that, most of the time, a sportsperson will not have free rein in his or her dealings with the federation and will be required to submit, for better or for worse, to its desires. Thus, an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause, in particular by signing up to the instrument of the sports federation in question in which the clause is to be found, all the more so in the case of a professional. He or she will be confronted with the following dilemma: to agree to arbitration or practise his or her sport in a non-professional context (on the subject of compulsory arbitration, see Antonio Rigozzi, *L'arbitrage international en matière de sport*, footnotes 475 et seq. and 811 et seq., with many references to the various opinions expressed on this subject). Presented with the choice between abiding by arbitration or practising the sport in the garden (François Knoepfler/Philippe Schweizer, *Arbitrage international*, p. 137 *in fine*), while watching competitions on television (Rigozzi, op. cit., p. 250, footnote 1509 and the first author cited), an athlete who wants to play against real competitors or who must do so because it is his or her sole source of income (monetary or in kind, advertising revenue, and so on) will be obliged in actual fact, *nolens volens*, to opt for the first of those alternatives.

..."

II. INTERNATIONAL MATERIALS

A. The New York Convention

60. Articles II and V of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in New York on 10 June 1958, of which Switzerland is a Contracting State), read as follows:

Article II

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

B. European Union law

61. As far back as the 1970s, the European Court of Justice, as it was then called, had to decide whether the European Economic Community (EEC) rules on non-discrimination and free movement applied to legal relationships, such as those between professional sports persons and sport governing bodies, which do not come under public law. It held that the EEC prohibition of discrimination on grounds of nationality did not only apply to the action of public authorities but extended likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services (*Walrave and Koch*, C-36/74, ECLI:EU:C:1974:140, paragraph 17). It also held that Article 39 of the Treaty on the Functioning of the European Union (TFEU) (then Article 48 EEC) applied to rules laid down by sporting associations which determined the terms on which professional sports

persons could engage in gainful employment (*Bosman*, C-415/93, ECLI:EU:C:1995:463, paragraph 87).

62. More recently, questions relating to sports arbitration, the CAS and the review of the latter's awards by the Federal Supreme Court have been the subject of direct and indirect actions before the General Court and the Court of Justice of the European Union (CJEU).

63. On 21 December 2023 the CJEU delivered a judgment on appeal in the *International Skating Union v. Commission* (C-124/21 P, EU:C:2023:1012) case, in which it examined questions relating to arbitration in the light of EU law. The background to that appeal judgment is as follows.

64. The International Skating Union (ISU), a private-law association with its seat in Switzerland, describes itself as the sole international sports federation recognised by the International Olympic Committee in the field of figure skating and speed skating. Overseeing the national associations in charge of those two disciplines, which are its members, the ISU set itself the objective, according to its statutes, of regulating, administering, governing and promoting those disciplines worldwide. The ISU also carries out a commercial activity that entails the organisation of various speed skating and figure skating events in the context of international competitions, such as the European and World Championships and the Olympic Winter Games.

65. In accordance with its objective set out in its statutes, the ISU adopted and published a set of acts establishing its regulations, which include, *inter alia*, the prior authorisation rules and the eligibility rules. Those rules determine the conditions for the organisation of international skating competitions and the conditions for the participation of athletes in such competitions. In order to ensure that the athletes comply with those rules, the regulations set out by the ISU include a set of rules governing sanctions. Lastly, the ISU also adopted rules establishing a mechanism for arbitral dispute resolution ("the arbitration rules"), which confers on the CAS exclusive jurisdiction to hear those disputes.

66. Following a complaint lodged by two professional skaters, the European Commission found, in a decision of 8 December 2017, that the ISU's prior authorisation and eligibility rules were incompatible with Article 101 of the TFEU in so far as they had as their object the restriction of competition. It ordered the ISU, on pain of a periodic penalty payment, to put an end to the infringement thus found. Moreover, it found that the arbitration rules reinforced that infringement, in so far as they did not enable the persons concerned to obtain effective judicial review, with regard to the EU competition rules, of decisions adopted by the ISU.

67. In a judgment of 16 December 2020, the European General Court held, in essence, that the decision at issue was not vitiated by illegality in so far as it related to the ISU's prior authorisation and eligibility rules, but that it was unlawful in so far as it related to the arbitration rules.

68. The CJEU quashed the judgment of 16 December 2020 in so far as it related to the arbitration rules. The judgment provided clarification as to the obligations imposed on sports federations in the light of Article 101(1) TFEU, where they had established, in the exercise of the powers they held under their statutes, rules governing authorisation and control, subject to sanctions, relating to the organisation of sporting competitions, while in parallel pursuing an economic activity in the field. The CJEU specified in particular that the fundamental requirement that such rules had to be capable of being subject to effective judicial review entailed, in a situation involving provisions that conferred mandatory and exclusive jurisdiction on an arbitration body for the purpose of settling disputes concerning the application of the rules at issue, ensuring that the court called upon to review the awards made by that body were capable, first, of ensuring compliance with the public policy provisions of EU law, which included the competition rules and, secondly, of referring questions, if necessary, to the CJEU for a preliminary ruling under Article 267 TFEU. The relevant parts of the judgment provided as follows:

> "...
>
> 125. It follows from the case-law of the Court of Justice that the maintenance or development of undistorted competition in the internal market can be guaranteed only if equality of opportunity is ensured as between undertakings. To entrust an undertaking which exercises a given economic activity the power to determine, *de jure* or even *de facto*, which other undertakings are also authorised to engage in that activity and to determine the conditions under which that activity may be exercised gives rise to a conflict of interests and puts that undertaking at an obvious advantage over its competitors, by enabling it to deny them entry to the relevant market or to favour its own activity ...
>
> 188. [T]he general and undifferentiated assessment that the arbitration rules may be justified by legitimate interests linked to the specific nature of the sport, in so far as they confer on the CAS mandatory and exclusive jurisdiction to review decisions that the ISU may adopt by virtue of its powers in respect of prior authorisation and sanctions, disregards ... the requirements that must be satisfied for an arbitration mechanism such as that at issue in the present case to be capable of being regarded, on the one hand, as allowing effective compliance with the public policy provisions that EU law contains to be ensured and, on the other hand, as being compatible with the principles underlying the judicial architecture of the European Union.
>
> 189. In that regard, it must be noted that ... the arbitration rules imposed by the ISU concern, in particular, two types of disputes which may arise in the context of economic activities consisting of (i) seeking to organise and market international speed skating events and (ii) seeking to take part in such competitions as a professional athlete. Those rules therefore apply to disputes concerning the exercise of a sport as an economic activity and, on that basis, come under EU competition law. Therefore, they must comply with EU competition law for the reasons set out in paragraphs 91 to 96 of the present judgment, in so far as they are implemented in the territory in which the EU and FEU Treaties apply, irrespective of the place where the entities that adopted them are established ...

190. It is, consequently, only the implementation of such rules in the context of such disputes and in the territory of the European Union that is at issue in the present case and not the implementation of those rules in a territory other than the European Union, their implementation in other types of disputes, such as disputes concerning merely the sport as such and therefore not falling under EU law, or, a fortiori, the implementation of the arbitration rules in different areas.

191. Furthermore, ... those rules are at issue, in the present case, not to the extent that they subject the review at first instance of decisions issued by the ISU to the CAS as an arbitration body, but only to the extent that they subject the review of the arbitral awards made by the CAS and the last-instance review of decisions of the ISU to the Tribunal fédéral (Federal Supreme Court), that is to say, a court of a third State.

192. In that regard, the Court of Justice has consistently held that Article[s] 101 and 102 TFEU are provisions having direct effect which create rights for individuals which national courts must protect ...

193. That is why, while noting that an individual may enter into an agreement that subjects, in clear and precise wording, all or part of any disputes relating to it to an arbitration body in place of the national court that would have had jurisdiction to rule on those disputes under the applicable national law, and that the requirements relating to the effectiveness of the arbitration proceedings may justify the judicial review of arbitral awards being limited (see, to that effect, judgments of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 35, and of 26 October 2006, *Mostaza Claro*, C-168/05, EU:C:2006:675, paragraph 34), the Court has nevertheless pointed out that such judicial review must, in any event, be able to cover the question whether those awards comply with the fundamental provisions that are a matter of EU public policy, which include Articles 101 and 102 TFEU (see, to that effect, judgment of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 37). Such a requirement is particularly necessary when such an arbitration mechanism must be regarded as being, in practice, imposed by a person governed by private law, such as an international sports association, on another, such as an athlete.

194. In the absence of such judicial review, the use of an arbitration mechanism is such as to undermine the protection of rights that subjects of the law derive from the direct effect of EU law and the effective compliance with Articles 101 and 102 TFEU, which must be ensured – and would therefore be ensured in the absence of such a mechanism – by the national rules relating to remedies.

195. Compliance with that requirement for effective judicial review applies in particular to arbitration rules such as those imposed by the ISU.

196. The Court of Justice has held previously that, while having legal autonomy entitling them to adopt rules relating, inter alia to the organisation of competitions, their proper functioning and the participation of athletes in those competitions (see, to that effect, judgments of 11 April 2000, *Deliège*, C-51/96 and C-191/97, EU:C:2000:199, paragraphs 67 and 68, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 60), sports associations cannot, in doing so, limit the exercise of rights and freedoms conferred on individuals by EU law (see, to that effect, judgments of 15 December 1995, *Bosman*, C-415/93, EU:C:1995:463, paragraphs 81 and 83, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 52), which include the rights that underlie Articles 101 and 102 TFEU.

197. For that reason, rules such as the prior authorisation and eligibility rules must be subject to effective judicial review as is apparent from paragraphs 127 and 134 of the present judgment.

198. That requirement of effective judicial review means that, in the event that such rules contain provisions conferring mandatory and exclusive jurisdiction on an arbitration body, the court having jurisdiction to review the awards made by that body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, it entails that court's satisfying all the requirements under Article 267 TFEU, so that it is entitled, or, as the case may be, required, to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it (see, to that effect, judgments of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107, paragraphs 14 and 15, and of 1 June 1999, *Eco Swiss*, C-126/97, EU:C:1999:269, paragraph 40).

199. Thus, the General Court erred in law by merely finding, in an undifferentiated and abstract manner, that the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport', in so far as they confer on 'a specialised court' the power to review disputes relating to the prior authorisation and eligibility rules, without seeking to ensure that those arbitration rules complied with all the requirements referred to in the preceding paragraphs of the present judgment and thus allowed for an effective review of compliance with the EU competition rules, even though the Commission correctly relied on those requirements ... in concluding that those rules reinforced the infringement identified in Article 1 of that decision."

III. OLYMPIC CHARTER

69. The Olympic Charter sets out the "Fundamental Principles of Olympism", which include the following:

"4. The practice of sport is a human right. Every individual must have access to the practice of sport, without discrimination of any kind in respect of internationally recognised human rights within the remit of the Olympic Movement. The Olympic spirit requires mutual understanding with a spirit of friendship, solidarity and fair play.

...

6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status."

IV. DSD REGULATIONS

70. On 23 April 2018 the IAAF published the version applicable at the material time of the "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" ("the DSD Regulations"), which came into force on 1 November 2018. The introduction provided as follows:

"1.1 ... These Regulations reflect the following imperatives:

(a) To ensure fair and meaningful competition in the sport of athletics, competition has to be organised within categories that create a level playing field and ensure that success is determined by talent, dedication, hard work, and the other values and characteristics that the sport embodies and celebrates. In particular:

(i) The IAAF wants athletes to be incentivised to make the huge commitment and sacrifice required to excel in the sport, and so to inspire new generations to join the sport and aspire to the same excellence. It does not want to risk discouraging those aspirations by having unfair competition conditions that deny athletes a fair opportunity to succeed.

(ii) Because of the significant advantages in size, strength and power enjoyed (on average) by men over women from puberty onwards, due in large part to men's much higher levels of circulating testosterone, and the impact that such advantages can have on sporting performance, it is generally accepted that competition between male and female athletes would not be fair and meaningful, and would risk discouraging women from participation in the sport. Therefore, in addition to separate competition categories based on age, the IAAF has also created separate competition categories for male and female athletes.

(b) The IAAF also recognises, however, that:

(i) Biological sex is an umbrella term that includes distinct aspects of chromosomal, gonadal, hormonal and phenotypic sex, each of which is fixed and all of which are usually aligned into the conventional male and female binary.

(ii) However, some individuals have congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex (known as differences of sex development, or DSDs, and sometimes referred to as 'intersex').

(iii) As a result, some national legal systems now recognise legal sexes other than simply male and female (for example, 'intersex', 'X', or 'other').

(c) The IAAF respects the dignity of all individuals, including individuals with DSDs. It also wishes the sport of athletics to be as inclusive as possible, and to encourage and provide a clear path to participation in the sport for all. The IAAF therefore seeks to place conditions on such participation only to the extent necessary to ensure fair and meaningful competition. As a result, the IAAF has issued these Regulations, to facilitate the participation in the sport of athletes with DSDs.

(d) There is a broad medical and scientific consensus, supported by peer-reviewed data and evidence from the field, that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance. These Regulations accordingly permit such athletes to compete in the female classification in the events that currently appear to be most clearly affected only if they meet the Eligibility Conditions defined below.

(e) These Regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes. In no way are they intended as any kind of judgement on or questioning of the sex or the gender identity of any athlete. To the contrary, the IAAF regards it as essential to respect and preserve the dignity and privacy of athletes with DSDs, and therefore all cases arising under these Regulations must be handled and resolved in a fair, consistent and confidential manner, recognising the sensitive nature of such matters. Any breach of confidentiality, improper discrimination, and/or stigmatisation on grounds of sex or gender identity will amount to a serious breach of the IAAF Integrity Code of Conduct and will result in appropriate disciplinary action against the offending party.

1.2 These Regulations operate globally, regulating the conditions for participation in Restricted Events at International Competitions. As such, the Regulations are to be interpreted and applied not by reference to national or local laws, but rather as an independent and autonomous text, and in a manner that protects and advances the

imperatives identified above. In the event that an issue arises that is not foreseen in these Regulations, it shall be addressed in the same manner.

1.3 All cases arising under these Regulations will be dealt with by the IAAF Health and Science Department, and not by the National Federation of the athlete concerned, or by any other athletics body, whether or not the athlete concerned has yet competed in an International Competition. Each National Federation is bound by these Regulations and is required to cooperate with and support the IAAF in the application and enforcement of these Regulations, and to observe strictly the confidentiality obligations set out below.

1.4 ... They are binding on and must be complied with by athletes, National Federations, Areas, Athlete Representatives, Member Federation Officials, and all other Applicable Persons. They will be subject to periodic review, and may be amended with the approval of the IAAF Council from time to time following such review to take account of any new evidence and/or relevant scientific or medical developments.

..."

71. The second part of the DSD Regulations set out the special eligibility criteria that "Relevant Athletes" had to fulfil in order to participate in the female classification in a "Restricted Event" (400 m races, 400 m hurdles races, 800 m races, 1 mile races, and all other Track Events over distances between 400 m and 1 mile (inclusive), whether run alone or as part of a relay event or a Combined Event – Article 2.2 (b)) at an International Competition or to set a World Record in a Restricted Event at a competition that was not an International Competition. In accordance with Article 2.2 (a), a Relevant Athlete was an athlete who met the following three criteria:

(i) she had one of the seven differences of sex development listed therein;

(ii) she had circulating testosterone levels in [her] blood of 5 nmol/L;

(iii) she had sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.

72. The benefit of any doubt that the three criteria had been satisfied was to be resolved in favour of the athlete, who was then entitled to compete freely (paragraph 23 of Appendix 3).

73. To be eligible to compete in the female classification in a Restricted Event at an International Competition, or to set a World Record in a competition that was not an International Competition, a Relevant Athlete had to meet each of the following conditions:

(i) she had to be recognised at law either as female or as intersex (or equivalent);

(ii) she had to reduce her blood testosterone level to below 5 nmol/L for a continuous period of at least six months (for example, by use of hormonal contraceptives);

(iii) thereafter she had to maintain her blood testosterone level below 5 nmol/L continuously (whether she was in competition or not) for so long as she wished to maintain eligibility to compete in the female classification in Restricted Events at international competitions (or to set a World Record in a Restricted Event at a competition that was not an International Competition).

74. Article 2.4 expressly specified that "surgical anatomical changes [were] not required in any circumstances" and Article 2.5 that "no athlete [would] be forced to undergo any assessment and/or treatment under these Regulations [and that it was] the athlete's responsibility, in close consultation with her medical team, to decide whether or not to proceed with any assessment and/or treatment".

75. In accordance with Article 2.6, a Relevant Athlete who did not meet the Eligibility Conditions under the DSD Regulations was nevertheless eligible to compete:

(a) in the female classification:

(i) in all events, including the Restricted Events, at competitions that were not international competitions; and

(ii) in all events, other than the Restricted Events, at international competitions; or

(b) in the male classification: in all events with no restrictions, including at international competitions; or

(c) in any applicable intersex or similar classification: in all events with no restrictions, including at international competitions.

76. Part 3 of the DSD Regulations related to the procedure for assessing whether a person was a Relevant Athlete. It provided that an athlete who was or believed that she might be a Relevant Athlete had to advise the IAAF Medical Manager if she wished to compete in the female classification in a Restricted Event at an International Competition, so that her case could be assessed in accordance with the Regulations; her National Federation had the same obligation (Article 3.1). The IAAF Medical Manager could investigate at any time (including, without limitation, through analysis of blood and/or urine samples collected from athletes who were competing or entered to compete in the female classification in a Restricted Event at an International Competition) whether any athlete who had not advised the IAAF Medical Manager could be a Relevant Athlete whose case required assessment under the Regulations (Article 3.2). Article 3.8 summarised the "standard procedure" for assessment of cases (the framework for assessment of cases was set out in Appendix 3 of the Regulations):

> "(a) There will be an initial assessment by a suitably qualified physician, involving an initial clinical examination of the athlete, and compilation of her clinical and anamnestic data, as well as a preliminary endocrine assessment.
>
> (b) If it appears the athlete may be a Relevant Athlete, the IAAF Medical Manager will then anonymise the file and send it to the chair, who will convene an Expert Panel to determine whether further assessment is warranted as to whether the athlete is a Relevant Athlete.
>
> (c) If the Expert Panel considers that further assessment is warranted, the athlete will then be referred to one of the specialist reference centres listed at Appendix 4 to these Regulations for further assessment, in order to reach a diagnosis of the cause of the athlete's elevated levels of blood testosterone, and to consider further the degree of the athlete's androgen insensitivity (if any).

(d) The report of the specialist reference centre will then be sent back to the Expert Panel for consideration."

77. Articles 3.18 and 3.19 provided as follows:

Article 3.18

"Any athlete who wishes to compete in the female classification in a Restricted Event at an International Competition and/or to be eligible to set a World Record in a Restricted Event at a competition that is not an International Competition agrees, as a condition to such participation/eligibility:

(a) to comply in full with these Regulations;

...

(d) to follow the procedures set out in clause 5 [see paragraph 79 below] to challenge these Regulations and/or to appeal decisions made under these Regulations, and not to bring any proceedings in any court or other forum that are inconsistent with that clause."

Article 3.19

"Upon request by the IAAF, the athlete will provide written confirmation of her agreement to the matters set out in clause 3.18, in such form as may be requested by the IAAF from time to time. However her agreement will be effective and binding upon her whether or not confirmed in writing."

78. The fourth part of the Regulations, relating to confidentiality, provided that all results of investigations, examinations and assessments conducted under the Regulations would be dealt with in strict confidence (Article 4.1) and that the IAAF would not comment publicly on the specific facts of a case arising under the Regulations except in response to public comments made by the athlete or the athlete's representatives (Article 4.2).

79. The fifth and final part of the DSD Regulations, concerning dispute resolution, provided as follows:

"5.1 Any breach of these Regulations by a National Federation or Area will be addressed in accordance with the relevant provisions in the IAAF Constitution. Any other breach of these Regulations amounts to a breach of the IAAF Integrity Code of Conduct and will accordingly be subject to investigation by the Athletics Integrity Unit under the IAAF Athletics Integrity Unit Reporting, Investigation and Prosecution Rules (Non-Doping) and possible prosecution before the IAAF Disciplinary Tribunal in accordance with the IAAF Disciplinary Tribunal Rules.

5.2 Any dispute arising between the IAAF and an affected athlete (and/or her Member Federation) in connection with these Regulations will be subject to the exclusive jurisdiction of the CAS. In particular (but without limitation), the validity, legality and/or proper interpretation or application of the Regulations may only be challenged (a) by way of ordinary proceedings filed before the CAS; and/or (b) as part of an appeal to the CAS made pursuant to clause 5.3.

5.3 The affected athlete may appeal the following decisions (and only the following decisions) made under these Regulations to the CAS, in accordance with this clause 5, by filing a Statement of Appeal with the CAS and with the IAAF within thirty days of

the date of communication of the written reasons for the decision (and the IAAF will be the respondent to the appeal):

(a) a decision that an athlete is a Relevant Athlete who does not satisfy the Eligibility Conditions and so is not eligible to compete in the female classification in a Restricted Event at an International Competition or to set a World Record in a Restricted Event at a competition that is not an International Competition;

(b) a decision that an athlete who is asked by the IAAF Medical Manager to submit to assessment under these Regulations and fails or refuses to do so (or fails to cooperate fully and in good faith the investigation/assessment under these Regulations) is not eligible to compete in the female classification in a Restricted Event at an International Competition or to set a World Record in a Restricted Event at a competition that is not an International Competition;

(c) a decision that a Relevant Athlete has failed to continue to satisfy the Eligibility Conditions, with the consequences set out in clause 3.13; and

(d) a decision to disqualify results further to clause 3.14.

5.4 The CAS will hear and determine the dispute or appeal definitively in accordance with the relevant provisions of the CAS Code of Sports-Related Arbitration, provided that in any appeal the athlete will have fifteen days from the filing of the Statement of Appeal to file his/her Appeal Brief, and the IAAF will have thirty days from its receipt of the Appeal Brief to file its Answer. The law governing the dispute or appeal will be the IAAF Constitution and the IAAF Rules and Regulations (including these Regulations), with the laws of Monaco applying subsidiarily, and in the case of any conflict between any of the above instruments and the CAS Code currently in force, the above instruments will take precedence. The proceedings before the CAS will be conducted in English, unless the parties agree otherwise. Pending determination of the dispute or appeal by the CAS, the Regulations and the decision under appeal will remain in full force and effect unless the CAS orders otherwise.

5.5 The decision of the CAS will be final and binding on all parties, and no right of appeal will lie from that decision. All parties waive irrevocably any right to any form of appeal, review or recourse by or in any court or judicial authority in respect of such decision, insofar as such waiver may be validly made."

80. The IAAF, now called World Athletics, has amended the DSD Regulations several times. The current version, which has been in force since 31 March 2023 and is called Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development), provides, in particular, that, in order to be eligible to compete in the female classification at a World Rankings Competition (or to have recognised any World Record performance in a competition that is not a World Rankings Competition), athletes with DSD must have continuously maintained the concentration of testosterone in their serum below 2.5 nmol/L for a period of at least twenty-four months. This rule applies to all events under its purview.

V. CODE OF SPORTS-RELATED ARBITRATION

81. The Code of Sports-related Arbitration was issued by the International Council of Arbitration for Sport and is made up of four parts: A. Joint

Dispositions (Articles S1-S3); B. The International Council of Arbitration for Sport (Articles S4-S11); C. The Court of Arbitration for Sport (Articles S12-S22); and D. Miscellaneous Provisions (Articles S23-S26). A set of Procedural Rules is included in the Code (Articles R27-R70).

82. The relevant provisions of the Code of Sports-related Arbitration provided as follows (version applicable at the material time[1]):

"**B The International Council of Arbitration for Sport (ICAS)**

1 Composition

S4 ICAS is composed of twenty members, experienced jurists appointed in the following manner:

a. four members are appointed by the International Sports Federations (IFs), *viz.* three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;

b. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;

c. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;

d. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;

e. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

S5 The members of ICAS are appointed for one or several renewable period(s) of four years. Such nominations shall take place during the last year of each four-year cycle.

Upon their appointment, the members of ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43.

Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.

If a member of the ICAS resigns, dies or is prevented from carrying out her/his functions for any other reason, she/he is replaced, for the remaining period of her/his mandate, in conformity with the terms applicable to her/his appointment.

ICAS may grant the title of Honorary Member to any former ICAS member who has made an exceptional contribution to the development of ICAS or CAS. The title of Honorary Member may be granted posthumously.

2 Attributions

S6 ICAS exercises the following functions:

1. It adopts and amends this Code;

[1] The version applicable in the present case is that which entered into force on 1 January 2019. An amended version entered into force on 1 July 2020.

...

4. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators on the proposal of the CAS Membership Commission. It can also remove them from those lists;

5. It resolves challenges to and the removal of arbitrators through its Challenge Commission, and performs any other functions identified in the Procedural Rules;

6. It is responsible for the financing of and financial reporting by CAS. For such purpose, *inter alia*:

6.1 it receives and manages the funds allocated to its operations;

6.2 it approves the ICAS [*sic*] budget prepared by the CAS Court Office and the CAS Anti-Doping Division Office;

6.3 it approves the annual report and financial statements of ICAS prepared in accordance with the requirements of Swiss Law;

7. It appoints the CAS Secretary General and may terminate her/his duties upon proposal of the President;

8. It supervises the activities of the CAS Court Office and the CAS Anti-Doping Division Office;

...

C The Court of Arbitration for Sport (CAS)

...

2 Arbitrators and mediators

S13 The personalities designated by ICAS, pursuant to Article S6, paragraph 3, appear on the CAS list for one or several renewable period(s) of four years. ICAS reviews the complete list every four years ...

There shall be not less than one hundred fifty arbitrators ...

S14 The ICAS shall appoint personalities to the list of CAS arbitrators with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the NOCs and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes.

...

S18 ...

Upon their appointment, CAS arbitrators ... shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators ... may not act as counsel for a party before the CAS.

S19 CAS arbitrators ... are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

ICAS may remove an arbitrator ... from the list of CAS members, temporarily or permanently, if she/he violates any rule of this Code or if her/his action affects the reputation of ICAS and/or CAS.

3 Organisation of the CAS

...

S21 The President of either Division may be challenged if circumstances exist that give rise to legitimate doubts with regard to her/his independence *vis-à-vis* one of the parties to an arbitration assigned to her/his Division. She/he shall pre-emptively disqualify herself/himself if, in arbitration proceedings assigned to her/his Division, one of the parties is a sports-related body to which she/he belongs, or if a member of the law firm to which she/he belongs is acting as arbitrator or counsel.

...

Procedural Rules

A General Provisions

...

R33 Independence and Qualifications of Arbitrators

Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect her/his independence with respect to any of the parties.

...

R34 Challenge

An arbitrator may be challenged if the circumstances give rise to legitimate doubts over her/his independence or over her/his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the Challenge Commission, which has the discretion to refer a case to ICAS. The challenge of an arbitrator shall be lodged by the party raising it ... The Challenge Commission or ICAS shall rule on the challenge after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments. Such comments shall be communicated by the CAS Court Office or the CAS Anti-Doping Division Court Office to the parties and to the other arbitrators, if any. The Challenge Commission or ICAS shall give brief reasons for its decision and may decide to publish it.

R35 Removal

An arbitrator may be removed by the Challenge Commission if she/he refuses to or is prevented from carrying out her/his duties or if she/he fails to fulfil her/his duties pursuant to this Code within a reasonable time. The Challenge Commission shall invite the parties, the arbitrator in question and the other arbitrators, if any, to submit written comments and shall give brief reasons for its decision. Removal of an arbitrator cannot be requested by a party.

...

B Special Provisions Applicable to the Ordinary Arbitration Procedure

...

R40 Formation of the Panel

R40.1 Number of Arbitrators

The Panel is composed of one or three arbitrators. If the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine the number, taking into account the circumstances of the case. The Division President may then choose to appoint a Sole arbitrator when the Claimant so requests and the Respondent does not pay its share of the advance of costs within the time limit fixed by the CAS Court Office.

R40.2 Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

If, by virtue of the arbitration agreement or a decision of the President of the Division, a sole arbitrator is to be appointed, the parties may select her/him by mutual agreement within a time limit of fifteen days set by the CAS Court Office upon receipt of the request. In the absence of agreement within that time limit, the President of the Division shall proceed with the appointment.

If, by virtue of the arbitration agreement, or a decision of the President of the Division, three arbitrators are to be appointed, the Claimant shall nominate its arbitrator in the request or within the time limit set in the decision on the number of arbitrators, failing which the request for arbitration is deemed to have been withdrawn. The Respondent shall nominate its arbitrator within the time limit set by the CAS Court Office upon receipt of the request. In the absence of such appointment, the President of the Division shall proceed with the appointment in lieu of the Respondent. The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel.

...

R45 Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono."

THE LAW

I. SCOPE OF THE CASE

83. The question whether the applicant had had access to an "independent and impartial tribunal established by law" within the meaning of Article 6 § 1 and, specifically, whether the CAS met that requirement, was addressed in the written and oral proceedings before the Grand Chamber.

84. It must be ascertained whether this question falls within the scope of the case that the applicant referred to the Court.

85. The scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint. A complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle, the Court is not bound by the legal

grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint, by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant. The Court cannot, however, base its decision on facts that are not covered by the complaint. To do so would be tantamount to deciding beyond the scope of a case; in other words, to deciding on matters that have not been "referred to" it, within the meaning of Article 32 of the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018).

86. Accordingly, an applicant must complain that a certain act or omission entailed a violation of the rights set forth in the Convention or the Protocols thereto, in a manner which should not leave the Court to second-guess whether a certain complaint was raised or not. This means that the Court has no power to substitute itself for the applicant and formulate new complaints simply on the basis of the arguments and facts advanced (see *Grosam v. the Czech Republic* [GC], no. 19750/13, §§ 90-91, 1 June 2023).

87. Furthermore, the complaints the applicant proposes to make under Article 6 of the Convention must contain all the parameters necessary for the Court to define the issue it will be called upon to examine. It has stressed in that connection that the scope of application of Article 6 of the Convention is very broad and that its examination is necessarily delimited by the specific complaints submitted to it (ibid., § 89).

88. In her application to the Court, however, the applicant in the present case, relying on Article 6 § 1 and Article 13, merely argued that where an applicant submitted an arguable claim of a violation of a right guaranteed by the Convention, the domestic legal order had to afford both "effective access" and an "effective remedy". In her view, either the limited nature of the review of the compatibility of arbitral awards with public policy under section 190(2)(e) of the Federal Act on Private International Law ("PILA") did not afford such a possibility, or the Federal Supreme Court had failed to provide such access or such a remedy. Referring to *Camenzind v. Switzerland* (16 December 1997, § 54, *Reports of Judgments and Decisions* 1997-VIII), she added that the scope of the review in her case had been excessively limited and, referring to *Smith and Grady v. the United Kingdom* (nos. 33985/96 and 33986/96, § 138, ECHR 1999-VI), that the Federal Supreme Court had been unable or unwilling to examine the merits of each of her Convention complaints.

89. It would therefore appear that, as formulated in her application, the applicant's complaint, based without distinction on Article 6 § 1 and Article 13, concerns the alleged insufficiency of the Federal Supreme Court's review of the CAS award. This is also clear from her written submissions to the Grand Chamber.

90. In her application to the Court, the applicant did not raise a complaint regarding a lack of access to an "independent and impartial tribunal established by law" within the meaning of Article 6 § 1.

91. It follows that this question does not form part of the scope of the case before the Court, with the result that the Grand Chamber is not called upon, in the context of the present case, to examine whether the CAS is an "independent and impartial tribunal established by law" within the meaning of Article 6 § 1.

92. Furthermore, in her written submissions and at the hearing, the applicant requested that the Grand Chamber examine the Article 3 complaint raised by her before the Chamber, which the Chamber had declared inadmissible as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention.

93. The Court reiterates that the Grand Chamber cannot examine those parts of an application which have been declared inadmissible by the Chamber (see, for example, *Savran v. Denmark* [GC], no. 57467/15, § 169, 7 December 2021, and the references cited therein). It sees no reason to depart from this principle in the present case.

94. Accordingly, in the context of the present case, the Court has no jurisdiction to examine the complaint raised under Article 3 of the Convention. The applicant's request for a re-examination of this complaint must therefore be rejected.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1, ARTICLE 8, ARTICLE 13 AND ARTICLE 14 OF THE CONVENTION

95. Relying on Article 8 of the Convention, the applicant argued that the DSD Regulations violated her right to respect for her private life, owing to their effects on her bodily and psychological integrity and identity, her right to self-determination and her right to exercise her professional activity. She alleged that the respondent State had failed in its positive obligation to secure to everyone within its jurisdiction respect for the rights provided for by that Article, considering that the Federal Supreme Court had failed to examine those interferences with her right to respect for her private life in the light of the criteria developed by the Court in this area.

96. Relying on Article 14 of the Convention taken in conjunction with Article 8, the applicant also submitted that the DSD Regulations created a discriminatory difference in treatment on grounds of (i) sex, between male and female athletes, given that no equivalent restriction existed for male athletes, and (ii) intersexuality, and/or physical or biological characteristics, and/or gender identity and/or a combination of these characteristics, between female athletes with differences of sex development (DSD) and female athletes without DSD. She submitted that they constituted indirect discrimination on grounds of race, ethnicity or colour, which she alleged to

have suffered as a result of the DSD Regulations disproportionately affecting female athletes from the Global South. In her view, there had been a violation of Article 14 in conjunction with Article 8 by the respondent State, in that those provisions imposed on States Parties the positive obligation to secure to everyone within their jurisdiction the right not to be discriminated against in the enjoyment of the right to respect for private life. She argued in that connection, as she had in her complaint under Article 8 taken alone, that the Federal Supreme Court had failed to examine this specific interference with her rights in the light of the criteria developed by the Court in this area.

97. Relying on Article 6 § 1 and Article 13 of the Convention, the applicant complained of a violation of her right of access to a court and of her right to an effective remedy, as a result of the excessively limited nature of the review carried out by the Federal Supreme Court on the basis of section 190(2)(e) PILA.

A. Switzerland's jurisdiction, within the meaning of Article 1 of the Convention, and the Government's preliminary objection that the complaints under Articles 8, 14 and 13 of the Convention are inadmissible as being incompatible *ratione personae* and *ratione loci* with the provisions of the Convention

98. The Court notes that the applicant is a South African national who resides in South Africa and has not submitted that she has a personal link with Switzerland. It also notes that Switzerland played no role in the drafting or application of the DSD Regulations, which were issued by a Monegasque private-law association. Furthermore, the applicant has not argued that she was prevented from taking part in an international competition organised in Switzerland because of those Regulations. The links between the case and Switzerland are limited to the following circumstances. First, the fact that the case was referred by the applicant to the CAS, which has its seat in Lausanne. As the Federal Supreme Court reiterated in this case (see paragraph 36 above), referring to *Mutu and Pechstein* (cited above, § 65), the CAS is not a domestic court or another institution of Swiss public law, but an entity emanating from a private-law foundation, namely, the International Council of Arbitration for Sport ("ICAS"). Secondly, the Federal Supreme Court subsequently examined the civil-law appeal lodged with it by the applicant against the CAS award within its competence to review the award's compatibility with substantive public policy.

99. In these circumstances, the first question which arises in this case is whether the applicant fell within the jurisdiction of Switzerland within the meaning of Article 1 of the Convention and, consequently, whether the Court has jurisdiction to examine the complaints she has raised. The Court reiterates in this connection that the question of the jurisdiction of the respondent State is a preliminary issue to be determined, at the admissibility stage, before any

assessment of the merits of the substantive allegations can take place (see, among other authorities, *Duarte Agostinho and Others v. Portugal and 32 Others* (dec.) [GC], no. 39371/20, § 197, 9 April 2024; *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, § 506, 30 November 2022; and *Ukraine v. Russia (*re *Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, §§ 264 and 340, 16 December 2020).

1. The parties' submissions

(a) The Government

100. The Government did not dispute that the application fell within Switzerland's jurisdiction in so far as it concerned Article 6 § 1. However, they submitted that the opposite was true in as far as it related to Article 8, taken alone and in conjunction with Article 14, and to Article 13. They therefore invited the Court to declare the complaints under these last three provisions inadmissible as being incompatible *ratione personae* and *ratione loci* with the provisions of the Convention.

101. With regard to the complaint under Article 8, taken alone and in conjunction with Article 14, the Government submitted as follows. First, that under section 190(2) PILA, the Federal Supreme Court's power of review when examining international arbitral awards was limited, since such awards could only be challenged substantively on the grounds that they were incompatible with public policy, a concept which was more restrictive than that of arbitrariness. They observed that the case-law distinguished between procedural public policy and substantive public policy. An award was incompatible with substantive public policy where it breached fundamental principles of substantive law – including the prohibition of discriminatory measures and respect for human dignity – to such an extent as to no longer be reconcilable with the legal order and the system of prevailing values. A party could not complain directly of a violation of the Convention by the arbitrators, but the Federal Supreme Court had held that "underlying Convention principles [could] be relied on, if applicable, in order to secure the guarantees invoked on the basis of section 190(2) PILA". As a result, the Convention guarantees were, "at least indirectly, important for giving effect to public policy in the context of the judicial review of international arbitral awards".

102. The Government submitted that in the area of domestic arbitration, the review of awards would be more extensive, since it was possible to argue that an arbitral award was "arbitrary in its result".

103. Secondly, the Government observed that the events which had given rise to the case had no link with Switzerland. The only link with Switzerland was the fact that the case had been dealt with by the CAS, which had its seat in Lausanne, because it had exclusive jurisdiction to hear disputes under the

DSD Regulations, and subsequently by the Federal Supreme Court, in the context of its limited power of review.

104. They noted the Court's case-law to the effect that, where a State Party instituted, by virtue of its domestic law, its own investigation into a death which had occurred outside its jurisdiction, this would be sufficient, in certain circumstances, to establish a jurisdictional link for the purposes of Article 1 in respect of the procedural obligations under Article 2. In their view, however, this case-law could not be transposed to the present case, particularly since, in the relevant cases, the proceedings had been entirely conducted by the State authorities and were provided for by domestic law.

105. The Government also noted that, to date, the Court had never inferred the jurisdiction of a State in respect of substantive guarantees under the Convention from the fact that civil or arbitral proceedings had been conducted in that State, although the events in question had taken place entirely outside that State and the parties were not residents or nationals of it. In their view, altering that approach would lead to a sort of universal and unlimited jurisdiction that the Contracting Parties to the Convention had never envisaged. They emphasised that Switzerland had no influence on the activities of stakeholders such as World Athletics, and considered that the Convention could not impose on it an obligation to protect, in terms of the substantive Convention guarantees, athletes from around the world in the many different situations which could give rise to proceedings before the CAS. Moreover, Switzerland was not in a position to assume such an obligation, since most parties to sports disputes were not subject to its jurisdiction or legislative power. Also, the Federal Supreme Court did not have jurisdiction to conduct a comprehensive substantive review of measures adopted in this area in the light of the substantive Convention guarantees. To accept that Switzerland had jurisdiction although it exercised no influence over the parties in question or the norms applicable in the sports domain, and did not have the means to secure the enforcement of any finding of a violation, would be tantamount to creating a "kind of fiction". It could also lead to the CAS being relocated to a State that was not a signatory to the Convention, or even prompt the parties concerned to seek international commercial arbitration before non-European bodies.

106. Thirdly, the Government considered that in its judgment the Chamber had contradicted several well-established case-law principles. They argued, first of all, that the Chamber had incorrectly interpreted section 190(2)(e) PILA and had disregarded the principle that it was primarily for the national courts to interpret domestic law. They also observed that the Chamber had relied, without good reason, on the judgments in *Markovic and Others v. Italy* ([GC], no. 1398/03, ECHR 2006-XIV); *Arlewin v. Sweden* (no. 22302/10, 1 March 2016); and *Naït-Liman v. Switzerland* ([GC], no. 51357/07, 15 March 2018) when ruling on Switzerland's jurisdiction in the context of Articles 8 and 14, although those judgments related only to

Article 6 § 1. The Chamber had also incorrectly relied on *Platini v. Switzerland* ((dec.), no. 526/18, 11 February 2020), which, as it had been declared inadmissible *de plano*, had not been subject to an exchange of arguments; it had also related to domestic, not international, arbitration. The Government regretted the Chamber's finding to the effect that had the Court concluded, in the context of compulsory arbitration, that it did not have jurisdiction, this would deprive professional female athletes of access to it. In their view, that could not justify creating a new basis for extraterritorial jurisdiction. The Chamber had also relied in this respect on the judgment in *Al-Dulimi and Montana Management Inc. v. Switzerland* ([GC], no. 5809/08, 21 June 2016), which, unlike the present case, had concerned acts and omissions by Swiss State bodies and only Article 6. Lastly, they submitted that it had not been established that the applicant had had no other choice but to apply to the CAS and subsequently to the Federal Supreme Court. In their view, it could not be ruled out that courts in another State might consider themselves not to be bound by the compulsory arbitration clause in the DSD Regulations. In that connection, the Government cited the example of one of the applicants in the *Mutu and Pechstein v. Switzerland* case (nos. 40575/10 and 67474/10, 2 October 2018) who, following a ban imposed by the disciplinary commission and upheld by the CAS and the Federal Supreme Court, had brought an action for damages before the German courts. In a judgment of 3 June 2022, the German Federal Constitutional Court had held that, owing to the lack of a public hearing in the proceedings before the CAS – the circumstance that had given rise to this Court's finding of a violation – , the arbitration clause was null and void, and the German courts had jurisdiction to examine the applicant's claim.

107. Lastly, the Government submitted that, since the application did not fall within Switzerland's jurisdiction in so far as Articles 8 and 14 were concerned, the same applied to Article 13, given the accessory nature of that provision.

(b) The applicant

108. The applicant submitted that Switzerland's jurisdiction was established in relation to all of the provisions of the Convention relied on by her.

109. She emphasised, first, that her case was one of compulsory arbitration. She indicated that under Article 5.2 of the DSD Regulations she had had no other option than to apply to the CAS, especially since sport governing bodies controlled access to international sport. Bringing an action before domestic courts would require the athlete challenging the Regulations to bring proceedings against the national federation of which she was a member (itself constrained by Article 5.2) – which would only be possible if the national federation applied the DSD Regulations – or to bring proceedings in each State in which she wished to participate in World Athletics

competitions. That would be onerous in terms of the time and costs involved in bringing proceedings. It would also not reflect the fact that elite athletes took part in international competitions which were held in a range of States and were subject to the jurisdiction of the sport governing bodies. Furthermore, the applicant pointed out that the Federal Supreme Court had jurisdiction under Swiss law to rule on the validity of CAS awards; that the Court had held in *Mutu and Pechstein* (cited above) that Swiss law gave effect to them; and that in this context the Federal Supreme Court examined, within the admittedly limited framework provided by section 190(2)(e) PILA, whether respect for the rights guaranteed by the Convention had been complied with. She further submitted that, unlike commercial arbitration, compulsory sports arbitration was typified by an imbalance of power between the athlete and his or her sport governing body, as the Federal Supreme Court had itself acknowledged in her case. The applicant also referred to the judgment of the Court of Justice of the European Union (CJEU) of 21 December 2023 in *International Skating Union v. Commission* (see paragraphs 64-68 above), in which the CJEU had held that arbitration rules adopted by sports associations could not limit the exercise of the rights and freedoms conferred on individuals by EU law; that they had to be subject to an effective judicial review of compliance with EU law; that, in the event that the relevant rules contained provisions conferring mandatory and exclusive jurisdiction on the relevant arbitration body, the review performed by the Federal Supreme Court did not fulfil this criterion; and that, in consequence, the requirement to resolve disputes through the CAS, in the absence of a review before national courts in the European Union, was inconsistent with EU law. Referring to other judgments delivered on the same date by the CJEU, the applicant also submitted that it followed from the CJEU's case-law that the rules of sport governing bodies ought to be drafted and implemented in compliance with the general principles of EU law, in particular the principles of non-discrimination and proportionality. In her submission, those principles applied, by analogy, in a Convention context. The applicant considered that the Convention imposed a requirement on the Federal Supreme Court to give full effect to the Convention in its analysis and review of cases. Where substantive rights were the basis of an appeal, the Federal Supreme Court was required to consider them, irrespective of whether an appellant was permitted by domestic law to invoke the Convention directly. In her view, there was no underlying principle which would justify a distinction between procedural or substantive Convention rights in this regard.

110. The applicant then submitted that the Court had held in the *Platini* and *Mutu and Pechstein* cases (both cited above) that CAS arbitral awards were within Switzerland's control, since Swiss law gave them effect and they were subject to appeal before the Federal Supreme Court. As had been demonstrated by the decision in *Platini*, there was no reason to consider that

Switzerland's jurisdiction was engaged solely under Article 6 § 1. She argued that the question of jurisdiction was determined by the same factual circumstances which triggered positive obligations under Articles 8 and 14. The jurisdictional test was met, and the acts or omissions in issue engaged Switzerland's positive obligations to take appropriate steps to ensure respect for the rights and freedoms guaranteed under the Convention. This was precisely because compulsory arbitration before the CAS had been inserted into Switzerland's legal structure and institutionalised therein, with exclusive review powers granted to the Federal Supreme Court. This situation led Switzerland to exert authority and control over the fundamental rights of an international athlete who, in this instance, happened to be a South African national and resident, but in fact could just as easily have been a national and resident of any country. Furthermore, given the small number of athletes likely to rely on the Convention in disputes against sport governing bodies, there was no risk of conferring extraterritorial jurisdiction on Switzerland for all cases of sports-related international arbitration.

111. In the alternative, the applicant submitted that if the Court considered that her case was one of extraterritoriality, Switzerland's jurisdiction was nevertheless engaged. She referred to the case-law according to which exceptional circumstances called for exceptions to the principle of territoriality, and set out the following relevant circumstances. First, Switzerland exercised control and influence over the applicant's Convention interests because the structure of the dispute-resolution process regarding individual athletes and World Athletics was embedded in its domestic legal system. She had not voluntarily submitted to that system but had been required to do so in order to vindicate her Convention rights. Secondly, Switzerland had, through the Federal Supreme Court, exclusive supervisory jurisdiction over the CAS. Thirdly, the mandatory referral of the dispute to the CAS and then to the Federal Supreme Court had created a *de jure* link between Switzerland and the applicant. Fourthly, there was a direct and foreseeable causal link between the acts and omissions of Switzerland and the impact on the applicant's Convention rights. Fifthly, her situation would be no different if she were a Swiss athlete. Sixthly, the reasoning in the judgments in *Markovic and Others* (cited above), and *Hanan v. Germany* ([GC], no. 4871/16, 16 February 2021) and in the decision in *Chagos Islanders v. the United Kingdom* ((dec.), no. 35622/04, 11 December 2012) could not be used as a basis for concluding that Switzerland did not have jurisdiction in the present case. Seventhly, it was important to note that the applicant was one of a vulnerable minority of individuals who came before the CAS, the Federal Supreme Court and this Court asking for her fundamental rights to be protected, as women and as athletes. The applicant argued that she was not asking the Court to expand its jurisdiction in a way that was either illogical or impermissible. At the same time, she submitted that, where the sports federation erred in a manner that violated fundamental

Convention norms, and an athlete wishing to challenge the eligibility criteria had no option but to do so before the CAS, which was domiciled in Switzerland, then that State had to provide an effective remedy for any unjustified violation of human rights. She asked the Court to ensure that the only State which had legal capacity to ensure that her Convention rights were protected and remedied fulfilled its own Convention-mandated requirements.

2. Observations of the third-party interveners

112. The United Kingdom Government submitted that supervision of an arbitration by the court of a Contracting State was insufficient to create Article 1 jurisdiction over the underlying subject matter of the arbitration. They acknowledged that, to the extent that the law of a Contracting State allowed parties to have their civil rights and obligations determined by arbitration, the State was responsible for ensuring that the arbitration process complied with the rights guaranteed by Article 6 § 1. Parties to a London arbitration were therefore within the United Kingdom's Article 1 "jurisdiction" in so far as the operation of the process was concerned. By contrast, referring to the cases of *Markovic and Others* (cited above, § 54); *Chagos Islanders* (cited above, § 66); and *Hanan* (cited above, § 143), and observing that the *Platini* case (cited above, § 37) had no cross-border aspect at all, the intervening Government submitted that in cases of international arbitration, the Contracting State's jurisdiction did not cover other Convention rights at stake in the context of the dispute.

113. The United Nations High Commissioner for Human Rights observed that, where a Contracting State was designated as the seat of an arbitration, then it was, as a matter of law, both the territory in which the arbitration was taking place and the territory in which an arbitral award was issued. As such, it was only its domestic courts that could exercise supervisory jurisdiction over the arbitration and set aside the award. The Contracting States thus had a positive obligation to secure rights and freedoms to everyone subject to an arbitration in their territory. Jurisdiction, within the meaning of Article 1, would thus derive from the place where the arbitration was legally taking place and/or where an arbitral award would be given legal effect through the process of judicial recognition and enforcement.

114. World Athletics recognised that the Court had jurisdiction to examine the complaint under Article 6 § 1. Referring to the dissenting opinion appended to the Chamber judgment and to the Swiss Government's arguments, World Athletics considered, however, that the Court did not have jurisdiction to examine the complaints under Articles 8, 14 and 13.

115. The other third-party interveners did not raise the issue of Switzerland's jurisdiction within the meaning of Article 1 of the Convention.

3. The Chamber judgment

116. The Chamber dismissed, by a majority, the Government's preliminary objection. It observed that the Federal Supreme Court was under a duty to apply international law, including the Convention, and that it was its practice to apply the Convention indirectly in cases of this type. Referring in particular to *Markovic and Others* (cited above, §§ 49-55), it reiterated that once a person brought a civil action in the courts or tribunals of a State, there indisputably existed a "jurisdictional link" between that person and the State, and that this was so even if there was an extraterritorial aspect to the events which had given rise to the action. It noted that, in the present case, the civil-law appeal that the applicant had lodged with the Federal Supreme Court against the CAS award had therefore triggered, prima facie, Switzerland's jurisdiction within the meaning of Article 1 of the Convention. Furthermore, referring to the cases of *Mutu and Pechstein* and *Platini* (both cited above), it considered that the fact that the IAAF was not a Swiss private-law association made no difference as regards the Court's jurisdiction *ratione personae* and *ratione loci*, especially since its examination would focus on the proceedings before the CAS and the Federal Supreme Court. The Chamber also noted that in the context of compulsory arbitration, which had deprived the applicant of the possibility of applying to the ordinary courts in her own country or elsewhere (specifically in Switzerland or Monaco), the only remedy available to her had been a request for arbitration before the CAS, followed by an appeal to the Federal Supreme Court. It concluded that if the Court were to find that it did not have jurisdiction to examine this type of application, it would risk barring access to the Court for an entire category of individuals, that of professional female athletes, which would not be in keeping with the spirit, object and purpose of the Convention.

117. In concluding its examination of this issue, the Chamber stated that it was mindful of the fact that the applicant had raised before it the question of the compatibility with the Convention of regulations issued by the IAAF and endorsed by the CAS, both of which were non-State actors. It concluded, however, that to the extent that the findings of the CAS had been reviewed by the Federal Supreme Court with regard to the applicant's complaints, her case fell within the "jurisdiction" of Switzerland within the meaning of Article 1 of the Convention; this was so even though the Swiss Federal Supreme Court had not explicitly referred to the provisions of the Convention and had, under section 190(2)(e) PILA, only had a limited power of review, being confined to the question whether the award under appeal was compatible with Swiss public policy.

4. The Court's assessment

(a) Applicable principles

118. The Court refers to its decision in *Duarte Agostinho and Others* [GC] (cited above, §§ 168-76) for a full statement of the general principles relating to the concept of jurisdiction within the meaning of Article 1 of the Convention, and, among other authorities, to the judgments in *Markovic and Others* [GC] (cited above), and *H.F. and Others v. France* ([GC], nos. 24384/19 and 44234/20, 14 September 2022), and the decisions in *Ukraine and the Netherlands v. Russia* [GC] (cited above); *M.N. and Others v. Belgium* ([GC], no. 3599/18, 5 May 2020); and *Ukraine v. Russia (*re *Crimea)* [GC] (cited above), all referred to in *Duarte Agostinho and Others* [GC].

119. It follows from the above case-law that the jurisdiction of a State, within the meaning of Article 1, is essentially territorial. The facts complained of by the applicant must, in principle, have taken place on the territory of the respondent State.

120. Exceptional circumstances, assessed in the light of the particular facts of a case, may, however, lead the Court to conclude that a State has exercised its jurisdiction outside its national territory, in respect of acts or omissions which can be attributed to it that are performed, or produce effects, outside its territory.

121. The Court has thus found an exception to the principle that the jurisdiction of a State Party is limited to its own territory where, on the one hand, that State exercised effective control over an area outside its national territory and, on the other, where, outside its national territory, an official of that State exercised authority or control over the victim.

122. Furthermore, specific circumstances of a procedural nature have been found to engage the jurisdiction of a State in relation to events which occurred outside its territory.

123. The Court thus held in the *Markovic and Others* [GC] case (cited above, §§ 53-54), in the context of complaints under Article 6 § 1 of the Convention, that, even if the events giving rise to an application occurred outside the territory of the respondent State, the latter's jurisdiction was established once a person brought a civil action in the courts of that State, if the domestic law recognised a right to bring such an action and if the right claimed was one which prima facie possessed the characteristics required by that provision. If civil proceedings were brought in the domestic courts, the State was required by Article 1 of the Convention to secure in those proceedings respect for the rights protected by Article 6. The Court considered, in particular, that "once a person [brought] a civil action in the courts or tribunals of a State, there indisputably [existed], without prejudice to the outcome of the proceedings, a 'jurisdictional link' for the purposes of Article 1 of the Convention". In other words, in the context of the given civil

action, the person in question falls within the jurisdiction of that State with regard to respect for the rights guaranteed by Article 6 § 1. In *Markovic and Others*, relatives of individuals who had died in airstrikes on Belgrade in 1999, carried out by North Atlantic Treaty Organisation (NATO) aircraft taking off from bases on Italian territory, had brought civil liability proceedings against the Italian State in the Italian courts.

124. In its admissibility decision of 12 June 2003 in the same case, however, the Court had held that the fact that the applicants had brought an action in the Italian courts did not suffice to engage Italy's jurisdiction in respect of the complaints they had made under Articles 2, 10 and 17 of the Convention. It referred to the *Banković and Others v. Belgium and Others* ((dec.) [GC], no. 52207/99, ECHR 2001-XII) case, in which it had held, in respect of complaints under Articles 2, 10 and 17, that there was no "jurisdictional link" within the meaning of Article 1 between victims of the same airstrikes and the respondent States (all NATO members). It based this finding on the principle that a State's jurisdiction, within the meaning of Article 1, is primarily territorial and on the absence of exceptional circumstances capable of leading to the conclusion that the respondent States had exercised their jurisdiction extraterritorially.

125. Moreover, the Court has accepted an exception where Article 2, concerning the right to life, has been relied on in its procedural limb against a Contracting State when the death occurred outside its territory. It based that finding on the fact that the procedural obligation under that provision to carry out an effective investigation had evolved into a separate and autonomous obligation that could be considered to be a detachable obligation arising out of Article 2 and capable of binding the State even when the death occurred outside its jurisdiction. In such cases, the question which arises is whether there is a "jurisdictional link" for the purposes of Article 1 of the Convention. The Court has found in this connection that if the investigative or judicial authorities of a Contracting State institute their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State, by virtue of its domestic law (for example, under provisions on universal jurisdiction or on the basis of the active or passive personality principle), the institution of that investigation or those proceedings was sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later bring proceedings before the Court (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, §§ 188-89, 29 January 2019).

126. The Court has also considered that where no such investigation or proceedings have been instituted in a Contracting State, special features of that case may nevertheless trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2 (ibid., § 190). This is also true where the principle set out in paragraph 125 above

does not apply to the factual scenario at issue in the case (see *Hanan*, cited above, §§ 135-45).

(b) Application of those principles to the present case

(i) Switzerland's jurisdiction in terms of the territoriality principle

127. The Court notes that there is no territorial link between Switzerland, on the one hand, and the applicant, the adoption of the DSD Regulations and their effects on her personal situation, on the other, bar the proceedings brought before the CAS and the Federal Supreme Court, which will be examined below. It is therefore clear that the applicant did not fall within the territorial jurisdiction of the respondent State.

(ii) Switzerland's jurisdiction as an exception to the territoriality principle

(α) As regards the complaint under Article 6 § 1 of the Convention

128. As indicated in paragraph 123 above, once a person brings a civil action in the courts of a member State, the domestic law recognises a right to bring an action and the right claimed is one which prima facie possesses the characteristics required by Article 6 of the Convention, then that person falls within its jurisdiction with regard to respect for the rights guaranteed by that provision, even if the events giving rise to the application occurred outside the territory of that State.

129. In the present case, the Court observes that the CAS, which has its seat in Switzerland, is an arbitral tribunal within the meaning of Swiss law (see paragraph 46 above) and as such is governed by the provisions of Chapter 12 PILA, relating to international arbitration.

130. The Court notes that it follows from section 77(1) of the Federal Supreme Court Act and section 190(2) PILA that, in the area of international arbitration, Swiss law provides for a civil-law appeal to the Federal Supreme Court against awards of arbitral tribunals which have their seat in Switzerland. Such appeals allow for not only an assessment of whether the awards comply with certain procedural requirements, but also for a substantive review of whether they are compatible with public policy within the meaning of section 190(2)(e) PILA (public policy within the meaning of that provision having both a procedural and a substantive aspect; see paragraphs 46-47 and 50-52 above).

131. The applicant thus brought a civil-law appeal against the award delivered on 30 April 2019 by the CAS in her case, which was examined by the Federal Supreme Court.

132. The Court further observes that the rights asserted by the applicant before the CAS and the Federal Supreme Court possessed the characteristics required by Article 6 of the Convention in so far as, as noted in paragraphs 158 to 163 below, the dispute raised by the applicant in her civil action concerned "her ... civil rights" within the meaning of that provision.

133. Thus, the applicant's appeal to the Federal Supreme Court, following on from her application to the CAS, created a jurisdictional link with Switzerland, entailing an obligation for that State, under Article 1 of the Convention, to ensure respect for the rights protected by Article 6 of the Convention in the proceedings which took place before the Federal Supreme Court.

134. The Court also observes that the Government have not contested Switzerland's jurisdiction in respect of this complaint (see paragraph 100 above).

135. In conclusion, in the light of the case-law set out in paragraphs 123 and 128 above, the applicant fell within Switzerland's jurisdiction as regards her complaint under Article 6 § 1.

(β) As regards the complaints under Article 8 of the Convention, taken alone or in conjunction with Article 14

136. The Court considers, first, that the exceptions set out in paragraphs 121 and 125 to 126 above are not applicable here: the present case does not concern either control by a State of a territory outside its national territory or the exercise of control or authority over a person by an agent of a State outside that State's borders; nor does it concern the procedural obligation to investigate under Article 2 of the Convention.

137. Secondly, the Court observes that the approach followed by the majority of the Chamber (see paragraphs 116-117 above) amounts to a finding that, where a court in a given State examines an appeal concerning alleged breaches of a Convention provision relating to a substantive right, such as Articles 8 and 14, on account of facts which occurred outside that State, the alleged victim of the violation, as a party to the proceedings, falls within that State's jurisdiction in respect of the procedural obligations inherent in those provisions.

138. On the latter point, it is clear from the Court's case-law that one of the positive obligations under Article 8 of the Convention is to put in place a legal framework for the protection of private life against interference by private persons, including a remedy capable of providing sufficient protection, and that individuals affected by discriminatory treatment must be provided with an opportunity to challenge it and to take legal action to obtain damages or other relief (see, for example – concerning, however, cases in which the circumstances are unrelated to the present case – *Söderman v. Sweden* [GC], no. 5786/08, §§ 78-85, ECHR 2013, concerning Article 8 taken alone, and *Zakharova and Others v. Russia*, no. 12736/10, § 35, 8 March 2022, concerning Article 14; see also *Danilenkov and Others v. Russia*, no. 67336/01, § 124, ECHR 2009 (extracts), cited in the Chamber judgment).

139. Thus, in *Platini* (cited above, § 62), in which the applicant had challenged before the CAS, and subsequently the Federal Supreme Court, a

sanction imposed on him by FIFA, the Court held under Article 8 of the Convention that its task was to ascertain whether he had had sufficient institutional and procedural safeguards available to him, in the form of a system of courts to which he could submit his complaints, and whether those courts had delivered reasoned decisions which took account of the Court's case-law. In the present case, the majority of the Chamber considered that the same principles applied to Article 14 of the Convention (see paragraphs 164-66 of the Chamber judgment).

140. That being said, the Court observes that the approach taken by the majority of the Chamber to the question of Switzerland's jurisdiction in respect of the complaints under Articles 8 and 14 of the Convention (see paragraph 137 above) is not based on any case-law precedent.

141. It notes in that connection that the majority of the Chamber relied on the *Platini* case (cited above), in which the Court held that it had jurisdiction to examine the applicant's complaints "as to the acts and omissions of the CAS that were validated by the Federal Supreme Court", including a complaint under Article 8 of the Convention. However, in contrast to the present case, in that case there was a link between the facts complained of by the applicant under Article 8 and Switzerland. That case concerned sanctions imposed on the applicant by the internal bodies of FIFA, a legal person under Swiss law whose seat is in Switzerland, for a breach of its Code of Ethics in the course of his duties at FIFA and while he was its Vice-President. As explained by the Court in that decision (ibid., §§ 22 and 37), the case did not concern international arbitration, governed by the PILA, but domestic arbitration, governed by the Code of Civil Procedure.

142. Nor does the Court's case-law on the jurisdiction of Contracting States in the context of the procedural limb of Article 2 (see paragraph 125 above) provide any precedent that might be relevant in the context of the procedural obligations under Articles 8 and 14. The exception to the territoriality principle in the case-law is linked to the nature of the procedural obligation under Article 2 to carry out an effective investigation where a person has died in violent or suspicious circumstances, which has become a separate and autonomous duty, "detachable" from the substantive limb of Article 2 and which may be capable of binding the State Party even when the death occurred outside its jurisdiction.

143. Furthermore, the Court considers that a general exception to the territoriality principle cannot be inferred from the exception set out in *Markovic and Others* [GC], in the specific context of Article 6 § 1 (see paragraph 123 above).

144. Article 6 § 1, concerning the right to a fair hearing, differs from most other provisions of the Convention – in particular Articles 8 and 14, in issue in the present case – in that it relates exclusively to procedural rights. It is on the basis of this specificity that the Court has reasoned that a State's jurisdiction is established with regard to respect for the procedural rights set

out in Article 6 § 1 where the law of that State provides for the possibility of bringing a civil action before its courts in respect of facts which occurred outside its territory; where the applicant has brought such a civil action; and where the civil action that he or she brought concerned *a priori* a dispute over a civil right, within the meaning of that provision.

145. In consequence, the Court considers that the fact that the Federal Supreme Court examined the applicant's civil-law appeal seeking to have the CAS award of 30 April 2019 set aside does not suffice to establish Switzerland's jurisdiction in respect of the applicant in the context of her complaints under Articles 8 and 14 of the Convention.

146. Moreover, the Court does not discern any special features in the present case which, either separately or in conjunction with the above procedural aspect, could constitute a jurisdictional link in relation to those complaints.

147. Apart from the fact that the CAS has its seat in Switzerland and the Federal Supreme Court examined the applicant's civil-law appeal seeking to have the CAS award of 30 April 2019 set aside, there are no specific circumstances in the present case which link it to Switzerland.

148. Indeed, it is only very exceptionally that the Court may conclude that a State has extraterritorial jurisdiction in circumstances other than those set out in paragraphs 121 and 123 to 126 above. The cases of *M.N. and Others v. Belgium* [GC] (cited above, §§ 113-26); *H.F. and Others v. France* [GC] (cited above, §§ 205-14); and *Duarte Agostinho and Others* [GC] (cited above, §§ 184-213) illustrate this point.

149. The Court notes that the applicant argued in particular that the respondent State had had control over and influenced her interests under the Convention, in that she had been obliged to make use of the Swiss legal system in order to defend her rights (see paragraphs 110-111 above). The Court reiterates, however, that extraterritorial jurisdiction as conceived under Article 1 of the Convention requires control over the person himself or herself rather than the person's interests as such. Leaving aside the particular case-law under Article 2 concerning intentional deprivation of life by State agents, there is no support in the case-law for a criterion such as "control over the Convention interests" as a basis for extraterritorial jurisdiction. The Court does not consider that the scope of extraterritorial jurisdiction could be expanded in such a manner, which would entail a radical departure from established principles under Article 1 (see *Duarte Agostinho and Others* [GC], cited above, § 205).

150. Lastly, the Court notes that, in concluding the reasoning under Article 1 of the Convention, the majority of the Chamber, having noted that the only remedy available to the applicant had been the request to the CAS, followed by an appeal to the Federal Supreme Court, held that if the Court were to find that it did not have jurisdiction to examine this type of application, it would risk barring access to the Court for an entire category of

individuals, namely professional female athletes, which would not be in keeping with the spirit, object and purpose of the Convention. That fact does not, however, suffice to link the present case to Switzerland in such a way as to establish a jurisdictional link between that State and the applicant (see, for the Court's dismissal of a similar argument, *Duarte Agostinho and Others* [GC], cited above, §§ 196-97). It cannot therefore be relied on under Article 1 of the Convention in relation to Article 8, taken alone or in conjunction with Article 14. Furthermore, adopting the approach taken by the Chamber would again be tantamount to expanding the scope of extraterritorial jurisdiction and departing from established principles under Article 1, and this despite the absence of valid grounds for developing the existing case-law on extraterritorial jurisdiction.

151. Accordingly, the applicant did not fall under the jurisdiction of Switzerland in respect of her complaints under Article 8, taken alone or in conjunction with Article 14.

(γ) As regards the complaint under Article 13 of the Convention

152. It follows from the Court's conclusion that the applicant did not fall within Switzerland's jurisdiction in respect of her complaints under Articles 8 and 14 of the Convention that the same applies to her complaint under Article 13 of the Convention taken in conjunction with those provisions (see *M.N. and Others v. Belgium* [GC], cited above, § 125).

(c) Conclusion

153. The applicant fell within the jurisdiction of Switzerland in so far as her complaint under Article 6 § 1 of the Convention is concerned.

154. In contrast, she did not fall within Switzerland's jurisdiction in respect of her complaints under Article 8, taken alone or in conjunction with Article 14, or Article 13 taken in conjunction with those provisions. The Government's preliminary objection that this part of the application is incompatible *ratione personae* and *loci* with the provisions of the Convention must therefore be upheld, and this part of the application must be declared inadmissible in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Article 6 § 1 of the Convention

155. Article 6 § 1 provides as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

1. Issues relating to admissibility other than that of Switzerland's jurisdiction

156. The Government did not dispute the admissibility of the complaint under Article 6 § 1 of the Convention. Referring to *Mutu and Pechstein* (cited above), they stated in particular that they did not contest the applicability of Article 6 § 1 in so far as the proceedings at issue concerned a civil right, specifically the right to practise one's profession.

157. The Court takes note of this statement. It reiterates, however, that it is obliged to examine the question of its jurisdiction at every stage of the proceedings and that the issue whether a particular Article of the Convention or a Protocol thereto is applicable or not, is a matter that goes to the Court's jurisdiction *ratione materiae* (see, for example, *Grosam*, cited above, §§ 106-07).

158. Noting that it has already held that Article 6 § 1 is applicable under its civil head to disputes submitted to arbitration, including international disputes in the field of sport (see, in particular, *Ali Riza v. Switzerland*, no. 74989/11, §§ 63-65, 13 July 2021; *Bakker v. Switzerland* (dec.) [Committee], no. 7198/07, §§ 27-29, 3 September 2019; and *Mutu and Pechstein*, cited above, §§ 56-59), the Court reiterates that the conditions for the applicability of that provision are as follows. There must be a "dispute" ("*contestation*" in French) regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see *Denisov v. Ukraine* [GC], no. 76639/11, § 44, 25 September 2018, and *Grzęda v. Poland* [GC], no. 43572/18, § 257, 15 March 2022). Lastly, the right must be a "civil" right (see *Grzęda*, cited above, § 257; see also, for a recent reference, *Fabbri and Others v. San Marino* [GC], nos. 6319/21 and 2 others, § 76, 24 September 2024). There has been an evolution in the Court's case-law towards applying the civil limb of Article 6 also to cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private right (see *De Tommaso v. Italy* [GC], no. 43395/09, § 151, 23 February 2017, with further references; see also *Denisov*, cited above, §§ 51-52, with further references).

159. The present case concerns a dispute between private persons, the subject matter of which was the applicant's right to respect for her identity, privacy, bodily and psychological integrity and dignity, and her right to exercise her professional activity.

160. The Federal Supreme Court, acting on a civil-law appeal lodged on the basis of section 190(2)(e) PILA (see paragraph 47 above), had to

determine whether the CAS award in the applicant's case was "incompatible with [substantive] public policy". In its judgment of 25 August 2020, it began by reiterating its case-law to the effect that, first, a serious breach of the "personality rights" of an athlete, within the meaning of Articles 27 et seq. of the Swiss Civil Code, could be incompatible with public policy, and, secondly, in the area of high-level sports, that personality rights encompassed the rights to health, bodily integrity, reputation, respect for one's profession, the practice of sport and, as regards sport at the professional level, the right to personal and economic development (see paragraph 40 above). Referring to this case-law, it examined the applicant's case in the light of the rights to respect for bodily and psychological integrity, identity, the private sphere, economic freedom and human dignity.

161. It follows that the dispute concerned civil rights recognised under domestic law.

162. As to whether the dispute was serious in nature, this can be inferred from the fact that the Federal Supreme Court had jurisdiction to assess whether the award of 30 April 2019 was compatible with public policy, within the meaning of section 190(2)(e) PILA, which includes respect for human dignity and personality rights, and from the reasoning it used to dismiss that dispute. It is also beyond doubt that the outcome of the proceedings was decisive for the above-mentioned rights, as it is clear that the applicant's ability to take part in international events in the female category in the disciplines in which she excels was dependent on that outcome.

163. Article 6 § 1 is therefore applicable under its civil limb.

164. Noting that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

2. Merits

(a) The parties' submissions

(i) The applicant

165. The applicant submitted that the CAS and the Federal Supreme Court had failed to protect her against the violations of her Convention rights. She also submitted that, owing to their erroneous interpretation of her case and the limited nature of the review conducted by the Federal Supreme Court on the basis of section 190(2)(e) PILA, under which it was not permitted to invoke a violation of Convention rights directly, there had been a violation of her right of access to a court or her right to an effective remedy.

166. In the applicant's view, while the system that Switzerland had put in place for resolving international professional sport disputes could be said to be appropriate, the same was not true where, as in the present case, the dispute concerned substantive violations of rights guaranteed by the Convention and

where the appeal before the Federal Supreme Court did not allow for those rights to be invoked directly or for Convention standards to be correctly assessed and applied. She referred to the CJEU's judgment of 21 December 2023 cited in paragraphs 64 to 68 above, from which she inferred that that court considered that an overly limited legal or factual review, such as that carried out by the Federal Supreme Court, deprived the athlete concerned of an essential part of the scope of protection provided under EU law. The applicant invited the Court to find similarly.

167. The applicant submitted that her main complaint was that, in the limited circumstances whereby the appeal before the Federal Supreme Court concerned substantive violations of the Convention *ab initio*, and it was compulsory for the person concerned to bring his or her action to the CAS, it was required under the Convention for the Federal Supreme Court – as a court of appeal – to be in a position to review the facts and the law of the CAS's findings.

168. Furthermore, in her observations under Articles 8 and 14 of the Convention, the applicant pointed out in particular that, although the CAS had noted that World Athletics' evidence could not establish a causal relationship between high levels of testosterone and performance advantage and although it had recognised that the evidence had a number of shortcomings, it had nevertheless concluded that this did not disprove World Athletics' position that there was a connection between testosterone and athletic advantage in 46 XY DSD female athletes. Moreover, the CAS had refused to make a finding as to what level of performance advantage was allegedly obtained through elevated testosterone levels. The CAS had also noted the lack of scientific consensus on key matters, as well as the lack of cogent evidence, flawed evidence and the conflict of interest in respect of the scientific advisers relied on by World Athletics. Despite all this, it had inexplicably concluded that the DSD Regulations were necessary, by reference to World Athletics' purpose of having a male/female divide in international competitions.

169. The Federal Supreme Court had refused to interfere with any of the CAS's findings, essentially confining itself to an endorsement of the CAS's conclusions in the light of the very limited concept of public policy which it had employed. Like the CAS, the Federal Supreme Court had failed to stress the need for sound evidence in support of the eligibility criteria. The Federal Supreme Court had been ill-equipped by its restricted remit to perceive that the DSD Regulations were not proportionate to their objective, for the following reasons: the Regulations entailed serious consequences for the applicant's rights under Article 8 of the Convention; the evidence relating to the impact of oral contraceptives on elite athletes with a 46 XY DSD condition was extremely limited and there were no guidelines to instruct clinicians how to use them to reduce and maintain testosterone levels; the side effects of hormonal treatment were significant, as the CAS had noted; there

was some doubt as to the practical ability of a Relevant Athlete to comply with the Regulations, as the CAS had also noted; the exclusion of a Relevant Athlete from Restricted Events would be likely to render confidentiality meaningless; and the evidence of any correlation between endogenous testosterone and athletic advantage for 46 XY DSD athletes in the 1,500 m and 1 mile disciplines was "sparse".

170. The applicant considered that the CAS and the Federal Supreme Court should have required World Athletics to provide very solid justification. She also considered that, owing to the overly restrictive scope of – or approach to – the review by the Federal Supreme Court in the light of public policy within the meaning of section 190(2) PILA, Switzerland had failed in its duty to protect the applicant against the violation of her rights.

(ii) The Government

171. With regard to the Federal Supreme Court's limited power of review, the Government argued that the Convention did not enshrine the right to appeal. They further argued, in particular, that limiting the review of international arbitral awards to whether they were compatible with public policy was the internationally recognised standard in the area of arbitration, and that the Swiss legislature had used as a basis the standards for review set out in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. They also emphasised the value of sports arbitration, as noted by the Court in the judgments in *Mutu and Pechstein* and *Ali Rıza and Others* (both cited above). Lastly, referring to the above-cited *Bakker* decision, the Government argued that the CAS and the Federal Supreme Court had proceeded, within the framework of their respective powers of review, to a comprehensive consideration of the applicant's claims, including those relating to a violation of her fundamental rights, carrying out a real weighing-up of the relevant interests and providing a reasoned response to the applicant's complaints.

172. Furthermore, in their observations under Articles 8 and 14 of the Convention, the Government pointed out that the CAS had delivered a detailed award of 165 pages, dealing not only with complex scientific issues but also with sensitive legal issues, following a five-day hearing in which numerous experts had been heard. It had conducted a comprehensive examination of the complaints, carefully weighing in the balance the various interests at stake. The CAS had concluded that the DSD Regulations did indeed create a difference in treatment, but that this nevertheless constituted a necessary, reasonable and proportionate means of achieving the aim pursued by World Athletics, namely to ensure fair competition. In the Government's view, it was clear from the reasons given for the award that the arbitrators had taken all the factors into account and had not disregarded any material circumstance. While the CAS had not been able to provide an exhaustive answer to all the questions raised by the case and had sometimes

expressed certain doubts, it had to be concluded that it had carefully analysed the applicant's arguments and given them the requisite attention. The Government added that the applicant had subsequently been able to lodge a civil-law appeal with the Federal Supreme Court, which, in a duly reasoned 70-page judgment, had examined whether she had been the victim of an unacceptable difference in treatment and whether the award had entailed any violation of her personality rights. The Federal Supreme Court had acknowledged that, in the area of high-level sports, personality rights encompassed the rights to health, bodily integrity, reputation, respect for one's profession, the practice of sport and, as regards sport at the professional level, the right to personal and economic development. It had also acknowledged that an infringement of the personality rights of an athlete could be in breach of substantive public policy, provided that it could be demonstrated that there had been "a serious and clear violation of a fundamental right". However, after a careful weighing-up of the interests at stake, it had concluded that this had not been so in the applicant's case.

173. The Government noted that the Federal Supreme Court had accepted that undergoing a "virilisation test" constituted an interference with the right to physical or mental integrity. It had considered, however, that it did not affect the very essence of that right in such a way as to make any justification impossible, given that: the tests provided for in the DSD Regulations were carried out by qualified doctors; they were not conducted if an athlete objected to them and could have certain beneficial effects; and a professional athlete's body was already subjected to considerable scrutiny for anti-doping purposes. They also noted that the CAS and the Federal Supreme Court had taken into account the side effects of contraceptive pills in weighing up the interests of the athletes concerned. The Federal Supreme Court had similarly concluded that while oral contraceptive use entailed significant side effects and was not based on completely free and informed consent – such as to amount to a serious infringement of the right to physical integrity of those athletes – it could not be accepted that the very essence of that right was affected and that any justification had to be excluded. The Government also noted, in particular, that the Federal Supreme Court had examined the complaint of an infringement of the right to respect for social and gender identity. It had pointed out in that connection that the DSD Regulations and the award "[did] not seek to call into question whether 46 XY DSD athletes [were] female" or to determine whether they were "sufficiently female", the question of defining a woman or an intersex person not being in issue.

174. The Government further observed that the applicant had been able to raise her complaints before the CAS and the Federal Supreme Court, both of which had conducted a genuine weighing-up of the relevant interests at stake and had replied to all her complaints in duly reasoned decisions. They noted, in particular, that the CAS had examined whether the DSD Regulations were discriminatory, necessary, reasonable and proportionate, weighing up the

interests at stake. They considered the Chamber's criticism that the CAS had not referred in its analysis to Article 14 or to the Court's case-law to be all the more difficult to understand given that the applicant had not relied on the Convention before it. They also challenged the Chamber's interpretation that the CAS had left room for doubt on certain points. They added that it had been clear from the Federal Supreme Court's judgment that the latter court had also examined whether the applicant had been the victim of an unacceptable difference in treatment and had weighed up the competing interests, before coming to the conclusion that the CAS's solution was "neither unjustified, that is, arbitrary, nor, *a fortiori*, in breach of public policy". They considered the Chamber's criticism that the Federal Supreme Court had essentially confined itself to endorsing the lower body's findings in the light of the very narrow concept of public policy, without examining the issues itself, to be unfounded. They expressed surprise that the Chamber had not taken account in its judgment of the legitimate aims pursued by the DSD Regulations. The Government also pointed out that, despite the doubts expressed by the CAS and the Federal Supreme Court, the findings of these bodies did not appear arbitrary or manifestly unreasonable, and pursued the legitimate aim of ensuring fair competition within women's athletics.

(b) Observations of the third-party interveners

(i) The United Kingdom Government

175. The intervening Government pointed out that arbitration played a vital role in international commerce, particularly in contractual matters, and referred to Article II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In their view, requiring supervising courts in commercial cases to apply the approach required by the Chamber in this case would have serious adverse consequences for the effectiveness of commercial arbitration, and for the attractiveness of Contracting States as arbitral venues. If the Grand Chamber was minded to uphold the Chamber's decision in this case, the intervening Government respectfully invited it to make clear that its approach was specific to compulsory arbitration between sportspeople and the governing bodies who controlled the activities from which they earned a living; that commercial arbitration was unaffected; and that in the field of commercial arbitration, the Contracting States continued to enjoy "considerable discretion" as to the grounds for interfering with an arbitral award.

(ii) The United Nations High Commissioner for Human Rights

176. The High Commissioner observed that, in situations such as that in the present case, arbitration was not an alternative form of dispute resolution chosen by the parties, but rather the only form of dispute resolution, imposed on individual athletes by their governing body. He considered that in the

event of such mandatory arbitrations, there could be no question of a voluntary renunciation of rights under the Convention. He also considered that the effect of compulsory arbitration before a private-law arbitral tribunal could not in practice be to deprive a victim of his or her human rights. Furthermore, the responsibility for securing the necessary human rights review and protection necessarily fell to the domestic court(s) at the seat of the arbitration, which could be achieved by construing public policy in the light of a State's obligations under the Convention. With regard to the CAS, he noted that the scope of its arbitral jurisdiction extended beyond commercial disputes, including to decisions and regulations rendered and enacted by sporting governing bodies. This could, as the present case showed, have a significant and direct impact on a wide range of fundamental rights, including on an individual's access to sport, or ability to exercise their profession. He considered that in cases of compulsory arbitration, as was the case in the field of sport, it was the State of the arbitral seat that would bear the primary responsibility of supervising not only the arbitration (through its courts), but also the effective exercise of Convention and possibly other international human rights. He also considered that while the scope of the positive obligations on the State in any given case would be commensurate to the nature of the rights engaged under the Convention, a core obligation on the State would always be to guarantee an individual's access to practical and effective remedies.

(iii) Dr Tlaleng Mofokeng, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Ms Melissa Upreti, President of the Working Group on discrimination against women and girls, and Mr Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

177. The interveners argued that States had obligations under international human rights law to prevent women athletes, including those with variations in their sex characteristics, from being subjected to medical examinations and interventions that violated the principles of human dignity, equality, autonomy, and physical and psychological integrity of a person. They observed that in order to comply with their positive obligations to protect persons from violations of the right to private life by private entities, States had to prohibit and prevent interferences resulting from regulations that subjected women athletes to non-consensual medical examination and interventions and/or exclusion in professional contexts. States should also provide redress if applicable. They also observed that such regulations had to be examined in the light of States' positive obligations to prohibit and redress discrimination against women in sports, including by private sporting organisations. They further submitted that under Article 6 § 1 and Article 13, States had positive obligations, also in the context of the system of sports arbitration, to ensure rigorous, full and substantive consideration of

Convention rights. The review of sports arbitral awards should not be limited by grounds of public policy or public order that did not effectively encompass international human rights norms and standards, or by any limitations on the review of awards by domestic courts which might preclude a full and substantive review of human rights claims.

(iv) South African Human Rights Commission

178. The South African Human Rights Commission observed that the "intersectionality principle" was core to this case. It set out the principles established in this area in the case-law of the South African Constitutional Court.

(v) World Athletics

179. World Athletics stated that male athletes naturally produced far higher levels of testosterone than female athletes; that the scientific evidence was clear that this gave them a significant physical advantage; that their performance exceeded that of female athletes by 9-18%; and that the only way to give women the same opportunities as men enjoyed in sport was to create separate competition categories for men and women. However, there were two cases where the "athlete's legal sex and gender identity" were female, but they had "male chromosomal sex" and therefore "male gonadal sex" (testes not ovaries) and "male hormonal sex" (testosterone in the high male range, not the low female range): 46 XY transgender athletes, and 46 XY athletes with a certain type of difference in sex development. It submitted that, rather than excluding 46 XY DSD athletes from the female category, it had decided, with the aim of being inclusive, to make their participation in certain events in the female category conditional on them reducing their testosterone level below the male range. It further submitted that the DSD Regulations did not force athletes to undergo assessment and/or treatment and they included features designed to protect their dignity and privacy; that the reduction of testosterone level was the recognised standard of care for individuals with 46 XY DSD and a female gender identity; and that there was no evidence it had significant side effects. World Athletics considered, among other points, that there had been no violation of Article 6 § 1 in that the CAS and the Federal Supreme Court had examined the case in accordance with that provision's requirements.

(vi) Athletics South Africa ("ASA")

180. ASA is the non-governmental organisation which regulates athletics in South Africa. As a member of World Athletics, ASA is required to apply the DSD Regulations to any athletes it wishes to licence to compete in international competitions hosted by World Athletics. It considered that Switzerland had not provided the applicant with the institutional and

procedural safeguards required under the Convention. It indicated that the DSD Regulations required it to monitor athletes if they considered that these regulations might apply to them and ensure that their testosterone levels did not exceed the acceptable level, subject to sanctions, including being suspended from its membership of World Athletics, with the result that athletes from South Africa would not be permitted to represent their country in international competitions held by the latter body, and to confirm world records. It submitted that medical treatment that had not been freely consented to constituted an interference with private life. However, consent given by athletes concerned by the DSD Regulations was not free and informed since their sporting career was at stake, and the question of the long-term side effects of sex-normalising treatments was currently being studied. ASA also noted that there was an insufficient evidence base that having a testosterone level in excess of the maximum permitted by the DSD Regulations conferred on the athletes concerned a performance advantage in the magnitude alleged by World Athletics so as to justify the DSD Regulations. It also pointed to the arbitrary approach to the choice of the events affected. ASA further observed that, since the DSD Regulations applied only to female athletes with differences of sex development, this latter group was treated less favourably than other female athletes and male athletes.

(vii) Canadian Centre for Ethics in Sport

181. The intervener noted that, below the "elite senior" level, all sport federations organised competitions for age-specific groups and taking into account skill levels. At the "elite senior" level, age was typically not a limiting factor and, aside from weight classes in the cases of weightlifting and powerlifting, combat sports and rowing, the DSD Regulations adopted by World Athletics was the only example where an inherited physical trait or genetic characteristic was used as a criterion to define eligibility for participation in sporting events. Accordingly, it submitted that the DSD Regulations cried out for evaluation on an ethical basis utilising the essential values of sport – safety, inclusion, and fairness – to consider if there exist[ed] an objective and reasonable justification for the restrictions they placed on some women athletes with differences of sex development.

(viii) Human Rights Centre of Ghent University

182. In the intervener's view, a central theme in the present case was the establishment of human rights accountability over transnational private sports governance and adjudication. It observed that the world of sports was very dense in rules, a large portion of which had not been issued by public authorities, but rather by private sport governing bodies, and this private regulation was enforced by private adjudicating bodies. It warned of the risk

that the rules and rulings of *lex sportiva* might escape any human rights scrutiny. It considered that, like other supranational human rights bodies, the Court was in a position, and had a responsibility, to prevent and remedy such a scenario. In addition, it pointed to the intersectional nature of the discrimination, pointing out that hormonal eligibility criteria in sport, such as those set out in the DSD Regulations, had a disproportionate impact on Black female athletes.

(ix) International Commission of Jurists, Organisation Intersex International Europe and the European Region of International Lesbian, Gay, Bisexual, Trans and Intersex Association-Europe

183. The interveners submitted that the DSD Regulations discriminated against intersex athletes on the grounds of sex and sex characteristics. They noted that since 2011 those regulations had evolved towards increasingly restricted access to sport for intersex and other athletes without "particularly weighty and convincing reasons" by way of justification. They underscored the potential negative impact of the DSD Regulations on persons other than elite-level intersex athletes, specifically intersex youths, who reportedly faced various challenges in the context of participation in sports, including social, psychological and physiological aspects. They also argued that while the rights of access to a court and to an effective remedy under Articles 6 and 13 were not absolute rights in their application, judicial review should not be carried out in a way that nullified them.

(x) Mr Antoine Duval, Mr Cesare P.R. Romano and Mr Faraz Shahlei

184. The interveners, who indicated that they were intervening on behalf of the International Human Rights Center of Loyola Law School (Los Angeles) and the International Sports Law Center of the T.M.C. Asser Instituut (The Hague), used their observations to set out the reasons why they considered that the CAS was not an independent and impartial tribunal within the meaning of Article 6 § 1. They pointed out in that connection that the jurisdiction of the CAS was in most instances compulsory for athletes who, if they wanted to compete internationally, had no other option but to accept arbitration.

(xi) Human Rights Watch, Ms Payoshni Mitra and Ms Katrina Karkazis

185. The interveners observed that the athletes covered under the DSD Regulations had been assigned female at birth, identified as women and had competed in the women's category of sport their entire lives. Sex testing of women in sport, which had been going on since 1966 and was getting more restrictive and severe, was part of broader medical abuse against women with DSD which had exposed them to medically unnecessary "normalising" interventions popularised in the 1950s in the United States of America, which

had become common in Europe as well. Referring specifically to statements by athletes who had been subjected to sex verification testing, they criticised the effects that practices such as those arising from the DSD Regulations could have on individuals' rights under, in particular, Articles 8 and 14 of the Convention.

(xii) The Vlaamse Ombudsdienst

186. The intervener observed that the biologically inspired and binary eligibility rules in sport contrasted with the multidimensionality of sex and gender and the evolution of society and the law. It also observed that some intersex athletes who wished to compete as female took hormonal treatments or underwent a gonadectomy (both forms of treatment that were unnecessary from a health perspective and could have side effects); others turned to another sporting discipline than that in which they excelled; still others opted for withdrawal from international competition. It pointed out that eligibility criteria, which perpetuated the perception of intersex characteristics as abnormal and could lead to further stigmatisation, were not mere administrative rules but had a real impact on the rights and freedoms of persons with intersex variations. In its view, all atypical athletes should be prevented from having to go through lengthy and expensive procedures proving their eligibility for competitive sport, and preference should clearly go to a baseline assumption of presumptive eligibility. It referred to the approach to eligibility in disability-specific sport.

(xiii) Women Sport International, the International Association of Physical Education and Sport for Girls and Women and the International Working Group for Women in Sport

187. The interveners stated that they were among the largest and oldest international organisations working towards the inclusion of women and girls in sports. They had repeatedly issued statements and written letters calling for the immediate withdrawal of the DSD Regulations, and of similar regulations enforced by sports bodies. They underlined that the DSD Regulations had serious harmful implications for women and girls in sport. They had the impact of profiling and targeting women according to gender stereotypes, by keeping women perceived to be "too masculine" from competing unless they conformed to unscientific and unethical flawed practices, in gross violation of domestic and international human rights laws. They argued that the right to participate in sport was a human right, as acknowledged by the fourth fundamental principle of the Olympic Movement. This also stated that every individual should have the possibility of practising sport, without discrimination of any kind.

(xiv) World Medical Association and Yale University's Global Health Justice Partnership

188. The interveners stated that World Medical Association was a global federation of National Medical Associations representing millions of physicians worldwide. They indicated that it had unequivocally objected to the DSD Regulations and had called on physicians to refrain from participating in their implementation. They observed that those regulations, which, at all stages of their implementation, implicated and relied on physicians (identification of the athletes concerned, testing, and intervention) led those who implemented them to commit flagrant breaches of the most fundamental ethical principles and obligations of the medical profession, which related to the rights under, in particular, Articles 8 and 14 of the Convention. They referred to respect for the patient's and the physician's autonomy, the principle of beneficence and the principle of non-maleficence. They observed that medically unnecessary interventions were generally not in the best interests of patients. They also observed that all procedures to reduce blood testosterone for the purpose of compliance with the DSD Regulations were inherently medically unnecessary, given their side effects, which they set out in detail. Furthermore, the interveners considered that the DSD Regulations implicated physicians in breaches of the ethical principles of justice and non-discrimination.

(c) The Chamber judgment

189. Having found a violation of Article 13 of the Convention in relation to Article 14 in conjunction with Article 8 on account, in particular, of the Federal Supreme Court's limited power of review, the Chamber considered that, in so far as the applicant alleged a violation of her right of access to a court on essentially the same ground, that complaint did not give rise to any separate issue and it followed that there was no need to give a separate ruling on it under Article 6 § 1.

190. With regard to Article 13, the Chamber found that there had been a violation of the right to an effective remedy for essentially the same reasons which had led it to find a violation of Article 14 of the Convention in conjunction with Article 8, that is, the lack of sufficient institutional and procedural safeguards in Switzerland.

191. It pointed out in that connection that, in the context of arbitration imposed on her, the only choice available to the applicant to contest the validity of the DSD Regulations had been a request to the CAS for arbitration. However, in finding that the regulations were indeed discriminatory but that they were nevertheless a necessary, reasonable and proportionate means of achieving the aims of the IAAF, the CAS had not assessed the validity of the regulations in the light of the Convention requirements and, in particular, despite the applicant's substantiated and credible claims, it had not examined

her allegations of discrimination in the light of Article 14 of the Convention. As to the Federal Supreme Court, its review had been very limited in the present case, as it had been confined to examining whether the CAS award was compatible with public policy within the meaning of section 190(2)(e) PILA.

192. The Chamber went on to observe that, in contrast to the *Platini* and *Bakker* cases (both cited above), the complaints lodged by the applicant with the CAS and the Federal Supreme Court had been substantiated and had been based directly or in substance on the Convention, such that the Federal Supreme Court had been given the opportunity to rule on the complaints subsequently lodged with the Court. However, like the CAS before it, the Federal Supreme Court, owing in particular to its very limited power of review, had not responded in an effective manner to the applicant's substantiated and credible complaints of, *inter alia*, discrimination. The Chamber concluded, in the context of the Court's limited role as guardian of European public order, that, taken as a whole, and in the particular circumstances of the present case, the domestic remedies available to the applicant could not be considered effective within the meaning of Article 13 of the Convention.

(d) The Court's assessment

(i) General principles relating to the Court's task under Article 6 of the Convention and to the reasoning of court decisions

193. The Court reiterates that its only duty, in accordance with Article 19 of the Convention, is to "ensure the observance of the engagements undertaken" by the States Parties to the Convention. In particular, it is not competent to deal with an application alleging that errors of law or fact have been committed by domestic courts, except where it considers that such errors might have involved a possible violation of any of the rights and freedoms set out in the Convention (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 90, 29 November 2016, and *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 149, 17 October 2019, with further references), for instance where they can be said to amount to "unfairness" in breach of Article 6 of the Convention (see *De Tommaso*, cited above, § 170). The Court cannot itself assess the facts which led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of fourth instance and would disregard the limits imposed on its action (see *Avotiņš v. Latvia* [GC], no. 17502/07, § 99, 23 May 2016). While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. In principle, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted

to them for consideration are not for the Court to review (see *De Tommaso*, cited above, § 170, with further references). The same applies to the probative value of evidence and the burden of proof (see *Grosam*, cited above, § 131). The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *De Tommaso*, § 170, cited above, and *López Ribalda and Others*, cited above, § 149, with further references). The Court's sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing (see *De Tommaso*, cited above, § 171).

194. It should also be noted that the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can only be seen to be effective if the observations are actually "heard", that is, duly considered by the trial court. In other words, the effect of Article 6 is, among others, to place the "tribunal", within the meaning of that provision, under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant (see, for example, *Perez v. France* [GC], no. 47287/99, § 80, ECHR 2004-I, and *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 89, 28 June 2007). They are thus under an obligation to provide reasons for their decisions, and compliance with this duty must be assessed in the light of the circumstances of each case. While the courts cannot be required to state the reasons for rejecting each argument of a party, they are nonetheless not relieved of the obligation to undertake a proper examination of and respond to the main pleas put forward by that party (see *Wagner and J.M.W.L.*, cited above, §§ 90 and 96), and parties should expect a specific and express reply to those submissions which are decisive for the outcome of the proceedings in question (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 185, 6 November 2018).

(ii) Case-law relating to arbitration

195. Recognising the advantages that arbitration clauses could have for the individual concerned as well as for the administration of justice, the Court has held that they do not in principle offend against the Convention, and that Article 6 does not preclude the establishment of arbitral tribunals in order to settle certain pecuniary disputes between individuals (see, in particular, *Tabbane v. Switzerland* (dec.), no. 41069/12, § 25, 1 March 2016, and *Mutu and Pechstein*, cited above, § 94, and the cases cited therein).

196. However, recourse to arbitration may have as a consequence the loss of certain of the rights and guarantees that legal proceedings afford claimants, including those enshrined in Article 6 § 1 of the Convention. It is therefore, in principle, permitted under this provision only if the parties have agreed to it.

197. The Court has thus pointed out that in the case of "voluntary arbitration to which consent has been freely given", no real issue arises under Article 6. The parties to a dispute are free to take certain disagreements arising under a contract to a body other than an ordinary court of law. By signing an arbitration clause, the parties voluntarily waive certain rights secured by the Convention. Such a waiver is not incompatible with the Convention provided it is established in a free, lawful and unequivocal manner. In addition, in the case of certain Convention rights, a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate with its importance (see *Tabbane*, cited above, § 27, and *Mutu and Pechstein*, cited above, § 96, and the cases cited therein). It is clear from the judgment in *Beg S.p.a. v. Italy* (no. 5312/11, §§ 135-38, 20 May 2021) that acceptance of arbitration does not in itself imply that the person has waived the right to an independent and impartial tribunal; this right must have been waived expressly.

198. That being said, the Court's case-law does not rule out the possibility that arbitration may be required by law, with the result that the parties have no option but to refer their dispute to an arbitral tribunal. In that case, however, the arbitral tribunal must afford the safeguards provided for by Article 6 § 1 of the Convention (see *Tabbane*, cited above, § 26, and *Mutu and Pechstein*, cited above, § 95, and the cases cited therein).

(iii) Specific issue of compulsory arbitration before the CAS for the resolution of international sports-related disputes

199. The fact that arbitration is imposed by a private entity rather than by law, as is the case with regard to international disputes relating to sport, where recourse to arbitration and referral to the CAS are generally imposed on sportspersons by the sport governing body which governs their sporting discipline, is not sufficient to give rise to a violation of Article 6 § 1. As the Court noted in *Mutu and Pechstein* (cited above, § 98), it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively. In that connection, it observed that since high-level international sports events are held in various countries by organisations based in different States, and are open to sportspersons from all over the world, recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal can be appealed against before the supreme court of a single

country, in this case the Swiss Federal Supreme Court. The Court has thus acknowledged that a non-State mechanism of conflict resolution at first or second instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution in this field.

200. However, regard must be had to the fact that sports arbitration occurs in the context of the structural imbalance which often characterises the relationship between sportspersons and the bodies which govern their respective sports. Thus, the Federal Supreme Court has acknowledged that competitive sport is characterised by a very hierarchical structure, whether at international or national level, and that, being on a vertical axis, the relations between the sportspersons and the sport governing bodies may in this regard be distinguished from horizontal relations between parties to a contractual relationship (see paragraphs 38 and 59 above).

201. Sport governing bodies exercise powers in the field of international sports competition which are akin to regulation-making powers; in particular, they determine who can compete and under what conditions. Indeed, where the CAS's mandatory and exclusive jurisdiction for the examination of disputes between those organisations and sportspersons is imposed by the organisations themselves, this forms part of the exercise of such powers.

202. In the area of international sports competition, there is thus a situation where private entities not governed by public law *de facto* regulate individuals' activity and have the capacity to restrict the exercise of their rights, thus exercising powers close to those of a public body.

203. In addition, the inherent dominance enjoyed by sport governing bodies in the system of international sports arbitration must also be taken into account: the CAS was established under the auspices of the IOC; the members of the ICAS, the functions of which include adopting and amending the Code of Sports-related Arbitration and appointing the persons listed as CAS arbitrators, are appointed directly or indirectly by the Associations of Olympic International Sports Federations, the Association of the National Olympic Committees and the IOC; the ICAS is responsible for the functioning and financing of the CAS under the Code of Sports-related Arbitration, which the ICAS itself issued and which regulates the CAS and sets out its Procedural Rules (see paragraph 81 above).

204. In consequence, sport governing bodies are in a position to dictate conditions in their relationship with sportspersons, in that they regulate international sports competitions, are able to impose the mandatory and exclusive jurisdiction of the CAS for the examination of disputes relating to those regulations, and exercise structural control over the international sports arbitration system.

205. Thus, even more than where arbitration is required by law, in a situation where the CAS's exclusive jurisdiction for resolving a dispute between a sports organisation and a sportsperson has been imposed on that

person, he or she must be able to benefit from the safeguards provided for by Article 6 § 1 of the Convention.

206. In the Court's view, this requirement is particularly important where the "civil" right or rights which are the subject of the dispute correspond under domestic law to fundamental rights.

207. In that connection, the Court notes, first, the importance accorded to respect for fundamental rights in the Federal Supreme Court's case-law relating to "public policy", within the meaning of section 190(2) PILA (see paragraph 47 above). It is apparent from that case-law that an arbitral award is incompatible with substantive public policy where it constitutes a serious breach of fundamental principles of substantive law, which include respect for human dignity (see paragraph 52 above) and, more generally, respect for the personality rights set out in Articles 27 et seq. of the Swiss Civil Code. The Federal Supreme Court made this point in the present case, emphasising that an infringement of an athlete's personality rights constituting a serious and clear violation of a fundamental right was in breach of public policy, within the meaning of section 190(2) PILA (see paragraphs 40 and 54 above).

208. Secondly, the Court observes that, as illustrated by the present case, what is at stake in the international sports disputes examined by the CAS may go beyond the exercise of the pecuniary or economic rights usually at issue in commercial arbitration proceedings, and concern the exercise of "civil" rights relating, for example, to respect for privacy, bodily and psychological integrity and human dignity.

209. Consequently, given the structural imbalance which characterises the relationship between sportspersons and the bodies which govern their respective sports, the Court considers that where the CAS's mandatory and exclusive jurisdiction is imposed on a sportsperson by a sport governing body, with the result that the Swiss Federal Supreme Court has jurisdiction to hear a civil-law appeal against the CAS award, in accordance with section 190 PILA; where the dispute between them concerns one or more "civil" rights, within the meaning of Article 6 § 1, of that sportsperson; and where that or those "civil" rights correspond, in domestic law, to fundamental rights, respect for that individual's right to a fair hearing requires a particularly rigorous examination of his or her case.

210. The Court's task is therefore to verify whether the examination by the Federal Supreme Court of the case of the sportsperson concerned has fulfilled the requirement of particular rigour.

(iv) Examination of the complaint

211. As to whether the present case concerns compulsory arbitration, the Court notes that the DSD Regulations left the applicant no choice other than to appeal to the CAS. Article 5.2 (see paragraph 79 above) expressly provided that any dispute arising between the IAAF and a Relevant Athlete relating, in particular, to the validity, legality or proper interpretation or application of

the Regulations was "subject to the exclusive jurisdiction of the CAS". In addition, Article 3.18 provided that any athlete who wished to compete in the female classification in a Restricted Event at an International Competition and/or to be eligible to set a World Record in a Restricted Event at a competition that was not an International Competition "[agreed], as a condition to such participation/eligibility: (a) to comply in full with [the] Regulations; ... (d) to follow the procedures set out in clause 5 [including the above-mentioned Article 5.2] to challenge these Regulations ... and not to bring any proceedings in any court or other forum that [would be] inconsistent with that clause" (see paragraph 77 above). Article 3.19 also provided that "[u]pon request by the IAAF, the athlete [was to] provide written confirmation of her agreement to the matters set out in clause 3.18, in such form as ... requested by the IAAF from time to time" and that "her agreement [would] be effective and binding upon her whether or not confirmed in writing" (see paragraph 77 above).

212. Furthermore, the Federal Supreme Court has noted that, as a general rule, an athlete wishing to take part in a competition organised under the auspices of a sports federation whose regulations prescribe arbitration would have no choice other than to accept the arbitration clause (see paragraph 59 above).

213. The applicant was thus in the same situation as Ms Pechstein (one of the applicants in *Mutu and Pechstein*, cited above, §§ 113-14): attempting another avenue of redress, assuming there was one, would have exposed her to the risk of being unable to participate in international competitions.

214. It is thus clear that in the present case the arbitration was compulsory, and that it was imposed not by law but by the DSD Regulations, that is, regulations issued by a private-law entity, which, moreover, was also a party to the relevant dispute.

215. The Court notes that the Federal Supreme Court examined the present case in the light of the right to respect for human dignity, and the rights to respect for bodily and psychological integrity, social identity and gender, and for the private sphere and economic freedom, which are "civil rights" within the meaning of Article 6 § 1 of the Convention, as noted in paragraph 161 above, and which are among the personality rights provided for in Articles 27 et seq. of the Swiss Civil Code. The Federal Supreme Court reviews respect for those rights as a matter of substantive public policy (as it pointed out in the present case, "[d]epending on the circumstances, an infringement of the personality rights of an athlete could be in breach of substantive public policy"; see paragraph 40 above).

216. It follows from the above that the present case was one of compulsory arbitration, which concerned a dispute relating to "civil rights", within the meaning of Article 6 § 1, corresponding in domestic law to fundamental rights. The Federal Supreme Court was therefore required to

carry out a particularly rigorous examination of the civil-law appeal lodged with it by the applicant.

217. In the Court's view, two other aspects support the conclusion that a particularly rigorous examination of the applicant's case was needed: the fact that the breach of "civil" rights complained of by her arose from a set of regulations which were issued by a private entity and restricted these rights; and the fact that her privacy, bodily integrity and dignity were at stake, as the Federal Supreme Court found in its judgment of 25 August 2020 (see paragraphs 40 and 160 above). The Court would emphasise, in particular, that the circumstances of the present case raise an issue with regard to the right to respect for dignity, since under the DSD Regulations the relevant athletes who wish to compete in international competitions have no other choice but to undergo an intrusive examination, and to take chemical substances or to undergo surgery.

218. The Court's task is therefore to verify whether the examination of the case by the Federal Supreme Court, within its competence to review the compatibility of the award with substantive public policy, fulfilled the requirement of particular rigour called for by the circumstances of the case and given the nature of the mandatory and exclusive sports arbitration which had led to the award. It will precede its assessment with details of the CAS's examination and award, which the Swiss Federal Supreme Court was required to review.

219. The Court would begin by pointing to the length of the CAS award (163 pages, of which 46 concerned the examination on the merits), and of the Federal Supreme Court's judgment (70 pages, of which 38 were dedicated to legal reasoning). This appears to demonstrate the attention that both the CAS and the Federal Supreme Court accorded to the examination of the applicant's dispute.

220. The Court also notes that the CAS took into account statements from around 30 medical, scientific and legal experts called by the parties, including around 15 by the applicant.

221. The Court further observes that the reasoning of the CAS award of 30 April 2019 demonstrates that it examined the majority of the arguments put forward by the applicant.

222. It also appears that, at least in respect of the discrimination complained of by the applicant, the criteria applied by the CAS were substantially similar to those used by the Court in its case-law.

223. In this connection, the Court notes that, having pointed out that the applicant was a woman and explained its reasons for considering that the level of testosterone was the primary driver in sports performance in certain athletics events and that, accordingly, 46 XY DSD athletes had such a significant performance advantage compared to other female athletes as to subvert fair competition (see paragraphs 488-93 and 517-38 of the award of 30 April 2019; see also paragraphs 569-80 – paragraph 31 above), the CAS

found that the DSD Regulations were prima facie discriminatory because they led to a "difference in treatment based on a person's legal sex and natural biological characteristics". It concluded that the IAAF was required to demonstrate that the regulations were a "necessary, reasonable and proportionate means of achieving the aims [pursued]", and acknowledged that ensuring fair competition in athletics events in the female category was a legitimate aim. The CAS then proceeded, in the proportionality assessment, to weigh in the balance the competing interests in the case. In so doing, it took into account the obligations on the athletes in question, and examined (i) the potential unwanted side effects of taking contraceptive pills to reduce their testosterone level; (ii) the intrusive nature of the examinations to determine the extent of virilisation; (iii) the fact that the DSD Regulations carried the risk of making public an aspect of their intimate identity; (iv) and the potential difficulty for them to maintain their testosterone level below the maximum permitted.

224. The Court notes, however, that, in assessing whether the DSD Regulations were reasonable and proportionate, the CAS left open the very last of these points, although it was not only at the heart of the applicant's detailed argument but also decisive for the outcome of the dispute brought by her.

225. The CAS rightly pointed out that "a regulation which is impossible or excessively difficult to apply cannot be characterised as a proportionate interference with the rights of 46 XY DSD athletes" (see paragraph 616 of the award). It observed that during the period she had been taking the hormone treatment consistently in order to reduce her testosterone level below 10 nmol/L (as was then required), Ms Semenya's testosterone levels had shown significant fluctuation, ranging from 0.5 to 7.85 nmol/L (paragraph 612 of the award); it considered that this "[raised] a very important question for the issue of proportionality, having regard to the new maximum level of 5 nmol/L", since there was a "real risk" that an athlete could suffer disqualification despite using her best endeavours to comply conscientiously with the DSD Regulations (see paragraph 614 of the award). The CAS expressed grave concerns over whether a Relevant Athlete who was diligently taking the prescribed hormonal treatment would be able to maintain her testosterone level continuously below the maximum threshold of 5 nmol/L required by the DSD Regulations (see paragraphs 617, 620 and 622 of the award). Nevertheless, it put those concerns to one side, considering that the matters raised in respect of potential difficulties in complying with the DSD Regulations were speculative.

226. As explained in the judgment of 25 August 2020 of the Federal Supreme Court (see paragraph 9.1 of that judgment, cited in paragraphs 36 et seq. above; see also the case-law of the Federal Supreme Court summarised in paragraphs 48-58 above) and as pointed out by the Chamber (see paragraph 175 of the Chamber judgment), the Federal Supreme Court's

subsequent substantive review was limited to assessing whether the CAS award was "incompatible with public policy" within the meaning of section 190(2)(e) PILA (procedural public policy – see paragraphs 50-52 above – was not at issue in the present case). As interpreted by the Federal Supreme Court, the concept of substantive public policy is more restrictive than that of arbitrariness: to be considered incompatible with public policy, an award must undermine essential and broadly recognised values which, according to the understanding which prevails in Switzerland, should underpin every legal system. Thus, an award is incompatible with substantive public policy where it breaches fundamental principles of substantive law – including the prohibition of discriminatory measures, human dignity, human personality rights and economic freedom – to such an extent as to no longer be reconcilable with the relevant legal order and value system. For there to have been incompatibility with public policy, it is not sufficient that evidence was incorrectly assessed, that a factual finding was manifestly false or that a legal rule was clearly breached. The Federal Supreme Court has also specified that, in carrying out its review, it is not able to review as it sees fit the legal assessment already carried out by the arbitral tribunal on the basis of the findings in its award, but simply examines "the question whether the consequences of this legal assessment performed by the arbitrators within their sole discretion are compatible with the jurisprudential definition of substantive public policy". It observed in the present case that "it [was] extremely rare for an international arbitral award to be set aside on this ground".

227. According to the material at the disposal of the Court, the Federal Supreme Court has only ever set aside one CAS award on grounds of public policy.

228. In consequence, the Federal Supreme Court's review in the present case was limited to the question whether, on the basis of the findings as established by the CAS, the conclusion of the award was "unjustified". In so doing, as regards in particular the question whether 46 XY DSD athletes would be able to maintain their testosterone level continuously below the maximum threshold of 5 nmol/L, the Federal Supreme Court merely noted that the CAS had not definitively endorsed the DSD Regulations but had expressly reserved the right to re-examine the proportionality of those regulations as applied in a (different) particular case (see paragraph 9.8.3.5 of its judgment of 25 August 2020).

229. It would therefore appear that although the CAS expressed very serious concerns, thereby rendering ambiguous its reasoning in relation to proportionality, the Federal Supreme Court conducted only a limited review of this aspect of the award.

230. It is thus apparent that the examination of this fundamental and detailed aspect of the applicant's dispute by the Federal Supreme Court, within its competence to review the compatibility of the award with

substantive public policy, was not subjected to the particularly rigorous examination called for by the circumstances of the case.

231. The CAS left open other questions, about which it had nevertheless expressed concerns when examining whether the DSD Regulations were reasonable and proportionate; the Federal Supreme Court did not, however, sufficiently act on the doubts expressed.

232. The CAS found that the decision to include the 1,500 m – one of the events in which the applicant competed – and 1 mile events within the list of Restricted Events seemed to be based, at least in part, on speculation that, since athletes who competed successfully in the 800 m also competed successfully in those distances, 46 XY DSD athletes were likely also to have a significant performance advantage compared to other female athletes in those two distances. Nevertheless, it considered that the IAAF had provided a rational overall explanation for how the category of Restricted Events had been defined, such that "the scope of the Restricted Events [could not] be described as arbitrary". It pointed out that it did not have the power to rewrite the DSD Regulations and concluded that it did not consider that "the scope of the Restricted Events *in toto* [was such as to render the regulations] disproportionate". However, reiterating its concern over the adequacy of the evidentiary basis provided, the CAS invited the IAAF to consider deferring the application of the DSD Regulations to those events until more evidence was available (see paragraphs 606-09 and 623 of the award; paragraph 31 above).

233. Despite these misgivings on the part of the CAS, the Federal Supreme Court paid little attention to the question whether the Restricted Events had been selected arbitrarily, merely stating that it was unable to find that the CAS's conclusions were incompatible with public policy (see paragraph 9.8.2 of its judgment; paragraph 39 above). However, having regard to the events selected, the question whether the DSD Regulations had been specifically framed to target the applicant went to the heart of her case before the CAS. Given the implications for the applicant's participation in international competitions of any finding in this regard, it was essential that this aspect of the applicant's dispute be subjected to a rigorous examination by the Federal Supreme Court. However narrow the concept of public policy preferred by that court, it had demonstrated in a previous case that it was capable of overturning a CAS award which constituted a manifest and serious violation of personality rights, as being incompatible with public policy (see paragraph 54 above).

234. In the same vein, the Court notes that the CAS found that the DSD Regulations could result in the status of female athletes with DSD being made public; it would be possible to infer this where an athlete who had qualified in national competitions in a Relevant Event was absent from subsequent international competitions in that same event in the female category. Although the CAS observed that confidential medical information could thus

be made public by inference, it merely considered, without a more in-depth proportionality assessment, that "this [was] likely to be an inevitable detrimental effect of the DSD Regulations", and that this factor did not render the DSD Regulations disproportionate, having regard to the legitimate interests pursued. However, here again, the Federal Supreme Court did not sufficiently act on the fact that the CAS had not fully decided this question, despite the fundamental consequences it had for the applicant and indeed for her ability to compete. Approaching it from the standpoint of the "protection of the private sphere", it merely stated that the CAS's conclusion was not incompatible with public policy and referred, *mutatis mutandis*, to its findings under the principle of the prohibition of discrimination (see paragraph 40 above).

235. In still other respects, the examination carried out by the Federal Supreme Court as part of its review of the compatibility of the CAS award with substantive public policy did not reach the required level of rigour. Thus the Court observes that the Federal Supreme Court rejected, without thorough examination, the applicant's argument comparing her case with the situation in which it had considered a CAS award to be incompatible with public policy in the *Francelino da Silva Matuzalem v. Fédération Internationale de Football Association* case (see paragraph 53 above). It would appear, however, that in both cases what was at stake was the ability of a sportsperson to satisfy the conditions laid down by the relevant sport governing body in order to be able to continue his or her professional activity, and the proportionality of those conditions in view of their impact on the exercise of fundamental rights.

236. The Court also notes that, in its judgment of 25 August 2020, the Federal Supreme Court found in paragraph 10.3 that the "aim of the DSD Regulations [was] not to 'redefine' or question the sex or gender identity" of the athletes concerned (see paragraph 40 above) and, equally, in paragraph 11.1, that "the award [did] not seek to call into question whether 46 XY DSD athletes [were] female or to determine whether they [were] sufficiently female" (see paragraph 41 above). Having thus referred to the aim of the contested regulations, it went on to state, however, that it was unable to accept that "the conclusion reached by the CAS ... [was], *per se*, incompatible with human dignity". The Court perceives in this reasoning the absence of a sufficiently rigorous examination of whether the impugned outcome was compatible with fundamental rights – such compatibility being an essential element of public policy – in that its focus was not the consequences complained of by the applicant but rather the theoretical aim of the regulations which had resulted in those consequences, especially since the Federal Supreme Court itself immediately acknowledged that one consequence of the regulations was that "biological characteristics" could "transcend the legal sex or gender identity of a person".

237. Lastly, the Court notes that Chapter 12 of the PILA, which includes section 190 (on civil-law appeals which may be brought before the Federal Supreme Court), covers all types of international arbitration without distinction (see paragraph 47 above). The provisions which apply in cases of international arbitration in the field of sport, including where the arbitration in question is compulsory and the dispute concerns respect for "civil" rights corresponding to fundamental rights, are thus the same as those which apply in cases of international arbitration in the field of commercial contracts. In both cases, therefore, the substantive review of arbitral awards conducted by the Federal Supreme Court is confined under section 190(2)(e) PILA to the question whether the award is compatible with public policy (*ordre public*). Moreover, when the Federal Supreme Court conducts a review of whether a CAS award is compatible with public policy, it follows the same restrictive approach as in cases of commercial arbitration.

238. In sum, the specific characteristics of the sports arbitration to which the applicant was subject, entailing the mandatory and exclusive jurisdiction of the CAS, required an in-depth judicial review – commensurate with the seriousness of the personal rights at issue – by the only domestic court having jurisdiction to carry out such a task. The review of the applicant's case by the Federal Supreme Court, not least owing to its very restrictive interpretation of the notion of public policy, which it also applied to the review of arbitral awards by the CAS, did not satisfy the requirement of particular rigour called for in the circumstances of the case. In these circumstances, the Court concludes that the applicant did not benefit from the safeguards provided by Article 6 § 1 of the Convention.

239. Accordingly, there has been a violation of Article 6 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

240. Article 41 of the Convention provides as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

241. The applicant did not submit a claim for damages before the Chamber or the Grand Chamber. The Court takes note of this.

B. Costs and expenses

242. The applicant claimed 482,513.97 euros (EUR) in respect of all her costs and expenses. She submitted dated lists of sums corresponding, *inter*

alia, to lawyers' fees and to translation, travel and accommodation expenses, together with various supporting documents. The following amounts date from after the decision to refer the case to the Grand Chamber: 18,692.82 Canadian dollars (approximately EUR 12,635), 183,092.44 pounds sterling (approximately EUR 216,762), 102,209.95 South African rands (approximately EUR 5,070) and EUR 7,524.70.

243. The Government did not dispute the amount of EUR 60,000 awarded by the Chamber in respect of the costs and expenses incurred before the CAS, the Federal Supreme Court and the Chamber. As to the claim relating to the proceedings before the Grand Chamber, the Government observed that it included the applicant's memorial, the preparation of the oral pleadings, the appearance of the applicant and six lawyers at the oral hearing, and translation expenses. They argued that translation expenses did not constitute expenses necessarily incurred to redress any potential violation of the Convention; that, even if the case was of a certain complexity, it had not been necessary to employ six lawyers (in this connection, they referred to *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 56, ECHR 2000-XI); and that, at that stage of the procedure, the lawyers had already been familiar with the subject matter of the case. They accordingly considered that the amount claimed by the applicant in respect of the proceedings before the Grand Chamber was excessive, and proposed the sum of EUR 8,000 under this head, making a total of EUR 68,000.

244. The Court agrees with the Government that the amount claimed by the applicant is excessive. It reiterates that, according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and its case-law, the Court considers it reasonable to award the applicant the sum of EUR 80,000, covering costs under all heads.

C. Default interest

245. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Rejects*, unanimously, the applicant's request for a re-examination of her complaint under Article 3 of the Convention;

2. *Upholds*, by thirteen votes to four, the Government's preliminary objection that the complaints under Article 8 of the Convention, taken alone or in conjunction with Article 14, and Article 13 in conjunction with

those provisions are incompatible *ratione personae* and *ratione loci* with the provisions of the Convention, and *declares* those complaints inadmissible;

3. *Declares,* unanimously, the complaint under Article 6 § 1 of the Convention admissible;

4. *Holds,* by fifteen votes to two, that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months, EUR 80,000 (eighty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 10 July 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos	Marko Bošnjak
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Judge Šimáčková;
(b) partly dissenting joint opinion of judges Bošnjak, Zünd, Šimáčková and Derenčinović;
(c) partly dissenting joint opinion of judges Eicke and Kucsko-Stadlmayer.

M.B.
A.C.

PARTLY CONCURRING OPINION OF JUDGE ŠIMÁČKOVÁ

(Translation)

1. I voted with the majority of the Court in finding a violation of Article 6 § 1, and I fully endorse the reasoning in the judgment in this respect.

2. However, it is my view that the Grand Chamber should have begun by ascertaining whether the applicant had had access to an "independent and impartial tribunal established by law" within the meaning of that provision and, specifically, whether the CAS met that requirement.

3. The Grand Chamber, in a particularly strict application of the criteria set out in the *Radomilja and Others v. Croatia* ([GC], nos. 37685/10 and 22768/12, 20 March 2018) and *Grosam v. the Czech Republic* ([GC], no. 19750/13, 1 June 2023) cases, found that this question did not form part of the scope of the case before the Court, as the applicant had not expressly raised it in her application form as part of the complaint under Article 6 § 1.

4. I am unable to agree with the finding that the applicant did not put forward sufficient arguments to enable the Court to examine, under Article 6 § 1 of the Convention, whether the CAS was an "independent and impartial tribunal established by law". Given that the applicant submitted that the arbitration was imposed on her and complained about the excessively limited nature of the review carried out by the Federal Supreme Court, the Court ought to have ascertained whether the CAS satisfied those criteria.

5. It should be pointed out in this connection that, according to the Court's case-law, even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1 (this principle is set out in, for example, *Denisov v. Ukraine* [GC], no. 76639/11, § 65, 25 September 2018). Consequently, while the fact that only a limited review of a civil-law dispute is available at second instance does not in itself pose a problem under the Convention, which does not guarantee a right of appeal in civil-law matters, it becomes problematic if the body which examined the dispute at first instance does not fulfil the requirements of Article 6 § 1.

6. The question whether the CAS is an "independent and impartial tribunal established by law", within the meaning of Article 6 § 1 – which was, moreover, raised by one of the third-party interveners –, was examined by the Federal Supreme Court and discussed before the Grand Chamber by the parties, both in their written observations and at the hearing.

7. The Court was therefore not prevented from examining it. Furthermore, it ought to have done so, given that the applicant submitted that the CAS's jurisdiction had been imposed on her by the IAAF.

A "tribunal established by law"?

8. The applicable principles were clarified by the Grand Chamber in the *Guðmundur Andri Ástráðsson v. Iceland* judgment ([GC], no. 26374/18, §§ 218-34, 1 December 2020).

9. It follows from that judgment that a tribunal is characterised in the substantive sense of the term by its judicial function: determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner. It must also satisfy a series of other conditions, including the independence, in particular from the executive, and impartiality of its members and the length of their terms of office, and it must also be composed of judges selected on the basis of merit (that is, judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law). The phrase "established by law" must be understood as covering not only the legal basis for the very existence of a tribunal but also the compliance by that tribunal with the particular rules that govern it and that govern the composition of the bench in each case. The court overseeing a case must have a "legal basis in domestic law" and the "requirements arising from the relevant domestic law [must be] complied with in the constitution and functioning of that court" (that is, the court must be "established in accordance with the law"). The Grand Chamber has also held that the right to a "tribunal established by law" has a very close interrelationship with the guarantees of independence and impartiality, observing in particular that a judicial body which does not satisfy the requirements of independence and of impartiality cannot even be characterised as a "tribunal" within the meaning of Article 6 § 1.

10. The question whether the CAS was a "tribunal established by law" within the meaning of Article 6 § 1 was examined by the Court in *Mutu and Pechstein v. Switzerland* (nos. 40575/10 and 67474/10, § 149, 2 October 2018). In it, the Court began by noting that the phrase "established by law" reflected the principle of the rule of law in the sense that "an organ which [had] not been established in accordance with the will of the legislature would necessarily lack the legitimacy required in a democratic society to hear the cases of individuals". It added, referring to *Sramek v. Austria* (22 October 1984, § 36, Series A no. 84), in which it had held with regard to the Regional Real Property Transactions Authority at the Government Office of the Tyrol, which was established by law but was "not classified as one of the courts of the respondent State", that such an authority "[could], for the purposes of Article 6 § 1, fall within the concept of a 'tribunal' in the substantive sense of this expression". The Court then specified that a court or tribunal was

characterised in that substantive sense by its judicial function, that is to say, determining matters within its competence on the basis of legal rules, with full jurisdiction and after proceedings conducted in a prescribed manner, the power of decision being inherent in the very notion of "tribunal". The Court concluded that "by the combined effect of the [Federal Act on Private International Law ("PILA")] and the Federal Supreme Court's case-law, the CAS thus had the appearance of a 'tribunal established by law'". In reaching this conclusion, it took into account the following factors: even though the CAS was the emanation of a private-law foundation, it was endowed with full jurisdiction to entertain, on the basis of legal rules and after proceedings conducted in a prescribed manner, any question of fact or law submitted to it in the context of the disputes before it; its awards resolved such disputes in a judicial manner and they could be appealed against to the Federal Supreme Court in the circumstances exhaustively enumerated in sections 190 to 192 PILA; and the Federal Supreme Court had regarded the CAS awards as "proper judgments comparable with those of a national court".

11. Thus, in the *Mutu and Pechstein* judgment, the Court's assessment was limited to whether, in the substantive sense of this expression, the CAS was a "tribunal". The question whether it was "established by law" was not fully addressed therein (in contrast to the judgment in *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, §§ 202-04, 28 January 2020, which concerned the Dispute Resolution Committee of the Turkish Football Federation).

12. However, the CAS was not established in accordance with the will of the Swiss legislature: the legal basis for its "existence" – to use the term which appears in the general principles set out in the present judgment – is not Swiss law (or indeed any other law). Its current legal basis is the "Agreement concerning the constitution of the International Council of Arbitration for Sport", which was signed on 22 June 1994 by the respective presidents of the International Olympic Committee (IOC), the Association of Summer Olympic International Federations, the Association of International Winter Sports Federations and the Association of National Olympic Committees. Its Preamble states that "with the aim of facilitating the resolution of disputes in the field of sport, an arbitration institution entitled the 'Court of Arbitration for Sport' (hereinafter the CAS) ... has been created, and that, with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution, the parties have decided by mutual agreement to create a Foundation for international sports-related arbitration, called the 'International Council of Arbitration for Sport [ICAS]' ... under the aegis of which the CAS will henceforth be placed" [1]. As pointed out by the Federal Supreme Court in the present case, the CAS is "neither a domestic court nor another institution of Swiss public law, but an entity, without legal

[1] https://www.tas-cas.org/en/general-information/history-of-the-cas.html

personality, emanating from the International Council of Arbitration for Sport, a private-law foundation" (see also *Mutu and Pechstein*, cited above, §§ 29, 65 and 149). What is more, it was the ICAS which adopted – and which is entitled to amend – the Code of Sports-related Arbitration, which lays down the CAS Statute.

13. In concluding in *Mutu and Pechstein* (ibid., §§ 23, 44 and 149) that the CAS had "the appearance of a 'tribunal established by law'", the Court noted, in particular, that the Federal Supreme Court had regarded the CAS awards as "proper judgments comparable with those of a national court", referring to a judgment of 27 May 2003 of the Federal Supreme Court (ATF 129 III 445 at 3.3.4) in which that court had held that the CAS was "sufficiently independent from the IOC, and from any other party before it, for the decisions it delivered in cases which concerned that body's interests to be regarded as proper judgments comparable with those of a national court". However, even assuming that the Court thus considered that this finding by the Federal Supreme Court conferred an ersatz legal basis on the CAS, this would not be sufficient with regard to the requirements set out by the Grand Chamber in *Guðmundur Andri Ástráðsson*, and in any event mere appearances cannot suffice in this area.

14. I would also refer to the separate opinion of Judges Keller and Serghides in the *Mutu and Pechstein* judgment (cited above, points 18-25). Like them, I question whether it is possible to confer the status of "tribunal established by law" within the meaning of Article 6 § 1 on a private entity which was created and is financed by a private-law entity. Like them, I also note that in the case of *Suda v. the Czech Republic* (no. 1643/06, 28 October 2010) the Court held that an arbitration tribunal composed of arbitrators designated on a list drawn up by a limited company did not constitute a tribunal "established by law".

An "independent and impartial" tribunal?

15. As regards the independence and impartiality of the CAS, the Court held in *Mutu and Pechstein* (cited above, §§ 151-59), by analogy with the fact that national courts are financed by the State budget, that the mere fact that the CAS was financed by sports bodies did not imply that it lacked independence and impartiality. The Court expressed reservations over the manner in which the list of arbitrators was composed at the relevant time, a matter which was within the control of the sports bodies, noting that the ICAS, itself composed of members appointed by sports bodies, had the power to renew their terms of office and to remove them. The Court indicated that while it was prepared to acknowledge that the organisations which were likely to be involved in disputes with athletes before the CAS had real influence over the mechanism for appointing arbitrators, as applicable at the relevant time, it could not conclude that, solely on account of this influence, the list of arbitrators, or even a majority thereof, was composed of arbitrators

who could not be regarded as independent and impartial, on an individual basis, whether objectively or subjectively, *vis-à-vis* those organisations. The Court found that there had been no violation of Article 6 § 1 of the Convention on account of an alleged lack of independence and impartiality on the part of the CAS.

16. I am not convinced by this approach, which places the emphasis on subjective impartiality, whereas it seems to me that the crux of the matter is the structural independence of the CAS. In this respect, the given approach differs from that subsequently followed by the Court in *Ali Rıza and Others* (cited above, §§ 201-22), in which it conducted a detailed structural analysis of the Turkish Football Federation's Dispute Resolution Committee and found that there had been a violation of Article 6 § 1 on account of the lack of adequate safeguards with regard to the requirement of independence and impartiality.

17. Subsequent to the *Mutu and Pechstein* judgment (cited above), the Court highlighted in *Guðmundur Andri Ástráðsson* (cited above) that a "tribunal established by law" had a very close interrelationship with the guarantees of independence and impartiality. It observed that a judicial body which did not satisfy the requirements of independence – in particular from the executive – and of impartiality could not even be characterised as a "tribunal" for the purposes of Article 6 § 1; similarly, when determining whether a "tribunal" was "established by law", the reference to "law" comprised any provision of domestic law – including, in particular, provisions concerning the independence of the members of a court – which, if breached, would render the participation of one or more judges in the examination of a case "irregular".

18. In order to determine whether a tribunal can be considered to be "independent" within the meaning of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see, for example, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 144, 6 November 2018). The requirement of independence relates not only to independence *vis-à-vis* the executive or the legislature, but also independence *vis-à-vis* the parties (see, for example, *Sramek*, cited above, § 42, and *Şahiner v. Turkey*, no. 29279/95, § 45, ECHR 2001-IX).

19. The CAS Statute, which is part of the Code of Sports-related Arbitration, was adopted and may be amended not by the legislature but by the ICAS, that is, a private entity composed of twenty members (all of whom are experienced lawyers): four are appointed by the International Sports Federations (IFs); four are appointed by the Association of the National Olympic Committees; four are appointed by the IOC; and four are appointed by those same twelve members, "after appropriate consultation with a view to safeguarding the interests of the athletes". The sixteen members so selected

then appoint four other members, "chosen from among personalities independent of the bodies designating the other members". They are appointed for one or several renewable period(s) of four years (see Articles S4 and S5 of the Code). Upon their appointment, they sign a declaration undertaking to exercise their function personally, with total objectivity and independence.

20. It is the ICAS which appoints the arbitrators to the CAS; resolves challenges to and the removal of arbitrators; is responsible for the financing of and financial reporting by the CAS (it receives and manages the funds allocated to its operations and approves its budget); appoints the CAS Secretary General; and, significantly, supervises the activities of the CAS Court Office (see Article S6 of the Code). There are not less than 150 arbitrators on the list, appointed for one or several renewable period(s) of four years. They must be "personalities ... with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs, the [National Olympic Committees (NOCs)] and by the athletes' commissions of the IOC, IFs and NOCs. ICAS may identify the arbitrators having a specific expertise to deal with certain types of disputes." For more detailed information on the Code of Sports-related Arbitration, see paragraph 82 of the present judgment, in which parts of it are cited.

21. It would therefore appear that, through the ICAS, the role of the sports bodies is structurally predominant in the CAS. As the Court noted in *Mutu and Pechstein* (cited above), they finance the CAS, but their role does not stop there: they also determine the framework within which the latter body operates, since they have control over its statute, appoint its members and can remove them, or (since the members' terms of office are short and renewable) decide not to reappoint them; moreover, they appoint the CAS's Secretary General.

22. The sports arbitration system – while affording certain safeguards – thus provides an advantage to one of the parties before the CAS in disputes between a sports body and an athlete (see, in this regard, *mutatis mutandis*, *Ali Rıza and Others*, cited above, §§ 201-23 and 241-42, in which the Court held that, owing to its structural shortcomings and despite affording certain safeguards, the Turkish Football Federation's Dispute Resolution Committee did not fulfil the Article 6 § 1 requirements of an independent and impartial tribunal; the Court found a violation of that provision and applied Article 46).

23. Over and above this structural imbalance, it might be questioned whether a panel whose members are chosen by the parties (or, in the absence of agreement, by the president of the division, who was himself or herself appointed by the sports bodies) can be regarded as independent.

24. Although the Code of Sports-related Arbitration specifies that arbitrators exercise their function personally, with total objectivity and independence, the above point does raise a question, at least in terms of the theory of appearances, according to which it must be clear that justice has been rendered impartially.

Conclusion

25. I am aware that it is not the Court's role to rule on the issue of fairness in sport; however, it was incumbent on it to conduct a thorough examination of the fairness of the proceedings in which the applicant's rights were at issue. I welcome the fact that the Court has found a violation of Article 6 § 1 of the Convention in respect of the applicant, but I consider that it ought to have examined in greater depth her argument concerning the unfairness of the arbitration imposed on her and the inadequacy of the review carried out by the Federal Supreme Court, and, in so doing, to have found that the CAS was not an "independent and impartial tribunal established by law" and that the appeal to the Federal Supreme Court did not remedy that fact. This ought to have constituted a ground for finding a violation of Article 6 § 1.

26. In conclusion, I should like to emphasise that the applicant was at a disadvantage *vis-à-vis* the IAAF, not only as a professional athlete, for the reasons set out in the present judgment, but also because she is a woman, she is black, and she is from the Global South.

PARTLY DISSENTING JOINT OPINION OF JUDGES BOŠNJAK, ZÜND, ŠIMÁČKOVÁ AND DERENČINOVIĆ

(Translation)

1. While we wholeheartedly concur with the majority's conclusion that there has been a violation of the applicant's procedural rights, we firmly believe that the circumstances of this case should have led the Court to find that the substantive conclusions reached by the Court of Arbitration for Sport (CAS) in its arbitration award fell within the Court's jurisdiction under Article 8, taken alone or in conjunction with Article 14. It is inconceivable that domestic courts, ruling within the territory of Europe, should disregard international fundamental rights obligations in the area of the protection of bodily integrity, equality and human dignity, even where highly specialised proceedings – in this instance, sports arbitration – are in issue.

2. The majority acknowledge that Switzerland and the Court have jurisdiction in respect of Article 6 of the Convention, but have decided that this was not the case for Articles 8 and 14, on the grounds that the applicant is a South African national and the sports federation in question has its seat in Monaco. We cannot subscribe to this contradictory approach. We note the specific and important role played by Switzerland in the sports domain. The International Olympic Committee has its seat in that country, as do many of the international sports federations. The CAS, which has exclusive jurisdiction to settle disputes between sportspersons and sports federations, has its seat in Switzerland. And the Federal Supreme Court, the country's highest court, is, of course, part of the Swiss legal system. In our view, these considerations ought to have sufficed for the Court to find that the dispute before it fell within Switzerland's jurisdiction within the meaning of Article 1 of the Convention, not only in respect of Article 6 but also of Articles 8 and 14. We will now explain the reasoning behind our approach.

3. The CAS, a sports arbitration tribunal, was set up by sport governing bodies, which are simultaneously parties to disputes before it and responsible for drawing up the regulations with which athletes must comply. This body decides the fate of athletes, although its jurisdiction is imposed on them and excludes the possibility of applying to any ordinary (State) court. The DSD Regulations, which the CAS examined in the present case, confer on the CAS exclusive jurisdiction to rule on disputes arising from those same regulations. Furthermore, the DSD Regulations specifically targeted the applicant, since they concerned only the events in which she competed – indeed, the fact that they amounted to a kind of *lex Semenya* clearly demonstrates the arbitrariness of those regulations as a whole.

4. The sports federation in question, namely World Athletics, is based in Monaco, but certain of the international sports competitions that are subject

to its regulations take place in Switzerland. In other words, athletes who are required to comply with the DSD Regulations participate in competitions which are held, among other locations, in Switzerland (for example, World Class Zürich and Athletissima in Lausanne), and both the CAS and the Federal Supreme Court are based in Switzerland.

5. All of these considerations, including the nature of sports arbitration as described in paragraphs 199 to 210 of the present judgment, should have led to the conclusion that Switzerland ought not to be exonerated from its obligation to respect the core fundamental rights of athletes, as these have been defined in its own domestic legal order: that is, not only those rights guaranteed by Article 6 of the Convention, but also those guaranteed by Article 8, taken alone or in conjunction with Article 14.

6. We regret that the majority do not share our view that athletes' fundamental rights must be protected effectively, particularly since the entire reputation of international sports regulation is specifically based on the fact that sport governing bodies and the CAS have their seat in Switzerland, or other Council of Europe member States, and that their regulations are subject to review by the Swiss Federal Supreme Court and the Court. As emphasised by the majority, under Swiss positive law the concept of public policy, within the meaning of section 190(2)(e) of the Federal Act on Private International Law ("PILA"), encompasses the protection of bodily integrity, equality and human dignity. The applicant could therefore have expected that those fundamental rights and the fundamental values of European civilisation would be protected in proceedings before the Swiss Federal Supreme Court. We are disappointed that her expectations have not been met.

7. To be clear: we fully endorse the view of the Chamber and the majority of the Grand Chamber that Switzerland cannot be held responsible for the content of the DSD Regulations, since it played no part in their adoption. However, the positive obligations under Article 8, taken alone and in conjunction with Article 14, include an obligation to put in place both a legal framework to protect private life against interference by private persons and a remedy capable of providing sufficient protection (see *Söderman v. Sweden* [GC], no. 5786/08, §§ 78-85, ECHR 2013). The fact that the Federal Supreme Court examined the applicant's civil-law appeal against the CAS award created a jurisdictional link with Switzerland; that link is related to the above-mentioned obligation to afford a remedy to individuals who claim to be victims of a violation of Article 8, taken alone or in conjunction with Article 14.

8. In a case such as the present one, which has an extraterritorial aspect, a State's jurisdiction is established once an action has been brought before its courts and they have ruled on it, not only in relation to Article 6 § 1 or the procedural obligations under Article 2 but also in relation to the procedural obligations arising from the other substantive provisions of the Convention,

including those relating to rights that may be subject to restrictions, such as Article 8.

9. Given that the only remedy available to the applicant – faced with compulsory arbitration – was an application to the CAS, then an appeal to the Federal Supreme Court, the Grand Chamber, in finding that it does not have jurisdiction to examine this type of application, risks depriving an entire category of individuals – namely, professional female athletes – of access to it, an outcome that is not in keeping with the spirit, object and purpose of the Convention (see the Chamber judgment, § 111).

10. The fact that the transnational regulation and arbitration of sport is of a private-law nature cannot exempt the entities involved from all accountability with regard to fundamental rights (for details of international sports arbitration and the structural imbalance between sportspersons and the sports federations as compared to traditional private-law relationships, see paragraphs 199-204 of the present judgment). The protection offered by international fundamental rights law would be illusory if it could be circumvented simply by private actors generating their own private-law system of rules and adjudication mechanism. The Court should be capable of protecting the fundamental rights of those persons who are obliged to accept the CAS's jurisdiction.

11. The Federal Supreme Court has jurisdiction under Swiss law to review the validity of CAS awards, and that review gives effect to them (see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, § 66, 2 October 2018). In this context it may examine, within the admittedly limited framework provided by section 190(2)(e) PILA, whether the rights guaranteed by the Convention have been complied with.

12. The acts or omissions in issue in the present case engage Switzerland's positive obligations to take appropriate measures to ensure respect for the rights and freedoms guaranteed under the Convention, precisely because of the insertion and institutionalisation into Switzerland's legal structure of compulsory arbitration before the CAS, with exclusive review powers granted to the Federal Supreme Court. That situation led Switzerland to exert authority and control over the fundamental rights of an international athlete who, in this instance, happens to be a South African national and resident but who in fact could just as easily hold a different nationality and be resident elsewhere.

13. We welcome the fact that, under Article 6, the Court took an approach in the present judgment which made it possible to identify certain shortcomings in the Federal Supreme Court's judgment. Recognising jurisdiction under Articles 8 and 14 would, however, have enabled it to draw attention to, first, the interferences with the applicant's private life and, secondly, the confusion made by the respondent Government and World Athletics in comparing the applicant's situation with that of transgender athletes. As the Chamber rightly pointed out, the advantage enjoyed by

transgender athletes arises from their initial male biological make-up, and the treatment imposed on them by the DSD Regulations in order to decrease their testosterone level corresponds to treatment that they undergo voluntarily, whereas the applicant was forced to follow medically unnecessary treatment against her will (see the Chamber judgment, §§ 196-99).

14. At the hearing, the applicant explained why she had brought her case before the Court:

> "I hope there is a favourable outcome for the young girls who are now and will be subject to the regulations. I hope there is a favourable outcome for all women, for they will come to see that these regulations will affect them too. ... I am Mokgadi Caster Semenya. Remember the meaning of my name – I am the one who gives up what they want so that others may have what they need."

This statement clearly demonstrates the degree to which sports federations' decisions and regulations have an impact on the private life of high-level athletes. It also bears witness to the importance of arbitral and judicial bodies in protecting this right. The Court's role is to protect fundamental rights. In choosing not to examine on the merits the question of the applicant's rights as guaranteed by Articles 8 and 14 of the Convention, the Court has failed to fulfil its role in the present case.

PARTLY DISSENTING JOINT OPINION OF JUDGES EICKE AND KUCSKO-STADLMAYER

INTRODUCTION

1. This case is, of course, of great personal importance to the applicant, a highly successful female athlete, who feared being excluded, by the operation of the Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) ("the DSD Regulations"), from certain sports competitions in the female category owing to her innate biological characteristics. We want to emphasise at the outset that neither our conclusion on her application before this Court nor the reasons for that conclusion in any way seek to detract from her very real sense of grievance and injustice or to prejudge, in any way, the merits of her claim of discrimination and a breach of her right to respect for her private life.

2. However, the present application is, in many ways, unusual; unusual in a way that raises critical legal difficulties in assessing both its admissibility as well as its merits.

3. After all, the circumstances of this case do not, in fact, have any meaningful or relevant connection to the respondent High Contracting Party, Switzerland, other than the fact that they arise in the context of

(a) international arbitration and, in this case, an arbitral award rendered by the Court of Arbitration for Sport (CAS), which has its seat in Lausanne, Switzerland; and

(b) the application by the Swiss Federal Supreme Court ("FSC") of section 190(2)(e) of the Swiss Federal Act on Private International Law of 18 December 1987 ("PILA") which, reflecting the language of Article V § 2 (b) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"), provides for a very limited right to "challenge" an award "if the award is incompatible with public policy (*ordre public*)".

4. Beyond these two factors, the circumstances of this case do not have any other factual or legal link to Switzerland:

(a) the applicant is a South African national who resides in South Africa;

(b) the applicant's challenge before the CAS was a challenge to the DSD Regulations, issued by the International Association of Athletics Federations (IAAF – now called World Athletics), a private-law association registered not in Switzerland but in Monaco;

(c) the CAS itself is not a domestic court or another institution of Swiss public law, but an entity emanating from a private-law foundation, namely, the International Council of Arbitration for Sport (ICAS);

(d) the applicant was not prevented from taking part in an international competition organised in Switzerland because of those Regulations. In fact,

importantly, her challenge was to the adoption and terms of the DSD Regulations in the abstract and not to their application to her in any specific case preventing her from competing; and

(e) the Swiss authorities played no role in the drafting or adoption of the DSD Regulations nor in any future application thereof (see, *inter alia*, paragraph 89 of the present judgment).

5. In this context, it is perhaps also worth noting that the applicant has not sought to bring any alternative or free-standing proceedings before the courts of any other High Contracting Party (with whom there are or may be stronger connections or links) to test the validity of the compulsory arbitration clause in the DSD Regulations, whether by reference to the adoption and terms of the DSD Regulations generally or a specific decision preventing her from taking part in an international competition because of the Regulations (see *mutatis mutandis*, *Platini v. Switzerland* (dec.), no. 526/18, 11 February 2020, and the judgment of the German Constitutional Court of 3 June 2022 (*Pechstein*)[1]).

6. In these circumstances, we start from the position that there is much in the majority judgment with which we agree, and, in fact, agree with wholeheartedly. Where we part ways with the majority is where, in the analysis of the merits of the complaint under the civil limb of Article 6 § 1, the majority introduce a novel requirement of a "particularly rigorous examination" (see paragraph 209 of the present judgment) or "in-depth judicial review" (ibid., paragraph 238) – in the context of the substantive public policy (*ordre public*) review under section 190(2)(e) PILA – and then proceed to find a violation of that requirement, and therefore Article 6 § 1 in the present case. Below, we briefly set out our position.

JURISDICTION

7. We agree that, applying the approach laid down in *Markovic and Others v. Italy* ([GC], no. 1398/03, ECHR 2006-XIV), "the applicant's appeal to the Federal Supreme Court, following on from her application to the CAS, created a jurisdictional link with Switzerland, entailing an obligation for that State, under Article 1 of the Convention, to ensure respect for the rights protected by Article 6 of the Convention in the proceedings which took place before the Federal Supreme Court" (see paragraph 133 of the present judgment). This was, in fact, not disputed by the respondent Government.

8. We also, wholeheartedly, agree with the majority (and our colleagues in the minority in the Chamber) that:

(a) the approach to the question of Switzerland's jurisdiction in respect of the complaints under Articles 8 and 14 of the Convention was without any

[1] 1 BvR 2103/16 (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html)

basis in the Court's well-established case-law (see paragraph 140 of the present judgment);

(b) the fact that the Federal Supreme Court examined the applicant's appeal under section 190(2)(e) PILA cannot suffice to establish Switzerland's jurisdiction in respect of the applicant's complaints under Articles 8 and 14 of the Convention (ibid., paragraph 145); and

(c) there are no special features in the present case which could provide the necessary jurisdictional link in relation to such complaints (ibid., paragraph 146).

MERITS OF THE ARTICLE 6 § 1 COMPLAINT

9. Having concluded, applying the principles in *Markovic and Others* (cited above), that there was a sufficient jurisdictional link to require Switzerland to ensure respect for the applicant's rights under Article 6 § 1 and only under its procedural-fairness guarantee, it is clear to us that the majority should also have followed the remainder of the approach adopted in that judgment. However, rather than do so, it appears to us that they

(a) sought to introduce a new or additional duty on the courts (and, ultimately, this Court) to consider the concerns expressed by the applicant under the substantive guarantees of Articles 8 and 14; and

(b) performed an in-depth proportionality analysis as required by these Articles, although they are outside the Court's jurisdiction and, therefore, not engaged in the circumstances of this case.

This the majority achieved by creating a new requirement for a "particularly rigorous examination" (see paragraph 209 of the present judgment) and/or an "in-depth judicial review" (ibid., paragraph 238). After all, in application of this new requirement to the right to a fair hearing under Article 6 § 1, the majority went on to analyse in some detail the reasoning of both the CAS award as well as the judgment of the FSC (ibid., paragraphs 224-39).

10. The point at which we start to diverge from the majority is where, having accepted jurisdiction and concluded that the appeal concerned a "civil right" so as to engage the right to a fair hearing under Article 6 § 1, the majority skipped a couple of essential steps in the analysis.

11. The majority, having reached this point, found a structural imbalance in the relationship between sportspersons and sport governing bodies and concluded that the "civil rights" in issue in the present case were, in fact, "the right to respect for human dignity, and the rights to respect for bodily and psychological integrity, social identity and gender, and for the private sphere and economic freedom, which are 'civil rights' within the meaning of Article 6 § 1 of the Convention" (ibid., paragraph 215). On that basis they went straight to:

(a) their conclusion that "the present case was one of compulsory arbitration, which concerned a dispute relating to 'civil rights', within the meaning of Article 6 § 1, corresponding in domestic law to fundamental rights. The Federal Supreme Court was therefore required to carry out a particularly rigorous examination of the civil-law appeal lodged with it by the applicant" (ibid., paragraph 216); and

(b) their detailed analysis of whether the FSC judgment and the CAS award satisfied this requirement of a "particularly rigorous examination", leading to the majority's conclusion that they did not (ibid., paragraphs 217 et seq.).

12. In our view, however, the omitted steps are, in fact, crucial to identifying both the scope of the "civil right" at issue and the resulting scope of the Court's Article 6 § 1 analysis (see, *inter alia*, *Markovic and Others*, cited above, § 94). In this context, it is important to bear in mind that Article 6 § 1, concerning the right to a fair hearing, differs from most other provisions of the Convention – in particular Articles 8 and 14 – in that it relates exclusively to procedural rights (as acknowledged in paragraph 144 of the present judgment). The substantive basis for the scope of the Court's fairness assessment lies in the definition of the "civil right" in domestic law which triggers the applicability of Article 6 § 1.

13. In conducting this crucial part of the analysis, the Court has consistently applied two important principles, namely:

(a) when assessing whether there is a civil "right" under domestic law and, if so, in determining the substantive or procedural characterisation to be given to any impugned restriction of that right, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Markovic and Others*, cited above, § 95, and *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A); and

(b) where the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 101, ECHR 2001-V).

14. Applying these principles to the present case, it seemed clear to us that any challenge to an international arbitral award under section 190(2)(e) PILA is clearly limited to the requirement to establish its incompatibility with "substantive public policy" (the relevant aspect of *ordre public*). This plainly constitutes a "legitimate restriction" to the right of access to a court (akin to "statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind"; see *Markovic and Others*, cited above, § 99; see also *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and

67474/10, § 97, 2 October 2018) and does not amount to an "immunity" from review. This limitation cannot be avoided where, in a case like the present, a complaint regarding insufficient access to a court was not even raised (see paragraphs 90-91 of the present judgment), and the Court is limited to assessing compliance with the right to a fair hearing (ibid., paragraphs 193-94 and 209). As the majority, at least by implication, accept, the limitation of the FSC's review to the standard of "public policy", notably its aspect of "substantive public policy", a concept even more restrictive than that of arbitrariness, does not amount to an outright violation of Article 6 § 1. Applying the Court's established approach, it is an inevitable consequence that the standards laid down by section 190(2)(e), as interpreted by the FSC, are also indicative of the extent (and the limits) of the courts' powers of review of arbitral awards (see *Markovic and Others*, cited above, § 114).

15. However, it is also a necessary consequence of this conclusion that the "civil right" enjoyed by the applicant in the present case and, therefore, the scope of the Article 6 § 1 analysis to be conducted by this Court should have been limited to the scope of the "public policy" notion under section 190(2)(e) (and, therefore, Article V of the New York Convention), as interpreted by the FSC, and its application in the present case. After all, the Court has consistently held that it is a principle of the Convention that Article 6 does not in itself guarantee any particular content for civil rights and obligations in national law (even where other Articles such as those protecting the right to respect for family life (Article 8) and the right to property (Article 1 of Protocol No. 1) may do so: see *Z and Others v. the United Kingdom*, cited above, § 98, and *Markovic and Others*, cited above, § 113). It is noteworthy that the applicant herself appears to have accepted that the nature of the challenge was so limited, that is, limited to the scope of the FSC review (see paragraphs 88-89 of the present judgment). Although this limitation *per se* is not called into question, the majority make another argument: that the "civil rights" which are the subject of the dispute "correspond under domestic law to fundamental rights" (ibid., paragraphs 206, 209 and 216). But this is the majority's own interpretation of domestic law, rejected as not relevant by the FSC itself, and changes the very content of the "civil right" at stake. It can therefore not "outweigh" the above restriction and extend the scope of the Court's Article 6 § 1 review.

16. In the light of the above, the only conclusion open to us, in the context of the present case, was that there was no basis for this Court to substitute its view for (or otherwise criticise) the conclusions reached in – as the majority acknowledge – a lengthy and most detailed judgment adopted by the FSC in the exercise of its jurisdiction under section 190(2)(e) PILA (see paragraph 219 of the present judgment). This is even more so where, as the majority record, the length of the judgment of the FSC, a national superior court with extensive experience in applying the public policy (*ordre public*) test under section 190(2)(e) PILA and Article V § 2 (b) of the New York

Convention, demonstrates the attention accorded by them to the examination of the applicant's appeal. As a consequence, we voted against the finding of a violation of Article 6 § 1 in the circumstances of this case on the basis that to do otherwise would have amounted, in effect, to acting as a "fourth instance".

POSTSCRIPT

17. Some welcome attempts have been made by the majority in the judgment to limit the impact of the introduction – through Article 6 § 1 – of a requirement for a "particularly rigorous examination" or an "in-depth judicial review" in an appeal under section 190(2)(e) PILA to "mandatory and exclusive" sports arbitrations (see paragraph 218 of the present judgment). However, it seems to us that, as a matter of principle, there must be a real risk that this requirement will be sought to be translated to other appeals against or challenges to arbitral awards (of whatever nature) under section 190(2)(e) PILA (and/or Article V § 2 (b) of the New York Convention), at least where they are capable being classified as a "dispute relating to 'civil rights', within the meaning of Article 6 § 1, corresponding in domestic law to fundamental rights" (ibid., paragraph 216). If this were to happen, this was clearly not what the Grand Chamber had in mind and would clearly be highly undesirable.