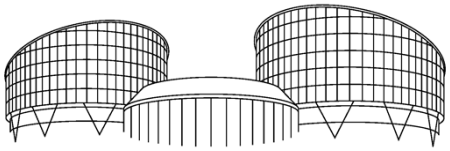

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF SEMENYA v. SWITZERLAND

(Application no. 10934/21)

JUDGMENT

Art 14 (+ Art 8) • Private life • Lack of sufficient institutional and procedural safeguards in respect of discrimination against professional athlete with differences of sex development (DSD) required under non-State regulations to lower her natural testosterone level to be allowed to compete in women's category in international competitions • Art 14 (+ Art 8) applicable • Applicant in comparable situation to other female athletes and treated differently as excluded from competitions by DSD Regulations • Compulsory arbitration under sports regulations with no access to ordinary courts • Court of Arbitration for Sport (CAS), despite its very detailed reasoning, did not apply Convention provisions and left open serious questions as to validity of DSD Regulations • Review by Federal Supreme Court very limited, confined to question whether CAS arbitral award was compatible with public policy • No thorough and sufficient examination of complaint of discriminatory treatment and no appropriate and adequate weighing-up of all interests at stake • Lack of differentiation between transgender and intersex athletes not addressed by Federal Supreme Court • Discrimination on grounds of sex and sex characteristics requiring "weighty reasons" by way of justification • High stakes for applicant: right to practise her profession • Narrow margin of appreciation overstepped • Measure neither objective nor proportionate to aim pursued.
Art 13 + (Art 14 + 8) • Ineffective remedies • Lack of sufficient institutional and procedural safeguards • Effective response not provided by Federal Supreme Court to applicant's substantiated and credible complaints of discrimination, owing in particular to its very limited power of review.

STRASBOURG

11 July 2023

Referred to the Grand Chamber
06/11/2023

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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In the case of Semenya v. Switzerland,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Pere Pastor Vilanova*, President*,
Yonko Grozev,
Georgios A. Serghides,
Darian Pavli,
Peeter Roosma,
Ioannis Ktistakis,
Andreas Zünd*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the 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;

the decision to give notice of the application to the Swiss Government ("the Government"),

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the observations received from the following organisations and individuals who had been given leave to intervene as third parties by the Section President ("the President"): the South African Human Rights Commission; Athletics South Africa; World Athletics; the Human Rights Centre Ghent University; the International Commission of Jurists (ICJ); the Canadian Centre for Ethics in Sport; Tlaleng Mofokeng, United Nations Special Rapporteur on the Right to Health, with Nils Melzer, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and Melissa Upreti, President of the Working Group on discrimination against women and girls; the World Medical Association (WMA) and Global Health Justice Partnership (GHJP), an initiative of the Yale Law School and Yale School of Public Health; Human Rights Watch joined by Payoshni Mitra and Katrina Karkazis; the *Vlaamse Ombudsdienst* (Flemish Ombudsman); and, jointly, Women Sport International, the International Association of Physical Education and Sport for Girls and Women (IAPESGW) and the International Working Group for Women in Sport (IWG);

the President's decisions to treat some of the documents in the case file as confidential under Rule 33 of the Rules of Court;

the President's decision to give priority to the application under Rule 41.

Having deliberated in private on 17 January and 30 May 2023,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The application was lodged by an international-level athlete, specialising in middle-distance races (800 to 3,000 m), who complained about a set of regulations of the International Association of Athletics Federations (IAAF – now called World Athletics) requiring her to take hormone treatment to decrease her natural testosterone level in order to be able to take part in international competitions in the female category. Having refused to undergo hormone treatment, she was no longer able to take part in international competitions. Her legal actions challenging the regulations in question before the Court of Arbitration for Sport (CAS) and the Federal Supreme Court were rejected. She relied on Articles 3, 6, 8, 13 and 14 of the Convention in support of her arguments.

THE FACTS

2. The applicant was born in 1991 and lives in Pretoria. She was represented by Ms S. Sfoggia, a lawyer practising in Paris.

3. The Government were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

I. BACKGROUND TO THE CASE

4. The applicant is a South-African international-level athlete, specialising in middle-distance races (800 to 3,000 m). 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). She is also a three-time world champion over that distance (Berlin 2009, Daegu 2011, and London 2017).

5. After her victory in the women's 800 m race at the World Championships in Berlin in 2009, the applicant was made to undergo sex testing[1] to determine whether she was "biologically male", and the IAAF informed her that she would have to decrease her testosterone level below a certain threshold if she wished to be eligible to compete in her preferred events in future international athletics competitions.

6. Despite suffering significant side effects from the hormone treatment she then underwent, the applicant won the women's 800 m race at the World Championships in Daegu (2011) and the Olympic Games in London (2012).

7. Following the interim award of 24 July 2015 delivered by the CAS in the case of *Dutee Chand* (see paragraphs 71 et seq. below) by which the relevant IAAF regulations in force at the time were temporarily suspended on

[1] The Federal Supreme Court used the term "gender verification" in its judgment of 25 August 2020 in respect of the applicant (see paragraphs 30 et seq. below).

the ground that the IAAF had not shown that hyperandrogenic[2] athletes possessed a significant performance advantage as compared to other female athletes, the applicant stopped taking her hormone treatment. In 2016 she once again won gold at the Olympics in the women's 800 m race.

8. On 23 April 2018 the IAAF issued a new set of regulations entitled "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)" ("the DSD Regulations", see paragraphs 59 et seq. below).

9. The applicant, who did not dispute that she was a "Relevant Athlete" within the meaning of the DSD Regulations, refused to comply with them since, in her submission, they required her to submit to hormone treatment with poorly understood side effects with the aim of lowering her natural testosterone level in order to be allowed to participate in the female category of an international competition.

10. On 18 June 2018 she lodged a request for arbitration with the CAS, which has its seat in Lausanne, in which she challenged the validity of the regulations in issue (CAS 2018/O/5794).

11. On 25 June 2018 Athletics South Africa (ASA), the South African athletics federation, also applied to the CAS (CAS 2018/O/5798), supporting the applicant's case.

12. The CAS joined the cases on 29 June 2018. On 23 July 2018, it informed the parties of the names of the three arbitrators on the panel which would examine their case.

13. While the proceedings were ongoing, the IAAF amended the list of differences of sex development (DSD) covered by the DSD Regulations; from that point onwards, they applied only to "46 XY DSD" athletes, that is, to persons with XY chromosomes, not to those with XX chromosomes. In other words, athletes with XX chromosomes having an increased level of testosterone were no longer subject to the DSD Regulations.

14. At the end of the exchange of written pleadings, the CAS sat in Lausanne from 18 to 22 February 2019. Representations from many experts were heard in a hearing lasting five days.

II. CAS AWARD OF 30 APRIL 2019

15. In a reasoned award of 30 April 2019, the CAS rejected the request for arbitration. The majority found that, while the DSD Regulations were discriminatory, they were a necessary, reasonable and proportionate means of achieving the aims of the IAAF, namely to ensure fair competition[3].

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[2] Hyperandrogenism is a medical condition characterised by high levels of androgens. Androgens are male hormones, the major one being testosterone.

[3] The first paragraph of Rule 46 of the CAS Procedural Rules provides: "Dissenting opinions are not recognized by the CAS and are not notified."

16. The Panel began by specifying that, in the absence of agreement between the parties, it could not rule *ex aequo et bono* and would "apply the IAAF's Constitution and Rules in conjunction with the Olympic Charter and in subsidiary, where necessary, Monegasque law".

17. Having examined the merits of the joined applications, the arbitrators found as follows*:

> "B.c.a. Ms. Semenya is a woman. She was born a woman and has been raised as one. She has lived and run as a woman. She is – and always has been – recognised in law as a woman and has always identified as a woman (award, paragraph 454).
>
> The IAAF is entrusted with enacting regulations to facilitate and ensure fair competition for the benefit of all athletes (award, paragraph 456). Post-puberty, male athletes outperform female athletes in terms of athletic ability and this difference is insurmountable. That is why the IAAF considered it necessary to provide for a 'protected class' of female athletes (award, paragraph 456). The necessity to have separate male and female categories is not in dispute (award, paragraph 461).
>
> Once it has been acknowledged that it is legitimate to have separate male and female categories, it is imperative to establish an objective, fair and effective way to determine which persons may participate in the 'protected class' (award, paragraphs 456 and 462). The answer, at first, seems simple: restrict entry to that 'protected class' to female athletes and deny entry to male athletes. 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 (award, paragraph 457). In this connection, 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). A rule that seeks to define 'maleness' or 'femaleness' for one purpose can easily be perceived (rightly or wrongly) as an attempt to challenge a person's 'maleness' or 'femaleness' for other purposes or in other contexts (award, paragraph 463).
>
> In recent years, a further complicating factor has begun to emerge. The question of legal sex has begun to evolve in many countries around the world. In the eyes of the law, sex is no longer exclusively confined to the statuses of 'male' and 'female'. Some countries now recognise other legal sex statuses, such as 'intersex'[4]. Moreover, some

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* Translator's note: In the French judgment, the French translation of the CAS award was taken from the summary of the award used by the Federal Supreme Court in its judgment of 25 August 2020. For the exact wording in English of the award, please refer to the paragraph numbers provided.

[4] "Intersex people are born with biological sex characteristics that do not fit societal norms or medical definitions of what makes a person male or female. Sometimes a person's intersex status is detected at birth; sometimes it only becomes apparent later in life, notably during puberty." (Glossary of the European Commission against Racism and Intolerance – https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/ecri-glossary)

domestic legal systems permit an individual born as one sex to change their legal sex (award, paragraph 458).

The DSD Regulations are the latest iteration of the IAAF's struggle to reconcile 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 (award, paragraph 459).

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 one set of rights without restricting the other set of rights. 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 to achieve the benefits of athletic success, such as positions on the podium and consequential commercial advantages (award, paragraph 460).

..."

18. As to the factual and scientific issues raised by the case, including any advantage DSD athletes may have compared to female athletes, the CAS found as follows:

"B.c.c. A number of complex factual and scientific issues emerged during the proceeding. In light of those issues and the direct bearing that they have upon the legal tests that the Panel must apply, it is necessary to understand the factual matrix before addressing the legal issues confronting the Panel (award, paragraph 473).

A number of eminent experts provided their opinions on the questions in issue. Many of the opinions expressed in the written expert reports were refined by the mechanism of a series of 'hot tubs', where the experts gave concurrent oral evidence before the Panel. 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 (award, paragraph 475).

B.c.c.a. 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 of a woman with no DSD (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 ... is 7.7 to 29.4 nmol/L (award, paragraph 489).

It is not in dispute that the level of testosterone of 5 nmol/L provided by the DSD Regulations represents a level that no 46 XX woman would exceed, save for potentially a small fraction of women with PCOS (award, paragraph 490).

While testosterone may not be the only factor that results in an increase in lean body mass, higher levels of haemoglobin and increased sporting ability, it is nevertheless the primary factor at the origin of the above-mentioned physical advantages.

...

The overwhelming majority view of the experts was that testosterone is the primary driver of the physical advantages and, therefore, of the difference between males and

females in athletic performance. The Panel accepts this conclusion (award, paragraph 492).

B.c.c.b. Turning next to the main characteristics of athletes who have XY chromosomes and DSD (46 XY DSD athletes), the Panel began by observing that all the DSD, such as 5α-Reductase deficiency (5-ARD), can affect testosterone levels. Individuals with 5-ARD have male chromosomes (XY), male gonads (testes not ovaries) and levels of testosterone in the male range (award, paragraph 497).

B.c.c.c. The Panel considers it appropriate to focus on whether women with 46 XY DSD 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 (award, paragraph 507).

...

In support of its position that 46 XY DSD athletes have an athletic advantage over other female athletes, the IAAF adduced evidence from a variety of sources, including scientific evidence regarding the physiological effects of conditions such as 5-ARD and the relationship between endogenous testosterone and athletic performance ..., observational data regarding the correlation between endogenous testosterone levels and athletic performance in two World Championships (Daegu and Moscow), and statistical evidence concerning the more prevalent incidence of 46 XY DSD athletes in certain athletic disciplines (award, paragraph 517).

The Panel has carefully considered all of the scientific evidence adduced by the parties in these proceedings, and the majority of the Panel ('the majority') accepts that the preponderance of the evidence is that female athletes with 5-ARD or other DSD have levels of testosterone in the male range, and that this results in a significantly enhanced sport performance ability, for example, by action in the body to increase muscle mass and size, and levels of haemoglobin (award, paragraph 535). It concludes that that enhanced performance ability translates in practice to a significant performance advantage in certain athletics events covered by the DSD Regulations [(award, paragraph 536)].

In reaching this conclusion, the majority refers in particular to the striking over-representation of 5-ARD athletes on the podium of Restricted Events at the international level. According to the evidence put forward by the IAAF, in the general population the incidence of [people] with DSD is 1 in 20,000; in elite women's competition, it is 7 in 1,000 (140 times greater). The population incidence of 5-ARD is less than 1 in 100,000 (<0.001%), a percentage which is disproportionate to the considerable number of medals won in international competitions (Olympic Games, World Championships, etc.) and the innumerable victories in recent years in Restricted Events at Diamond League Series races by 5-ARD athletes (award, paragraphs 533 and 537).

The majority considers that the contrast between the rare incidence of 5-ARD in the general population and the overwhelming success that women with 5-ARD have achieved in Restricted Events provides powerful evidential support for the conclusion that female athletes with 5-ARD have a significant performance advantage (award, paragraph 537). It does not purport to quantify precisely the exact percentage of that advantage. Having examined and considered the totality of the evidence, the majority concludes that it provides adequate support for the 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 (award, paragraph 538).

19. As to the necessity and reasonableness of the DSD Regulations, the CAS held as follows:

> "B.c.e. As to the necessity of the DSD Regulations, the Panel reiterates that ensuring fair competition in the female category of competitive athletics is a legitimate objective (award, paragraph 556). Once it is recognised that it is legitimate to have separate male and female categories, it is necessary to devise criteria to determine which individuals belong in which category. The Panel accepts that reference to a person's legal sex alone may not always constitute a fair and effective means of making that determination. The purpose of having separate categories 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. 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 (award, paragraphs 558-59).
>
> 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. 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 confers a sufficiently significant performance advantage in each athletic discipline that is covered by the Regulations. If a certain biological factor is shown to confer a substantial performance advantage in Event A but not in Event B, then regulations that purported to regulate eligibility to participate in Event B by reference to that biological factor would not fulfil the necessity requirement (award, paragraph 560).
>
> The IAAF says that all of the many different factors that contribute to sport performance (training, coaching, nutrition and medical support, etc.) are equally available to men and women. On the other hand, only men are exposed to the increased testosterone levels that produce 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 it, then it is necessarily 'category defeating' to permit any individuals who possess that testosterone-derived advantage to compete in that category (award, paragraph 563).
>
> The majority accept the logic of the IAAF's submission, according to which the degree of the performance advantage caused by elevated testosterone levels is so great as to require that athletes who lack that advantage be protected. 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 (award, paragraph 564).

In the Panel's view, the necessity of the DSD Regulations turns on the question 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 them if they wish to compete in the female category. The answer to this question turns on a disputed issue of science (the existence and magnitude of the performance advantage) and an evaluative assessment (whether that magnitude is so great as to warrant the imposition of eligibility restrictions) (award, paragraph 569). That performance advantage may not be of the order of 10-12% but it is sufficient to enable those athletes consistently to beat women who do not have 46 XY DSD (award, paragraph 574). On the basis of the evidence put forward by the parties and the representations made by the various experts, the majority concludes that androgen sensitive female athletes with 46 XY DSD enjoy a significant performance advantage and that this advantage is attributable to their exposure to levels of circulating testosterone in the adult male range (award, paragraph 575). It considers that the elevated testosterone levels that 46 XY DSD athletes possess can create an insuperable advantage over other female athletes who do not have a 46 XY DSD condition (award, paragraph 579). The majority also accepts that the IAAF has demonstrated the necessity of establishing regulations governing the eligibility of female athletes with 46 XY DSD to participate in certain events in order to maintain fair competition in female athletics (award, paragraph 580).

On the same grounds, the majority finds that there is a reasoned basis for the DSD Regulations (award, paragraph 583)."

20. In respect of whether the DSD Regulations were proportionate, the CAS found as follows:

"B.c.f. Examining the validity of the DSD Regulations with regard to the principle of proportionality, the majority observes, first of all, that it is neither necessary nor appropriate to seek to make any assessment of the possible wider impact of the DSD Regulations outside of the world of athletics, of which the IAAF is the governing body (award, paragraph 589).

B.c.f.a. 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. 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, it submits that hormonal treatment is a recognised standard of care for athletes with various DSD conditions 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 (award, paragraph 591).

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 gonadotropin hormone-releasing (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 the 5 nmol/L required by the DSD Regulations – thus requiring an athlete to turn to GnRH agonists or gonadectomy (surgical removal of the gonads) – a different analysis of proportionality would need to be undertaken (award, paragraph 592).

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. Prof. [G.-L.] spoke of her clinical experiences generally rather than with athletes, while Prof. [H.] spoke of her experience in reducing testosterone from 20 to 1 nmol/L. 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 (award, paragraph 593).

The Panel accepts that the use of oral contraceptives to reduce testosterone levels can cause a range of unwanted side effects. It 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. Thus, the expert evidence supports Ms. Semenya's evidence as to the side effects that she says that she experienced (award, paragraph 595). The evidence of the side effects experienced by Ms. Semenya concerned reactions experienced when bringing her testosterone level down to below 10 nmol/L (that is, the maximum testosterone level permitted under the previous regulations issued by the IAAF). 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 (award, paragraph 596). It is not possible to conclude that all of the symptoms Ms. Semenya 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 another form of oral contraceptive, if prescribed, would result in the same side effects (award, paragraph 597). 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 (award, paragraph 598).

In the majority's view, requiring 46 XY DSD athletes to take oral contraceptives to lower their testosterone levels 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 (award, paragraph 599)."

21. As regards, more specifically, the allegation that "femininity tests" violated athletes' bodily integrity, the Panel found as follows:

"B.c.f.b. 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 that is both subjective and

inappropriate, and violates bodily integrity. Psychological harm may also arise from an athlete being labelled as having a DSD and as being a 46 XY DSD athlete (award, paragraph 600).

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, it 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 suspicion of doping (award, paragraph 601)."

22. As to the allegedly arbitrary application of the DSD Regulations, the CAS continued as follows:

"Ms. Semenya submits it is inevitable that the DSD Regulations will be applied in an arbitrary and inconsistent manner since there is no objective test to establish the degree of virilisation. Instead, the process of assessing virilisation necessarily depends upon the subjective views of the clinician tasked with carrying out the assessment. 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. Prof. [A.] and Prof. [H.] have given evidence that, for an expert, the assessment of the degree of androgen sensitivity is not difficult to evaluate, using physical examination and laboratory evaluation. Further, the DSD Regulations provide that the benefit of any doubt will be resolved in favour of the athlete. Having regard to all these factors, the majority concludes that the requirement related to the assessment of virilisation does not render the DSD Regulations disproportionate (award, paragraphs 602-04).

23. The CAS found as follows as regards the issue of confidentiality:

"B.c.f.c. As regards the risk that an individual's 'Relevant Athlete' status would be made public, 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. The Panel does not consider that this factor renders the DSD Regulations disproportionate having regard to the legitimate interests pursued by the Regulations. It nevertheless has regard to the likelihood of some harm

arising from the disclosure in reaching its overall conclusion as to the proportionality of the Regulations (award, paragraph 605)."

24. The CAS responded as follows to the applicant's argument that the Relevant Events within the meaning of the DSD Regulations had been selected arbitrarily:

"B.c.f.d. The Claimants submit that the Restricted Events were selected arbitrarily. They point out that events for which there was evidence of advantage in the BG17 study (such as the hammer throw and pole vault) were not included within the category of Restricted Events, while the 1,500 m and 1 mile events – where the evidence of advantage was less significant – were included (award, paragraph 606). The IAAF provided some evidence relating to all of the events included within the category of Restricted Events. The IAAF explained 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 (award, paragraph 607). On the basis of the evidence presented to the Panel, the IAAF's decision to include the 1,500 m 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 800 m also compete successfully in the 1,500 m 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 (award, paragraph 608). The Panel has some concern about the inclusion of these two events within the category of Restricted Events on the basis (at least in part) of a speculative assumption. Nevertheless, the majority considers that the IAAF has provided a rational overall explanation for how the category of Restricted Events has been defined. While the Panel has concerns regarding the 1,500 m and 1 mile 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 does not consider that the scope of the Restricted Events *in toto* is disproportionate (award, paragraph 609)."

25. The CAS continued its proportionality assessment as follows:

"B.c.f.e. The upper level of testosterone permitted under the previous IAAF regulations, as considered in *Chand*, was 10 nmol/L. The IAAF lowered this to 5 nmol/L in the DSD Regulations. There are statements in the IAAF's evidence as to a performance advantage, in the form of increased muscle mass and increased circulating haemoglobin, when the level of testosterone exceeds 5 nmol/L but remains below 10 nmol/L. The Panel is therefore satisfied that the decision to reduce the authorised threshold from 10 nmol/L to 5 nmol/L was not arbitrary (award, paragraphs 610-11).

B.c.f.f. 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 testosterone and an athlete's ability to keep her testosterone level below the 5 nmol/L threshold notwithstanding these fluctuations. Spikes in Ms. Semenya's testosterone level were recorded while she was taking the hormone treatment consistently. In particular, there was evidence that during the period that Ms. Semenya consistently took oral contraceptives, her testosterone levels, although still below 10 nmol/L (as was then

required), showed significant fluctuation, ranging from 0.5 to 7.85 nmol/L. Ms. Semenya suggested that such spikes could result in an athlete inadvertently breaching the 5 nmol/L maximum permitted level even if the hormone treatment regime was followed diligently (award, paragraphs 612-13).

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 diligently takes the medication as prescribed to lower testosterone, but the levels still fluctuate over the maximum permitted level, that would still disqualify her under the DSD Regulations in force at the time of the hearing. It would be an impossible burden for the athlete to demonstrate that such unintentional fluctuations had not impacted 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 was below the prescribed threshold on the day of the competition. 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 (award, paragraph 614).

For the purposes of the assessment of the proportionality of the DSD Regulations, it is necessary to weigh up the countervailing factors. On the one hand is the imposition of a new maximum threshold of 5 nmol/L which represents the highest level of testosterone normally present in females. 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 athlete to keep her testosterone consistently within the regulatory limits, to monitor that level adequately in real time and to pay for that monitoring (award, paragraph 615).

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 cannot be characterised as a proportionate interference with the rights of 46 XY DSD athletes. 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 (award, paragraphs 616-17). As to implementation by the IAAF, the Panel only has what is set out in the DSD Regulations and the evidence of various experts. Some of those experts, who have to determine androgen sensitivity as part of their regular clinical medicine practices and who are on the list of experts who would be called upon to make the assessments provided for by the DSD Regulations, gave evidence before the Panel which demonstrated a high level of care and a sympathetic approach to the treatment of women with DSD. 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 (award, paragraph 618).

However, the matters raised concerning potential difficulties in complying with the DSD Regulations were speculative (apart from agreement as to the possible difficulty with taking the contraceptive pill if the athlete had a gastro-intestinal infection) and without evidence or evidentiary support with respect to compliance with the 5 nmol/L

requirement. 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 (award, paragraph 619)."

26. The CAS summed up its findings as follows:

"B.c.g. 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 arrived at, this may change in the future unless constant attention is paid to the fairness of how they are implemented (award, paragraph 620). 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 proportionality. However, as the case stands, those matters have not been established on the evidence and the majority considers that the side effects of hormonal treatment, while significant, are not sufficient to outweigh the aims pursued by the IAAF (award, paragraph 621).

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 various aspects of the DSD Regulations and to repeat its concerns 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 consequences of unintentionally and unavoidably exceeding the 5 nmol/L limit (award, paragraphs 622 and 624). In addition, the evidence of actual significant athletic advantage for 46 XY DSD athletes in the 1,500 m 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 (award, paragraph 623). 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 (award, paragraph 624).

The Panel concludes, by a majority, that, while the DSD Regulations are discriminatory, they are a necessary, reasonable and proportionate means of achieving the aims of the IAAF (award, paragraph 626)."

III. PROCEEDINGS IN THE FEDERAL SUPREME COURT AND ITS JUDGMENT OF 25 AUGUST 2020

27. On 28 May 2019 the applicant lodged a civil-law appeal with the Federal Supreme Court, alleging in particular that she had been discriminated against on grounds of sex as compared to male and female athletes with no DSD, and that her human dignity and personality rights had been violated. She also applied for *ex parte* interim measures (*mesures superprovisionnelles*) and interim measures (*mesures provisionnelles*),

requested that her appeal be given suspensive effect, and sought the setting-aside of the CAS award of 30 April 2019.

28. In a decision of 31 May 2019, the President of the First Civil-Law Division (*la première Cour de droit civil*) 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.

29. 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.

30. In a judgment of 25 August 2020, notified on 7 September 2020, the Federal Supreme Court dismissed the applicant's appeal, considering that the relevant IAAF regulations were an appropriate, necessary and proportionate means of achieving the legitimate aims of fairness in sport and of maintaining the "protected class".

31. As to whether the applicant had a legitimate interest in having the contested award set aside, the Federal Supreme Court held as follows:

> "4.1.2. The appellant, who took part in the CAS proceedings, is particularly affected by the contested decision, since the DSD Regulations, which the CAS endorsed, impose on her certain obligations if she wishes to take part in particular events at international athletics competitions. She therefore has a current personal legitimate interest in having the award set aside, which confers on her standing to appeal (section 76(1) [of the Federal Supreme Court Act – "the FSCA"])."

32. The Federal Supreme Court also drew attention to the legal framework in which the dispute had arisen, and to its role and the scope of its power of review in the area of international arbitration:

> "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, which was 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 ICAS, 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, 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) [of the Federal Act on Private International Law – "PILA"] (section 77(1)(a) FSCA). Sections 90 to 98 FSCA, among other provisions (section 77(2) FSCA), may not be relied on in this type of appeal, 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).

...

5.2.4. ... 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 of the ECHR (*Mutu and Pechstein*, cited above, § 98).

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.

..."

33. Turning now to the applicant's allegation of a violation of public policy, the Federal Supreme Court began by reiterating the general principles and found as follows:

"9. In her third argument, divided into several parts, the appellant submitted that the contested award violated substantive public policy, within the meaning of section 190(2)(e) PILA, in various respects.

In support of her complaint of a violation of substantive public policy, the appellant, relying on several constitutional guarantees, submitted, first, that the contested award breached the prohibition of discrimination. Secondly, she claimed to be a victim of a breach of her personality rights, in that the award violated several fundamental rights. Lastly, she complained of a violation of her human dignity.

Before examining the merit of the contentions in support of this argument, reference should be made to what is meant by the notion of public policy within the meaning of the above-mentioned provision.

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 contrary to 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 unreasonable, 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 is compatible with the jurisprudential

definition of substantive public policy (judgment no. 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 all the more 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 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.

...

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 comes under 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, 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. 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). However, 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."

34. Continuing its examination of the alleged breach of public policy, the Federal Supreme Court turned next to the discrimination complaint and reiterated the findings of the CAS in that regard, including its findings regarding the necessary, reasonable and proportionate nature of the contested regulations:

"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 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 they 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 review of proportionality, 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."

35. The Federal Supreme Court found as follows as regards the necessity of the DSD Regulations:

"9.8.2. That being said, it should be reiterated that the Panel made the following findings:

– 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 athletes with 46 XY DSD 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 female 46 XY DSD athletes have.

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."

36. As regards the proportionality of the contested regulations, the Federal Supreme Court found as follows:

"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 disregard 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 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, 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 [are] 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 thus confirmed that the aim of ensuring fair competition in sport was an important one capable of justifying serious interferences with athletes' rights. 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 had 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. However, 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 disregarded, 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 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 excluded 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 they were very intrusive and that being subjected to such an examination could be unwelcome and distressing even when conducted with due care and sensitivity. At the same time, it also noted the possibility that such examinations could in some cases yield the discovery of medical information capable of assisting athletes who were unaware of having a DSD to reach informed decisions about possible necessary medical treatments, and also of exonerating 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 unreasonable, that is, arbitrary, nor, *a fortiori*, in breach of public policy."

37. The Federal Supreme Court found as follows as regards the applicant's allegation that the contested regulations had breached her personality rights:

"10. Remaining within the context of her allegation of a breach of public policy, the appellant complained in addition that her personality rights had been violated on account of 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 may 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 of the CC does not automatically infringe 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).

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 female athletes' 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 yield the discovery of medical information capable of assisting athletes who were unaware of having a DSD to reach informed decisions about possible necessary medical treatments, and also of exonerating 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; but 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 unable to find, however, that the measure in issue impairs the very essence of that right, without there being any justification for it.

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 infringe public policy from the standpoint of the right to bodily integrity either.

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.

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 infringe public policy. In that connection, the Court reiterates, *mutatis mutandis*, its considerations in respect of the principle of the prohibition of discrimination.

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 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.

10.6. The complaints made by the appellant association in its written submissions in respect of a violation of athletes’ personality rights, even assuming that they are admissible, do not disclose an infringement of public policy either. In addition, in asserting incidentally that the taking of oral contraceptives could be contrary to a ‘Relevant Athlete’s’ moral and religious convictions, without complying with the strict requirement to provide due reasoning applicable in the present case, it is voicing abstract criticism in addition to relying on a ground which it would appear not to have raised before the CAS. This complaint is therefore inadmissible.

10.7. Ultimately, the arguments put forward by the appellants by no means disclose the existence of an infringement of public policy arising from a serious and clear violation of personality rights. It follows that this complaint must also be rejected.”

38. 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 female enough. 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 of 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 athletic 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."

39. Having examined the appeal within the limits imposed on its power of review by the case-law, the Federal Supreme Court concluded that the impugned award was not incompatible with substantive public policy within the meaning of section 190(2)(e) PILA, from whichever angle it was examined. It therefore dismissed the appeal.

40. In a decision published on 23 March 2023, World Athletics announced changes to the DSD Regulations with effect from 31 March 2023. The maximum permitted level of testosterone for all international competitions was reduced to 2.5 nmol/L (it had been 5 nmol/L) for a continuous period of twenty-four months (it had been twelve months).

RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

41. Article 190 of the Swiss Constitution of 18 April 1999 defines the law which must be applied by, *inter alia*, the Federal Supreme Court:

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

42. Under section 77(1) of the Federal Supreme Court Act of 17 June 2005 ("FSCA"), a civil-law appeal is admissible against decisions of arbitral tribunals, under the conditions provided for in section 190 of the Federal Law on Private International Law of 18 December 1987 ("PILA"; RS 291).

43. The provisions of the PILA relevant to the present case, as in force at the material time, read as follows:

Chapiter 12: International Arbitration
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."

44. 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) in conjunction with section 105(2) FSCA).

II. DOMESTIC PRACTICE

45. The Federal Supreme Court has held on many occasions that the list of grounds enumerated in section 190(2) PILA is exhaustive (Federal Supreme Court judgments 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 incompatible 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 unreasonable, 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 violated (ATF 144 III 120 at 5.1).

46. 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. According to the settled case-law of the Federal Supreme Court, an award is contrary to 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).

47. In the case brought by the Brazilian football player Francelino da Silva Matuzalem against FIFA, the Federal Supreme Court reiterated that, as a fundamental legal interest, human personality rights must 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, also protected all the basic prerogatives that were vital for personal development. Economic freedom, which guarantees the rights to freely choose one's profession and to free access to a (private) economic activity and to practise it (ATF 138 III 322 at 4.3.1) also comes under this protection.

48. 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 the legal assessment performed by the arbitrators within their sole discretion is compatible with the definition in the case-law of substantive public policy (judgment no. 4A_157/2017 of 14 December 2017, at 3.3.3).

49. 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 (judgment 4A_370/2007 of 21 February 2008, at 5.3.2).

50. 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 (judgment 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 contested award are well founded or not (judgment 4A_386/2010 of 18 July 2012, at 3.2).

51. 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 (judgment 4A_318/2018 of 4 March 2019, at 4.5.1). As the Federal Supreme Court observed in its judgment of 25 August 2020, this finding was all the more valid where, as in the present case, Swiss law had not even been applicable, as a supplementary body of law, in the arbitral proceedings.

III. INTERNATIONAL LAW AND PRACTICE

A. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine ("the Oviedo Convention")

52. The Oviedo Convention is the first legally binding international instrument on the protection of human dignity, rights and freedoms against the misuse of biological and medical advances. It was adopted on 4 April 1997 and came into force on 1 December 1999. There are currently twenty-nine States Parties. Switzerland ratified this instrument on 24 July 2008 (it came into force on 1 November 2008).

53. Articles 1 and 2 read as follows:

Article 1 – Purpose and object

"Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other

rights and fundamental freedoms with regard to the application of biology and medicine.

Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention."

Article 2 – Primacy of the human being

"The interests and welfare of the human being shall prevail over the sole interest of society or science."

B. Work of the Commissioner for Human Rights of the Council of Europe on human rights and intersex people

54. In an Issue paper entitled "Human Rights and Intersex People" (June 2015), the Commissioner for Human Rights of the Council of Europe observed, in particular, as follows (footnotes omitted):

"... The Commissioner's recommendations

...

4. Member states should facilitate the recognition of intersex individuals before the law through the expeditious provision of birth certificates, civil registration documents, identity papers, passports and other official personal documentation while respecting intersex persons' right to self-determination. Flexible procedures should be observed in assigning and reassigning sex/gender in official documents while also providing for the possibility of not choosing a specified male or female gender marker. Member states should consider the proportionality of requiring gender markers in official documents.

...

Chapter 1 – Introduction

1.1. Understanding intersex people

When a newborn is welcomed into this world, the same question is repeatedly posed: 'Is it a boy or a girl?' While at face value that question is innocent, it indicates just how fundamental sex and gender classifications are to our society, as well as the binary manner in which the human sexes are categorised. It also demonstrates our limited understanding of sex, given that the rigid line with which we separate the sexes into two mutually exclusive categories does not have a parallel in nature.

The sex assigned at birth will subsequently become a legal and a social fact for the newborn and will accompany them throughout the rest of their life. As they grow, go through adolescence, and become an adult, certain mannerisms, behaviours and interests will be expected to develop as 'normal' manifestations of the person's assigned sex. Additionally, that sex will be clearly designated on identification documents as an 'F' or an 'M', and in some countries with an even or odd digit in personal social security numbers. Gendered symbols will also indicate which sex-segregated facilities are available to that person, and which are not. Likewise, various forms and documents throughout people's lives will oblige them to tick F or M as part of the personal data set required before the provision of the service or entitlement in question.

While the importance conferred to sex as a classifier does not pose difficulties for most people, it does create serious problems for those who do not neatly fit within the 'female'/'male' dichotomy. This is because society does not usually recognise a person

without reference to their sex, and as a result, the ability of intersex and trans people to enjoy their human rights is especially impacted by the current normative confines of sex and gender.

It is important to note the distinction between intersex and trans people:

Intersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure.

Differences can include the number of sex chromosomes and patterns (e.g. XXY or XO), different tissue responses to sex hormones (e.g. having one ovary and one testis, or gonads that contain both ovarian and testicular tissue) or a different hormone balance. The genitalia of some intersex persons may not be clearly identifiable as male or female, and are hence easily identifiable as intersex at birth; however, for others the detection only occurs later in life during puberty or sometimes even later (e.g. due to the absence of menstruation or physical development that is not in line with the assigned sex). Although they do not usually face actual health problems due to their status, intersex people are routinely subjected to medical and surgical treatments – often while very young – to align their physical appearance with either of the binary sexes without their prior and fully informed consent.

Conversely, trans people externalise an innate gender identity which does not correspond with society's gender expectations in relation to their assigned sex, and often encounter various forms of discrimination, especially following their decision to undertake a process of transition to align their body, appearance and mannerisms with their gender identity.

In essence, as a result of surgeries or other sex-altering medical interventions, intersex people are denied their right to physical integrity as well as their ability to develop their own gender identity, as an a priori choice is made for them. Additionally, these interventions often disrupt their physical and psychological well-being, producing negative impacts with lifelong consequences, which include sterilisation, severe scarring, infections in the urinary tract, reduced or complete loss of sexual sensation, removal of natural hormones, dependency on medication, and a deep feeling of violation of their person.

...

1.2. Diversity of intersex persons

It is important not to lump all intersex people into one new collective category, such as a 'third sex', perhaps running in parallel to female and male. Such a classification would be incorrect due to the great diversity among intersex people and the fact that many intersex individuals do identify as women or men, while others identify as both or neither. In effect, intersex is an umbrella term including people with 'variations in sex characteristics', rather than a type *per se*. This diversity is not unique to intersex people, as – unsurprisingly – a range of variations in sexual anatomy is also found in women and men that meet the medical norms of their respective categories.

The term 'hermaphrodite' was widely used by medical practitioners during the 18th and 19th centuries before 'intersex' was coined as a scientific and medical term in the early 20th century. Before the current medical classification of the disorder of sex development (DSD) was developed, variations in intersex sex characteristics were

classified under different categories, the most common being: congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compositions such as XXY (Klinefelter Syndrome) or XO (Turner Syndrome). The so-called 'true hermaphrodites' referred to those who had a combination of ovaries and testes.

Importantly, variations in sex characteristics are different than sexual orientation and gender identity, even though the three layers interact in the formation of a person's personality. The Office of the United Nations High Commissioner for Human Rights' (OHCHR) *Free & Equal* campaign points out that: 'Intersex people experience the same range of sexual orientations and gender identities as non-intersex people.' In this vein, reference to intersex people as 'intersexuals' is wrong since intersex sex characteristics are unrelated to sexual orientation. Similarly, reference to 'intersex identity' is also incorrect as intersex is not necessarily a matter of identity or self-perception but mostly refers to physical aspects of the body.

..."

C. Resolution and report of the Parliamentary Assembly on the fight for a level playing field – ending discrimination against women in the world of sport

55. On 13 October 2022 the Parliamentary Assembly of the Council of Europe adopted Resolution 2465 (2022) on the fight for a level playing field – ending discrimination against women in the world of sport, the relevant paragraphs of which read as follows:

"3. Inequalities in pay, treatment, access and status between women and men are still common in both professional and non-professional sport. Women, in all their diversity, are poorly represented in decision-making bodies. Women have less access to sport because of gender inequalities in relation to resources, time and lack of infrastructure. Sexist comments and stereotyped images of female athletes, questioning their 'femininity', regularly appear in the media and on social networks. The Assembly condemns the hate speech and sexism directed at female athletes, including lesbian, bisexual, transgender, intersex (LBTI) athletes.

4. Female athletes must be recognised in all their diversity so that appropriate measures to prevent and combat discrimination can be implemented. Taking into account the intersectional dimension paves the way for a targeted response and proper policies. The Assembly calls to promote access to sport for all women and notes that discrimination against LBTI women has a negative impact on women in general. The Assembly condemns the use of sport as a means of controlling women's bodies.

...

7. In the light of these considerations, the Assembly calls on Council of Europe member and observer States, as well as on all States whose parliaments enjoy observer or partner for democracy status with the Assembly, to:

...

7.2 as regards combating gender-based discrimination and gender stereotypes:

...

7.2.4 prevent and combat sexism and gender stereotypes and all forms of gender-based discrimination, in particular by adopting legislation and codes of conduct and by organising awareness-raising campaigns, including at major sporting events;

...

7.2.6 recognise the fact that women from diverse backgrounds, LBTI women, women with disabilities, women from a migration background or with diverse religious affiliations are subjected to multiple discrimination;

7.2.7 abolish discriminatory policies against LBTI athletes and respect the human rights of female athletes in all their diversity;

7.2.8 ensure full and equal access to the practice of sport to all women and, to this end, allow transgender and intersex athletes to train and compete in sports competitions consistent with their gender identity;

7.2.9 prevent and combat harassment of LBTI athletes and prevent and combat lesbophobia, biphobia, transphobia and interphobia in sport;

...

8. The Assembly calls on sports federations to:

8.1 engage in the fight against gender-based violence and discrimination and take appropriate action against perpetrators;

8.2 support the practice of sport by women and girls in all their diversity and promote athletes' work-life balance;

8.3 ensure full and equal access to the practice of sport to all women and, to this end, allow transgender and intersex athletes to train and compete in sports competitions consistent with their gender identity;

8.4 promote the participation of women, in all their diversity, in the governing bodies of sports federations, notably through the adoption of quotas aimed at achieving 40% representation."

56. In her report on this resolution (Doc. 15611), Edite Estrela (Portugal) noted, *inter alia*, as follows (footnotes omitted):

4. Discrimination against LBTI women

"21. LBTI women suffer from invisible and multiple discrimination in the world of sport. Their families may not support them or may actively oppose them participating in sport. They may be rejected upon arrival in a team. Their performance is constantly questioned. The media peddle negative stereotypes about LBTI athletes, who are apt to be the target of hate speech, harassment and violence. Successful female athletes also have to contend with media reports and speculation about their sexual orientation. All this implies negative stereotypes against LBTI people.

...

24. I should emphasise that discrimination against LBTI women has a negative impact on all women, and that combating discrimination against LGBTI people in general is the business of everyone.

...

27. On 16 November 2021, the IOC published its Framework on fairness, inclusion and non-discrimination on the basis of gender identity and sex variations, in order to 'promote a safe and welcoming environment for everyone involved in elite-level competition, consistent with the principles enshrined in the Olympic Charter'. This framework should be transformed into a regulation by the national committees. The Framework affirms that human rights must be respected and recognises 'the interest of everyone ... to participate in fair competitions where no participant has an unfair and disproportionate advantage over the rest.'

28. In the name of fairness, a woman with so-called 'masculine' characteristics could be 'too strong' to compete with female athletes, whereas a man with so-called 'feminine' characteristics, if less successful than other male athletes, will not pose a problem or raise any issues relating to fairness because male athletes will be sure to win against that person. Male-to-female transgender athletes have been widely attacked in the media and their place in sport called into question.

29. Femininity tests are conducted regularly to prevent the risk of gender cheating. Such tests violate many internationally protected human rights, such as the right to privacy, dignity, health, non-discrimination and freedom from abuse, as well as labour rights. They should no longer be permitted.

30. The intersectional dimension should not be overlooked. According to Ilaria Todde (EuroCentralAsian Lesbian* Community), LBTI athletes of colour, of African descent for example, are particularly stigmatised. The captain of the Italian national volleyball team is a black, immigrant, lesbian woman. Her coming out has attracted spiteful comments, especially in the media.

31. The situation of intersex people is also a source of concern. According to Cianán Russell, there is a structural interphobia at play. Intersex people avoid doing sport for fear of inviting embarrassing questions about their bodies. They do not feel safe in the world of sport."

D. Report of the United Nations High Commissioner for Human Rights, "Intersection of race and gender discrimination in sport"

57. On 15 June 2020 the United Nations High Commissioner for Human Rights issued a report entitled "Intersection of race and gender discrimination in sport" (UN Doc. A/HRC/44/26). It gave an overview of relevant international human rights norms and standards, and the corresponding obligations of States and responsibilities of sporting bodies towards women and girl athletes. It also identified possible gaps in the protection of the human rights of women and girls in sport, and presented conclusions and recommendations aimed at enhancing such protection.

58. Chapter IV of the report, which focused on the impact of female eligibility regulations on the enjoyment of human rights, stated as follows (references and footnotes omitted):

"24. Women began participating in elite sport in the early twentieth century, but their inclusion was hindered by cultural ideologies about women's bodies, including concerns about the public exhibition of the female body, and exposure to physical exertion and risk. Because women's participation in sports was managed according to a strict two-sex categorical division, concern for who belonged in the women's category

arose almost immediately, giving rise to female eligibility criteria, which remain in place.

25. So-called sex testing (also called femininity testing or gender verification) began in the 1930s as ad hoc, suspicion-driven testing of women athletes based on their physical appearance. In the 1960s, this practice evolved into mandatory universal certification of all women athletes seeking to compete in international competitions governed by the International Association of Athletics Federations (IAAF) and/or IOC.

26. The processes, methods and criteria for determining sex have shifted over time, from physical inspections to biological sampling, at first for chromosomal karyotype and specific genes and more recently for endogenous testosterone levels. While most individuals have innate sex characteristics that fit typical expectations for female or male bodies, this is not true of everyone and no single marker is determinative of male or female sex.

27. In the 1990s, under pressure from its own policymakers, medical professional organizations and athletes, IAAF and then IOC stopped the practice of mandatory sex testing of all women and reverted to suspicion-driven testing that targeted women whose bodies were perceived as 'masculine'.

28. In 2011, IAAF (in consultation with IOC) released new regulations governing the eligibility of women with 'hyperandrogenism' to compete internationally. These regulations restricted the permissible amount of naturally occurring testosterone in female athletes and required them to undergo interventions to lower their testosterone to specified levels in order to compete. IOC has issued its own version of such regulations.

29. These regulations have come under scrutiny for their impact on athletes' rights to non-discrimination, as well as the continued use of a single biological marker for determining sex. Questions have also been raised regarding the selective use of scientific evidence, as the underlying claim that higher natural testosterone provides some women with a competitive advantage over other women, and the magnitude of any performance difference, remains unsettled in the scientific literature.

30. In 2015, the Court of Arbitration for Sport suspended the IAAF hyperandrogenism regulations on the basis that they were unjustifiably discriminatory: the evidence did not establish that 'hyperandrogenic' females enjoy a performance advantage over their peers sufficient to justify their exclusion from the female category of competition. The Court granted IAAF two years to provide additional evidence, failing which the regulations would become void.

31. In 2018, IAAF issued new eligibility regulations for the female classification, which apply only to women with particular variations in sex characteristics. These regulations set eligibility criteria which, inter alia, require women athletes with variations in sex characteristics to reduce their blood testosterone to a specified level so as to maintain eligibility to compete in the female category.

32. Various athletes from around the world have been affected by these sex testing regulations, including María José Martínez-Patiño (Spain) and Ewa Klobukowska (Poland). The most well-known women affected in the last decade, however, have been from sub-Saharan Africa and South Asia, including Santhi Soundarajan and Dutee Chand (India), Caster Semenya (South Africa), Annet Negesa (Uganda), Margaret Wambui (Kenya) and Francine Niyonsaba (Burundi). Reports of these and other athletes from the same regions undergoing investigations and/or medically unnecessary and potentially harmful procedures are being published and investigated, as well as challenged by the women themselves.

33. In a letter to IAAF regarding the 2018 regulations, three United Nations human rights experts raised concerns that the regulations effectively legitimize the surveillance of all women athletes based on stereotypes of femininity, adding that the regulations would in effect single out a group of women athletes, putting them at risk of repercussions far beyond the inability to compete while also subjecting them to shame, ridicule and intrusion upon their personal and private lives. Additional harms stemmed from the implication that the women need to be 'fixed' through medically unnecessary interventions with negative health impacts. As Caster Semenya has stated, 'I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being'.

34. The implementation of female eligibility regulations denies athletes with variations in sex characteristics an equal right to participate in sports and violates the right to non-discrimination more broadly. Current approaches to regulating female eligibility may have a negative impact on athletes' enjoyment of their human rights and may amount to violations of the following rights:

(a) The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, alongside other mandate holders, has emphasized that while the 2018 IAAF regulations do not force athletes to undergo any assessment or treatment, they leave athletes with a difficult choice: to undergo intrusive medically unnecessary assessments and/or interventions that have a negative impact on their health and well-being or to be banned from sport. Such treatments also entail the risk of harm to physical and bodily integrity that may amount to violations of the right to be free from cruel, inhuman or degrading treatment or punishment and even torture;

(b) The right to work and to the enjoyment of just and favourable conditions of work. Female eligibility regulations may be contrary to the right to work since, in practice, they may constitute a barrier limiting disproportionally equal access to work for athletes with variations in sex characteristics. Furthermore, they may require unnecessary physical alterations of one's body as a precondition to working as an athlete and continuous invasive monitoring as an ongoing condition of work;

(c) The right to the highest attainable standard of physical and mental health. The enjoyment of this right may be put at risk when athletes are pressured into making critical decisions based on concerns of sport eligibility rather than health and well-being. Female eligibility regulations may push some athletes to undergo investigations, tests and interventions, for example to lower testosterone levels, which may have negative physical and mental health impacts. The panel of the Court of Arbitration for Sport reviewing Ms. Semenya's case agreed that the requirement to undergo intimate examinations to determine the extent of her 'virilization" was 'highly intrusive and could result in psychological harm'. The regulations also create the risk of unethical medical practice, particularly when the informed consent of the person concerned is not required, and violations of the general prohibition on medically unnecessary procedures. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has stressed that informed consent to any medical intervention goes beyond mere acceptance and must be voluntary and sufficiently informed in order to protect human dignity and autonomy. Particular care is required where there are power imbalances resulting from inequalities in knowledge, experience and trust between health-care providers and individuals, particularly those from vulnerable groups. In sport, such power imbalances are compounded by athletes' dependency on the sports federations requiring such medical interventions and the frequent absence of adequate and holistic support during the decision-making process;

(d) The right to sexual and reproductive health. This right may be put particularly at risk by unnecessary medical interventions that affect hormones and reproductive anatomy and capacity;

(e) The right of everyone to be free from arbitrary interference with their privacy. This right is at risk of being violated when women's names and personal details are made public and/or are shared in the media. History demonstrates that, because these regulations are applied in hundreds of countries, among many actors, it is impossible to guarantee privacy. The panel of the Court of Arbitration for Sport has acknowledged that foreseeable circumstances (such as the absence of certain athletes in restricted events in international competitions for which they have qualified in national championships) 'would be likely to render confidentiality meaningless in some cases' [(*Mokgadi Caster Semenya v. International Association of Athletics Federations* et *Athletics South Africa v. International Association of Athletics Federations*)];

(f) The right to respect for the dignity, bodily integrity and bodily autonomy of the person. This right includes the ability to make fundamental decisions about one's life and health. Meaningful decision-making relies not just on formal legal capacity but on the material conditions, social support and freedom from harm or coercion. Female eligibility regulations may therefore take away the ability of athletes to control their bodies and the trajectory of their sporting and post-sporting life.

35. States' human rights obligations include the application of the principle of due diligence enshrined in multiple human rights treaties, pursuant to which they must prevent, investigate and redress human rights abuses committed by others.

..."

E. Relevant World Athletics regulations

1. Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) – "the DSD Regulations"

59. Part 1 (Introduction) of the DSD Regulations, issued by the IAAF (now World Athletics) on 23 April 2018, provided as follows at the material time:

"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.

..."

60. The DSD Regulations also set out the special eligibility requirements a "Relevant Athlete" had to fulfil in order to compete in a "Restricted Event" in the female category at an international competition or to be eligible to set a world record at a competition that was not an international competition.

61. In accordance with regulation 2.2 (a) of the DSD Regulations, a Relevant Athlete was an athlete who met the following three criteria:

(i) she had one of the DSDs listed in that regulation;

(ii) she had circulating testosterone levels in blood of 5 nanomoles per litre (nmol/L) or above; and

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

The benefit of any doubt that the three criteria had been satisfied was to be resolved in favour of the athlete (paragraph 23 of Appendix 3 of the DSD Regulations).

62. A Relevant Athlete who wished to take part, at an international competition, in a Restricted Event within the meaning of regulation 2.2 (b) of the DSD Regulations, that is, 400 m, 400 m hurdles, 800 m, 1,500 m and 1 mile (1.6 km) races, and all the other races over distances between 400 m and 1 mile, had to meet each of the conditions (the Eligibility Conditions) provided by regulation 2.3:

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

(b) 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); and

(c) 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.

63. A Relevant Athlete was solely responsible for continuing to comply with the Eligibility Conditions for as long as she wished to compete in the female classification in a Restricted Event at international competitions (regulation 3.11). There were no other special conditions that she had to satisfy, such as surgical anatomical changes (regulation 2.4), and she could not be forced to undergo any assessment and/or treatment (regulation 2.5).

64. In accordance with regulation 2.6, a Relevant Athlete who did not meet the Eligibility Conditions under the DSD Regulations was 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.

65. Part 3 of the DSD Regulations set out the procedure for assessing whether a person was a Relevant Athlete. Part 4 dealt with the issue of confidentiality. It provided that all the assessments conducted and the data collected under the Regulations were to be dealt with in strict confidence at all times (regulation 4.1). In addition, the IAAF would not comment publicly on the specific facts of a case except in response to public comments made by the athlete or her representatives (regulation 4.2).

66. Lastly, part 5 of the DSD Regulations contained provisions relating to dispute resolution and, in particular, an arbitration clause providing for the jurisdiction of the CAS:

> "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."

2. Eligibility Regulations for Transgender Athletes (2019)

67. The regulations described below were in force at the material time but were annulled/revoked from 31 March 2023 by a decision of World Athletics. In accordance with the amendments to them, female transgender athletes assigned male at birth who underwent gender-affirming treatment after puberty are now excluded from competing in international competitions.

68. In order to determine whether a person is eligible to compete in the female or male category, a distinction must first be made between legal gender recognition and eligibility criteria (Matthieu Perruchoud, *Le droit à l'égalité des chances dans le sport – Concept, mise en œuvre et concrétisation*, Helbing Lichtenhahn, 2020, p. 224). Initially, a male-to-female transgender person will be classified in the female category (ibid.). Subsequently, each sports organisation will set out the eligibility criteria, in particular, the maximum permitted level of testosterone, determining whether female athletes can compete in competitions or not (World Athletics Eligibility Regulations for Transgender Athletes (2019), regulations 3.2.2 and 3.2.3).

69. A distinction should be made between two scenarios in relation to eligibility criteria: whether the athlete underwent gender-reassignment treatment before or after puberty (Perruchoud, cited above, p. 224). Undergoing the treatment before puberty does not lead to any advantage necessitating the putting in place of special conditions for the athlete's participation in competitions (ibid.). The only case which raises an issue is

that of male-to-female transgender athletes who went through puberty before undergoing the treatment (ibid.).

70. World Athletics has defined three conditions that transgender athletes must meet in order to be able to take part in the female category at international competitions:

– the athlete must provide a written and signed declaration that her gender identity is female:

– she must demonstrate a concentration of testosterone of less than 5 nmol/L continuously for a period of at least twelve months; and

– she must keep her serum testosterone concentration below 5 nmol/L for so long as she wishes to maintain her eligibility to compete in the female category of competition (World Athletics Eligibility Regulations for Transgender Athletes (2019), regulations 3.2.1, 3.2.2 and 3.2.3).

F. Relevant CAS or domestic court cases

1. The Dutee Chand *case (CAS)*

71. Dutee Chand is an Indian athlete who won gold medals in the 200 m and 4 x 400 m races at the Asian Junior Track and Field Championships. In the light of her increased level of testosterone, the IAAF revoked her eligibility to participate in the female category of competition. The athlete lodged a request for arbitration with the CAS against this decision. In its award, the CAS found, in the first place, that the IAAF regulations were discriminatory (award of 24 July 2015 in *Dutee Chand v. Athletics Federation of India (AFI) and IAAF*, CAS 2014/A/3759). It followed that, in order for the regulations not to be declared void, it had to be established that they were necessary, reasonable and proportionate in respect of the equality of opportunity (ibid., paragraph 450).

72. After examining the various scientific opinions and expert reports, the CAS delivered an interim award in which it concluded that it had not been sufficiently proven that an athlete with a testosterone level above the maximum permitted by the IAAF enjoyed such an unfair performance advantage over her competitors that it was necessary to exclude her from competing in the female category. It therefore found that the link between an increased testosterone level and increased athletic performance had not been sufficiently established (ibid., paragraphs 522, 531, 532, 537 and 547).

73. Accordingly, the CAS suspended the IAAF regulations for a maximum period of two years during which the IAAF had to provide evidence concerning the magnitude of the performance advantage that hyperandrogenic females enjoyed over other females as a result of their testosterone level (ibid., paragraph 548, and point 2 of the operative provisions), in the absence of which the regulations would be declared void (ibid., paragraph 548). At the beginning of 2018, the CAS gave the IAAF a six-month time-limit to issue its new regulations.

2. *The* Renée Richards *case (New York County Court, United States of America, 16 August 1977)*

74. Renée Richards (assigned male at birth), a tennis player, underwent feminising gender-affirming surgery in 1975. In 1979, at the age of 45, she got through to the semi-final of the US Open. Subsequently, the United States Tennis Association (USTA), the United States Open Committee (USOC) and the Women's Tennis Association (WTA) banned her from playing in the female category of the US Open and required her to submit to a sex verification test (the Barr body test) to determine whether she was female.

75. Ms Richards challenged this ban before the New York County Court (Supreme Court, Special Term, New York County), which held that she did not have an unfair advantage over the other female tennis players (*Renée Richards v. The United States Tennis Association (USTA)*, 93 Misc.2d 713 (1977)). It found, in particular, that the requirement to submit to a sex verification test had been "grossly unfair, discriminatory and inequitable, and violative of [Ms Richards'] rights under the Human Rights Law of this State ..." (ibid., p. 721).

76. The court also held that the sole purpose of the requirement had been to prevent Ms Richards from playing in tournaments in the female category (ibid.). As regards any possible justification for the discriminatory treatment sustained by Ms Richards, the court observed that "the only justification for using a sex determination test in athletic competition [was] to prevent fraud, i.e., men masquerading as women, competing against women" (ibid., pp. 721-22). It concluded, in that context, that sex verification tests were not the only relevant criterion and that other factors should be taken into account in the determination of whether transgender athletes were eligible to participate in the female category of competition (ibid., p. 722).

THE LAW

I. PRELIMINARY OBSERVATIONS ON THE SCOPE OF THE CASE AND THE COURT'S APPROACH

77. The Court is mindful of the complexity and novel character of the case before it. That being so, it considers it appropriate to make clear at the outset the scope of the dispute and the approach it will adopt in the present case.

78. The Court reiterates that the applicant, a professional athlete of South African nationality who resides in South Africa, challenged the validity of the DSD Regulations before the Court of Arbitration for Sport (CAS). She subsequently lodged a civil-law appeal with the Federal Supreme Court under section(190)(2) of the Federal Act on Private International Law ("PILA") seeking to have the CAS award of 30 April 2019 set aside. In a judgment of 25 August 2020 the Federal Supreme Court dismissed her appeal.

79. Consequently, the Court observes that the applicant has challenged the compatibility with various provisions of the Convention of a set of regulations that were issued by the IAAF and subsequently endorsed by the CAS and the Swiss Federal Supreme Court.

80. The Court observes that Switzerland played no part in the adoption of the DSD Regulations, which were issued by the IAAF, a Monegasque private-law association. The Court will therefore focus its examination on the question whether the review carried out by the CAS and the Federal Supreme Court satisfied the requirements of the Convention.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION THAT THE COURT LACKS JURISDICTION *RATIONE PERSONAE* AND *RATIONE LOCI*

A. The parties' submissions

1. The Government

81. The Government observed that the CAS, as the supreme court in the sports domain, heard disputes between parties from all over the world since high-level international sports competitions were held in various countries, were organised by associations with their seats in various States, and were often open to athletes from around the world. The disputes submitted to the CAS, a private-law organisation, therefore concerned private parties (sports federations, athletes, private companies) which very often had no link with Switzerland (with the exception of the seat of the CAS), sometimes not even with a member State of the Council of Europe.

82. The Government noted that, in the present case, an athlete residing in South Africa and her national federation, a South African private-law association, had challenged the validity of regulations issued by the IAAF, a Monegasque private-law association, before the CAS, a non-State body. They pointed out that, in the proceedings before it, the CAS had not examined the validity of the contested regulations by reference to Swiss law, applying instead the IAAF's Constitution and Rules, the Olympic Charter and, subsidiarily, Monegasque law.

83. They argued that in this context, in conformity with the relevant domestic provisions and the practice followed thereunder, the role of the Federal Supreme Court when examining a civil-law appeal against an international arbitral award was not to examine the case with a full power of review, like a court of appeal, but simply to examine whether or not, within the limits of the legally admissible arguments against the award, that is, those listed in section 190(2) PILA, the complaints against the award were well founded.

84. In the Government's submission, the Federal Supreme Court was therefore unable to rule on the substance of the contested award but only to

examine, on the basis of the findings in that award, whether or not the conclusion arrived at was at odds with the essential and broadly recognised values which, according to the understanding prevailing in Switzerland, had to underpin every legal system. They argued that, when examining the applicant's appeal, the Federal Supreme Court had disposed of only a very limited power of review, as regards both the facts and the substantive review of the award.

85. The Government argued that the violations alleged by the applicant under Articles 3, 8 and 14 of the Convention related to a set of facts which had no territorial link with Switzerland. In their view, the Swiss authorities had had no influence over the activities of the parties in question, in particular, the IAAF. It followed that, in accordance with the principles set out above, the complaints in issue did not fall within Switzerland's jurisdiction within the meaning of Article 1 of the Convention.

86. The Government also contended that, if Switzerland were to be held accountable for the implementation of the entirety of the substantive Convention guarantees in cases of this kind, it would only be able to attempt to fulfil its obligations – in an incomplete fashion – by establishing a mechanism for a domestic court to re-examine fully the CAS's arbitral awards. In their view, such a system would not only run counter to the provisions of the PILA, but would also call into question the very concept of arbitration and the nature of the system in place in the sports domain, which had been devised precisely because, with respect to the international nature of the parties and events involved, domestic courts did not provide an appropriate forum for that context.

87. They argued that calling the system into question in such a way could lead to the seat of the CAS being relocated to a State not signatory to the Convention. They pointed out that the Court had held in its judgment in *Mutu and Pechstein v. Switzerland* (nos. 40575/10 and 67474/10, § 99, 2 October 2018) that it could not comment on such a possibility in the abstract, and that, if such an eventuality arose, it would be the Court's task to decide on each individual case when examining applications that had been lodged with it following decisions by the ordinary courts of the States Parties to the Convention to enforce CAS awards in the respective legal orders of those States. The Government submitted that this represented a misunderstanding on the Court's part because, for the most part, CAS awards did not require recognition or enforcement proceedings in order to have effect in respect of athletes. They observed that in the present case the DSD Regulations had applied to the applicant without any need for a State authority to intervene, and that any dispute in respect of their application had been within the exclusive competence of the CAS (regulation 5 of the DSD Regulations). They added that, were the system to be called into question, there would be a risk that the seat of the CAS would be relocated outside Europe and that, in that case, the persons concerned would also lose the benefit of the guarantees

under Article 6 § 1 of the Convention, which currently applied to proceedings before the CAS.

88. Having regard to all the foregoing considerations, the Government submitted that the complaints based on Articles 3, 8 and 14 of the Conventions did not fall within Switzerland's jurisdiction within the meaning of Article 1 of the Convention and should therefore be declared inadmissible as being incompatible *ratione personae* and *ratione loci* with the provisions of the Convention. In their view, the same was true of the complaint under Article 13 since this provision applied only where an applicant had an arguable claim of a violation of another provision of the Convention.

89. The Government also argued that, to their knowledge, the Court had so far only ever examined international arbitration cases from the standpoint of Article 6 of the Convention, in which context it could be considered that the fact that the proceedings had been held in Switzerland established a jurisdictional link within the meaning of Article 1 of the Convention.

2. The applicant

90. The applicant submitted that the Court had jurisdiction *ratione personae* under Article 1 of the Convention. She referred to the Court's conclusions in *Platini v. Switzerland* ((dec.), no. 526/18, § 37, 11 March 2020) and, *mutatis mutandis*, *Mutu and Pechstein* (cited above, §§ 66-67) according to which Swiss law gave effect to CAS awards and conferred jurisdiction on the Federal Supreme Court to examine their validity. In her view, in dismissing her appeal, the Federal Supreme Court had given the arbitral award of 30 April 2019 force of law in the Swiss legal order.

91. She argued that the fact that her place of residence was in South Africa had no relevance in that connection and that, since the facts of the case came within the jurisdiction of Switzerland under Article 1 of the Convention, it had to be held accountable, under the Convention, for its failure to honour its positive obligations.

92. In this regard, she also submitted that it was Switzerland which had made the decision to develop its position as an attractive and effective venue for arbitration. She argued that the only remedy available to her to have the DSD Regulations examined had been compulsory arbitral proceedings before the CAS, followed by an appeal to the Federal Supreme Court to review the validity of the award. It followed from this system that a sufficient jurisdictional link between her case and Switzerland existed for Article 1 of the Convention to be engaged and to serve as a basis for the positive obligations which Articles 3, 8 and 13 of the Convention imposed on that State.

93. Furthermore, she submitted that the distinction the respondent State had made between the complaints under Article 6 of the Convention, in respect of which it seemed to recognise that the Court had jurisdiction *ratione personae*, and those under Articles 3, 8 and 14, in respect of which it rejected

such jurisdiction, was unfounded. In her view, the fact that the Court had examined the vast majority of sports arbitration cases under Article 6 did not mean that it should restrict its examination on the merits to that provision.

94. The applicant also submitted that, even though there was an international dimension to her case, this did not mean that there was also an extraterritorial aspect in terms of "jurisdiction" within the meaning of Article 1 of the Convention. She argued that in any event the respondent State had exercised *de facto* and *de jure* control over the alleged acts and omissions, that is, those that the Federal Supreme Court had committed when examining her appeal against the CAS award in proceedings which had been compulsory and had represented the only remedy available to her.

95. In the applicant's view, it was hard to understand, and even contradictory, that the Government had based their argument that her case did not have a sufficient link with Switzerland on the fact that she resided in South Africa when, by virtue of the law itself, in order for the Federal Supreme Court to be able to examine an international arbitration case, at the time of signing the arbitration agreement, at least one of the parties to it had to neither be domiciled nor have their habitual residence in Switzerland. That argument was hardly compatible with Switzerland's choice to institutionalise the international arbitration system, to integrate it into its own legal order and to have arbitral awards validated by its own highest court.

96. The applicant also observed that the Federal Supreme Court itself had expressed the view that the safeguards provided by the possibility of appealing against arbitral awards before the highest domestic court constituted a certain counterweight to the clauses imposing compulsory arbitration in the sports domain.

97. In view of the above considerations, the applicant submitted that the Court had jurisdiction *ratione personae* and *ratione loci* to examine all the complaints raised in her application concerning the acts and omissions of the CAS, as endorsed by the Federal Supreme Court. For these reasons, she did not necessarily see an extraterritorial aspect to the present case.

98. The applicant also presented, in the alternative, other detailed submissions in support of her argument that the Court had jurisdiction to deal with the present case, even assuming that an extraterritorial aspect were to exist. Those submissions were included in the observations she submitted to the Court, but for practical reasons are not reproduced here.

B. The Court's assessment

1. Applicable principles

99. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

100. As provided by this Article, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction" (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 130, ECHR 2011; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII; and *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161). "Jurisdiction" under Article 1 is a threshold criterion for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of infringement of rights and freedoms set forth in the Convention (see *Al-Skeini and Others*, cited above, § 130, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII).

101. The concept of jurisdiction must be considered to reflect the term's meaning in public international law (see *Assanidze v. Georgia* [GC], no. 71503/01, § 137, ECHR 2004-II; *Gentilhomme and Others v. France*, nos. 48205/99 and 2 others, § 20, 14 May 2002; and *Banković and Others*, cited above, §§ 59-61), such that a State's jurisdiction is primarily territorial (see *Al-Skeini and Others*, § 131, and *Banković and Others*, § 59, both cited above) and is presumed to be exercised normally throughout the State's territory (see *Ilaşcu and Others*, cited above, § 312).

102. In accordance with Article 31 § 1 of the Vienna Convention on the Law of Treaties of 1969, the Court must interpret the words "within their jurisdiction" by ascertaining the ordinary meaning to be given to the phrase in its context and in the light of the object and purpose of the Convention (see *M.N. and Others v. Belgium* (dec.) [GC], no. 3599/18, § 99, 5 March 2020).

2. Application of those principles to the instant case

103. The Court would begin by observing that, pursuant to Article 190 of the Swiss Federal Constitution, the Federal Supreme Court is under a duty to apply international law (see paragraph 41 above), including the Convention, even in very specific proceedings such as those under examination in the present case. In addition, it is the practice of the Federal Supreme Court to apply the Convention indirectly in cases of this type (see paragraph 49 above).

104. The Court reiterates that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists a "jurisdictional link" between that person and the State, and that this is the case even if there is an extraterritorial aspect to the events which gave rise to the action (see *Markovic and Others v. Italy* [GC], no. 1398/03, §§ 49-55, ECHR 2006-XIV, concerning Article 6 of the Convention; see also, similarly, *Arlewin v. Sweden*, no. 22302/10, §§ 65-74, 1 March 2016, and *Naït-Liman v. Switzerland* [GC], no. 51357/07, §§ 96-102, 15 March 2018, in which the Court implicitly accepted that it had jurisdiction). In the present case, the civil-law appeal that the applicant lodged with the Federal Supreme Court

against the CAS award therefore triggered, as a matter of principle, Switzerland's jurisdiction within the meaning of Article 1 of the Convention.

105. These findings have been confirmed by the Court in other cases concerning, like the present one, sports arbitration. The Court notes that in *Mutu and Pechstein* (cited above), it examined several complaints under Article 6 § 1. In that case, it found that the CAS was neither a domestic court nor another institution of Swiss public law, but an entity emanating from the International Council of Arbitration for Sport ("the ICAS"), a private-law foundation (ibid., §§ 65 and 149), which, as such, did not apply the Convention directly (ibid., §§ 101-02). The Court also held that, in dismissing the applicants' appeals, the Federal Supreme Court had given the relevant awards force of law in the Swiss legal order (ibid., § 66). It therefore discerned, in the dismissal by the Federal Supreme Court of the appeals against the CAS awards, an endorsement, at least a tacit one, of the acts of private individuals which violated the Convention rights of other individuals within the State's jurisdiction (ibid., § 64). As a result, the Court held that it had jurisdiction *ratione personae* to examine the applicants' complaints as to the acts and omissions of the CAS that had been validated by the Federal Supreme Court.

106. In the *Platini* decision (cited above), the applicant, who was a high-level official of FIFA at the time, submitted that the sanction imposed on him had breached his freedom to practise a professional activity, as protected by Article 8 of the Convention, in that it prohibited him from any football-related activity for a period of four years. The Court held that the sanction had been imposed by FIFA, a Swiss private-law association, and that the proceedings had been conducted before FIFA committees, and subsequently the CAS. It also observed that the Federal Supreme Court had rejected the applicant's appeal, thereby giving the CAS award force of law in the Swiss legal order (ibid., § 37). The Court concluded that the impugned acts or omissions were thus capable of engaging the responsibility of the respondent State under the Convention and that it had jurisdiction *ratione personae* (ibid., § 38).

107. The Court sees no reason to depart from those findings in the present case. The fact that the IAAF is a Monegasque private-law association with its seat in Monaco, and not a Swiss private-law association, as was the case for FIFA and the ISU (International Skating Union) in *Mutu and Pechstein* (cited above), makes no difference as regards the Court's jurisdiction *ratione personae* and *ratione loci*, especially since the Court's examination will focus on the proceedings before the CAS and the Federal Supreme Court (see paragraph 80 above).

108. As regards the Government's argument that the Federal Supreme Court had only a limited power of review in proceedings of the type under examination, the Court acknowledges that the review carried out by that court is limited to examining whether the contested arbitral award is incompatible with public policy, and that the Federal Supreme Court interprets that concept

narrowly. However, the Court observes that it is clear from the Federal Supreme Court's case-law that the concept of public policy, in the substantive sense of that term, encompasses, among other things, the prohibition of discrimination and respect for human dignity (ATF 144 III 120, at 5.1; see also paragraph 46 above), and also, to a certain degree, the right to freely practise a profession as a limb of personality rights (ATF 138 II 322, at 4.3.1; see also paragraph 47 above). The Court notes that those are the rights which lie at the heart of the present case. The Federal Supreme Court certainly examined the applicant's complaints before it from the standpoint of discrimination, personality rights and human dignity. It is not therefore possible to argue that those complaints cannot be the subject of examination by this Court (see, *mutatis mutandis*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, §§ 43-45, ECHR 2009).

109. The Court considers it useful to distinguish the present case from that of *Drozd and Janousek v. France and Spain* (26 June 1992, Series A no. 240), which concerned the lack of a fair trial before the Andorran Tribunal de Corts and the unlawful detention of the applicants in France following their conviction. In that case, the Court had to determine whether it had jurisdiction *ratione personae*. Owing, in particular, to the *sui generis* nature of the Principality of Andorra at the material time, the question to be decided was whether the administration of justice in Andorra was under the control of France and Spain (ibid., § 91). The Court found that the judgments of the Andorran courts were not subject to supervision by France and Spain and that it therefore lacked jurisdiction *ratione personae* (ibid., §§ 96-97). In the present case, on the other hand, CAS awards are, by contrast, subject to supervision by Switzerland, since they can be appealed against in the Federal Supreme Court.

110. Furthermore, in the cases of *Galić v. the Netherlands* ((dec.), no. 22617/07, § 46, 9 June 2009) and *Blagojević v. the Netherlands* ((dec.), no. 49032/07, § 46, 9 June 2009), which concerned alleged violations of the right to a fair trial before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the absence of remedies against the decisions of the ICTY, the Court found that the sole fact that the ICTY, an international organisation enjoying certain immunities *vis-à-vis* the host State, had its seat and premises in the Netherlands was not a sufficient ground on which to attribute the matters complained of to that State. In the present case, however, the CAS is not an international organisation (in the "intergovernmental" sense), but an entity emanating from the ICAS, that is, from a Swiss private-law foundation. In addition, in the above-cited cases, no remedy lay before a Dutch court, whereas in the present case a limited review by the highest national court was expressly provided for in Swiss law.

111. Lastly, one final argument flows from the very specific context of the case and from the object and purpose of the Convention. These two factors must be taken into account by the Court in interpreting Article 1 of the

Convention (see *M.N. and Others v. Belgium*, cited above, § 99). In the case concerning Claudia Pechstein, the Court observed that she had had no choice other than to accept the arbitration clause and that, therefore, it had to be regarded as compulsory arbitration, in that she had had no option but to refer her dispute to the arbitral tribunal (see *Mutu and Pechstein*, cited above, § 115). However, the Federal Supreme Court itself has expressed the view that the safeguards provided by the possibility of appealing against arbitral awards before the highest domestic court constitute a certain counterweight to clauses imposing compulsory arbitration in the sports domain. In other words, the Court notes that, in the context of compulsory arbitration which deprived the applicant of the possibility of applying to the ordinary courts in her own country or elsewhere, the only remedy available to her was that before the CAS, followed by an appeal to the Federal Supreme Court. No other remedy, in particular an appeal to other Swiss courts or to the Monegasque courts, was available to her. This has not in fact been disputed by the Government. The Court does not deny that a "centralised" system for handling disputes in the domain of sport has its advantages, in particular, in order to guarantee a certain coherence and consistency in the case-law, internationally, through the CAS. The fact remains, nevertheless, 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. Such a conclusion would hardly be compatible with the idea of the Convention as a constitutional instrument of European public order, of which the States Parties are required to guarantee at least the foundations to all the individuals under their jurisdiction by virtue of Article 1 (see, to this effect, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 145, 21 June 2016, and the cases cited therein).

3. Conclusion

112. The Court is mindful that the applicant has 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 are non-State actors. However, to the extent that the findings of the CAS were reviewed by the Federal Supreme Court with regard to the applicant's complaints, it concludes that, in the light of the above-cited case-law, the applicant's case falls within the "jurisdiction" of Switzerland for the purposes of Article 1 of the Convention. This is so even though the Swiss Federal Supreme Court did not explicitly refer to the provisions of the Convention and only had a limited power of review, being confined to the question whether the award under appeal was compatible with Swiss public policy (section 190(2)(e) PILA; see paragraph 43 above).

113. Accordingly, the Court dismisses the preliminary objection that it lacks jurisdiction *ratione personae* and *ratione loci* to examine the present application.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

114. The applicant submitted that she had been subjected to discriminatory treatment on account of her DSD, which resulted in her having a naturally higher level of testosterone. She relied on Article 14 of the Convention in conjunction with Articles 8 and 3, which provide as follows:

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

115. The Government contested that argument.

A. Admissibility

116. The Government submitted that this complaint was manifestly ill-founded.

117. The applicant disagreed with the Government.

118. The Court observes that the Government did not dispute that the applicant's complaint fell within the scope of Article 14 of the Convention. It reiterates, however, that any matter which goes to the Court's jurisdiction is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case. It follows that the Court is obliged to examine the question of its jurisdiction *ratione materiae* at every stage of the proceedings (see *Blečić v. Croatia* [GC], no. 59532/00, § 67, ECHR 2006-III, and *Tănase v. Moldova* [GC], no. 7/08, § 131, ECHR 2010).

1. Applicability of Article 14 in conjunction with Article 8

(a) General principles

119. According to the consistent case-law of the Court, Article 14 of the Convention only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among other authorities, *Beeler v. Switzerland* [GC], no. 78630/12, § 47, 11 October 2022; *Şahin v. Germany* [GC], no. 30943/96, § 85, ECHR 2003-VIII; and *Fábián v. Hungary* [GC], no. 78117/13, § 112, 5 September 2017).

120. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient, for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see, among many other authorities, *Beeler*, cited above, § 48; *Petrovic v. Austria*, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II; and *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 39, ECHR 2005-X).

(b) Rights capable of being engaged in the present case

121. In support of her complaint under Article 14, the applicant alleged that her rights under Articles 3 and 8 of the Convention had been breached. The Court must therefore establish whether the facts of the case fall within the ambit of at least one of those two Articles. It considers it appropriate to examine the complaint under Article 14 exclusively from the standpoint of Article 8.

122. As to the applicability of Article 8 in the present case, the Court must examine whether the applicant's complaint falls within the notion of "private life". The Court has already had occasion to observe that this is a broad term which is not susceptible to exhaustive definition. It also covers the right to personal development and to establish and develop relationships with other human beings and the outside world (see, for example, *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I). The Court considers that the applicant may rely on several aspects of "private life".

123. The applicant submitted that the contested regulations had impaired the core rights attracting the protection of Article 8, in particular, because the CAS and the Federal Supreme Court had concluded that her characteristics were "not sufficiently female" for the purposes of the sports classification. In that connection, the Court notes that an individual's sex characteristics fall within the scope of his or her "private life" within the meaning of Article 8. In so far as the applicant was required to take hormone treatment in order not to be excluded from certain athletics competitions in the female category because of her increased testosterone level caused by DSD, her personal

identity was directly affected (see, *mutatis mutandis*, *X and Y v. Romania*, nos. 2145/16 and 20607/16, § 106, 19 January 2021; *A.P., Garçon and Nicot v. France*, nos. 79885/12 and 2 others, §§ 92-94, 6 April 2017; and *X v. the former Yugoslav Republic of Macedonia*, no. 29683/16, § 38, 17 January 2019).

124. The Court has further held that the concept of personal autonomy is an important principle underlying the interpretation of the Article 8 guarantees (see *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13, § 61, 11 December 2018; *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III; and *Haas v. Switzerland*, no. 31322/07, § 51, ECHR 2011). In the present case, it notes that the Federal Supreme Court concluded that female 46 XY DSD athletes were not under an obligation to take oral contraceptives, since they could choose not to submit to this "treatment". The Court considers that this conclusion nevertheless demonstrates the dilemma with which the applicant was faced (see, *mutatis mutandis*, *Tănase*, cited above, § 108; *Kara-Murza v. Russia*, no. 2513/14, §§ 49-50, 4 October 2022; and *Belli and Arquier-Martinez*, cited above, §§ 66-67): either she took the medication, which was likely to cause her physical and mental harm, in order to decrease her testosterone level and to be able to practise her profession, or she refused to take it, with the result that she would have to renounce her right to compete in events of her choosing, and therefore her right to practise her profession. Given that personal autonomy is protected by Article 8 of the Convention and that the choice with which the applicant was faced necessarily affected rights falling within the scope of Article 8 – namely, on the one hand, her right to practise her profession and, on the other, her right to protection from physical and mental harm – the facts of the present case fall within the ambit of Article 8.

125. Moreover, the protection of Article 8 may encompass activities of a professional nature (see *Denisov v. Ukraine* [GC], no. 76639/11, § 115, 25 September 2018; *Fernández Martínez v. Spain* [GC], no. 56030/07, § 110, ECHR 2014 (extracts); *Bărbulescu v. Romania* [GC], no. 61496/08, § 71, 5 September 2017; *Antović and Mirković v. Montenegro*, no. 70838/13, § 42, 28 November 2017; and *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 88, 17 October 2019). In the present case, the Court considers that the applicant has been seriously hindered in the practice of her profession, having been prevented by the DSD Regulations from participating in the international competitions in which she was the most successful. To the extent that those regulations had their own rationale in relation to the sex (particularly genetic) characteristics of athletes, the Court considers that the "grounds" for the adoption of the regulations in issue come within the scope of the applicant's private life. Furthermore, it considers that the DSD Regulations are also likely to have major "consequences" for the enjoyment by the applicant of her right to respect for her private life, in

particular, her reputation, private sphere and dignity (see, *mutatis mutandis*, *Denisov*, cited above, §§ 103-06 and 115).

126. Finally, and in support of its findings, the Court considers it appropriate to refer to the conclusions in the report of the United Nations High Commissioner for Human Rights entitled "Intersection of race and gender discrimination in sport" (UN Doc. A/HRC/44/26), issued on 15 June 2020 (see paragraph 57 above). The High Commissioner stated in the report that certain regulations in force governing the criteria women had to fulfil to participate in the female category could have adverse effects on, among others, the right to work and to the enjoyment of just and favourable conditions of work, the right to the highest attainable standard of physical and mental health, the right of everyone to be free from arbitrary interference with their privacy, and the right to respect for the dignity, bodily integrity and bodily autonomy of the person (chapter IV, § 34).

127. Having regard to the foregoing, the applicant may rely on Article 8 under its "private life" head in order for Article 14 to be engaged. The latter provision is therefore applicable.

2. Conclusion as to admissibility

128. Noting that this complaint is neither manifestly ill-founded, nor inadmissible on any other grounds within the meaning of Article 35 of the Convention, the Court declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

129. The applicant alleged that the application to her of the DSD Regulations had discriminated against her mainly on the grounds of her status as an intersex person, by targeting certain biological traits, including an elevated testosterone level which in her case was caused by her DSD. She submitted that she had been subjected to discrimination in that respect compared to female athletes without those traits. The applicant also submitted that she had been discriminated against compared to men in two respects: on the one hand, because the eligibility criteria did not apply to men with naturally elevated testosterone levels, and, on the other, owing to the assessments of virilisation to which she had been subjected in order to verify her "biological sex" or "sport sex", a notion which, in her view, did not apply to men. Lastly, she alleged that there was evidence that the DSD Regulations disproportionately affected women from the Global South[5] and that their

[5] "Global South" is a term that broadly comprises countries in Africa, Latin America and developing countries in Asia.

application to her therefore constituted indirect discrimination on grounds of race, ethnicity and colour.

130. As to the requirement of objective justification for differential treatment, the applicant argued that sex verification tests should not be used to exclude people who were born women and had always identified as women. In her view, the notion of "sport sex" was an illegitimate attempt at categorisation. In addition, she submitted that the results of those tests could not be obtained without egregious violations of human dignity and confidentiality. Lastly, she argued that neither the CAS not the Federal Supreme Court had made a finding as to what level of performance advantage was obtained through elevated testosterone levels of female athletes with 46 XY DSD.

131. In response to the Government's argument that a person's legal sex might not always be the appropriate eligibility criteria to determine who could compete in the female category, the applicant noted that the emphasis on legal sex was to adopt the language used in respect of transgender athletes, whose situation was fundamentally different from hers, as she had already stated. She argued that the emphasis should be placed on her actual sex, that is, female, which was an immutable characteristic which had never changed and would never change.

132. The applicant also disputed the argument that testosterone had been the reason for the creation of the female category. She submitted that the Government, like the CAS and the Federal Supreme Court, had ignored the fact that other innate characteristics which conferred performance advantages existed but were not regulated, in either the male or female categories.

133. As to the justification for the DSD Regulations and, in particular, whether they were proportionate, the applicant submitted that the CAS, the Federal Supreme Court and the Government had perpetuated the, in her view, flawed assumption that there was a causative link between testosterone levels in female athletes with 46 XY DSD and performance advantage, and that it was this assumption which underlay the regulations in issue. She argued that there was no sufficient scientific basis for that assumption, that there was no scientific consensus on that point, and that the expert evidence relied on by World Athletics was questionable and now discredited by the same experts who had published it.

134. The applicant also argued that even the very limited evidence available demonstrating that elevated testosterone levels did confer a performance advantage showed indisputably that, on average, it was no greater than 1.6% in female athletes, which was very substantially less than the performance advantage shown by men (10-12%). She added that the most marked performance advantage had been observed in two events which were not even in the "Relevant Events" group (hammer throw and pole vault).

135. The applicant relied on expert evidence which challenged the validity and adequacy of the DSD Regulations, and also the law-making

process by which the Regulations had been created, in particular, the lack of science supporting the Regulations, the fact that the scientific advice had not been free from actual and apparent conflicts of interest, that the evidence relied on had not been transparent, and that the research used had not been peer-reviewed.

136. She submitted in that connection that the situation had been made worse by the fact that the CAS's findings had not been subjected to an adequate and sufficient review – including as to the burden of proof – by the Federal Supreme Court which, owing to its very limited power of review, had been restricted to examining whether the award was incompatible with public policy.

137. The applicant also noted that the evidence relating to the effects of oral contraceptives on elite athletes was extremely limited and there were no guidelines to instruct how a clinician would use them to reduce and maintain testosterone levels. She also pointed out that the CAS had had "grave concerns as to the future practical application of the DSD Regulations" and had considered that if the Regulations could not be implemented fairly, that could have an effect on the assessment of their proportionality.

138. In view of the foregoing, even allowing for a certain margin of appreciation to be afforded to the State in matters of equal treatment and taking account of any consensus between the States, the applicant submitted that having regard to her extremely vulnerable position, a very weighty justification for the contested regulations had been required, but the respondent State had failed to provide one. She argued that, in the absence of an effective review by the Federal Supreme Court, the respondent State had failed to sufficiently protect her against discrimination in the exercise of her rights guaranteed by Articles 3 and 8 of the Convention.

(b) The Government

139. The Government began by observing that States enjoyed a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justified a difference in treatment and that the Court had to have regard to the changing conditions in the Contracting States and to respond, for example, to any emerging consensus as to the standards to be achieved.

140. They also observed that the CAS and the Federal Supreme Court had found that the eligibility criteria provided for by the DSD Regulations were prima facie discriminatory in that they created a difference on grounds of legal sex and innate biological characteristics, but that they had concluded that the regulations were a necessary, reasonable and proportionate measure to ensure equality and the upholding of the "protected class" and to guarantee fair competition.

141. They cited the CAS finding that ensuring fair competition in the female category of competitive athletics was a legitimate objective, and that,

once it had been 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. They pointed out that the CAS had 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.

142. They noted that the CAS had also considered that testosterone was the primary driver of the physical advantages and, therefore, of the sex difference in sports performance and that it had found, on the basis of the material put forward by the parties and the examination of the various experts, that androgen-sensitive female athletes with 46 XY DSD enjoyed a significant performance advantage which was attributable to their exposure to levels of circulating testosterone in the adult male range.

143. The Government submitted that, as pointed out by the Federal Supreme Court, the natural characteristics of athletes belonging to a particular group could also undermine the fairness of competitions, and that, when issuing regulations, the aim of sports federations was to ensure fair and equal competition. Separate categories had thus been created with the aim of creating a level playing field, and it was for this reason that, in certain sports, several categories had been created on the basis of biological factors. In the majority of sports, including athletics, women and men competed in separate categories, the latter having a natural physical advantage over the former. According to the Federal Supreme Court, separating athletes into female and male categories required, however, the fixing of limits and distinguishing criteria even though any attempt to categorise men and women in a binary manner, as was the case in the area of athletics, necessarily raised certain classification difficulties, of which the present case was a perfect illustration.

144. The Government observed that, as to the examination of the proportionality of the regulations in issue, the Federal Supreme Court had considered that the CAS had carried out a careful weighing-up of all the different interests at stake, in that it had taken into account, on the one hand, 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, and, on the other, 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, as well as the issues related to confidentiality and the ability of 46 XY DSD athletes to maintain their level of testosterone below the maximum permitted level.

145. Lastly, the Government observed that the Federal Supreme Court had not agreed with the applicant's attempt to play down the insuperable nature of the advantage that female 46 XY DSD athletes had, or with her

submission that the list of "Restricted Events" constituted a disproportionate interference with the rights of 46 XY DSD athletes, since, while the CAS had expressed concerns over the inclusion of the 1,500 m and 1 mile events in the DSD Regulations and indicated that the IAAF should consider deferring the application of these regulations to them, it had nevertheless concluded that the IAAF had provided the evidential basis for all the "Restricted Events" as well as giving a rational overall explanation of how this category had been defined.

(c) Third-party interveners

146. World Athletics submitted that the ultimate question for the Court was whether the applicant had had available to her a reasonable and fair system of institutional and procedural safeguards in relation to the resolution of disputes, and whether Switzerland had satisfied its positive obligation in that respect. It argued that, since the issue in question was informed by developing science with no consensus yet emerging, a wide margin of appreciation had to be afforded to States and international sports federations in making the assessment as to where the correct balance was to be struck. It disputed the argument that the applicant's right to practise her profession had been infringed since the application of the DSD Regulations was a necessary and proportionate compromise to ensure fair competition.

World Athletics also submitted that the applicant had not been subjected to discrimination within the meaning of Article 14 of the Convention; on the contrary the underlying logic of the DSD Regulations was to treat like cases alike and different cases differently. It argued that the DSD Regulations struck a fair balance between the competing interests at stake, in particular in view of the wide margin of appreciation properly afforded both to sports bodies and specialist tribunals to determine what rules were required to protect fair competition.

147. Athletics South Africa submitted that the applicant had been discriminated against in the exercise of her rights guaranteed by Articles 3 and 8 compared to male athletes and to female athletes without DSD, and that this discrimination could not be justified by reference to the interest of other athletes in fair competition. In its view, the ban on the applicant competing in her preferred events had been a disproportionate measure, in particular in the light of her right to practise a profession as guaranteed by Article 8. It also considered that the ban on DSD athletes competing in the 400 m race, but not the 200 m one, was illogical, not to say arbitrary.

148. The South African Human Rights Commission submitted that the examination of whether there had been a violation of Article 14 had to be conducted taking into account the global context of the case and applying the intersectionality principle, according to which discrimination could affect a person on multiple grounds depending on the individual's position in society.

149. The three United Nations experts given leave to intervene jointly as third parties (Tlaleng Mofokeng, Nils Melzer and Melissa Upreti) argued that States Parties were under the obligation to prevent women athletes from being subjected to medical examinations and interventions that violated the principles of human dignity, equality, autonomy, and the physical and psychological integrity of a person. They submitted that the DSD Regulations were based on gender and racial stereotypes about who was a woman and who was a woman athlete in particular. These stereotypes were narrow and essentialist, and had, to date, disproportionately impacted Black women athletes and women athletes of Asian descent, predominantly from the Global South. They also submitted that the DSD Regulations were likely to constitute not only sex (female) discrimination which required very weighty reasons to be justified, but also discrimination based on sex characteristics, as well as the race and national origin of athletes. It followed, in their view, that an intersectional approach was required in respect of that type of discrimination.

150. The Canadian Centre for Ethics in Sport observed that, with the exception of three sporting disciplines which established a difference based on athletes' weight (weightlifting, certain combat sports like boxing, and rowing), the DSD Regulations were the only example where a physical characteristic was used as a criterion to define eligibility and thus served to restrict some athletes from participation in certain sporting events. They provided examples of athletes who had an advantage owing to certain of their physical characteristics, yet had not been prevented from competing, in particular in the sport of swimming.

151. Women Sport International, the International Association of Physical Education and Sport for Girls and Women (IAPESGW) and the International Working Group for Women in Sport (IWG) jointly submitted that the present case required a holistic perspective, whereas the DSD Regulations singled out and excluded certain female athletes on the sole criterion of having a testosterone level higher than 5 nmol/L. They also submitted that, in doing so, these regulations ignored other natural physical, psychological and biological attributes as well as social and economic factors that affected sports performance. In their view, the DSD Regulations had serious harmful implications for women and girls in sport, since they had the impact of keeping women perceived to be "too masculine" out of competing on the basis of flawed practices in gross violation of human rights laws.

152. The Vlaamse Ombudsdienst submitted that intersex people were particularly vulnerable. It questioned whether it remained acceptable in sport to use the definition of biological sex, in a binary male/female sense, while in a considerable number of other domains in society, and also more and more in the (human rights) law, this definition seemed to have been replaced by a more nuanced and more inclusive definition.

153. In the view of the World Medical Association (WMA) and Global Health Justice Partnership (GHJP), an initiative of the Yale Law School and

Yale School of Public Health, the conditions for eligibility imposed by the DSD Regulations threatened the patient-physician relationship as they asked physicians to violate their ethical obligations to athletes who came before them not for health-seeking but rather regulatory compliance reasons. They submitted that these regulations unfairly left athletes with the coerced "choice" to either submit to physical assessments, consult with physicians, and undergo unnecessary medical interventions with the potential for serious side effects, or give up their livelihood. They also pointed out that physicians were central to the implementation of the Regulations but that they were being exposed to a conflict of interest arising from their dual loyalties to the athletes and athletics federations. They referred to the Declaration on the Principles of Health Care for Sports Medicine, adopted by the WMA in 1981, which stated that the health of athletes was the physician's primary consideration and that the latter should have full freedom, especially when it came to the health, safety and legitimate interests of athletes. For these reasons, they submitted that the DSD Regulations were contrary to international medical ethics and human rights standards.

154. The Human Rights Centre at Ghent University observed that the Convention imposed on States the obligation to ensure the effective protection of the physical and psychological integrity of female athletes, in particular by maintaining and applying in practice an adequate legal framework affording effective protection of the rights guaranteed. It submitted that in cases concerning the rights of intersex persons, especially when their right to bodily integrity was at stake, the Court should allow only a narrow margin of appreciation. It also submitted that, given the inherent connection between their exclusion and the natural composition of their bodies, these athletes were exposed to stigma and potential negative effects on their reputation.

2. The Court's assessment

(a) General principles

155. The Court reiterates that Article 14 of the Convention affords protection against discrimination in the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and the Protocols thereto. According to the Court's settled case-law, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among many other authorities, *Beeler*, cited above, § 93; *Biao v. Denmark* [GC], no. 38590/10, § 90, 24 May 2016; and *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64,

24 January 2017). In other words, the notion of discrimination generally includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 82, Series A no. 94, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013 (extracts)).

156. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that the difference was justified (see *Biao*, § 92, and *Khamtokhu and Aksenchik*, § 65, both cited above).

(b) Application of these principles to the present case

(i) Whether there was a ground of discrimination prohibited by Article 14

157. The Court considers that the applicant can rely on at least one ground of discrimination within the meaning of Article 14.

158. The applicant mainly alleged discrimination on the ground of her sex characteristics, in particular her increased testosterone level caused by DSD. In this connection, the Court is of the view that the applicant can claim to be the victim of discrimination on the ground of "sex" within the meaning of Article 14 of the Convention, and also on that of sex characteristics (in particular, genetic), a concept which falls without doubt within the ambit of this provision (see, to this effect, *G.N. and Others v. Italy*, no. 43134/05, § 126, 1 December 2009). The Court reiterates that the list set out in this Article is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see, *mutatis mutandis*, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 28, ECHR 1999-IX).

159. In view of the foregoing, the Court does not find it necessary to consider the question whether the applicant, as a female athlete, has been discriminated against compared to male athletes in so far as the World Athletics regulations did not provide for a maximum permitted level of testosterone in order to compete in the male category. Nor does it find it necessary to consider the question whether the applicant can also rely on her race, ethnicity or "colour", even though she has alleged that the DSD Regulations disproportionately affect athletes from the "Global South". The Court would simply reiterate that, according to the report on Resolution 2465 (2022) of the Parliamentary Assembly of the Council of Europe (see paragraph 56 above), LBTI athletes of colour, of African descent for example, are particularly stigmatised.

(ii) Whether there has been a difference in treatment between persons in analogous or relevantly similar situations

160. The applicant submitted, in particular, that she had been treated differently compared to other female athletes without DSD. She reiterated that, from a legal perspective, she had been a woman since birth, she had grown up and been raised as a woman, and she had always participated in competitions as a woman, which the CAS had clearly acknowledged (see paragraph 17 above) and the Federal Supreme Court had not disputed.

161. The Court observes that, in the domestic proceedings, there was no adversarial debate on the question whether the applicant could be compared to persons in situations that were analogous or relevantly similar to her own. It considers, however, that the domestic courts acknowledged, tacitly, that the situation of female athletes and that of the applicant, as an intersex athlete, were equivalent (criterion taken from the *Advisory opinion on the difference in treatment between landowners' associations "having a recognised existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date*, request no. P16-2021-002, French *Conseil d'État*, § 70, 13 July 2022). The Court does not have sufficient evidence at its disposal at the time of its judgment to adopt a different position.

162. In the light of the foregoing, the Court concludes that the applicant was in a comparable situation to that of other female athletes and that she was subjected to a difference in treatment in relation to those athletes as she was excluded from taking part in competitions as a result of the DSD Regulations.

(iii) The nature of the obligation imposed on Switzerland and its margin of appreciation in the present case

(α) Preliminary remarks

163. As set out above, the DSD Regulations, which the applicant submitted had discriminated against her, were drafted and adopted by World Athletics, an association under Monegasque law. In the absence of any measure taken by the State, the Court considers that it must examine whether the respondent State satisfied its positive obligations under Article 14 of the Convention (see, *mutatis mutandis*, *Platini*, cited above, § 59).

164. The Court reiterates that the State's positive obligations under Article 8 of the Convention are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context (see *Platini*, cited above, § 61; *López Ribalda and Others*, cited above, § 113; *M.C. v. Bulgaria*, no. 39272/98, § 150, ECHR 2003-XII; and *K.U. v. Finland*, no. 2872/02, §§ 43 and 49, ECHR 2008). In this connection, the Court has also observed that the domestic courts must provide sufficiently detailed reasons for their decisions, not least to

enable the Court to carry out the European supervision entrusted to it (see, *mutatis mutandis*, *I.M. v. Switzerland*, no. 23887/16, § 72, 9 April 2019, and *X v. Latvia* [GC], no. 27853/09, § 107, ECHR 2013). Where the reasoning of domestic decisions is insufficient, without any real weighing-up of the interests in issue, this would fall short of the requirements of Article 8 of the Convention (see *Platini*, cited above, § 61).

165. The Court considers that the above principles, developed under Article 8, also apply, *mutatis mutandis*, to Article 14 of the Convention (see, to this effect, *Danilenkov and Others v. Russia*, no. 67336/01, § 124, ECHR 2009 (extracts)). That being the case, the main question in the present case is whether, in the context of its positive obligations under Article 14, the respondent State was required, and if so to what extent, to protect the applicant from any discriminatory treatment – within the meaning of that Article – arising from the adoption of the DSD Regulations, which the CAS and the Federal Supreme Court held to be necessary, reasonable, proportionate and non-arbitrary (see, *mutatis mutandis*, *Platini*, cited above, § 62).

166. The Court's task, in particular, is to ascertain whether the applicant in the present case had sufficient institutional and procedural safeguards available to her, in the form of a system of courts to which she could submit her complaints, in particular her complaint under Article 14, and whether those courts delivered reasoned decisions which took account of the Court's case-law (ibid., § 62, and *Obst v. Germany*, no. 425/03, §§ 45-46, 23 September 2010).

167. In examining this issue, the Court will take account of the specific situation of the applicant, who freely chose a particular career in athletics. While it is true that such a career affords numerous privileges and advantages, it also requires the waiving of certain rights (see, to this effect, *Fernández Martínez*, cited above, §§ 134-35). Such limitations are permissible under the Convention where they are freely accepted (ibid., § 135). However, in the present case, unlike the applicant in *Platini* (cited above, § 63), the applicant submitted before the Court that she had had no choice but to accept the compulsory arbitration clause depriving her of all avenues of redress before the ordinary domestic courts (see, also to this effect, *Mutu and Pechstein*, cited above, §§ 114 and 122). The Court concludes that the applicant's only option under the international sports arbitration rules was therefore to apply to the CAS, and then to appeal to the Federal Supreme Court.

168. The Court considers that those circumstances of the applicant's specific situation should be borne in mind when examining the merits of her complaint under Article 14 of the Convention.

169. Lastly, the Court has repeatedly held that differences based exclusively on sex require "very weighty reasons", "particularly serious reasons" or, as it is sometimes said, "particularly weighty and convincing reasons" by way of justification (see *Stec and Others*, cited above, § 52;

Vallianatos and Others, cited above, § 77; and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts)). The Court considers that similar considerations apply where a difference in treatment is based on the sex characteristics of an individual or his or her status as an intersex person. Furthermore, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *Hämäläinen v. Finland* [GC], no. 37359/09, § 67, ECHR 2014; *X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27, Series A no. 91; and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; see also *Pretty*, cited above, § 71).

170. The Court is of the view that those considerations should guide it in the present case, even though it will not conduct its own weighing-up of the interests at stake and will restrict its examination to an assessment of the institutional and procedural safeguards in place. In its examination, the Court will consider the following aspects: the power of review of the CAS and the Federal Supreme Court (β); the scientific uncertainty as to the justification for the DSD Regulations (γ); the weighing-up of interests and the account taken of the side effects caused by the compulsory medication (δ); the horizontal effect of the discrimination (ε); and the comparison with the situation of transgender athletes (στ).

(β) Power of review of the CAS and the Federal Supreme Court

171. The applicant lodged a request for arbitration with the CAS to contest the validity of the DSD Regulations on 18 June 2018. As outlined above (see paragraph 167), the applicant had no choice other than to turn to the CAS in order to have what she saw as the discriminatory nature of the DSD Regulations recognised, given that in order to be able to participate in events organised by World Athletics she had had to sign an arbitration clause depriving her of any right of appeal to the ordinary courts.

172. The Court observes that in its judgment in *Mutu and Pechstein* (cited above, § 159) it did not call into question the independence and impartiality of the CAS as a "tribunal". Moreover, in the present case, the CAS heard representations from many experts in a hearing lasting five days, before delivering an extremely detailed award (see paragraph 14 above).

173. The Court observes that the CAS is neither a domestic court nor another institution of Swiss public law, but an entity emanating from the ICAS, a private-law foundation (see *Mutu and Pechstein*, cited above, §§ 29 and 65). It is a tribunal specialising in sports law with full jurisdiction to rule on both the facts and the law. As a non-State tribunal, the CAS is not directly bound by the human rights treaties entered into by States. In the present case, it applied primarily the IAAF's Constitution and Rules, the Olympic Charter and, "in subsidiary", Monegasque law (see paragraph 16 above), which incorporates the Convention guarantees.

174. In the applicant's case, the CAS carried out a thorough examination of the alleged discrimination and concluded that, while the DSD Regulations were discriminatory, they were a necessary, reasonable and proportionate means of achieving the aims of the IAAF, in particular to ensure fair competition (see paragraph 626 of the award, cited in paragraph 26 above). Although the CAS applied relatively similar criteria to those which the Court itself would take into consideration under Article 14 (necessity, reasonableness and proportionality), it must nevertheless be noted that it did not refer at all in its analysis either to that provision or to any case-law of the Court which might have been of relevance.

175. As to the Federal Supreme Court, its power of review was limited to the question whether the award under appeal was incompatible with public policy within the meaning of section 190(2)(e) PILA. In accordance with the practice of the Federal Supreme Court, this was the case if the award undermined essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system (see paragraph 46 above). Incompatibility of the award with public policy is, in the case-law of the Federal Supreme Court, a concept that is even more restrictive than that of arbitrariness. In other words, owing to its restrictive approach, the Federal Supreme Court had a very limited power of review in the present case.

176. It is true that in *Platini* (cited above) and *Bakker v. Switzerland* ((dec.) [Committee], no. 7198/07, 3 September 2019), which both gave rise to declarations of inadmissibility, the Court held that the Federal Supreme Court's limited power of review had not prevented it from carrying out an examination which complied with Article 6 (see *Bakker*, cited above, § 47) or Article 8 (see *Platini*, cited above, § 70) of the Convention. It observes nevertheless that those cases differed substantially from the present one and, with the exception of only one, relatively specific, complaint under Article 8 in *Platini* (ibid.), were bound to fail from the outset on formal grounds, owing, in particular, to non-exhaustion of domestic remedies.

177. The Court considers that, while the Federal Supreme Court's very limited power of review might be justifiable in the area of commercial arbitration, in which companies that are generally on an equal footing voluntarily agree to having their disputes settled by such means, it may be more problematic in the area of sports arbitration, in which individuals find themselves in opposition to often very powerful sports organisations. The Federal Supreme Court itself acknowledged in its judgment in respect of the applicant that "competitive sport [was] characterised by a very hierarchical structure whether at international or national level" and that "[o]n a vertical axis, the relations between the athletes and the organisations which [dealt] with various sports [could] thus be distinguished from horizontal relations between parties to a contractual relationship" (judgment of the Federal Supreme Court, at 9.4; see paragraph 33 above).

178. Accordingly, the Court sees no reason why professional athletes should be afforded a lesser legal protection than that afforded to people practising a more conventional profession.

(γ) Scientific uncertainty as to the justification for the DSD Regulations

179. As regards the burden of proof under Article 14 of the Convention, the Court has held that, once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment was justified (see, for example, *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, §§ 91-92, ECHR 1999-III, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 57, ECHR 2005-XII).

180. As regards the question of what constitutes sufficient prima facie evidence capable of shifting the burden of proof to the respondent State, the Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 178, ECHR 2007-IV).

181. In the present case, the Court notes that the applicant raised before both the CAS and the Federal Supreme Court a discrimination complaint of which the prima facie serious and arguable nature was not disputed by those courts. In this connection, the Court reiterates that the CAS itself expressed serious concerns about the DSD Regulations in at least three respects: it acknowledged that the side effects of the hormone treatment were "significant"; it also acknowledged that, even if female athletes carefully followed the prescribed hormone treatment, they might still be unable to remain in compliance with the DSD Regulations; and, lastly, it considered that the evidence that 46 XY DSD athletes had any actual significant athletic advantage in the 1,500 m and 1 mile races was "sparse".

182. The Court observes that these serious concerns did not lead to the CAS suspending the regulations in issue, as it had done in the *Dutee Chand* case several years before. It notes in this connection that, following the interim award delivered on 24 July 2015 in that case (see paragraphs 7 and 67-73 above), the CAS temporarily suspended the IAAF regulations in force at that time, finding that the IAAF had not demonstrated that hyperandrogenic female athletes had a significant athletic performance advantage as compared to other female athletes. The Court observes that in the present case the

tribunal did not proceed in the same way. It notes in this connection that even the DSD Regulations themselves provide that the athlete should be given the benefit of the doubt (regulation 2.2 (a) of the DSD Regulations; see paragraph 61 above).

183. As to the Federal Supreme Court, it did not seek to address the doubts expressed by the CAS with respect to the practical application of and scientific basis for the DSD Regulations. On the other hand, recent reports of human rights bodies, in particular the Parliamentary Assembly of the Council of Europe (see paragraphs 55-56 above) and the Office of the High Commissioner for Human Rights (see paragraphs 57-58 above), have set out serious concerns about discrimination against women in the sports domain, including intersex athletes, based on regulations such as those in issue in the present case. These concerns are, moreover, supported by the observations of certain third-party interveners in the present case and also by recent scientific research[6].

184. Having regard to the foregoing, the Court is of the view that neither the CAS nor the Federal Supreme Court carried out a thorough examination, in the light of the Convention, of the grounds relied on in support of an objective and reasonable justification for the DSD Regulations.

(δ) Weighing-up of interests and account taken of side effects caused by compulsory medication

185. The Court notes that the above-mentioned concerns expressed by the CAS regarding the DSD Regulations did not lead to the Federal Supreme Court calling the arbitral award into question in its subsequent examination. In essence, the Federal Supreme Court simply endorsed, on the basis of the very restrictive concept of public policy, the findings of the CAS, without carrying out its own assessment of the issues in question. In particular, it did not carry out a thorough and sufficient examination of the complaint of discriminatory treatment, or an appropriate and adequate weighing-up of all the interests at stake, as required by the Convention (see paragraph 164 above).

186. According to the Court's case-law, the applicable test under Article 14 of the Convention, namely that a difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see paragraph 155 above). In other words, in order to fulfil the

[6] See, for example, Marisa Jensen, Jörg Schorer and Irene R. Faber, "How is the Topic of Intersex Athletes in Elite Sports Positioned in Academic Literature Between January 2000 and July 2022? A Systematic Review", *Sports Medicine – Open* (2022) 8:130. On the basis of a systematic review of the academic literature from 2000 to 2022, those authors considered that there was a research gap on the topic of intersex athletes, in particular as to any competitive advantage the different types of DSD might provide.

requirements under Article 14 of the Convention, the Federal Supreme Court should have weighed up the interests relied on by World Athletics, in particular that of fair competition, against those relied on by the applicant, in particular those related to her dignity and reputation, her bodily integrity, her private sphere, including sex characteristics, and her right to practise her profession. However, the Federal Supreme Court did not carry out this weighing-up of interests since, according to its case-law, such an examination did not fall within the concept of public policy.

187. In the present case, the Court observes that the Federal Supreme Court proceeded on the assumption that the DSD Regulations afforded the applicant a real "choice", pointing out that female 46 XY DSD athletes were not under an obligation to take oral contraceptives, since they could choose not to submit to this "treatment". However, as the Court has already observed above (see paragraph 124), it is of the view that the applicant does not have a real choice: either she took the medication, which was likely to cause her physical and mental harm, in order to decrease her testosterone level and to be able to practise her profession, or she refused to take it, with the result that she would have to renounce her right to compete in events of her choosing, and therefore to practise her profession. In other words, whatever she decided, her choice would necessarily lead to the waiving of certain rights protected by Article 8. In order to satisfy the requirements of the Convention, the Federal Supreme Court should have addressed the dilemma with which the applicant was faced.

188. In particular, the Federal Supreme Court did not sufficiently take into account the argument regarding the side effects of taking oral contraceptives, despite making reference to the finding in the CAS award that those side effects were "significant" (see its judgment in paragraph 34 above, at 9.6.3). The Federal Supreme Court even acknowledged that administering medical treatment to an individual against their will amounted to a "serious breach" of personal liberty and struck at the core of the dignity of the person concerned (see its judgment in paragraph 38 above, at 11.2). At the same time, it endorsed the opinion of the CAS that the side effects in question, 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 (see its judgment in paragraph 36 above, at 9.8.3.5). The Court is not convinced by this argument, which does not take into account the point that, precisely because of the side effects associated with a hormone treatment, many women do not take oral contraceptives. It also overlooks the fact that the side effects experienced by women who practise sport, but not at competition level, could have an even greater impact on the body and physical and mental well-being of a female athlete at the highest level and, accordingly, negatively affect her sporting performance (see, in this connection, the applicant's argument that the evidence relating to the effects

of oral contraceptives on elite athletes was extremely limited, paragraph 137 above).

189. Lastly, the Court observes that certain of the third-party interveners, in particular the World Medical Association and Global Health Justice Partnership, pointed out that coercing athletes to undergo unnecessary medical interventions with the potential for serious side effects, not strictly for health-seeking reasons but rather to comply with the eligibility criteria established by the DSD Regulations, was contrary to international medical ethics standards (see paragraph 153 above). The Court also observes that Switzerland is a State Party to the Oviedo Convention, the first binding international instrument on the protection of human dignity, rights and freedoms against the misuse of biological and medical advances (see paragraphs 52 et seq. above). Article 2 of that Convention provides for the principle of the primacy of the human being, stating that "the interests and welfare of the human being shall prevail over the sole interest of society or science". Other ethical principles also arise from this instrument, such as benevolence and non-maleficence, as was pointed out, under very different circumstances, in *Lambert and Others v. France* ([GC], no. 46043/14, § 61, ECHR 2015 (extracts))

190. For its examination to have been compatible with the requirements of the Convention, the Federal Supreme Court should have given a more thorough response, in particular with regard to the argument concerning the side effects of the medication.

(ε) Horizontal effect of the discrimination

191. It emerges from the judgment of the Federal Supreme Court in the applicant's case that, in terms of Swiss constitutional law, the case-law considers that the task of guaranteeing the prohibition of discrimination (Article 8 § 2 of the Constitution) falls to the State and does not, in principle, produce a direct horizontal effect on relations between private individuals (see its judgment in paragraph 33 above, at 9.4). Moreover, according to the Federal Supreme Court, it is most doubtful that the prohibition of discrimination on the part of a private entity could be found to come within the scope of the essential and broadly recognised values which, according to the understanding prevailing in Switzerland, should underpin every legal system (ibid.).

192. On the other hand, it is clear from the case-law of the Court that the States are under an obligation to take measures to protect the persons within their jurisdiction from discriminatory treatment – this remains the case even if the discriminatory treatment is carried out by private individuals. In *Danilenkov and Others* (cited above), the issue was whether sufficient measures had been taken by the State authorities to protect the applicants from discriminatory treatment inflicted by their employer owing to their choice to join a trade union. In that context, the Court found that it was crucial

that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and to take legal action to obtain damages or other relief (ibid., § 124).

193. Moreover, in a case concerning a will whose judicial interpretation was allegedly discriminatory towards adopted children (see *Pla and Puncernau v. Andorra*, no. 69498/01, ECHR 2004-VIII), the Court confirmed that it was not in principle required to settle disputes of a purely private nature. It considered, however, that in exercising the European supervision incumbent on it, it could not remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice, appeared unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (ibid., § 59).

194. It can therefore be concluded from the above-cited case-law of the Court that domestic courts are under an obligation to ensure real and effective protection against discrimination committed by private individuals (see also, to this effect, the cases concerning violent attacks against individuals carried out by private groups and the issue of a State's positive, including procedural, obligations, for example, *Identoba and Others v. Georgia*, no. 73235/12, § 63, 12 May 2015, and *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020). In the present case, however, the Federal Supreme Court did not consider that prohibition of discrimination committed by private-law entities fell within the concept of public policy within the meaning of section 190(2)(e) PILA. As such, it did not carry out a review, that the applicant had requested, of the compatibility of the DSD Regulations issued by World Athletics, a non-State instrument, with the Constitution or the Convention.

195. Having regard to the foregoing, the Court considers that the Federal Supreme Court did not fulfil the requirements set out in the above-cited case-law, which requires States Parties to the Convention to effectively prevent and provide redress for discriminatory acts, even those carried out by private individuals or entities.

(στ) Comparison with the situation of transgender athletes

196. Lastly, the Court would refer to another aspect of its Article 14 case-law according to which the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV).

197. In the present case the applicant submitted that the respondent State and World Athletics had erred in comparing her situation with that of transgender athletes, since the weighing-up of interests in those two situations

was very different. In this connection, the Court notes that the content of the World Athletics regulations pertaining to female transgender and intersex athletes was essentially the same at the relevant time (see paragraphs 59 et seq. above).

198. It is not clear to the Court why the applicant and transgender athletes who have undergone a male-to-female transition were treated equally. Without wishing to prejudge cases that could be brought before it, the Court simply notes at this juncture that, in the case of female transgender athletes, the advantage they possess stems from the inequality inherent in their having been born male (see Matthieu Perruchoud, op. cit., p. 225). The advantage they have arises from their initial biological make-up, and moreover, the treatment they are asked to undergo in order to decrease their testosterone level is simply an adjustment of the treatment they are already undergoing (ibid.). Moreover, in a decision which took effect on 31 March 2023, World Athletics put an end to the equal treatment of transgender athletes and those athletes coming under the scope of the DSD Regulations (see paragraphs 40 and 67 above).

199. The Court considers that the Federal Supreme Court, even in the context of its limited examination, should have addressed this lack of differentiation.

(ζ) Conclusions

200. Having regard to the foregoing, the Court finds that, in the context of compulsory arbitration, which deprived the applicant of the possibility of appealing to the ordinary courts, the only remedy available to her was an application to the CAS which, despite providing very detailed reasoning, did not apply the provisions of the Convention and left open serious questions as to the validity of the DSD Regulations, in particular as regards: the side effects of the hormone treatment; the potential inability of athletes to remain in compliance with the DSD Regulations; and the lack of evidence of 46 XY DSD athletes having an actual athletic advantage in the 1,500 m and 1 mile races. Furthermore, the review carried out by the Federal Supreme Court on appeal against the CAS decision was very limited, being confined to the question whether the arbitral award was compatible with public policy, and failed, in the present case, to respond to the serious concerns expressed by the CAS in a manner compatible with the requirements of Article 14 of the Convention.

201. The Court considers, for the reasons set out above (letters β to στ), that the applicant was not afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since they concerned substantiated and credible claims of discrimination as a result of her increased testosterone level caused by DSD. It follows, particularly with regard to the high personal stakes involved for the applicant – namely, participating in athletics competitions at

international level, and therefore practising her profession – that Switzerland overstepped the narrow margin of appreciation afforded to it in the present case, which concerned discrimination on grounds of sex and sex characteristics requiring "very weighty reasons" by way of justification (see paragraph 169 above). The high stakes of the case for the applicant and the narrow margin of appreciation afforded to the respondent State should have led to an in-depth institutional and procedural review, but such a review was not available to the applicant in the present case. As a result, the Court is unable to find that the application of the DSD Regulations to the applicant's case could be considered a measure that was objective and proportionate to the aim pursued.

202. There has accordingly been a violation of Article 14 of the Convention in conjunction with Article 8.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

203. The applicant submitted that the DSD Regulations had violated her bodily integrity in that she had been obliged to undergo examinations of her body, in particular her genitals, that had been medically unnecessary. She also argued that the obligation for her to take contraceptives to lower her level of testosterone, without her informed consent and with no therapeutic purpose, was incompatible with Article 8. She further argued that the examinations imposed on her and the obligation to take contraceptives in order to be able to continue competing had violated her psychological integrity. She also alleged that the DSD Regulations had had a stigmatising and humiliating effect and caused severe harm to her dignity. She submitted, further, that she had been the victim of an infringement of her right to respect for her social identity and gender and her right to practise her profession. She relied on Article 8 of the Convention, cited in paragraph 114 above.

204. The Government contested this argument.

205. The Court observes that it has found a violation of Article 14 of the Convention in conjunction with Article 8 owing to the lack of sufficient institutional and procedural safeguards in Switzerland (see paragraph 202 above). Given that it would also carry out a primarily formal examination if it were to examine the case under Article 8 taken alone, the Court considers that this complaint does not give rise to any essential separate issue. It follows that there is no need to give a separate ruling on this complaint (see, to this effect, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references).

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

Admissibility

206. The applicant submitted that the DSD Regulations had violated her bodily integrity in that she had been obliged to undergo examinations of her body, in particular her genitals, that had been medically unnecessary. She also argued that the obligation for her to take contraceptives to lower her level of testosterone, without her informed consent and with no therapeutic purpose, was incompatible with Article 3. She further argued that the examinations imposed on her and the obligation to take contraceptives in order to be able to continue competing had violated her psychological integrity. She also alleged that the DSD Regulations had had a stigmatising and humiliating effect and caused serious harm to her dignity. She relied on Article 3 of the Convention, cited in paragraph 114 above.

207. The Government contested this argument.

1. Submissions of the parties and the third-party interveners

208. The respondent Government submitted, for several reasons, that Article 3 of the Convention was not applicable in the present case and, in addition, that the complaint of a violation of this provision was manifestly ill-founded.

209. The applicant submitted that Switzerland had failed to protect her from the harmful effects of the DSD Regulations and that it now sought to relativise the harm that their application had caused. Applying the eligibility criteria provided for in the DSD Regulations and coercing her into physical examinations and pharmacological or surgical interventions which were not medically necessary as a condition for continued participation in elite sports activities amounted to inhuman and degrading treatment in breach of Article 3 of the Convention. This was particularly so given the exceptionally intimate and immutable nature of the characteristics at which those examinations were directed.

210. World Athletics submitted that the negative effects of the DSD Regulations had not reached the required level of severity for Article 3 of the Convention to be engaged. In the third-party intervener's view, the regulations in issue did not mandate any of the examinations or femininity tests alleged by the applicant. They did not impose any forced treatment and athletes had the choice to decide themselves, with the assistance of their own medical teams, whether they wished to take hormone treatment to lower their testosterone level. That treatment was, in addition, one which millions of women took every day without suffering major side effects. The investigation procedures respected the confidentiality and dignity of the athletes, and their aim was under no circumstances to humiliate or degrade them. It followed

that they did not amount to inhuman or degrading treatment within the meaning of Article 3 of the Convention.

211. Athletics South Africa submitted that the DSD Regulations had extremely stigmatising and humiliating effects in that they suggested that a DSD was a "problem" that needed medical help and attention. It observed that, even where confidentiality as to specific medical information was protected, the examinations of athletes took place on the international stage, attracting intense media scrutiny and exposing them to speculation regarding their bodies, their sex and other most intimate characteristics. It argued that this amounted to treatment contrary to human dignity capable of meeting the requisite threshold of severity for the purposes of Article 3.

212. In its joint third-party intervention with Payoshni Mitra and Katrina Karkazis, Human Rights Watch submitted that the sex testing carried out on the athletes in question was an extremely degrading and humiliating practice capable of causing serious harm to their private and intimate sphere, and that the benefits of the treatments and their scientific basis had not been proven. They also submitted that, by imposing on athletes examinations and treatments with no medical or therapeutic aim, the application of the DSD Regulations amounted to treatment contrary to Article 3. As to the procedures carried out, they alleged that the athletes were not adequately informed about the options and had to give their consent under threat of serious personal consequences if they refused. The joint third-party interveners, who have been working with the athletes in question for many years, attested to the traumatising and humiliating effects that such procedures could have on those athletes, with serious consequences on their psychological state and, at the same time, on their performance and future in the profession. They specified that, once the procedure had been started, the athletes in question had to put up with numerous rumours and speculation over their sex, as well as insults from both within the athletic world and from the general public, from spectators at events, the media and on social media platforms. In their view, such treatment exposed the athletes to enormous psychological stress and gave rise to feelings of anguish and inferiority which attained the threshold of severity required for the purposes of Article 3.

2. The Court's assessment

(a) General principles

213. The prohibition of torture and inhuman or degrading treatment or punishment under Article 3 does not relate to all instances of ill-treatment (see *Savran v. Denmark* [GC], no. 57467/15, § 122, 7 December 2021). According to the Court's well-established case-law, treatment prohibited under Article 3 must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some

cases, the sex, age and state of health of the victim (see *Ireland v. the United Kingdom*, 18 January 1978, § 162, Series A no. 25; *Jalloh v. Germany* [GC], no. 54810/00, § 67, ECHR 2006-IX; and *Muršić v. Croatia* [GC], no. 7334/13, § 97, 20 October 2016). In order to determine whether the threshold of severity has been reached, other factors may be taken into consideration by the Court, in particular: the purpose for which the ill-treatment was inflicted, together with the intention or motivation behind it; the context in which the ill-treatment was inflicted, such as an atmosphere of heightened tension and emotions; and whether the victim was in a vulnerable situation (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 160, 15 December 2016).

214. Treatment has been held by the Court to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience (see, *inter alia*, *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III, and *Jalloh*, cited above, § 68).

(b) Application of the above principles

215. As to the present case, the Court considers that a complaint on the basis of the obligatory medical examinations and treatments to which female athletes are subjected under the DSD Regulations would constitute the very essence of an allegation of a violation of dignity within the meaning of Article 3 of the Convention. It observes that the applicant was subjected to sex testing in 2009 (see paragraph 5 above), that is, well before the entry into force of the DSD Regulations which she challenged before the CAS and the Federal Supreme Court. However, it would appear that, in the context of the procedure with which the present case is concerned, the applicant was not actually subjected to any of the medical examinations or treatments in issue since she chose to renounce competing in her preferred competitions rather than be subjected to the consequences of a procedure under the DSD Regulations (contrast *Jalloh*, cited above). The Court considers, moreover, that the dilemma with which the applicant was faced and her "choice" to no longer practise her profession have been duly taken into account by the Court in its assessment of Article 14 in conjunction with Article 8.

216. Lastly, as to the complaint that the DSD Regulations themselves violated the dignity, honour and reputation of the applicant owing to their humiliating and stigmatising effects, the Court considers that the threshold of severity for Article 3 to be engaged has not been reached.

217. Having regard to the above considerations, the Court finds that the complaint under Article 3 is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected pursuant to Article 35 § 4.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

218. The applicant also complained of a violation of her right to an effective remedy within the meaning of Article 13 of the Convention in conjunction with Articles 3, 8 and 14, in particular in respect of the Federal Supreme Court's limited power of review. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

219. Articles 3, 8 and 14 are cited above (see paragraph 114).

220. The Court considers that this complaint falls to be examined solely in relation to Article 14 of the Convention in conjunction with Article 8.

A. Admissibility

1. The parties' submissions

221. The Government submitted that the complaint under Article 13 of the Convention was manifestly ill-founded, arguing that none of the claims made by the applicant in support of her allegation of a violation of Article 13 fell within the jurisdiction of Switzerland and they could not therefore be said to be arguable within the meaning of the Court's case-law.

222. The applicant disagreed with that assessment.

2. The Court's assessment

223. The Court notes that Article 13 of the Convention guarantees the availability at the national level of a remedy by which to complain of a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (see, for example, *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, § 217, 25 June 2019; *Soering*, cited above, § 120; and *De Tommaso v. Italy* [GC], no. 43395/09, § 179, 23 February 2017).

224. The Court would begin by noting that its finding of a violation of Article 14 of the Convention in conjunction with Article 8 is sufficient for the applicant to have an "arguable" claim for the purposes of Article 13 of the Convention (see, to this effect, *Batı and Others v. Turkey*, nos. 33097/96 and 57834/00, § 138, ECHR 2004-IV).

225. The Court notes that the complaint under Article 13 in relation to Article 14 in conjunction with Article 8 is not manifestly ill-founded nor inadmissible on any other grounds within the meaning of Article 35 of the Convention. It therefore declares it admissible.

B. Merits

1. The parties' submissions

(a) The applicant

226. The applicant submitted that the CAS and the Federal Supreme Court had failed in their duty to adequately protect her from the violations of her rights under Articles 8 and 14, in particular owing to the limited power of review conferred on the Federal Supreme Court by section 190(2)(e) PILA. She complained of an infringement of her right to an effective remedy within the meaning of Article 13 of the Convention.

227. She accepted, in principle, that the particular position occupied by Switzerland in international arbitration could constitute a legitimate justification for restricting the right of access to a court. However, she argued that what was important in the present case was whether the Federal Supreme Court had properly taken into account Convention standards and principles in reaching its conclusion, including as to the standard of proof and the issue of proportionality, and whether the excessively limited scope of review by the Federal Supreme Court had been a proportionate means of achieving that aim, in a compulsory arbitration case of which the subject matter had concerned alleged violations of Convention rights.

228. The applicant observed that both the CAS and the Federal Supreme Court had themselves acknowledged, in previous cases, that the situation of an athlete alleging violations of her fundamental rights could not be compared with that of a commercial party in an ordinary international arbitration. She submitted that the Federal Supreme Court's very limited power of review, consisting in examining the issue of compatibility with public policy under section 190(2)(e) PILA, did not therefore comply with the requirements of the right to an effective remedy within the meaning of Article 13, particularly since the CAS was far from being a specialist human rights body.

229. Lastly, she argued that even in the context of its very limited power of review of the compatibility of the award with public policy, the Federal Supreme Court should have appropriately weighed up the interests at stake, taking into account in particular the standard and burden of proof and the justification for the contested measure. In the applicant's view, the Federal Supreme Court had found it sufficient in the present case to reproduce and endorse the findings of the CAS without conducting its own assessment.

(b) The Government

230. The Government argued that a request for arbitration to an arbitral tribunal could be taken into account in the examination of whether the requirements of Article 13 had been complied with. They submitted that the CAS had carried out a very thorough examination of the applicant's complaints, on both the law and facts of the case. They observed, in that

context, that the Court had held on several occasions that the CAS could be considered an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. The Government observed that the applicant had been able to lodge an appeal with the Federal Supreme Court, which had examined her complaints within the limits prescribed by section 190(2)(e) PILA. They acknowledged that it was not possible to rely directly on a violation of the Convention in that context, but submitted that the underlying principles of the Convention (or the Constitution) could nevertheless be taken into account under the head of public policy in order to give effect to this concept. They referred to the previous finding of the Court that the system in place could be "an appropriate solution" for the purposes of Article 6 of the Convention (see *Mutu and Pechstein*, cited above, § 98).

231. The Government argued that if the Court were to examine whether there had been a violation of Article 13 of the Convention, it should take into account the particular context of international arbitration in the domain of professional sport and that the facts of the dispute, between an athlete habitually resident in South Africa and a private-law Monegasque association, had no link with Switzerland.

2. The Court's assessment

(a) General principles

232. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State. In certain circumstances, the aggregate of remedies provided for under domestic law may satisfy the requirements of Article 13 (see, among other authorities, *Nicolae Virgiliu Tănase*, § 218, and *De Tommaso*, § 179, both cited above).

233. As regards the complaint concerning the overly restrictive nature of the domestic courts' power of review, the Court has previously held that judicial review was not an effective remedy in a situation where the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, §§ 135-39, ECHR 1999-VI, and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 140, ECHR 2003-VIII). To be precise, the Court specified in the relevant case that the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence's policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public-order aims pursued,

principles which lay at the heart of the Court's analysis of complaints under Article 8 of the Convention (see *Smith and Grady*, cited above, § 138).

(b) Application of the above principles

234. As to the question whether in the present case there has been a violation of Article 13 in relation to Article 14 in conjunction with Article 8, the Court reiterates that it must examine the aggregate of remedies provided for under domestic law, as indicated in the above-mentioned case-law. In the context of that examination, it is mindful that, when it comes to the interpretation and assessment of domestic law, it leaves the national authorities very wide discretion; however, it considers that nothing prevents it from exercising its role as guardian of European public order to verify whether an individual has benefited, effectively and in practice, from the foundations of that public order in proceedings before the domestic courts (see *Al-Dulimi and Montana Management Inc.*, cited above, § 145, and the cases cited therein).

235. The Court finds that there has been a violation of the right to an effective remedy within the meaning of Article 13 of the Convention for essentially the same reasons which led it to find a violation of Article 14 in conjunction with Article 8, namely the lack of sufficient institutional and procedural safeguards in Switzerland. It observes in that connection that, in the context of arbitration imposed on her by the relevant sports regulations and depriving her of the right to appeal to the ordinary courts, the only choice available to the applicant to contest the validity of the DSD Regulations was a request for arbitration to the CAS. 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 did not assess the validity of the regulations in the light of the Convention requirements and, in particular, despite her substantiated and credible claims, it did not examine the applicant's allegations of discrimination in the light of Article 14 of the Convention.

236. As to the Federal Supreme Court, its power of review was very limited in the present case, as it related to sports arbitration, and was therefore confined to examining the question whether the contested award was contrary to public policy within the meaning of section 190(2)(e) PILA.

237. The Court acknowledges that in its decisions in *Platini* and *Bakker*, it found that the Federal Supreme Court's limited power of review had not prevented it from carrying out an examination compatible with Article 8 (see *Platini*, cited above, § 70) and Article 6 (see *Bakker*, cited above, § 47; see also paragraph 176 above). In so far as that finding is relevant to the alleged violation of Article 13 in relation to Article 14 in conjunction with Article 8 of the Convention, the Court observes that the complaints lodged with the Court in the above-mentioned cases were, in the main, bound to fail, in particular for non-exhaustion of the available domestic remedies (ibid.)

238. Conversely, in the present case, the complaints lodged with the CAS and the Federal Supreme Court were substantiated and relied directly or in substance on the Convention. In her appeal of 28 May 2019 before the Federal Supreme Court against the decision refusing arbitration, the applicant complained, in particular, of discrimination on grounds of sex as compared to male and female athletes with no DSD, and of a breach of her right to dignity and her personality rights (see paragraph 27 above). As such, she gave the Federal Supreme Court the opportunity to rule on those complaints.

239. However, like the CAS before it, the Federal Supreme Court, owing in particular to its very limited power of review, did not respond in an effective manner to the applicant's substantiated and credible complaints of, *inter alia*, discrimination. The Court concludes, in its 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 cannot be considered effective within the meaning of Article 13 of the Convention.

240. Having regard to the foregoing, the Court finds that there has been a violation of Article 13 of the Convention in relation to Article 14 in conjunction with Article 8.

VII. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

241. Lastly, the applicant complained of a violation of her right of access to a court owing, in particular, to the Federal Supreme Court's limited power of review. She relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

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

242. The Government contested this argument.

243. The International Commission of Jurists (ICJ) observed that, where courts of appeal or cassation existed within a Contracting Party, such courts had to comply with the guarantees under Article 6. Accordingly, in an instance where a professional regulatory (disciplinary) body had made an adjudication on a dispute, it was critical under the Convention that either the professional regulatory body itself complied with the full requirements of Article 6 § 1, including being independent and impartial, or that the decision of such body was subject to the subsequent control of a judicial body that had full jurisdiction and guaranteed respect for the rights protected by that provision.

244. The Court notes that it has found a violation of Article 13 of the Convention in relation to Article 14 in conjunction with Article 8, owing in particular to the Federal Supreme Court's very limited power of review. In so

far as the applicant alleged a violation of her right of access to a court essentially on the same ground, the Court considers that this complaint does not give rise to any separate issue. It follows that there is no need to give a separate ruling on the complaint under Article 6 § 1 (see, to this effect, *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 156).

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

245. Article 41 of the Convention provides:

> "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

246. The applicant did not submit a claim in respect of pecuniary or non-pecuniary damage.

247. The Court therefore makes no award on that account.

B. Costs and expenses

248. The applicant submitted to the Court invoices in the amount of 65,211 Swiss francs (CHF) in respect of the costs and expenses of the proceedings before the CAS. As regards the proceedings before the Federal Supreme Court, she submitted invoices in the amount of 2,283,097.92 South African rands ((ZAR) – approximately 127,756 euros (EUR)[7]). Lastly, for the proceedings before the Court, she claimed a total amount of ZAR 1,745,611.95 (approximately EUR 97,678).

249. The Government submitted that, since the CAS could not be considered a "domestic" court within the meaning of the Court's case-law, the costs of the proceedings before it could not be taken into account under the head of costs and expenses.

250. In respect of the costs and expenses incurred before the Federal Supreme Court, the Government did not dispute the well-foundedness of the amount of CHF 7,000, which corresponded to the court fees paid to the Federal Supreme Court (judgment of 25 August 2020). On the other hand, they submitted that the total amount claimed by the applicant was manifestly excessive. They pointed out that those proceedings consisted mainly in the submissions of 28 May 2019 which were 106 pages long, of which 60 related to the violation of fundamental rights. They added that accommodation and travel expenses did not constitute expenses necessarily incurred to redress any potential violation of the Convention. The same was true, in their view,

[7] Conversion date: 21 December 2021 (date of claim).

for translation expenses. Lastly, they submitted that at that stage of the proceedings, the lawyers had already been familiar with the subject matter of the case. In view of those considerations, the Government submitted that a total amount of CHF 15,000 would be appropriate in respect of the costs and expenses incurred in the proceedings before the Federal Supreme Court.

251. In respect of the proceedings before the Court, the Government submitted that the total amount claimed was manifestly excessive. They argued that translation expenses did not constitute expenses necessarily incurred to redress any potential violation of the Convention. They also observed that the proceedings before the Court consisted mainly in the application of 18 February 2021 and the observations of 2 December 2021. In view of the foregoing, they submitted that a total amount of CHF 8,000 would be appropriate in respect of the costs and expenses incurred before the Court. They also submitted that that amount should be reduced accordingly in the event of a finding by the Court that only part of the application was admissible.

252. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

253. The Court does not share the Government's view that the costs incurred before the CAS cannot be taken into consideration under the head of costs and expenses, considering that the proceedings before that body were an integral part of the proceedings giving rise to the present case. It reiterates in that connection that the Government themselves submitted that a request for arbitration to an arbitral tribunal could be taken into account in the Article 13 examination (see paragraph 230 above). It considers, however, the applicant's claims in respect of costs and expenses to be excessive. Regard being had to the documents in its possession and the above criteria, the Court finds it reasonable to award the applicant EUR 45,000, covering costs under all heads, in respect of the proceedings before the CAS and the Federal Supreme Court, and EUR 15,000 for the proceedings before it, that is, a total of EUR 60,000, plus any tax that may be chargeable to her.

FOR THESE REASONS, THE COURT,

1. *Dismisses*, by a majority, the Government's preliminary objection that the Court lacked jurisdiction *ratione personae* and *ratione loci* to examine the application;

2. *Declares* admissible, by a majority, the complaints concerning Article 14 in conjunction with Article 8, and Article 13 in relation to Article 14 in conjunction with Article 8;

3. *Declares*, by a majority, the complaint concerning Article 3 of the Convention inadmissible;

4. *Holds*, by four votes to three, that there has been a violation of Article 14 of the Convention in conjunction with Article 8;

5. *Holds*, by four votes to three, that there has been a violation of Article 13 of the Convention in relation to Article 14 in conjunction with Article 8;

6. *Holds*, by six votes to one, that there is no need to examine separately the complaints under Article 8 of the Convention taken alone or the complaint under Article 6 § 1;

7. *Holds*, by four votes to three,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 60,000 (sixty thousand euros), to be converted into Swiss francs at the rate applicable at the date of settlement, 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;

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

Done in French, and notified in writing on 11 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Pere Pastor Vilanova
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:

– concurring opinion of Judge Pavli;
– partly concurring, partly dissenting opinion of Judge Serghides;
– joint dissenting opinion of Judges Grozev, Roosma and Ktistakis.

P.P.V.
M.B.

CONCURRING OPINION OF JUDGE PAVLI

1. I have voted with the majority in support of the main finding that there has been a violation of the applicant's right not to be discriminated against, in connection with the exercise of her Article 8 right to respect for her private life, as well as the other operative provisions of the judgment. I am also in full agreement with the majority reasoning, and am writing separately in order to provide some further clarifications as to the reasons underlying my position in this case.

Jurisdiction and scope of review

2. As to the questions of the Court's jurisdiction *ratione personae* and *ratione loci* and the applicability of Article 14, read together with Article 8 of the Convention, I fully subscribe to the majority position.

3. It is important to recall that, being a threshold condition, jurisdiction is governed by Article 1 of the Convention and general rules of public international law – as such, it is distinct from questions of jurisdiction of national courts or other aspects of domestic law. Switzerland's jurisdiction in this case was not triggered merely by a unilateral act or legal action brought arbitrarily by a non-resident person in the Swiss courts. The applicant made use, first, of a mandatory arbitral procedure which was the only form of contractual remedy open to her under her contract with World Athletics – namely, an appeal to the CAS. The latter was set up as a sports dispute-resolution mechanism with a clear international dimension, not one restricted to dealing with purely Swiss domestic disputes. Secondly, the applicant legitimately used the option granted by Swiss law to lodge an appeal against any CAS decision with the Federal Supreme Court (*Tribunal fédéral*). The nature of her appeal was of a primarily substantive character, rather than procedural. Neither the CAS, nor the Federal Supreme Court questioned in any way their respective jurisdiction to hear the case – in fact, both proceeded to a comprehensive consideration of the merits of the applicant's claims, including those related to discrimination in connection with her private life. The limited scope of the substantive review carried out by the Federal Supreme Court is something that may be relevant to the merits stage of this Court's assessment of the case (see more on this below), but it cannot have any decisive impact on the question of Swiss jurisdiction.

4. The basic rationale for Swiss jurisdiction in cases involving CAS decisions is clear from the Court's established case-law, which has involved a range of diverse scenarios to date: the respondent State's international responsibility stems from the actions or omissions of its highest tribunal, which decides any appeals against CAS decisions and gives them binding force (see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, §§ 65-67, 2 October 2018, and, in a similar scenario, *Beg S.p.a. v. Italy*, no. 5312/11, §§ 63-66, 20 May 2021). I see no reason for the Court to have

reached a different conclusion in this case, or to have accepted the respondent Government's argument that our finding of jurisdiction should be limited to any claims made under Article 6 of the Convention alone. The review carried out by the Federal Supreme Court, under national law, clearly went beyond matters of a purely procedural nature.

The challenge: binary sports categories facing a non-binary world

5. The applicant does not challenge the binary (male and female) categories in athletics. She simply argues that, as an athlete who was born a woman and has lived her entire life as a woman, she should be entitled to compete in the female category without being subjected to any further conditions related to her natural biology. Her claim is, essentially, that she should be able to choose based on her lifelong *self-identification* as a woman (see paragraphs 129-30 of the judgment).

6. Self-identification as the sole and sufficient basis for individual decision-making in sports is, however, contested terrain, owing in part to the growing debate on the treatment of transgender people in this and other fields of life. I note here that there are important differences between the applicant, who was born an intersex person, and transgender persons who may choose to transition later in life. The judgment recognises these differences and finds fault with the Swiss Federal Supreme Court for having failed to do so sufficiently (see paragraphs 196-99 of the judgment). At the same time, an intersex person is someone whose biology includes, to varying degrees, characteristics of both sexes – an aspect that, according to the World Athletics policy, gives the applicant an "unfair" competitive advantage over other female competitors.

7. The growing number and visibility of transgender athletes – primarily those who have transitioned from male to female and wish to compete in the female category – has led various sports organisations to address the categorisation question in recent years. It is the subject of heated debates and ongoing experimentation in the search for fair or at least generally accepted solutions. The approach chosen by World Athletics, focusing on female athletes' natural testosterone levels, is neither uncontested scientifically, nor the only one. To note a few recent examples: a number of sports federations are exploring the possibility of introducing a separate category that is either open to all competitors or reserved for transgender athletes – these include the World Boxing Council, the International Swimming Federation and World Rugby. For the swimming federation, the open category would allow individuals to compete "without regard to their sex, their legal gender, or their gender identity". World Rugby is exploring a mixed-gender category for contact rugby. Other federations are maintaining two categories, but will change the male category to an "open" category, whereas the female category remains "protected" (British Cycling and British Triathlon, in particular).

8. Such proposed solutions have also been contested, sometimes vigorously, by transgender and intersex athletes and their advocates. In terms of sports science, these approaches seem to be driven by the lack of scientific consensus as to whether post-puberty hormone therapies can effectively reverse the competitive advantages of athletes who have already gone through male puberty. It is obvious, at the same time, that such policies may have important implications for the dignity, privacy and bodily integrity of the affected athletes.

9. Our collective notions of what is fair in sports tend to be generally more raw and simplistic than considerations of equality in other fields of life.[1] It is not for this Court to resolve all the non-binary dilemmas in sports or settle on a single approach of fairness for all intents and purposes. At the same time, athletes are still entitled to respect for their fundamental rights, as confirmed by a growing line of our case-law (see paragraphs 105-07 of the judgment). To the extent that matters concerning such rights are brought and properly fall within the Court's jurisdiction, it is our responsibility under Article 19 of the Convention to assess whether any "solutions" implemented in this field respect the athletes' fundamental rights and freedoms. These questions are only likely to get harder in the transgender context. While it may not be for the Court to question the *goals* (ensuring fair competition in the various sports categories) or the underlying scientific approaches as such, it is necessary and appropriate to assess the *means* through which such goals are pursued and their impact on athletes' Convention interests.

Swiss ordre public *and European public order*

10. The present dispute between the applicant and World Athletics was treated at the national level as a matter of international private arbitration, on the basis that both parties were based or incorporated outside Switzerland. As a result – and similarly to most of the earlier sports-related cases decided by this Court which have tended to involve at least one non-Swiss party – national law provides for a more restricted form of review of arbitral decisions by the Federal Supreme Court. Section 176(2) of the Federal Act on Private International Law lists five possible grounds of appeal against private arbitral decisions, the relevant one for the current purposes being

[1] See Joshua Rothman, "The Equality Conundrum", *The New Yorker*, 6 January 2020. See also, from sports-related literature, Irena Martínková, "Unisex sports: challenging the binary", *Journal of the Philosophy of Sport* 47:2 (2020); Andria Bianchi, "Transgender Women in Sport", *Journal of the Philosophy of Sport* 44:2 (2017); Lynley Anderson, Taryn Knox and Alison Heather, "Trans-athletes in Elite Sport: Inclusion and Fairness", *Emerging Topics in Life Sciences* (2019); Roslyn Kerr and Camilla Obel, "Reassembling Sex: Reconsidering Sex Segregation Policies in Sport", *International Journal of Sport Policy and Politics* 10:2 (2018); and Matteo Winkler and Giovanna Gilleri, "Of Athletes, Bodies, and Rules", *Journal of Law, Medicine & Ethics* 49:4 (2021).

incompatibility of the award with public policy ("*lorsque la sentence est incompatible avec l'ordre public*").

11. In interpreting this ground of appeal, the Federal Supreme Court has noted that while the Convention or even the national Constitution cannot be directly invoked in such appeals, the "underlying principles contained in the provisions of the ECHR ... may however be taken into account under the head of public policy in order to give effect to this concept". In assessing compliance with Swiss public policy, the Federal Supreme Court also considers whether arbitral awards are consistent with "the essential and broadly recognised values which ... should underpin every legal system" (see paragraphs 9.2. and 9.4. of the Federal Supreme Court's judgment in this case, as cited in paragraph 33 of the present judgment).

12. There is no doubt that this sets a high threshold for challenging private arbitral awards in the Swiss legal order. Today's judgment does not take issue with this legislative approach as such, which is furthermore not uncommon. At the same time, the Swiss courts accept that the Convention does have a role to play in considering fundamental rights claims as part of private arbitral disputes. Furthermore, it must be recalled that the Court of Arbitration for Sport (CAS) itself presumed to apply, even if in subsidiary, Monegasque law, which incorporates the fundamental rights guarantees of the Convention and could have been of guidance to the arbitral tribunal (see paragraph 173 of the judgment).

13. The finding of a violation of Article 14 of the Convention read together with Article 8 in this case rests in my view on two primary and related grounds: (i) that in applying concepts of Swiss public policy and of "essential and broadly recognised values", the national court should have taken into account the underlying principles of the Convention as an instrument of European public order (see paragraphs 111 and 239 of the judgment); and (ii) that while the Federal Supreme Court did seek to incorporate a Convention analysis into its judgment, it did so in a way that does not reflect the true state of the Court's case-law. In particular, it failed to take proper account of the strength of Convention protections against sex-based discrimination at the horizontal level (see paragraphs 191-95 of the judgment) and against harm caused to a person's bodily and mental integrity as a result of being subjected to involuntary and unnecessary medical treatment (see paragraphs 185-90 of the judgment). Both sets of protections are of a truly fundamental nature.

Whether the ends justify the means

14. The Court has found, like the national authorities, that the applicant's treatment amounted to discrimination on grounds of sex, as well as on her biological characteristics: in other words, owing to bodily features the applicant was born with and that have remained unchanged throughout her life and sports career. Such forms of discrimination come with a high burden

of justification: public and private actors must present "compelling grounds" or "particularly convincing and weighty reasons" in order to satisfy the Court that the difference in treatment serves legitimate aims and that the means used are proportionate to those aims (see paragraph 169 of the judgment).

15. Furthermore, intersex persons belong to a vulnerable category that has historically been subjected to stigma and discrimination (see the report by the Council of Europe's Commissioner for Human Rights, "Human Rights and Intersex People", April 2015). The applicant herself has suffered intense scrutiny of her sexuality and intimate private life from a very young age and throughout her career. This aspect also calls for close scrutiny by the Court.

16. With respect to the question of the comparator – the category of other persons who are in an analogous or relevantly similar situation to the applicant, which can be duly compared to her situation for Article 14 purposes – the Court has held that "the domestic courts acknowledged, tacitly, that the situation of female athletes and that of the applicant, as an intersex athlete, were equivalent" and that the Court saw no reason to reach a different conclusion (see paragraph 161 of the judgment). It is important to point out here that World Athletics does not contest that the applicant is legally female, that she has identified, lived and competed as a woman throughout her life and career, and that she is *in principle* entitled to compete in the "protected" female category in athletics. Both the CAS and the Federal Supreme Court have compared the applicant, as a female athlete with DSD, to female athletes without DSD – the logic that the contested World Athletics regulations themselves follow. Under these persuasive circumstances, and in such a sensitive context, it would have been rather reckless for the Court to override the assessment of the previous instances and find that a different comparator ought to have been used. For similar reasons, any arguments based on the desirability of positive discrimination for women become moot if the compared groups are both within the female category in sports. Intersex is a biological category, not a gender one, and a very diverse one as well – it would have been legally and methodologically misguided for the Court to engage in a simplistic comparison between "intersex athletes" and "female athletes".

(a) The nature of the discrimination at play and the respective burden of justification

17. The Federal Supreme Court concluded that "[it was] 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 …" (see paragraph 9.4. of its decision, as cited in paragraph 33 of the judgment). While it is for the national court to determine what the "concepts prevailing in Switzerland" in this respect are, such a conclusion is highly questionable from the perspective of the Convention as an instrument of European public order, when seen in the light of the present facts – and it is duly rejected in today's judgment, through reliance on our extensive case-law to the contrary

(see paragraphs 191-95 in particular). Furthermore, the Federal Supreme Court maintained its position on horizontal discrimination despite recognising that the relationship between athletes and sports federations is closer to one of a vertical nature (and therefore State-like) in view of their "very hierarchical structure".

18. It begs recalling that, apart from any general abstractions, the present case concerns a form of horizontal discrimination based on the person's sex and permanent biological characteristics. Let's consider the following scenario: a private company suddenly requires all its female employees whose bodies, according to certain company-selected criteria, are not considered "feminine enough" for their brand, to undergo certain "corrective" medical treatments or procedures as a condition for keeping their jobs. I cannot imagine that such policies would have an easy day in court in today's Europe. This aspect of the case seems to have been seriously downplayed by the Federal Supreme Court.

(b) The impact on the applicant's bodily and mental integrity

19. The same can be said of the highest national court's assessment of the effects of the prolonged testosterone-reducing medication – a form of treatment that can in no way be considered voluntary for the current applicant – on her bodily and psychological integrity, both as a person and as an elite athlete. These adverse effects were deemed to be "significant" by the CAS itself and to constitute a "serious breach" of her personal liberty and dignity by the Federal Supreme Court. That notwithstanding, the argument that millions of women *choose* to take oral contraceptives on a regular basis seems to have carried the day. For the reasons indicated in paragraph 188 of the judgment, it is an argument that the Court finds flawed and not persuasive.

20. It is also significant that many of the world's leading medical groups have raised serious ethical concerns about the treatment protocol imposed by World Athletics on athletes it considers to be suffering from a disorder of sexual development – a label that is itself controversial when applied to intersex persons. Thus, the World Medical Association has adopted the following position on the World Athletics policy and its implementation by medical personnel:

> "It is in general considered as unethical for physicians to prescribe treatment for excessive endogenous testosterone if the condition is not recognized as pathological.[2] … The days when doctors or society would determine which gender a person should have are definitely over. It is the ethical duty of physicians to respect the dignity and integrity of people, regardless of whether they are female, male, intersex or transgender.

[2] World Medical Association, "WMA urges physicians not to implement IAAF rules on classifying women athletes", 25 April 2019.

> Medical treatment for the sole purpose of altering the performance in sport is not permissible."[3]

Conclusion

21. The World Athletics policy rests on a series of assumptions: that naturally elevated testosterone levels in female athletes provide an "unfair and insurmountable" competitive advantage, at least in certain races; that this single factor is predominant among other natural biological traits or competitive advantages enjoyed by female athletes; and that fairness requires that certain corrective action be taken to undo such a competitive advantage and ensure a level playing field for all female athletes.

22. As the judgment notes, these assumptions are not undisputed on either medical-scientific or ethical grounds. Thus, in November 2021, the International Olympic Committee, the umbrella organisation for all Olympic sports, adopted a new framework for intersex and transgender athletes, based in part on a new understanding that "there is an unclear role of testosterone alone in predicting performance across all sports"[4].

23. It is, ultimately, not for the Court to resolve such scientific disputes or decide what is fair in sports. As noted, the participation of non-binary athletes in sports that have been traditionally defined along binary lines raises difficult and evolving questions, with different approaches being pursued by various sports organisations. At the same time, the fundamental rights implications for the affected athletes – as sportspeople and as human beings – are too important for the matter to be left to the discretion of sports bodies alone.

24. In today's judgment the Court does not reject the goals pursued by World Athletics in seeking to ensure a level playing field in female competitions. By the same token, the Court does not presume to identify and impose one or another solution in this context. However, it is bound to assess, in the specific circumstances of the case before us, whether the ends can justify the means chosen, in the light of their proportionality and their impact on the applicant's fundamental rights. For the reasons indicated in the judgment and highlighted in this separate opinion, I join the majority in answering that question in the negative. The World Athletics DSD policy

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[3] World Medical Association, "Physician leaders reaffirm opposition to IAAF rules", 15 May 2019. See also a recent statement by the American Medical Association (AMA): "The new AMA policy responds to eligibility criteria from World Athletics. The international governing body for track and field events requires suppression of naturally high testosterone levels in female athletes with DSD and transgender athletes as a prerequisite to compete with other female athletes. World Athletics relied heavily on a 2017 study in developing eligibility criteria that has since been deemed flawed. Despite the authors of the study acknowledging that a causal relationship could not be established between elevated testosterone levels and performance advantages for elite female athletes, World Athletics has not modified its eligibility requirements."

[4] International Olympic Committee, IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations, 16 November 2021.

discriminates against Caster Semenya in ways and with effects that cannot be reconciled with the Convention.

25. The authorities of the respondent State have therefore failed to meet their positive obligations to adequately protect the applicant from such third-party discriminatory treatment, albeit within a judicial review of limited scope. The domestic proceedings did not provide adequate institutional and procedural safeguards for the protection of the applicant's Convention rights, in line with this Court's established case-law.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

Introduction

1. The applicant, an international-level athlete specialising in middle-distance races (800 to 3,000 metres), who had previously won two Olympic gold medals and three World Championships in the women's 800 metres race, complained about a set of regulations (the DSD Regulations) issued by the International Association of Athletics Federations (IAAF, now World Athletics) in so far as they obliged her to reduce her natural testosterone level in order to be able to participate in international competitions in the female category. Having refused to undergo hormone treatment, the applicant was prevented from participating in international competitions, which was tantamount to a ban. Her legal actions challenging the Regulations in question were rejected by the Court of Arbitration for Sport (CAS) and the Federal Supreme Court (FSC). She relied on Articles 3, 6, 8, 13 and 14 of the Convention in support of her arguments.

2. I voted in favour of points 1, 2, 4, 5, 7 and 8 of the operative provisions of the judgment, agreeing that there had been a violation of Article 14 of the Convention in conjunction with Article 8, as well as a violation of Article 13 in relation to Article 14 in conjunction with Article 8. I agree with the majority in finding a procedural violation of those provisions on account of the lack of review by the CAS and, in particular, the FSC. This is the only point in respect of which my opinion is concurring. In contrast, I find that there has been a substantive violation based on issues of inequality and discrimination arising from the DSD Regulations. The majority did not find it necessary to examine this aspect.

3. However, I voted against points 3 and 6 of the operative provisions, disagreeing with my eminent colleagues in the majority, first, that the complaint under Article 3 was inadmissible, and, in particular, that it was manifestly ill-founded under Article 35 § 3 (a) of the Convention and should therefore be rejected under Article 35 § 4 of the Convention, and, secondly, that there was no need to examine separately the complaints under Articles 8 and 6.

4. I would argue that the Article 3 complaint was admissible, and I will propose that there has been a violation of this Article. I would also argue that the Court ought to have examined the Article 8 complaint separately, and I will propose that there has also been a violation of this provision. I have decided to address the complaints under Articles 8 and 3 as corresponding to the respective alternatives in the forced choice imposed on the applicant, and, in doing so, I will seek to show more clearly the severity and interconnection of the violations of both Articles 8 and 3.

5. As regards the Article 6 complaint, namely, that the scope of the review was excessively restrictive and the FSC could not, or would not, examine the merits of each of the applicant's Convention complaints, this being also an important complaint, I would argue that there was a need for the Court to examine it in isolation and will propose that there has been a violation of this Article also. However, given the time constraints in writing this opinion, I have chosen with regard to the Article 6 complaint to annex a "bare statement of dissent" to the Court's ruling that there is no need to examine the Article 6 complaint, a mode of expressing dissent to which judges are entitled under Rule 74 § 2 of the Rules of Court.

1. Article 8 complaint

6. As the applicant stated in the annex to her application form under her Article 8 complaint, she has spent her entire career in the world of athletics, winning her first World Championship gold medal in 2009 at the age of 18. Her hard work and success have allowed her to establish and develop social and economic relations with others. Her identity is bound up with her ability to compete and succeed as the elite athlete she is.

7. With regard to her Article 8 complaint, the applicant argued as follows in the application form, and the annex thereto, which she lodged with the Court: the Differences of Sex Development (DSD) Regulations enacted by the IAAF mandated humiliating and intrusive examinations aimed at determining whether she was "biologically male", as well as pharmacological or even surgical interventions to reduce the levels of naturally occurring testosterone in the bodies of affected female athletes. Those Regulations seriously interfered with her right to respect for her private life under Article 8, with her bodily and psychological integrity and identity and with her right to self-determination, including the right to exercise her professional activity as an elite athlete without undue restriction and interference, and to respect for human dignity.

8. She further maintained that the concept of consent was entirely artificial. As a condition of participation in international competitions, she had to subject herself to the mandatory requirements of the DSD Regulations and any refusal to do so would exclude her entirely from international competitions in "Relevant Events".

9. She asserted that any alleged safeguards within the Regulations which purported to allow her to compete were a sham. Once the IAAF had determined that the applicant was a "Relevant Athlete", she was prevented from competing in international competitions unless she kept her testosterone below 5 nmol/L. The Regulations failed to prescribe how a "Relevant Athlete" was to do this (or if it was even possible to do so) but the experts giving evidence before the CAS agreed that "a reduction" of testosterone levels in women with 46 XY DSD could be achieved by taking oral contraceptives or GnRH agonists, or via a gonadectomy, all of which carry

established health risks and uncertain outcomes. She further argued that the CAS Panel and the FSC had proceeded erroneously on the assumption that oral contraceptives could be used to achieve compliance with the DSD Regulations, although the evidence pointed overwhelmingly to the opposite conclusion. The CAS Panel had admitted that evidence on oral contraceptive use by female athletes to reduce their testosterone levels was "extremely limited" and "[consisted] principally" of her evidence. She had taken oral contraceptives only because her physician had objected to a gonadectomy, given the likelihood of "dramatic, physical and mental deterioration", and she had experienced significant fluctuations in her testosterone levels when using oral contraceptives. Consequently, she contended, there had been no basis for the CAS or the FSC to disregard entirely in their analysis the prospect that Relevant Athletes might be required to turn to GnRH agonists or a gonadectomy, thereby suffering more severe interference with their bodily integrity. Another point she raised was that there was no practical way to safeguard or maintain the confidentiality of personal health data since the inevitable impact of the Regulations was to lead athletes to reveal such data, either by their exclusion from their chosen events or by their participation and excellence in such events.

10. The FSC had acknowledged the severe intrusion on the applicant's "personality rights" (a concept within Swiss public policy akin to the right to respect for private life under Article 8 § 1 of the Convention) and that the applicant's consent to the regime imposed by the DSD Regulations had not been freely given (FSC judgment, at 10.2). The FSC had also acknowledged (as had the CAS) the likelihood of breaches of confidentiality caused by the regime (ibid., at 10.4).

11. Nevertheless, the applicant submitted, the FSC had failed properly to assess and analyse these serious infringements by reference to Convention-compliant legal tests and standards and, in particular, had wholly failed to appreciate that: (a) the DSD Regulations were not in accordance with the law because they were not delineated with sufficient clarity or precision to create foreseeability, so as to afford the applicant protection against arbitrariness; (b) the objective of the Regulations (*de facto* "sex testing") did not pursue one of the aims enumerated in Article 8 § 2 of the Convention; (c) the Regulations had no rational connection to their stated aims (fairness and integrity in sport and inclusive participation in sport); (d) the objective of the Regulations was not sufficiently weighty as to be necessary in a democratic society and they did not meet a pressing social need, given that they sought to exclude women from their own (that is, female) category; and (e) the serious interference with the applicant's Article 8 § 1 rights had not been proportionate to the aim pursued. The FSC had failed to engage with and have regard to the manifest flaws in the IAAF's evidence, and it had thus been unable to discharge the task of justifying its decision.

12. Furthermore, the applicant complained that Switzerland had breached its positive obligation under Article 8 of the Convention to safeguard her bodily integrity and to protect her right to self-determination, including to personal development through engaging in activities in the professional sphere as an elite international athlete. That obligation had required Switzerland to implement in practice an adequate legal framework affording such protection, including proper application of the burden of providing reasons for the Regulations (both as to necessity and proportionality) and the objectivity of the expert evidence used to establish the facts relevant to the assessment.

13. She ended her complaint under Article 8 by arguing that the Convention had to be interpreted as a living instrument and submitted that, in that context, sporting concerns neither met any pressing social need, nor constituted any objective or reasonable justification, since they could not be considered proportionate to the harm caused by the Regulations.

2. Article 3 complaint

14. With regard to her Article 3 complaint, the applicant argued the following in her application form and the annex thereto: she is a healthy woman and does not need to be "treated" or "corrected". However, the DSD Regulations had caused: (a) harm to her physical integrity by subjecting her body to assessment and interference (including examination of her genitalia) which had been medically unnecessary; (b) stigmatisation through public shaming and humiliation (the application of the DSD Regulations marking her out as not female enough); (c) psychological harm through coercion and the lack of valid consent to the assessment pathway and the medical interventions imposed on her to allow her to continue competing; (d) a disproportionate impact on her as a woman from the Global South; and (e) by reason of the above, severe harm to her dignity and self-worth, owing to her being singled out for regulation by virtue of her very person.

15. She further complained that intrusive medical treatments lacking a therapeutic purpose or known consequences and administered without free and informed consent might well constitute inhuman and degrading treatment, particularly where that treatment was provided to marginalised groups. The CAS Panel and the FSC ought to have considered the harm (discrimination, human dignity, personality rights and privacy), not only separately (by assessing whether each form of harm was significant in itself), but also cumulatively. On any cumulative assessment, the applicant argued, it was readily apparent that she had been subjected to inhuman and degrading treatment through both the debasing aim and the application of the DSD Regulations, and that the legal framework consisting in the CAS and the FSC was inadequate to afford protection against such treatment. Moreover, she argued that the FSC had considered the harm issues, but that the narrow scope of review provided by the Federal Act on Private International Law ("PILA")

had prevented it from assessing their severity which, viewed individually and cumulatively, met the threshold of inhuman and degrading treatment.

16. Furthermore, the applicant argued that, as with Article 8 and/or read together with it, the protection of the individual from harm imposed a positive obligation on the State under Article 3 to maintain and apply in practice an adequate legal framework affording protection against acts even by private persons, and not just acts of violence or criminal acts but also those causing harm in violation of Articles 3 and/or 8. Where, as here, a particularly important facet of an individual's existence or identity was at stake, or the activities at stake involved a most intimate aspect of private life, the margin allowed to the State was correspondingly narrower.

17. Finally, in her observations in response to the Government's observations, the applicant invoked the following principles from the Court's case-law regarding mandatory medical intervention and the question whether such intervention amounted to inhuman and degrading treatment in breach of Article 3: (a) when deciding whether a certain practice or treatment falls within the scope of Article 3, the Court considers whether the ill-treatment has attained a minimum level of severity (*Identoba and Others v. Georgia*, no. 73235/12, § 65, 12 May 2015); (b) in assessing whether that minimum threshold has been exceeded, the Court considers several factors (*Keenan v. the United Kingdom*, no. 27229/95, § 110, 3 April 2001); and (c) when deciding whether medical examinations breach the Article 3 threshold, the question whether there was proper consent to them and whether they were medically and legally necessary may be decisive (*Salmanoğlu and Polattaş v. Turkey*, no. 15828/03, 17 March 2009, where the lack of consent to gynaecological examinations by the police led to a finding by the Court of discriminatory and degrading treatment contrary to Article 3).

18. Finally, as in her other pleadings, in her observations in response to the Government's observations the applicant emphasised the centrality of the principles of the prevention of harm and the primacy of health and bodily autonomy.

3. The applicant confronted with a forced choice: between a violation of her Article 8 right and a violation of her Article 3 right – ultimately amounting to a violation of both of those rights

19. I will begin this part by pointing out the following facts: the applicant was born a woman; since birth she has always been a woman; she grew up and was raised as a woman; she has not changed anything biologically; she has always participated in international or other competitions as a woman, as the CAS clearly acknowledged (see paragraph 17 of the judgment). However, it happens that she has a higher level of testosterone than other women and in order to participate in women's international competitions she was obliged by the DSD Regulations to lower her testosterone levels. I fully support all of the applicant's factual and legal submissions in arguing that there has been a

violation of her rights under Articles 8 and 3 of the Convention, and I consider that there is no need to reiterate those arguments unless and to the extent that this is necessary for the discussion below. I will substantiate this conclusion of a violation of both Articles 8 and 3 by examining the alleged violations of the rights under those Articles as corresponding to the respective alternatives in the forced choice imposed on the applicant, while discussing more thoroughly, however, her complaint under Article 3, given that it was held to be inadmissible, and, in particular, manifestly ill-founded.

20. In *S.P. and Others v. Russia* (nos. 36463/11 and 10 others, 2 May 2023) the Court referred to two factors which may constitute ill-treatment and which are particularly relevant in the present case: first, infliction of psychological suffering (and not only *acts* of ill-treatment), and, secondly, the threat of ill-treatment:

> "90. … [The Court] reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of [Article 3]. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 …
>
> 92. The Court also reiterates that acts of abuse other than physical violence may also constitute ill-treatment because of the psychological harm they cause to human dignity. In particular, a threat of ill-treatment can also amount to a form of ill-treatment because of the fear of violence it instils in the victim and the mental suffering it entails (see *Gäfgen v. Germany* [GC], no. 22978/05, § 108, ECHR 2010). … The Court accepts that living in a state of mental anguish and fear of ill-treatment was an integral part of the applicants' experience as 'outcast' prisoners … It undermined [the] human dignity of the applicants … This amounted to a form of degrading treatment prohibited by Article 3 of the Convention."

21. Because of the ban prohibiting the applicant from participating in international competitions, she has been confronted with a forced choice which has serious effects on the protection of her human rights as safeguarded by Articles 8 and 3 of the Convention. In particular, if the applicant wishes to exercise her right to respect for her private life, including her personal autonomy, by taking part in the women's international competitions in which she has excelled – a right which there is no doubt that she wishes to exercise – this will amount to forcing herself to violate, through her own actions, her right not to be subjected to inhuman and degrading treatment under Article 3, either by subjecting herself to an operation or to accepting injections or oral treatment (taking pills) in order to lower her testosterone levels. I consider those interventions on her body to be an assault or attack against her bodily and psychological integrity. On the other hand, if the applicant wishes to respect and protect her bodily and psychological integrity, by not being subjected to one of the above three actions, she will be prohibited from taking

part in international competitions, which will amount to violating her right to respect for her private life under Article 8. In my view, the dilemma imposed on the applicant by the above ban, also confirmed by the CAS, amounts to a simultaneous violation of her right to respect for her private life under Article 8 and her right not to be subjected to inhuman or degrading treatment under Article 3. Both of the alternatives in such a forced choice are not only incompatible with but also clearly violate both Articles 8 and 3 of the Convention respectively, and the forced choice, as such, violates both those provisions. This last point is something which needs to be underlined most strongly, because it has not been properly dealt with by the majority, although it is so obvious.

22. The above choice is forced because there is no alternative other than the two which are placed before the applicant, in other words, no alternative that the applicant could choose without disrespecting or self-violating her bodily integrity or her private life, or both. This forced choice contains a double-edged threat to the applicant, forcing her to self-violate one or other of her rights in order to maintain her bodily integrity or to exercise her right to respect for her private life. This choice amounts to placing the applicant between the devil and the deep blue sea or between a rock and a hard place. She is in a no-win situation.

23. In such a forced choice, the notion of the applicant's consent loses its meaning and function, and this is another important point which needs to be underlined.

24. In this connection, in his intervention as a third party in the present case (paragraph 32 of his report), the United Nations Special Rapporteur argued as follows regarding the nature of the choice in question:

> "Moreover, while the Regulations claim that 'no athlete will be forced to undergo any assessment and/or treatment', they leave *no real or viable choice* to the woman athlete, who has to 'choose' between (i) exclusion from competing in restricted events thereby damaging her livelihood and sporting career, or (ii) undergoing medically unnecessary and intrusive assessments and treatments with negative impacts on her health and well-being. Though the 'choice' is formally left to the woman athlete, the exercise of that choice involves significant detrimental impact on the physical and psychological integrity and dignity of women. The lack of autonomy of women athletes over their bodies and careers in turn signifies the very high degree or control exercised by sporting organisations on women athletes, a relationship characterised by *an acute imbalance of power*." (Original emphasis.)

It is clear from the above passage that the United Nations Special Rapporteur described the predicament in question as representing "no real and viable choice". However, such a description is very lenient, since the choice is in fact a forced choice, or even more accurately a non-choice and a double threat.

25. The only option actually available to the applicant in this particular case was to choose either to be excluded from international competitions or to undergo the medical procedure and intervention. This so-called "choice"

left open to her involved a detrimental impact on her bodily and psychological integrity and dignity as a woman. The absence of autonomy over her own body and career shows the extent of the control that the Regulations exerted over her, to the point of prohibiting her from exercising an autonomous choice. In my view, this is in no way necessary in a democratic society, as provided in Article 8 § 2 of the Convention.

26. The forced choice entails a simultaneous threat of ill-treatment and a threat of forbidding the applicant from participating in women's international competitions, thus inflicting psychological suffering, anxiety, anger and anguish on the applicant.

27. The two alternatives imposed on the applicant do not involve a limitation of her rights under Articles 8 and 3 but are rather of the nature of an entire abrogation or deprivation of those rights, despite the fact that Article 3 guarantees an absolute right. The result of the forced choice imposed on the applicant has been to deprive her of any protection of her Convention rights under those two Articles.

28. It is concluded that the applicant's situation could be compared with that of other female athletes and that she might have been treated differently in relation to those other athletes as a result of her exclusion from women's international competitions by virtue of the DSD Regulations (see paragraph 161 of the present judgment). The Court, while holding that there has been a violation of Article 14 in conjunction with Article 8 and a violation of Article 13 in relation to Article 14 in conjunction with Article 8 of the Convention, regrettably and surprisingly holds that it is not necessary to examine separately the complaint under Article 8 taken in isolation. This latter complaint is extremely important, and it is obvious that it is admissible and that there has been a violation of the right guaranteed by Article 8 in the present case. By not examining the Article 8 complaint, the Court fails to acknowledge that in the present case the applicant was faced with a forced choice, one part of which concerned the violation of her right to respect for her private life and the other part her right not to be subjected to ill-treatment.

29. The Court rightly begins by considering that a complaint alleging forced medical examinations and treatment of athletes under the DSD Regulations would constitute the very essence of an allegation of a violation of dignity for the purposes of Article 3 of the Convention (see paragraph 215). Subsequently, it argues that it appears that, in the context of the present proceedings, the applicant was not in fact subjected to any of the medical examinations or treatments indicated, since she chose to renounce competing in her preferred competitions rather than suffer the consequences of a procedure based on the DSD Regulations (ibid.). However, this statement, and the entire judgment in general, fails to take account the arguments set out above, namely, that a forced choice was imposed on the applicant and that she sacrificed her right to respect for her private life under Article 8 in order to maintain her bodily and psychological integrity by refraining from any

treatment incompatible with her right under Article 3. The applicant decided not to undergo any unwanted and unnecessary interventions on her body, not only as a matter of principle and out of respect for her human dignity and her right under Article 3, but also out of fear that any such medical intervention would have severe consequences for her physical and psychological health. The fact that my eminent colleagues decided that there was no need to examine the complaint under Article 8 in isolation undoubtedly prevented them from considering the importance of this right, which has been sacrificed – or more accurately violated – for the sake of or on the altar of the applicant's ability to exercise and not to violate her right under Article 3. Hence, it seems that the failure to examine the complaint under Article 8 in isolation prevented the majority from also examining the Article 3 complaint more thoroughly and in conjunction with Article 8, with the effect that they found the complaint under Article 3 to be manifestly ill-founded. To reiterate, the judgment fails to acknowledge that the exercise of the rights under Articles 8 and 3 falls within the mechanism of the forced choice as explained above, a mechanism which works as follows: the non-enjoyment of the exercise and the violation of one of those rights, (that is, the right under Article 8), is an unavoidable consequence and indispensable prerequisite or *sine qua non* for the enjoyment and the non-violation of the other right (that is, the right under Article 3), and vice versa. To sum up, the judgment fails to recognise the forced choice itself as a destructive mechanism for human rights, with its two alternatives being part of the forced choice.

30. The bitter truth, however, is that within such a forced choice both rights are violated, despite the fact that, ultimately, and incredible as it may seem, one of them appears to be satisfied. This is because the choice is forced, which means one right is sacrificed for the exercise of the other and the rights-holder does not have the alternative of enjoying the exercise of both of those rights freely. The exercise of a right cannot result from a threat that another Convention right cannot be exercised. The exercise of a right should be a matter of free choice and there can be no enjoyment of the exercise of a right if there is any kind of threat related to it directly or indirectly.

31. To reiterate, within the forced choice imposed on the applicant, there has been a violation of the applicant's rights under both Articles 8 and 3, even if the applicant ultimately decided not to take any steps to lower her testosterone. The threat of ill-treatment amounts to and is equivalent to ill-treatment itself, because of the fear it instils in the victim and the mental suffering it entails. In the present case, the threat was coming simultaneously from two separate albeit mutually interdependent directions: in one scenario, against the applicant's bodily integrity, by obliging her to accept a treatment she did not want, and in another, against her personal autonomy, by preventing her from participating in the women's international competitions in which she had previously excelled.

32. The rights safeguarded by the Convention must be exercised with the free and informed consent of the rights-holder. The choice to exercise a right guaranteed by the Convention implies and presupposes the free consent of its holder to exercise or not to exercise it.

33. Moreover, it is argued in the judgment that the dilemma with which the applicant was faced and her "choice" to renounce the exercise of her profession were duly taken into account by the Court in examining Article 14 taken together with Article 8 (see paragraph 215). The counter-argument might be that an examination of Article 14 taken together with Article 8, without the latter also being examined in isolation, is not sufficient to explain the dilemma imposed on the applicant, namely that of having to choose between her two rights (under Article 8 and Article 3), especially since the complaint under Article 3 was found inadmissible, and, in particular, manifestly ill-founded. In any event, no examination of the complaint under Article 14 taken together with Article 8 in its substantive dimension was carried out, so it cannot be argued that the dilemma with which the applicant was faced and her "choice" to renounce the exercise of her profession were duly taken into account by the Court in examining those provisions. For my part, I have found a violation of those provisions read in conjunction not only in their procedural but also in their substantive limb and dimension.

34. Lastly, in dealing again with the Article 3 complaint, it is noted (see paragraph 215) that the applicant underwent a sex verification test in 2009, that is, well before the entry into force of the DSD Regulations, which she challenged before the CAS and the Federal Supreme Court. With all due respect, I am unable to see the relevance of this statement to the alleged violation of Article 3. Whatever the applicant did before the DSD Regulations were enacted, if she did anything, she did freely. This is not the same thing, and has nothing to do with, the forced choice that she faced.

35. The violations of the applicant's Article 8 and Article 3 rights may appear to be self-inflicted in exercising one or other alternative in her forced choice. This is not the case, however, since the violations in question are in reality not self-inflicted, but are imposed on the applicant by the DSD Regulations in the form of a forced choice. I regret that this obvious observation is entirely overlooked in the judgment. Unfortunately, sometimes what is obvious and self-evident is so close to the eyes that it can hardly be seen.

36. Forced choices, such as that imposed on the applicant, are sometimes not easily detected, since they are like mines which are hidden in the ground, ready to explode. However, the applicant's complaints under Articles 3 and 8 of the Convention were properly raised by her, as were the elements of the forced choice. The complaint under Article 3 was nevertheless not examined thoroughly in the judgment and was found inadmissible (manifestly ill-founded) and the complaint under Article 8 was not examined at all in the judgment.

37. Member States have a positive obligation to ensure that individuals within their jurisdiction are not required to face forced choices as regards their Convention rights, as has happened to the applicant in the present case.

38. The principle of effectiveness, both in its capacity as a norm of international law enshrined in each Convention provision and as a method of interpretation and application of the Convention provisions, requires that human-rights provisions should be interpreted and applied in a practical and effective and not a theoretical and illusory manner, giving to those provisions their fullest weight and effect consistent with their text and object (see, with regard to the principle of effectiveness as used in another Article 3 case, my partly concurring and partly dissenting opinion (paragraphs 16, 35-36 and 40-42) in *Savran v. Denmark* [GC], no. 57467/15, 7 December 2021). In the present case, Articles 8 and 3 should not be in conflict under the machinery of a forced choice; in this sense, the application of these provisions differs from that of Articles 8 and 10 in certain cases, where a balancing exercise must be carried out. Both Articles 8 and 3 and the norm of effectiveness enshrined in them should be given their fullest weight and meaning in their application to the present case, as in any other case, according to the principle of effectiveness as a norm of international law and as a method of interpretation. Any choice in the exercise of human rights which is forced will undermine and militate against not only the effective protection of human rights and the principle of the rule of law, but also against the principles of equality and non-discrimination, and of democracy.

4. The absolute character of Article 3 and the "situational vulnerability" caused to the applicant by the forced choice

39. In my humble submission, the Court has underestimated the complaint under Article 3 of the Convention by finding it manifestly ill-founded, although in the circumstances of the case it should not have done so. It has not even found no violation of Article 3. In my view, the absolute character of the right under Article 3 has also been underestimated or overlooked by the Court in examining this provision for the purposes of the present case. This Article should be examined first by the Court, since it is one of the most fundamental values of a democratic society (see *Muršić v. Croatia* [GC], no. 7334/13, § 96, 26 October 2016; *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV; and *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 113, ECHR 2014 (extracts)).

40. With all due respect, the minimum threshold of Article 3, as used and applied to the circumstances of the present case in finding the related complaint manifestly ill-founded has been raised higher than the threshold that is required, in my view, by Article 3 and the Court's case-law thereon. Consequently, such a restrictive interpretation and application of Article 3 (by way of raising its minimum threshold), may amount to treating it as if it were a qualified right: such a higher threshold amounts to imposing a

limitation, through the back door, on a right which has an absolute character and is free from any limitations. Françoise Tulkens, former Judge and Vice-President of the Court, writing in her personal capacity, acknowledges that the absolute character of Article 3 is easily forgotten: "What is an absolute right? Strange as it may be, this basic question is very often forgotten not only by doctrine but also by judges" (Foreword to Professor Natasa Mavronicola's book, *Torture, Inhumanity and Degradation under Article 3 of the ECHR – Absolute Rights and Absolute Wrongs*, Hart, Oxford, 2021, at p. v.).

41. In deciding that the minimum threshold of Article 3 was not reached, the Court in the present judgment takes into account neither the fact that the alleged violation of Article 3 should be seen in conjunction with the forced choice imposed on the applicant, nor the applicant's circumstances and the fact that both the forced choice imposed on her, and all the fuss created about her having higher levels of testosterone than other women, not only rendered her vulnerable, but also increased her humiliation, anxiety and suffering.

42. The vulnerability caused to the applicant as a result of the forced choice is, in my view, a kind of "situational vulnerability", which, by its nature, is very serious, because the victim is "enslaved" and can do nothing to escape the situation which is imposed on her and which gives rise to the vulnerability. This vulnerability, which is created by the forced choice, is further exacerbated by the fact that the applicant has been discriminated against in comparison with other women athletes, who do not have to go through medical procedures and interventions to lower their testosterone and are nevertheless able to participate in international competitions. I had the opportunity to address another issue of situational vulnerability in my partly dissenting opinion in *Y.P. v. Russia*, no. 43399/13, 20 September 2022 (paragraphs 24-29); on situational vulnerability regarding Article 3 cases, see Corina Heri, *Responsive Human Rights: Vulnerability, Ill-treatment and the ECtHR* (Chapter 3 on "A Typology of the Court's Approach to Vulnerability under Article 3 ECHR"), Oxford: Hart Publishing, 2021, at pp. 31, 33, 38, 63-64, 78 and 112-13, and Natasa Mavronicola, op. cit., at p. 103).

43. In *Bouyid v. Belgium* ([GC], no. 23380/09, ECHR 2015), the applicant was slapped only once on the face by the police, without any intensity of suffering or for any particular duration, and, nevertheless, this was considered by the Grand Chamber of the Court to amount to "degrading treatment". As observed by Professor Mavronicola, "*Bouyid* potentially illustrates that 'severity' does not stem straightforwardly from the degree of harm or suffering inflicted, but relates rather to the character of the treatment at issue. … The treatment's severity pertained to its character and not merely to its consequence" (see Natasa Mavronicola, op. cit., at p. 92).

44. To describe this in images, the threshold of severity for a violation to be found, especially when dealing with Article 3, may act as a buffer between the complaint and the protective scope of the right, serving not only as a sort of entrance lobby but also a stumbling block which an applicant must

overcome in order to enter the circle of a right's protection. However, such an obstacle between the complaint and the protection of the right concerned has no basis in the Convention, but only in the Court's case-law, and the Court must be very careful in how it applies it, especially when dealing with an absolute right such as Article 3. In doing so, the Court must take into account the character of the right as absolute or qualified, the text of the terms in the relevant Convention provision – in the present case, "inhuman or degrading treatment" in Article 3 –, the purpose of that provision and how to render the exercise of that right practical and effective and not theoretical and illusory in relation to the relevant facts. If those safeguards are not taken into consideration, then it will amount to a regression in the effective protection of human rights. Rights should have protective rather than preventive shields.

5. The continuous character of the forced choice imposed on the applicant

45. The choice imposed on the applicant was not only forced, but also continuous; thus, it has been a continuously forced choice which has placed her in a position of situational vulnerability continuing up to the present day. I have decided to address the continuous character of the forced choice under a separate heading, because it is an additional characteristic of the choice imposed on the applicant which deserves separate examination.

46. A choice which has resulted in a violation of the applicant's rights under both Articles 8 and 3 and which is not only forced but also continuous, is of such a nature that it renders all the repercussions of the violation of the applicant's rights even more severe and unbearable for her. It is to the applicant's credit that she did not ask for an award in respect of non-pecuniary damage (see paragraph 246 of the judgment), but this does not reduce the intensity of the pain, anxiety and anger she has suffered on account of this continuous forced choice which has held her captive for so long. It is a shame for any athlete, and not only for a renowned athlete like the applicant, to be in such a difficult situation, where they must make unavoidable choices violating their Convention-protected rights. The most positive aspect of participating in international sports competitions can be ruined by a dilemma such as that forced upon the applicant. She stopped participating in women's international competitions and applied to the Court for protection not because she wanted to end her international career, but in order to maintain her bodily and psychological integrity and her identity as a woman, something that she should not need to prove by being subjected to medical and biological interventions, since she was born a woman and has always been a woman.

47. According to the Court's case-law (see, for instance, *Keenan*, cited above), in assessing whether the minimum threshold has been reached in respect of a complaint under Article 3, the Court considers: (a) the nature and context of the treatment; (b) its duration; (c) the physical and mental effects of the treatment; (d) the sex, age and state of health of the victim; (e) the

extent to which the treatment affects the individual's personality because it arouses feelings of fear, anguish and inferiority capable of humiliating and debasing them; and (f) whether the treatment is such as to drive the victim to act against their will or conscience.

48. I have taken "treatment" under Article 3 to refer not only to the treatment which the applicant did not undertake to reduce her levels of testosterone, but, also, and mainly, the forced choice that was imposed on her, which has been continuous and has had harsh consequences for her. Thus, the first two minimum threshold case-law factors, the "nature and context of the treatment" and its "duration" – continuous in character – are present in the applicant's case, in addition, of course, to the other four factors provided for by the case-law of the Court.

49. The continuous character of the forced choice imposed on the applicant is a factor which makes the violation not only of Article 3, but also of Article 8, more severe.

6. Conclusion

50. In view of all these considerations, I have reached the conclusion that there has been a violation of both Articles 8 and 3, taking each of these Articles in isolation. I am convinced that the foregoing thorough examination of the continuous and forced choice imposed on the applicant, which has implicated both of the above rights via the two alternatives in that forced choice and created a situational vulnerability for the applicant, leaves no room for any doubt whatsoever that the proposed conclusion is correct. The imposition of a forced choice involving human rights in the field of sports brings to the surface the social and moral dimension of the rights which have been breached and renders their violation more holistic and severe. This discussion on the forced choice has also led me to find that there has been both a procedural and a substantive violation of Article 14 in conjunction with Article 8, as well as a violation of Article 13 in relation to Article 14 in conjunction with Article 8.

51. By their very nature, human rights cannot be petrified or fossilised; otherwise it would not be possible for them to be practical and effective at the time when a given issue arises, and it is on this premise that the doctrine that the Convention is a living instrument which must be interpreted in the light of present-day conditions is based. The present judgment, to the extent that it is concluded therein that there has been a violation of Articles 14 and 8 of the Convention taken together, as well as a violation of Article 13 in relation to those two Articles taken together – findings with which I agree – is, I believe, compatible with the living-instrument doctrine and can be said to be a manifestation thereof. However, with all due respect, to the extent that the majority find the Article 3 complaint inadmissible (manifestly ill-founded) and consider that there is no need to examine Article 8 separately, the judgment represents a regression in human-rights protection and is not in line

with the aim of the Council of Europe, as stated in the Preamble to the Convention, namely, "the maintenance and further realisation of Human Rights and Fundamental Freedoms".

52. This case is extremely important, not only with regard to the issues of inequality and non-discrimination examined and decided upon in the judgment, but also because it shows that the Convention, and by extension also the Court, reaches into any field of human life, such as, here, the field of sports, when the protection of human rights so requires. In this respect, the role of member States under Article 1 of the Convention to secure to everyone within their jurisdiction the rights safeguarded in the Convention is significant, and member States cannot be considered to be fulfilling their role in securing human rights if they impose or tolerate, directly or indirectly, in any field of human life, forced choices preventing people within their jurisdiction from freely exercising their rights safeguarded by the Convention. This is similar to the role of the Court under Article 19 of the Convention in ensuring the engagements undertaken by member States, and under Article 32 of the Convention in interpreting and applying the Convention provisions. Had the Court not accepted jurisdiction in the present case, the consequence would have been that not only the applicant but an entire category of persons would have been unable to seek Convention protection for their human rights. Since the Convention does not allow forced choices regarding the exercise and enjoyment of one's rights, the Court must be vigilant in acknowledging when such a forced choice has arisen and in putting an end to it, by finding a violation of the relevant provisions of the Convention.

53. If forced choices between rights guaranteed by the Convention are allowed to exist, then they will eventually extinguish the rights concerned; this would be catastrophic for the machinery of protection of human rights in general, the aim of the Convention and the role and credibility of the Court.

JOINT DISSENTING OPINION OF JUDGES GROZEV, ROOSMA AND KTISTAKIS

We voted against finding a violation of any right under the Convention in the present case, as such a finding requires resolving several novel issues in a manner with which we cannot agree. Those issues relate to the jurisdiction of the Court and the analysis carried out under Article 14 in conjunction with Article 8, namely the choice of comparator, the assessment of scientific evidence and the substantive criteria to be applied in the proportionality analysis. We will address those issues in turn.

The first novel question that must be resolved in the present case, and probably the most important, is establishing whether the Court has jurisdiction to hear the case. The complaint before the Court was brought by a South African athlete who lives in South Africa, about measures adopted by a private-law organisation registered in Monaco that prevent her from participating in athletic competitions all over the world. By accepting that the Court has full jurisdiction, beyond the basic fair-trial guarantees under Article 6, and by including in its jurisdiction also the prohibition of discrimination under Article 14 in conjunction with Article 8, the majority has dramatically expanded the reach of this Court to cover the whole world of sports. Such an expansion can only be done on very sound legal grounds, which in our view are not present.

It is well established in the Court's case-law that the basis for its own jurisdiction is the jurisdiction of the respondent State which allegedly violated the Convention. Most recently the Grand Chamber reaffirmed this approach in its admissibility decision in *Ukraine and the Netherlands v. Russia*, where it expressly stated that "[i]n order for an alleged violation to fall within the Court's Article 19 jurisdiction to 'ensure the observance of the engagements undertaken by the High Contracting Parties', it must first be shown to fall under the Article 1 jurisdiction of a High Contracting Party" (see *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16 and 2 others, § 506, 30 November 2022).

This being a case against Switzerland, the basis for the alleged jurisdiction of the Court must derive from Swiss law, in the present case the Federal Supreme Court Act of 17 June 2005 ("the FSCA") and sections 176 and 190 of the Federal Act on Private International Law of 18 December 1987 ("PILA"). In accordance with the latter law, where an applicant does not have their residence in Switzerland, an arbitral decision falls under the jurisdiction of the Federal Supreme Court on very limited grounds. Namely, the lawfulness of the arbitral tribunal itself, competence to hear the dispute, not exceeding the demands of the parties and observance of equality of arms. It is on this basis that the Court has in previous cases accepted that it has jurisdiction under Article 6 of the Convention in cases originating in the Court of Arbitration for Sports (CAS) and has reviewed complaints under Article 6

of the Convention (see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, § 99, 2 October 2018).

The novel issue in the present case, and one which the Court addresses as such for the first time, is the jurisdiction of the Federal Supreme Court on the basis of section 190(2)(e) PILA, providing for jurisdiction in cases "[i]f the award is incompatible with public policy [*ordre public*]". The majority has taken the position that as long as the Federal Supreme Court is competent to hear a complaint against an arbitral decision, it should apply the Convention fully in its review. We see no legal basis for such a conclusion in the case-law of the Court and as a matter of principle we find no convincing justification for this approach.

As the basis of the Court's jurisdiction is Swiss law, under the Convention it is incumbent on the Federal Supreme Court to interpret and apply its national law. In addressing the issue, the Federal Supreme Court expressly pointed out that the applicant does not reside in Switzerland, an explicit condition of section 176 PILA, that the challenged regulations were adopted by a private-law organisation based in Monaco and that in reviewing them the CAS does not apply Swiss law. On this basis, the Federal Supreme Court carried out a restricted review of the challenged arbitral decision, limited to whether it complied with "public policy", as required under section 190(2)(e) PILA. In their judgment the majority held that this limited interpretation of section 190(2)(e) PILA by the Federal Supreme Court was wrong, and that "public policy" should encompass each and every obligation flowing from the Convention and the Court's case-law. This conclusion is problematic for at least two reasons. First, because the Court steps in and interprets domestic law in a manner contrary to the interpretation of domestic law given by the highest domestic court. And, secondly, because it extends the reach of the Convention worldwide, which neither follows from the case-law of the Court, nor was it ever the intention.

We do not need to go any further into why the Court is not competent to interpret domestic law besides noting that there was nothing arbitrary or manifestly unreasonable in the judgment of the Federal Supreme Court. It is primarily for the national authorities, in particular the courts, to interpret, and assess compliance with, domestic law (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 186, 6 November 2018, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 251, 1 December 2020).

As to whether this interpretation produces consequences that are consistent with the principles of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 191, ECHR 2006-V), it is questionable whether this principle would apply in the context of deciding on jurisdiction. Assuming it does, a more detailed analysis of this interpretation of section 190(2)(e) PILA and "public policy" will be required. In our view the guidance which the Convention provides to answer this particular question lies in the distinction

between derogable and non-derogable rights. The non-derogable rights defined by the Convention reflect a universal consensus, not limited to the Council of Europe member States, about basic human rights which States are obliged to observe under any circumstances. In this connection it is important to note that the Court has accepted a jurisdictional link where the investigative or judicial authorities of a Contracting State have instituted, by virtue of their domestic law, their own criminal investigation or proceedings concerning a death which has occurred outside the jurisdiction of that State (see *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, § 188, 29 January 2019, as refined in *Hanan v. Germany*, no. 4871/16, § 135, 16 February 2021). The Court has done this, however, only with respect to complaints of a violation of the right to life under Article 2 of the Convention, a non-derogable right.

In contrast, in the present case the applicant's complaint concerns a violation of Article 14 in conjunction with Article 8, both derogable rights. Further, the alleged violation requires a particularly careful and balanced analysis of the rights of two protected groups under the Article 14 case-law of the Court, women on the one hand and intersex people on the other. And this, in the context of a novel issue, fairness in sport, on which there is precious little general guidance and/or agreement. To equate such a complaint to a violation of one of the non-derogable rights is equivalent to destroying the whole hierarchy of rights established by the Convention. It would lead to a paradoxical result, where the respondent State would have higher obligations with respect to non-resident foreigners, about events having no link whatsoever with that State, than to individuals on its own territory. We find it difficult to accept that such an interpretation is consistent with the principles of the Convention.

In establishing jurisdiction, the majority rely mainly on two arguments, first, that a "jurisdictional link" is established as soon as a domestic court reviews a case (see paragraph 102 of the judgment) and, second, that the applicant would not have access to any other judicial forum (see paragraph 109 of the judgment). The first is derived from the principle established by the Court in *Markovic and Others v. Italy* (no. 1398/03, § 54, ECHR 2006-XIV), according to which "the Court considers that, once a person brings a civil action in the courts or tribunals of a State, there indisputably exists ... a 'jurisdictional link' for the purposes of Article 1". We find the reliance on this principle highly problematic. The jurisdictional link thus established, as it is very clear from the judgment in *Markovic and Others*, is only for the purposes of Article 6 and relates to purely procedural rights. As stated in that judgment and obvious from the Court's finding of no violation of Article 6, the fact that the Court had jurisdiction did not mean that there was an obligation for the respondent State to provide a forum for the hearing of the applicants' case on the merits. In the present case, in contrast, the rights alleged by the applicant and reviewed by the majority are

substantive in character, and by accepting that they have jurisdiction, the majority goes well beyond the narrow ground on which the question of jurisdiction was decided in *Markovic and Others*.

As to the second argument, that the applicant would not have access to any other judicial forum to vindicate her rights, we find it both insufficient and hypothetical. Nothing in the Convention suggests that it should provide universal protection of the rights laid down by it. We find this also an untested statement, which is contradicted by the comparative case-law cited in the judgment itself. As the *Renée Richards* case (see paragraphs 72-74 of the judgment) indicates, it might well be possible that national courts in countries on whose territory competitive athletic events are organised would agree to hear discrimination complaints with respect to those events. And they would certainly have a lot more legitimacy to review such complaints, enforcing their own laws on their own territory, than the Swiss courts enforcing Swiss "public policy" on the whole world.

For all the above reasons, we respectfully submit that section 190(2)(e) PILA and the concept of "public policy", as well as its interpretation provided by the Federal Supreme Court, are not sufficient to create a jurisdictional link and as a consequence the Court has no jurisdiction to hear the present complaint.

Having regard to our conclusion above, there is no strict need to examine in detail the merits of the complaint about the alleged discrimination. We would still briefly address the key arguments on which the majority rely in finding a violation. We start by noting that there exist many rules and restrictions in sports which aim to place competitors on an equal footing. These rules relate to the technical parameters of the equipment used but also to physical characteristics of athletes such as their weight in disciplines like weightlifting, rowing and different kinds of combat sports. Such rules aim to create equal conditions for the participating athletes and avoid situations where some athletes have a clear and known advantage over the others already before the competition starts. This is undoubtedly a legitimate aim and in designing measures to achieve it, the sports authorities should enjoy a wide discretion.

One of the most common categorisations in sports is that between men and women. The distinction on the basis of gender is justified by the aim of giving female athletes protected space for competition, without the need to compete against male athletes who are generally, for biological reasons, physically stronger, something that could create an advantage in many fields of sports. Providing women in the world of sports with equal opportunities and protection was also the primary concern of the Parliamentary Assembly of the Council of Europe in its Resolution 2465 (2022) of 13 October 2022. The need to provide special protection to women in order to fully guarantee to them equality of treatment is also a well-established principle in the Court's case-law. When it comes to discrimination on grounds of sex, the Court has

repeatedly stated that the advancement of gender equality is today a major goal in the member States of the Council of Europe (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012). The Court has recognised on various occasions that treating women more favourably was acceptable as it was a form of positive measure aimed at correcting factual inequalities between the two genders. It has so ruled in the context of State pension schemes (see *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 61, ECHR 2006-VI, and *Andrle v. the Czech Republic*, no. 6268/08, § 60, 17 February 2011) and the exemption of female offenders from life imprisonment (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, 24 January 2017), and it has expressly insisted on the discriminatory effect of domestic violence and the need to provide special protection to women (see, among many other authorities, *Opuz v. Turkey*, no. 33401/02, §§ 72-86, ECHR 2009). We thus find striking the complete lack of recognition by the majority in their analysis of the particular purpose of the DSD Regulations. While the challenged regulations were clearly aimed at providing equal opportunities for women in sports and were analysed as such at all levels in the proceedings before the different authorities, the majority completely ignored this aspect of the case.

Our next point is with respect to the definition of the ground on which the applicant was treated differently and the definition of the group with which she is allegedly in an analogous or comparable situation. The applicant, for her part, argued that she was treated differently from other women on the basis of her natural testosterone levels caused by her DSD. The majority, however, accepted that the applicant was treated differently on the basis of "'sex' within the meaning of Article 14 of the Convention, and sex characteristics (in particular, genetic)" (see paragraph 158 of the judgment). They implicitly compared the applicant with other women, without however expressly addressing the question of an analogous or comparable situation. The applicant being genetically different from other women and this being the basis for the application of the DSD Regulations to her, it would be possible to rely on genetic characteristics as the ground for the alleged difference in treatment. However, it would require a clear explanation why, taking into account this genetic difference, the applicant is in an analogous or similar situation with other women. As to the reliance by the majority on the ground of "sex", the applicant being a woman, it is far from obvious how the difference in treatment was based on her sex, something she herself did not claim.

This ambiguity in the reasoning of the majority is quite telling of the difficulties the present case raises. Something which, in our view, should be reflected both in the Court's reasoning as to its jurisdiction based on "public policy" and to the proportionality of the measure, if on some novel ground jurisdiction is accepted. It has become evident over time, through scientific research as well as increasing awareness related to sexual minorities, that the

binary categorisation of athletes into male and female is not unambiguous. It has been questioned whether the distinction, if any, should follow legal gender, gender identity or certain biological characteristics of the athletes, and which ground for distinction would best serve the very goal of the distinction – securing a level playing field for female athletes.

In the present case, restrictions were placed on the eligibility of women with certain differences of sex development and levels of endogenous testosterone above a certain limit to participate in the female classification in some disciplines at international athletics competitions. This restriction, as discussed above, sought to ensure equal conditions of competition for female athletes, including those without differences of sex development and having considerably lower testosterone levels. According to scientific evidence, as established by the CAS, higher testosterone levels – which are characteristic of men as opposed to women – enhance athletes' performance. Based on this scientific evidence – which we are not in a position to call into question in the absence of an apparent arbitrariness in the CAS's assessment –, the underlying idea of the DSD Regulations is that a person's testosterone level is an appropriate and biologically objective characteristic compared to, for example, legal gender or gender identity. This difference of treatment for the purposes of protecting female athletes from having to compete with athletes who possess characteristics which make them generally stronger and which, as such, are among the main characteristics that explain the difference in the performance of female and male athletes, was narrowly tailored to address precisely the defined purpose of the DSD Regulations. It is important to keep in mind that the testosterone level set by the DSD Regulations (5 nmol/L) was well above the normal female range. On this basis, the justification for the distinction made in the DSD Regulations can be seen as necessary and reasonable.

As to whether the scientific evidence on which this difference of treatment was based was reliable, we consider that in the present case the Supreme Federal Court applied the most recent international-law understanding of the approach that superior courts should take when performing a judicial review of scientific research, by examining the question whether the scientific research into testosterone, on which the applicant's ban on competing was based, met the standard of "reasonableness" in its "design and implementation".

This question was addressed by the International Court of Justice (ICJ) in the *Whaling in the Antarctic* case (*Australia v. Japan: New Zealand intervening*, judgment of 31 March 2014). The number of separate opinions, in particular dissenting opinions, bear witness to the importance that the judges of the ICJ attached to this case. The ICJ placed the reliability of Japan's scientific methodology at the heart of its analysis, examining point by point the "logic" behind the JARPA II research programme. To this end, the ICJ created what is known as the "standard of review", which consists in

examining whether the "design and implementation [of the research in question] are reasonable". The central issue addressed by the ICJ was that of whether and how international courts could perform an effective judicial review of scientific activities (see, to this effect, Achilles Skordas, "International judicial authority, social systems and geoeconomics: The ICJ *Whaling in the Antarctic* case (2014)", in Achilles Skordas, Gábor Halmai and Lisa Mardikian (eds), *Economic Constitutionalism in a Turbulent World*, Edward Elgar, 2023, pp. 299-356). This is the first time that the European Court has had occasion to consider this issue, although it did examine – rather indirectly – the Greulich and Pyle and TW3 scientific methods for determining an individual's age by analysis of the ossification of the wrist and hand in *Darboe and Camara v. Italy* (no. 5797/17, §§ 12, 33 and 59, 21 July 2022).

Returning now to the present case, and applying the ICJ's test to the scientific research on testosterone on which the applicant's ban on competing was based, we consider that the Supreme Federal Court carried out a detailed and conclusive examination of that research and that its "design and implementation" meet the standard of "reasonableness". While we may have some hesitation as to whether the implementation of the research was reasonable (in accordance with its conclusions, an athlete with DSD had to take medication to reduce her blood testosterone level to below 5 nmol/L for a continuous period of at least six months, but this is another point which remains uncertain), we are not, however, inclined to dismiss the relevant research. In any event, the review was appropriate, it was carried out in accordance with the most recent international-law approaches and the scientific methodology utilised proved to be coherent, free from inconsistencies and apt to justify the measures taken, such that no issue of lawfulness arises.

Finally, regarding the assessment of the proportionality of the measures, we regret that the majority did not recognise the depth of the examination carried out by the CAS and the Federal Supreme Court. Having observed that the CAS examined, during five days of hearings, a considerable number of experts before delivering a very detailed decision (see paragraph 172 of the judgment), they nevertheless concluded that neither the CAS nor the Federal Supreme Court carried out an in-depth examination of the reasons for the objective and reasonable justification for the DSD Regulations (see paragraph 184 of the judgment). Certain doubts expressed in the decision of the CAS are, in our view, indicative of its thorough analysis and the due attention it paid to different arguments rather than signs of a lack of in-depth examination. The same applies to the assessment of the proportionality of the restrictive measure by the CAS – one may agree or disagree with the outcome of the assessment, but the fact remains that in its decision the CAS analysed the ways of reducing testosterone levels, including possible side effects of different methods, and came to the conclusion that these did not outweigh the

legitimate objective of protecting and facilitating fair competition in the female category. It also had regard to the potential consequences of the examination of the athletes and other points raised by the applicant and considered that the DSD Regulations were not disproportionate on those grounds either.

Having regard to the above and, in particular, the limited power of review of the Federal Supreme Court, we are not convinced by the finding of a violation of Article 14 in conjunction with Article 8 in the present case. Even less so can the present case be described as being blatantly inconsistent with the prohibition of discrimination established by Article 14 (see *Pla and Puncernau v. Andorra*, no. 69498/01, § 59, ECHR 2004-VIII, referred to in paragraph 193 of the judgment).