

Bulletin TAS
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2025/3 & 4



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TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
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Editorial

At the end of September this year, Mr John Coates (Australia), 75, has decided to step down as President of the International Council of Arbitration for Sport (ICAS) and of the Court of Arbitration for Sport (CAS). He has been a member of ICAS since its creation in 1994, he became its third President in 2010 and was re-elected unopposed in 2015, 2019 and 2023.

Under his leadership, ICAS and CAS have experienced substantial growth. Since 2010, the number of CAS procedures registered annually has tripled (from 304 in 2010 to 917 in 2024), and the staff of the CAS Court Office has increased from 18 to 60 employees. The ICAS budget has also expanded significantly, rising from CHF 4 million in 2010 to CHF 24 million in 2024.

In his resignation letter, Mr Coates wrote: “Thanks to the contributions and support of our ICAS colleagues and CAS staff, the quality of our arbitrators and the stakeholders’ respect for our independence, the institution I am leaving has never been stronger”.

Pursuant to Article S6 of the ICAS Statutes, the senior Vice-President, Mr Michael Lenard, will assume the functions and responsibilities of the President until an election is held. The next presidential election is scheduled for May 2027, unless ICAS decides to convene one earlier. Mr Lenard stated: “It is a great honour for me to take over the ICAS Presidency. I look forward to ensuring, with the support of my colleagues, that the success story of ICAS and CAS continues. On behalf of ICAS and CAS, I wish to express my sincere gratitude to John Coates for his outstanding leadership during his 15 years of presidency.”.

From a digital standpoint, several important developments have taken place recently. On 17 December 2025, CAS launched a new website featuring an updated jurisprudence database. A new e-filing system will be

operational in the course of the first half of 2026 to facilitate the notification of documents in CAS procedures. This evolution will represent a further step towards increased digitalization of CAS arbitration.

As planned, CAS has organized quarterly workshops and webinars for its arbitrators and mediators. These workshops are aimed at informing the CAS members about the recent CAS case law, procedural issues and the CAS practice.

The year 2025 was marked by two European proceedings concerning CAS cases:

- 1) Semenya/Switzerland, at the Grand Chamber of the European Court of Human Rights (ECHR)
- 2) Seraing/FIFA, at the Court of Justice of the European Union (CJEU)

Although the CAS awards in both matters have remained undisturbed after these European procedures, the main test was the scope of the review process of awards following CAS arbitrations. In both matters, the European courts have confirmed the legal standards which existed prior to 2025. In short, such review process is limited to public policy and does not include a full review of the law, like in a classic appeal. Taking the example of the case RFC Seraing/FIFA, the CJEU determined that the review of CAS awards should be limited to EU public policy only. The Seraing decision follows the previous European jurisprudence and is in line with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Both European courts recognized that sports arbitration is a legitimate mechanism ensuring a uniform treatment of sporting disputes and a consistent application of sporting rules. This is a positive signal,

encouraging CAS to continue improving the services of its arbitration procedures, in accordance with the requirements of independence and neutrality, and in compliance with due process rights.

For the 2026 Olympic Winter Games to be held in Milan-Cortina from 6 to 22 February 2026, CAS will open two temporary offices in Milan. The first will host the CAS Ad Hoc Division, which has operated at every edition of the Summer and Winter Olympic Games since 1996 and at other major international events. The CAS Ad hoc Division guarantees free access to arbitration services conducted within a timeframe consistent with the competition schedule as decisions could be rendered within 24 hours in urgent matters.

The second temporary office will be a section of the CAS Anti-Doping Division (CAS ADD), responsible for adjudicating doping-related cases arising during the Games as a first-instance authority. Inaugurated at the Rio 2016 Olympic Games, this structure handles cases referred to by the International Testing Agency (ITA) under the IOC Anti-

Doping Rules. The CAS ADD became permanent, also outside the Olympic Games, in 2019.

This issue of the Bulletin combines the September and December editions and therefore includes a substantial number of significant cases—those raising novel legal issues, reaffirming key principles, or attracting notable public interest. Beginning this year, selected decisions are published in their original form, accompanied by concise summaries highlighting the core legal points.

As football continues to represent most CAS proceedings, this issue features 14 football-related cases out of the 25 notable cases selected.

I wish you a pleasant reading of this new edition of the CAS Bulletin and a Happy New Year 2026.

Matthieu Reeb
CAS Director General

Jurisprudence notable*

Cases of interest

Casos de interés



* Nous attirons votre attention sur le fait que la jurisprudence qui suit a été sélectionnée et résumée par le Greffe du TAS afin de mettre l'accent sur des questions juridiques récentes qui contribuent au développement de la jurisprudence du TAS.

We draw your attention to the fact that the following case law has been selected and summarised by the CAS Court Office in order to highlight recent legal issues which have arisen, and which contribute to the development of CAS jurisprudence.

Llamamos su atención sobre el hecho de que la siguiente jurisprudencia ha sido seleccionada y resumida por la Secretaría del TAS con el fin de poner de relieve las recientes cuestiones jurídicas que han surgido y que contribuyen al desarrollo de la jurisprudencia del TAS.

Biathlon; Doping (Athlete's Biological Passport); Production of new evidence; Private samples; Official samples; Illegally obtained evidence; Doctrine of estoppel; Genetic condition; Sanctions

Panel

Prof. Massimo Coccia (Italy), President
Mr Pierre Muller (Switzerland)
Mr Romano Subiotto KC (United Kingdom)

1. Pursuant to Article R56(1) of the CAS Code, the parties shall not be authorised to produce new exhibits after the exchange of the written submissions, save in exceptional circumstances. Such circumstances are met when the new evidence becomes available after the filing of the appeal brief or answer. Some flexibility also exists in practice regarding documents that are publicly available online.
2. Only samples collected for anti-doping purposes by the competent bodies and using relevant protocols can be included in the Athlete's Biological Passport (ABP). Private samples can be admitted to the case file but constitute unreliable evidence. They cannot be used to expand, reformulate or recalculate an athlete's longitudinal profile.
3. Minor procedural departures surrounding the collection and transport of an athlete's official samples do not justify their

invalidation or call into question their reliability under applicable guidelines and standards.

4. The athlete's consent to undergo further testing in order to investigate his genetic defence precludes subsequent complaints related to data protection. In any event, illegally obtained evidence may be admissible if there is an overriding public or private interest at stake.
5. The consideration of successive reports by a group of experts whose opinion has evolved due to ongoing investigations and evidence does not violate the doctrine of estoppel, and shows good faith in the search for the truth.
6. An antidoping rule violation is established when longitudinal abnormalities in hemoglobin levels cannot be scientifically explained by an alleged genetic condition or infection. This is particularly true when the peaks in question coincide with major competitions and the spectre of state sponsored doping casts a shadow over the athlete.
7. The sanctions imposed do not have to be reviewed in depth on appeal if they appear to be correct and are not challenged.

I. INTRODUCTION

1. This appeal is brought by the biathlon athlete Mr Evgeny Ustyugov against the International Biathlon Union to challenge a decision rendered on 27 October 2020 by a Sole Arbitrator of the CAS Anti-Doping Division ("ADD"), who found that Mr Evgeny Ustyugov

had committed an Anti-Doping Rule Violation (“ADRV”) and sanctioned him with a 4-year period of ineligibility and a disqualification of all competitive results obtained from 24 January 2010 to the end of the 2013-2014 season with all resulting consequences.

2. In his appeal, Mr Evgeny Ustyugov raised some preliminary objections, arguing in short that (i) the ADD did not have first instance jurisdiction and that, as a consequence, (ii) the CAS did not have jurisdiction on appeal, and that (iii) the ADD was irregularly constituted. This Panel, in its Award on Jurisdiction and Other Preliminary Issues dated 8 April 2022 (the “Preliminary Award”), dismissed those objections, by deciding that the ADD had first instance jurisdiction and was regularly constituted and that the CAS does have appellate jurisdiction over the merits of this case. The Preliminary Award was upheld by the Swiss Federal Tribunal in its judgment 4A_232/2022 of 22 December 2022. Therefore, the present final Award only addresses the merits of this case and does not deal with the preliminary issues adjudicated by the Preliminary Award, which are by now *res judicata*.

II. THE PARTIES

3. Mr Evgeny Ustyugov (the “Appellant”, the “Athlete” or “Mr Ustyugov”), born on 4 June 1985, is a former international level athlete of Russian nationality who had a successful career in the sport of biathlon, winning, most notably, a gold and bronze medal in the 2010 Vancouver Winter Olympics, as well as a gold medal in the 2014 Sochi Winter Olympics.

4. The International Biathlon Union (the “IBU” or the “Respondent”), headquartered in Anif, Austria, is the international sporting federation and the world governing body for the sport of biathlon.
5. The Appellant and the Respondent are collectively referred to as the “Parties.”

III. FACTUAL BACKGROUND

6. Below is a summary of the main relevant facts, as submitted by the Parties in their written pleadings and adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this final Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Mr Ustyugov’s Testing History and ABP

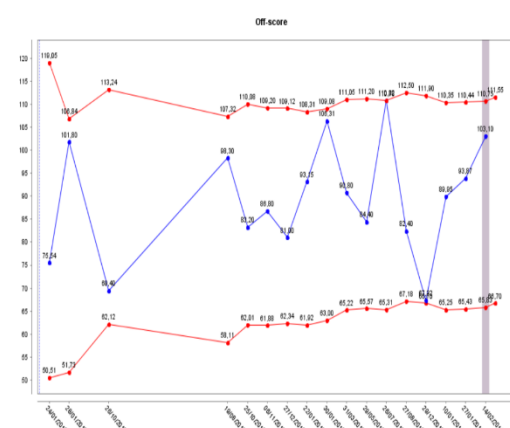
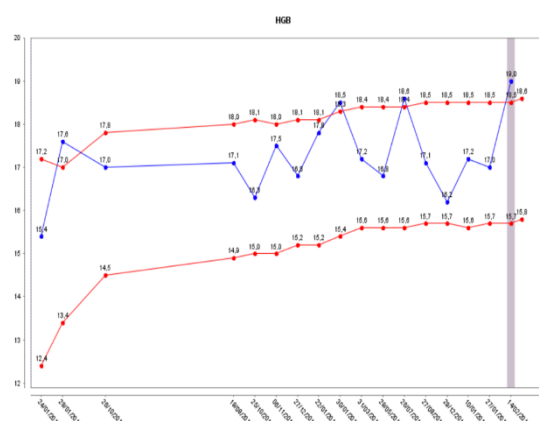
7. The Athlete began competing in international biathlon events in 2005. He competed for several years in IBU international events, obtaining several Olympic and World Championship medals as well as many World Cup podiums, until he retired from international biathlon competitions in 2014.
8. During his career, the Athlete underwent numerous doping tests in accordance with the IBU’s testing program.
9. Blood samples periodically collected from the Athlete were compiled to create his hematological Athlete Biological Passport (“ABP”), a

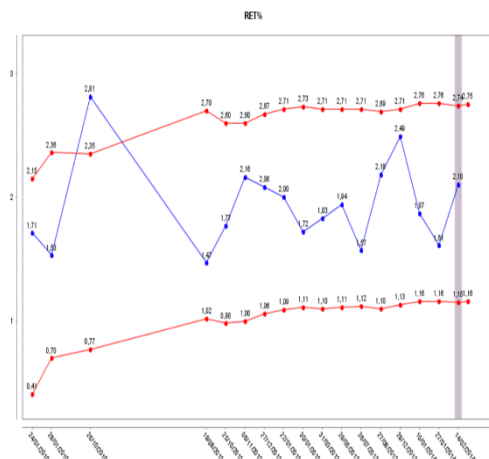
document which records and tracks the values of certain hematological parameters over time to monitor red blood cell production and detect blood manipulation. The biomarkers recorded in the ABP include hemoglobin concentration (“HGB”), the percentage of reticulocytes – i.e., young red blood cells – calculated out of the total red blood cells (“RET%”), and the ratio of the HGB and the RET%, as reflected by an “OFF-Score”.

10. Mr Ustyugov’s ABP consists of seventeen blood samples collected on behalf of the IBU from 24 January 2010 until 14 February 2014. The detected HGB, RET% and OFF-score values are shown in the table below (note that Samples 4 and 13 were held invalid and, accordingly, not included in the ABP):

No.	Date of Sample	HGB (g/dL)	RET %	OFF- score
1.	24.01.2010	15.4	1.71	75.54
2.	28.01.2010	17.6	1.53	101.80
3.	26.10.2010	17.0	2.81	69.40
4.	21.02.2012	17.7	1.05	115.52
5.	19.09.2012	17.1	1.47	98.30
6.	25.10.2012	16.3	1.77	83.20
7.	6.11.2012	17.5	2.16	86.80
8.	27.12.2012	16.8	2.08	81.00
9.	22.01.2013	17.8	2.00	93.15
10.	30.01.2013	18.5	1.72	106.31
11.	31.03.2013	17.2	1.83	90.80
12.	29.05.2013	16.8	1.94	84.40
13.	17.07.2013	17.7	1.98	92.60
14.	26.07.2013	18.6	1.57	110.82
15.	27.09.2013	17.1	2.18	82.40
16.	29.12.2013	16.2	2.49	67.32
17.	10.01.2014	17.2	1.87	89.95
18.	27.01.2014	17.0	1.61	93.87
19.	14.01.2014	19.0	2.10	103.10

11. Mr Ustyugov’s ABP sample results were also reproduced in the following charts, which compare the detected HGB, RET% and OFF-score values to his individual limits as calculated by the Adaptive Model (a mathematical model that was designed to identify unusual results from athletes based on a longitudinal review of their blood values):





12. Mr Ustyugov's ABP sample results were also reproduced in the following charts, which compare the detected HGB, RET% and OFF-score values to his individual limits as calculated by the Adaptive Model (a mathematical model that was designed to identify unusual results from athletes based on a longitudinal review of their blood values):
13. Mr Ustyugov's ABP sample results were also reproduced in the following charts, which compare the detected HGB, RET% and OFF-score values to his individual limits as calculated by the Adaptive Model (a mathematical model that was designed to identify unusual results from athletes based on a longitudinal review of their blood values):
14. On 27 September 2016, the Nordic Athlete Passport Management Unit ("NAPMU") referred the Athlete's ABP for expert review. A panel consisting of Dr. Paulo Paixão, Prof. Giuseppe D'Onofrio and Prof. Michel Audran (hereinafter "ABP Panel") independently reviewed the Athlete's anonymized ABP.

15. During the IBU investigation relating to the Athlete, new ABP samples were collected and added to the Athlete's ABP on 25 October 2017 and 6 December 2017 (the "2017 Samples" *infra* at paras. 21 to 24).

B. The First ABP Panel Opinion

16. On 21 March 2017, the ABP Panel issued the Joint Expert Opinion (the "First ABP Panel Opinion"), finding as follows:

"In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the probability of abnormality, according to ABP software at the 99% specificity level, is > 99.9% for hemoglobin (HB), >99% for the Off-score and >99.5% for reticulocyte percentage (ret%). The athlete has several flagged samples: samples 2, 10, 14 and 19 for hemoglobin; sample 3 for ret%.

This profile displays important variability, with difficult physiological explanations. In particular, the sequence between samples 16 and 19 is very suspicious: sample 19, collected in-competition, has an increase to the highest hemoglobin value (19g/dL) of the profile in less than 3 weeks (2g/dL), with a slight increase in ret%, suggesting that the body's blood cell mass has been increased behind any physiological explanation. This sequence started with sample 16, which shows the lowest hemoglobin and the highest ret% results of the last three years; this sample was collected 1 week before a period of competitions, and hemoglobin increased thereafter to 17.2g/dL (sample 17) when the competition restarted, keeping this result (17g/dL) during his stay at the biathlon centrum (1700m), to peak on sample 19 (19g/dL). In the Doping control form of sample

19, the athlete declares that he stayed at altitude (1700m) for 1 month. It is well known that altitude can cause mild changes to the OFF score within a defined timeframe (1,2). Nevertheless, based on the many studies in which effects of altitude on the blood picture have been assessed, training at less than 2000m has very little hematological effect and cannot explain the hematological changes observed in this sample.

In addition, other hematological abnormalities are present in this passport, which are not compatible with normal physiology, altitude nor intense exercise, such as the very fast increase of hemoglobin from sample 1 to sample 2, the frequent combination of high hemoglobin with high or very high reticulocytes (such as in samples 3, 7, 9, 10), the extremely high hemoglobin value observed is [sic] samples 10, 14 and 19 [...].

In the medical document, on the other hand, results of the complete blood count (in translation), show that the athlete had a very high value of HB (18.9 g/dl) in September 2012. The document also includes blood counts of the athlete's father (HB 17.0 g/dl) and mother (HB 15.3 g/dl), which are in medium-high normal range for the general population. This finding raises the possible presence of a very rare congenital form of erythrocytosis in the athlete [5]. The possibility of a rare congenital form of erythrocytosis should be excluded by accurate, in-depth clinical diagnosis, including genetic and molecular studies. [...]

Based on these facts and the information available to date, it is our unanimous opinion that, in the absence of an appropriate explanation, the likelihood of the abnormalities described above being due to blood manipulation is high. On the contrary, the likelihood of environmental factors causing the described pattern is very low”.

17. On 5 May 2017, the IBU sent the Athlete a letter notifying him of an investigation

into a potential anti-doping rule violation (an “ADRV”) pursuant to Article 2.2 of the IBU Anti-Doping Rules (“IBU ADR”) following an Adverse Passport Finding issued by the NAPMU. The letter invited the Athlete to provide a written explanation for his ABP anomalies.

18. On 19 May 2017, the Athlete denied the ADRV charges. The Athlete wrote: “I have elevated red blood cell count and this is a biological feature of my body only. But the reasons for these remains obscure for me. To prove my innocence, I am preparing to submit a medical examination, in particular the in-depth clinical diagnosis in specialized center regarding existence of the mutations associated with the elevated development of erythrocytes”. The Athlete followed this up with a letter of 12 July 2017, in which he stated that his doctors planned to conduct tests (i) for an “abnormality in the EPO-signalling pathway genes and in parallel”, (ii) to “examine the probability of acquired erythrocytosis”, and (iii) to check for “mutations in the genes associated with the oxygen-sensing pathway”.
19. On 20 July 2017, the Athlete provided a letter from geneticist Dr. E.G. Okuneva proposing to conduct Whole-Exome Sequencing (“WES”) on the Athlete to identify any relevant genetic mutations, based on private testing which had allegedly revealed elevated HGB levels in the Athlete’s mother.

C. The Second ABP Panel Opinion

20. On 7 September 2017, the ABP Panel issued a further joint expert opinion (the “Second ABP Panel Opinion”), finding as follows:

“[I]n his letter dated 19.5.2017, the Athlete states that elevated red blood cell count is a

biological feature of his body and affirms his availability to undergo in-depth clinical studies in a specialized center regarding the existence of the mutations associated with erythrocytosis.

Given such Athlete's availability, it is our opinion that it would be very useful to obtain recent information on the current Athlete's blood values. Such updated knowledge should be obtained by a few unannounced tests, collected according to the formal ABP protocol, repeated several times over a period of at least six months [...].

[I]n our opinion WES, as mentioned in Dr Ogareva's document translation, is not a currently recognized method for the definition of congenital erythrocytosis and has never been applied to the molecular investigation of candidate subjects with this genetic condition. [...]

In conclusion, it is our opinion that WES is not a currently recognized method for the identification of genetic variants associated with congenital erythrocytosis. Specific genetic analysis, on the other hand, should be performed in specifically expert laboratories, whose availability has to be verified. It is also our opinion that any further testing of the Athlete, which should also preliminary include new recent blood cell counts, should be carried out in strict adherence to the pre-analytical and analytical requirements prescribed by the Athlete Biological Passport Operating Guidelines, version 6.0 published in January 2017, including TD2017BAR and ISTI annexes K and L,, which regulate collection by anti-doping collection authorities, storage and transport with chain of custody and analysis of anonymous samples".

21. On 2 October 2017, the IBU sent a letter requesting the Athlete's consent to conduct no-notice testing within a six-month period and for the Athlete to provide his whereabouts information to

facilitate the collection of samples without prior notice. The request for consent read *inter alia* as follows:

"[T]he IBU is willing in principle to give you the opportunity to have further testing conducted in connection with your alleged congenital condition. I must stress that the IBU is under no obligation to afford you this opportunity in the circumstances of this case. Moreover the IBU is only willing to do so if you accept that the further testing shall be coordinated by the IBU and on the condition that you cooperate fully with the process. As a first step in that process, the IBU requires that you provide your written consent [...] to the full Testing authority of the IBU for an initial period of six months from the date of your consent (the "Relevant Period") for the purposes of an analysis, at one of the laboratories identified by the Expert Panel, for a potential genetic variation compatible with erythrocytosis and any other analysis that may be relevant in connection with the investigation of the alleged congenital condition. By providing such consent, you acknowledge and consent that the IBU may, without any limitation, collect blood samples from you (including without prior notice), arrange for the analysis of such samples by either WADA-accredited laboratories and other laboratories specialized in genetic analysis, store such samples for such period as may be necessary and process any data resulting from such analysis".

22. On 10 October 2017, the Athlete sent a letter to the IBU granting the requested consent: "I read your letter and writing to inform you that I'm ready to fully cooperate and to provide all possible samples". The Athlete went on to provide the requested whereabouts information.
23. Testing samples were collected from the Athlete on 25 October 2017: a blood sample was sent to Queen's University, Belfast laboratory for genetic analysis,

and an ABP sample was sent to the Moscow laboratory for analysis.

24. On 6 December 2017, further samples (a urine, a blood, and an ABP sample) were collected from the Athlete: the ABP sample was sent to the Moscow laboratory for analysis, and the urine and blood samples were sent for analyses to the Cologne anti-doping laboratory, accredited by the World Anti-Doping Agency (“WADA”).

D. Genetic Findings and the Third ABP Panel Opinion

25. The Belfast laboratory discovered a mutation of the EGLN2 gene in the Athlete through its genetic testing of the 25 October 2017 blood sample.
26. On 18 April 2018, Dr Mark Catherwood from the Belfast laboratory emailed the IBU the following:

“You will note from the report that we describe the variant detected as non-pathogenic in the gene EGLN2 (previously referred to as hypoxia inducible factor 2). This is thought not to be disease causing. The evidence to support this is twofold:

- 1. This variant has not been described in case of erythrocytosis.*
- 2. This variant has been found in the normal population and is commonly referred to as SNP (single nucleotide polymorphism). SNPs are thought to be remnants of an evolutionary process that shaped human variation.*

Using this evidence and the information from the genetic databases, we believe that this variant is unlikely to be disease causing” (hereinafter the “Belfast Report”).

27. On 25 April 2018, the IBU sent an email to the Athlete notifying him of the 25 October 2017 and 6 December 2017 test results and inviting the Athlete to comment on them. The results were the following:

Date of Sample	HGB (g/dL)	RET%	OFF-score
25 October 2017	17.7	1.95	93.2
6 December 2017	18.5	1.61	108.9

28. On 15 May 2018, the Athlete replied to the IBU’s request with the following comments received from “*professionals from the Institute of Hematology*”:

“Erythrocytosis is a rare disorder characterized by increased red cell mass and elevated hemoglobin concentration and hematocrit. Several genetic variants have been identified as for erythrocytosis in genes. However, in spite of clinical investigation and screening for these mutations, the cause of the disease is not found in a significant number of patients, who are classified as having idiopathic erythrocytosis. And up to now, the phenomenon of idiopathic erythrocytosis is completely unexplored.

The athlete was found to have a genetic feature in the form of an amino acid substitution for the protein encoded by the EGLN2 gene, this is one of the key enzymes that affect the regulation of erythropoietin production.

In normoxia, HIFa is hydroxylated by oxygen-dependent prolyl hydroxylase (encoded by EGLN1, EGLN2 and EGLN3), binds to VHL and becomes ubiquitinated and degraded. And it cannot be ruled out that this amino acid substitution does not affect the activity of this enzyme and can be the cause of idiopathic erythrocytosis”.

29. On 16 June 2018, the ABP Panel issued a revised joint opinion (the “Third ABP Panel Opinion”), finding as follows:

“With an email dated 24.5.2018, you asked us to comment on the results of recent genetic studies and new ABP tests provided by the Athlete regarding his blood profile with ID BPX571J27. You made available to us:

- A short letter from the athlete with an opinion concerning the new genetic results (Dated 15-5-2018);*
- Hematological and administrative data concerning two new ABP tests carried out in 2017;*
- Genetic results of the study in the Belfast Laboratory of genetic variants potentially involved in the development of erythrocytosis;*
- An email signed “Mark” (probably Dr Mark Catherwood) from the Laboratory of Molecular Hematology of Queen’s University of Belfast)*

We refer to our previous Joint Evaluation, submitted on 21.3.2017 for the details of the abnormalities of this Athlete’s blood passport. In brief, we had pointed out how abnormal hematological patterns were observed in several passport samples, such as:

- the sequence of samples 16 to 19;25*
- the sequence of samples 1 and 2;*
- the high values of hemoglobin in samples 10, 14, 19.*

In our first report we mentioned, on the basis of several hematologic features of this Athlete’s profiles, the possibility of a very rare congenital form of erythrocytosis, deserving further investigation through genetic and molecular studies.

In a subsequent letter, dated 19.5.2017, the Athlete stated that elevated red blood cell count (generally corresponding to elevated HB in ABP) is a biological feature of his body and affirmed his availability to undergo in-depth clinical studies in a specialized center regarding the existence of the mutations associated with erythrocytosis. We expressed our opinion that it would be have been useful to obtain recent information on the current Athlete’s blood values by further tests, collected according to the formal ABP protocol, and we have provided the APMU with references for several laboratories with specific expertise on genetic variants associated with congenital erythrocytosis, where the Athlete’s blood could have been analyzed for the presence of relevant genetic mutations.

New laboratory tests and their results

In the subsequent period, two new ABP tests have been carried out in the following date[s] with the below reported results:

Date	HB [g/dl]	Reticulocyte %	Off score
25-10-2017	17.7	1.95	93.2
6-12-2017	18.5	1.61	108.9

These results confirm the atypical presence of high HBs associated with increased reticulocytes, already pointed out in several samples of the Athlete’s ABP Passport.

The Athlete’s blood was also anonymously analyzed in the specialized laboratory of Molecular Hematology for the genetic study of essential erythrocytosis, directed by Professor Marie Frances McMullin, at the Belfast Queen’s University. The Belfast Laboratory has sequenced a panel 10 of genes “considered relevant” in idiopathic erythrocytosis. As a result, a single nucleotide change of the gene EGLN2 was identified, with the following interpretation: “We have identified a mutation

that we believe to be non-pathogenetic". In his email dated 18-4-2018, Dr Mark Catherwood from the Belfast Laboratory confirms the opinion that the variant detected in the gene EGLN2 is not-pathogenetic, that is not disease causing, on the basis of a twofold evidence:

- *This variant has not been described in cases of erythrocytosis;*
- *This variant has been found in the normal population.*

Experts comment and conclusion

Genetic analysis of the Athlete's blood has shown that he is carrier of a mutation, which is not rare and has not been previously described in cases of erythrocytosis, of the EGLN2 gene, which codifies for the protein prolyl-hydroxylase 2. [...]

It is our opinion that, in consideration of these genetic findings, as well as of the atypical hematological pattern in the [Athlete's ABP, anonymised as] BPX571J27 ABP, which is not fully consistent with the most used and plausible blood doping schemes, the likelihood of ESA doping behavior in this case cannot be considered sufficient to prosecute the Athlete on the only basis of the indirect evidence ensuing from his hematological profile.

This opinion is supported by the following elements.

- 1) EGLN2, although its variants have not been associated with pathology, is an important gene involved in the oxygen-sensing mechanism of the human body;*
- 2) EGLN2 is included in the panel of genes for the genetic diagnosis of erythrocytosis because it is "potentially relevant";*
- 3) Experimental studies have shown that the inhibition of the EGLN-product PDHs is*

capable of inducing increased production of erythropoietin in laboratory animals: although EGLN1 plays the dominant role, EGLN2 and 3 seem to have additive effects.

On the basis of the new findings and on the general characteristics of the BPX571J27 blood profile, therefore, we are unable to conclude that it is highly unlikely that this profile is the result of a normal physiological or pathological condition; similarly, we are unable to conclude that it is highly likely that it was caused by the use of prohibited substances or prohibited methods. On the other hand, we recommend further tests for the athlete, both in and out of competition, by searching all types of ESA in blood and urine and through further hematological ABP monitoring".

30. This Third ABP Panel Opinion was not notified to the Athlete at this time.

E. The Oxandrolone Case

31. In August 2018, the IBU charged the Athlete with an ADRV – separate from the present ABP proceedings – involving the Athlete's alleged use of the synthetic steroid known as oxandrolone revealed in a sample collected on 27 August 2013 (hereinafter the "Oxandrolone Case").
32. On 13 February 2020, the IBU Anti-Doping Hearing Panel ("IBU ADHP") found the Athlete guilty of the ADRV of Use of Oxandrolone. The IBU ADHP sanctioned the Athlete for a two-year period and annulled all competitive results from 27 October 2013 through the Athlete's retirement after the 2014 season.

F. Prof. Werge's Report and the Fourth ABP Panel Opinion

33. The Athlete's case was discussed on an anonymous basis at an ABP event meeting organized by WADA in December 2019, which was attended *inter alia* by geneticist Prof. Thomas Werge. At this meeting, Prof. Werge was asked whether the hematological abnormalities in the (anonymous) passport of the Athlete could be explained by genetic variants (in particular EGLN2). He expressed his view that they could not be explained by such genetic variants. Prof. Werge was then asked by WADA to provide a report to that effect.

34. On 9 January 2020, Prof. Werge provided a report regarding the Athlete's genetic testing results in relation to his ABP, stating the following:

"I have been asked to provide a second opinion on the possible functional impact of a mis-sense, single-nucleotide variant (SNV) in the gene EGLN2.

In the documents presented, the identified SNV is referred to as chr19(GRCh38):g.40806669G>A and NM_053046.3(EGLN2):c.958G>A C.958G>A, and is correctly stated that the SNV has previously been reported in publicly available databases and is referred to as rs774710749. The missense SNV leads to an amino-acid substitution in the encoded protein: Egl nine homolog 2.

I confirm that the SNV has been observed in normal population, it is not reported in the ClinVar database that catalogues known pathogenic, genomic variants, and analysis of the putative functional impact of the SNV using the PolyPhen-2 tool predict it to be benign.

In conclusion, I find no evidence to support a claim that the observed SNV, rs774710749, has functional consequences in humans of

pathological, clinical or biological importance" (hereinafter the "First Werge Report").

35. On 10 January 2020, the IBU sent an email to the NAPMU requesting further review of the Athlete's ABP by the ABP Panel. The email attachments included the First Werge Report, information regarding the Oxandrolone Case, and analyses of the samples collected from the Athlete on 25 October 2017 and 6 December 2017.

36. On 11 January 2020, the ABP Panel, taking into account the First Werge Report, issued a revised joint expert opinion (the "Fourth ABP Panel Opinion"), finding as follows:

"In his Expert Opinion, Professor Thomas Werge now affirms, on the basis of solid scientific evidence, that the observed mutation is observed among healthy subjects and has no 'functional consequences in humans of pathological, clinical or biological importance'. His statement confirms the comment of Dr Mark Catherwood to the analytical report from the Belfast laboratory (in which the mutation was found) that the variant detected in the gene EGLN2 is not-pathogenetic.

On the basis of the exclusion of any possible role of the gene mutation in erythropoiesis, it is our unanimous opinion that it is highly likely that the abnormalities observed in this passport and described by us in detail in our first Joint Expert Report were caused by the use of prohibited substances or prohibited methods, and that it is unlikely that they were the result of confounding factors.

In particular, even if a mild effect of anabolic steroids on erythropoiesis has been described in the scientific literature, it is our unanimous opinion that the timing, the type and the amplitude of the abnormalities in this passport

fully exclude any role of anabolic steroids in their genesis”.

37. On 13 January 2020, the IBU sent a letter to the Athlete requesting comments to be considered by the ABP Panel in relation the Fourth ABP Panel Opinion.
38. On 20 January 2020, the Athlete replied to the IBU, stating that he “*strongly challenges any wrongdoings*” and “*does not recognize the authority of the [IB]U and of the CAS Anti-Doping Division upon him as he has never agreed to be placed under their jurisdiction*”.

G. The Notice of ADRV Charge

39. On 21 January 2020, the IBU sent the Athlete a formal notice of ADRV charge of “*Use of a Prohibited Substance and/or a Prohibited Method in the period 2010-2014, in breach of Article 2.2 of the IBU Anti-Doping Rules*”. The notice of ADRV charge invited the Athlete to admit the charge against him or request a hearing. On 7 February 2020, the Athlete formally denied the ADRV charge against him.

IV. THE APPEALED DECISION

40. On 25 February 2020, the IBU started disciplinary proceedings against the Athlete before the ADD.
41. On 27 October 2020, the ADD Sole Arbitrator (the “ADD Arbitrator”), ruled that the Athlete had committed an ADRV (hereinafter the “ADD Decision” or “Appealed Decision”) and ordered as follows:

“1. The Anti-Doping Division of the Court of Arbitration for Sport has jurisdiction to decide on the subject matter of this dispute.

2. The request for arbitration filed by the International Biathlon Union is upheld.

3. Mr Evgeny Ustyugov is found guilty of an anti-doping rule violation in accordance with Article 2.2 of the 2009 IBU ADR Rules between 24 January 2010 and April 2014.

4. Mr Evgeny Ustyugov is sanctioned with a 4-year period of ineligibility starting from the date of the final CAS ADD Award.

5. All competitive results obtained by Evgeny Ustyugov from 24 January 2010 to the end of the 2013/2014 season, including, without limitation, all results and medals won at the 2010 and 2014 Olympic games, are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The award is pronounced without costs, except for the ADD Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the International Biathlon Union, which is retained by the ADD.

7. Each party shall bear their own legal costs and other expenses incurred in connection with this arbitration.

8. All other motions or prayers for relief are dismissed”.

42. Leaving aside the preliminary objections raised by the Appellant (already adjudicated by this Panel in the Preliminary Award and, by now, become *res judicata*), in reaching her decision on the merits of the charged ADRV the ADD Arbitrator held *inter alia* the following:

- On whether the IBU violated the principles of *res judicata* and *venire contra factum proprium*.

“147. While the Athlete’s ABP case was not very active in the period between the issuance of the Expert Panel Opinion in June 2018 and the receipt of the Werge Report in January 2020, it is clear to the Sole Arbitrator that no evidence presented either constituted a ‘decision’ of the IBU to forego pursuit of the Athlete’s case or to ratify the findings of the ABP Panel. Neither could a de facto termination of the proceedings be implied. [...]

150. For the Athlete’s estoppel argument to succeed, there must have been some reliance in good faith by the Athlete to his detriment (CAS 2011/A/2473). No example of reliance on a representation made by, or on behalf of, or under the auspices of the IBU was proffered by the Athlete much less a detrimental reliance which is a pre-requisite to the success of this argument. Neither has any prejudice to the Athlete been demonstrated.

151. This is an APB case where the unique genetics of the Athlete are proffered to explain his haematological abnormalities. Nothing prevents that explanation and the underlying evidence and relevant witness testimony being considered by the Sole Arbitrator in these proceedings giving the Athlete the full opportunity to defend himself (see CAS 2014/A/3639)”.

- On whether Prof. Werge’s opinion was based on illegally obtained evidence:

“155. Regarding the admissibility of illegally obtained evidence, the Panel in CAS 2016/A/4486 determined that the interest in the fight against doping can be greater than the individual’s interest in not having an illicitly obtained evidence admitted.

156. The admittance of evidence is subject to procedural laws. In this respect, Article 3.2 of 2009 IBU ADR determines that anti-doping rule violations may be established by ‘any reliable means’. Considering the very large scope of means of admissible evidence provided by Article 3.2, the Sole Arbitrator considers that the Athlete’s APB and expert witness opinions and statements should be considered as reliable means of evidence in the sense of the 2009 IBU ADR. Even illegally obtained evidence may be admissible if the interest in finding the truth is found to outweigh an athlete’s rights as part of an overall balancing exercise.

157. WADA must be kept informed of investigations (Article 12 International Standard for Testing and Investigations), copied on charges (WADA Code Art. 7.10) and be notified of decision (WADA Code Art. 8.4). The Athlete was also aware that WADA was being kept apprised of the IBU’s results management process as Dr Reid Aikin of WADA was inter alia copied on the IBU letter of investigation to the Athlete regarding his ABP Profile of 13 January 2020.

158. The Sole Arbitrator considers that the ABP of the Athlete was provided to Prof. Werge legally and on an anonymised basis by WADA, as the owner of ADAMS with the right to access the Athlete’s ABP information. Prof. Werge’s Report as provided to WADA & IBU was done by his own admission, ‘on the interpretation of the genetic analyses performed by Dr Mark Catherwood and coworkers at the UK Reference Center Belfast City Hospital, Molecular Haematology Unit, as they were presented to me by Dr. Reid.’ The Belfast reports referred to ‘Patient Name: 337973’ ”.

- On whether the Athlete's genetic condition caused his ABP abnormalities:

"182. Having weighed up the evidence given by all the experts, the Sole Arbitrator is persuaded by the evidence of the IBU's experts and is not persuaded that the Athlete's genetic variations are the cause of his high HGB levels. The scientific evidence presented by the Athlete is based primarily upon inference and hypothesis. The absence of more up-to-date literature or a study to demonstrate that any of the identified variants in the Athlete's genes had a functional impact was unhelpful to his case. Equally unsatisfactory was the rationale provided for the strikingly fortuitous timing of spikes in the Athlete's HGB proximate to major championships".

- On whether the 2017 samples proved that the Athlete did not use prohibited substances:

"188. The Athlete indicated in his submissions that there were essentially two possible explanations, either that he produces naturally more HGB than the normal population or that he has continually taken prohibited substances since his retirement in 2014 to this day. On the basis that it has not been demonstrated that the Athlete's high HGB levels are naturally occurring as a result of a genetic condition, the only plausible explanation is that they are accounted for through the taking or Use of a prohibited substance or prohibited method. This is an ABP case, therefore only Use can be considered as an explanation and the Sole Arbitrator, on the basis of the expert evidence is comfortably satisfied that this is the case".

- On whether the private samples collected by the Athlete should be considered:

"192. The Sole Arbitrator is not prepared to accept the inclusion of private blood tests taken over a period of 5 years since the Athlete retired, taken in unknown circumstances and for unknown purposes. Only samples taken and managed in accordance with the appropriate supervision and in accordance with the IBU and the WADA International Standards for collection, storage and testing of samples is appropriate to maintain a level playing field".

- On whether the altitude at which certain samples were collected could account for the Athlete's ABP abnormalities:

"197. The Sole Arbitrator is not persuaded that in the Athlete's case altitude can account for the abnormalities in his ABP, in particular the high HGB levels and the even higher peaks which in some case increased by 2 g/dL within 4 days to reach 17.6 g/dL (between Sample 1 and 2) or over 3 weeks to reach 19 g/dL (between Sample 17 and 19)".

- On whether the Athlete committed an ADRV:

"198. The Sole Arbitrator, having considered all the evidence, determines that she is comfortably satisfied on the basis of the ABP profile of the Athlete that the Athlete committed an ADRV in that he used a prohibited substance and/or a prohibited method in the period 2010-2014 in breach of Article 2.2 of the 2009 IBU ADR. Consequently, consideration of the other circumstantial evidence submitted by the IBU in terms of reaching the threshold test

is not necessary as the burden of proof has been met by the IBU”.

- On whether other circumstantial evidence warrants harsher sanctions based on aggravating circumstances:

“216. The Sole Arbitrator is comfortably satisfied the Athlete Used prohibited substances or prohibited methods on multiple occasions between 24 January 2010 and 14 February 2014. It is of note that blood doping using rEPO requires repeated administration (by injection) over a period of time and that blood doping by autologous blood transfusion requires both withdrawal and re-administration of the blood. The Expert Panel concluded that the Athlete’s ABP reflected an artificial increase in HGB levels immediately proximate to the Vancouver Olympic Games 2010 and the Sochi Olympic Games 2014. The intention to illegally improve performance in the most important international competitions ‘can be considered particularly reprehensible because these events enjoy [the] ultimate respect’ and has been an aggravating factor in other CAS cases (2018/O/5667 and 5668).

217. The Athlete has been found to have committed another ADRV in the Oxandrolone case. The outcome of that case remains in place as at the date of this Award (but is under appeal to CAS). Notwithstanding same, Article 10.7.4 IBU ADR provides that w[h]ere a separate violation cannot be treated under the multiple violations regime the second violation may nonetheless be treated as an aggravating circumstance;

10.7.4.2 If, after the imposition of a sanction for a first anti-doping rule violation, the BIU discovers facts involving an anti-doping rule violation by the Athlete or other

Person which occurred prior to notification regarding the first violation, then the BIU will impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time. Results in all Competitions dating back to the earlier anti-doping rule violation will be disqualified as provided in Article 10.8’

218. In light of the overwhelming circumstantial evidence provided to the Sole Arbitrator, it is difficult to conclude other than that the Athlete has had the benefit of protection and support to artificially augment his performance through doping and to avoid detection. Given the diversity of support, its elaborate nature and its extent, it could not have been achieved other than with a significant degree of orchestration or common enterprise to commit the instant anti-doping rule violation”.

V. THE PROCEEDINGS BEFORE THE CAS

43. On 13 November 2020, the Appellant filed a Statement of Appeal challenging the ADD Decision before the Court of Arbitration for Sport (the “CAS”) in accordance with Articles R47 and R48 of the Code of Sport-related Arbitration (the “CAS Code”). In the Statement of Appeal, the Appellant attempted to nominate as arbitrator Prof. Pierre Tercier, who is not on the CAS list of arbitrators. The Appellant explained that he was aware that Prof. Tercier did not appear on the CAS list, but that his nomination would be an “adequate remedy to cure the lack of independence of the CAS Appeals Arbitration Division towards the CAS-ADD”. The Appellant also requested that the arbitration proceedings be stayed until the Swiss

Federal Tribunal (hereinafter, also indicated as the “SFT”) ruled on the challenge against the ADD Decision that the Appellant intended to soon file.

44. On 16 November 2020, the CAS Court Office acknowledged receipt of the Statement of Appeal. The CAS Court Office also invited the Appellant to nominate another arbitrator from the CAS list, since his nomination of Prof. Tercier as an arbitrator was invalid based on Articles R33 and R48, para. 1, of the CAS Code, which only allow nominations from the CAS list.
45. On 18 November 2020, the Appellant nominated Mr. Pierre Muller, former judge in Lausanne, Switzerland, as arbitrator. The Appellant reiterated that his attempt to nominate Prof. Tercier was done to “*ensure the independence of the CAS Panel from the CAS ADD*” as there was a “*structural issue with respect to independence and impartiality, when the CAS Appeals Arbitration Division is in charge to review decisions issued by another CAS Division*”.
46. On 20 November 2020, the Respondent objected to the Appellant’s request that the arbitration be suspended until the SFT ruled on the Appellant’s appeal before that tribunal.
47. On 23 November 2020, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to deny the Appellant’s request to stay the proceedings pending the appeal before the SFT.
48. On the same day, 23 November 2020, the Athlete challenged the ADD Decision before the SFT, requesting that it be annulled pursuant to Article 190 of the Swiss Federal Act on Private International Law (“PILA”) for lack of jurisdiction and for irregular constitution of the ADD.
49. On 30 November 2020, the Respondent nominated Mr. Romano Subiotto KC as arbitrator.
50. On 2 December 2020, the Appellant filed with the CAS an objection to jurisdiction and request to bifurcate the proceedings (the “Objection to Jurisdiction and Request for Bifurcation”), also reiterating his request to stay the CAS proceedings until the SFT issued a decision on the appeal filed on 23 November 2020. Along with this submission, the Appellant filed an expert report prepared by Prof. François Bohnet on the question of the jurisdiction of the ADD.
51. On 4 December 2020, the Appellant challenged the nomination as arbitrator of Mr. Romano Subiotto KC.
52. On 9 December 2020, the Respondent objected to the Appellant’s Objection to Jurisdiction and Request for Bifurcation.
53. On 11 December 2020, the Respondent filed its comments with respect to the Appellant’s challenge against the nomination of Mr. Subiotto KC as arbitrator.
54. On 15 December 2020, the CAS Court Office informed the Parties on behalf of the Deputy President of the CAS Appeals Arbitration Division that the decision on whether to bifurcate the proceeding would be deferred to the Panel, once constituted.
55. On 12 January 2021, the Appellant filed his Appeal Brief in accordance with

- Article R51 of the CAS Code. In para. 178 of the Appeal Brief, the Appellant requested *“that the IBU produces the whole case file in these proceedings as he wants to be sure that this Panel can issue a ruling based on all the available evidence. This file should in particular include ADAMS data with respect to the ABP. The IBU is also requested to file the agreement that would have been signed with the Russian Biathlon Union regarding the costs associated with proceedings initiated against Russian biathletes”*.
56. On 14 January 2021, the Challenge Commission of the International Council of Arbitration for Sport (“ICAS”) dismissed the Appellant’s challenge against the nomination of Mr. Subiotto KC as arbitrator and indicated that the costs of that decision would be determined in the final Award or in any other final disposition of this arbitration.
 57. On 26 January 2021, the CAS Court Office notified the Parties that Prof. Massimo Coccia, Professor and Attorney-at-law in Rome, Italy, had accepted his appointment as the President of the Panel.
 58. On 3 February 2021, the CAS Court Office notified the Parties that, on behalf of the President of the CAS Appeals Arbitration Division and pursuant to Article R54 of the CAS Code, the Panel appointed to decide the matter would be constituted by Prof. Massimo Coccia, as chairman, Mr. Pierre Muller nominated by the Appellant, and Mr. Romano F. Subiotto QC nominated by the Respondent.
 59. On 4 February 2021, the CAS Court Office notified the Parties that Mr. Francisco Larios, Attorney-at-Law in Miami, Florida, USA had been appointed as *Ad Hoc* Clerk in the present arbitration.
 60. On 8 March 2021, the Respondent filed its Answer in accordance with Article R55 of the CAS Code. Along with this submission, the Respondent filed an expert report prepared by Prof. Antonio Rigozzi on the question of the jurisdiction of the ADD.
 61. On 17 March 2021, the Panel invited the Parties to inform the CAS Court Office on the status of the Athlete’s appeal before the SFT and to provide their comments on whether, in their opinion, there were “substantive grounds” to suspend the present CAS arbitration, pursuant to Article R55, fourth paragraph, of the CAS Code and Article 186.1bis PILA, until the SFT ruled on the Appellant’s request to set aside the ADD decision.
 62. On 24 March 2021, the Parties informed the CAS Court Office that the appeal procedure before the SFT was still pending and gave their respective comments on the aforementioned issue of whether substantive grounds to suspend the CAS proceedings existed.
 63. On 25 March 2021, the Panel, pursuant to Articles R32, third paragraph, and R55, fourth paragraph, of the CAS Code, suspended the arbitration proceedings until the SFT ruled on the Appellant’s challenge against the ADD Decision.
 64. On 18 June 2021, the Federal Tribunal held the Athlete’s appeal as “inadmissible”, i.e. “*irrecevable*” in French (see SFT Judgement of 18 June 2021, 4A_612/2020).
 65. On 19 July 2021, the Panel noted that the SFT had issued its decision with grounds

on the Athlete's appeal, and, accordingly, lifted the suspension of the CAS arbitration procedure. The CAS Court Office, on behalf of the Panel, invited the Appellant to indicate whether he maintained his request for bifurcation.

66. On 22 July 2021, the Appellant informed the CAS that he maintained his request for bifurcation as the SFT had not yet ruled on the alleged lack of jurisdiction and irregular constitution of the ADD.
67. On 19 August 2021, the Panel decided to bifurcate the proceedings and to decide on the issue of the alleged lack of jurisdiction and irregular constitution of the ADD as a preliminary matter, given that the SFT had left the issue open. The Panel invited the Parties to state whether they wished to file further submissions and/or whether they deemed a hearing necessary on such preliminary issues.
68. On 24 August 2021, the Parties indicated that they did not consider a further round of submissions necessary at this stage. As to whether a hearing was necessary, the Appellant did not request one and the Respondent left it for the Panel to decide.
69. On 30 August 2021, the Panel, considering the Parties' positions with respect to a hearing and a further round of written submissions, and pursuant to Articles R56 and R57 of the CAS Code, deemed itself sufficiently well-informed to rule on the issue of the alleged lack of jurisdiction and irregular constitution of the ADD based solely on the Parties' existing written submissions, without the need to hold a hearing.
70. On 8 April 2022, the Panel delivered the Preliminary Award, ruling as follows:

"1. The Court of Arbitration for Sport has jurisdiction over the appeal filed by Mr Evgeny Ustyugov on 13 November 2020 against the decision rendered on 27 October 2020 by the appointed Sole Arbitrator of the Anti-Doping Division of the Court of Arbitration for Sport.

2. The request of Mr Evgeny Ustyugov to set aside the decision rendered on 27 October 2020 by the appointed Sole Arbitrator of the Anti-Doping Division of the Court of Arbitration for Sport due to the lack of jurisdiction of the Anti-Doping Division is rejected.

3. The request of Mr Evgeny Ustyugov to set aside the decision rendered on 27 October 2020 by the appointed Sole Arbitrator of the Anti-Doping Division of the Court of Arbitration for Sport due to the improper constitution of the first instance adjudicator is rejected.

4. Any further or different request or motion related to the preliminary issues adjudicated in this award are rejected.

5. All other claims or issues, including the costs of this award, will be assessed and determined in the final award".

71. On 25 May 2022, the Athlete filed an appeal with the SFT against the Preliminary Award and requested the CAS to suspend the arbitration proceeding pending a decision of the SFT.
72. On 14 June 2022, the CAS Court Office informed the Parties that the Panel had granted the Appellant's request to suspend the CAS proceeding.
73. On 22 December 2022, the SFT dismissed the Athlete's appeal against the Preliminary Award (4A_232/2022).
74. On 10 January 2023, the CAS Court Office informed that Parties that, in view

of the SFT's dismissal of the Athlete's appeal, the suspension of the CAS arbitration proceeding was lifted with immediate effect. The CAS Court Office also invited the Athlete to confirm (i) his request for production of documents made in para. 178 of the Appeal Brief and, if confirmed, to give further detail and reasons on the request, as well as (ii) his request for a public hearing made in para. 179 of the Appeal Brief.

75. On 27 January 2023, the Appellant confirmed his request for production of documents and explained: *"the ABP Panel appointed by the IBU initially found that the blood profile of the Appellant was not caused by the use of prohibited substances or prohibited methods. However, the ABP Panel changed its mind in less than 24 hours based on an unsubstantiated opinion provided by Prof. Werge. What happened between the issuance of the initial expert report of the ABP Panel, on 16 June 2018, and the new opinion dated 11 January 2020 remains completely unclear. It is legitimate for the Appellant to understand why the IBU suddenly decided to reopen the case against him and to initiate new proceedings. Furthermore, the accusations against the Appellant are based on very sensitive medical data and he has the right to have access to the whole case file in order to receive a copy of all data collected by the IBU. Since the IBU is seated in Austria, the IBU shall comply with the General Data Protection Regulation (GDPR) and the whole case file shall be disclosed pursuant to art. 15 GDPR"*. The Appellant also requested the Panel to grant a second round of written submissions and confirmed his request for a public hearing, specifying however that, in light of the political context and related travel difficulties, the Appellant (as a Russian citizen) and his Russian experts were very likely going to attend the hearing online, while his Swiss

counsel would attend the hearing in person in Lausanne.

76. On 15 February 2023, Prof. Coccia updated his disclosure form. The CAS Court Office granted the Parties the opportunity pursuant to Article R34 of the CAS Code to challenge Prof. Coccia as arbitrator if it considered the additional disclosure gave rise to legitimate doubts over his independence. Neither party challenged Prof. Coccia's independence following said disclosure.
77. On 20 February 2023, the Respondent objected to the Appellant's requests for production of documents and for a second round of written submissions.
78. On 22 February 2023, the CAS Court Office informed the Parties *inter alia* that, with respect to the Appellant's procedural requests, the Panel had:
 - (i) Denied, in accordance with Article R44.3(1) of the CAS Code, the Appellant's request for production at para. 178 of the Appeal Brief as supplemented by his letter of 27 January 2023 for reasons that would be provided in the final Award;
 - (ii) Granted a second round of written submissions on the grounds that the Parties' submissions on the merits were filed two years earlier and that the Panel wished to ensure that the Parties had the opportunity to make reference to and exhibit the most recent scientific findings and literature;
 - (iii) Granted the public hearing and the possibility for the Appellant and his experts to attend the hearing through videoconference while their counsel would be present in

- person in Lausanne; considering that the hearing would be held in a hybrid format and the complex technical and legal issues at stake, the publicity of the hearing would be ensured through the publication of the full video recording of the hearing on the CAS website after the hearing.
79. On 27 April 2023, the Appellant filed his Reply.
 80. On 30 June 2023, the Respondent filed its Rejoinder.
 81. On 5 July 2023, the CAS Court Office issued the Order of Procedure, which was signed and returned on the same day by the Parties.
 82. On 12 July 2023, the Appellant informed the CAS Court Office that Dr Ilya Efremov had allegedly discovered a new variant over the weekend that could explain the elevated values of the HBG in the Appellant's system and requested to submit new evidence in support thereof.
 83. On 13 July 2023, a hearing was held at the CAS headquarters. In addition to the Panel, the *ad hoc* clerk (Francisco A. Larios) and CAS Counsel, the following persons attended the hearing:
 - For the Appellant:
 - Mr. Evgeny Ustyugov (Appellant, by videoconference)
 - Mr. Yvan Henzer (Counsel, accompanied by videoconference by two interns from Libra Law, as consented by the Panel and the other party)
 - Ms. Tatiana Petropavioskaya (Counsel)
 - Ms. Oksana Sirotkina (Athlete Entourage, by videoconference)
 - Prof. Pascal Kintz (expert, by videoconference)
 - Dr. Manana Sokalova (expert, by videoconference)
 - Dr. Douwer de Boer (expert, by videoconference)
 - Dr. Ilya Efremov (expert, by videoconference).
- For the Respondent:
- Mr. Nicolas Zbinden (Counsel)
 - Mr. Anton Sotir (Counsel)
 - Mr. Adam Taylor (Counsel)
 - Mr. Lucas Harrati (IBU Lawyer)
 - Greg McKenna (Head of the Biathlon Integrity Unit)
 - Prof. Giuseppe D'Onofrio (expert)
 - Prof. Thomas Werge (expert)
 - Aaron Walker (expert, by videoconference)

- Dr. Reid Aikin (expert, by videoconference).
84. At the beginning of the hearing, the Parties expressed they had no objections to the constitution and composition of the Panel. The Respondent then objected to the admissibility of the new evidence submitted by the Appellant on 12 July 2023. The Panel decided to admit the new evidence provisionally for the purposes of discussing it at that hearing, but reserved its right to decide on the admissibility of the document in the final Award.
85. At the end of the hearing, the Parties made no procedural objections and acknowledged that the Panel had fully respected their rights to be heard and to be treated equally throughout the proceeding. A few days after the hearing, as previously decided by the Panel when it upheld the Appellant's request to have a public hearing (*supra* at para. 78), and with no objection from the Parties, the video recording of the hearing was published on the CAS website and, thus, made available to the public.
86. On 14 July 2023, the Appellant sought to introduce into the record two publications forwarded to him by Dr Douwe de Boer.
87. On 17 July 2023, the CAS Court Office informed the Parties that the Panel had decided to admit both publications into the file for reasons that would be set out in the final Award. It also granted the Respondent an opportunity to comment on those publications, which it did on 24 July 2023.

VI. OVERVIEW OF THE PARTIES' POSITIONS ON THE MERITS

88. Given that (i) the Panel already decided on all the preliminary issues in its Preliminary Award dated 8 April 2022 (see *supra* para. 70), and that (ii) the Federal Tribunal dismissed the appeal against such Preliminary Award (see *supra* para. 73), thus rendering the Panels' decision on those preliminary issues *res judicata*, only the Parties' positions on the merits of the case are reported hereinafter.

A. The Appellant: Mr Evgeny Ustyugov

89. In his prayers for relief, identically submitted in all his briefs, the Appellant requests that the Panel order the following:

"I. The appeal is upheld.

II. On a preliminary basis, the CAS-ADD is found to have no jurisdiction in the dispute between Mr Evgeny Ustyugov and the IBU; therefore, the decision issued on 27 October 2020 by the CAS Anti-Doping Division is annulled.

III. The decision issued on 27 October 2020 by the CAS Anti-Doping Division is annulled.

IV. The International Biathlon Union shall be ordered to bear all arbitration costs and to reimburse Mr Evgeny Ustyugov the minimum CAS Court Office fee of CHF 1,000.

V. The International Biathlon Union shall be ordered to pay Mr Evgeny Ustyugov a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the panel".

90. In support of his position on the merits, the Appellant submits the following:

- a. The IBU has violated the principle of *venire contra factum proprium*. The IBU initiated disciplinary proceedings on 5 May 2017 by notifying the Athlete of adverse ABP findings. After the Athlete's samples of 25 October 2017 and 6 December 2017 were analyzed, the ABP Panel on 16 June 2018 determined "*we are unable to conclude that it is highly likely that [the Athlete's ABP abnormality] was caused by the use of prohibited substances or prohibited methods*". The IBU did not continue investigating the Athlete thereafter, and the disciplinary case was thus terminated *de facto*. The Athlete therefore had a legitimate expectation that the case was permanently closed and that he would not be prosecuted. Accordingly, the IBU should be estopped from reopening the case against the Athlete. Furthermore, the Athlete's case could not be reopened by the IBU in the absence of any new facts. The report of Prof. Werge is not a new fact and is an inadequate basis on which to start new proceedings. The report is not supported by any medical publication, and Prof. Werge's opinion aligns with the findings of the Belfast laboratory (which were already considered by the ABP Panel in the Third ABP Panel Opinion). Additionally, Prof. Werge relied on incomplete information, as he was not notified that the Athlete's samples reflect consistently elevated HGB levels, like those of his parents. Based on the violation of *venire contra factum proprium* and the re-opening of the case without new facts, the IBU must be barred to present this case.
- b. The IBU's reopening of the present proceedings was based on illegal evidence. The IBU's sharing of the Athlete's genetic data with WADA and Prof. Werge was a breach its own commitments, as well as applicable data protection rules, including the International Standard on Protection of Privacy and Personal Information ("ISPPPI") and the European Union's General Data Protection Regulation ("GDPR"). To be sure, the Athlete consented to further testing and accepted the terms of the 2 October 2017 letter from the IBU; however, in doing so, he did not consent to the sharing of his profile with third parties including WADA and Prof. Werge. The IBU violated (i) the ISPPPI by not deleting, destroying, or permanently anonymizing the Athlete's personal genetic data after the ABP Panel's Third Joint Opinion of 16 June 2018, pursuant to ISPPPI Articles 3.2, 9.2, and 10.1-2, and (ii) the GDPR by sharing the Athlete's genetic data without consent, and for different purposes than the original reason for collection, pursuant to GDPR Article 5 § 1(b) and (e), and Articles 13, 15 and 44-50 (Chapter V). Since the opinion of Mr. Werge is based on illegal evidence, it may not be used by the IBU as evidence to re-open disciplinary proceedings against the Athlete.
- c. The IBU has not met its burden of proving that the Athlete committed an ADRV to the required standard of proof ("comfortable satisfaction" of the judging body), because the IBU's ABP sample collection did not comply with the

standards of the Athlete Biological Passport Operating Guidelines (“ABP Guidelines”). The NAPMU’s Athlete Biological Passport Documentation Package (“ABP Documentation Package”) indicates that several of the Athlete’s ABP samples were not collected in compliance with the ABP Guidelines and, therefore, may not be used as ‘reliable evidence’ to establish an ADRV pursuant to Article 3.2 of the IBU ADR. In particular, (i) the ABP Documentation Package does not indicate the reception date and transport time for samples 3-8 and, therefore, it is not possible to determine whether these samples were collected in compliance with WADA technical document TD2017BAR, and (ii) the ABP Documentation Package does not indicate storage temperature information for samples 2, 3, 10, 14, and 19 and, therefore, it is not possible to determine whether these samples were collected in compliance with Rules K.2.3 and K.2.4 of the ABP Guidelines.

- d. The Athlete’s ABP is not abnormal nor suspicious. First, Dr de Boer, former director of the WADA-accredited laboratory of Lisbon, applied a statistical tool to the Athlete’s ABP called the “Biological Variation Approach,” which is based on a SigmaPlot software. Dr de Boer’s more appropriate approach found all the Athlete’s HGB values to be within an acceptable range and the RET% not to be suspicious. Dr de Boer also found that (i) there is no correlation between HGB and RET% in the

Athlete’s ABP that would indicate use of blood transfusion or regular use of EPO, and (ii) micro-dosing must be excluded since the ABP cannot flag such doping practice. Second, the Athlete’s HGB values did not, as Prof. D’Onofrio and the ADD Decision contend, rise with “*strikingly fortuitous timing*” in relation to major competitions. Prof. D’Onofrio incorrectly considered the invalid Sample 19, which was not analyzed within the 12-hour time limit required by the ABP Guidelines. Furthermore, elevated HGB values were revealed in sample 14, which was collected during a period without competitions, and in the two 2017 no-notice samples, which were collected despite the Athlete having been retired for over three years.

- e. The Athlete did not use any prohibited substances or methods, and any abnormalities in the Athlete’s ABP are due to the Athlete’s hereditary erythrocytosis, which causes consistently elevated HGB levels in the blood of the Athlete. The Athlete’s medical condition is evident from the following:
 - The Athlete has mutations in at least five genes (HFE; PIEZO1; EGLN2; AIRE; STXBP2), several of which he shares with his parents.
 - Due to these genetic variants, both he and his parents have high HGB values.
 - Two blood samples collected by the IBU in 2017 revealed high HGB values from the

Athlete, despite having retired three years earlier.

- Fourteen Athlete’s blood samples, privately collected for medical check-ups between 2010 and 2020 (the “Private Samples”), similarly reflect consistently high HGB values during and after the Athlete’s career.
- Out of the 35 HGB values on the Appellant’s record – 19 values registered by the ABP, 8 values deriving from the Private Samples collected between 2010 and 2013, 2 values recorded in 2017 (additional tests conducted by the IBU) and 6 values deriving from the Private Samples recorded randomly after his retirement – 32 (91%) are above 16.5 b/dl, 8 of which were recorded after his retirement. This proves that either the Appellant produces naturally more HGB than the normal population or the Appellant continued to use prohibited substances after his retirement. Since the second theory is illogical, the first must be accepted.
- The ABP Panel concluded in the Third ABP Panel Opinion that the EGLN2 gene may be responsible for the Athlete’s high HGB levels (see *supra* at para. 23).
- The Werge Report’s conclusion that there is “no evidence to support a claim that the observed SNV, rs774710749, has

functional consequences in humans of pathological, clinical or biological importance” is not substantiated by any medical publication and, furthermore, was made without being told by WADA that the Appellant always recorded high levels of HGB and that his parents suffered from the same dysfunction.

- During the present proceedings, geneticists from Russian Institutes conducted Whole-Exome Sequencing on the Athlete’s request identified the five genetic mutations. The geneticists concluded “*the constantly increased hemoglobin level of Evgeny Romanovich Ustyugov is explained by his unique genetic characteristics*”. This was confirmed by GenoTechnologia LLC, which used the Sanger method to conduct a full genome sequencing: “*This study conducted with the help of sequencing according to Sanger, confirmed the data obtained earlier on the presence in Evgeny Romanovich Ustyugov of pathogenetically significant mutations, which cause iron overload in the organism, as well as excessive activation of erythropoiesis and increase in erythrocyte level in blood, including [in the genes HFE, PIEZO1, EGLN2, AIRE, and STXBP2]. Besides, additional polymorphisms have been revealed, which can also cause the elevated level of haemoglobin in blood, in particular [in the genes HFE and STXBP2]. Therefore, the presence of these polymorphisms causes constantly elevated level of*

haemoglobin in blood of Evgeny Romanovich Ustyugov”.

- Prof. Pascal Kintz (Professor of Legal Medicine and Toxicology Expert) and Dr Manana Sokolova (Haematologist and PhD in Medicine) concluded, in their respective expert reports, that the Athlete’s high levels of HGB in his ABP are likely caused by the Athlete’s rare congenital form of erythrocytosis.
- Dr Ilya Efremov (PhD in biology and specialist in genetics) concluded, in his expert report, that the high HGB levels of the Athlete can be explained by “*two polymorphic markers located in the HFE gene, namely rs1799945 (heterozygote C/G, H63D) and rs2071303 (heterozygote T/C)*”. In Dr Efremov’s opinion, the rare combination of these two variants in the HFE gene is sufficient to explain the high HGB values that the Athlete constantly shows (when he was competing and after his retirement from sport). Dr Efremov also mentioned that, on 22 September 2012, a genetic study conducted on the Athlete revealed a mutation in the HFE gene in the heterozygous form, H63D. Based on this finding, Dr Bogomolov made the following diagnosis in 2012: “*hereditary hemochromatosis (heterozygote H63D)*” and this diagnosis was made years

before the IBU decided to initiate disciplinary proceedings against the Athlete.

B. The Respondent: IBU

91. In its prayers for relief, submitted in its Answer, the Respondent requests the Panel to rule as follows:

“(1) The appeal of Evgeny Ustyugov is dismissed.

(2) The arbitration costs, if any, shall be borne by Evgeny Ustyugov.

(3) The International Biathlon Union is granted a significant contribution to its legal and other costs”.

92. In support of its position, the Respondent submits the following:

- a. The IBU’s charge of the Athlete for an ADRV should not be estopped, as it does not violate the principle of *venire contra factum proprium*. The IBU never closed the case nor indicated to the Athlete that he would not be charged with an ADRV in connection with his ABP, and the Athlete did not detrimentally rely on any such IBU representation. The IBU reconsidered the case against the Athlete after receiving Prof. Werge’s expert opinion, a new (and final) unanimous ABP Panel opinion, and additional circumstantial evidence indicating that the Athlete was doping and being systematically protected around the time of the Sochi Olympics. There is no evidence that the IBU acted in bad faith, as the Appellant contends.

- b. The Athlete's data were validly shared to further the IBU's investigation, and Prof. Werge's report is admissible in accordance with WADA rules. The Athlete consented to undergo genetic testing for the purpose of the IBU's evaluation of his genetic mutation defense. His consent, therefore, included the use of such data in that evaluation by third party experts, such as Prof. Werge. Furthermore, Prof. Werge was provided only with an anonymized ABP during a WADA conference; Prof. Werge was provided with the Belfast Report only after he determined that the Athlete's genetic mutation argument was inadequate. In any case, CAS jurisprudence indicates that even if the evidence was illegally obtained, it is admissible if the IBU's interest outweighs the Athlete's. In the present case, the public interest in fighting doping is clearly stronger than the Athlete's personal data-privacy interest.
- c. The Athlete Biological Passport's peer-reviewed 'Adaptive Model' is a 'reliable means' of detecting doping and establishing an ADRV under CAS jurisprudence. Dr de Boer's statistical approach, however, is flawed, not validated, and not well-suited for evaluating blood parameters. Dr de Boer's statistical models include analyses from non-WADA-accredited laboratories of the Private Samples (i.e., some samples privately taken by the Athlete with no guarantee whatsoever of reliability), despite CAS jurisprudence (e.g. CAS 2017/A/5045) indicating the inadmissibility and unreliability of those types of samples. Dr de Boer's approach further fails to incorporate broader population-based values over time.
- d. The minor procedural departures surrounding the collection of the Athlete's ABP samples do not warrant the samples' invalidation. The Athlete's unsupported claims of sample invalidity contradict Rule L.2.1.6.2 of WADA's International Standard for Testing and Investigations, which provides that relevant markers unaffected by such departures may be validly considered by the ABP Panel and included in the ABP's Adaptive Model analyses. The ABP Panel further noted that "[t]he departures from WADA Guidelines requirements in this Passport are minimal and would not have caused any change in ABP markers to the Athlete's disadvantage".
- e. The Athlete's ABP reflects extreme hematological abnormalities. Indeed, the ABP software indicated a sequence abnormality over 99.9% for the Athlete's HGB levels, which equates to a probability of occurrence in an athlete with normal physiological condition of less than 1 in 1,000. The sequence abnormality was similarly over 99% for the OFF-score and over 99.5% for RET%. Furthermore, samples 2, 10, 14, and 19 were individually flagged as outliers at 99% for the HGB marker, while sample 3 was flagged at 99% for RET%.
- f. The Athlete's rise in HGB values coincided with major international competitions, which supports that he committed an ADRV. Indeed,

his HGB spiked in the four days between the collection of samples 1 and 2, preceding the Vancouver Olympic Games. Similarly, samples 16-19, collected prior to the Sochi Olympic Games, culminated in the Athlete's highest recorded HGB value (in sample 19).

- g. The Athlete's alleged genetic condition does not explain the abnormalities in his ABP. None of the identified variants have any proven link to elevated HGB levels. Indeed, Prof. Werge ruled out each of the Athlete's gene variants (HFE, PIZOL1, EGLN2, AIRE, STXBP2) as potential cause of his alleged condition, as he confirmed at the ADD hearing: *"none of the implicated variants that [he has] been presented with are considered to be pathogenic in these settings. And [he does not] see there's any evidence linking any of the implicated variants to relevant pathology either"*. In any case, as also explained by Prof. Werge, the Athlete's immutable genetic constitution does not explain the extreme volatility in the Athlete's ABP, nor the material value increases before major competitions.
- h. Circumstantial evidence corroborates an ADRV finding. Indeed, there is evidence that the Athlete was a "protected athlete" in a large scale cover-up doping scheme. Prof. McLaren's reports (dated 18 July 2016 and 9 December 2016) detailed an extensive doping and protection scheme to undermine the anti-doping system in Russia. The Athlete was previously convicted in the

Oxandrolone Case for the use of oxandrolone, a prohibited steroid that formed part of the doping scheme. Dr Rodchenkov testified that doping was *"particularly widespread"* in biathlon, and *"all of the athletes were carefully protected"*. There is evidence that the Athlete benefited from such protection. For example, the Oxandrolone Case originated by a whistleblower revealing the Athlete's positive oxandrolone sample had been hidden and misreported as negative (this 'disappearing positives' methodology was common to the Russian doping scheme). Furthermore, several of the Athlete's urine samples collected in Sochi on the occasion of the 2014 Winter Olympic Games were recorded alongside the Athlete's name, which is considered by WADA to indicate special detection. There is also evidence indicating that anti-detection strategies were used to hide the Athlete's doping, including undisputed evidence that some of the Athlete's urine samples had been manually swapped. Furthermore, the Athlete's retirement at 28 years old aligns with Dr Rodchenkov's suggestion that athletes *"facing a disqualification, in order to do it quietly would just announce the end of his or her career"*.

VII. JURISDICTION

- 93. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the

said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

94. Article 31.1 of the IBU Constitution (2019 edition) so provides:

“To the extent that this Constitution or the Rules (including the IBU Integrity Code) give a party a right of appeal against any decision, that appeal is to be made (unless otherwise specified in this Constitution or in those Rules) exclusively to the CAS Appeals Division, which will appoint one or three CAS arbitrators to resolve the appeal definitively in accordance with the CAS Code of Sports-related Arbitration”.

95. Article 13 of the 2019 IBU ADR, in force at the time the Athlete’s appeal was filed and this arbitration was commenced, provides in the relevant parts that *“Decisions made under these IBU Anti-Doping Rules may be appealed [...] in cases involving International-Level Athletes [...] exclusively to CAS”.*

96. Article A21 of the ADD Rules provides that *“the award [rendered by an ADD Sole Arbitrator] may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons by mail or courier in accordance with Articles R47 et seq. of the Code of Sports-Related Arbitration, applicable to appeals procedures”.*

97. It is undisputed that, at the time of the alleged anti-doping rule violation, the Appellant was an international-level athlete and that he has the right under Articles 8.4 and 13 of the 2019 IBU ADR, as well as Article A21 of the ADD Rules, to bring his appeal to the CAS against the ADD Decision.

98. This Panel ruled as follows with regard to jurisdiction in para. 1 of the operative part of its Preliminary Award (see *supra* at para. 70):

“The Court of Arbitration for Sport has jurisdiction over the appeal filed by Mr Evgeny Ustyugov on 13 November 2020 against the decision rendered on 27 October 2020 by the appointed Sole Arbitrator of the Anti-Doping Division of the Court of Arbitration for Sport”.

99. The above ruling on jurisdiction became *res judicata*, and thus final and binding on the Parties, when the SFT dismissed the challenge brought by the Appellant against the Preliminary Award (see *supra* at para. 73).

100. Therefore, the Panel confirms that it has jurisdiction to hear and adjudicate the merits of the Appellant’s appeal against the ADD Decision.

VIII. ADMISSIBILITY OF THE APPEAL

101. Article R49 of the CAS Code so provides in the relevant part:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

102. Article 13.7.1 (entitled *“Appeals to the CAS”*) of the 2019 IBU ADR so provides in its relevant part:

“The time to file an appeal to the CAS will be twenty-one (21) days from the date of receipt of the decision by the appealing party [...]”.

103. The challenged ADD Decision is dated 27 October 2020 and was received by the Appellant on 29 October 2020.

104. The Appellant filed his Statement of Appeal on 13 November 2020, well within the 21-day time-limit provided by Article 13.7.1 of the 2019 ICU ADR. The Respondent did not raise any objection as to the admissibility of the appeal.

105. Therefore, the Panel holds that the Athlete's appeal is admissible.

IX. APPLICABLE LAW

106. With regard to procedural matters, the Panel must apply Swiss law as *lex arbitri*, and in particular the PILA, given that this arbitration is seated in Lausanne (Article R28 of the CAS Code) and the Parties are not resident or domiciled in Switzerland. In accordance with Article 182.1 PILA, the procedural rules chosen by the Parties are the CAS Code (on the basis of the above quoted Article 31.1 of the IBU Constitution) and the 2019 IBU ADR (on the basis of its Article 1.4.2.2 which states that *"the procedural aspects of the case will be governed by these IBU Anti-Doping Rules"*).

107. With regard to substantive issues, Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

108. The *"applicable regulations"* are undisputedly the rules of the IBU.

Article 33.1 of the IBU Constitution (2019 edition) provides as follows:

"Unless the IBU has explicitly agreed to the contrary, any dispute resolution proceedings involving the IBU, of whatever nature and in whatever forum [...] will be governed by the Constitution and the Rules, and (subsidiarily) by the laws of Austria".

109. Therefore, the Panel will apply to any substantive issues the IBU rules and, subsidiarily, Austrian law.

X. EVIDENTIARY ISSUES

A. The Appellant's Requests for Production of Documents

110. The Appellant made a very succinct request for production in para. 178 of his Appeal Brief (and briefly supplemented it by the letter dated 27 January 2023). The Appellant requested:

- *"that the IBU produces the whole case file in these proceedings"* ("Request A");
- the *"ADAMS data with respect to the ABP"* ("Request B"); and
- *"the agreement that would have been signed with the Russian Biathlon Union regarding the costs associated with proceedings initiated against Russian biathletes"* ("Request C").

111. On 10 January 2023, the Panel invited the Appellant to give further details and explain the reasons for his request for production of documents (see *supra* at para. 74). The Appellant's letter of 27 January 2023, however, did not actually add any significant details on his requests for production. The Appellant limited his remarks to stating, with respect to Request A, that he would like to know

why “*the ABP Panel changed its mind [and] the IBU suddenly decided to reopen the case against him and to initiate new proceedings*” (see *supra* at para. 75).

112. The Respondent objected to all of the Appellant’s request for the following reasons:

- Request A for being too unspecific. Respondent claimed that it did not “*even understand what the Athlete refers to*”;
- Request B (in addition to being unclear and unspecific) for being moot, given that the Respondent had already provided as exhibits to its Answer all the analytical documentation relating to the Athlete’s ABP, as well as the Athlete’s competition and altitude schedules as taken from ADAMS; and
- Request C for being irrelevant.

113. The Panel, on 22 February 2023, rejected the Appellant’s production requests for the reasons that are articulated herein:

- Request A is unclear and way too vague. In the Panel’s view, the Appellant’s request for the “*whole case file*” is unclear because the Appellant already had in his possession the whole case file of the first instance proceedings held before the ADD, and the ADD Sole Arbitrator based her decision solely on the evidence exhibited during the ADD proceedings. Furthermore, Request A is too vague. Indeed, according to the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”), which reflect commonly

accepted standards in international arbitration and are often used as guidance in CAS proceedings, a party requesting production should provide “(i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents” (Article 3(a) of said IBA Rules). The request for the “*whole case file*”, in order for the Appellant to understand why the Respondent “*suddenly decided to reopen the case against him*”, fails to identify a specific document or category of documents and appears to be a fishing expedition which is not allowed by CAS jurisprudence and the IBA Rules. In addition, Prof. D’Onofrio, who is a member of the ABP Panel, was called to testify at the hearing and the Appellant did have the opportunity to cross-examine him on that point (see *infra* at para. 165 for Prof. D’Onofrio’s testimony on the alleged “change of mind” of the ABP Panel).

- Request B is moot, because the analytical data used by the Respondent with respect to the ABP were submitted as exhibits to the Respondent’s Answer (i.e. after the Appellant’s request was made) and, thus, were introduced into the file.
- Request C is irrelevant. The Appellant has not provided an explanation, and the Panel is unable to discern, why and how the agreement between the IBU and the Russian Biathlon Union regarding the costs associated with the proceedings initiated against

Russian biathletes could be pertinent to the present case.

B. Request to Submit Additional Evidence

i. Late evidence of an alleged new variant

114. On 12 July 2023, the night before the hearing, the Appellant informed the CAS Court Office that Dr Efremov, one of his experts, had allegedly discovered a new variant over the weekend that could explain the elevated values of the HBG in the Athlete's system (variant rs1049481 in the gene CALR) and requested to submit new evidence in support thereof:

- a report (commissioned by the Athlete's counsel) dated 12 July 2023 and entitled "*Project documentation for the detection of mutant genotypes in a full-exome sequencing sample*", by Mr. Turakulov Rustamjon Ismailjonovich ("Document A").
- a study dated 29 October 2019 (revised on 17 April 2020) entitled "*Erythrocytosis with JAK2 GGCC_46/1 haplotype and without JAK2 V617F mutation is associated with CALR rs1049481_G allele*", by Ms. Luisa Anelli *et al.* ("Document B").
- an article dated 28 August 2022 entitled "*The genomic analysis brings a new piece to the molecular jigsaw of idiopathic erythrocytosis*", by Ms. Antonella Zagaria *et al.* ("Document C").

115. The Appellant argued that the aforementioned evidence should be

admitted into the record because, although filed at the last minute, "*it is almost an impossible task to identify relevant variants out of more than 150,000 that can explain the so-called abnormalities in the ABP passport of the athlete*".

116. At the opening of the hearing the Respondent objected to the admissibility of the new report and evidence, arguing that after the closing of written submissions the Appellant was not entitled, pursuant to Article R56 of the CAS Code, to submit new documents without exceptional circumstances. With regard to the articles, the Respondent underlined that the Appellant had plenty of time to find and submit them during the two rounds of written submissions.

117. The Appellant, on the other hand, argued that the Respondent was being overly formalistic and that, since the Athlete was facing a 4-year ban with high consequences, the search for the truth should prevail over procedural rules.

118. As mentioned *supra* at para. 84, the Panel had decided to admit the new evidence provisionally for the purposes of discussing it at that hearing, but reserved its right to decide on the admissibility of the document in this final Award.

119. After careful consideration, the Panel has decided to admit the documents into the file. In particular, the Panel admits the report because it is based on a new variant which was only very recently discovered by Dr Efremov. With regard to the scientific articles, they are published material and, as such, they are of public domain and, in principle, could be even searched and relied on by the Panel *ex officio*. Therefore, all three new documents are admitted into the file. This said, the issue of their relevance and

bearing on this case is a distinct one and goes to the substance of the matter; indeed, the Panel observes that the Appellant did not even discuss the new evidence during the hearing, thus implying a limited significance of those documents.

ii. Publications submitted after the hearing

120. On 14 July 2023, the Appellant submitted two publications forwarded to him by Dr de Boer, which the Panel admitted to the record on 17 July 2023, for reasons that would be set out in this final Award. More specifically, the Appellant sought to introduce two studies entitled (i) “*Long-term biological variation estimates of 13 hematological parameters in healthy Chinese subjects*” by Peng *et al.* and (ii) “*Within-day biological variation and hour-to-hour reference change values for hematological parameters*” by Hilderink, *et al.* In its letter of 14 July 2023, the Appellant explained that the studies “*describe the biological variation approach with haematological parameters for clinical settings*” and allegedly prove that the “*model used by Dr. de Boer is fit for purpose*”.

121. In finding the publications admissible, the Panel notes that the purpose for the Appellant’s submission of the studies was to fulfil Prof. D’Onofrio’s solicitation, made at the hearing, that Dr de Boer present publications on how the Biological Variation Approach is applied to blood-related measurements in a clinical context. Moreover, as already stated in reference to the other articles whose admissibility was contested by the Respondent (*supra*, para. 119), scientific articles are published material and, as such, they are of public domain and, in

principle, could be even searched and relied on by the Panel *ex officio*. The Panel thus admits this late submission of documents from the Appellant.

XI. MERITS

A. Admissibility and unreliability of the Private Samples

122. The Panel notes that the Appellant has submitted 14 blood samples, collected on his behalf for medical check-ups between 2010 and 2020, as evidence of his consistently high HGB values, and that the Parties dispute whether such samples should be taken into account in assessing the Athlete’s case.

123. The Appellant submits that these Private Samples must be taken into account, because one cannot expect the Athlete to provide a full chain of custody or for the samples to meet all the standards of the anti-doping rules since, at the time they were taken, the Athlete was retired. The Appellant further submits that the Respondent has not proven that the Private Samples are not genuine and provide no probatory value.

124. The Respondent, on the other hand, submits that the Private Samples must be excluded from consideration since the CAS (and other tribunals) have consistently refused to take such Private Samples into account for the following reasons: (i) an athlete would be able to “cherry-pick” the private tests that support his case, (ii) there is no chain of custody, (iii) there is no guarantee that the samples even belong to the athlete, and (iv) the WADA protocols and the analytical equipment are not followed.

125. The Panel recognizes that CAS panels have held in the past that only samples

collected for anti-doping purposes by the competent anti-doping bodies and using the relevant anti-doping protocols can be included in the ABP. For example, in CAS 2017/A/5045 the panel found that *“only samples collected for anti-doping purposes from the Athlete and that comply with the respective protocols should be included in the ABP in order to ensure that the data is reliable and reflects the true profile of an athlete. Only standardized sample taking and quality control ensure fair and comparable testing results, needed to establish a level playing field and to ensure the equal treatment of all athletes. Thus, the Panel is not prepared to include private tests results whose origins and conditions in which they were taken are unknown and undocumented”*. Based on this jurisprudence, the ADD Sole Arbitrator in the first instance decided to exclude from consideration the Private Samples. More specifically, the ADD Sole Arbitrator excluded them because (i) they were *“taken in unknown circumstances and for unknown purposes”*, and (ii) *“[o]nly samples taken and managed in accordance with the appropriate supervision and in accordance with the IBU and the WADA International Standards for collection, storage and testing of samples is appropriate to maintain a level playing field”*.

126. The Panel finds that, irrespective of whether an athlete is retired or competing, private samples are, in principle, admissible evidence. Admissibility, however, only refers to whether the evidence is allowed to be presented by a party in an arbitration and introduced into the file. It is a separate question altogether whether the evidence is reliable, what probative value it may carry and whether private samples may be considered on an equal footing with the official anti-doping samples and inserted into the ABP. The Panel finds

that private samples – while generally admissible into the file as legitimate evidence – are hardly reliable and lack any meaningful probative value, given that: (i) collection and analysis of the samples are not carried out using established anti-doping protocols to ensure their trustworthiness and comparability with official anti-doping samples tested in WADA-accredited laboratories; (ii) the laboratories picked by an athlete and the instruments, tests and personnel used by such laboratories, inevitably, would not be certified and validated by WADA as fit for anti-doping purposes and compliant with WADA standards; (iii) unlike official samples (which are specifically taken for anti-doping uses), such samples are taken voluntarily at an athlete’s discretion, which means that their collection could be timed to ensure that the recorded values could support the athlete’s case; (iv) due to a lack of supervision by an independent authority and lack of anonymity, samples could be altered or manipulated in a deceptive or fraudulent manner; and (v) an athlete could simply pick and choose which private samples to disclose, selecting only those that are beneficial to his case.

127. The Panel must also add that – contrary to what the Appellant argues – it is not the Respondent’s burden to prove that the Private Samples are not reliable, but rather, in accordance with the probatory principle *ei incumbit probatio qui dicit, non qui negat*, it would fall on the Appellant to prove their reliability. However, the Appellant submitted no evidence which could cure the above listed concerns or, at the very least, a significant portion thereof.

128. In light of the above, while the Panel finds the Private Samples – i.e., the analytical results of 14 blood samples exhibited by the Appellant – admissible and, accordingly, admits them into the case file, it also finds them unreliable as evidence. In particular, the Panel is of the view that the Private Samples may not be blended with the official ABP samples in order to expand, reformulate or recalculate the Appellant's ABP longitudinal profile and his reference range of acceptable values.

B. Validity of ABP Samples

129. The Appellant submits that the ABP sample collection did not comply with the standards of the Athlete Biological Passport Operating Guidelines ("ABP Guidelines"). The Appellant maintains that the NAPMU's Athlete Biological Passport Documentation Package ("ABP Documentation Package") reported that several of the Athlete's ABP samples were not collected in compliance with the ABP Guidelines. In particular, the Appellant claims that the ABP Documentation Package does not indicate (i) the reception date and transport time for Samples 3-8 – collected between October 2010 and December 2012 (see the exact dates *supra* at para. 10) – so their compliance with WADA technical document TD2017BAR cannot be verified, or (ii) the storage temperature information for Samples 2, 3, 10, 14, and 19 – collected between January 2010 and February 2014 (see the exact dates *supra* at para. 10) – so their compliance with Rules K.2.3 and K.2.4 of the ABP Guidelines cannot be verified (in particular, the "Temperature follow-up form" is missing). In the Appellant's view, this means that they are invalid and

unreliable samples and, in turn, cannot be used to establish an ADRV. The Appellant also submits that Sample 19 is invalid as it was not analyzed within the allotted time limit.

130. The Respondent, on the other hand, argues that there were only minor procedural departures surrounding the collection of the Athlete's ABP samples that do not warrant the samples' invalidation or put in question their reliability. Indeed, according to Rule L.2.1.6.2 of WADA's International Standard for Testing and Investigations ("ISTT"), relevant markers unaffected by minor procedural departures may be validly considered by the ABP Panel in their qualitative assessment of the ABP. The Respondent also underscores that the ABP Panel, in a report dated 1 March 2021, demonstrated that, even assuming there were minor departures from the requirements in the ABP Guidelines (*quod non*), they are immaterial and do not prevent the sample data from being taken into account.

131. The Panel observes that the relevant provisions provide the following:

- Rule 3.2 of the 2009 IBU Anti-Doping Rules: *"The facts related to anti-doping rule violations may be established by any reliable means, including admissions"*.
- WADA technical document TD2017BAR (p. 31 of the ABP Guidelines, version 6.0 of January 2017, whose application was invoked in the Appeal Brief): *"The blood Sample shall be analyzed as soon as possible upon reception and no later than 12 hours of Sample reception unless the Sample Collection Authority provides specific information regarding the Sample"*

- collection and transportation conditions which would allow the Laboratory to extend the time window of the analysis of the Sample without affecting blood stability”.*
- Rule K.2.3 of the ABP Guidelines: *“The Sample shall be refrigerated from its collection until its analysis with the exception of when the Sample is analyzed at the collection site without delay. The storage procedure is the DCO’s responsibility. The storage and transport device shall be capable of maintaining blood Samples at a cool temperature during storage. Whole blood Samples shall not be allowed to freeze at any time. In choosing the storage and transport device, the DCO shall take into account the time of storage, the number of Samples to be stored in the device and the prevailing environmental conditions (hot or cold temperatures). The storage device shall be: a) Refrigerator. b) Insulated cool box. c) Isotherm bag. d) Any other device that possesses the capabilities mentioned below”.*
 - Rule K.2.4 of the ABP Guidelines: *“A temperature data logger shall be used to record the temperature from the collection to the analysis of the Sample except when the Sample is analyzed at the collection site without delay. The temperature data logger shall be able to: a) record the temperature in degrees Celsius at least once per minute; b) record time in GMT; c) report the temperature profile over time in text format with one line per measurement following the format “YYYY-MM-DD HH:MM T”; d) have a unique ID of at least six characters”.*
 - Rule L.2.1.6.2 of the ISTI: *“A Marker result which is not affected by the non-conformity can still be considered in the Adaptive Model calculations. In such case, the APMU shall provide the specific explanations supporting the inclusion of the result(s). In all cases, the Sample shall remain recorded in the Athlete’s Passport. The Experts may include all results in their review provided that their conclusions may be validly supported when taking into account the effects of the non-conformity”.*
132. The Panel observes that the ABP Documentation Package states as follows: *“The reception time was in this ABP Doc Pack therefore retrieved from the Laboratory Documentation Packages whenever this was possible; this was possible when the full Laboratory Documentation Package (full LDPs) had been requested (samples 1-2, 9-12, and 14-19), but not when only the Certificate of Analysis (CA) had been requested (samples 3-8). ‘Reception date/time’ and ‘Transport time’ is therefore N/A for samples 3-8”.* According to the Appellant, this means that one cannot assess whether the twelve-hour rule was complied with by the laboratories in charge of the analysis and, in turn, results in the invalidity and unreliability of samples 3 to 8.
- i. Timing of sample analysis*
133. With respect to the validity of Samples 3-8 of the ABP, the Panel finds that the form for each sample indicates a deadline of *“48 hours to analyze the sample”* and that in each of those forms such deadline was indicated as *“respected”* (except sample 4). Indeed, the analytical turnaround time is marked for each sample and each falls within said 48-hour time limit: Sample 3 had an analytical turnaround time of 25:34 hours; Sample 5 took 38:41 hours; Sample 6 took 19:15 hours; Sample 7 took 20:32; and Sample 8 took 29:07 hours. On the other hand, Sample 4 had an analytical turnaround time of 57:29 hours and, accordingly,

was deemed invalid and not included in the ABP (see *supra* at para. 10).

134. As explained at the hearing by Dr Reid Aikin (Associate Director of ABP at WADA), at the time, the total time of 48 hours was allocated to analyzing a sample, where 36 hours was given to the anti-doping organization for the collection and transport of the sample and 12 hours was given to the laboratory to conduct the analysis thereon. Dr Aikin confirmed that if the 12 hours for conducting the analysis was exceeded, the result would have been automatically invalidated within ADAMS; however, if the analysis was still conducted within the total allotted 48 hours, the Athlete Passport Management Unit (APMU), i.e. the management unit in charge of managing and monitoring the data collected from athletes participating in the ABP program, could revalidate the samples on the basis of the verified stability of the blood.

135. This is confirmed, for example in the WADA Guidelines for Blood Sample Collection (versions 2.2 August 2010 and 2.3 August 2011), which stated that “*Transport of Blood Sample(s) from site of collection to Laboratory should be made as soon as possible and preferably within 36 hours of collection*” (Article 7.7.5) and that “[t]he DCO shall keep the samples under his/her control until they are passed to the courier. Blood Samples should be dispatched as soon as possible after collection to arrive at the Laboratory ideally on the same day, and preferably within 36-48 hours of collection” (Article 7.6.10). The same is stated in the Athlete Biological Passport Operating Guidelines & Compilation of Required Elements, Version 4.0 (November 2013), which stated that “*Blood Samples*

shall be transported as rapidly as possible to a Laboratory or WADA Approved Laboratory for the ABP located close to the Sample Collection site, and be delivered no later than 36 hours following Sample Collection” (see Article 7.2 of APPENDIX B of WADA Technical Document – TD2014BSTR) and “[t]he blood Sample shall be analyzed within 48 hours of Sample Collection” (see Appendix C of the same”).

136. As to the timing of Sample 19 of the ABP, the Panel notes that the form reports a transportation time of 09:50 hours and an analytical turnaround time of 43:35 hours, with a footnote indicating that the “[e]xact time of collection cannot be found in the LDP. 14.02.2014 15:30 is retrieved from the DCF in ADAMS. In the LDP, the session ended 14.02.2014 23.00 (see page 5 in the LDP)”. However, the Panel notes that, according to the “*Report on IBU Mission M-207514755 During Sochi Games*” and other evidence submitted by the Respondent (in particular email correspondence related to the Sochi Games), five of twenty samples collected at a training camp in Sochi on 14 February 2020 by the IBU for analysis, including Sample 19 of the Athlete’s ABP, were withheld (by the doping control officers working for the 2014 Olympic Games, as part of an anti-detection strategy to cover up doping) on the basis of the missing gender information (which, according to the unrebutted Dr Aikin’s testimony during the hearing, is not a valid reason to withhold a sample) and not forwarded to the Sochi laboratory until after the 36-hour period for collection and transportation of a sample had expired. This caused Sample 19 to have an analytical turnaround time of 43:35 hours and for ADAMS to automatically record the results as invalid. However,

this sample – along with the other four – was properly revalidated in 2016 by the competent APMU.

137. Based on the above, the Panel holds that Samples 3, 5, 6, 7, 8 and 19 all complied with the timing requirements of WADA.

ii. *Temperature of sample analysis*

138. As to samples 2, 3, 10, 14, and 19 and their alleged lack of compliance with Rules K.2.3 and K.2.4 of the ABP Guidelines for not reporting storage temperature information, the Panel observes that:

- Sample 2 reports that the data logger was initially not used. In a footnote it is explained that the *“Sample was collected 08:00, but temperature logger records start at 11:19...”*. The form confirms that thereafter temperature during transportation was recorded and that temperature at reception was 4-5°C.
- Sample 3 has a “N/A” next to *“Temperature during transportation correct?”* and *“Temperature at reception”*.
- Sample 10 confirms the temperature during transportation was correct and that temperature at reception was refrigerated. However, no temperature follow up form was submitted to indicate the exact temperatures.
- Sample 14 has a “N/A” next to *“Temperature during transportation correct?”* and *“Temperature at reception”*. In a footnote, it indicates that *“Stop date and time noted as 27.07.2013 12:10 in LDP. This is prior to reception time?”*

According to logger the temperature was above 12 °C for a total of 41 minutes (highest temperature 13.1 °C, average temperature 8.7 °C)”.

- Sample 19 reports that the data logger was not used. It has “N/A” next to *“Temperature during transportation correct?”* and reports a temperature at reception of 12.3°C, with a footnote reading *“the Laboratory, temperature logger was not provided. The temperature was however measured upon receipt with a laser gun”*.

139. The Panel finds that even if these constitute departures from the ABP Guidelines, they are immaterial and have not caused any change in the ABP markers to the disadvantage of the Athlete so as to warrant their invalidity. This is supported by the ABP Panel’s report of 1 March 2021, which is unrebutted by counter-expert evidence, where it carefully analyzed the situation and stability of each of the aforementioned samples and confirmed the validity and reliability of all of them, finding no red flags:

- Sample 2: *“Temperature during transport: CORRECT. Temperature logger was used until reception by lab. Temperature (measured every 5 minutes) was constantly between 5.0-10.6°C (mean 5.8°C). CAT was 26:34 hours and BSS is 43.74 (that is, <85). Excellent scattergrams distribution, normal red cell indices and absence of flags, as in fresh samples. Perfect storage”*.
- Sample 3: *“The instrument reports show excellent scattergrams distribution, normal red cell indices and absence of flags, as in fresh samples”*.

- Sample 10: “Temperature during transport: CORRECT. Temperature logger (every minute) was used and temperature was constantly between 3.2-7.7°C (mean 4.1°C). CAT was 26:34 hours and BSS is 38.77 (that is, <85). Perfect storage. Excellent WBC distribution, normal indices, no flags”.
 - Sample 14: “Temp. above 13° for 41 minutes, not relevant. Mean temp. 8.7°C. CAT: 32:16. BSS: 58:26 (that is, <85). Perfect storage. Excellent WBC distribution, no flags”.
 - Sample 19: “Temperature at reception: 12.3°C. Perfect storage. Excellent WBC distribution, HB/turb flag due to high HB (MCHC>36.5). *The red blood cell index is calculated from hematocrit (HCT) and HB as it follows: $[(HB/HCT)*100]$. In this case $[(51.3/18.9)*100]=36.8$ g/dL. It is very common in samples with extremely high HB”.
140. The ABP Panel so concluded (being un rebutted by any other expert evidence):
- “The departures from WADA Guidelines requirements in this Passport are minimal and would not have caused any change in ABP markers to the Athlete’s disadvantage. There is recognized scientific and experimental evidence that a slight deviation of temperature during storage does not affect the quality of samples and the blood count results. Several studies on the stability of haematological parameters in blood samples are found in the scientific literature. Many authors have confirmed that the measurement of hemoglobin concentration is stable for at least 72 hours, both at room temperature (RT) and 4°C on Sysmex instruments [Ashenden et al, 2013; De Baca et al, 2006; Lombardi et al, 2011]. The MCV, on the other hand, tend to increase in a predictable measure: importantly, no sample in this Passport displays an abnormally increased MCV, all values lying between 88.0 and 91.2 fL, except for the invalid sample 4, which shows, as expected, moderate red cell swelling (MCV 96.1 fL) due to the long storage. Reticulocyte count has also been demonstrated as a robust parameter: there is irrefutable evidence that reticulocytes are stable for at least 48 hours at room temperature and 72 hours if refrigerated [Ashenden et al, 2013; De Baca et al, 2006; Lombardi et al, 2011]”.*
141. The ABP Panel’s conclusion is fully in line with Rule L.2.1.6.2 of the ISTI which states that a marker can still be included in the ABP if not affected by the non-conformity and if a specific explanation supporting the inclusion of the results is made.
142. The Panel also takes note of the Appellant’s argument at the hearing that a double standard would be created if the Panel were to accept the non-confirming ABP samples but not the Private Samples submitted by the Athlete (as it has done). The Panel rejects this argument because the Private Samples are not subject to any of the anti-doping rules or protocols. The ABP samples, on the other hand, are subject to them, including the aforementioned provision that permits minor deviations from the protocols with justified reason. In this case, the ABP Panel has confirmed, on the basis of published scientific studies, that the minor deviations did not lead to an inaccuracy of the ABP markers or unfairly disadvantage the Athlete, whereas the same cannot be said and done for the Private Samples, as there is no information whatsoever on the protocols followed during their collection and analysis (not to mention

the other important concerns listed above at para. 126).

iii. Conclusion on the validity of samples

143. In light of the foregoing, the Panel finds that the 17 samples recorded in the Athlete's ABP are valid and should be taken into consideration in assessing whether the Athlete has committed an ADRV.

C. No illegally obtained evidence

144. The Appellant submits that the Respondent's case is based on illegally obtained evidence. In particular, the Appellant objects to the fact that the Respondent shared with WADA his genetic data – including the tests conducted on 25 October 2017 and 6 December 2017 – and that this was a breach of the Respondent's commitments, the ISPPPI and GDPR. In the Appellant's view, the Respondent needed to obtain the Athlete's specific consent and, having failed to do so, the provision of the Athlete's ABP to Prof. Werge at the WADA conference was illegal and, in turn, the Respondent may not use the Werge Report to charge the Appellant with an ADRV. The Appellant acknowledges that he granted the Respondent consent to conduct further unannounced tests to investigate and evaluate his genetic defense. However, the Appellant argues that the Respondent deviated from the granted consent, as it had no right to share his genetic profile to WADA and WADA could not validly accept such information, bearing in mind that, as a retired athlete, the Appellant was not subject to the rules whereby he would consent to share sensitive medical data to anti-doping organizations.

145. The Respondent, on the other hand, submits that it validly shared the Athlete's data to further investigation and evaluation of his case because the Athlete himself had granted the IBU consent to undergo further testing for the purpose of investigating and evaluating his genetic defense. Moreover, pursuant to CAS jurisprudence, even if the evidence is deemed illegally obtained, it is admissible because the IBU's interest in the fight against doping outweighs the Athlete's personal data-privacy interest.

146. The Panel observes that the Athlete granted to the Respondent his consent on 10 October 2017 to undergo further testing in connection with his "*alleged congenital condition*" (see *supra* at paras. 21 and 22). This consent granted the Respondent the right, "*without any limitation*", to collect blood samples without prior notice, to arrange for analysis of such samples (including by WADA and other laboratories specialized in genetic analysis), to store the samples, and to "*process any data resulting from such analysis*" (*Idem*).

147. Furthermore, the Panel notes that, as held in the Preliminary Award (*res judicata* by now), even after his retirement the Athlete remained subject to the subsequently issued IBU ADR (see paras. 104-116 of the Preliminary Award). The Panel reasoned in said Preliminary Award that the Appellant signed a declaration without any reservation on 26 January 2006 (the "2006 Declaration"), under which he agreed to be subject to all IBU regulations as amended from time to time, including the 2019 ADR, provided that he did not "retract" the declaration (more specifically, the Appellant had

contractually agreed to “recognize and observe the IBU Constitution, all orders, rules and contracts of the IBU [to bear the] responsibility to get information on any amendment to these rules and directives [and that] this declaration is valid until as long as it is not retracted by the undersigned”). The Panel found in the Preliminary Award that the Appellant had never retracted the 2006 Declaration, not even when he retired from the sport in 2014, since the IBU regulations did not state that the retraction of this declaration was one of the consequences of an athlete’s retirement. The Panel also found that there was no indication that the 2006 Declaration was not intended to apply to retired athletes or that the declaration was limited in scope to a specific event. Moreover, the Panel notes that there is no evidence on file that the Appellant ever submitted to the Respondent such a declaration of retraction, even after the notification of said Preliminary Award.

148. As the Athlete remains subject to the IBU rules, Article 14.6 (“Data Privacy”) of the IBU ADR applies to him. That provision states that athletes consent to the following:

- Article 14.6.1: *“IBU may collect, store, process or disclose personal information relating to athletes and other persons where necessary and appropriate to conduct their anti-doping activities under the Code, the International Standards (including specifically the International Standard for the Protection of Privacy and Personal Information) and these Anti-Doping Rules”.*
- Article 14.6.2: *“Any participant who submits information including personal data to any person in accordance with these Anti-Doping Rules shall be deemed to*

have agreed, pursuant to applicable data protection laws and otherwise, that such information may be collected, processed, disclosed and used by such person for the purposes of the implementation of these Anti-Doping Rules, in accordance with the International Standard for the Protection of Privacy and Personal Information and otherwise as required to implement these Anti-Doping Rules” (see e.g. editions 2016 and 2018).

149. The Panel finds – based on the consent granted by the Athlete on 10 October 2017 and on the IBU ADR – that the Respondent did not breach any data protection rules.

150. First, the Respondent did not commit a data breach in sharing the Athlete’s ABP at the WADA conference because it was anonymized. As confirmed by Dr Aikin in his testimony, the conference was simply a working group that meets annually to discuss the ABP and shares anonymized complicated cases that arose that year. Moreover, Dr Aikin confirmed that the members in attendance are always bound by strict confidentiality agreements.

151. Second, the Respondent did not commit a data breach by sharing the Athlete’s genetic data with Prof. Werge since (i) the consent granted by the Athlete on 10 October 2017 was broad, and (ii) the reason for sharing his genetic data was directly related to the very purpose of the consent granted on that day, i.e. to investigate and evaluate his genetic defense with a view to checking whether such defense could exonerate him from the ADRV charge. It is expected that, in order to analyze the Athlete’s genetic defense, his data would need to be presented to experts in that field, such as

Prof. Werge. The consent granted by the Athlete on the basis of the IBU ADR is also broad and permits the sharing of the Athlete's data with a specialist as it would fall under the Respondent's right to "disclose personal information relating to athletes [...] where necessary and appropriate to conduct their anti-doping activities under the Code".

152. In light of the foregoing, the Panel does not find that the Respondent breached its commitment, as undertaken in the letter of 2 October 2017, or any data protection rules, including those contained in the ISPPPI or the GDPR. Therefore, the Werge Report does not constitute illegally obtained evidence. This conclusion is bolstered by Article 3.2 of the IBU ADR, which establishes broadly that an anti-doping rule violation may be established by "any reliable means".

153. The Panel adds that, in any case, according to well-established CAS jurisprudence, even illegally obtained evidence does not violate procedural public policy and is not inadmissible in a CAS arbitration if there is an overriding public or private interest at stake, such as the search for truth in doping cases. For example, in CAS 2016/A/4486, the panel held that "it has to be recalled that even illegally obtained evidence may be admissible if the interest to find the truth prevails (Art. 152, 168 Swiss Code of Civil Procedure; HAFTER, *Commentary to the Swiss Code of Civil Procedure*, 2nd ed., para. 8). According to the Swiss Federal Tribunal and the ECHR, the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth. If the latter outweighs the former, the courts may declare a piece of evidence admissible for assessment even though it was unlawfully acquired (BERGER/KELLERHALS,

International and Domestic Arbitration in Switzerland, 3rd ed., p. 461) [...]. This balancing test set out by the Swiss Federal Tribunal, and applied by the CAS, is in line with the jurisprudence of the European Court of Human Rights (see i.e. *K.S and M.S v. Germany*, no. 33969/11, ECHR 2016-V, 6 October 2016, and case law cited)" (see also *ex multis* CAS 2011/A/2426 and CAS 2009/A/1879).

154. In the present case, even if the ABP of the Athlete had been provided to WADA and Prof. Werge illegally (*quod non*), the Panel finds that the Werge Report could be used by the ABP Panel to evaluate the Athlete's genetic defense because there are overriding private and public interests at stake tilting in favour of using this evidence, namely (i) the private interest of the Athlete himself to have a renowned genetics expert scientifically check whether he has a particular medical condition and whether his genetic defense can exonerate him, (ii) a private interest of each athlete to be reassured that he/she can compete on a level playing field without having to face athletes whose performances are artificially boosted by doping practices, (iii) a private interest of the IBU and all its member federations to identify and sanction doping offenses to dissuade similar misconduct in the future and protect the integrity of the sport, and finally (iv) a general public interest in the fight against doping to protect sporting fair play and the health of athletes. The Appellant argues that the balance of interests should tilt in his favour because one cannot "reopen" a case using illegally obtained evidence. As the Panel holds in the next section, however, the Respondent never closed and "reopened" the case against the

Athlete; it remained opened at all times as the investigation developed.

D. No estoppel or *venire contra factum proprium*

155. According to the Appellant, the Respondent should have been estopped from “re-opening” the case against the Athlete on 21 January 2020 for an ADRV. According to the Appellant, the Respondent violated the principle of *venire contra factum proprium* and acted in bad faith. In the Appellant’s view, the case against the Athlete should have been considered definitely closed on 16 June 2018, when the ABP Panel issued the Third ABP Panel Opinion and WADA and IBU decided not to challenge it. The Appellant believes he had a legitimate expectation that the case was terminated and would not be reopened.
156. The Respondent, on the other hand, does not believe that it should have been estopped from charging the Athlete with an ADRV. The Respondent argues that it never closed the case against the Athlete and, especially, it never informed the Athlete that he would not be charged for an ADRV in connection with his ABP. Therefore, the Athlete could not have relied to his detriment on the Respondent’s conduct.
157. According to well-established CAS jurisprudence, the doctrine of estoppel is defined as a general principle of law “firmly established in common law and known in other legal systems even though under a different heading (e.g. reliance in good faith, *venire contra factum proprium*) [...] that arises when one makes a statement or admission that induces another person to believe something and that results in that person’s reasonable and

detrimental reliance on the belief” (CAS 2011/A/2473, at para. 33). In other words, under the principles of estoppel and *venire contra factum proprium*, a party may not act against its own actions that created an assumption to another party relying in good faith and detrimentally on that assumption (CAS 2018/A/5552, at para. 81; see also CAS 2017/O/5264, 5265 & 5266, at para. 243).

158. The Panel recognizes that the ABP Panel issued a Third ABP Panel Opinion on 16 June 2018, in which it asserted to be “unable to conclude that it is highly likely that [the Appellant’s ABP abnormality] was caused by the use of prohibited substances or prohibited methods” (see *supra* para. 29).
159. This report, however, was only an internal document exchanged between the ABP Panel and the IBU as demonstrated by the facts that: (i) the Respondent did not at that time notify the report to the Athlete, and (ii) the ABP Panel concluded the report by asking the Respondent whether it had any further questions (“[w]e remain at your disposal for any further questions you might have”). The Third ABP Panel Opinion was not shown to the Athlete until 13 January 2020, in the context of inviting the Athlete to comment on the findings of the Fourth ABP Panel Opinion.
160. Furthermore, at no point did the Respondent communicate to the Athlete that the investigation against him had concluded or that he would not be charged with an ADRV.
161. Based on the foregoing, it is clear that the Respondent never made any representation to the Athlete and, thus, the latter does not have any basis for claiming that he detrimentally relied on the former’s conduct.

162. The Panel thus holds that, since the Athlete has failed to show he was induced into reasonable and detrimental reliance, there was no violation of the principle of estoppel or *venire contra factum proprium* when the Respondent charged the Athlete on 20 January 2020. The Respondent was free to charge that Athlete at that time considering that, as is uncontested by the Parties, the statute of limitations for an ADRV had not expired.

E. Athlete's commission of an ADRV

163. The Appellant submits that he did not use any prohibited substances or methods, and any "abnormalities" in the Athlete's ABP were due to the Athlete's hereditary erythrocytosis. The Appellant maintains he has proven he has hereditary erythrocytosis since (i) his parents have high HGB values and (ii) his medical records show consistent high HGB values in competition, out of competition, during his sports career and after his retirement. The Appellant appointed geneticists who found 5 gene variants and several polymorphisms, which in their view caused the Athlete to have erythrocytosis and resulted in his elevated HGB values in the ABP. The Appellant asserts that even the ABP Panel acknowledged, in the Third ABP Panel Opinion, the possibility that the alleged abnormality in his ABP could have been caused by a gene mutation (EGLN2).

164. The Respondent, on the other hand, submits that none of the gene mutations identified by the Appellant have any proven link to elevated HGB levels. In support, the Respondent points to (i) the Belfast Report, which determined the gene mutation EGLN2 was non-

pathogenic and not associated with erythrocytosis, and (ii) the Werge Report, which found that the variation had no "*functional consequences in humans of pathological, clinical or biological importance*". Moreover, the Respondent submits that the alleged hereditary erythrocytosis does not explain the fluctuations and peaks in the Athlete's ABP or why those peaks happened to occur right before major competitions.

165. In support of their positions, the Parties retained several experts to submit reports and testimony, which can be summarized as follows:

i) Dr Douwe de Boer (former director of the WADA-accredited laboratory of Lisbon, called by the Appellant):

Since the specific software used by the Nordic APMU was not available to him, Dr de Boer used a "Biological Variation Approach" (which is based on a SigmaPlot software) to assess the Athlete's case. According to Dr de Boer, this approach is more relevant for the Appellant's case because the software used by the APMU relies on algorithms that implement data of a "representative group of athletes"; however, no group can be representative of the Appellant's individual situation, bearing in mind that he suffers from erythrocytosis unlike other athletes. Moreover, it is therefore preferable to use a statistical model that considers more the variation in time as does the Biological Variation Approach. Dr de Boer concluded – taking into account the 17 valid samples

supplied by APMU, the 14 Private Samples, and the 2 samples taken by the IBU in 2017 – that, according to the Biological Variation Approach, the consistently elevated HGB concentrations in the Appellants' blood profile and the variations are all within the common expected maximum biological variation. Dr de Boer found that the RET% values of the Appellant are also not suspicious and there is no correlation between HGB and RET% that would indicate the use of blood transfusion or regular use of EPO or any use of a prohibited substance and method. Dr de Boer also testified that the first admittedly suspicious sequence (Samples 1 to 2) could simply be the result of an infection combined with “analytical uncertainties”, which together significantly reduced the HGB value in Samples 1.

ii) Professor Pascal Kintz (Professor of legal medicine and toxicology expert, called by the Appellant):

Professor Kintz explained that erythrocytosis is suspected when HGB is above 18.5 g/dL or the packed cell volume (PCV) is greater than 0.52 in a man. An absolute or true erythrocytosis is present only when the red cell mass (RCM) is greater than 125% of that predicted for sex and body mass (Keohane et al, Br Med J, 2013). Professor Kintz concluded as follows:

“several points have to be taken into consideration before the abnormalities

observed in the athlete's biological passport of Evgeny Ustyugov can be attributed, with no doubt, to doping:

– 2 unannounced blood tests, performed late 2017 under control of the sport authorities, several years after retirement, have demonstrated an elevated HGB. In addition, 2 WADA controls (in Cologne), performed on blood and urine collected on the same dates, have indicated that the tests did not evidence a prohibited substance or a prohibited method

– 6 additional blood tests, performed from 2015 to 2020, after retirement of the athlete, have demonstrated high levels of HGB

– 3 gene mutations, in 2 different laboratories, have been found. The variant c.187C>G of the HFE gene has been considered in the joint report of 13 May 2020 to correspond to a pathogenic variant. The two other variants (c.5863C>T from the PIEZO1 gene and c.958G>A from the EGLN2 gene) are of unclear clinical significance and deserve more investigation with respect to their possible pathogenic status

Given it has been verified that the athlete is presenting 3 mutations, one cannot consider that the ABP of Evgeny Ustyugov is presenting abnormalities, which can be listed as characteristic of doping practices. At this time and given the new data from the joint report of 13 May 2020 of the Genomic center of the Russian National Research Medical University, his biological passport can be in relation with a specific genetic profile”.

Prof. Kintz added that, if the Athlete did not have

erythrocytosis and doped, only a massive amount of EPO could explain such high HGB values in the Athlete's ABP and that micro-dosing would not be a possible explanation. According to Prof. Kintz, however, the laboratory would have detected such massive intakes of EPO.

- iii) Dr Manana Sokolova (Hematologist, PhD in Medicine, called by the Appellant):

Dr Sokolova found that the hereditary mutation revealed in Evgeny Ustyugov, including variant N°1 (in the HFE gene; H63A) and variant N°2 (in the EGLN2 gene), can result in abnormal values in the Athlete Biological Passport, such as an increased level of HGB. Dr Sokolova explained, with respect to the EGLN2 gene mutations, that *“potential participation in HIF regulation and erythrocytosis development has not been fully studied yet. The fact that EGLN2 is not reflected in the ClinVar database simply means that the information on the influence of this gene on human health is absent as of today, as respective studies have not been conducted [...]. In this regard, one cannot be sure that this mutation is non-pathogenic and has no influence on human medical parameters”*. Dr Sokolova further explained, as to HFE (variant H63A), that it could be the cause of erythrocytosis, and that this mutation could influence the blood values of the Athlete: *“As the sport of biathlon is associated with high-endurance exercise, where hepcidin synthesis can increase, and therefore*

reduce iron availability, it may be assumed that the carriers of mutations of hereditary HFE have a genetic advantage in sporting results with high oxygen demand and high muscle load [...]. Therefore, it may be assumed that mutation in the gene HFE limits the hepcidin increase caused by physical activity, which results in an increase in iron availability and increased stimulation of erythropoiesis – this is what is necessary for high working capacity and endurance during athletic training. In addition, higher iron availability can help athletes to recover more effectively between competitions. Taking into account the considerations mentioned above, the conclusion can be drawn that mutation of HFE (H63A) with heterozygous genotype can possibly explain the increased level of hemoglobin, hematocrit and erythrocytosis”. According to Dr Sokolova, during the Athlete's sports career, he had normal levels of iron and ferritin due to physical activities; however, post-retirement his blood values show increased level of iron and ferritin, which is one of the main symptoms of hemochromatosis, which consequently leads to erythrocytosis and increased level of HGB.

- iv) Dr Ilya Efremov (PhD in biology and genetics specialist, called by the Appellant):

Dr Efremov concluded that genetic traits (genotypes for specific loci) established for the Athlete can explain the “abnormalities” in his ABP, namely the increased content of HGB, erythrocytes and hematocrit in the peripheral blood over a long

period of time. He explained that the *“combined genotype established for Evgeny Romanovich Ustyugov by two polymorphic markers located in the HFE gene, namely rs1799945 (heterozygote C/G, H63D) and rs2071303 (heterozygote T/C) may be the only and sufficient reason for elevated blood haemoglobin levels (erythrocytosis). The findings allow us to rule out forms of erythrocytosis such as ECYT1...ECYT8 for Evgeny Romanovich Ustyugov”*.

- v) Professor Giuseppe D’Onofrio (Professor of Hematology, Oncology and Clinical Pathology, member of the ABP Panel, called by the Respondent):

Professor D’Onofrio found that the dynamic evolution of HGB demonstrates blood manipulation. In his view, the HGB sequence is greater than 99.9% likely not to be physiological, even considering the alleged gene variations. He described the Athlete’s passport as an “arrogant” one, as there are no attempts to mask the changes in HGB and RET%, which are obvious signs of manipulation.

Professor D’Onofrio rejected: (i) Dr de Boer’s claim that the lower HGB value of Sample 1 as compared to Samples 2 occurred because of an infection since there is no evidence or indication whatsoever that the Athlete had an infection during that time and he is unaware of any infection that could cause such a serious degree of change in a person’s HGB level; (ii) Dr. Sokolova’s position that training/competition depletes

iron levels in an athlete; and (iii) Dr. Bogomolov’s diagnosis of *“hereditary hemochromatosis”* because hemochromatosis is a condition that is diagnosed clinically and not through genetic testing, and, moreover, because the recommendation of *“administration of No. 4 blood exfusions (400 ml/week) under Hb and ferritin control”* would not be given to an athlete that has normal values of iron (as did the Athlete).

- vi) Prof. Thomas Werge (Professor of Genetics, called by the Respondent):

Prof. Werge concluded that that the variants mentioned by the Athlete could not cause the increased HGB levels of the Athlete. Prof. Werge reviewed the Athlete’s gene variants and concluded:

HFE: The H63D variant of the HFE-gene is very common (a common variant, in the context of genetics, refers to a version of a DNA sequence that is present in a significant proportion of a population and, as such, is neutral with no relevant impact on human traits or disease). The H63D variant – as a common variant – cannot have a high effect on erythrocytosis; otherwise, a high portion of the population would suffer from that condition. Furthermore, the claim that the H63D variant has been shown to be the cause of hemochromatosis and thus a possible cause for increased HGB levels is wrong. It relies on observations and

hypotheses reported in the late 1990s and later disproven and abandoned. A study based on a cohort of approximately 15,000 subjects demonstrated that there was no clinically relevant effect of the H63D variant on HGB levels. There is a functional pathogenic variant in the HFE gene (C282Y), but it is not a variant carried by the Athlete.

PIZOL1: There is no evidence that the identified variant to the PIZOL1 gene leads to increased HGB levels. The variant is associated with dehydrated hereditary stomatocytosis (DHS). However, the literature indicates that this pathology, which compromises red blood cell physiology, will not increase HGB levels. In fact, a study specifically found that individuals affected by this variant *“were not anemic and their hemoglobin concentrations were not statistically different from unaffected individuals”*. There is no clinical evidence that the Athlete suffers from DHS and the pathology is, in principle, inconsistent with high performance endurance sport.

EGLN2: The EGLN2 gene has been identified in a single patient with a confirmed clinical diagnosis of erythrocytosis, and since the EGLN2 gene is part of the oxygen-sensing pathway, it was speculated that this mutation or other deleterious mutations might confer risk of developing erythrocytosis. While legitimate, this observation has not been substantiated in subsequent studies of idiopathic

erythrocytosis following the initial 2016 report. The variant identified in the Athlete is fundamentally different to the one identified in the aforementioned case of the single patient and is not predicted to be deleterious. The statement that *“mutations in this gene are presumably associated with erythrocytosis”* is incorrect both in the case of EGLN2 and in general. There is also no evidence that variants in the EGLN2 gene could cause oscillations in HGB levels of an individual.

AIRE and STXBP2: There are no studies on these variants that could even suggest that they could have any impact on HGB values in the examinee.

166. Based on the disagreement between the Parties and their respective experts, the Panel will address the following issues in the subsections to follow before reaching its conclusion on whether Respondent has proven to a comfortable satisfaction that the Athlete committed an ADRV between 24 January 2010 and April 2014 in violation of Article 2.2 of the 2009 IBU ADR Rules:

- (i) whether there are abnormalities in the Athlete’s ABP;
- (ii) whether the abnormalities in the Athlete’s ABP can be explained by the Athlete’s alleged genetic condition (i.e. hereditary erythrocytosis);
- (iii) whether the abnormality in Samples 1 to 2 can be explained by an alleged infection;

- (iv) whether the 2017 Samples and the Private Samples should be taken into account in the assessment of the Athlete's case; and
 - (v) whether circumstantial evidence supports an ADRV finding.
167. Preliminarily, however, the Panel wishes to briefly deal with the alleged lack of credibility of the ABP Panel and of its member Prof. D'Onofrio, raised by the Appellant, due to the fact that those experts (including Prof. D'Onofrio) changed their mind between the Third ABP Panel Opinion dated 16 June 2018 (where the ABP Panel was "*unable to conclude that it is highly unlikely that this profile is the result of a normal physiological or pathological condition; similarly, we are unable to conclude that it is highly likely that it was caused by the use of prohibited substances or prohibited methods*" while recommending further investigations, *supra* at para. 29) and the Fourth ABP Panel Opinion dated 11 January 2020 (where the ABP Panel, after considering Prof. Werge's opinion on genetics issues, concluded that "*it is highly likely that the abnormalities observed in this passport and described by us in detail in our first Joint Expert Report were caused by the use of prohibited substances or prohibited methods, and that it is unlikely that they were the result of confounding factors*", *supra* at para. 36).
168. The Panel finds that the ABP Panel's change in conclusion in the Fourth ABP Panel Opinion (*supra* at para. 36) does not prove, as suggested by the Athlete, that Professor D'Onofrio or the ABP Panel were biased or that their opinions are unreliable and lack credibility. The Panel does not detect any indication that Professor D'Onofrio or the ABP Panel had a bias, preconceived notion, or any sort of attitude suggesting they merely attempted to implicate or accuse the Athlete; nor is there any proof that Professor D'Onofrio or the ABP Panel were instructed or pressured by the Respondent to find against the Athlete. On the contrary, the Panel finds that the fact itself that Professor D'Onofrio and the other experts on the ABP Panel were very careful and refrained, in an interlocutory stage, from finding against the Appellant is evidence of their good faith and of the fact that they did not have any preconceived agenda against the Athlete. They revised their conclusions simply because of the new scientific evidence presented over the course of the investigation, as Prof. D'Onofrio testified during the hearing.
169. Indeed, the Panel observes that in the First ABP Panel Opinion on 21 March 2017 (see *supra* at para. 16), the ABP Panel concluded that the abnormalities in the Athlete's ABP were likely a result of blood manipulation; however, the ABP Panel mentioned that the possibility of erythrocytosis deserved further investigation through genetic and molecular studies. Thereafter, on 7 September 2017, in response to the Athlete's request that WES testing be performed, the ABP Panel suggested in its Second ABP Panel Opinion that genetic testing and further unannounced ABP tests be conducted to investigate his claim of erythrocytosis (see *supra* at para. 20). Indeed, Prof. D'Onofrio confirmed at the hearing that at that time he felt it necessary, in order to assess the genetic defense of the Athlete, to ask for clinical information and external testing in a specialized lab. It was based on these further tests, information and scientific evidence requested by the ABP Panel, that the ABP decided to revise its

opinion on 16 June 2018 and issue the Third ABP Panel Opinion (*supra* at para. 29). As Prof. D’Onofrio recalled during his testimony, it was on the basis of a new gene (EGLN2), whose clinical effect was unknown to the ABP Panel at the time (and knowing that a similar polymorphism EGLN was associated with erythrocytosis), that they could not conclude that doping was highly likely. However, further evidence was later submitted to the ABP Panel – the Werge Report of 9 January 2020, concluding that the EGLN2 gene was non-pathogenic and benign – which convinced the ABP Panel that the First ABP Panel Opinion was in fact correct. Accordingly, the ABP issued the Fourth ABP Panel Opinion on 11 January 2020 confirming its original position (see *supra* at para. 36).

170. The Panel finds that, under the circumstances, the credibility of the experts on the ABP Panel, including Professor D’Onofrio, is strengthened rather than weakened by the various revisions of their conclusions. In fact, as already mentioned, given the lack of any signs of bad faith and the ABP Panel’s considerable efforts to assess the Athlete’s genetic condition, the revision of their conclusions demonstrates the ABP Panel members’ objectivity, priority in accuracy, and *bona fide* will to reach scientifically robust conclusions.
171. The Panel is of the view that this finding of objectivity and good faith and, thus, of credibility of the ABP Panel, is further corroborated by the circumstance, as testified at the hearing by Prof. D’Onofrio, that during his many years as an ABP expert he found on average that among the ABP profiles that are anonymously submitted to him for the

initial expert evaluation – i.e. the ABP profiles that are flagged by the system as “abnormal” or anyway that deserve more attention – about 30% end up being considered as normal, about 60% are considered to be merely suspicious (not showing any clear doping scenario), and only about 10% point to a likely doping scenario and prompt further enquiries. Prof. D’Onofrio also recalled in his testimony that, in accordance with the ABP Guidelines, this residual 10% of ABP profiles is sent – still anonymously – for evaluation to the ABP Panel, whose three members must all independently and separately find that a doping scenario is likely, which prompts the exchange of opinions within the ABP Panel and the issuance of a joint expert report, which in turn prompts, if a high likelihood of doping is found, an investigation (not yet an indictment) by the competent anti-doping organization and the request to the concerned athlete to provide some explanations. Prof. D’Onofrio also pointed out in his testimony that “the first role of the [ABP] expert is to avoid false positives and this is what we have tried to do also in this case”.

172. To conclude on this point, the Panel is of the view that the ABP Panel’s change of mind in the evaluation of the Athlete’s ABP, in light of the data and process described by Prof. D’Onofrio in his testimony, actually excludes any biased attitude of the ABP Panel against the Athlete and denotes the genuine, *bona fide* effort to search for the truth while trying to avoid a false positive. In other terms, the ABP Panel’s change of mind between the Third and the Fourth ABP Panel Opinion actually lends credibility to Prof. D’Onofrio and his colleagues on

the ABP Panel rather than the opposite. This Appellant's argument thus fails.

i. Abnormalities in the Athlete's ABP

173. The Panel first finds that there are abnormalities in the Athlete's ABP. Indeed, The Athlete's ABP reveals that the probability of doping, according to the ABP software, exceeded 99.9% for HGB, 99% for OFF-score and 99.5% for RET%. The Panel observes that the ABP software flagged samples 2, 10, 14 and 19 for high HGB, (17.6, 18.5, 18.6, and 19.0 g/dL) and sample 3 for RET% (2.81%).
174. Dr de Boer suggested during his testimony at the hearing that these HGB values are not abnormal for the Athlete because his baseline is 18 g/DL. The Panel rejects that the Athlete's baseline for HGB is 18 g/DL because among the 17 valid samples only 3 show levels of HGB of 18 g/DL or more. Nor can the HGB value of 17 g/DL be considered relatively low, as suggested by Dr de Boer, since 10 of the Athlete's valid samples float around that value. The Panel considers that, based on the ABP, the Athlete's baseline appears to be between 16 and 17 g/DL, along the lines of what Prof. D'Onofrio suggested during his testimony at the hearing; it follows that the flagged samples 2, 10, 14 and 19 do show abnormal levels of HGB.
175. In fact, even Dr de Boer admitted during cross-examination that the Athlete's HGB values in his ABP are relatively high and that they should be investigated for cause. Indeed, in response to a question from Respondent's legal counsel on whether the HGB concentration in the ABP was

inconsistent (as reflected by its significant peaks and troughs throughout Samples 1 to 19), Dr de Boer admitted that there were "relatively high" levels of HGB and that one of the possible causes for the elevated concentration was doping: "yes [...] it is important to find a cause and once more, indeed, the application, let's say, of doping related substances can be the cause". The Panel recognizes that Dr de Boer was then quick to point out that this was not the only possible cause and that the high levels of HGB could also be caused by genetics. However, what is relevant here is that Dr. de Boer recognized some significant anomaly in the Athlete's ABP profile that required an explanation.

ii. The alleged genetic condition

176. The Panel then finds that the abnormalities in the Athlete's ABP have not been proven to be caused by the alleged genetic condition of the Athlete (i.e. hereditary erythrocytosis).
- a. Insufficient proof that the Athlete's genetics caused high HGB levels in ABP*
177. First, the Panel finds that the Athlete has failed to prove that he has consistently high levels of HGB. The Athlete argues that he suffers from erythrocytosis and that this causes consistent elevated levels of HGB; however, in reviewing his ABP there are only 3 samples (samples 10, 14 and 19) out of 17 in which his HGB levels are at or above 18.5 g/DL, which, according to Dr. Kintz (the Appellant's own expert) is the threshold for suspecting erythrocytosis. Moreover, there are some significantly lower levels of HGB in some of his ABP samples (e.g. 15.4 in sample 1, 16.3 in sample 6,

16.2 in sample 16) which are difficult to square with an alleged erythrocytosis.

178. Second, the Panel is not persuaded that any genetic variants identified by the Athlete – HFE, EGLN2, PIEZO1, AIRE and STXBP2 – could cause the high levels of HGB in his ABP. There is, in the Panel’s view, a lack of direct scientific evidence that any of these variants cause erythrocytosis or contribute to increased HGB levels. As correctly found by the ADD Sole Arbitrator, the scientific evidence presented by the Athlete is based primarily upon inference and hypothesis.

179. In particular, the Panel is not persuaded by:

- Dr. Sokolova’s explanation that the HFE genetic variant could be the cause of erythrocytosis and, in turn, of the Athlete’s high HGB values. As convincingly explained by Prof. Werge, the variant observed in the Athlete is not functional or pathogenic; it is a common genetic variant (present in a significant portion of the general population) that is neutral with no relevant impact on human traits or diseases; there is, as Prof. Werge admits, a functional pathogenic variant in the HFE gene (C282Y); however, it is undisputed that the Athlete does not carry this variant.
- the study relied on by Dr. Efremov entitled “*Erythropoietin Concentration in Boys With p.His63Asp Polymorphism of the HFE Gene*” by Kaczorowska-Hac *et al.* This study analyzed the impact of the H63A polymorphism of the HFE gene on erythropoiesis taking into consideration

endogenous EPO production in the developmental age, and reported an increase in iron concentration, caused by HFE gene mutation, leading to intensified HGB production in children. The Panel finds, however, that the study lacks any meaningful relevance and probative value to the case at hand since it was only performed on a small sample of 18 individuals, and, moreover, focuses only on children.

180. The Panel is also not persuaded by the Appellant’s arguments that: (i) there are inexplicable cases of erythrocytosis and that the Athlete could simply fall into that category (according to Dr de Boer, in a French study on 56 adults with high HGB, 40% of the cases found no cause for the high HGB), and (ii) the fact the EGLN2 is not reflected in the ClinVar (a database that provides information about the relationships among gene variations and their interpretations of clinical significance) only means that currently there is a lack of information on the impact of that gene on human health, but does confirm the gene variation’s non-pathogenic and benign nature (see Prof. Sokolova’s expert report summarized *supra* at para. 165(iii)).

181. The Panel finds that it is the burden of the Athlete to prove his case (in defense of the abnormalities found in the ABP) that he suffers from erythrocytosis and establish a clear link between his gene variations and his high levels of HGB. Contrary to what the Appellant suggested during the hearing, the burden of proof is not on the Respondent to exclude all genetic variations in his profile as a cause of the high HGB values in his ABP. The Athlete, thus, cannot

simply rely on the fact that the cause of his alleged condition is complicated to find or inexplicable, or that there are insufficient studies to understand with certainty whether one of the gene variations he possesses affect HGB levels.

182. In light of the foregoing, the Panel holds that, on the balance of probabilities, there is insufficient proof that the Athlete's genetics caused the elevated HGB values in his ABP.

b. Lack of explanation for the fluctuations and peaks in the Athlete's HGB levels

183. Even if the Panel were to accept that the Athlete suffered from a genetic condition that caused high levels of HGB (*quod non*), the Panel finds that there is no coherent and substantiated explanation for the significant fluctuations in the Athlete's ABP.
184. The Panel finds that, even if the Athlete had hereditary erythrocytosis, his HGB levels would be consistently high and any variations in HGB levels would be minor since, as convincingly explained by Prof. D'Onofrio, the biological variability of the HGB parameter is usually of less than 3% for a healthy individual and up to 4% for an Athlete, with an analytical variability of only 1%. In the present case, however, the Athlete's ABP shows high volatility of his HGB values. Indeed, the Athlete's HGB values fluctuate and to a considerable degree, ranging from as low as 15.4 (Sample 1) to 18.5, 18.6 and 19 g/DL (Samples 10, 14 and 19).
185. The experts called by the Appellant have not provided a convincing explanation as to why the Athlete's alleged hereditary

erythrocytosis would cause these significant fluctuations. If indeed the Athlete had this condition and, as suggested by Dr de Boer, his baseline HGB level was 18 g/DL (*quod non*), there would need to be an explanation as to why there are 12 HGB values that fall far below that baseline. However, no such explanation has been provided.

186. During the hearing, the Panel expressed its concern that, even assuming that genetics could explain the Athlete's high levels of HGB, there appeared to be no explanation as to how genetics could cause the significant fluctuations in the readings and why they coincided with important competitions of the Athlete.
187. In response, Prof. Werge answered that genetics is static and, thus, by default, it explains static features. Prof. Werge explained that one could only "*hypothesize [...] that you have genetic variance that creates some instability*" but this instability would be "*there all the time and not only on particular occasions*". This supports the notion that, if the Athlete had erythrocytosis, his HGB would be consistently high (which is not the case).
188. As for Dr Sokolova, she testified as follows at the hearing: "*As far as this variability is concerned, there's fluctuations of the level of hemoglobin, which may confuse some why at one point it's almost normal and then at another point in time it's from 160 and above. But if you look at the hereditary mutation which is a given pass from the parents, quite clearly the childhood and adolescent period is when in a person we see the person growing physically, being active, and excess iron that one may find in the body because of this mutation is being consumed down to the normal level, continuously consumed. And, as the person grows, for example, a person goes into an active sport. We*

also register such fluctuations because in an active exercise iron has been consumed more actively and so the excess iron will go down, become normal, will go lower or will jump up, depending upon the state of the person active training, relaxation, high above the sea level, or because of some other reason, and we can see that the patients with hemochromatosis, this hemochromatosis is extended throughout so many years. Danger emerges post 50 years old when a person acquires certain somatic conditions when he grows old and is no longer physically active, and at that point in time we are no longer going to register such fluctuations. We will continuously see high iron concentration and continuous higher level of hemoglobin. So this can be explained by path genetically ...”.

189. In other words, Dr Sokolova suggests that iron levels affect HGB levels and that individuals with hereditary mutations, specifically related to hemochromatosis, may experience fluctuations in iron levels. Furthermore, according to Dr Sokolova, engaging in active sports or exercises further influences these HGB fluctuations based on the varying intensity of iron consumption.
190. The Panel is not persuaded by Dr Sokolova’s explanation. First of all, the Panel finds there is insufficient proof that the Athlete suffered from hemochromatosis. The Appellant has only submitted a diagnosis dated 22 September 2012 by Dr Bogomolov. However, the Panel is not comfortable relying on this diagnosis because the Appellant has not called Dr Bogomolov as an expert witness to explain his diagnosis and to be cross-examined, and because, as convincingly explained by Prof. D’Onofrio, the diagnosis is suspicious since (i) the diagnosis of hereditary hemochromatosis should be

based on a clinical diagnosis and not a genetic analysis, and (ii) at the time of the diagnosis in 2012 his iron levels were normal (25.1 $\mu\text{mol/l}$). Even Dr Sokolova admitted in her expert report that “*the Athlete has no clinical symptoms or signs of hemochromatosis in the presence of heterozygous mutation of the gene HFE (H63A)*”. Second, there is insufficient evidence on record to support that iron values of a biathlon athlete are affected by training/competition to the degree seen in the Athlete’s ABP. As convincingly testified by Prof. D’Onofrio: (i) it is pure speculation – not backed by any studies to his knowledge – that iron stimulates erythrocytosis directly, and (ii) only the injection/consumption of iron would explain an Athlete having normal iron parameters in 2012 and high iron levels a couple of years later after his retirement, because it is not possible for iron levels in a body to increase so much in such a short time.

191. As a final point, the Panel notes that Dr Efremov – who is a geneticist – did not testify in response to the Panel’s question on how the significant fluctuations in the ABP could be explained by the genetic makeup or profile of the Athlete. Despite Respondent’s counsel requesting Dr Efremov’s response, counsel for Appellant preferred to have Dr Sokolova answer the question.

c. ABP’s inherent adaptation to genetics increasing HGB levels

192. Even if the Panel were to accept that the Athlete had erythrocytosis (*quod non*), one of the virtues of the ABP method is that the ADP inherently adapts to the increase of HGB levels due to genetic

reasons, meaning that it would already take into account the Athlete's alleged genetic condition.

193. As is well known and not challenged by the Parties, the ABP involves regular monitoring of biological markers on a longitudinal basis to facilitate the indirect detection of prohibited substances and methods (i.e., it focuses on the effect of prohibited substances or methods on the body). The selected markers are monitored over a period of time and an individual longitudinal profile is created that establishes an athlete's own upper and lower limits within which the athlete's values are expected to fall. In other terms, in the ABP the athlete becomes his own point of reference, and each time a blood sample is recorded the Adaptive Model calculates where the reported HGB, RET% and OFF-score values fall within the athlete's expected distribution. In other words, the ABP adjusted the Athlete's limits over time based on his specific individual values.
194. Since the Athlete became his own point of reference in the ABP, the Panel finds that the ABP would already take into account the alleged hereditary erythrocytosis and the high HGB that comes with it. Therefore, even if the Panel were to accept that the Athlete suffers from hereditary erythrocytosis and that this caused the high levels of HGB, the ABP – which, as just stated, already takes into account the allegedly genetically induced high HGB values – still detected significant fluctuations and four samples falling outside of the Athlete's own individual limits for which there is no explanation.

iii. The alleged infection

195. The Panel finds that there is insufficient proof to find that an infection affected the recorded HGB value of Sample 1. The Panel rejects Dr de Boer's claim that the significantly lower HGB value of Sample 1 (15.4 g/dL on 24 January 2010), as compared to Sample 2 (17.6 g/dL on 28 January 2010, i.e. an increase in HGB of 14,2% just four days after Sample 1 and shortly before the start of the Vancouver Winter Olympics), occurred because of an infection. The Panel rejects this claim on the basis of (i) Prof. D'Onofrio's unrebutted expert testimony that he is unaware of any infection that could change to such a degree the HGB level of an individual, and (ii) the fact that Dr de Boer, when asked at the hearing by Respondent's counsel what type of infection the Athlete could have had to cause such a dramatic change, had no answer; Dr de Boer only mentioned that, hypothetically, an athlete with hepatitis with certain complications could see his HGB lowered to that extent; however, it is undisputed that (a) the Athlete did not have that medical condition and that (b) a few weeks later he won an individual gold medal and a team bronze medal at the Vancouver Olympics (performances which would be very difficult to reconcile with a recent hepatitis with complications).

iv. Unreliability of samples not in the ABP

a. The Private Samples

196. Dr. Sokolova relies on the Private Samples to argue that "*the analysis of the dynamic control of peripheral blood indices for 2015, 2016, 2017, 2018, 2019 and 2020...ma[kes] clear the maintenance of high values of the red blood indices with fluctuations*

within the following limits: hemoglobin 166-185gm/l, erythrocytes 5.18-5.54x10¹²/l, hematocrit 47.2-52%...even after the Athlete's career ended in April 2014, his level of hemoglobin still remains increased". However, as already held *supra* at para. 126, the Panel does not find these Private Samples – submitted by the Athlete to support his claim that he suffers from hereditary erythrocytosis – reliable since: (i) the samples were not collected and analysed using established anti-doping protocols and there is no guarantee that they truly belonged to the Athlete; (ii) the laboratories and their instruments, tests and personnel were not certified and validated by WADA as fit for anti-doping purposes and compliant with WADA standards; (iii) the samples were taken at the Athlete's discretion, which means that their collection could be timed to ensure that the recorded values could support the athlete's case; (iv) due to a lack of supervision by an independent authority and lack of anonymity, the samples could be altered or manipulated; and (v) there is no guarantee that the Athlete could have simply cherry-picked which samples to disclose, selecting only those that could be beneficial to his case.

197. Therefore, the Panel does not take the Private Samples into consideration in assessing the Athlete's case. In any case, even if the Panel were to take the Private Samples into account, they might only slightly increase the baseline of the Athlete, but would still not explain the fluctuations and high peaks in the Athlete's ABP during the period he competed.

b. The 2017 Samples

198. The Panel finds that the tests conducted and the samples collected in October and December 2017, which had HGB levels of 17.7g/dL and 18.5g/dL (the "2017 Samples"), do not have any meaningful relevance. Even if organized by the Respondent, these two samples are scarcely reliable in assessing the Athlete's case because they were not truly unannounced tests. The Athlete was warned that he would be tested out of competition during the three-month window from October to December of 2017, so he could have intentionally manipulated his HGB levels to support his case that he suffered from erythrocytosis.

199. In any case, the Panel finds that the 2017 Samples do not affect the abnormality of the values found in the period 2010-2014 and, in particular, fail to explain the HGB fluctuations and high peaks in the Athlete's ABP and why they occurred right before or during the Winter Olympic Games of Vancouver and Sochi.

c. The Athlete's parents' samples

200. The Panel finds that any reports of the Athlete's parents hold scarce evidentiary value for the same concerns expressed *supra* (at para. 196) and because the Appellant has not submitted evidence to cure said concerns or, at the very least, a significant portion thereof. In any case, the Panel finds that the Athlete's parents' levels of HGB fail to explain the HGB fluctuations and high peaks in the Athlete's ABP and why they occurred right before very important competitions.

v. Circumstantial evidence supports an ADRV finding

201. There is some further evidence strongly and decisively corroborating the finding that the abnormal levels of HGB were caused by blood doping, and not a genetic condition.
202. First, the Panel observes that the peaks of HGB levels coincide with major competitions in which the Athlete participated. Indeed, the Athlete's Samples 1 and 2, which showed an increase in HGB of 2.2 g/dL in just four days, were taken a couple of weeks before the Vancouver Olympic Games (which started on 12 February 2010), and Samples 16, 17, 18 and 19, which show an increase in HGB of 2.8 g/dL in six weeks (from sample 16 to 19) and an increase in HGB of 2.0 g/dL in two weeks, were taken in the period leading up to the 2014 Sochi Olympic Games (with the last one collected during the Olympics). The Athlete, however, has not provided any explanation as to why his HGB levels would spike in such convenient moments. The Panel considers that statistically it is highly unlikely for an athlete to have such significant HGB spikes just before the two most important competitions that a biathlete can have.
203. Second, the Panel observes that the Athlete was one of the "protected athletes" in the Russian doping system, particularly on the occasion of the 2014 Sochi Winter Olympics, as shown *inter alia* by:
 - Professor McLaren's reports of 18 July and 9 December 2016, in which he confirms the existence of a sophisticated doping and protection scheme involving the Russian anti-doping agency (RUSADA), the

Moscow Laboratory, and individuals from the Ministry of Sport, the FSB (the Russian agency for security services) and the Centre for Sports Preparation (CSP). The scheme utilized the "Duchess cocktail" to dope athletes and employed anti-detection methodologies to undermine the anti-doping system in Russia, as confirmed by various CAS Panels (see e.g. CAS OG 16/09, CAS OG 16/012, CAS 2017/O/5039, CAS OG 18/03, CAS 2018/O/5666, CAS 2018/O/5667 and CAS 2018/O/5713).

- The testimony during the ADD proceedings of Dr Rodchenkov, former director of the Moscow Laboratory, who had direct knowledge of the Athlete's involvement in the aforementioned scheme and whom many CAS panels have found to be a very credible witness. Dr Rodchenkov testified that:
 - (a) biathlon was one of the sports where doping was "*widespread and all of the athletes were carefully protected*", in particular at the 2014 Olympic Games;
 - (b) the Duchess Cocktail was used by the "*entire Russian National Biathlon Team [...] in the period before the Sochi Games*" and that, in April 2014, biathletes were injected rEPO to enrich their blood at the end of the season, so as to have it withdrawn and later available for transfusion for the Olympic season;

- (c) in 2012, urine was collected from biathletes, including the Athlete, and recorded in a clean urine bank inventory;
 - (d) after the introduction of the ABP system, Dr. Rodchenkov reviewed ABPs that RUSADA had viewed as “terrible” and Dr. Rodchenkov found the Athlete’s ABP to be “the worst”; and
 - (e) it is common practice of Russian athletes facing disqualification to quietly retire from competitions.
- The Laboratory Information Management System (“LIMS”) from the Moscow Laboratory – revealed to WADA by a whistleblower in September 2017 and covering the results of analyses from the period 2012 to 2015 – which:
- (a) confirmed that, using the so-called “Disappearing Positives Method”, revealed by the already mentioned McLaren reports, hundreds of positive results were reported as negative, including four of the Athlete’s samples, one of which (2808577) had tested positive for oxandrolone and led to the IBU ADHP finding him guilty of an ADRV in 2013 (see *supra* at para. 32); and
 - (b) identified the Athlete by name in the “general comments” section in what

was supposed to be an anonymized database.

vi. Conclusion on the Athlete’s commission of an ADRV

204. After carefully assessing the Parties’ arguments and expert’s testimony, the Panel finds that the Respondent has proven to the Panel’s comfortable satisfaction that the Athlete committed an ADRV between January 2010 and April 2014 in violation of Article 2.2 of the 2009 IBU ADR Rules. Indeed, there are abnormalities in the Athlete’s ABP and these abnormalities – in particular, the significant fluctuations in the levels of HGB – are not explained by the Athlete’s alleged hereditary erythrocytosis or by an alleged infection. Further, the circumstantial evidence – specifically, the facts that the peaks of HGB levels coincide with major competitions and that the Athlete was a “protected athlete” by RUSADA prior to and during the 2014 Sochi Olympics – strongly and decisively supports this finding of an ADRV.

F. Period of ineligibility and disqualification of results

205. The Athlete has not challenged the period of ineligibility or disqualification of results ordered by the ADD Decision. Therefore, the Panel – which fully agrees and endorses the finding and reasoning of the ADD arbitrator on this point – confirms the sanction of four years starting from the date of the final ADD Decision and the disqualification of the Athlete’s results obtained between 24 January 2010 until the end of the 2013-2014 season, with all resulting consequences (including forfeiture of medals, points and prizes).

G. Further or different motions

206. All further or different motions or requests of the Parties are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. Evgeny Ustyugov on 13 November 2020 against the decision issued by the CAS Anti-Doping Division on 27 October 2020 is dismissed.
2. The decision issued by the CAS Anti-Doping Division on 27 October 2020 is confirmed.
3. (...).
4. (...).
5. All further or different motions or prayers for relief are dismissed.

Football; Sanction disciplinaire pour abus sexuels et abus de pouvoir; Délais de prescription du Code d'Éthique de la FIFA; Anonymisation des témoignages; Standard de la preuve; Proportionnalité de la sanction

Formation

Me Alexander McLin (Suisse), Président
Prof. Gérard Simon (France)
Me José Juan Pinto (Espagne)

1. Les délais de prescription prévus par le Code d'Éthique de la FIFA (FCE) s'appliquent à compter de la date de son entrée en vigueur. L'infraction prévue à l'article 23 (protection de l'intégrité physique et morale) est prescrite au bout d'une période de dix ans par application de l'article 12 al. 2 FCE ("*2. Les infractions liées à la corruption (art. 27), à la mauvaise utilisation ou au détournement de fonds (art. 28) et à la protection de l'intégrité physique et morale (art. 23) se prescrivent par dix ans*"), alors que l'infraction prévue par l'article 25 (abus de pouvoir) est prescrite au bout d'une période de cinq ans par application de l'article 12 al. 1 et 5 FCE, qui commence à courir à compter de la date de la dernière récidive. De plus, il est précisé à l'article 12 al. 3 FCE que "*[l]a période de prescription est prolongée le cas échéant de la moitié de sa durée si une enquête formelle est ouverte avant son expiration*".
2. Si le code de procédure applicable prévoit la possibilité de prouver des faits par des déclarations de témoins, il y aurait violation du principe du pouvoir du tribunal d'apprécier les preuves si une partie était empêchée de s'appuyer sur des déclarations de témoins anonymes. Toutefois, la pertinence du droit à un procès équitable implique que les intérêts de la défense soient mis en balance avec ceux des témoins. En tout état de cause, une condamnation ne peut être fondée uniquement ou de manière décisive sur des déclarations anonymes; la partie ne doit pas être empêchée de tester la fiabilité du témoin, et les preuves obtenues doivent être traitées avec une extrême prudence. Le droit d'être entendu et le droit à un procès équitable doivent être garantis par d'autres moyens, à savoir un contre-interrogatoire au moyen d'une "protection audiovisuelle" et par un contrôle approfondi de l'identité et de la réputation du témoin anonyme par le tribunal.
3. En matière d'abus et/ou harcèlement sexuel, le degré de preuve requis n'est pas l'absence de "*doute raisonnable*" ou même la "*quasi-certitude*". En application des dispositions de l'article 48 FCE relatif au degré de la preuve, l'organe décisionnel doit apprécier les éléments de preuve sur la base du principe de sa "*satisfaction adéquate*". Il n'y a pas lieu de s'écarter de ce standard, puisque ce degré de preuve est ancré dans une disposition spécifique de la réglementation applicable adoptée par la FIFA, association qui a pris la décision de sanction.

4. **Lorsqu’une association fait usage de son pouvoir discrétionnaire pour imposer une sanction, le TAS doit se tenir à l’expertise de cette association, mais, si le TAS considère toutefois que la sanction est disproportionnée, il doit faire usage de son pouvoir *de novo* et être libre d’imposer la sanction qu’il juge appropriée. Ainsi, le rôle d’une formation arbitrale du TAS n’est pas de déterminer si la décision prise aurait pu être meilleure ou si une autre décision (même légèrement différente) aurait pu être prise. Le pouvoir d’examen de la formation arbitrale est en effet de déterminer si la décision litigieuse viole la loi ou les règlements et si l’autorité de première instance, en prenant sa décision, a exercé son pouvoir discrétionnaire de manière arbitraire et disproportionnée.**

I. PARTIES

1. M. Rosnick Grant (“l’Appelant” ou “M. Grant”) est citoyen haïtien, Vice-Président de la Fédération Haïtienne de Football (la “FHF”) depuis 2020 et Président de la Commission Nationale des Arbitres de la FHF (la “CONA”) depuis 2014, jusqu’à sa suspension provisoire de toute activité liée au football au niveau national et international le 10 février 2021.
2. La Fédération Internationale de Football Association (“l’Intimée” ou la “FIFA”) est une association à but non lucratif de droit suisse, dont le siège statutaire est situé à Zurich en Suisse. La FIFA est l’instance dirigeante du football au niveau mondial.

3. M. Grant et la FIFA sont dénommés individuellement, la “Partie” et, collectivement, les “Parties”.

II. FAITS

A. Généralités

4. Cette section comprend un résumé des faits pertinents à l’origine du litige, établi sur la base des pièces de procédure écrite déposées par les Parties ainsi que de leurs plaidoiries. D’autres faits et allégations peuvent également y être mentionnés dans la mesure de leur pertinence en vue de la discussion au fond dans la présente sentence arbitrale. Si la Formation arbitrale a pris en compte l’ensemble des faits de la cause, assertions, arguments de droit et éléments de preuve avancés par les Parties dans la procédure, elle se réfère dans la présente sentence arbitrale aux seuls éléments de fait et de droit qui lui sont nécessaires pour l’exposé de son **raisonnement**.

B. Faits à l’origine du litige

5. Le 25 avril 2020, dans une vidéo de la même date sur sa chaîne YouTube, M. Romain Molina (“M. Molina”), un journaliste d’investigation du football (présenté comme tel par le journal *The Guardian*), a mentionné des allégations d’abus sexuels systématiques qui auraient eu lieu au sein de la FHF.
6. Le 30 avril 2020, le journal *The Guardian* a publié un article indiquant que plusieurs officiels de la FHF, en particulier M. Yves Jean-Bart (“M. Jean-Bart”), ancien Président de la FHF, auraient contraint plusieurs joueuses du Centre Technique National de la Croix-des-Bouquets (le “Centre”) à avoir des rapports sexuels en utilisant plusieurs

- manœuvres de coercition et d'intimidation.
7. Le 1^{er} mai 2020, à la suite de ces publications, la Chambre d'Instruction de la Commission d'Éthique de la FIFA (la "Chambre d'Instruction") a demandé à la Confédération de football d'Amérique du Nord, d'Amérique Centrale et des Caraïbes (la "CONCACAF") de lui fournir les informations et les documents en sa possession à propos des allégations mentionnées dans l'article du 30 avril 2020 publié par *The Guardian*. En outre, la Commission d'Éthique de la FIFA (la "Commission d'Éthique") a demandé à la CONCACAF d'enquêter sur ces allégations.
 8. Le 5 mai 2020, la CONCACAF a répondu qu'elle ne possédait pas davantage d'informations à propos de ces allégations et a rappelé qu'elle ne disposait pas de commission d'éthique et que, par conséquent, elle ne pouvait pas mener d'enquêtes.
 9. Le 11 mai 2020, en raison des restrictions de voyage mises en place à cause de la pandémie de COVID-19, la Présidente de la Chambre d'Instruction a nommé un comité *ad hoc* (le "Comité *ad hoc*") afin de mettre en œuvre les mesures d'investigation nécessaires selon les instructions de la Présidente de la Chambre d'Instruction, dans le but d'évaluer correctement les faits liés aux allégations contre M. Jean-Bart.
 10. Au cours de la procédure d'enquête contre M. Jean-Bart, la Chambre d'Instruction a identifié M. Grant comme l'un des auteurs d'abus sexuels, notamment en raison de son rôle au sein de la CONA.
 11. Le 13 août 2020, la Fédération internationale des associations de footballeurs professionnels (la "FIFPro") a transmis à la Chambre d'Instruction un rapport détaillé sous forme de lettre contenant des conclusions sur les allégations d'abus sexuels dans le Centre (le "Rapport FIFPro"). Ce rapport indiquait notamment que la FIFPro avait été en mesure d'identifier trente-quatre possibles victimes d'abus sexuels et dix auteurs potentiels, dont M. Grant pour lequel les conclusions étaient les suivantes (selon une traduction libre):

"Rosnick Grant: a violé et/ou abusé sexuellement et/ou tenté de violer plus de 11 joueuses et arbitres, a abusé de son pouvoir de manière répétée pour forcer ou persuader de jeunes femmes à avoir des rapports sexuels avec lui, proposant aux arbitres des opportunités et des arrangements en échange de faveurs sexuelles. Grant menace désormais les arbitres et propose également des emplois à celles qu'il a licenciées pour avoir refusé d'avoir des rapports sexuels avec lui".
 12. Par courrier du 21 août 2020, la Chambre d'Instruction a informé M. Grant de l'ouverture d'une enquête préliminaire à son encontre en application des articles 30 al. 2 et 59 al. 2 et 3 du Code d'Éthique de la FIFA (le "FCE") pour de possibles violations des articles 13 (Règles de conduite générales), 17 (Devoir de signalement), 23 (Protection de l'intégrité physique et morale) et 25 (Abus de pouvoir) FCE.
 13. Le 10 février 2021, la Présidente de la Chambre d'Instruction a décidé d'interdire provisoirement M. Grant de toute activité relative au football pendant

90 jours, conformément à l'article 84 FCE (la "Suspension Provisoire").

14. Le 7 mai 2021, la Présidente de la Chambre d'Instruction a soumis à la Chambre de Jugement de la Commission d'Éthique (la "Chambre de Jugement"), une requête aux fins de prolonger la Suspension Provisoire à l'encontre de M. Grant, d'une durée supplémentaire de 90 jours, sur le fondement des dispositions de l'article 85 al. 1 FCE.
15. Le même jour, le Président de la Chambre de Jugement a prolongé la Suspension Provisoire de 90 jours à compter de la fin de la durée initiale de la Suspension Provisoire du 10 février 2021.
16. Le 24 juin 2021, la Chambre d'Instruction a rendu son rapport final concernant l'enquête sur M. Grant (le "Rapport Final"), lequel incluait la déclaration écrite d'une victime (la "Victime") du 6 octobre 2020, dont le contenu était notamment le suivant (selon une traduction libre):

"[...]"

J'ai intégré l'arbitrage en 2011 à travers une formation organisée par M. Rosnick Grant, le président de la Commission nationale des arbitres (CONA) [...]. Dès le premier jour, M. Grant m'avait dit qu'il voulait me rencontrer ailleurs pour qu'on puisse se parler parce qu'il lui semble que j'ai de l'avenir dans le milieu. Ainsi, il m'a proposé de venir à l'hôtel où il logeait dans la ville de [...]. Je n'ai pas hésité, parce que ce dernier était accompagné d'une jeune femme très gentille, elle était arbitre. Au lendemain, je me suis rendue à l'hôtel aux environs de 5 heures du matin et j'ai pu constater que la jeune arbitre et le président de la CONA partageaient la même chambre et un même lit.

Quand je suis arrivée, la jeune arbitre a tout de suite laissé la chambre (M. Grant, c'est quelqu'un qui utilise ses propres victimes pour en faire d'autres...) puis il m'a invité à m'asseoir. Il a commencé par me dire que j'étais belle, ensuite il a mis ses mains sur mes cuisses, il est arrivé jusqu'à mes seins... Et moi qui croyais qu'on allait parler des différentes étapes à franchir pour devenir un arbitre international.

Quelques jours plus tard, il m'a appelé pour me demander de lui laisser prendre ma virginité, et ce jour-là, il m'avait dit qu'il voulait faire de moi une femme, il a insisté là-dessus. Il m'avait dit que si j'ai accepté de coucher avec lui, il paierait mes études et me permettrait de faire une carrière.

A la suite de cela, j'ai appelé la jeune arbitre, je lui ai tout dit, je lui dit également que je n'allais pas rester dans ce milieu. Quelques minutes après l'avoir parlé, Mr Grant m'a appelé pour me dire qu'il va cesser avec ses propositions indécentes.

[...]

Un jour, après avoir dirigé un match, il était venu nous faire des remarques au vestiaire (c'était au stade [...]). Il m'a fait signe de sortir pour me dire de me changer rapidement parce qu'il était tard, et qu'il allait me déposer chez moi. Ce jour-là, il m'a emmenée dans un endroit où il y avait pleins d'arbres. Je ne savais où j'étais. Il a commencé à me toucher, disant qu'il avait envie de moi. Heureusement, j'avais la force de me battre et j'en suis sortie.

Une autre fois, il m'a appelé au téléphone pour me dire que j'allais être dans une compétition internationale, il m'avait demandé de me préparer en conséquence. J'allais subir un test physique. J'ai raté plusieurs cours à l'université pour aller me préparer physiquement, j'ai investi tout mon temps, mon énergie. Je me suis investie pour réussir, j'étais super motivée. Puis deux

jours avant le jour où je devais subir le test, il m'a appelé pour me demander de venir passer une nuit avec lui chez lui, ce que j'ai refusé. Après l'avoir refusé, je savais déjà que je n'allais pas participer à cette compétition. J'étais déçue, démotivée et fatiguée.

Le jour du test, je suis venue, et j'ai raté, malheureusement... Cela m'est arrivé plusieurs fois.

Il est diabolique, il m'a détruit. Il a brisé mes rêves, détruit ma carrière... je n'avais aucune motivation de faire des efforts pour répondre aux exigences de la FIFA parce que je savais qu'il ne me laisserait pas évoluer. Je voulais marquer l'histoire de l'arbitrage Haïtien, il m'en a empêché, à mon plus grand regret. [...]"

17. Le Rapport Final incluait également un procès-verbal d'un entretien entre la Chambre d'Instruction et la Victime, dont l'identité avait été dûment vérifiée, au cours duquel la Victime avait fourni ses données personnelles et avait décrit sa relation actuelle et passée avec la FHF et un procès-verbal d'un entretien entre la Chambre d'Investigation et un ancien officiel de la FHF (le "Témoin 1"), qui a témoigné au sujet des allégations d'abus sexuels ayant eu lieu au sein du Centre et d'autres infrastructures de la FHF.

18. Le Rapport Final concluait ce qui suit:

- *M. Grant a enfreint l'article 23 al. 1, 3, 4 et 5 du FCE 2018, en se livrant à des actes d'abus et de harcèlements sexuels commis sur des femmes arbitres.*
- *M. Grant a enfreint l'article 25. al .1 du FCE 2018, à abuser de son pouvoir pour faire en sorte de se retrouver seul avec des arbitres et de pouvoir les persuader de se livrer à des actes sexuels.*

- *M. Grant a enfreint l'article 23 al. 3 du FCE 2020, en menaçant des victimes et témoins potentiels et en les empêchant de témoigner.*

Au vu de ce qui précède, M. Grant est reconnu coupable d'avoir enfreint plusieurs dispositions du Code d'Éthique de la FIFA, édition 2018 et 2019, à savoir les articles 13 (règles de conduites générales), 23 (protection de l'intégrité physique et morale) et 25 (abus de pouvoir)".

C. Procédure devant la Chambre de Jugement de la Commission d'Éthique de la FIFA

19. Le 25 juin 2021, la Chambre de Jugement a notifié à M. Grant l'ouverture à son encontre d'une procédure sur la base des conclusions du Rapport Final et sur le fondement de l'article 68 al. 3 FCE. M. Grant a été invité à prendre position et a été informé que, s'il demandait une audience, celle-ci serait organisée le 22 juillet 2021 par vidéoconférence.
20. Le 29 juin 2021, M. Grant a demandé la tenue d'une audience et demandé à recevoir *"les audios des auditions aussi que les témoignages dûment signés"*.
21. Le 11 juillet 2021, M. Grant a notifié sa prise de position à la Chambre de Jugement.
22. Le 12 juillet 2021, la Chambre de Jugement a transmis à M. Grant des documents reçus de la part du Syndicat National des Arbitres de Football ("SYNAF") et demandé à M. Grant de limiter le nombre de témoins à l'audience à deux personnes, dans la mesure du possible.

23. Le 22 juillet 2021, une audience s'est déroulée en vidéoconférence à laquelle les parties suivantes ont participé: M. Grant, les trois membres de la Chambre de Jugement, le président de la Chambre d'Instruction, ainsi que deux membres du secrétariat de la Chambre de Jugement et deux membres du secrétariat de la Chambre d'Instruction.
24. Le 23 juillet 2021, sur la base du Rapport Final, des déclarations de M. Grant et de la Présidente de la Chambre d'Instruction, la Chambre de Jugement a notifié à M. Grant le dispositif de sa décision prise le 22 juillet 2021 (la "Décision Litigieuse") qui dispose de ce qui suit:

"1. M. Rosnick Grant est reconnu responsable d'avoir enfreint l'art. 23 (Protection de l'intégrité physique et mentale) et l'art. 25 (Abus de pouvoir) du Code d'éthique de la FIFA, concernant des actes de harcèlement, d'abus sexuels, et de menaces et coercition à l'encontre de femmes arbitres, pendant la période 2011 - 2021. À cet égard, M. Grant a profité de sa position d'autorité au sein du football haïtien en échange de faveurs sexuelles.

- 2. M. Grant est interdit à vie de participation à toute activité liée au football aux niveaux national et international (administratif, sportif ou autre), à compter de la notification de la présente décision, conformément à l'art. 7 lit. j) du Code d'Éthique de la FIFA lu conjointement avec l'art. 6 par. 2 c) du Code Disciplinaire de la FIFA.*
- 3. M. Grant devra payer une amende d'un montant de CHF 100 000, dans les 30 jours suivant la notification de la présente décision.*
- 4. M. Grant devra payer les frais de cette procédure, d'un montant de 3 000 CHF,*

dans les 30 jours suivant la notification de la présente décision.

- 5. M. Grant devra s'acquitter de ses propres frais juridiques et autres encourus dans le cadre de la présente procédure.*
- 6. Cette décision est envoyée à M. Grant. Copie de cette décision est envoyée à la FHF, la CONCACAF, et à M. Ngoga, président de la chambre d'instruction de la Commission d'Éthique de la FIFA".*

25. Le 17 septembre 2021, la Décision Litigieuse motivée a été notifiée à M. Grant et à la Présidente de la Chambre d'Instruction.

III. PROCÉDURE DEVANT LE TRIBUNAL ARBITRAL DU SPORT

A. Avant l'audience

26. Le 6 octobre 2021, conformément à l'article R48 du Code de l'arbitrage en matière de sport (le "Code"), M. Grant a déposé une déclaration d'appel auprès du Tribunal Arbitral du Sport ("TAS") contre la Décision Litigieuse, désignant le Professeur Gérard Simon, professeur à Dijon, France, comme arbitre, et a demandé une prolongation du délai de 60 jours pour soumettre son mémoire d'appel.
27. Le 20 octobre 2021, le Greffe du TAS a accusé réception de la déclaration d'appel de M. Grant et l'a transmise à la FIFA en l'invitant à se déterminer sur la requête de prolongation de M. Grant, un silence étant considéré comme un accord.
28. Le 25 octobre 2021, la FIFA a informé le Greffe du TAS qu'elle ne s'opposait pas à une prolongation de 60 jours du délai de M. Grant pour déposer son mémoire d'appel.

29. Le 1^{er} novembre 2021, la FIFA a informé le Greffe du TAS qu'elle souhaitait désigner Me Benoît Pasquier, avocat à Zurich, Suisse, comme arbitre.
30. Le 2 novembre 2021, le Greffe du TAS a transmis aux Parties la "Déclaration d'acceptation et d'indépendance" complétée et signée par Me Benoît Pasquier et attiré leur attention sur la remarque faite par ce dernier.
31. Le 5 novembre 2021, M. Grant a déposé une demande motivée de récusation de Me Benoît Pasquier auprès du Greffe du TAS.
32. Le 11 novembre 2021, le Greffe du TAS a informé les Parties que Me Benoît Pasquier avait décidé de se récuser spontanément, afin d'éviter un quelconque doute sur son impartialité et indépendance et afin de ne pas retarder inutilement la procédure. La FIFA était ainsi invitée à désigner un arbitre dans un délai de dix jours.
33. Le 22 novembre 2021, la FIFA a informé le Greffe du TAS qu'elle souhaitait désigner Me José Juan Pintó Sala, avocat à Barcelone, Espagne, comme arbitre.
34. Le 24 novembre 2021, le Greffe du TAS a transmis aux Parties la "Déclaration d'acceptation et d'indépendance" complétée et signée par Me José Juan Pintó Sala, a attiré leur attention sur la remarque faite par ce dernier et rappelé que la récusation devait être requise dans les sept jours suivant la connaissance de la cause de récusation.
35. Le 2 décembre 2021, le Greffe du TAS a informé les Parties qu'aucune demande de récusation n'avait été déposée quant à la nomination de Me José Juan Pintó Sala dans le délai imparti.
36. Le 3 décembre 2021, M. Grant a déposé une demande motivée de suspension du délai d'appel et de communication de l'entier du dossier de la Commission d'Éthique. A l'appui de cette demande, le conseil de M. Grant invoquait qu'il n'était pas en possession du dossier complet de la Commission d'Éthique. Il demandait ainsi qu'il soit enjoint à la FIFA de produire l'entier dossier non anonymisé de la Commission d'Éthique, ainsi que l'enregistrement de l'audience du 18 novembre 2020 devant la Chambre de Jugement, et que le TAS suspende le délai de M. Grant pour déposer son mémoire d'appel jusqu'à communication de ces éléments.
37. Le 6 décembre 2021, le Greffe du TAS a invité la FIFA à produire les documents requis, respectivement à indiquer les motifs de son objection, d'ici au 13 décembre 2021, et à se déterminer dans le même délai sur la requête de suspension de M. Grant.
38. Le 9 décembre 2021, la FIFA informait le Greffe du TAS qu'elle n'aurait pas d'inconvénient à produire le dossier dans son état actuel (*"c'est-à-dire, caviardé/anonymisé, qui est d'ailleurs la seule version du dossier qui existe"*), mais uniquement si ordonné par la Formation arbitrale. La FIFA indiquait toutefois s'opposer fermement à une remise des documents originaux non caviardés ou à une divulgation de l'identité des victimes/témoins. La FIFA rappelait également que le droit d'être entendu de M. Grant et de bénéficier d'un procès équitable pouvait être garanti par d'autres moyens, à titre d'exemple, par le contre-interrogatoire des témoins au moyen d'une protection audiovisuelle et par la vérification de l'identité de chaque témoin par la Formation arbitrale.

39. Le 21 décembre 2021, le Greffe du TAS a informé les Parties que le Tribunal arbitral appelé à se prononcer sur le litige serait constitué de la manière suivante: Me Alexander McLin, avocat à Lausanne, Suisse, comme Président, le Prof. Gérard Simon, professeur à Dijon, France, et Me José Juan Pintó Sala, avocat à Barcelone, Espagne, comme arbitres.
40. Le 22 décembre 2021, le Greffe du TAS a informé les Parties que Me Alexandra Veuthey, greffière auprès du TAS, avait été nommée en qualité de Greffière *ad hoc* dans la procédure.
41. Le 23 décembre 2021, le Greffe du TAS a informé les Parties que Me Alexandra Veuthey avait décidé de se retirer spontanément de la procédure.
42. Le 28 décembre 2021, le Greffe du TAS a informé les Parties que Me Pierre Turrettini, avocat à Genève, avait été nommé en qualité de Greffier *ad hoc* dans la procédure.
43. Le 17 janvier 2022, la FIFA a adressé au Greffe du TAS une copie du dossier complet de la procédure devant la Chambre de Jugement, précisant que M. Grant disposait également de ce dossier (anonymisé).
44. Le 31 janvier 2022, le Greffe du TAS a informé les Parties que la requête de M. Grant en production du dossier complet de la Commission d'Éthique, dans sa version non anonymisée, était rejetée. Les motifs de la décision de la Formation arbitrale seraient indiqués dans la sentence, étant précisé que la Formation arbitrale se réservait la possibilité de s'assurer de l'identité des témoins *ex parte*.
45. Le 1^{er} février 2022, M. Grant a demandé au Greffe du TAS une prolongation du délai de 60 jours pour soumettre son mémoire d'appel.
46. Le 8 mars 2022, dans le délai prolongé par le Greffe du TAS, M. Grant a déposé son mémoire d'appel, incluant les requêtes procédurales suivantes:
 - “ *La victime potentielle s'étant entretenue le 23 février 2021 avec la chambre d'instruction, le témoin A. ainsi que les onze victimes potentielles évoquées dans les rapports préliminaires et le rapport de la F.I.F.P.R.O. devront être entendues en présentiel ou par visioconférence lors de l'audience;*
 - *Elles devront se munir lors de cette audition d'un passeport ou de tout autre élément permettant de vérifier leur identité et le respect de leur liberté de parole;*
 - *Un conseiller du T.A.S. devra être présent auprès d'elle afin de vérifier cette identité;*
 - *le lien de ces personnes avec le Camp Nous devra également être vérifié par la consultation des registres officiels de la Fédération;*
 - *Un interprète indépendant et impartial devra être présent lors de chacune de ces auditions;*
 - *L'appelant devra avoir la possibilité d'interroger chacun des témoins à l'issue de leur interrogatoire;*
 - *Tout témoignage anonyme ou tout témoignage venant d'une personne dont l'identité n'aura pas été vérifiée sera écarté des débats.*
 - *Il conviendra également d'ordonner l'audition par visioconférence des 18 témoins*

dont M. GRANT annexe la liste aux présentes écritures”.

47. Le 9 mars 2022, le Greffe du TAS a transmis à la FIFA le mémoire d’appel de M. Grant et l’a invité à déposer sa réponse dans un délai de 20 jours.
48. Le 18 mars 2022, la FIFA, rappelant que M. Grant avait bénéficié de 141 jours de prolongation de son délai pour déposer son mémoire d’appel, plus des prolongations ultérieures de 97 jours, a demandé au Greffe du TAS un délai supplémentaire pour déposer sa réponse au mémoire d’appel au plus tard le 16 septembre 2022.
49. Le 24 mars 2022, le Greffe du TAS a informé les Parties que, au vu de l’accord de M. Grant, la requête de la FIFA en prolongation du délai imparti pour déposer sa réponse était accordée.
50. Le 8 septembre 2022, la FIFA a demandé une prolongation de quatorze jours de son délai pour présenter sa réponse au recours, invoquant de sérieuses difficultés pour assurer la liaison avec les témoins et les victimes en Haïti qui doivent fournir leurs déclarations.
51. Le 12 septembre 2022, le Greffe du TAS a informé les Parties que, au vu de l’accord de M. Grant, la requête de la FIFA en prolongation du délai imparti pour déposer sa réponse était accordée.
52. Le 30 septembre 2022, la FIFA a déposé son mémoire de réponse dans le délai prolongé par le Greffe du TAS, lequel incluait notamment les demandes de mesures probatoires suivantes:
 - a. -Autorisation de l’examen et du contre-interrogatoire de la Victime et du Témoin 1 sur une base anonyme (c’est-à-dire sans divulguer leur identité) avec des modalités similaires à celles adoptées dans les procédures CAS 2009/A/1920, CAS 2018/A/5734, CAS 2019/A/6388, et CAS 2021/A/7661;
 - b. Contre-interrogatoire des victimes, témoins et experts que si M. Grant ou la Formation arbitrale le demande, afin d’éviter de traumatiser davantage les victimes et témoins;
 - c. Soumission des questions de M. Grant qu’il souhaite poser à la Victime et aux témoins anonymes par écrit avant que ceux-ci ne soient interrogés, afin de s’assurer notamment que les questions posées soient limitées aux questions factuelles et ne visent pas à identifier les témoins et la Victime protégés.
53. La FIFA indiquait également que la Victime, le Témoin 1 et une autre victime-témoin (le “Témoin 2”) pourraient être entendus lors d’une éventuelle audience et demandait un délai supplémentaire de 30 jours pour essayer d’obtenir et produire une déclaration écrite du Témoin 1 et du Témoin 2, ce qui n’avait pas été possible en raison de problèmes de communication.
54. Le 3 octobre 2022, le Greffe du TAS a transmis la réponse de la FIFA à M. Grant et invité les Parties à indiquer si elles sollicitaient que le TAS tienne une audience ou si elles préféreraient y renoncer. M. Grant était également invité à se déterminer sur les diverses requêtes et suggestions de la FIFA en relation avec une éventuelle audience.

55. Le 7 octobre 2022, M. Grant a informé le Greffe du TAS qu'il s'opposait à la demande de délai supplémentaire de la FIFA pour obtenir des déclarations écrites des deux témoins et qu'il continuait à réclamer la levée de l'anonymat *"de la prétendue victime et de tous les témoins qui viendraient à l'accuser des faits lui étant reprochés"*, invoquant que le maintien de l'anonymat constituerait une pré-sentence, puisqu'il reviendrait à considérer que la parole de la victime a plus de poids que celle de M. Grant. Sur les modalités de l'audience, M. Grant a informé le Greffe du TAS qu'il souhaitait que l'audience puisse se tenir en présentiel et que la victime présumée soit présente lors de celle-ci, afin qu'elle puisse être interrogée par les Parties. M. Grant a également indiqué qu'il souhaitait que la victime et les témoins soient soumis à un contre-interrogatoire et qu'il refusait que ses questions soient soumises au préalable, par écrit, à la victime et aux témoins.
56. Le 10 octobre 2022, la FIFA a informé le Greffe du TAS qu'elle considérait que la tenue d'une audience en personne était nécessaire vu le nombre élevé de témoins et la nature des faits au cœur de l'affaire. La FIFA précisait qu'une audience avant mars 2023 était irréalisable compte tenu de la Coupe du Monde de la FIFA en novembre et décembre 2022 et de la nécessité d'obtenir un visa pour les personnes résidant à Haïti (processus notoirement long) et d'organiser les voyages de ces personnes, ainsi que des modalités d'une audience avec des témoins protégés.
57. Le 14 octobre 2022, M. Grant a informé le Greffe du TAS qu'il s'opposait à ce que l'audience ne soit fixée qu'à partir de mars 2023, vu les répercussions considérables de la Décision Litigieuse sur sa vie (y compris sur le plan professionnel), et qu'un délai d'un mois à un mois et demi serait suffisant pour l'obtention d'un visa.
58. Le 25 octobre 2022, le Greffe du TAS a informé les Parties que la Formation arbitrale avait décidé de tenir une audience à Lausanne, que les témoins qui le souhaitaient pourraient être entendus par vidéo-conférence, que la requête de la FIFA pour obtenir un délai supplémentaire pour produire une déclaration écrite pour le Témoin 1 et le Témoin 2 était accordée, que la requête de M. Grant visant à obtenir la levée de l'anonymat des témoins cités par la FIFA était rejetée (afin de garantir les droits des victimes présumées, notamment leur droit à la vie privée), que les témoins protégés cités par la FIFA seraient entendus à distance, via un téléphone muni d'un dispositif permettant la distorsion de la voix, dans un lieu gardé confidentiel, et selon les modalités suivantes:
- a. Chaque témoin témoignerait seul et chacun son tour en présence d'un Conseiller du TAS qui, au préalable, se sera assuré de leur identité.
 - b. Les témoins devront ainsi se munir de leur passeport et le présenter au Conseiller du TAS présent sur place qui confirmera ensuite l'identité du témoin à la Formation arbitrale et aux personnes présentes à l'audience.
 - c. Le Conseiller du TAS présent s'assurera que chaque témoin soit auditionné dans une pièce et confirmera à la Formation arbitrale et aux personnes présentes à l'audience que le témoin est

- auditionné librement, sans l'influence d'une tierce personne.
- d. M. Grant sera invité à communiquer au Greffe du TAS, à l'attention de la Formation arbitrale uniquement, une liste précise et exhaustive des questions qu'il entend poser aux témoins protégés, ceci afin de garantir la protection de l'identité des témoins et de déterminer si certaines questions, pourraient, dans une certaine mesure, aider à leur identification.
 - e. La Formation arbitrale posera directement aux témoins les questions préalablement soumises par M. Grant.
59. La Formation arbitrale proposait également de tenir une vidéo-conférence au sujet de la gestion de la procédure.
 60. Le 2 novembre 2022, le Greffe du TAS a informé les Parties que, au vu des disponibilités communiquées par les Parties, la vidéo-conférence sur la gestion de la procédure aurait lieu le 2 décembre 2022.
 61. Le 28 novembre 2022, dans le délai prolongé par le Greffe du TAS, la FIFA a produit une déclaration écrite pour le Témoin 1 et a informé le Greffe du TAS qu'il n'avait pas réussi à obtenir une déclaration écrite pour le Témoin 2.
 62. Le 2 décembre 2022, une vidéo-conférence sur la gestion de la procédure s'est tenue en présence de la Formation arbitrale, de Me Delphine Deschenaux-Rochat, Conseillère auprès du TAS, de Me Pierre Turrettini, Greffier *ad hoc*, de Me Charles Amson, conseil de M. Grant et de M. Miguel Liétard Fernández-Palacios, Directeur du département des litiges de la FIFA, et M. Saverio Paolo Spera, Conseiller juridique senior auprès de la FIFA.
 63. Le 5 décembre 2022, pour faire suite à la vidéo-conférence sur la gestion de la procédure, M. Grant a informé le Greffe du TAS qu'il acceptait de limiter le nombre de dépositions et de renoncer à l'audition de six témoins. La liste définitive des témoins appelés par M. Grant était donc la suivante: M. Jean-Claude Nexil, M. Jean-Evensck Desjardins, Mme Ronide Henrius, Mme Berline Geffrard, Mme Wesline Louis, Mme Anne-Marie Joseph, M. Thomas Deland, M. Toussaint Coissi Dogbe, M. Wilson Tilus, M. Carl-Henry Elie, M. Petiel Dumas et M. Jean-Nathan Aristil.
 64. Le 6 décembre 2022, le Greffe du TAS a invité les Parties à réserver les 15, 16 et 17 février 2023 pour une audience en personne à Lausanne, Suisse, et a informé les Parties que la requête de M. Grant visant à entendre les onze victimes potentielles évoquées dans les rapports préliminaires et le Rapport FIFPro était rejetée, les motifs de cette décision seraient indiqués dans la sentence.
 65. Le 15 décembre 2022, le Greffe du TAS a informé les Parties que, conformément à l'article R44.3 al. 2 du Code, applicable par renvoi de l'article R57 al. 3 du Code, la Formation arbitrale envisageait d'entendre M. Molina, Mme Kat Craig, Mme Minky Worden et M. Roy Vermeer, en qualité de témoins lors de l'audience fixée les 15, 16 et 17 février 2023, à condition que ces personnes soient en mesure de fournir des informations pertinentes au sujet de M. Grant et des agissements prétendument commis par ce dernier. La FIFA était ainsi invitée à indiquer au Greffe du TAS

quel(s) témoin(s) serai(en)t le(s) mieux à même de renseigner la Formation arbitrale.

66. Le 27 décembre 2022, dans le délai prolongé par le Greffe du TAS, la FIFA a informé le Greffe du TAS qu'elle considérait que M. Molina serait la personne la mieux placée pour fournir à la Formation arbitrale des informations pertinentes au sujet de M. Grant et de ses agissements au vu des entretiens qu'il aurait eu avec plusieurs victimes de M. Grant. La FIFA indiquait également attendre des réponses de Mme Kat Craig et M. Roy Vermeer.
67. Le 9 janvier 2023, la FIFA a informé le Greffe du TAS avoir réussi à contacter Mme Kat Craig et M. Roy Vermeer qui considéraient ne pas être les personnes les mieux placées pour témoigner et qui ne seraient donc pas disponibles pour l'audience.
68. Le 13 janvier 2023, le Greffe du TAS a convoqué les Parties à l'audience d'instruction et de jugement fixée les 15 et 16 février 2023 à Lausanne, Suisse et a transmis, à titre indicatif, un programme d'audience aux Parties pour commentaires.
69. Le 16 janvier 2023, le Greffe du TAS a adressé l'ordonnance de procédure aux Parties, laquelle a été signée par M. Grant et la FIFA les 19 et 23 janvier 2023.
70. Le 17 janvier 2023, M. Grant a informé le Greffe du TAS qu'il serait présent à l'audience prévue les 15 et 16 février 2023 et assisté de Me Charles Amson, avocat à Paris, France, et a transmis les coordonnées des témoins suivants cités par M. Grant: M. Jean-Claude Nexil, M. Jean-Evensck Desjardins, Mme Ronide Henrius, Mme Berline Geffrard, Mme

Wesline Louis, Mme Anne-Marie Joseph, M. Thomas Deland, M. Toussaint Coissi Dogbe, M. Wilson Tilus, M. Carl-Henry Elie, M. Petiel Dumas et M. Jean-Nathan Aristil.

71. Le 20 janvier 2023, la FIFA a informé le Greffe du TAS que la FIFA serait représentée par M. Miguel Liétard Fernández-Palacios, Directeur du département des litiges, et M. Saverio Paolo Spera, Conseiller juridique senior, lors de l'audience prévue les 15 et 16 février 2023 et que la FIFA souhaitait entendre la Victime, le Témoin 1 et le Témoin 2, M. Molina étant disponible pour témoigner par vidéo-conférence.
72. Le 1^{er} février 2023, la FIFA a informé le Greffe du TAS que, malgré tous ses efforts, elle n'a pas pu entrer en contact avec le Témoin 2 dans le contexte de sa participation à l'audience en Suisse et renonçait donc à l'entendre lors de l'audience.
73. Le 15 février 2023, le FIFA a adressé au Greffe du TAS des versions non-caviardées des déclarations écrites de la Victime et du Témoin.

B. A l'audience

74. L'audience s'est tenue les 15 et 16 février 2023 à Lausanne, Suisse, en présence de la Formation arbitrale, assistée par Me Delphine Deschenaux-Rochat, Conseillère auprès du TAS, et par Me Pierre Turrettini, Greffier *ad hoc*.
75. Les personnes suivantes étaient présentes à l'audience:
 - M. Rosnick Grant, assistée par son conseil Me Charles Amson, avocat.

- La FIFA était représentée par M. Miguel Liétard Fernández-Palacios, Directeur du département des litiges, et M. Saverio Paolo Spera, Conseiller juridique senior.
76. A l'ouverture de l'audience, les Parties ont expressément confirmé qu'elles n'avaient pas d'objection à formuler quant à la composition de la Formation arbitrale ni quant au déroulement de la procédure.
77. La Formation arbitrale a précisé que les questions de M. Grant à la Victime et au Témoin 1 lui avaient été remises au préalable pour validation. Toute question additionnelle devait être communiquée à la Formation arbitrale avant d'être soumise à la Victime et au Témoin 1. Cette approche a été validée par les Parties.
78. Le 15 février 2023 (le "Jour 1"), la Formation arbitrale a entendu certains témoins cités par la FIFA, M. Grant et certains témoins cités par ce dernier.
79. La Victime a été entendue en qualité de témoin. Elle se trouvait dans un poste de police où son identité a pu être vérifiée par Me Andrea Sherpa-Zimmermann, Conseillère auprès du TAS, qui a confirmé que la Victime était seule dans la salle. En substance, elle a confirmé sa déclaration écrite et notamment déclaré ce qui suit:
- Elle n'a pas accepté de le rejoindre à l'hôtel. Il s'agissait d'une formation pour les arbitres et c'est dans ce cadre qu'elle a été invitée. M. Grant est venu la chercher chez elle pour aller à cette formation et elle a été informée qu'il n'y avait qu'une seule chambre de réserve.
 - Dans la chambre, M. Grant ne portait rien du tout et a essayé de la toucher. Elle s'est levée et a demandé ce qu'il faisait et lui a dit que le fait qu'il était son supérieur hiérarchique ne lui donnait aucun droit sur son corps. M. Grant a ensuite commencé à pleurer et à dire qu'il ne le ferait plus.
 - M. Grant avait son numéro de téléphone et ne cessait pas de l'appeler. Quand M. Grant lui faisait des avances, il insistait.
 - Pour recevoir les uniformes, il fallait s'y rendre en personne et signer un papier. M. Grant ne donnait pas les uniformes à un ou une collègue. Elle avait ainsi l'obligation de s'y rendre en personne pour ne pas être grondée par M. Grant qui voulait qu'on lui fasse confiance.
 - M. Grant n'a jamais été violent. Il faisait toutefois des avances, voulait la voir en bikini et coucher avec elle. Il utilisait sa position pour abuser des jeunes issues de familles pauvres. Il lui a dit *"je veux être avec toi car je t'aime et je te laisserai quand tu auras trouvé un homme"*.
 - Elle s'est dit qu'elle devait agir pour que justice soit faite et pour protéger l'image du football haïtien et les jeunes arbitres qui devraient évoluer dans un milieu sans ce type de comportements.
 - Elle a été menacée lorsqu'elle a contacté le journaliste et la FIFA et a reçu des menaces à plusieurs reprises à chaque fois qu'il se passait quelque chose dans la procédure. Elle n'a pas fait un suivi analytique de tout cela. Cela étant, au

- téléphone, on lui a même donné la couleur de l'uniforme, ce qui prouvait que c'était du sérieux.
- Elle a compris de M. Grant avait eu des contacts avec la police, raison pour laquelle elle n'a pas osé donner des suites pénales au dossier car elle avait peur. De plus, le système juridique en Haïti est corrompu et les tribunaux ne fonctionnent pas bien. La situation d'insécurité du pays s'aggrave de jour en jour. Comme M. Grant connaît ses parents et où elle habite, elle ne souhaite pas s'exposer.
 - Très énervée et pensant que la procédure n'irait pas de l'avant, elle a effacé les messages.
 - M. Grant n'était pas souvent présent au Centre car il n'y avait pas de bureau.
 - Il y a plusieurs victimes, même certaines qui ne sont pas conscientes qu'elles étaient victimes. Une dizaine de femmes lui ont parlé. Il est impossible d'assister aux scènes d'abus. M. Grant est très intelligent et ne laisse pas de trace. Il arrive à manipuler ses propres victimes. Une fille a témoigné et abandonné car elle se sentait faible.
 - Quand M. Grant aime une femme arbitre, il s'assure de connaître toutes les informations sur la personne (adresse des parents, adresse personnelle, adresse de l'université). Il est donc ensuite trop risqué de poursuivre M. Grant en Haïti et les victimes refusent de poursuivre par peur. M. Grant abuse des filles, mais les aide également à évoluer.
 - Elle soutient également toutes les femmes qui ont refusé les avances de M. Grant. Ce dernier a laissé évoluer une femme, quoiqu'elle ait refusé de coucher avec lui, afin d'envoyer un message à tout le monde et pour contredire les rumeurs.
 - Elle a décidé de témoigner car elle trouvait que M. Molina faisait quelque chose de bien. Le contact a été fait par les réseaux sociaux. C'est elle qui l'a contacté quand elle a vu ce qu'il faisait.
 - Elle n'a jamais réussi un test physique, ni subi de tests théoriques. Elle se demandait donc régulièrement comment sa carrière allait évoluer, ce qui la rendait fragile. Il y avait aussi l'université. Elle faisait des pauses d'entraînement quand elle en avait marre des avances de M. Grant.
 - Lors de la formation en 2016, elle était en déplacement avec lui. Les participants logeaient dans leur maison qui était au lieu de la formation.
 - Parmi les victimes inconscientes, il y a des arbitres nationales et des femmes arbitres internationales. Certaines ont mis fin à leur carrière.
80. Le Témoin 1 a été entendu en qualité de témoin. Il se trouvait dans un poste de police où son identité a pu être vérifiée par Me Andrea Sherpa-Zimmermann, Conseillère auprès du TAS, qui a confirmé que le Témoin 1 était seul dans la salle. En substance, il a confirmé sa déclaration écrite et a notamment déclaré ce qui suit:

- Il n'a jamais eu de rapports avec M. Grant. Il le connaît.
 - Il n'a jamais été témoin direct d'actes mais a plusieurs amis qui lui ont raconté les actes de M. Grant, quatre femmes. Il ne peut pas donner de noms pour des raisons de souhaits d'anonymat. Dans ses fonctions à la FHF, il côtoyait les joueuses et arbitres au quotidien.
 - Une personne a raconté que, lors d'une formation, M. Grant est venu dans sa chambre au cours de la nuit et l'a touché. La femme a refusé. Il n'a pas la date de cet événement en tête mais pense que cela devait être en 2015 ou 2016.
 - Il a vu la déclaration de M. Molina sur les réseaux sociaux et l'a contacté.
 - Un jour, M. Grant a invité une arbitre dans une réunion dans un hôtel à 22h00 et lui a dit qu'elle pouvait rester avec l'officiel de la FIFA et se baigner dans la piscine et dormir avec lui.
 - Selon une connaissance du Témoin 1, il y avait tellement de bruits dans la chambre que les gens dans les chambres à côté n'arrivaient pas à dormir.
 - La majorité des arbitres internationales sont les maîtresses de M. Grant et des officiels de la FIFA. Elles ont peur de témoigner.
 - Il a entendu qu'il fallait envoyer des femmes pour les officiels de la FIFA, tout le monde le sait.
81. M. Molina a été entendu en qualité de témoin. En substance, il a déclaré ce qui suit:
- Il s'agit d'un système et d'un réseau qui perdure depuis de nombreuses années. Il y a actuellement une personne en prison pour ces faits. C'est une organisation criminelle avec des gens très puissants et personne n'ose en parler vu que Haïti est le pays le plus dangereux du monde.
 - Fin janvier 2020, des gens, notamment les membres de la famille des victimes, le contactent à la suite de sa vidéo *Youtube* pour relater des faits d'abus sexuels et le premier nom qui sort est celui de M. Jean-Bart.
 - Vers mars ou avril 2020, il contacte la FIFA pour parler des abus sexuels, sans préciser pourquoi, car il ne sait pas gérer le cas vu la taille du dossier. Des gens sont impliqués et la confidentialité n'est ainsi pas respectée. Lors de la parution du premier article début mai 2020, il reçoit des menaces de mort et de procès, notamment de M. Jean-Bart. D'autres personnes le contactent, notamment de la part de M. Jean-Bart, pour des fausses informations. D'autres noms sortent, dont celui de M. Grant. Les articles n'ont pas été attaqués.
 - Il y a celles qui ont été abusées sexuellement et d'autres qui ont accepté ou refusé des propositions. Avec M. Grant, il fallait coucher pour être promu. Pour M. Grant, cinq victimes l'ont contacté pour des cas de pénétrations et attouchements sexuels.

- M. Grant a fait prostituer des arbitres. Quand des officiels de la FIFA venaient à Haïti, il y avait des cadeaux sexuels.
- Il ne peut pas mentir pour des histoires d'abus sexuels. L'affaire de M. Evans Lescouflair, ancien Ministre des Sports à Haïti, arrêté par Interpol, est une preuve que cela n'est pas un complot. De plus, il sacrifie sa vie en raison de ce dossier car il soutient psychologiquement des victimes et ne reçoit pas d'argent. Il est profondément insulté par l'idée d'un complot contre M. Grant.
- Il a fait des enquêtes similaires dans d'autres pays, notamment Barbade, Colombie, France, Sierra Leone, Zimbabwe. C'est un combat international qui est beau.
- Les tentatives de chantage ne concernent pas M. Grant, mais M. Jean-Bart. Il y a toutefois eu des menaces. Ses articles parlent d'un système. Chaque article du journal *The Guardian* était revu par les avocats du journal compte tenu des accusations graves.
- Les deux seules arbitres internationales, Mme Ronide Henrius et Mme Wesline Louis, qui viennent témoigner sont des maîtresses de M. Grant. Pour être promue, il faut coucher, c'est l'unique condition. M. Jean-Bart s'occupait des joueuses et M. Grant s'occupait des arbitres. Cela ne créait pas de friction car chacun avait son dicastère.
- Il n'a pas suivi de formation de journaliste vu ses moyens et sa

situation familiale. Cela étant, plusieurs de ses articles ont été publiés dans les journaux *The New York Times* et *The Guardian*. Ce dernier journal, soit son département juridique, vérifiait les identités des personnes avec qui il était en contact. Il y avait des photos et des vidéos et ils ont parlé à tous via vidéoconférence. L'équipe juridique a tout vérifié pour éviter des erreurs vu l'importance du dossier.

- Il n'a pas remis les preuves en sa possession au Comité *ad hoc* car il ne l'estimait pas crédible. Une fois que M. Lestang a démissionné, il a remis les preuves à la Commission d'Éthique.
- Il y a des procès en cours contre M. Grant pour tentatives de meurtre. Il s'agit de filles qui vivent dans la précarité et la peur. L'affaire de M. Evans Lescouflair a permis aux langues de se délier. Comme il y a un traumatisme, cela met toutefois du temps.
- Il n'a jamais reçu un message avec des déclarations directes de victimes. Cela se fait au fil du temps. Cela étant, il n'a jamais forcé personne à parler ou à initier des conversations vu le traumatisme. Il préfère ne rien publier plutôt que de causer un traumatisme à une personne.
- Seul M. Jean-Bart a engagé une procédure en diffamation contre lui. Deux autres procédures sont en cours mais il n'a jamais été condamné.

82. M. Grant a été entendu en qualité de partie. En substance, il a déclaré ce qui suit:

- Il se sent indigné d'être accusé car des gens ont profité d'une situation pour l'éjecter en raison d'inimités. En trente ans de carrière d'arbitre, M. Grant n'avait jamais eu aucune histoire avec des femmes et ne comprend donc pas comment la FIFA a pu être induite en erreur. De plus, il a toujours œuvré pour le développement en faveur des femmes et l'égalité des sexes. Quand il a commencé à mettre des femmes arbitres pour les matchs de football hommes il a été critiqué. Il a toutefois assumé ses responsabilités car il ne considère pas les femmes inférieures aux hommes.
- Pour être arbitre, il faut être en bonne condition physique, peu importe le niveau intellectuel. Il y a quatre tests par année organisés par la CONA: en février, en mai, en août et en septembre. Selon le règlement de la FIFA, si le test est raté dans une catégorie, on ne peut pas arbitrer dans cette catégorie jusqu'à réussite dudit test. Pour être arbitre international, il faut avoir le niveau. La CONA prend la décision d'un commun accord pour mettre les arbitres sur la liste. Chaque année, il faut regagner ce droit d'être sur la liste. Ce n'est pas lui qui a mis Mme Ronide Henrius sur la liste. Elle a accouché depuis et n'est plus sur la liste car elle doit regagner sa place. Mme Wesline Louis avait un poids important avant de commencer l'arbitrage et c'est lui qui est allé la chercher car il la connaissait. C'est la FIFA qui décide

qui elle choisit à la fin. Aujourd'hui, il y a cinq arbitres sur la liste de la FIFA alors que, à son époque, il y en avait dix.

- Les critères pour choisir les arbitres sont la disponibilité, la condition physique, les performances précédentes et les éventuels antécédents avec les équipes. Les anciens arbitres regardent les matchs et l'appellent ensuite pour partager leur évaluation.
- M. Molina ne l'incrimine pas complètement mais plutôt M. Jean-Bart.
- Il n'est pas membre d'un cartel, il est en train de construire deux maisons. A Santo, les travaux ont commencé en 2006 et l'autre maison en 2016, et les travaux ne sont pas terminés. Il reçoit des gens et en est fier, des européens en mission d'évangélisation. Une arbitre et sa fille sont finalement restées cinq ans chez lui.
- Il a effectivement été traduit en justice mais c'est lié à des arrangements. Il n'a pas de nouvelles de ce dossier depuis plus d'une année. Il a demandé un casier judiciaire depuis qui est vierge.
- Devant la Chambre de Jugement, il n'y avait aucune victime, aucun témoin mais la décision de 40 pages a pourtant été envoyée dans les six heures.
- Quand il reçoit les équipements, il les remet au capitaine qui est l'arbitre le plus expérimenté d'un secteur, lequel les distribue.

- M. Grant reçoit des sollicitations de transport, que ce soit au travail ou pour le football. S'il va à un match ou chez lui, il profite de ramener ceux qui en ont besoin en raison de l'insécurité.
 - Pour les formations, les instructeurs n'étaient pas logés au même endroit que les participants. Parfois, ils logeaient même chez lui. Il n'y avait jamais de chambres individuelles mais plutôt des chambres double, voire parfois avec plus de lits.
 - Pour les cours, il peut y avoir jusqu'à 60 femmes. C'est lui fait le cours ou, parfois, il prend un arbitre expérimenté. Il y a deux groupes qui sont mis en concours.
 - Les arbitres sont payés *per diem*, c'est-à-dire par match, en plus des remboursements des frais d'entraînement. Il indiquait à M. Jean-Bart que la rémunération était trop faible, surtout que le niveau devait être le même que les arbitres internationaux qui eux sont mieux payés.
 - Quand la décision de suspension provisoire de M. Jean-Bart a été rendue, il aurait pu devenir président de la FHF. D'autres gens voulaient toutefois prendre cette place.
 - Depuis la dissolution de la FHF, il n'y a plus de compétition.
83. Tous les autres témoins ont été entendus par vidéo-conférence ou conférence téléphonique selon la qualité du réseau disponible au moment de leur témoignage.
84. M. Jean-Claude Nexil, qui aurait "*enquêté sur les événements ayant entraîné la mise en accusation de M. Grant*", a ainsi été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:
- L'humanité a été induite en erreur dans ce dossier. Il est enquêteur d'expérience et confirme que M. Grant est victime d'un complot organisé par ceux qui veulent avoir le contrôle du football et de l'arbitrage. M. Grant – qui n'est pas manipulable – a mené des luttes qui lui valent des ennemis. Le complot est organisé par M. Jacques Robert Arthur avec M. Molina. La FIFA doit reconnaître son erreur de jugement dans le traitement du dossier d'Haïti. Si M. Grant n'était pas pressenti pour être président de la FHF, il ne serait pas dans cette situation.
 - Il a enquêté sur le dossier en parlant à des présidents de clubs de première et seconde divisions et a suivi la carrière de M. Grant. Il a voulu faire l'enquête car il avait l'impression qu'il y avait des mensonges. Il a conclu que des gens ont voulu punir M. Grant. M. Jacques Robert Arthur a voulu se venger d'avoir été exclu de la liste des arbitres de la FIFA.
85. M. Jean-Evensick Desjardins, arbitre, a été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:
- Les capitaines ont pour mission de s'occuper des entraînements dans les secteurs et de la répartition des matériels, avec accusé de réception.

- Pour les cours, les arbitres hommes sont entre eux et les arbitres femmes sont entre elles. Au sein des arbitres, il n'y avait pas de cas d'abus ou d'agressions. Cela aurait été sa responsabilité compte tenu de sa position au sein du SYNAF.
 - Il n'a aucun problème avec M. Grant qui a fait son travail et est très strict et sévère.
 - M. Grant a instauré le fait que les arbitres femmes pouvaient diriger des matchs d'hommes. Des arbitres se sont frustrés car ils ne sont pas restés sur la liste en raison de déficits de performance et car ils n'ont pas résisté aux tests physiques. M. Jacques Robert Arthur a dit qu'il allait écrire à la FIFA. Plusieurs autres personnes ont indiqué qu'elles allaient combattre M. Grant.
86. Mme Wesline Louis, arbitre assistante FIFA, a été entendue en qualité de témoin. En substance, elle a confirmé son témoignage écrit et ajouté ce qui suit:
- Elle était capitaine des femmes arbitres nationales et internationales et a confirmé n'avoir jamais été confrontée à une attitude de M. Grant telle que reprochée.
 - Elle a suivi son premier cours d'arbitrage en 2010, avec pour objectif de devenir arbitre internationale.
 - M. Grant – qui est un humaniste qui aide les gens – est victime d'un complot. Seul un arbitre inconscient peut par méchanceté participer à ce complot. Si, aujourd'hui, les femmes arbitres sont respectées,
- c'est grâce à M. Grant dont le *"leadership"* met les femmes et la société en confiance. Dorénavant, le public demande que les femmes arbitrent les matchs.
- La rémunération par match était de USD 250. Selon les périodes, il pouvait y avoir jusqu'à trois matchs par semaine.
 - Il y a eu un complot car les arbitres pensent que c'est M. Grant qui décide quand une personne est sur la liste ou non et quand une personne n'est pas sur la liste des arbitres internationaux. Elle reconnaît que c'est la FIFA qui décide.
87. M. Wilson Tilus, capitaine des arbitres, a été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit.
88. Mme Berline Geffrard, arbitre, a été entendue en qualité de témoin. En substance, elle a confirmé son témoignage écrit et ajouté ce qui suit:
- Elle n'a jamais entendu de plaintes de ses collègues arbitres depuis qu'elle est dans ce milieu. Les arbitres n'ont pas côtoyé les instructeurs de la FIFA.
 - M. Grant est très exigeant, ce qui est une bonne chose. Il n'a pas fait les choses qu'on lui reproche. Ce sont des jalousies des arbitres qui n'arrivent pas à passer les tests physiques pour être sur la liste de la FIFA.
89. M. Thomas Deland, ancien membre de la CONA, a été entendu en qualité de

témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:

- Pendant le passage de M. Grant, il était vice-président de la CONA et tout se passait très bien. M. Grant ne prenait aucune décision sans que la CONA ne soit au courant. En tant que vice-président, il était en charge de la programmation des arbitres. M. Grant s'occupait de la première division et il s'occupait de la deuxième et troisième division. Les capitaines préparaient une liste. Pour les sanctions disciplinaires, M. Grant ne prenait aucune décision sans consulter les membres de la CONA.
- Pour la distribution des équipements, ce sont les capitaines des différentes zones qui s'en occupaient. M. Grant envoyait des lots aux capitaines, principalement pour la première division. Comme il y avait beaucoup d'arbitres, pas tous ne recevaient toujours des équipements. Il y avait donc des frustrés parfois et M. Grant devait résoudre ce genre de problèmes. Ce sont les arbitres qui n'étaient pas sur les listes qui se sont plaints et qui ont provoqué des rumeurs.
- Il y avait une personne responsable de la préparation physique des arbitres. Il y avait quatre tests physiques par année.
- C'est la CONA, soit M. Grant et lui-même, qui décidait qui est sur la liste de la FIFA. Si un arbitre ne fait pas une bonne saison, la CONA, M. Grant et lui-même, déterminait si l'arbitre était à la hauteur ou non d'être sur la liste de la FIFA. Parfois, les inspecteurs de la FIFA

pointaient les arbitres qui ne faisaient pas des bonnes notes. Il choisissait les arbitres pour les compétitions féminines.

90. Mme Ronide Henrius, arbitre, a été entendue en qualité de témoin. En substance, elle a confirmé son témoignage écrit et ajouté ce qui suit:

- Selon elle, les accusations sont totalement fausses. M. Grant a fait beaucoup de choses pour l'arbitrage. Jamais une femme n'est venue se plaindre auprès d'elle au sujet d'un harcèlement.
- Pour devenir arbitre FIFA, il faut suivre les matchs et les étapes et gravir les échelons. Il y a aussi les examens. Parfois, elle a échoué dans les examens. Elle ne s'entendait pas toujours très bien avec M. Grant car elle avait des mauvaises notes.
- Elle a arbitré en première division masculine sous l'impulsion de M. Grant.
- Selon ses souvenirs, la rémunération par match correspondait à environ USD 310. Elle arbitrait trois ou quatre matchs par semaine pour les championnats de la FHF.
- Elle a fait une pétition et a écrit au journal *The Guardian* pour critiquer l'article qu'elle trouvait injuste et pour soutenir M. Grant.

91. Le 16 février 2023 (le "Jour 2"), la Formation arbitrale a entendu les autres témoins cités M. Grant.

92. M. Carl-Henry Elie, arbitre international, a été entendu en qualité de témoin. En

substance, il a confirmé son témoignage écrit et ajouté ce qui suit:

- Il n'a jamais entendu personne se plaindre d'avoir subi un quelconque comportement déplacé de M. Grant.
- Sa responsabilité était de faire la programmation du championnat de 3ème division et de distribuer les maillots dans sa région.
- M. Grant a toujours eu du plaisir à ramener les gens chez eux pour leur sécurité en raison des gangs qui se trouvent à certains endroits. Il a également été ramené par M. Grant qui est très hospitalier et toujours disponible pour aider les arbitres.
- Il a confirmé que, lors des formations, les participants et les instructeurs ne sont pas logés au même endroit.
- Une femme arbitre lui a indiqué qu'un dirigeant du club Don Bosco, un dénommé Emil, faisait partie du complot contre M. Grant. Les exigences de la CONA pour devenir arbitre étaient élevées, raison pour laquelle un départ de M. Grant facilitait pour certaines personnes la possibilité de devenir arbitre international.

93. M. Toussaint Coissi Dogbe, préparateur physique, a été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:

- Il était préparateur physique des arbitres et joueurs et c'est comme cela qu'il a côtoyé M. Grant. Il était rare de voir quelqu'un d'aussi assidu au travail à Haïti. M. Grant avait un

rêve de faire arriver les arbitres haïtiens au plus haut niveau.

- Il y a quatre tests physiques par année (février, mai, août, novembre). Il y a autant de tests pour avoir un suivi régulier du niveau des arbitres.

94. M. Jean-Nathan Aristil, "*qui côtoie M. GRANT depuis 18 ans*", a été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:

- Il connaît M. Grant depuis longtemps. Les employés ont toujours fait l'éloge de M. Grant. Pendant neuf années en tant que secrétaire général du SYNAF, il n'a jamais eu de plaintes contre M. Grant. Ce dernier était directeur commercial avec plus d'une centaine d'employés sous sa hiérarchie, dont 60% de femmes. M. Grant n'a jamais eu de problèmes avec les employés ou les responsables. Il a eu un comportement exemplaire, il est humaniste et c'est un altruiste.
- La procédure contre M. Grant a eu des conséquences sur lui-même mais aussi sur ses collaborateurs car il y avait eu du progrès grâce à M. Grant. Depuis la décision de Suspension Provisoire, il a été écarté.

95. M. Petiel Dumas, pasteur "*qui connaît M. GRANT depuis 2014*", a été entendu en qualité de témoin. En substance, il a confirmé son témoignage écrit et ajouté ce qui suit:

- M. Grant travaille toujours avec équité et droiture. Il ne veut pas

- travailler avec des partis pris, raison pour laquelle il y a des accusations sans fondement, ceci pour le déstabiliser et le décourager par rapport à ses objectifs.
- Tous les arbitres peuvent confirmer que M. Grant est hospitalier et connu de tous. Il travaille avec objectivité.
 - Les gens qui souhaitent le déstabiliser sont les gens qui sont frustrés avec ce que M. Grant a fait avec la FHF car ils ne pensent qu'à eux. En Haïti, quand on fait bien son travail, on s'attend à de la déstabilisation.
96. Mme Anne-Marie Joseph, citée en qualité de témoin par M. Grant, ne s'est pas présentée.
97. Le Jour 2, la Formation arbitrale a également entendu les plaidoiries finales des Parties et leur a accordé le droit de réplique.
98. A la fin de l'audience, sur interrogation de la Formation arbitrale, la FIFA a déclaré ce qui suit:
- Les fédérations nationales proposent les arbitres internationaux. Le comité des arbitres de la FIFA nomme ensuite les arbitres. La FIFA établit certains critères pour les tests physiques.
99. Sur interrogation de la Formation arbitrale, M. Grant a déclaré ce qui suit:
- Les tests physiques doivent être réussis au moins quatre mois avant la date limite pour proposer les candidats. La FIFA décide des personnes à retenir en concertation avec la CONCACAF.
100. A la fin du Jour 2, le programme de l'audience ayant été rempli, les Parties ont expressément reconnu que leur droit d'être entendu avait été respecté par le TAS et qu'elles étaient satisfaites de la manière dont elles avaient été traitées au cours de la présente procédure arbitrale, à l'exception de la réserve soulevée par M. Grant concernant l'impact de la procédure d'anonymisation de la défense.
- #### IV. ARGUMENTS ET CONCLUSIONS DES PARTIES
101. Les arguments des Parties, développés tant dans leurs écritures respectives que lors de l'audience des 15 et 16 février 2023, seront résumés ci-dessous. Si seuls les arguments essentiels sont exposés ci-après, toutes les soumissions ont naturellement été prises en compte dans leur intégralité par la Formation arbitrale, y compris celles auxquelles il n'est pas expressément fait référence.
- ##### A. La position de l'Appelant
102. Dans son mémoire d'appel, l'Athlète a pris les conclusions suivantes:
- “A TITRE PRINCIPAL:***
- *Annuler la décision du 22 juillet 2021 de la Chambre de Jugement de la Commission d'Ethique de la F.I.F.A;*
- Statuant à nouveau, sur le fondement des dispositions de l'article R57 du Code de l'Arbitrage en matière de Sport:*
- *Dire que M. GRANT n'a commis aucune violation du Code d'Ethique de la F.I.F.A;*

- *Dire qu'il n'y pas lieu à sanction à l'encontre de M. GRANT;*

A TITRE SUBSIDIAIRE:

- *Dans l'hypothèse où une sanction serait édictée à l'encontre de M. GRANT, la ramener à de plus justes proportions;*
- *Dire qu'il n'y aura pas lieu non plus à sanction financière et, dans l'hypothèse où celle-ci ne serait pas entièrement annulée, la ramener également à de plus justes proportions pour tenir compte du montant des revenus de M. GRANT et accorder à celui-ci les plus larges délais de paiement;*

EN TOUT ETAT DE CAUSE:

- *Dire que les frais de procédure seront mis à la charge de la F.I.F.A.;*
- *Condamner la F.I.F.A à verser à M. GRANT une indemnité destinée à le dédommager de ses frais d'avocat ainsi que de tous les autres frais avancés dans le cadre de la présente procédure et dont le montant sera déterminé par la Formation arbitrale”.*

103. En substance, les arguments de l'Appelant peuvent être résumés comme suit:

- M. Grant n'a jamais fait l'objet de la moindre accusation relative à ses comportements envers d'autres arbitres et/ou envers des femmes jusqu'au mois de mai 2020. Toutes les fonctions exercées par M. Grant au sein de la FHF l'ont été à titre bénévole.
- M. Grant a construit sa vie sur deux axes, l'un professionnel et l'autre sportif, et a eu beaucoup de succès dans les deux. Sa carrière est désormais bloquée sur ses deux axes alors qu'elle ne faisait que progresser de manière linéaire.

Contrairement à ce qu'affirme la FIFA, il n'est devenu Président de la CONA qu'en 2014, et non pas en 2011.

- M. Grant, sensible à la situation des femmes, a considérablement favorisé leur place dans l'arbitrage en Haïti et a été en pionnier dans ce cadre. La carrière internationale de plusieurs arbitres s'est ainsi développée grâce à M. Grant, notamment pour Mme Wesline Louis, Mme Joanne Monestime ou encore Mme Ronide Henrius. Haïti est le seul pays de la zone CONCACAF à avoir placé un quatuor arbitral féminin à la tête d'un match de première division et les rencontres de championnat national sont régulièrement dirigées par des femmes. Le nombre de femmes arbitres, inférieur à cinq avant l'arrivée de M. Grant, s'élève aujourd'hui à environ 85 et certaines femmes sont mêmes devenues arbitres FIFA. M. Grant a également procédé à une réforme profonde de l'arbitrage en Haïti en donnant leur chance à des arbitres n'étant pas issus de Port-au-Prince et en nommant des capitaines d'arbitres par secteurs géographiques, favorisant ainsi les arbitres en fonction de leurs mérites. Les conditions de préparation physique des arbitres ont aussi été améliorées grâce à la mise en place de tests pour évaluer leur condition. Ces réformes l'ont été au détriment de certains arbitres qui ont disparu des listes de personnes retenues pour les équipes internationales, ce qui n'a pas manqué d'attiser des rancœurs à l'encontre de M. Grant, étant

rappelé que Haïti est un des pays les plus pauvres de la planète, de sorte que la manne financière représentée par le football revêt un enjeu considérable et est l'objet de nombreuses convoitises.

- M. Grant ne dispose pas à lui seul des pouvoirs en matière d'arbitrage car il doit coordonner ses actions avec les autres membres de la CONA, ainsi qu'avec celles des évaluateurs et instructeurs FIFA.
- Parallèlement à ses fonctions dans le football, M. Grant a effectué un parcours professionnel très honorable. En 1996, il a intégré le personnel de l'Electricité d'Haïti et y a gravi de nombreux échelons. Il a occupé le poste de Directeur Commercial entre 2011 et 2013 et est, depuis cette date, conseiller auprès de la Direction Générale.
- L'article du 30 avril 2020 du journal *The Guardian*, à l'origine de la présente procédure, ne cite aucune déclaration de témoin. Aucune allusion à M. Grant ne figurait dans cet article. Cette publication a fait suite à une vidéo de M. Molina, lequel tente de discréditer les autorités du football international, étant rappelé que les méthodes de M. Molina sont contestées, une plainte pour diffamation ayant été déposée par une joueuse française.
- Les premiers rapports intermédiaires du Comité *ad hoc* n'incriminaient pas M. Grant. M. Grant apparaît finalement à la fin du Rapport FIFPro du 13 août 2020 (avant-dernière page), lequel n'a pas été établi à la suite de rencontres entre les accusatrices de M. Jean-

Bart et M. Grant. Ce Rapport FIFPro mentionne également d'autres potentiels auteurs d'infractions, M. Etienne Wilner, Directeur Technique National de la FHF, M. Jean-Roosevelt Ducasse, traducteur de la FHF ou encore M. Nella Joseph, entraîneur des sélections Senior et U20 Féminine. Le Rapport FIFPro, qui constitue selon la Décision Litigieuse une source d'éléments de preuve suffisante et fiable, n'était pas consacré à l'examen de l'attitude de M. Grant, a été rédigé dans une procédure non contradictoire et n'a jamais été communiqué à M. Grant. Cette absence de communication est problématique car ce Rapport FIFPro a directement influencé la Chambre d'Instruction. Par ailleurs, l'accusation se dégonfle car, au départ, selon M. Molina, il y a une centaine de victimes, puis ensuite, selon le Rapport FIFPro, onze victimes et, enfin, devant le TAS, une seule victime et un seul témoin, sans preuves tangibles alors que la charge de la preuve revient à l'accusateur. Il n'y a aucune procédure pénale engagée contre M. Grant et la décision de sanction de la Commission d'Éthique concernant M. Jean-Bart a été annulée.

- Lors de l'audience en visioconférence devant la Chambre de Jugement, M. Grant, qui n'était pas assisté d'un conseil, n'a pas eu la possibilité d'interroger ses accusatrices.
- Aucune plainte pénale n'a été déposée par une femme en Haïti à l'encontre de M. Grant, alors qu'une

accusatrice de M. Grant invoque des actes d'agression sexuelle qui auraient débuté en 2011, soit il y a plus de dix ans. De plus, la procédure pénale engagée à l'encontre de M. Jean-Bart s'est conclue par une ordonnance de non-lieu rendue le 16 novembre 2020, en première instance, relevant que la Brigade de Protection des Mineurs n'avait trouvé aucun indice ou aucun nom susceptible de corroborer les informations du journal *The Guardian*, le Président de la FHF ayant par ailleurs affirmé que *“ces histoires d'agression sexuelle (constituent) une manœuvre pour intimider nos joueuses”*.

- Les sanctions prononcées contre M. Grant ont été prises sans que celui-ci soit informé de l'identité des accusatrices et sans qu'il ait eu la possibilité de les confronter lors de l'instruction ou de l'audience, ce qui viole le principe du contradictoire. La Chambre de Jugement a en effet refusé de lever l'anonymat des personnes ayant porté atteinte à M. Grant et refusé d'autoriser M. Grant à les interroger, y compris par écrit, en violation de l'article 44 FCE puisque les témoignages anonymes constituent l'unique preuve à charge de M. Grant, et des articles 29 de la Constitution suisse et 6.3 de la Convention européenne des droits de l'homme (“CEDH”). La jurisprudence de la CEDH – indirectement applicable selon le TAS (TAS 2011/A/2433) – indique en effet que le maintien de l'anonymat n'est envisageable que dans des hypothèses très rares, par exemple lorsque sa levée empêcherait de continuer à recourir

à des agents infiltrés. Le Tribunal fédéral suisse a déjà jugé que l'accusé devait notamment avoir la possibilité de prendre connaissance des pièces du dossier, de faire administrer des preuves sur des faits importants pour la décision envisagée, de participer à l'administration de l'ensemble des preuves et de faire valoir ses arguments, ce que M. Grant n'a, à aucun moment, pu faire sur les arguments de ses accusatrices puisqu'elles ne se sont pas présentées à l'audience devant la FIFA. M. Grant n'a ainsi pas pu se défendre efficacement puisqu'il ignore l'identité des personnes ayant proféré les accusations et n'est pas non plus informé de la date ou du lieu des infractions présumées. Par ailleurs, aucun fait concret de nature à démontrer l'existence de réelles menaces sur la sécurité des témoins n'a été avancé dans la Décision Litigieuse, la Victime ne faisant allusion dans son témoignage qu'à des appels téléphoniques menaçants sans même prétendre que ces appels auraient émanés de M. Grant ou d'une personne *“téléguidée”* par lui.

- L'accusatrice principale de M. Grant évoque des faits qui auraient débuté en 2011. La Décision Litigieuse indique que les faits se seraient produits entre 2011 et 2021. Or, l'article 12 FCE prévoit que *“en règle générale, la poursuite des infractions au présent Code se prescrit par cinq ans”*. En conséquence, tous les faits antérieurs à plus de cinq ans à l'ouverture de l'instruction ne peuvent être opposés à M. Grant. Aucune date précise n'étant communiquée par la Victime, il est

impossible de déterminer que certains faits reprochés à M. Grant ne seraient pas couverts par la prescription.

- Le témoignage de la prétendue victime comporte des incohérences:

- La Victime soutient que M. Grant était Président de la CONA au moment de leur rencontre en 2011, alors qu'il n'a accédé à cette fonction qu'en 2014.
- La Victime prétend que M. Grant l'aurait contacté par téléphone pour lui proposer de monter dans sa chambre. À supposer que c'était le cas, ce comportement n'est nullement constitutif d'une infraction.
- En lien avec le prétendu incident au cours duquel M. Grant aurait emmené la Victime en voiture après un match et se serait livré à des actes répréhensibles, les versions présentées par la Victime sont contradictoires. Elle se révèle incapable de préciser le jour et le lieu des événements. En tout état de cause, la prétendue agression sexuelle ne se serait pas matérialisée puisque l'accusatrice a indiqué avoir pris la fuite. Il y a aussi une contradiction car elle a indiqué dans sa déclaration qu'elle s'est fait ramener par M. Grant.
- L'épisode le plus grave, selon lequel M. Grant se serait introduit dans son lit, n'a pas été signalé dans la première

déclaration, ce qui est invraisemblable.

- Le fait évoqué dans le témoignage d'inviter quelqu'un à un bal ne constitue ni un comportement répréhensible, ni même une attitude inappropriée car l'invitée est libre de refuser de se rendre audit bal.
- La Victime reconnaît que M. Grant ne disposait pas de bureau au sein de la FHF et elle tente d'en tirer parti pour soutenir qu'il avait demandé aux arbitres de passer à son domicile retirer leurs équipements. Or, M. Desjardins a reconnu qu'il revenait aux capitaines arbitres, nommés chaque année par la CONA, d'aller eux-mêmes retirer leurs équipements.
- La Victime n'explique pas pourquoi elle a mis neuf ans pour révéler les agissements de M. Grant. De plus, la Victime n'a jamais déposé de plainte pénale, alors même qu'elle avait démissionné en 2018 et pouvait donc, à compter de cette date, engager une procédure sans avoir à craindre des conséquences pour sa carrière d'arbitre.
- La Victime ne précise pas non plus les répercussions de l'attitude de M. Grant sur l'évolution de sa carrière. Son témoignage est contradictoire car elle déclare, d'une part, qu'elle se préparait avec la plus grande énergie pour être

- sélectionnée et, d'autre part, elle indique qu'elle n'avait pas la motivation nécessaire pour les entraînements requis.
- Ce qui est reconnu en revanche est qu'il n'y a jamais eu de violence, ni de coups.
 - Le témoignage du Témoin 1, interrogé le 28 janvier 2021 par la Chambre d'Instruction, appelle les remarques suivantes:
 - La nature des fonctions officielles et des dates précises du Témoin 1 ne sont pas indiquées, ni ses liens avec la Victime.
 - Les déclarations du Témoin 1 sont tellement outrancières qu'elles perdent toute crédibilité. M. Grant aurait ainsi *"abusé de toutes/ tous les arbitres"* et mis en place un système institutionnalisé visant à *"offrir des femmes"* aux instructeurs de la CONCACAF et de la FIFA.
 - Le Témoin 1 rapporte des faits auxquels il admet ne pas avoir assisté et ne juge pas utile de préciser la date à laquelle les faits supposés se seraient produits.
 - L'enquête menée par M. Molina exclusivement à charge contre M. Grant était déloyale. Il a en effet envoyé directement des messages à des victimes potentielles – visant à flatter son interlocuteur – en laissant entendre qu'il disposait d'éléments démontrant la culpabilité de M. Grant. Il a posté sur le réseau *Twitter* des messages particulièrement vulgaires et diffamatoires à l'encontre de M. Grant, tout ceci pour mettre la pression sur la FIFA. Il convient donc de prendre avec extrême prudence l'ensemble des accusations proférées par M. Molina, dont le rôle et les méthodes ont été dénoncées par la presse haïtienne. Sans M. Molina, qui était très agressif, il n'y aurait pas eu d'affaire. M. Molina – qui dénonce tout et n'importe quoi (y compris en critiquant le TAS) – n'est pas crédible et fait d'ailleurs l'objet d'une plainte en diffamation en lien avec la fédération gabonaise.
 - La FIFPro ne s'est même pas présentée pour soutenir son rapport.
 - La Chambre de Jugement n'a pas pris en compte les principes applicables en matière d'administration de la preuve et en matière d'harcèlement et/ou d'abus sexuel, selon lesquels *"le juge doit motiver sa décision, énonçant les éléments déterminants la présence de charges suffisantes ou caractérisant l'infraction"* (DESPREZ F., *Archives politiques criminelles 2012/1*). Ainsi, lorsqu'il n'est pas possible de disposer de preuves matérielles ou scientifiques et en l'absence d'aveu, le juge doit forger son intime conviction en se basant sur un faisceau d'indices, parmi lesquels la personnalité des protagonistes, leurs déclarations, les expertises médicales ou encore le portrait qu'en dresse l'entourage. Dans ce cadre, il est nécessaire de faire preuve de prudence à propos des déclarations de la Victime qui disposent de davantage de valeur lorsqu'il y a confrontation. Si les

instances sportives ne s'estiment pas liées par les règles applicables aux procédures pénales, elles doivent toutefois démontrer l'absence de "*doute raisonnable*" relatif aux accusations portées en matière d'abus et/ou harcèlement sexuel. La nature des accusations à l'encontre de M. Grant impose une certitude absolue ou, à tout le moins, une quasi-certitude. Or, en l'espèce, l'ensemble des éléments rappelés démontre l'existence d'un doute raisonnable sur la matérialité des faits allégués par la Victime. La Décision Litigieuse n'a pas non plus tenu compte des déclarations de M. Variano St-Fleur, lequel avait assuré l'intérim de M. Jean-Bart comme Président de la FHF et qui a indiqué considérer comme fausses les accusations d'harcèlement sexuel. Il n'y a rien contre M. Grant: une victime anonyme, pas de date, pas de lieu, des messages SMS effacés. Rien ne peut être vérifié.

- Il est soutenu à l'appui des accusations portées contre M. Grant que ce dernier était fréquemment présent au Centre et aurait profité de cette situation pour se livrer à des actes de harcèlement. Cependant, M. Grant ne disposait d'aucun bureau au Centre et ne s'y rendait donc que de manière exceptionnelle, ce qui a été confirmé par M. Sterin Dorival, M. Carl-Henry Elie et M. Michel Guerbyson. Par ailleurs, les réunions du Comité Exécutif de la FHF étaient organisées à différents endroits et n'avaient donc pas lieu systématiquement au Centre. M. Grant n'exerçait aucune fonction au sein du personnel des différentes

équipes nationales et n'était dès lors en contact ni avec les joueuses, ni avec les entraîneuses. Les attestations des hôtels Servotel, Visa Lodge et Kingdom (pièces 78a à 78f) confirment que les instructeurs de la FIFA qui se rendaient chaque année en Haïti n'étaient pas logés au même endroit que les participants aux sessions en question et étaient hébergés loin du Centre, ce qui est confirmé aussi par M. Wilson Tilus (capitaine des arbitres internationaux pendant plusieurs années) et M. Jean Labady Pierre (arbitre assistant international). Les directeurs des hôtels Cilina et Le Créole ont également confirmé que M. Grant avait été hébergé dans leur établissement, ce qui signifie qu'il ne se trouvait pas au Centre. Les instructeurs n'ont été logés au même hôtel que les participants haïtiens qu'à deux reprises, en 2021 (au Centre) et 2019 (à l'hôtel Kingdom), du fait de la situation exceptionnelle générée par la pénurie de carburant en Haïti. M. Junior Auguste, qui a participé à plusieurs séminaires, a confirmé dans son attestation que les femmes arbitres ne pénétraient pas dans les chambres des instructeurs. M. Thélusma Pierre-Noel a précisé que les participants haïtiens à ces séances étaient logés au Centre d'Espoir et Sport d'Haïti, dirigé par le Comité Olympique Haïtien, situé à quelques kilomètres du Centre. D'autres participants à ces séminaires se sont indignés de ces accusations, dont notamment Mme Ronide Henrius.

- La Décision Litigieuse a estimé qu'aucun élément objectif ne

permettait de retenir l'existence d'un complot à l'encontre de MM. Grant et Jean-Bart, alors que cette thèse est fréquemment mise en avant par la presse haïtienne (*L'Observateur*) et par plusieurs témoignages versés au dossier. Il est ainsi très vraisemblable que les accusations contre M. Grant aient pour origine la frustration de certains arbitres, écartés des listes officielles, lorsque la CONCACAF a durci, en 2015, les critères permettant l'inscription sur ladite liste. Par ailleurs, lorsque M. Jean-Bart a été suspendu, s'est posée la question de son possible successeur en la personne de M. Grant. C'est à ce moment-là que le nom de M. Grant est sorti en lien avec l'affaire comme par hasard, possiblement à cause de M. Jacques Robert Arthur.

- La Décision Litigieuse n'a pas tenu compte des multiples marques de soutien exprimées vis-à-vis de M. Grant par cinq femmes arbitres, la communauté des arbitres haïtiens (formée de vingt-trois capitaines de secteurs), Mme Ronide Henrius (arbitre FIFA depuis 2018), M. Jean-Evensck Desjardins (arbitre national depuis 2010) et M. Thomas Deland (vice-Président de la CONA). Mme Ronide Henrius a notamment indiqué que M. Grant n'avait pas à lui seul le pouvoir de décider de l'évolution de la carrière des femmes arbitres et que ses choix, auxquels étaient associés tous les membres de la CONA, devaient naturellement être confirmés par la FIFA. M. Grant a également réuni plus de 130 témoignages de soutien moral d'arbitres, notamment féminins, de collègues de travail,

d'amis, de voisins et de personnes l'ayant rencontré dans le cadre de ses différentes activités (notamment le Pasteur Daniel Hortica et le Père Ernst Julien). M. Grant a également versé au dossier 57 attestations d'arbitres féminines haïtiennes, soit près de trois quarts du nombre total de femmes arbitres exerçant dans le pays. Aucune raison n'existe pour considérer que ces innombrables témoignages auraient une valeur moindre que ceux ayant servi de fondement à la sanction prise à l'encontre de M. Grant. En ne permettant pas à M. Grant d'interroger plus de deux personnes lors de son audience, le Chambre de Jugement a manifestement porté atteinte au principe de l'égalité des armes entre les parties. Durant la procédure devant le TAS, il y a eu 130 témoignages unanimes et importants avec beaucoup de sincérité dans les propos tenus.

- Le contexte dramatique à Haïti doit être pris en compte car les tentatives de kidnapping et les menaces quotidiennes sont ainsi difficilement imputables à M. Grant. Comme le climat est dangereux, il était fréquent que M. Grant propose aux arbitres (hommes ou femmes) de rentrer en voiture avec lui, plutôt qu'à pied, pour des questions de sécurité.
- Les sanctions prises contre M. Grant sont beaucoup plus graves que celles pouvant être prises dans une procédure pénale. La Chambre de Jugement a ainsi considéré que M. Grant s'était rendu coupable d'harcèlement et d'abus sexuels, soit le fait *"d'user des forces, menaces et*

manipulations pour amener la victime non consentante à se livrer à des actes sexuels”, alors que le témoignage de la Victime ne révèle pas qu’elle aurait eu une relation sexuelle avec M. Grant. De plus, la Victime a relevé que M. Grant aurait abusé de sa position à des fins privées et pécuniaires, ce qui ne peut être vérifié car l’anonymat empêche de rechercher si les femmes arbitres qui auraient refusé les avances de M. Grant ont vu leur carrière entravée.

- Le principe de personnalité des peines empêche de comparer la suspension à vie imposée par la FIFA à l’ancien président de la Fédération afghane, M. Karim Keramuddin, à la sanction imposée à M. Grant, ce d’autant plus que les faits (viol, poursuites pénales, plusieurs déclarations anonymes concordantes) étaient radicalement différents du cas d’espèce. La suspension à vie constitue la plus lourde des mesures et met fin à plus de quarante ans de carrière de M. Grant. La gravité de cette suspension est en disproportion manifeste avec la nature des preuves et donc contraire à l’ordre public. Par ailleurs, on arriverait à une situation paradoxale si la Décision Litigieuse devait être confirmée alors que la décision concernant M. Jean-Bart, le principal accusé, a été annulée. En tout état, l’épisode de la chambre n’est pas suffisant, à lui seul, pour justifier une suspension à vie, voire même une suspension plus courte.
- La sanction financière prise à l’encontre de M. Grant ne tient pas compte de la réalité de ses revenus,

ni de la situation financière à Haïti. Son quantum est arbitraire. En effet, M. Grant perçoit un salaire de 155'700 Gourdes, soit environ CHF 1'368. La somme de CHF 100'000 imposée correspond à environ 77 mois de salaire et est, pour le surplus, 156 fois supérieure au montant du PIB par habitant à Haïti, lequel s’élève à CHF 640. La Décision Litigieuse doit être annulée sur ce point et aucune sanction financière ne doit être imposée ou, à tout le moins, elle doit être ramenée à de plus justes proportions pour tenir compte de la situation financière de M. Grant.

B. La position de l’Intimée

104. Dans son mémoire de réponse, l’Intimée a pris les conclusions suivantes:

“Au vu de ce qui précède, la FIFA demande respectueusement au TAS de rendre une sentence arbitrale:

- (a) Rejetant l’appel de l’Appelant sur le fond;*
- (b) Confirmant la Décision Attaquée;*
- (c) Condamnant l’Appelant à contribuer aux frais de la FIFA”.*

105. En substance, les arguments de l’Intimée peuvent être résumés comme suit:

- La Chambre d’Instruction a mentionné dans son Rapport Final que, depuis l’ouverture de l’instruction concernant les allégations d’abus sexuels commis au sein de la FHF, à de nombreuses occasions, les victimes et les témoins ont exprimé leur préoccupation quant à ce qui pourrait se passer si leur participation était révélée. La plupart

des victimes et des témoins qui ont collaboré étaient extrêmement effrayés et ont demandé que leur sécurité et/ou leur anonymat soient garantis. Par ailleurs, après l'ouverture de la procédure, M. Grant a menacé des arbitres et proposé des emplois à celles qu'il avait licenciées pour avoir refusé ses avances sexuelles, de façon à les dissuader de témoigner. La Victime a également écrit à la FIFA pour évoquer les intimidations de M. Grant. Compte tenu de toutes ces menaces qui portent sur la vie des individus concernés, il est justifié que les témoins de la FIFA soient protégés pour empêcher leur identification par M. Grant.

- Les statuts et règlements de la FIFA – notamment l'édition 2020 du FCE – constituent le droit applicable de l'affaire en question, le droit suisse étant appliqué à titre subsidiaire s'il y aurait besoin de combler une lacune dans les règlements de la FIFA.
- Le fardeau de la preuve incombe à l'accusateur, c'est-à-dire la FIFA, conformément à l'article 49 FCE et la jurisprudence constante du TAS. La Formation arbitrale doit également tenir compte de l'article 8 du Code Civil Suisse ("CC") et de la jurisprudence du TAS qui relève que, si une partie souhaite établir des faits et convaincre l'organe décisionnaire, elle doit activement corroborer ses allégations avec des preuves convaincantes (TAS 2003/A/506, TAS 2009/A/1810&1811, TAS 2009/A/1975). Cela étant, la Formation arbitrale doit garder à l'esprit la nature des infractions – c'est-à-dire la difficulté d'administrer des preuves, le comportement

examiné – c'est-à-dire l'incitation de la personne accusée, soit M. Grant, à dissimuler sa faute au vu de la gravité des faits – et les moyens d'investigation limités d'une association de droit privé comme la FIFA, ce d'autant plus en période de pandémie mondiale de Covid-19. Dans de tels scénarios, le TAS a reconnu qu'il existe un devoir de collaboration des autres parties, voire l'inversion de la charge de la preuve selon le cas (TAS 2013/A/3256, TAS 2019/A/6665 et TAS 2019/A/6669). Ainsi, plus les accusations sont détaillées, plus la défense doit être étayée. La FIFA considère que la Commission d'Éthique s'est clairement acquittée de sa charge de la preuve en décrivant en détail tous les faits pertinents et en fournissant et référant des éléments de preuve clairs dans le Rapport Final et la Décision Litigieuse. Il faut également rappeler que la FIFA avait des moyens limités.

- Le degré de la preuve est la "*satisfaction adéquate*" comme prévu par l'article 48 FCE et confirmé par la jurisprudence du TAS (TAS 2019/A/6833), sans gradation selon la nature de l'infraction reprochée. La nature des incriminations n'impose pas une "*certitude absolue*" comme invoqué par M. Grant. Au contraire, la difficulté d'investigation pour une association de droit privé pourrait même mener à une réduction du degré de preuve (TAS 2011/A/2490).
- S'agissant de l'évaluation des éléments de preuve en soi, il faut tenir compte du fait que les instances dirigeantes du sport, comme la FIFA, ont des pouvoirs d'investigation

limités. En conséquence, les preuves circonstanciées peuvent être valablement utilisées, comme confirmé par le TAS et le Tribunal fédéral suisse à de nombreuses reprises. Tous les éléments de preuve doivent être analysés de manière cumulative pour arriver à la satisfaction adéquate de la Formation arbitrale. En l'espèce, les éléments de preuve du dossier évalués individuellement permettent déjà de mettre en lumière le fait que M. Grant a commis des infractions au FCE et l'analyse cumulative de toutes les preuves (directes ou circonstanciées) ne laisse aucun doute sur la culpabilité de M. Grant.

- Concernant la crédibilité des victimes, témoins et autres sources, la FIFA rejette les arguments de M. Grant. Pour commencer, l'allégation de M. Grant selon laquelle la CONA a fonctionné de manière collégiale est contestée, la Victime ayant déclaré que M. Grant était le responsable de tout, malgré la formation de trois personnes. M. Deland a également confirmé que, avec M. Grant, ils décidaient de tout. De plus, les conclusions du journal *The Guardian* – une pièce du puzzle –, ainsi que le Rapport FIFPro, ont mis en lumière les abus perpétrés à la FHF depuis des années et définissent un contexte général d'abus généralisés dans lequel se sont également produits les actes horribles de M. Grant, soutenus par M. Jean-Bart. La conclusion du Rapport FIFPro concernant M. Grant a été déduite de déclarations directes par au moins onze victimes présumées et mentionne des allégations très graves comme le viol, l'abus sexuel ou la tentative de viol de

plus de onze joueuses et arbitres, l'abus répété de sa position pour contraindre ou persuader des jeunes femmes d'avoir des relations sexuelles avec lui, l'offre de possibilités d'arbitrage et de logement en échange de relations sexuelles, ainsi que des menaces à l'encontre des arbitres et l'offre d'emplois à ceux que M. Grant avait précédemment licenciés pour avoir refusé ses avances sexuelles. Le fait qu'aucune poursuite pénale pour harcèlement ou abus sexuel n'ait été ouverte contre lui en Haïti n'est pas relevant, car la Commission d'Éthique n'est pas conditionnée à l'ouverture de procédures pénales pour ouvrir ses propres enquêtes et les victimes de harcèlement et abus sexuels ne choisissent pas toujours d'engager des poursuites pénales devant les tribunaux compétents pour de nombreuses raisons (notamment, les craintes de représailles).

- La déclaration de la Victime est crédible et ne contient pas d'incohérences comme invoqué par M. Grant. De plus, ce dernier fonde son innocence sur le fait qu'il n'avait pas de bureau au Centre, alors que les faits qui lui sont reprochés se sont produits ailleurs, comme l'a confirmé la Victime (notamment: hôtel, chez lui, dans sa voiture).
- La Victime et le Témoin 1 ont été consistants par rapport aux déclarations écrites. Il n'y avait pas d'hésitations ou d'inventions. Le Témoin 1 a été consistant par rapport à ce qu'il s'est passé dans la chambre et ce qui a été raconté par la Victime. M. Molina a également fait un témoignage crédible, sans

préparation, au meilleur de ses souvenirs. Il a également confirmé ce qu'a dit la Victime. Il n'est pas allé chercher les victimes qui sont venues à lui par les réseaux sociaux.

- Le point central de la position de M. Grant est qu'il y aurait un complot contre lui, alors qu'il n'a apporté aucune preuve concrète à l'appui de ses affirmations, notamment celle selon laquelle la Victime ou le Témoin 1 seraient liés à des individus (M. Jacques Robert Arthur ou des membres du Comité de normalisation de la FHF) qui auraient comploté contre lui. M. Grant a uniquement apporté des témoignages d'amis et acolytes (Mme Wesline Louis ayant lu un texte préparé), par ailleurs inconsistants (notamment sur le prétendu complot), concernant ses prétendues vertus personnelles, ayant probablement accepté des avantages promis par M. Grant, alors que la Victime a apporté un récit détaillé des abus sexuel subis et une confirmation du Témoin 1 indépendant des mauvais comportements de M. Grant. La déclaration du Témoin 1 est cohérente avec le souvenir de la Victime d'au moins un événement.
- Les arguments de M. Grant sur M. Molina doivent être rejetés. Il est improbable qu'un journal comme *The Guardian* publie plusieurs articles sans vérification de l'identité ou de la vérité de ses sources.
- Le harcèlement de M. Grant envers de jeunes arbitres et les tactiques de pression de M. Grant envers victimes et témoins lors de l'instruction ont été confirmés à plusieurs reprises

(notamment à l'audience), par le Témoin 1 et par la Victime.

- M. Grant a été impliqué dans des actes de harcèlement et d'abus sexuels commis à l'égard d'au moins une femme arbitre et potentiellement à l'égard d'autres victimes également (onze selon le Rapport FIFPro), commis notamment dans des hôtels, dans la voiture de M. Grant ou à son domicile, sur une période de huit ans. Ils ont pris diverses formes, notamment des remarques et avances indécentes, des attouchements et d'autres comportements d'ordre sexuel, ainsi que de tentatives d'avoir des rapports sexuels avec la ou les victimes. Il est prouvé que M. Grant a agressé au moins une victime. Il a gardé les clés et est entré dans sa chambre pour le début d'un acte sexuel, ce qui signifie qu'il y a agression ou, à tout le moins, tentative. M. Grant a ainsi abusé du pouvoir associé à son haut rang dans la CONA et à la protection de M. Jean-Bart afin de forcer les femmes arbitres à se livrer à des actes sexuels avec lui, en leur promettant de l'aide ou en menaçant de nuire à leurs carrières dans le milieu du football. M. Grant s'est assuré du silence (et de la coopération) des arbitres par divers mécanismes de coercition et de récompense liés à son autorité. En conséquence, M. Grant a violé les articles 23 et 25 FCE.
- L'utilisation de témoins anonymes est pleinement autorisée sous réserve de l'adoption de garanties procédurales (protection audiovisuelle, vérification approfondie de l'identité et de la réputation des témoins; TAS 2009/A/1920 et TAS 2018/A/5734).

L'article 44 al. 1 et al. 2 FCE 2020, reconnu par M. Grant, prévoit les modalités applicables pour un témoignage anonyme et son utilisation. A la lumière de leur statut de victimes de comportements graves commis par M. Grant, et compte tenu du pouvoir de ce dernier dans la FHF, il est clair que le témoignage des victimes et témoins conduirait à les mettre en danger ainsi que leur famille, à mettre en péril leur intégrité physique et à tout le moins à les exposer à des menaces tangibles, ce qui justifie leur audition sur une base anonyme. Les préoccupations sérieuses et tangibles en matière de sécurité ont été soulevées dans plusieurs échanges entre Mme Minky Worden (Human Rights Watch), Mme Kat Craig (Athlead UK), Mme Joyce Cook (FIFA) et M. Roy Vermeer (FIFPro) produits dans la procédure, et confirmées par la Victime à l'audience. Il convient également de prendre en compte le contexte politique et social en Haïti où le gouvernement et les institutions (sa police et son système judiciaire) ne sont pas en mesure de protéger les témoins. Le pays entier est en effet en désarroi, le président ayant été assassiné le 7 juillet 2021, et il n'y a plus de loi et d'ordre en Haïti où le gouvernement collabore avec le crime organisé, comme confirmé par un récent rapport de Human Rights Watch. C'est dans ce contexte que la FIFA considère qu'il n'est pas souhaitable d'exposer l'identité de témoins et victimes vulnérables puisqu'aucune structure n'est en place pour garantir leur sécurité et leur bien-être. Il n'y a donc pas d'autre alternative que de confirmer l'anonymat, comme dans l'affaire

Karim Keramuddin (TAS 2019/A/6388). La Chambre d'Instruction a pleinement respecté les règles applicables concernant l'anonymat, soit l'article 44 al. 2 FCE et le droit suisse (articles 149 et suivants du Code de procédure pénale suisse). En tout état, toute prétendue violation du droit d'être entendu de M. Grant lors de la procédure d'instance est guérie par le pouvoir d'examen *de novo* conformément à la Formation arbitrale conformément à l'article R57 du Code TAS.

- Les principes de non-rétroactivité et de légalité ont été respectés et les faits n'ont pas été prescrits. La prescription pour les abus reprochés est en effet de dix ans selon l'article 12 al. 2 FCE, et non de cinq ans comme invoqué par M. Grant qui ne cite que l'alinéa 1. L'article 3 FCE (version 2020) prévoit plusieurs principes: le FCE (version 2020) s'applique à une conduite quelle qu'elle soit, y compris avant son entrée en vigueur, une personne peut être sanctionnée pour une infraction au FCE (version 2020) uniquement si la conduite en question contrevenait à la version applicable du FCE au moment où elle s'est produite et la sanction ne peut pas dépasser la sanction maximale disponible en vertu de la version applicable du FCE à ce moment-là. En l'espèce, la Décision Litigieuse se fonde sur des infractions commises par M. Grant au cours de la période allant de 2011 à 2021. En conséquence, tout règlement en vigueur au cours de cette période pourrait être pris en compte, à moins que M. Grant considère que son comportement s'étendrait au-delà de cette période et

que des règlements antérieurs devraient également être analysés. Quoi qu'il en soit, les dispositions violées par M. Grant (articles 23 et 25 du FCE version 2020) ont des dispositions équivalentes dans l'édition 2021 du FCE (les articles 24 et 14 al. 4) et dans les éditions 2019 et 2020 du FCE, avec un champ de responsabilité inchangé, à l'exception de quelques évolutions mineures immatérielles (telles que la formulation et numérotation). Cela confirme l'applicabilité du FCE version 2020. Les actes reprochés ont eu lieu pendant toute la période entre 2011 et 2021 et ne sont donc pas prescrits.

- La sanction d'interdiction à vie de prendre part à toute activité liée au football est proportionnée et compatible avec l'ordre public. Tout d'abord, le FCE ne fixe pas de limite maximale à la violation de l'article 25. En outre, les abus et harcèlements sexuels commis par M. Grant – passibles de longues peines d'emprisonnement – doivent être classés parmi les pires comportements possibles qu'un officiel du football puisse adopter. Nonobstant son pouvoir *de novo*, le TAS ne peut modifier une décision disciplinaire d'une organisation sportive que dans les cas où il constate que l'organe compétent a outrepassé la marge d'appréciation que lui reconnaît le principe de l'autonomie de l'association, c'est-à-dire uniquement dans les cas où l'organe de décision de l'association doit être considéré comme ayant agi de manière arbitraire (TAS 2019/A/6665, TAS 2009/A/1817, TAS 2009/A/1844 et TAS

2014/A/3562), et non pas si le TAS est simplement en désaccord avec une sanction spécifique, mais uniquement si la sanction concernée est considérée comme manifestement et grossièrement disproportionnée par rapport à l'infraction (notamment TAS 2020/A/6719). Lors de l'imposition d'une sanction, les éléments suivants doivent en particulier être pris en considération: (i) la responsabilité et le statut de la personne, (ii) les conséquences qu'un comportement fautif a causé aux victimes de l'acte répréhensible, l'atteinte au bon fonctionnement ou à la réputation des institutions auxquelles la personne est directement ou indirectement affiliée (ici la FHF, la CONCACAF et la FIFA), (iii) la nature et la gravité de la faute, (iv) les motifs de l'infraction, ainsi que (v) le comportement de l'accusé. La FIFA interdit fermement et doit appliquer une politique de "tolérance zéro" à l'égard de toute conduite ou tentative d'un acteur du football dans le monde de se comporter en violation directe des droits les plus fondamentaux, comme l'a fait M. Grant, ce afin de dissuader d'autres personnes d'agir de la même manière. Une sanction clémente ne répondrait pas à cet objectif dans le cas présent pour lequel M. Grant a gravement porté atteinte au bien-être d'au moins une femme arbitre pendant plusieurs années et, collatéralement, mis en danger le développement du mouvement des femmes arbitres en Haïti et du football féminin en général. La position de M. Grant au moment des violations, en sa qualité de président de la CONA et membre du comité exécutif de la FHF, est un aspect

central dans cette affaire. Au lieu d'agir comme exemple pour promouvoir le sport, M. Grant a choisi d'abuser de ses positions pour semer la terreur avec les abus perpétrés. En ce qui concerne, la portée et la durée de l'interdiction, il faut tenir compte des dommages causés par M. Grant et de la politique de tolérance zéro de la FIFA en matière de violations des droits de l'homme et de sa condamnation de toutes les formes de violence sexuelle. La sanction imposée à M. Grant est conforme à la pratique de la FIFA dans des cas similaires de violations graves du FCE (notamment: cas Karim Keramuddin, Chuck Blazer ou Jeffrey Webb).

- La décision concernant M. Jean-Bart ne lie pas la Formation arbitrale, car il s'agit différents faits.
- En ce qui concerne l'amende, elle ne peut être inférieure à CHF 10'000 selon les articles 7 et 23 FCE. Le résultat particulièrement grave de la faute de M. Grant – qui ne pourra jamais être correctement mesuré chez les victimes – et le fait qu'il a occupé des positions officielles importantes dans le football conduisent à la conclusion que seule une amende d'un montant significatif, soit CHF 100'000, peut constituer une sanction adéquate et proportionnée.

V. COMPÉTENCE

106. L'article R47 du Code dispose que:

“Un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et

dans la mesure aussi où la partie appelante a épuisé les voies de droit préalables à l'appel dont il dispose en vertu des statuts ou règlements dudit organisme sportif”.

107. L'article 56 al. 1 des Statuts de la FIFA dispose:

“La FIFA reconnaît le recours au Tribunal Arbitral du Sport (TAS), tribunal arbitral indépendant dont le siège est à Lausanne (Suisse), en cas de litige entre la FIFA, les associations membres, les confédérations, les ligues, les clubs, les joueurs, les officiels, les agents et les agents organisateurs de matches”.

108. L'article 82 al. 1 FCE prévoit en particulier:

“Les décisions de la chambre de jugement sont définitives, sous réserve d'un recours déposé auprès du Tribunal Arbitral du Sport (TAS) conformément aux dispositions pertinentes des Statuts de la FIFA”.

109. En l'espèce, la Décision Litigieuse a été rendue par la Chambre de Jugement. De plus, les Parties ont reconnu la compétence du TAS dans leurs écritures ainsi que par la signature et l'acceptation de l'ordonnance de procédure. La Formation arbitrale déclare en conséquence que le TAS est compétent pour décider du présent appel.

VI. RECEVABILITÉ

110. L'article R49 du Code dispose que:

“En l'absence de délai d'appel fixé par les statuts ou règlements de la fédération, de l'association ou de l'organisme sportif concerné ou par une convention préalablement conclue, le délai d'appel est de vingt-et-un jours dès la réception de la décision faisant l'objet de l'appel. Le/la Président(e) de Chambre n'ouvre pas de

procédure si la déclaration d'appel est manifestement tardive et doit notifier cette décision à la personne qui l'a déposée. [...]".

111. L'article 56 al. 1 des Statuts de la FIFA prévoit qu'un recours en appel "doit être déposé auprès du TAS dans un délai de vingt-et-un jours suivant la réception de la décision".

112. Enfin, l'article 78 FCE dispose:

"1. La chambre de jugement communique sa décision par écrit et dans son intégralité.

2. En cas d'urgence ou d'autres circonstances particulières, la chambre de jugement peut notifier uniquement les termes de la décision à la partie concernée. Ces termes entrent immédiatement en vigueur. La décision écrite et intégrale est alors notifiée sous soixante jours".

113. En l'espèce, le dispositif de la Décision Litigieuse est daté du 22 juillet 2021 et a été notifié à l'Appelant le 23 juillet 2021. La Décision Litigieuse dûment motivée a été notifiée à l'Appelant le 17 septembre 2021 et a fait l'objet d'une déclaration d'appel auprès du TAS le 6 octobre 2021, suivi d'un mémoire d'appel déposé le 8 mars 2022, dans le délai prolongé par le Greffe du TAS.

114. En l'espèce, la déclaration d'appel de l'Appelant contre la Décision Litigieuse a été déposée le 6 octobre 2021, soit dans le délai prévu par l'article R49 du Code. Elle remplissait par ailleurs les conditions fixées à l'article R48 du Code. L'appel de l'Appelant est donc déclaré recevable.

VII. DROIT APPLICABLE

115. L'article R58 du Code, dispose que:

"La Formation statue selon les règlements applicables et, subsidiairement, selon les règles de

droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit que la Formation estime appropriées. Dans ce dernier cas, la décision de la Formation doit être motivée".

116. L'article 56 al. 2 des Statuts de la FIFA dispose que "[l]e TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif".

117. Le siège du TAS se trouvant en Suisse et le litige revêtant un caractère international, les dispositions du Chapitre 12 relatif à l'arbitrage international de la Loi fédérale sur le droit international privé ("LDIP") sont applicables en vertu de son article 176 al. 1 LDIP.

118. Eu égard à ce qui précède, la Formation appliquera en premier lieu les règlements, directives et circulaires de la FIFA (notamment le FCE), ainsi que le droit suisse à titre supplétif. Les Parties ont reconnu ce droit applicable.

119. Enfin, considérant que l'ouverture à l'encontre de l'Appelant d'une enquête préliminaire a été notifiée le 21 août 2020 par la Chambre d'Instruction et l'ouverture d'une procédure sur la base des conclusions du Rapport Final et sur le fondement de l'article 68 al. 3 FCE a été notifiée le 25 juin 2021 par la Chambre de Jugement, il sera fait application du FCE dans son édition entrée en vigueur le 13 juillet 2020 ("FCE 2020").

VIII. QUESTIONS PROCÉDURALES

120. Avant d'aborder les questions matérielles relatives à la présente

procédure, la Formation arbitrale doit se pencher sur trois questions procédurales soulevées par M. Grant, c'est-à-dire la problématique de la prescription, l'anonymat des victimes et témoins et les conditions d'appréciation des preuves.

A. Sur la prescription

121. M. Grant fait en effet valoir que, comme son accusatrice principale évoque des faits qui auraient débuté en 2011 et que la Décision Litigieuse indique des faits qui se seraient produits entre 2011 et 2021, tous les faits antérieurs à plus de cinq ans à l'ouverture de l'instruction ne peuvent être opposés à M. Grant en application de l'article 12 FCE. De plus, M. Grant avance qu'il est impossible de déterminer que certains faits qui lui sont reprochés ne seraient pas couverts par la prescription, car aucune date précise n'a été communiquée par la Victime.
122. La FIFA conteste la position de M. Grant sur ce point et considère, au contraire, que les principes de non-rétroactivité et de légalité ont été respectés et que les faits ne sont pas prescrits, puisque les abus reprochés se prescrivent par dix ans selon l'article 12 al. 2 FCE, et non cinq ans comme avancé par M. Grant.
123. La Formation arbitrale souhaite tout d'abord rappeler la teneur de l'article 3 FCE qui dispose de ce qui suit:

“Le présent code s'applique à tout comportement, même survenu avant l'adoption du présent code. Un individu ne peut être sanctionné pour une infraction au présent code que si le comportement en question était contraire au code en vigueur au moment des faits. La sanction ne peut être plus sévère que la plus lourde des sanctions applicables au moment des faits”.

124. La Formation arbitrale rappelle également les dispositions suivantes de l'article 88 al. 2 et 3 FCE:

“2. Le présent code entre en vigueur au 13 juillet 2020.

3. Les règles procédurales édictées dans le présent code entrent immédiatement en vigueur pour toutes les procédures dans le cadre desquelles aucune procédure de jugement n'a été formellement ouverte à la date prévue à l'al. 2 du présent article”.

125. En premier lieu, la Formation arbitrale retient que des dispositions similaires à celles prévues aux articles 23 (Protection de l'intégrité physique et morale) et 25 (abus de pouvoir) FCE (édition 2020), existaient dans les précédentes éditions du Code d'Éthique de la FIFA de 2012 (i.e., les articles 13 para. 4 et 24), de 2018 (i.e., articles 23 et 25) et 2019 (i.e., articles 23 et 25). En conséquence, la Décision Litigieuse respecte le principe de légalité.
126. En deuxième lieu, la Formation rappelle que les délais de prescription prévus par le FCE s'appliquent à compter de la date de son entrée en vigueur.
127. Enfin, la Formation arbitrale observe que l'infraction prévue à l'article 23 (Protection de l'intégrité physique et morale) est prescrite au bout d'une période de dix ans par application de l'article 12 al. 2 FCE (*“2. Les infractions liées à la corruption (art. 27), à la mauvaise utilisation ou au détournement de fonds (art. 28) et à la protection de l'intégrité physique et morale (art. 23) se prescrivent par dix ans”*), alors que l'infraction prévue par l'article 25 (abus de pouvoir) est prescrite au bout d'une période de cinq ans par application de l'article 12 al. 1 et 5 FCE,

qui commence à courir à compter de la date de la dernière récidive:

“1. En règle générale, les infractions aux dispositions du présent code sont prescrites après cinq ans.

[...]

5. En cas de récidive, la période de prescription décrite ci-dessus ne débute qu’après la dernière récidive commise”.

128. De plus, il est précisé à l'article 12 al. 3 FCE que “[l]a période de prescription est prolongée le cas échéant de la moitié de sa durée si une enquête formelle est ouverte avant son expiration”.
129. En l'espèce, M. Grant a été informé le 21 août 2020 de l'ouverture d'une enquête préliminaire à son encontre par la Chambre d'Instruction pour de possibles violations des articles 13 (Règles de conduite générales), 17 (Devoir de signalement), 23 (Protection de l'intégrité physique et morale) et 25 (Abus de pouvoir) FCE. Les faits reprochés remontaient à 2011 au plus tôt.
130. Au vu de ce qui précède, la Formation considère que les faits découlant de l'article 23 (Protection de l'intégrité physique et morale) pendant la période “entre 2011 et 2021”, ne sont pas prescrits. S'agissant des faits visés à l'article 25 (abus de pouvoir), il ne sera pas possible de sanctionner des faits antérieurs au 21 août 2015.

B. L'audition et l'anonymisation des victimes et des témoins

131. M. Grant a contesté le principe de l'anonymat garanti aux victimes et aux témoins et du dossier, en particulier le refus du TAS d'entendre les onze victimes potentielles évoquées dans les

rapports préliminaires et le Rapport FIFPro, au motif de violations de l'article 29 de la Constitution suisse en rapport avec les garanties procédurales, de l'article 6 de la CEDH relatif au respect du droit de la défense d'interroger les témoins à charge et à décharge et de l'article 44 FCE. En raison de cette violation du principe du contradictoire, M. Grant n'a pas pu se défendre efficacement, ignorant l'identité de ses accusateurs et la date ou le lieu des infractions présumées.

132. A ce sujet, la Formation arbitrale rappelle que l'anonymisation de témoignages n'est pas en soi prohibée aux motifs qu'elle serait contraire aux dispositions de l'article 6 CEDH ou de l'article 29 de la Constitution suisse. En effet, la jurisprudence du TAS (TAS 2019/A/6388) a déjà retenu ce qui suit:

“125. The European Court of Human Rights (the “ECtHR”), in fact, allowed the use of “protected” or “anonymous” witnesses even in criminal cases (covered also by the far-reaching guarantees set by Article 6(3) of the ECHR), if procedural safeguards are adopted (judgments in Doorson v. The Netherlands, Application No. 20524/92, 26 March 1996; van Mechelen and others v. The Netherlands, Applications No. 21363/93, 21364/93, 21427/93 and 22056/93, 30 October 1997; Krasniki v. Czech Republic, Application No. 51277/99, 28 February 2006; Balta and Demir v. Turkey, Application No. 48628/12, 23 June 2015). In those cases, the ECtHR noted that, strictly speaking, Article 6 of the ECHR does not require that the interests of the witnesses be taken into consideration when considering the fairness of a trial. However, the interests of the witnesses (with regard to their life, liberty and security) may be protected by other provisions of the ECHR (e.g., Article 8). This means that States must organise criminal

proceedings in a way that these interests are not unjustifiably put in danger. As a result, in order to verify whether domestic proceedings respected the fundamental rights of all the individuals involved, the relevance of the right to a fair trial implies that the interests of the defence must be balanced against those of the witnesses. In any case, the ECtHR underlined that a conviction cannot be based either solely or to a decisive extent on anonymous statements; the party should not be prevented from testing the witness' reliability, and the evidence derived should be treated with extreme care.

126. In the same way, the Swiss Federal Tribunal (SFT), in a decision dated 2 November 2006 (6S.59/2006, ATF 133 I 33, at § 4), confirmed that anonymous witness statements do not breach the right to a fair trial when such statements support the other evidence provided to the court. According to the Swiss Federal Court, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court's power to assess the evidence if a party was prevented from relying on anonymous witness statements. In support of such conclusion, the SFT referred to the jurisprudence of the ECtHR and noted that the right to be heard and to a fair trial must be ensured through other means, namely by cross-examination through "audiovisual protection" and by an in-depth check of the identity and the reputation of the anonymous witness by the court".

133. Dans ces conditions, il est possible pour le TAS de retenir un témoignage anonyme comme étant probant, sans pour autant violer le principe du droit d'être entendu, à condition que cette anonymisation soit justifiée par les circonstances du cas d'espèce.

134. Le TAS s'est déterminé dans plusieurs autres affaires sur l'anonymisation des témoignages:

- Dans le cas *Pobeda* (TAS 2009/A/1920), le TAS a retenu que le recours à des témoignages anonymes doit obéir à des conditions strictes et a ainsi adopté des mesures assurant le respect du droit d'être entendu et des droits d'un procès équitable en présence de témoins anonymes, avec leur audition avec une protection audiovisuelle et une vérification extensive de l'identité et de la réputation des témoins.
- Dans l'affaire *Contador* (TAS 2011/A/2384 & 2386), le TAS a défini les conditions d'audition des témoins protégés comme suit: le témoin doit motiver sa demande d'anonymat de manière à emporter la conviction de la formation; le témoin doit être concrètement face à un risque de subir des représailles émanant de la partie à l'encontre de laquelle le témoignage est déposé si son identité venait à être dévoilée. Il faut également que les témoins soient auditionnés par le tribunal lui-même après vérification de leur identité, du caractère sérieux de leur déposition et que les témoins subissent un contre-interrogatoire à travers un système de protection audiovisuel.
- Enfin, dans l'affaire plus récente *Keramuddin* (TAS 2019/A/6388), les témoins protégés ont pu valablement s'exprimer à travers un appareil de distorsion de voix

qui leur permettait de préserver leur anonymat.

135. En l'espèce, la Formation arbitrale considère que l'anonymat des potentielles victimes et témoins concernés était justifié et que les conditions de leur déposition et de leur interrogatoire étaient remplies.
136. En effet, les victimes et témoins, notamment la Victime et le Témoin 1, ont tous fait valoir qu'ils étaient sujets, ainsi que leurs proches, à des menaces réelles. Ceci a été confirmé par M. Molina qui a également fait l'objet de menaces selon ses dires. Le TAS peut difficilement demander qu'un témoin protégé produise davantage d'éléments de preuve justifiant sa crainte de révéler son identité, à moins qu'il ne le décide lui-même, ce d'autant plus si les menaces sont faites par téléphone comme cela semble avoir été le cas.
137. Par conséquent, la décision du TAS de confirmer un tel anonymat comme requis a été prise sur la base de leurs affirmations, qui présentaient un degré de crédibilité suffisant au regard de l'ensemble des circonstances du cas d'espèce, ainsi que par prudence. La Formation arbitrale n'avait aucune raison d'ignorer l'existence de potentielles menaces physiques pesant sur les personnes concernées ou de leurs proches, en particulier dans le contexte connu dangereux d'Haïti.
138. Dans ce cadre, la Formation arbitrale a vérifié l'identité des personnes concernées et présentes lors de l'audience et a donné aux Parties la possibilité de les interroger et de les contre-interroger, conformément aux conditions évoquées par l'article 6 al. 1 CEDH, tout en veillant au respect des

limites dans les conditions et pour les besoins évoqués ci-dessus.

139. Ainsi, la Victime et le Témoin 1 ont témoigné depuis un endroit gardé secret, sans vidéo et avec une voix déformée, en présence d'une conseillère du TAS (en la personne de Me Andrea Sherpa-Zimmermann). Comme accepté par M. Grant, les questions ont été filtrées et soumises à la Formation arbitrale avant l'audience, en autorisant de nouvelles questions qui ont été préalablement validées par la Formation arbitrale avant d'être posées afin de garantir l'anonymat.
140. Enfin et à toutes fins utiles, concernant les (potentielles) victimes et témoins dont les dépositions avaient été anonymisées et qui n'ont pas pu participer à l'audience, la Formation rappelle les dispositions de l'article R44 al. 2 du Code: *"Les parties amènent et font entendre uniquement les témoins ou expert(e)s qu'elles ont désignés dans leurs écritures. Les parties sont responsables de la disponibilité et des frais des témoins et expert(e)s qu'elles ont appelés à comparaître"*.
141. En conséquence, la Formation arbitrale considère que sa décision de faire droit au caviardage et à l'anonymisation des victimes et des témoins présentés par la FIFA, en particulier à l'audience, était justifiée et contrebalancée par le souci de la Formation arbitrale d'assurer, au mieux, la protection de leurs droits fondamentaux et au droit des Parties d'assurer la défense de leurs intérêts.

C. Les conditions d'appréciation des éléments de preuve

142. M. Grant fait valoir que la Chambre de Jugement n'a pas pris en compte les principes applicables en matière d'administration de la preuve et en

matière de harcèlement et/ou d'abus sexuel, selon lesquels *“le juge doit motiver sa décision, énonçant les éléments déterminants la présence de charges suffisantes ou caractérisant l'infraction”* (DESPREZ F., *Archives politiques criminelles* 2012/1). Selon lui, lorsqu'il n'est pas possible de disposer de preuves matérielles ou scientifiques et, en l'absence d'aveu, le juge doit forger son intime conviction en se basant sur un faisceau d'indices, parmi lesquels la personnalité des protagonistes, leurs déclarations, les expertises médicales ou encore le portrait qu'en dresse l'entourage et, dans ce cadre, il serait nécessaire de faire preuve de prudence à propos des déclarations de la Victime.

143. M. Grant avance également que l'organe décisionnel doit démontrer l'absence de *“doute raisonnable”* relatif aux accusations portées en matière d'abus et/ou harcèlement sexuel ou même une quasi-certitude.
144. De son côté, la FIFA invoque que le degré de la preuve est la *“satisfaction adéquate”* comme prévu par l'article 48 FCE et confirmé par la jurisprudence du TAS (TAS 2019/A/6833), sans gradation selon la nature de l'infraction reprochée. La nature des incriminations n'impose pas une *“certitude absolue”*, comme invoqué par M. Grant, au contraire, la difficulté d'investigation pour une association de droit privé pourrait même mener à une réduction du degré de preuve (TAS 2011/A/2490). En conséquence, les preuves circonstanciellées peuvent être valablement utilisées, comme confirmé par le TAS et le Tribunal fédéral suisse à de nombreuses reprises.
145. En l'espèce, la Formation considère que le droit de la défense des Parties a été

respecté, comme cela a été évoqué plus avant, et que ces dernières ont eu l'occasion de présenter leurs arguments et éléments de preuve et de les confronter dans des conditions optimales, nonobstant l'anonymat et le caviardage de leurs témoignages.

146. De plus, en application des dispositions de l'article 48 FCE relatif au degré de la preuve, la Formation arbitrale appréciera les éléments de preuve sur la base du principe de sa *“satisfaction adéquate”*. La Formation arbitrale considère en effet qu'il n'y a pas lieu de s'écarter de ce degré de preuve, comme plaidé par M. Grant, puisque ce degré de preuve est ancré dans une disposition spécifique de la réglementation applicable adoptée par la FIFA, association qui a pris la décision de sanction. La Formation arbitrale rappelle qu'elle doit examiner si une décision de sanction prise par une association de droit suisse respecte la réglementation applicable. Il ne s'agit pas de procéder au même examen qu'une autorité pénale étatique dont les critères sont en effet différents.
147. Enfin, par application de la jurisprudence constante du TAS (voir par exemple, TAS 2016/A/4871, par. 119) et des dispositions de l'article R57 du Code (*“La Formation revoit les faits et le droit avec plein pouvoir d'examen. Elle peut soit rendre une nouvelle décision se substituant à la décision attaquée, soit annuler cette dernière et renvoyer la cause à l'autorité qui a statué en dernier”*), la Formation arbitrale dispose d'une compétence pour statuer *de novo*, qui lui permet d'apprécier de nouveau et de manière autonome les dires des parties et les éléments de preuve, sans toutefois se limiter à apprécier la régularité de la procédure ou de la décision attaquée.

IX. AU FOND

148. L'objet de la présente procédure est le recours de M. Grant qui demande d'annuler la Décision Litigieuse l'ayant condamné, notamment, à une interdiction à vie de participer à toute activité en rapport avec le football et au paiement d'une amende de CHF 100'000 en raison de la violation des articles 23 et 25 FCE.

149. La Formation arbitrale est donc appelée à se déterminer sur les prétendues violations des dispositions des articles 23 et 25 FCE et, cas échéant, à évaluer la proportionnalité des sanctions infligées à M. Grant par la Commission d'Éthique.

150. Dans ce contexte, la Formation arbitrale va reprendre les principaux témoignages, c'est-à-dire en particulier ceux de la Victime, du Témoin 1 et de M. Grant, et les analyser au regard des actes reprochés à M. Grant et pour lesquelles il a été sanctionné.

A. Le contenu des principaux témoignages

151. La présente affaire tourne principalement autour des dépositions faites par la Victime et le Témoin 1, ainsi que du témoignage de M. Grant. Ainsi, la Formation arbitrale fournit les extraits pertinents de ces témoignages dans le but de donner une vue d'ensemble et afin notamment de pouvoir analyser la crédibilité de ces témoignages. Les témoins cités par M. Grant sont également évoqués.

a) Le témoignage de la Victime

152. La déclaration écrite de la Victime du 6 octobre 2020 est reproduite au point 0 ci-dessus.

153. Dans sa déclaration orale du 23 février 2021 faite devant la Chambre d'Instruction, la Victime a notamment déclaré ce qui suit en ce qui concerne les actes reprochés M. Grant:

‘J’ai passé environ sept ans au Centre et j’ai rejoint le corps en 2011, et j’ai été obligée de partir en 2018 et de démissionner et cela n’a pas été facile pour moi. Et j’ai passé, franchement je dois vous dire sincèrement que j’ai passé sept ans à me battre, sept ans à me battre vraiment, et ce n’était pas facile pour moi. Par conséquent, j’ai été une arbitre, comme je viens de vous le dire, je n’étais pas un joueur.

[...] dès le début, dès le premier jour de ma formation, Monsieur avait déjà commencé à me harceler; il avait déjà commencé à me toucher, à me dire que j’étais belle et que je pouvais progresser dans le cercle; il avait commencé à me toucher, à me faire des propositions indécentes.

J’en ai parlé à une fille, comme moi, je lui ai dit “bon, je ne vais pas continuer”, et puis elle l’a rapporté à Monsieur, et Monsieur m’avait promis de ne plus continuer, mais franchement c’était un mensonge. J’ai passé sept ans dans le cercle et sept ans à me battre contre un oppresseur qui était soutenu par le président de la fédération même, parce que tout le monde connaissait tout le monde.

[...]

Et parfois, dans le cadre d’une formation, il peut vous dire: “Bon, nous allons passer trois jours dans une ville de province, nous allons y rester” et puis pendant la nuit, bizarrement, dans l’hôtel, une fois, j’ai senti quelque chose sur mon lit, c’était lui. Il est venu

et en plus **il était nu**, donc j'ai eu beaucoup de problèmes, vraiment beaucoup de problèmes, dans ce corps.

Mais j'ai essayé à maintes reprises de lui dire qu'il ne fallait pas faire ça, qu'il fallait que ça s'arrête, donc de manière amicale, **mais il n'a jamais écouté, il a insisté**. Mais **il n'y avait pas que moi**, certaines filles étaient d'accord, peut-être contre elles-mêmes. Des filles qui sont dans une situation de vulnérabilité. Ce n'est pas que j'étais riche moi-même mais je n'ai jamais accepté et je me suis battue. Mais, malheureusement, **j'ai été obligée de partir parce que je ne pouvais plus supporter Monsieur**. Il a brisé mes rêves, ma carrière. J'ai dû tout abandonner. C'était vraiment malheureux pour moi.

[...]

Mais comme je viens de vous le dire, certaines filles, compte tenu de leur situation financière vulnérable, acceptent. Mais je n'en connais pas beaucoup, je connais pas mal de filles qui sont des victimes.

[...]

Par conséquent, lorsque nous sommes arrivés à [inaudible], j'ai vu qu'il occupait la même chambre que moi, ce que j'ai refusé. J'ai dit "non, je ne vais pas accepter ça" et il a dit "OK, je quitte la chambre". J'ai dit "eh bien, si tu ne quittes pas la chambre, je vais dormir chez mon oncle". Il m'a dit "pas la peine, je vais prendre une autre chambre, tu peux y rester toute seule" et il a quitté la chambre et j'y suis resté. Mais je ne suis pas allée chercher la clé, cela ne m'a pas traversé l'esprit. Je me suis préparée **et j'ai commencé à dormir. Pendant la nuit, j'ai senti quelque chose d'étrange sur le lit, j'ai senti une main, je me suis réveillée, bizarrement. Ce que j'ai découvert ce jour-là, c'est que j'ai vu Monsieur, il était nu, sur le lit, sa**

main dans mon pantalon. Il est allé trop loin ce jour-là.

Une autre fois, après un match au stade [...], il était déjà 10 heures du soir, il était tard, je n'avais pas de voiture et je ne pouvais pas rentrer chez moi. Il m'a dit "bon, je vais te déposer" et ce jour-là, beaucoup d'arbitres sont montés dans sa voiture. Il a raccompagné tous les autres arbitres. Je suis restée toute seule, je n'ai rien dit. **Ensuite, il a refusé de prendre la route pour aller chez moi, il m'a emmené dans un endroit, nous étions seuls, il était presque minuit, il m'a demandé de descendre. Je suis sortie et là il a commencé à enlever ma jupe, à me dire "je t'aime, on va regarder des choses ensemble, on va regarder le ciel et la lune".**

... Puis il a mis sa main sous ma jupe.

Ce jour-là, c'était pratiquement la même chose, je me suis battue, je lui ai dit "ce n'est pas possible de faire ça, tu ne dois pas être comme ça". Ce jour-là, il m'a dit "c'est un sentiment naturel que j'ai pour toi, je ne l'ai pas acheté dans un magasin. Si je l'avais acheté, je l'aurais repris, mais je ne l'ai pas acheté, je t'aime, je veux être avec toi". Ce jour-là, il n'a pas réussi à faire ce qu'il voulait, mais il avait commencé.

Une autre fois, **il m'a demandé d'aller chez lui, d'aller chercher de nouveaux uniformes. Je n'ai pas eu le choix**. J'avais un match avec d'autres arbitres. Les filles m'ont dit "on va porter la nouvelle tenue". J'ai dit "je n'ai pas encore le nouvel uniforme, je n'ai pas le temps de m'occuper de ça" parce que j'étais à l'université. Ce n'est pas que je n'avais pas le temps, c'est que je ne voulais pas aller chez Monsieur. Ils ont insisté et vu qu'ils insistaient, **j'ai été obligée d'aller chez lui.**

Quand je suis arrivée chez lui, il n'était pas là. La femme de chambre m'a dit que Monsieur n'était pas là. [inaudible]. Il était 8-9 heures

du soir et la femme de chambre m'a dit "Monsieur est revenu". Il a pris soin de dire qu'il n'était pas là pour que je reste chez lui. Il m'avait rejoint très tard ce jour-là, je suis entrée dans sa chambre. C'est toujours comme ça, on ne peut pas refuser, pour récupérer les nouveaux uniformes. Il m'a demandé de m'allonger, "mets-toi à l'aise, tu peux dormir sur mon lit", je lui ai dit non je ne vais pas rester et il m'a dit "il est déjà 9 heures, je ne vais pas t'emmener, ma voiture est en panne, donc tu vas dormir avec moi, tu ne peux pas partir maintenant. Demain, je t'emmènerai à l'université. Tu pourras dormir avec moi."

[...]

En cas de refus: "vous n'avez pas de match", "vous ne serez plus programmée pour faire les matchs". J'avais besoin d'argent, donc nous sommes tous dans la même situation, nous vivons dans un pays pauvre, nous avons besoin d'argent, et donc, les filles ont besoin de coucher avec Monsieur".

154. Lors de l'audience, la Victime a notamment confirmé que:

- ses précédentes déclarations écrites et orales devant la Commission d'Éthique étaient correctes;
- dans la chambre d'hôtel, M. Grant ne portait rien du tout et a essayé de la toucher;
- M. Grant avait son numéro de téléphone et ne cessait pas de l'appeler et de lui faire des avances insistantes;
- les menaces reçues lorsqu'elle a contacté le journaliste et la FIFA;

- il y avait plusieurs victimes, dont certaines inconscientes ou qui avaient peur de témoigner.

b) Le témoignage du Témoin 1

155. Dans sa déclaration orale du 28 janvier 2021 faite devant Chambre d'Instruction, le Témoin 1 a notamment déclaré ce qui suit en ce qui concerne les actes reprochés à M. Grant:

*"Ils étaient nombreux. Pas seulement Jean-Bart. **Rosnick Grant aussi**, le président de la commission des arbitres. C'est lui qui sélectionne les arbitres haïtiens pour la FIFA et la CONCACAF. Il a abusé de tous les arbitres. Et dans ce cas aussi, si vous ne l'acceptiez pas, vous deviez quitter la profession. Je connais des arbitres, hommes et femmes, qui m'en ont parlé. Et j'ai des preuves très claires de tout cela. Nous parlons de Rosnick Grant.*

[...]

*Oui, après la publication, j'étais très content, parce que si j'avais pu, je l'aurais fait, mais bien sûr, il y aurait eu des conséquences. Heureusement, Romain a travaillé pendant des mois pour que les filles du centre aient une chance. La FIFA a elle aussi décidé d'assainir la fédération, mais pour ce faire, elle doit être très prudente dans ses relations avec les membres de la CONCACAF, car nombre d'entre eux, **lorsqu'ils viennent en Haïti, agissent de la même manière avec les filles, par exemple avec les prostituées et les arbitres. Ils abusent des filles en leur disant qu'elles vont travailler comme arbitres pour la FIFA, comme arbitres nationaux. C'est ainsi qu'ils procédaient en Haïti. Ils leur disaient que si elles n'acceptaient pas [les approches***

sexuelles], elles ne seraient plus autorisées à arbitrer un match. M. Grant avait l'abréviation "SPM", qui signifie "sexe par match". C'est ainsi que nous l'appelions. [...]

A mon avis, Grant est encore plus corrompu qu'Yves Jean-Bart.

Il est plus corrompu que Jean-Bart. Il obligeait les arbitres à se prostituer pour les instructeurs de la FIFA et de la CONCACAF. Il disait aux arbitres qu'elles seraient des arbitres de la FIFA, des arbitres nationaux, mais qu'elles devaient d'abord répondre à ses désirs.

Un jour, il y a eu une session de formation à [...]. Il a emmené une arbitre avec lui. Elle ne voulait pas rester à l'hôtel. Il était tard et elle devait donc rester. La nuit, il est entré dans sa chambre, s'est mis dans son lit complètement nu et a essayé de la toucher et de la pénétrer.

Un autre fait s'est produit à l'hôtel [...]. C'était également lors d'une session de formation, à laquelle participaient des arbitres étrangers et des instructeurs de la FIFA et de la CONCACAF. Il y avait aussi des arbitres haïtiens, qu'il avait invités à venir à la session de formation. Son objectif était de les faire dormir dans ces hôtels. C'était son rôle au sein de la fédération, de la commission des arbitres. Si vous n'étiez pas d'accord, vous n'étiez pas arbitre national.

[...] chaque fois qu'il venait en Haïti, on lui offrait toujours une femme en cadeau. Les officiels de la CONCACAF aussi. Mais ils pensent tous que ces femmes sont des prostituées parce que M. Grant cache toujours l'identité des filles...".

156. Dans sa déclaration écrite du 28 novembre 2022 produite par la FIFA devant le TAS, le Témoin 1 a notamment déclaré ce qui suit:

"[...] Non, j'ai jamais été personnellement témoin des actes d'abus commis par M. Grant, comme faisaient Mr Jean Bart et les autres membres de la fédération. Mais je suis au courant comme plusieurs autres personnes des actes commis et organisés par Mr Grant:

1. *Mr Grant harcèle toutes les arbitres: "si tu n'acceptes pas, c'est fini tu n'auras jamais la chance de programmée dans un match".*

[...]

4. *Un jour lors d'une formation dans une ville près de la capitale au cours la nuit il a même essayé de coucher avec une arbitre. Heureusement la personne n'avait pas accepté et a pu refuser les avances de Mr Grant.*

5. *Il n'a jamais peur de coucher avec les arbitres. Parfois il empêchait les arbitres à dormir. C'est comme s'il était en train de tourner un film pornographique dans sa chambre.*

6. *Dans l'arbitrage haïtien, c'est la corruption totale. Même les instructeurs de la FIFA bénéficient de cadeaux sexuels de la part de Mr Grant. [...]*

[...]

7. *Mr Grant ramenait les arbitres dans les hôtels pour les gens de la FIFA ou de la CONCACAF en faisant croire que ce sont des femmes de rue. Il disait toujours qu'Yves Jean-Bart gère les joueuses, et lui il gère les arbitres.*

8. *Il organisait toujours des formations avec une arbitre pendant un week-end dans une ville de province juste pour la couchée. Tout le monde était au courant, mais comme il avait la même mission avec Mr Jean-Bart c'était le silence total à ce sujet.*
 9. *Pour être arbitre internationale tu dois coucher avec lui et aussi avec les officiels de la FIFA. [...]*
 10. *Il y a des officiels de la FIFA qui ont même laissé des enfants en Haïti.*
 11. *Pour conclure avec ma réponse: pour progresser dans le domaine arbitrage féminin, les arbitres devaient être la maîtresse de Mr Grant. En plus, pour être arbitre internationale, il fallait qu'elles couchent avec les instructeurs de la FIFA. [...]"*
157. Lors de l'audience, le Témoin 1 a notamment confirmé que:
- ses précédentes déclarations écrites et orales devant la Commission d'Éthique et le TAS étaient correctes;
 - il n'a jamais été témoin direct d'actes mais a plusieurs amis qui lui ont raconté les actes de M. Grant, quatre femmes;
 - une personne a raconté que, lors d'une formation, M. Grant est venu dans sa chambre au cours de la nuit et l'a touché, la femme ayant toutefois refusé;
 - un jour, M. Grant a invité une arbitre dans une réunion dans un hôtel à 22h00 et lui a dit qu'elle pouvait rester avec l'officiel de la FIFA et se baigner dans la piscine et dormir avec lui;
 - il a entendu qu'il fallait envoyer des femmes pour les officiels de la FIFA.
- c) Le témoignage de M. Grant**
158. Dans sa prise de position écrite du 11 juillet 2021 faite devant Chambre de Jugement, M. Grant a notamment déclaré ce qui suit:
- Il n'a jamais occupé un poste lui permettant de côtoyer des joueuses ou des joueurs, ni des entraîneuses et entraîneurs, au Centre, et il n'a jamais participé à des fêtes ou des activités de loisirs organisées pour les jeunes du Centre.
 - Depuis qu'il a été nommé responsable de l'arbitrage en 2010, sa priorité en tant que responsable a été d'abaisser l'âge des arbitres masculins et d'intégrer davantage de femmes dans le métier de l'arbitrage, afin d'avoir beaucoup d'arbitres inscrits sur les listes internationales d'arbitrage de la FIFA
 - Depuis 2015, lorsque la CONCACAF a commencé à mettre en priorité la qualité plutôt que la quantité, les critères de sélection et de promotion sont devenus très importants et strictement suivis. En conséquence, certains arbitres ont perdu le privilège d'être officiels ou arbitres de la FIFA. Certaines de ces personnes, liées à la presse ou proches d'anciens et actuels officiels du football, ont commencé à l'attaquer et à ourdir des complots pour le persécuter.
 - A la suite de la publication de l'article de *The Guardian* sur les abus

sexuels en Haïti, ses critiques, dont M. Allan Jacques et M. Jacques Robert Arthur, tous deux retirés de la liste de la FIFA, ont profité de l'occasion pour tromper la FIFA car ils voulaient la tête de M. Grant.

- Dans la plupart des douze cours du Programme d'aide à l'Arbitrage de la FIFA, les instructeurs ont été hébergés à l'écart des participants haïtiens (y compris les femmes arbitres). A la demande du directeur de l'Arbitrage de la CONCACAF, les arbitres des Caraïbes françaises ont participé au cours du Programme d'aide à l'Arbitrage de la FIFA en Haïti en 2018 et 2019 et ont été hébergés dans le même hôtel que les instructeurs de la FIFA pour des raisons logistiques et de sécurité.
- De nombreuses personnes se sont exprimées pour se plaindre du complot à son encontre, notamment la presse, des femmes arbitres et le syndicat des arbitres.
- Dans le cadre d'un cours pour arbitres, le transport et l'hébergement sont toujours de la responsabilité des participants, l'hébergement n'étant pris en charge que dans le cas d'un cours national.

159. Lors de l'audience, M. Grant a notamment confirmé ce qui suit:

- En trente ans de carrière d'arbitre, il n'avait jamais eu aucune histoire avec des femmes et ne comprend donc pas comment la FIFA a pu être induite en erreur.
- La CONA prend la décision d'un commun accord pour mettre les

arbitres sur la liste. C'est la FIFA qui décide qui elle choisit à la fin.

- Les critères pour choisir les arbitres sont la disponibilité, la condition physique, les performances précédentes et les éventuels antécédents avec les équipes. Les anciens arbitres regardent les matchs et l'appellent ensuite pour partager leur évaluation.
- Il a effectivement été traduit en justice mais en raison d'arrangements. Il n'a pas de nouvelles de ce dossier depuis plus d'une année. Il a demandé un casier judiciaire depuis qui est vierge.
- Devant la Chambre de Jugement, il n'y avait aucune victime, aucun témoin mais la décision de quarante pages a pourtant été envoyée dans les six heures.
- Quand il reçoit les équipements, il les remet au capitaine qui est l'arbitre le plus expérimenté d'un secteur, lequel les distribue.
- M. Grant reçoit des sollicitations de transport, que ce soit au travail ou pour le football. S'il va à un match ou chez lui, il profite de ramener ceux qui en ont besoin en raison de l'insécurité.
- Pour les formations, les instructeurs n'étaient pas logés au même endroit que les participants. Parfois, ils logeaient même chez lui. Il n'y avait jamais de chambres individuelles mais plutôt des chambres double, voire parfois avec plus de lits.

d) *Le témoignage des témoins cités par M. Grant*

160. Au cours de la présente procédure, M. Grant a déposé 143 témoignages écrits de 143 témoins différents (notamment: arbitres masculins et féminins, collègues, employés d'hôtels, pasteurs ou autres proches), parmi lesquels 11 témoins ont été auditionnés et interrogés lors de l'audience. Alors que la Formation arbitrale a analysé l'ensemble de ces témoignages, y compris ceux confirmés lors de l'audience, elle ne fera ici référence qu'à certains d'entre eux pour les besoins de son raisonnement.
161. Les témoignages recueillis durant l'audience sont reproduits aux points 0 et suivants ci-dessus. D'une manière générale, les témoins cités par M. Grant ont déclaré ce qui suit:
- M. Grant a été victime d'un complot organisé par certaines personnes frustrées de ne plus être sur la liste des arbitres ou qui voulaient prendre le contrôle de la FHF, dont M. Jacques Robert Arthur.
 - M. Grant a toujours voulu aider les gens même s'il était très exigeant et assidu au travail. Il ramenait les gens chez eux pour leur sécurité.
 - Pour les arbitres, la rémunération par match était de USD 250 ou USD 310 par match, pour trois ou quatre matchs possibles par semaine.
 - Il n'y a jamais eu de plaintes des collègues ou arbitres au sujet de M. Grant.
 - M. Grant et M. Deland prenaient ensemble les décisions au sein de la CONA.

B. Analyse des témoignages et conclusions

162. Tout d'abord, la Formation arbitrale rappelle que sa mission consiste à vérifier le bien-fondé de la décision prise par la Commission d'Éthique, sur la base des éléments de preuves présentés par les Parties, et en fonction du degré de preuve applicable devant la Commission d'Éthique. Son rôle n'est pas celui d'investiguer et de démontrer l'existence d'éventuelles violations du FCE, ce qui incombe à la FIFA.
163. Dans ce contexte, la Formation arbitrale constate qu'elle doit déterminer laquelle des deux thèses invoquées par les Parties est la plus convaincante pour établir les faits à la "*satisfaction adéquate*" de la Formation arbitrale. D'une part, la FIFA s'appuie sur des dénonciations de victimes, dont la Victime, et témoins et, d'autre part, M. Grant invoque un complot organisé afin de nuire à sa carrière dans le milieu du football haïtien.
164. Dans ce cadre, la Formation arbitrale relève que les différents témoignages de la Victime sont linéaires et qu'elle a confirmé à plusieurs reprises et de manière cohérente les événements suivants qu'elle aurait subis: attouchements dans un hôtel en 2011, nombreuses et persistantes avances de nature sexuelle pendant plusieurs années, attouchements dans la voiture de M. Grant et, lors d'une formation (vraisemblablement en 2015 ou 2016), irruption de M. Grant, entièrement nu, dans sa chambre d'hôtel au milieu de la nuit et attouchements, ce qui constitue au moins trois événements distincts et une attitude générale à son encontre qui pourrait être qualifiée de harcèlement. La

Formation arbitrale constate que la Victime a également, à plusieurs reprises, indiqué qu'il y avait d'autres victimes, forcées d'accepter les avances de M. Grant au vu de leur situation de vulnérabilité financière puisque M. Grant conditionnait leur participation aux matchs à l'acceptation de ses avances. La Victime a indiqué toutefois que M. Grant n'a jamais été violent, mais qu'il était très intelligent et manipulateur.

165. Au sujet de l'implication de la Victime dans cette procédure, la Formation arbitrale considère que les risques pris par elle pour dénoncer les actes reprochés à M. Grant sont importants, puisqu'elle devait se rendre à l'aéroport d'Haïti à deux reprises pour son aller-retour en Suisse avec un risque important d'être identifiée. La Victime avait donc potentiellement beaucoup à perdre, mais rien à gagner de participer à cette procédure. Ces circonstances, en plus de la cohérence de ses témoignages, renforcent sa crédibilité.
166. Ensuite, la Formation arbitrale constate que le Témoin 1 a confirmé à plusieurs reprises dans ses témoignages les faits suivants avancés par la Victime: que M. Grant profitait de son statut pour abuser des arbitres et que, lors d'une formation, M. Grant s'est rendu dans la chambre d'une arbitre, s'est mis dans son lit complètement nu et essayé de la toucher. Le Témoin 1 a également déclaré plusieurs fois, de manière cohérente, que, pour être arbitre internationale, il fallait coucher avec les instructeurs et officiels de la CONCACAF et de la FIFA.
167. De l'autre côté, la Formation arbitrale relève que M. Grant avance – pour

principale défense – que cette procédure est liée à un complot contre lui, organisé notamment par M. Jacques Robert Arthur et M. Allan Jacques, qui auraient été retirés de la liste de la FIFA. La Formation arbitrale considère que le témoignage de M. Grant et des témoins cités sur l'existence d'un complot est peu crédible en raison notamment des nombreuses déclarations contradictoires. En effet, M. Grant indique, d'une part, que des arbitres retirés de la liste de la FIFA ont voulu faire tomber M. Grant et, d'autre part, que des personnes ont souhaité prendre sa place au sein de la FHF puisqu'il aurait pu devenir président à la suite de la suspension provisoire de M. Jean-Bart. Les témoins qu'il a cités ont également des versions différentes: M. Jean-Claude Nexil, dont les raisons de son "*enquête*" au sujet de l'affaire demeurent floues, évoque que le complot a été organisé par M. Jacques Robert Arthur et M. Molina, vu que M. Grant était pressenti pour la présidence de la FHF, mais aussi en raison de la volonté de M. Jacques Robert Arthur de se venger d'avoir été exclu de la liste des arbitres de la FIFA; et Mme Wesline Louis pense qu'il y a complot en raison du pouvoir de M. Grant de mettre les gens sur la liste des arbitres internationaux. La Formation arbitrale relève enfin que les théories du complot avancées dans la procédure ne sont corroborées par aucun autre élément.

168. La Formation arbitrale relève que les témoins cités par M. Grant ont confirmé que M. Grant et M. Deland pouvaient prendre les décisions ensemble au sein de la CONA et que la rémunération par match s'élevait au moins à USD 250, ce qui constitue une somme importante selon la Formation arbitrale, puisque les

arbitres pouvaient participer à trois ou quatre matchs par semaine, ce qui correspond à une rémunération potentielle par semaine de USD 1'000.

169. En raison de ce qui précède, la Formation arbitrale considère, à sa “*satisfaction adéquate*”, que la dénonciation de la Victime est plus crédible et corroborée que la thèse du complot avancée par M. Grant et ses témoins. La Formation arbitrale retient donc que les faits établis de manière objective et incontestable au cours des procédures devant la Commission d'Éthique et devant le TAS incluent les attouchements de M. Grant sur la Victime dans un hôtel en 2011, les nombreuses et persistantes avances de nature sexuelle faites par M. Grant à la Victime, les attouchements de M. Grant dans sa voiture sur la Victime et les attouchements de M. Grant, entièrement nu, sur la Victime au milieu de la nuit lors d'une formation. Sur cette base, la Formation arbitrale ne juge pas nécessaire d'analyser les autres témoignages des victimes et témoins évoqués durant la procédure devant la FIFA, les actes prouvés étant suffisamment graves pour permettre de statuer dans cette procédure.

170. La Formation arbitrale retient également que, sur la base du dossier, plusieurs facteurs mis en place ont permis à M. Grant de profiter d'un système dont il était le principal bénéficiaire. En effet, son pouvoir au sein de la CONA, couplé à la rémunération intéressante octroyée aux arbitres, ainsi que la situation de pauvreté en Haïti, permettaient à M. Grant d'user de son pouvoir pour profiter, et faire profiter, de possibles faveurs sexuelles d'arbitres.

171. La Formation arbitrale reconnaît que, sur la base de la jurisprudence du TAS laquelle est conforme à celle de la Cour Européenne des Droits de l'Homme et au droit suisse, un témoignage anonyme, alors même qu'il serait valable et recevable, ne constitue pas une preuve irréfragable de nature à emporter, à lui seul, la condamnation d'une personne. Cela étant, en l'espèce, le témoignage de la Victime – crédible et cohérent – est corroboré par le témoignage du Témoin 1, ainsi que le témoignage de M. Molina qui confirme une tendance dans le comportement de M. Grant.

172. Il s'agit par conséquent d'examiner si les faits établis constituent des infractions au FCE comme retenu par la Décision Litigieuse.

C. Les violations des dispositions du FCE

a) Les violations de l'article 23 FCE

173. L'article 23 FCE (“*Protection de l'intégrité physique et mentale*”) prévoit ce qui suit:

- “1. Les personnes auxquelles s'applique le présent code doivent protéger, respecter et sauvegarder l'intégrité et la dignité personnelle d'autrui.
2. Les personnes auxquelles s'applique le présent code ne doivent pas faire usage de propos ou gestes à caractère offensant afin d'insulter quelqu'un ou d'inciter d'autres personnes à la haine ou la violence.
3. Les personnes auxquelles s'applique le présent code doivent s'abstenir de toute forme de violence physique ou morale, de toute forme de harcèlement et de tout autre acte hostile dont l'objectif est d'isoler ou d'ostraciser une personne ou d'affecter sa dignité.

4. *Les menaces, la promesse d'avantages, la coercition et toutes les formes d'abus sexuel, de harcèlement et d'exploitation sont interdites.*
 5. *Toute violation du présent article est sanctionnée d'une amende d'au moins CHF 10 000, ainsi que d'une interdiction d'exercer toute activité relative au football de deux ans au moins. Dans les cas d'abus ou d'exploitation sexuel(le), ou dans des cas graves et/ou en cas de récidive, l'interdiction d'exercer toute activité relative au football sera prononcée pour une durée minimale de dix ans".*
174. En sa qualité de vice-président de la FHF, M. Grant devait protéger, respecter et sauvegarder l'intégrité et la dignité personnelle d'autrui. De plus, il devait s'abstenir de toute promesse d'avantages, de coercition ou toutes formes d'abus sexuel, de harcèlement et d'exploitation. M. Grant a toutefois traumatisé la Victime qui a été contrainte d'arrêter sa carrière d'arbitre et, à plusieurs reprises, l'a harcelée avec des avances de nature sexuelle et l'a attouchée ou tenté de le faire.
175. La Formation arbitrale considère donc que M. Grant s'est rendu coupable de violations de l'article 23 al. 1 et 4 FCE.
- b) Les violations de l'article 25 FCE**
176. L'article 25 FCE ("*Abus de pouvoir*") prévoit ce qui suit:
- "1. Les personnes auxquelles s'applique le présent code ne doivent en aucun cas abuser de leur pouvoir ou de leur fonction, notamment à des fins privées ou pour en tirer un quelconque avantage pécuniaire.*
2. *Toute violation du présent article est sanctionnée d'une amende d'au moins CHF 10 000, ainsi que d'une interdiction d'exercer toute activité relative au football de deux ans au moins. La sanction est alourdie si la personne occupe de hautes fonctions dans le football, ainsi qu'en fonction de la pertinence et de l'importance de l'avantage reçu".*
177. En sa qualité de vice-président de la FHF, M. Grant ne devait en aucun cas abuser de son pouvoir ou de sa fonction, notamment à des fins privées. Or, il a été prouvé lors de la procédure, par les témoignages de la Victime et du Témoin 1, que M. Grant a profité de sa position pour obtenir des faveurs sexuelles d'arbitres jusqu'en 2021 au moins. La Formation arbitrale considère que M. Grant a profité de son pouvoir de choisir les arbitres à inclure sur les listes de matchs nationaux et internationaux pour ses propres fins, étant donné que les rémunérations octroyées aux arbitres étaient importantes en comparaison du coût de la vie à Haïti et permettaient de faire évoluer les carrières des arbitres de manière positive.
178. Dès lors, la Formation arbitrale considère que M. Grant s'est rendu coupable de violations de l'article 25 FCE.
- D. Sanction**
179. Selon la jurisprudence reconnue du TAS, lorsqu'une association fait usage de son pouvoir discrétionnaire pour imposer une sanction, le TAS doit se tenir à l'expertise de cette association, mais, si le TAS considère toutefois que la sanction

est disproportionnée, il doit faire usage de son pouvoir *de novo* et être libre d'imposer la sanction qu'il juge appropriée (TAS 2019/A/6388, par. 220, TAS 2017/A/5003, par. 274, TAS 2015/A/4338, par. 51). Ainsi, la Formation arbitrale rappelle que son rôle n'est pas de déterminer si la décision prise aurait pu être meilleure ou si la Formation arbitrale aurait pris une autre décision (même légèrement différente) à la place de la Chambre de Jugement. Le pouvoir d'examen de la Formation arbitrale est en effet de déterminer si la Décision Litigieuse viole la loi ou FCE et si la Chambre de Jugement, en prenant cette décision, a exercé son pouvoir discrétionnaire de manière arbitraire et disproportionnée.

180. En l'espèce, la Formation arbitrale a retenu les mêmes violations du FCE que la Décision Litigieuse, c'est-à-dire celles des articles 23 et 25 FCE. Chacune de ces deux dispositions prévoit que toute violation est sanctionnée par une amende d'au moins CHF 10'000, ainsi que d'une interdiction d'exercer toute activité relative au football de deux ans au moins, mais de dix ans au moins pour les cas d'abus ou d'exploitation sexuel(le) et les cas graves ou de récidive, la sanction étant alourdie en ce qui concerne les abus de pouvoir si la personne occupe des hautes fonctions dans le football.

181. La Formation arbitrale souhaite également rappeler la teneur de l'article 9 al. 1 FCE qui prévoit que *"[L]orsqu'elle impose une sanction, la Commission d'Éthique doit prendre en compte tous les facteurs pertinents du cas d'espèce, notamment la nature de l'infraction, l'intérêt substantiel à décourager toute infraction similaire, l'aide et la coopération du fautif avec la Commission d'Éthique, ainsi*

que le contexte, les motivations et le degré de culpabilité du fautif, la mesure dans laquelle le fautif admet sa responsabilité ou encore si le fautif a atténué sa responsabilité en retournant l'avantage reçu". L'article 11 FCE prévoit de son côté que lorsque plus d'une infraction a été commise, la sanction (autre que financière) s'établit d'après l'infraction la plus grave et peut être alourdie en fonction des circonstances concrètes de l'incident.

182. La Formation arbitrale rappelle qu'elle doit déterminer si la sanction infligée à M. Grant, c'est-à-dire l'interdiction à vie d'exercer toute activité relative au football et l'amende de CHF 100'000, est arbitraire et disproportionnée. Aux yeux de la Formation arbitrale, la Chambre de Jugement n'a pas pris une décision arbitraire ou disproportionnée et, dès lors, la sanction ne peut être réduite par le TAS. Cette conclusion est motivée par le raisonnement qui suit.

183. Premièrement, la nature des infractions commise – abus sexuels et harcèlement, ainsi qu'abus de pouvoir à des fins d'abus sexuels – est parmi une des plus graves et immorales et il est nécessaire et indispensable de dissuader M. Grant, ainsi que tout autre officiel de la FIFA, de se comporter de la même manière à l'avenir. Il s'agit d'une infraction honteuse et inacceptable, qui ne peut être tolérée pour personne, et encore moins pour un vice-président d'une fédération nationale, qui a la responsabilité de donner un bon exemple à toutes les personnes actives au sein de la fédération, aux autres personnes qui y sont affiliées et, plus généralement, à toutes les personnes impliquées dans le monde du football.

184. Deuxièmement, il s'agit d'une affaire d'une gravité d'autant plus importante que d'autres affaires dans lesquelles la FIFA a imposé à des officiels de la FIFA des interdictions à vie de toute activité liée au football pour des infractions liées à la corruption (voir notamment: les affaires Chuck Blazer, Jeffrey Webb, Hector Trujillo, Kokou Hounnimon Fagla, Ibrahim Chaibou et Karim Keramuddin) et pour des infractions liées à des trucages de matches (TAS 2017/A/5173). La Formation arbitrale considère que la corruption et les trucages de matches, bien que très graves, sont moins horribles et punissables que les affaires d'abus sexuels et abus de pouvoir à des fins d'abus sexuels puisque, pour ce type de cas, c'est-à-dire en l'espèce, la personne accusée a violé les droits de l'homme fondamentaux et porté atteinte à la dignité et à l'intégrité mentale et physique de jeunes arbitres. Par ses actes, M. Grant a, gravement ou de manière irréversible, porté atteinte à leur vie privée et professionnelle. La Formation arbitrale considère donc que cela justifie la sanction la plus sévère possible prévue par le FCE, soit une sanction à vie.

185. En ce qui concerne l'amende de CHF 100'000, la Formation arbitrale retient que M. Grant a prouvé, avec les fiches de salaire produites, qu'il percevait mensuellement 155'700 Gourdes Haïtiennes, soit un peu plus de CHF 1'000 à un taux de change de 1/0.0065. En conséquence, la Formation arbitrale considère qu'une amende de CHF 100'000 serait disproportionnée au vu d'un tel salaire et de la situation de précarité en Haïti. Toutefois, le but d'une amende est l'effet dissuasif et pédagogique et la Formation arbitrale ne peut donc pas supprimer l'amende en

raison de la situation financière particulière de M. Grant. Partant, la Formation arbitrale décide de baisser l'amende de CHF 100'000 à CHF 35'000 pour la ramener à de plus justes proportions.

186. Au vu de ce qui précède, la Formation arbitrale décide de confirmer l'interdiction à vie pour M. Grant d'exercer toute activité relative au football et de réformer la Décision Litigieuse en ce qui concerne l'amende qui doit être réduite à CHF 35'000. En vue de cette conclusion, toutes autres ou plus amples conclusions des Parties sont rejetées.

PAR CES MOTIFS

Le Tribunal Arbitral du Sport, statuant contradictoirement:

1. Admet partiellement l'appel déposé le 6 octobre 2021 par M. Rosnick Grant contre la décision rendue le 22 juillet 2021 par la Chambre de Jugement de la Commission d'éthique de la Fédération Internationale de Football Association.

2. Confirme la décision rendue le 22 juillet 2021 par la Chambre de Jugement de la Commission d'éthique de la Fédération Internationale de Football Association, à l'exception du chiffre 3, qui est réformé comme suit:

"3. M. Rosnick Grant devra payer une amende d'un montant de CHF 35'000.-, dans les 30 jours suivant la notification de la présente décision".

3. (...).

4. (...).

5. Rejette toutes autres ou plus amples conclusions des Parties.

Arbitration CAS 2022/O/8722

Simidele Adeagbo v. International Bobsleigh and Skeleton Federation (IBSF) & International Olympic Committee (IOC)

31 March 2025

Bobsleigh; Qualification system for the Olympic Games; Effect of the CAS Court Office's designation of a case as ordinary or appellate; Concept of "appealable decision"; Exhaustion of internal remedies; Waiver of exhaustion of legal remedies; Time limit for appeal; Indeterminate request for relief; Prohibition of discrimination under Article 14 ECHR; Scope of application of Article 8 ECHR; Scope of application of the EU Charter of Fundamental Rights; Scope of application of the UN Universal Declaration of Human Rights; Scope of application of the CEDAW Convention; Scope of application of Article 8, paras. 2 and 3 of the Swiss Constitution; Application of mandatory rules of EU law; Rights of personality

Panel

Prof. Massimo Coccia (Italy), President

Mr Jeffrey Mishkin (USA)

The Hon. Annabelle Bennett AC SC (Australia)

1. The CAS Court Office designating a case as an ordinary arbitration is a mere administrative deed and merely defines the procedural framework within which the case will be administered, i.e. it establishes the set of CAS Code provisions applicable to the CAS proceedings. However, the designation assigned by the CAS Court Office may not alter the inherent nature of a case. It does

not affect whether in substance a case is truly ordinary or appellate and, in turn, what requirements of admissibility are applicable (in particular, whether the time limit to file a claim provided by the CAS Code for appeal procedures is applicable). The power to characterize a given CAS case as substantively ordinary or appellate, and the related responsibility, must logically lie with those who are appointed to adjudicate the case (the arbitrators) and not with those who are merely tasked to oversee the arbitration proceedings and take care of its organizational and administrative aspects (the CAS Court Office). Therefore, even though the CAS Court Office has designated a case as an "ordinary" arbitration under the CAS Code, this does not determine in a binding manner whether it is in substance an ordinary arbitration and not an appeal against a challengeable decision. It is for the CAS panel to determine what is the proper nature of the case, looking in particular at the motions for relief.

2. A statement or communication from a sports organization must be characterized as a true "decision", and thus deemed as appealable to the CAS, if the following cumulative criteria are met: (i) it is a unilateral act brought to the attention of one or more addressees, being irrelevant that such act is not formally characterized as a decision, (ii) it is not of a mere informative nature but denotes the sports organization's *animus decidendi* (i.e. will to decide on a matter), and (iii) it has a content which affects the legal situation of the addressee(s) or of other

concerned parties. The publication by an international federation of the list of eligible and/or qualified athletes or NFs or NOCs into a specific competition, in particular into the Olympic Games, as well as of the results of the allocation or re-allocation of quota places for the Olympic Games, is a “decision” in the sense of the CAS Code.

3. The exhaustion of internal remedies is an admissibility requirement. Under Swiss law, admissibility issues must be addressed *ex officio* by judges or arbitrators, even if parties do not raise them in their submissions or, *a fortiori*, if they raise them at a late stage of the proceedings. At its core, exhaustion of legal remedies serves to uphold the freedom, autonomy and associational life of the relevant association, by granting it the right to make a first decision on matters concerning its own members and to internally redress any incorrect decision, thus limiting costly and time-consuming external litigation. In fact, exhaustion of legal remedies is mandatorily required under Swiss law; any direct or indirect member of an association must exhaust the internal remedies of the association before suing the association before a Swiss court. As arbitration is an alternative to State courts, this Swiss law requirement also applies to arbitration (if and when an association has in its statutes an arbitration clause). The CAS Code has duly recognized this principle of Swiss law and has inserted it in Article R47, within the context of the CAS appeals procedure. However, given that under Swiss case-law

related to Art. 75 of the Swiss Civil Code a member of an association is expected to exhaust any internal remedies prior to challenging a decision of the association before an outside tribunal, notwithstanding the fact that the provisions of the CAS Code applicable to the ordinary arbitration procedure do not require explicitly the exhaustion of internal legal remedies prior to the CAS arbitration, even in the context of a case brought to CAS as an “ordinary” arbitration, it is required that internal remedies be exhausted, if any are available.

4. An association may waive the requirement of the exhaustion of internal remedies prior to the appeal to the CAS. However, as admissibility issues such as the exhaustion of internal remedies must be addressed *ex officio* by judges or arbitrators even if parties do not raise them in their submissions or only raise them at a late stage of the proceedings; therefore, no waiver can be implied from the fact that the issue has not initially been raised. The exhaustion of legal remedies can only be waived in truly exceptional circumstances, for instance where the time necessary to exhaust internal remedies would make the appeal ineffective. As such, a waiver may not be easily implied.
5. In the context of qualification for a competition, the essence of the time limit to appeal is to ensure timely submission of appeals from the date of the decision stating who is in and who is out, given that athletes need to swiftly know if they qualify for a competition or not. A party wishing

to challenge a decision may not extend the time limit to appeal at will by sending a letter asking for an answer within a given deadline.

6. Under Swiss law, a vague “catch-all” request for relief such as *“order any other relief that the tribunal shall deem appropriate to eliminate gender discrimination”* is too indeterminate to be admitted by an arbitral tribunal seated in Switzerland. In addition, to uphold such request would translate into the necessity for the arbitral tribunal to make some policy choices and become a rule-maker, something which clearly is foreign to the mandate of an arbitral tribunal.
7. Article 14 of the European Convention on Human Rights (ECHR) is not a stand-alone guarantee and does not grant *per se* an enforceable right against discrimination. Rather, it only prohibits discrimination in the enjoyment of the rights and freedoms set for in the ECHR. That is, it operates as a provision that complements other rights and freedoms guaranteed by the ECHR. It ensures that these rights are enjoyed without discrimination based on certain grounds listed in the ECHR. Article 14 must therefore be invoked in conjunction with other articles of the ECHR when alleging violations of rights due to discriminatory treatment.
8. Professional and business activities fall within the substantive scope of application of Article 8 ECHR only if they are of sufficient relevance for the right to private and family life. In

other words, the ECHR does not grant a general right to exercise a given profession unless the professional activities are relevant for private and family life. When assessing the applicability of Article 8 ECHR, what matters is whether the challenged action generated a restriction of access to a profession as such. Accordingly, the ECHR does not grant a right to reach certain professional results. A Qualification System for the Olympic Games does not control access to a profession but simply adopts qualification provisions in relation to the access to a single high level competition.

9. The European Union (EU) Charter of Fundamental Rights only applies as a protection vis-à-vis the rules and deeds of the institutions, bodies, offices, and agencies of the EU, as well as of the EU Member States when they are implementing EU law, and to national authorities of the EU member States when they are implementing national law within the scope of EU law. Therefore, the EU Charter of Fundamental Rights does not extend to protect individuals against the rules and deeds of private sports associations headquartered in Switzerland, which are not part of the EU institutional framework.
10. The United Nations (UN) Universal Declaration of Human Rights serves as a foundational and inspirational document outlining fundamental human rights and freedoms aspiring to be vertically granted to individuals by sovereign States, but its provisions are not legally binding to sovereign States (unless demonstrated to have

become part of international customary law) and, to private parties unless specifically incorporated into domestic legislation rendering them horizontally applicable. Accordingly, private sports associations are not directly bound by the UN Universal Declaration of Human Rights and the Swiss public policy filter cannot transform those vertical principles into horizontal ones to be applied between private parties.

11. The UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW Convention) only imposes obligations upon its contracting States and requires implementation through domestic legislation. Thus, Article 13(c) of the CEDAW Convention is not directly applicable in the context of relationships between private parties and does not grant rights horizontally enforceable against private organizations, and Swiss public policy may not be invoked to transform those vertical principles into horizontal ones.
12. The prohibition against gender discrimination of Article 8, paras. 2 and 3, of the Swiss Constitution is directed at the Swiss Confederation and does not apply horizontally between private parties, with the exception of the third sentence of Article 8, para. 3, which only deals with employment relationships.
13. Drawing inspiration from Article 19 of the Swiss Private International Law Act, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory

rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met: (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called “*lois d’application immediate*”); (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.

14. The freedom to participate in sporting activity of one’s choice, the right to private life and the right to professional and economic freedom are personality rights. However, personality rights do not extend to the right to compete at a specific event. For a restriction of economic freedom to be considered excessive, it must force the person who has obliged itself to the arbitrariness of its co-contractor, suppresses its economic freedom or limits it in such a measure that the bases of its economic existence are endangered. This is not the case if an athlete has failed to qualify to a specific event based on a qualification system, as this does not prevent the athlete from participating in the sport in question or from making a living therefrom.

I. THE PARTIES

1. Ms. Simidele Adeagbo (the “Claimant”), born on 29 July 1981, is an elite Nigerian monobob and skeleton athlete who competed in the 2018 Olympic Winter Games in the women’s skeleton event, where she finished 20th overall, and who attempted to qualify for the monobob event at the 2022 Olympic Winter Games.
2. The International Bobsleigh and Skeleton Federation (the “IBSF” or the “First Respondent”), headquartered in Lausanne, Switzerland, is the international federation and world governing body for the winter sports of bobsleigh and skeleton.
3. The International Olympic Committee (the “IOC” or the “Second Respondent”), headquartered in Lausanne, Switzerland, is the world governing body of the Olympic Movement.
4. The Claimant and the Respondents are collectively referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as submitted by the Parties in their written pleadings and adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. The Olympic Agenda and creation of the ISBF Women’s Working Group

6. Pursuant to Rule 40 of the Olympic Charter, the “*conditions of participation*” in the Olympic Games are “*established by the IOC*” as well as by “*the rules of the relevant IF as approved by the IOC*”. Then, paras. 1 and 2 of the Bye-law to Rule 40 of the Olympic Charter provide as follows: “1. *Each IF establishes its sport’s rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.* 2. *The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities*”.
7. Pursuant to Bye-law 3.2 of Rule 45 of the Olympic Charter, with regard to the Olympic Winter Games (“OWG”) of 2022, the IOC capped the number of participants at 2,900 athletes and the number of events at 100. The IOC also capped at 170 the total number of spots for bobsleigh athletes.
8. At the IOC Session in December 2014, the IOC adopted the “Olympic Agenda 2020” for the purposes of the future editions of the Olympic Games. Recommendation 11, titled “*Foster gender equality*”, of the Olympic Agenda 2020 called for “*[t]he IOC to work with the International Federations to achieve 50 per cent female participation in the Olympic Games and to stimulate women’s participation and involvement in sport by creating more participation opportunities at the Olympic Games*”.
9. On 16 March 2017, to act upon said Recommendation 11 of the Olympic

Agenda 2020, the IOC Executive Board launched the IOC Gender Equality Review Project with a mandate to “*push gender equality globally*” with “*action-oriented recommendations for change*”. This led to the IOC Gender Equality Working Group issuing a report in March 2018, under which it recommended that the IOC “[e]nsure there is full gender equality in athlete quotas and medal events for both genders from the Olympic Games 2024 and the Olympic Winter Games 2026 onwards” and, “[f]or all team sports/disciplines/events, [to] ensure an equal number of teams and, where appropriate, an equal number of athletes for both genders”.

10. Further to the IOC’s Recommendation 11 and the IOC’s plan to have gender balance by the OWG 2026, the IBSF Executive Committee (“IBSF ExCo”) established the Women’s Working Group (“WWG”) on 14 December 2017 with the task of assessing the addition of a women’s event at the OWG 2022 and, more specifically, to evaluate two proposals: women’s monobob or 4-woman bobsleigh. The aim was to have a proposal ready for the IOC by March 2018 and a 4-year business plan established.
11. On 23 March 2018, the WWG issued a report to the IBSF Executive Committee. The WWG informed the IBSF Executive Committee that, after studying different options, it recommended, by a narrow majority (4 to 3), to apply to the IOC to introduce the 4-woman bobsleigh competition in the OWG 2022 as an additional medal event and, to that end, to apply to the IOC for 12 additional quota places for women’s bobsleigh. In reaching that recommendation, the WWG noted the

objectives of the application would be: “1. To achieve equality of medal events in IBSF disciplines in 2022 (current 3 men’s, 2 women’s)”, “2. To improve the gender balance of athletes competing at the 2022 OWG (current 73/27%)”, “3. To achieve gender balance of athletes competing at the 2026 OWG (minimum 55/45%)”, and “4. To simultaneously maintain at least the same number of men’s nations at OWG (to avoid a negative impact on men’s bobsleigh and skeleton)”. The WWG noted the benefits and drawbacks of each of 4-woman bobsleigh and monobob. For monobob, the WWG noted *inter alia* as benefits, that (i) it “*kn[e]w the concept*” and that the “*system works*”, (ii) it was the simplest method to achieve Objective 1 (equal number of medal events), (iii) the sleds could also be used for Youth and Paralympics, (iv) it was the easiest method to attract new female pilots into bobsleigh. As negatives it noted *inter alia* that (i) it was not a driving stepping stone towards 4-woman bobsleigh, (ii) 20 new sleds would need to be purchased, (iii) it would be an inefficient use of quota places, (iv) it would be more difficult to ask for additional quota places from the IOC as the total women’s athlete numbers would be lower than 4-woman bobsleigh. For 4-woman bobsleigh, the benefits pointed out were *inter alia* that (i) it was a significantly easier move to 50% women’s participation in the OWG 2026, (ii) an opportunity to ask the IOC for additional quota places, and (iii) a higher women’s percentage that would help move towards satisfying the IOC’s wishes of equality. The drawbacks included “more uncertainty” and a concern for filling twelve 4-woman sleds.

12. The issue of what discipline to propose to the IOC was discussed by the IBSF Executive Committee. In an internal IBSF document dated 30 March 2018, called “Women’s Promotion in Sport”, the IBSF compared monobob and 4-woman bobsleigh. The IBSF Executive Committee noted that monobob was already used by several national federations (“NFs”) and the IBSF to enhance the participation and that the IBSF had developed a good structure for the Youth and Paraspport and would be able to use this experience to introduce the monobob at the OWG 2022. As for 4-woman bobsleigh, the Executive Committee noted that *“there is a strong demand by current female pilots to do a 4-woman bobsleigh. The IBSF should respect the demand and establish a 4-woman bobsleigh race...”*. The IBSF concluded that it would *“inform the IOC that the IBSF strongly supports Agenda 2020 and the gender equality approach by establishing the Women’s Monobob and the 4-woman bobsleigh event; the IBSF request the IOC to enter a new female bobsleigh event in 2022 whereas the IBSF in coordination with the IOC will review both disciplines after the 2019/20 season to propose one for Beijing 2022 – the aim is to have 4-woman bobsleigh”*.
13. On 6 April 2018, the IOC Sports Director reminded the IBSF President of the parameters outlined and published in the Olympic Charter and in the Olympic Agenda 2020, in particular that the IOC was working with *“a strict cap of approximately 2,900 athletes”*, that *“IFs must demonstrate efforts to include athletes for any new events within existing individual sport quotas”* and that there was *“[t]he push for gender balance in the Winter Games through the inclusion of additional women’s and mixed events”*. The IOC Sports Director explained that the IOC *“hope[d] to achieve 50% gender balance by the Olympic Winter Games 2026, but take a significant [step] towards this for Beijing 2022”*.
14. On or before 19 April 2018, at a meeting on the occasion of the SportAccord conference in Bangkok, the IBSF informed the IOC Sports Department about its intention to propose to the IOC the 4-woman bobsleigh as an additional medal event at the OWG 2022. Present at this meeting was the IBSF Secretary General Ms. Heike Groesswang. According to an email from Ms. Groesswang to the members of the IBSF Executive Committee dated 19 April 2018, at this meeting the IOC Sports Department questioned why the IBSF did not intend to propose monobob for women, which had successfully been implemented in the Youth Olympic Games 2016. Ms. Groesswang reported that the IOC Sports Department had doubts about the successful acceptance of the 4-woman bobsleigh for the OWG 2022 and that it believed there was a bigger chance for women’s monobob to be accepted by the IOC as the new discipline for women, since data were available and experience and supporting documents could be provided. Ms. Groesswang also reported that the IOC was keen on getting more information on both options – 4-woman bobsleigh and monobob. Ms. Groesswang informed the members of the IBSF Executive Committee that they had to decide whether to propose only the 4-woman bobsleigh or also the monobob to the IOC.

15. Eventually, the IBSF decided to present both events to the IOC. The IBSF proposals for monobob and 4-woman bobsleigh were submitted on 27 and 30 April 2018, respectively.
16. In the proposal for monobob, the IBSF noted that the discipline's added value to the Olympic Games would be to *"allow female athletes to show their best performance without being directly compared to the men as it is a new event which men do not do – we believe this would give them a much higher recognition and appreciation as they do have their own event"* and to *"enhance the female participation in bobsleigh immense[ly]"*. As for value added to the sport, it noted: *"We see some National Federations lacking in development for women in sport. With an additional event at the Olympic Winter Games and the possibility to be ranked this will increase the motivation for several National Federations to improve their women's program. As the Monobobs will be given by the IBSF only, there will be minimized cost impact to the National Federations (the IBSF will bring mechanics as well as the whole equipment). Additionally, the technical aspect of the sled itself will be zero as all Monobobs will be the same. The driving technique of the female pilot will be decisive. We believe this will give the female pilots more recognition and appreciation of their driving skills which at least are as good as the men but get lost in the overall discussion about the push times and the technical aspects of the bobsleigh. Generally, we believe the Women's Monobob will enhance the female participation in bobsleigh immense[ly]"*.
17. In the proposal for bobsleigh, the IBSF noted that the discipline's added value to the Olympic Games would be: *"Gender equality achieved in terms of events; a large step towards participation gender equality also achieved"*. As for added value to the sport it noted: *"Athlete and National Federation numbers in women's bobsleigh have been an issue for some time (the reasons why/challenges have been outlined earlier on separate document). This would be a step-change for women's bobsleigh, creating a strong positive impact in culture, participation, messaging and empowerment both within and beyond our sport"*.
18. On 18 July 2018, the IOC decided to add women's monobob to the OWG 2022 Programme as the IBSF's sixth discipline.
19. Questions arose within the IOC as to the decision to admit women's monobob instead of 4-woman bobsleigh. In response, on 28 June 2018, the IOC Sports Director sent to other IOC officers an email answering such questions. The IOC Sports Director explained:
 - *Firstly it is great that there is debate over which women's event to add to the Olympic bobsleigh programme, not whether to add one or not. The addition of any women's event also gives equality on event numbers in the sport.*
 - *There is an argument for the 4-woman event as it gives a fully equivalent programme between the men's and women's event programmes in the sport, however any new additional event needs to have integrity and have a sustainable development pathway which gives an appropriate level of universality and competitiveness at the Olympic level.*
 - *Monobob was included in the Lillehammer 2016 Winter YOG and will also be included in the Lausanne 2020 YOG as well, meaning there is an existing competition pathway for young athletes in monobob that does*

not exist in 4-woman bob, along with national investment programmes to support this. There is no existing programme of 4-woman bobsleigh events.

- *Irina can give the stats on the referenced 4-woman bobsleigh “World Championships” below, but I believe there were very few NOCs (maybe 3 from memory?) and athletes involved and it was hard to call it a legitimate World Championships.*
- *The 4-man bob event has been open to women pilots for several years but there are an incredibly small number who have actually done so.*
- *The cost of a monobob is approximately US \$17k while a 4-woman bob is approximately \$60k. The impact of the IF investment would therefore be able to provide 3x-4x the number of bobs for events and training, meaning greater numbers of NOCs / NFs involved in training and competition. Likewise the cost and numbers of athletes needed mean it is likely there will be more investment programmes at a national level in more countries for monobob than 4-woman bob – in simple terms the cheaper it is to invest in a programme and more likely you are likely to be competitive as a result, then the more likely you are to invest in it.*
- *As a result of this we were concerned with the number of countries that would actually invest in a 4-woman programme, beyond the very small number of countries (USA, CAN, may be GER and RUS) which would see it is a very fast pathway towards an Olympic podium. It is not coincidence we have heard from the female athletes*

from this small number of countries rather than a wider voice in favour of 4-woman bob from the global bobsleigh community”.

20. In a December 2019 memo from the IOC’s Sports Department to the IOC Executive Board, the IOC’s Sports Department noted that bobsleigh would add the women’s monobob event enabling it “to achieve gender balance in terms of number of events”.

B. The Qualification System for the OWG 2022

21. By email of 10 January 2019, the IOC notified the Presidents and Secretaries General of the international federations (“IFs”) of the qualification systems principles for the OWG 2022 and provided them with the templates for the qualification system for each sport at the OWG 2022. The IBSF Secretary General submitted a first draft of the qualification System for bobsleigh to the IOC on 17 May 2019. There were further versions until the last version was approved by the IOC Executive Board on 4 December 2019, published and communicated to the NFs on 5 December 2019.
22. However, further versions of the IBSF qualification system were discussed with and approved by the IOC to take into account the IBSF’s difficulties in organizing the originally contemplated qualification events during the Covid-19 pandemic. Nonetheless, the principle of the quota allocation for women’s monobob remained unchanged, including in the latest version of 6 September 2021. On that date, pursuant to Rule 40 of the Olympic Charter, the IBSF released the

final version of its qualification system for the bobsleigh events at the OWG 2022 (the “Qualification System”), which will be summarized below.

23. The Qualification System (i) presented 4 medal events, 2 for each gender: the 4-man and 2-man bobsleigh for men, and the 2-woman bobsleigh and monobob for women, (ii) allocated 124 quota places for men and 46 for women, to reach the total of 170 allocation spots set aside by the IOC for bobsleigh athletes, and (iii) presented twenty-eight 4-man bobsleigh crews and thirty 2-man bobsleigh crews, compared to twenty 2-woman bobsleigh crews and twenty female monobob pilots, totalling 31 male pilots (and thus 31 sleds in male bobsleigh competitions) and 26 female pilots (and thus 26 sleds in female bobsleigh competitions). The Qualification System explained that *“the quota place/s is/are allocated to the NOC”, i.e. the National Olympic Committee, and that “[t]he selection of the athletes for its allocated quota places is at the discretion of the NOC subject to eligibility requirements”*.
24. With regard to the monobob, which would see its first inclusion ever in the Olympic Games, the Qualification System reserved 20 slots. Qualification for the monobob event would be achieved on the basis of the IBSF Women’s Monobob Ranking and the 2-woman Bobsleigh Ranking for the 2021/2022 season. The Qualification System published on 6 September 2021 determined the qualification procedure as follows:

D.2.3 Women’s Bobsleigh IBSF Combined Ranking List

The Women’s Bobsleigh IBSF Combined Ranking List will be made by combining the best results of each pilot in both the 2-woman and Women’s Monobob events during the 2021/2022 season until the deadline of 16 January 2022 (23:59 Lausanne time) in all races that she had participated in regardless of the race series below in which the results were scored:

- World Cup
- Europe Cup
- North American Cup
- Women’s Monobob Series

The maximum number of races taken into account for determining the Women’s IBSF Ranking List is seven (7). The Monobob Series may have a lower number of races taken into consideration.

In cases of equal points, the following decision criteria apply for the Women’s IBSF Ranking List:

- c) First, the highest points obtained in a single race;
- d) Next, the highest points obtained at the last race before the qualification deadline.

(World Cup points are of higher priority than points obtained in the other race series)

D.2.4 Women’s Monobob IBSF Ranking List

During the 2021/2022 season until the deadline of 16 January 2022 (23:59 Lausanne time), the best results of each pilot’s result in the Women’s Monobob Series are totaled to form by name for the respective Women’s Monobob IBSF Ranking List.

The maximum number of races taken into account for determining the Monobob IBSF Ranking List will be the overall number of IBSF Women’s Monobob races within the IBSF Women’s Monobob Race Series carried out in the season 2021/2022.

D.2.5 Allocation of quotas for Women’s Monobob

D.2.5.1 The quotas for the 4 NOCs with 2 pilots will be allocated to the best 4 NOCs already qualified for the 2-woman bobsleigh event and determined by the second-best ranked pilots in the Women’s Bobsleigh IBSF Combined Ranking List (as described in D.2.3);

D.2.5.2 The quotas for the 6 NOCs with 1 pilot will be allocated to the best 6 NOCs already qualified for the 2-woman bobsleigh event which have not been allocated a quota place from **D.2.5.1** as of 16 January 2022 (23:59 Lausanne time).

D.2.5.3 The remaining 6 quota places in Women’s Monobob will be allocated to the top 6 NOCs with the highest ranked pilot on the Women’s Monobob IBSF Ranking List (as described in D.2.4) as of 16 January 2022 (23:59 Lausanne time) which have not been allocated a quota place from **D.2.5.1** and **D.2.5.3**.

D.2.5.4 If the host country is not allocated a quota place from **D.2.5.1**, **D.2.5.2** or **D.2.5.3**, the quota place of the NOC with the lowest ranked pilot on the Women’s Monobob IBSF Ranking List (as described in D.2.4) from **D.2.5.3** will be allocated to the highest ranked pilot from the host country on the Monobob IBSF Ranking List (Refer to Host Country Places).

25. In summary: for the 20 starting positions in the women’s monobob, 14 positions were allocated through a combined ranking including both the 2-woman bobsleigh and women’s

monobob, while 6 positions were allocated exclusively on the basis of the women's monobob rankings only.

26. In order to be eligible under the Qualification System, a monobob athlete, in addition to age and medical requirements, had to possess a valid IBSF International license and to have been *“participating and ranked in a minimum of six (6) IBSF races on at least 3 different tracks in the period between of 15 October 2020 and 16 January 2022. In addition, the pilot must have been ranked in at least five (5) of the six (6) above mentioned races on a minimum of two (2) different tracks during the 2021/2022 season by 16 January 2022 (23:59 Lausanne time) and must have been ranked among the top 50 in the 2-man and 4-man or Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time)”*.
27. The Qualification System also set the procedure for reallocating unused quota places. The procedure stated inter alia that: *“If there are places still available for reallocation, only NOCs which do not already have a qualified team by the end of the qualification period will be considered. Among the potential candidates for reallocation, only the highest ranked pilot in the respective IBSF Ranking List will enable his/her NOC to send a crew to fill a reallocation position”*.
28. Finally, the Qualification System established the qualification timeline. Notably, on 16 January 2022 the IBSF Ranking list would be published, on 17 January 2022 the IBSF would inform the NOCs of their allocated quota places, by 19 January 2022 the NOCs

would need to confirm use of allocated quota places, between 20-23 January 2022 the IBSF would reallocate unused quota places, and 24 January 2022 would be deadline for the 2022 OWG sports entries.

C. Ms. Adeagbo's failure to qualify for the OWG 2022

29. In February 2021, the Claimant began competing in women's monobob. Before the beginning of the qualification season 2021/2022 for monobob, on 15 August 2021, the Claimant asked specific questions about the workings of the Qualification System to the IBSF Secretary of Sport Administration Mr. Martin Kerbler, who answered them first by email of 20 August 2021 and then, after a follow-up question, by another email of 21 August 2021. Essentially, the Claimant sought to understand how a pilot would qualify for the monobob event in the OWG 2022.
30. The Claimant went on to compete in the 2021/2022 season and accumulated 440 points in the IBSF Women's Monobob Rankings, which put her in 33rd place on the rankings list (out of 45 participants).
31. On 17 January 2022, IBSF informed the NOCs of their allocated quota places for the Olympic bobsleigh and skeleton events at the OWG 2022. With regard to monobob, based on the Combined Ranking, 4 NOCs (Germany, Canada, USA and China) were allocated 2 quota spots each, and 6 NOCs (Russia, Switzerland, Romania, Austria, United Kingdom and Australia) each received 1 quota spot. The remaining 6 quota spots were

allocated on the basis of the Women's Monobob Ranking to the NOCs of the Netherlands, Korea, France, Slovakia, Jamaica, and Ukraine. Based on the female pilots' ranking and competition status, the Claimant's NOC was second in line to earn a reallocated quota place in the monobob event, behind the Italian NOC. The NOCs which were granted a spot had until 19 January 2022 to confirm that they would use it or their unused quota places would be reallocated to other NOCs.

32. The British NOC, which had the right to obtain a spot, informed the IBSF that it did not claim its quota place; hence, as an Italian monobob pilot was ranked next, on 18 January 2022 the IBSF offered the unused quota place to the Italian NOC, which accepted it on the same day. The Nigerian NOC, which was next in line due to the Claimant's ranking, was not offered a quota place.

33. On 18 January 2022, the Nigerian NOC sent the following email to the IBSF:

"Thank you for the email regarding the quota allocation in monobob to GBR. However, it is still unclear why this quota allocation would go to a monobob pilot that was not within the top 40.

Per the below email from the IBSF's Martin Kerbler to our athlete, Simidele, on August 23rd, 2021, the IBSF confirmed that according to the 'QUALIFICATION SYSTEM FOR XXIV OLYMPIC WINTER GAMES, BEIJING' within Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).

A quota allocation for a pilot ranked 43rd in monobob does not fit this criteria. We understand that she is qualified for 2-women per her participation in that event. However, she did not rank in monobob and giving her a spot in monobob based on her qualification in 2-woman is not justified against those athletes who competed in a full season of monobob. Especially those athletes who are monobob specialists. It is not clearly stated in the qualification rules that she should have a default quota spot in monobob for this reason.

Is this something we can file a formal objection on?"

34. The same day, Ms. Groesswang, replied on behalf of the IBSF as follows:

"The Qualification System speaks about:

Selected pilots must have been participating and ranked in a minimum of six (6) IBSF races on at least 3 different tracks in the period between of 15 October 2020 and 16 January 2022. In addition, the pilot must have been ranked in at least five (5) of the six (6) above mentioned races on a minimum of two (2) different tracks during the 2021/2022 season by 16 January 2022 (23:59 Lausanne time) and must have been ranked among the top 50 in the 2-man and 4-man or Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).

The difference would have been if we had spoken only about the 2-woman and Women's Monobob Top 40 from which the Women's Combined List is created.

But since we explicitly mention the Top 40 for the Women's combined List, GBR is under the Top 40 of that list and therefore considered

for the allocation of the 2-woman bobsleigh quota. Which then furthermore allows her to move to the Women's Monobob allocation process".

35. Later that day of 18 January 2022, the Claimant followed-up with the following email to the IBSF Athletics Committee and its Chairman:

"I would like to get more clarity on the Beijing 2022 Olympic quota selection spots for Women's monobob. It is my understanding that the women's monobob will be inclusive of 14 total athletes including 6 NOCS with one team from the combined Women's Bobsled Ranking List. We noticed that GBR received a quota spot in Women's Monobob, however that athlete is not ranked in Women's Monobob; she is only ranked in 2-Women's bobsled.

Per an email that I received from the IBSF's Martin Kerbler on August 23rd, 2021, the IBSF confirmed that according to the QUALIFICATION SYSTEM FOR XXIV OLYMPIC WINTER GAMES, BEIJING' within Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).

A quota allocation for a pilot ranked 43rd in Women's monobob does not fit this criteria. Per below email communication, my federation, The Bobsled and Skeleton Federation of Nigeria, has reached out to the IBSF for clarity. However, it is still unclear why this quota allocation would go to a monobob pilot that was not within the top 40.

My federation will continue to seek clarity and take necessary action to file a formal objection on this quota allocation selection. From an athlete's perspective, can you please let me

know what steps I can take to also file a formal objection to this quota allocation selection? Stephen H. Hess is listed as the Chairman of the Appeals Tribunal and I would like to engage him to action a formal appeals process. Can you please provide his email address so I can reach out to him immediately? I also welcome your recommendations on any available IBSF formal processes for athletes to address matters of this nature.

As this is time sensitive, I'd be grateful if you can please revert back to me as soon as possible with clarification and recommended next steps on this matter".

36. The IBSF Athlete's Committee Chair, Ms. Christina Hengster, replied on the same day as follows: *"Your NOC has always the possibility to go the legal way, if they interpret the rules different. I just studied the criterias and read it again and again. In my opinion the IBSF like Heike wrote you interprets it the right way. The way to contact Stephen Hess, is contacting the secretary general of the ibsf, they forward your mail. Hope this Information helps you, if you ve any firther questions, just let me know"* (mistakes in the original).

37. On 23 January 2022, the IBSF published the final quota allocation for monobob. It did not include the Nigerian NOC and, on 24 January 2022, it informed the Claimant that no more spots were available.

38. On 2 February 2022, the Claimant answered Ms. Hengster's email of 18 January 2022 (*supra* at para. 36) by thanking for her *"response and perspective on this"* and specifying that she had *"no further questions at this time"*.

39. On 13 and 14 February 2022 the monobob competition took place at the OWG 2022.
40. On 15 February 2022, during the OWG, Counsel for Claimant wrote to the IBSF (and cc to the IOC) indicating that “*Ms. Adeagbo intends to seek redress before the Court of Arbitration for Sport (‘CAS’). Before filing a petition with CAS, we are writing to confirm that there is no internal IBSF procedure that should first be exhausted to seek redress for Ms. Adeagbo with respect to her illegal exclusion from the Beijing Olympics and to seek a ruling requiring IBSF, and the IOC, to provide equal sled allocation for male and female bobsleigh athletes in the future. Unless the IBSF identifies such an internal procedure for first seeking this legal relief within the next ten days, Ms. Adeagbo will file a petition for relief directly with CAS*”. Counsel for Claimant closed the letter by declaring that “*unless IBSF informs us otherwise by 5:00 pm EST (22:00 UTC) on February 25, 2022, we will proceed with initiating an arbitration proceeding before CAS to seek redress for Ms. Adeagbo and to end this continuing discrimination against female bobsleigh athletes*”.

D. Expected quota split for the OWG 2026

41. According to the Official Programme of the next Winter Olympics – OWG Milano Cortina 2026 – there is further growth in the number of female bobsleigh athletes. The quota places for women will increase from 46 to 56, with five additional starting positions in the 2-woman Bobsleigh (totalling 25 instead of 20) and there will be a reduction of male bobsleigh athletes by 10 quota places. This will mark the first time that female pilots outnumber male pilots by 3 (31/28).

III. THE PROCEEDINGS BEFORE THE CAS

42. On 8 March 2022 the Claimant filed a Request for Arbitration in accordance with Article R38 of the Code of Sport-related Arbitration (the “CAS Code”).
43. On 23 and 27 May 2022, respectively, the First Respondent and Second Respondent filed their respective Answers to the Request for Arbitration in accordance with Article R39 of the CAS Code.
44. On 24 May 2022, the CAS Court Office notified the Parties that, on behalf of the Deputy President of the CAS Ordinary Arbitration Division and pursuant to Article R40.3 of the CAS Code, the Panel appointed to decide the matter would be constituted by Prof. Massimo Coccia, as chairman, Mr. Jeffrey Mishkin nominated by the Claimant, and Dr. Annabelle Bennett nominated by the Respondent.
45. On 1 June 2022, the CAS Court Office notified the Parties that Mr. Francisco Larios, Attorney-at-Law in Miami, Florida, USA had been appointed as *ad hoc* clerk in the present arbitration in accordance with Article R40.3 of the CAS Code.
46. On 27 July 2022 the Panel, in accordance with Article R44.1 of the CAS Code and based on the agreement reached by the Parties on the procedural calendar, issued Procedural Order no. 1 (“PO1”), giving directions in connection with the Parties’ written submissions and requests for production of documents.

47. On 26 August 2022, the Claimant filed her Statement of Claim in accordance with Article R44.1 of the CAS Code.
48. On 2 December 2022, the Respondents filed their respective Responses in accordance with Article R44.1 of the CAS Code.
49. In accordance with PO1, the Parties submitted their respective Redfern Schedules, following which, on 25 January 2023, the Panel issued Procedural Order no. 2 (“PO2”) on the requests for the production of documents in accordance with Article R44.3 of the CAS Code. The Panel issued further instructions on this matter following disputes between the Parties about the search terms for the production of documents. The Parties fully complied with the Panel’s instructions and produced the documents ordered to be produced.
50. On 10 March 2023, the Panel, in accordance with Articles R43 and R.44.1 of the CAS Code, issued a Confidentiality Order, related in particular to any document produced during the document production phase, which was subsequently signed for acceptance by each of the Parties.
51. On 2 May 2023, the Claimant filed her Reply Brief in accordance with Article R44.1 of the CAS Code.
52. On 26 July 2023, the Panel sent the Parties a copy of the judgment dated 11 July 2023 of the European Court of Human Rights (“ECtHR”) in the *Semenya v. Switzerland* case and invited them to submit comments thereupon.
53. On 29 August 2023, the Claimant submitted her comments on the ECtHR’s *Semenya v. Switzerland* judgment.
54. On 9 and 10 October 2023, respectively, the First Respondent and Second Respondent filed their respective rejoinders in accordance with Article R44.1 of the CAS Code. Both Respondents provided their comments on the ECtHR’s *Semenya v. Switzerland* judgment in their respective Rejoinder.
55. On 23 November 2023, the Panel rejected the Claimant’s request of 21 November 2023 to hire a court reporter to attend – either in person or virtually – and transcribe the first day of the two-day hearing set for 28 and 29 November 2023. The Panel denied the request because it was submitted too late to allow the Parties to try and find an agreement, or, alternatively, to allow the CAS Court Office to organize it by appointing a neutral court reporter. The Panel noted that, in any case, the hearing would be recorded and the CAS Court Office would make every effort to deliver the recording of the first day immediately after that day ended (which it duly did).
56. On 28 and 29 November 2023, a hearing was held at the CAS headquarters. In addition to the Panel, the *ad hoc* clerk Francisco A. Larios and the CAS Head of Arbitration Antonio de Quesada, the following individuals attended the hearing either in person or remotely:
 - For the Claimant:
 - Ms. Simidele Adeagbo (Claimant)

- Ms. Cardelle Spangler (Counsel)
 - Ms. Mathilde Lefranc-Barthe (Counsel)
 - Ms. Angela Smedley (Counsel)
 - Mr. Scott Sherman (Counsel)
 - Ms. Juliette Huard-Bourgouis (Counsel)
 - Mr. David Feher (Counsel)
 - Mr. Drew Washington (Counsel)
 - Ms. Charlotte Monroe (Counsel)
 - Mr. Patrick Quinn (Expert Witness)
- For the First Respondent:
- Mr. Stephan Netzle (Counsel)
 - Mr. Frank Meyer (Counsel)
 - Ms. Miram Koller-Trunz (Counsel)
 - Mr. Heike Groesswang (IBSF Secretary General)
 - Mr. Nicola Minichiello (IBSF)
 - Mr. Martins Dambergs (IBSF VP Legal)
- For the Second Respondent:
- Mr. Antonio Rigozzi (Counsel)
 - Mr. Michele Potestà (Counsel)
 - Mr. Donald Slater (Counsel)
 - Ms. Marie-Christin Bareuther (Counsel)
 - Ms. Mariam Mahdavi (IOC Director of Legal Affairs)
57. At the beginning of the hearing, the Parties stated that they had no objections to the constitution and composition of the Panel.
58. At the end of the hearing, the Parties made no procedural objections and acknowledged that the Panel had fully respected their rights to be heard and to be treated equally throughout the proceedings.
59. On 29 December 2023, the Panel informed the Parties that it did not consider itself sufficiently briefed by the Parties on the issue of exhaustion of legal remedies and, for that reason, invited the Parties to submit post-hearing briefs with their respective views on legal questions asked by the Panel related to that matter. The questions were the following:
- “1. *Is there a requirement of exhaustion of internal remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes?*
2. *Does Swiss jurisprudence related to exhaustion of internal remedies and Article 75 CC (see for example ATF 85 II 525) apply to CAS proceedings? Does it apply only to CAS appeals proceedings or also to CAS ordinary proceedings? (See for example an ordinary case where the issue of exhaustion of internal remedies was discussed: CAS 2003/O/466 NISA v. ISU, published in Sweet &*

Maxwell's International Sports Law Review, no. 4/2004, SLR-48).

3. *Is exhaustion of internal remedies an admissibility or a jurisdictional requirement under Swiss law?*
4. *In another CAS case (CAS OG 22/005), the IBSF explicitly waived the requirement of exhaustion of internal remedies; in the case at hand, did the IBSF waive such requirement by not explicitly raising it as a defense?*
5. *If the IBSF were to be considered to have waived the requirement of exhaustion of internal remedies, would this affect the Respondents' defence that Ms. Adeagbo did not comply with the 21-day time-limit?"*.

60. On 29 January 2024, the Parties submitted their respective post-hearing briefs answering the aforementioned questions.

IV. OVERVIEW OF THE PARTIES POSITIONS

A. The Claimant: Ms. Adeagbo

61. In her prayers for relief, identically submitted in her Statement of Claim and in the subsequent briefs, the Claimant requests that the Panel order the following:

"1. Declaring that Respondents' Olympic Bobsleigh Qualification System for the 2022 Winter Olympics discriminated against female athletes, on the basis of gender, because it employed a quota allocation scheme that allocated disproportionately fewer quota places to women than to men in their respective bobsleigh events, without any justification;

2. Declaring that Respondents' Olympic Bobsleigh Qualification System for the 2022

Winter Olympics discriminated against female athletes, on the basis of gender, because it applied a total athlete quota that further inequitably and disproportionately reduced the number of athlete competition spots available to women as compared to men in their respective bobsleigh events, without any justification;

3. Requiring Respondents to provide equal quota place allocation for comparable male and female bobsleigh events on a going-forward basis;

4. Requiring Respondents to pay Ms. Adeagbo monetary damages in an amount corresponding to her lost earnings and lost potential earnings due to her unjustifiable exclusion from the 2022 Winter Olympics; and

5. Directing any other relief necessary to eliminate the practice of gender discrimination by Respondents that the CAS Tribunal shall deem appropriate".

62. In support of her position, the Claimant submits the following:

On admissibility:

- a. The Claimant's claim was properly qualified as an ordinary arbitration subject to Article R38 of the CAS Code and Respondents are prohibited, pursuant to Article R20 of the CAS Code, from challenging said designation now. Even if Respondents could challenge the designation, it would still not qualify as an "appeal" under Article R47 of the CAS Code because no "decision" of a federation was ever reached.

- b. The Claimant's claim is not a challenge to an IBSF decision at all: it is a tort and discrimination claim for damages based on Article 41 SCO, Articles 27 and 28 SCC and Articles 8 and 14 of the European Convention on Human Rights ("ECHR"). As such, the Claimant was not required to take her case through IBSF internal procedures. Nor can it be qualified as an appeal or be subject to the time limits applicable to appeals. It is only subject to the statute of limitations for tort claims under Swiss law, which is three years as provided in Article 60 SCO.
- c. The CAS is the court of exclusive jurisdiction over athletes' discrimination claims against their sports federations. Any proposition that the IBSF internal bodies should be the first instance in a statutory tort and damage claim brought against the IBSF is irrational and contrary to basic principles of due process, as it would not comply with a party's right of access to an impartial and independent judge as guaranteed under Swiss law by Article 6 of the ECHR. The Claimant has not waived, under Article 18 of the IBSF Statutes, her right to submit statutory claims arising from personality rights infringements under Swiss law or claims of gender discrimination protected by the ECHR.
- d. There is no requirement of exhaustion of remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct. Article 18 of the IBSF Statutes, by its terms, provides no internal procedure suitable for adjudication of the Claimant's tort claim for damages. Neither of the provisions covers a dispute between an athlete and the IBSF based on statutory rights under Swiss law and does not concern the interpretation or enforcement of any IBSF statute. Where no internal remedy is readily available, exhaustion is not required. This was confirmed by the IBSF's and IOC's silence to the email from Claimant to the IBSF dated 15 February 2022, where she inquired as to whether there was an internal IBSF dispute resolution procedure that the Claimant could exhaust. Moreover, it is supported by CAS 2004/O466 which held that in the absence of a "*true internal remedy*", a party is permitted to submit a dispute directly to CAS as an ordinary arbitration. The CAS panel in that case found that an internal remedy must be "*readily and effectively available to the aggrieved party and it must grant access to a definite procedure*".
- e. Swiss law of international arbitration, as set forth in Chapter 12 PILA, is the only law that governs issues of international arbitration procedure for arbitrations seated in Switzerland. Article 75 CC provides the basis for an action for annulment or nullity of a decision adopted by a sports federation. Since the Claimant

has not challenged any resolution by IBSF, Article 75 CC is inapplicable. In any case, Swiss law confirms that tort actions remain available to parties aggrieved by the decision of an association, separate and apart from their right to challenge a decision under Article 75 CC. Therefore, Article 75 CC would not bar the Claimant from pursuing the present tort action pursuant to Article 41CO.

- f.* In the context of CAS arbitration proceedings, the exhaustion of internal remedies is an admissibility requirement not a jurisdictional one.
- g.* Even if the Claimant were required to exhaust internal remedies in this matter, CAS precedents and Swiss law confirm that the IBSF waived any such requirement by failing to raise this defense in its Answer to the Request for Arbitration, and, separately, by failing to provide any response to letter of the Claimant to the IBSF dated 15 February 2022 making it clear that it was not willing to grant the Claimant effective legal protection or hear her case.
- h.* The IBSF's waiver of the exhaustion of internal remedies requirement nullifies its appeal and 21-day time limit arguments, which were, in any case, belatedly raised and have no bearing on this Ordinary Arbitration Procedure. But even if the present case were considered an appeal procedure, and there was

a "decision", it would be the IBSF's silence to the letter of the Claimant to the IBSF dated 15 February 2022 (see e.g. CAS 2020/A/6921 & 7297 at paras. 123 and 126; CAS 2005/A/944 at para. 7). Since the Claimant's counsel gave the IBSF 10 days to respond to that letter, the "decision" would be of 25 February 2022 – fewer than 21 days before the Claimant filed her Request for Arbitration on 8 March 2022, thereby making the Claimant's claim timely and admissible.

On the merits:

- i.* The Claimant was narrowly excluded – by a single quota place – from the monobob event at the OWG 2022 because of gender discrimination in the allocation of quota places for men and women to compete in the bobsleigh sports, which violated the Olympic and sporting principles, Swiss law, international public policy, and the Claimant's human rights.
- j.* The Qualification System used a discriminatory quota allocation scheme to qualify athletes for the bobsleigh sports, allocating fewer quota places to women than to men in their respective events and applying caps on the total number of bobsleigh athletes permitted to qualify, in a manner that further and disproportionately restricted the number of women athletes. This allocation scheme drastically limited the number of

competition spots for women in the bobsleigh sports compared to the number of competition spots available for men. As a result, the Claimant was excluded from Olympic competition even though she would have qualified – being the next eligible monobob athlete on the list – if the same number of quota places had been made available to men and women and if the total athlete quota had been equitably applied, i.e. if women bobsledders were allocated the same number of quota places as men.

k. The Qualification System's allocation scheme produced a 2.7-to-1 male/female ratio (124:46). The Qualification System also inflicted discrimination in other forms, such as requiring 14 of the 20 quota spots allocated to women's monobob to be reserved for athletes already competing in the 2-woman bobsleigh event, which resulted in only 6 quota places being available to women athletes competing exclusively in the monobob event.

l. If women bobsledders had been allocated the same number of quota places as the men, 10 more monobob and 8 more 2-woman bobsleigh quota places would have been available to women for the OWG 2022, resulting in 10 more monobob and 16 more 2-woman bobsleigh competition spots, for a total of 86 women's competition spots altogether. And if the total athlete quota

were applied equitably to men and women, this number would have been capped at no less than 62 women bobsleigh athletes – half of the men's total quota – instead of the 46 that the Qualification System actually permitted. Alternatively, if the IBSF and IOC had interest in maintaining the same overall number of 170 total athletes, a proper 2:1 ratio would have yielded 114 competition spots for men bobsleigh athletes and 56 athlete competition spots for women. In either case, the quota places allocated to the women's bobsleigh events, including monobob, required an increase, and any increase in quota places allotted to the monobob event would have qualified the Claimant to the OWG 2022.

m. The evidence supports the contention that the IBSF committed willful discrimination and that the IOC was complicit therein. The IBSF knew that it should be offering equal opportunities to women – not only in terms of equal number of events but also in competition spots – but refused to do so. Indeed, a March 2018 document from the WWG revealed acknowledgment within the IBSF of the ethical imperative to promote equality and increase female participation in bobsleigh, noting that it was *“the right thing to do”* and that *“now [wa]s the time to create gender equality in bobsleigh”*. The same document noted that the IBSF had *“the lowest percentage of females participating in all Olympic*

sports both summer and winter” and underscored the need to “*improve the gender balance of athletes competing at the 2022 OWG*” because the then current breakdown for bobsleigh was 73% men and 27% women. Regrettably, despite efforts by the WWG, resistance from within the IBSF hindered progress towards creating additional opportunities for women athletes, as the “conservative” leadership sought to prioritize maintaining a greater number of bobsleigh opportunities for male athletes. This difficulty –and outright resistance to actual gender equality – severely frustrated WWG member Mr. Martin Kerbler, who reached a boiling point when he was informed that the WWG’s proposal for the addition of a 4-woman bobsleigh event would have to be reduced “dramatically”. Mr. Kerbler contacted the IBSF Secretary General to advise that he had determined the WWG had “*not the slightest interest in serious further development of our sports*” and to report how “*appalled*” he was “*at how costs are knowingly falsified, facts are denied, and thus my own colleagues are ‘duped’*” when trying to execute the group’s mission. Because of the IBSF’s intransigence when it came to effectuating gender equity, Kerbler asked to be dismissed from the WWG. Ultimately, the IBSF rejected the 4-woman bobsled proposal and only agreed to add an additional women’s bobsleigh event – monobob – to the OWG 2022,

creating far fewer new competitive opportunities for women to close the gender equality gap. This decision was made despite many factors weighing in favor of introducing the 4-woman bobsleigh event. The IBSF internally acknowledged that the reason for adding the monobob as opposed to a 4-woman event was to “[a]void [any] negative impact on men’s bobsleigh” and avoid “*reducing [the] men’s quota drastically*”. While the IBSF understood that the IOC’s principle goal was to achieve 50% female participation, the IBSF ended up adding 21 bobsleigh athlete competition spots for men for the OWG 2022, while increasing women spots by only 6, actually worsening the male/female ratio.

- n. The Qualification System’s differential treatment between male and female bobsleigh athletes constitutes discrimination on grounds of sex and violates the principle of equality between men and women and the prohibition of gender-based discrimination enshrined in:
 - i. The Fundamental Principles nos. 4 and 6 of Olympism set forth in the Olympic Charter.
 - ii. Article 1.5 of the IBSF Statutes and Article 4 of the IBSF Code of Ethics.
 - iii. Swiss domestic law, specifically, Article 8 of the Swiss Constitution, Article 3

of the Federal Act on Gender Equality (the “Gender Equality Act”), and Article 10 of the Constitution of the Canton of Vaud dated 14 April 2003.

iv. The principle of equality between women and men and the prohibition of gender-based discrimination forming part of substantial public policy in the meaning of Article 190 of PILA and emanating from:

- Articles 1 and 2 of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations (“UN”) on 10 December 1948 (General Assembly resolution 217 A);
- Articles 1 and 13(c) of the UN Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, which was ratified by Switzerland);
- Article 14 in combination with Article 8 ECHR and Protocol no. 12 of the ECHR;
- Article 23 of the Charter of Fundamental Rights of

the European Union; and

- Mandatory European Union law.

a. The Qualification System also violated the Claimant’s personality rights under Articles 27 and 28 of the Swiss Civil Code of 10 December 1907 (“SCC”), including her right to participate in the sport of her choice and her right to professional and economic freedom.

p. Respondents have not established that the discrimination was necessary, reasonable and proportionate. The only and true reason the IBSF did not implement a gender-equal system for the OWG 2022 is that it wished to preserve a greater number of spots for male athletes. None of the following justifications raised by Respondents for not creating a gender-equal quota system are legitimate:

- i.* That men and women had an equal number of events in the OWG 2022. This is not a legitimate justification because the opportunity to compete remains entirely unequal. It is “*equality of opportunity*” that is required, as has even been recognized by the IBSF itself (see the April 2018 IBSF document concluding that “*now is the time to create gender equality in bobsleigh and have the same opportunities for women as there are for men*”). Under the

IBSF's errant logic, it could offer two events with 4 quota places to woman and two events with 1,000 quota places to men and call this "equal".

- ii. That there was an insufficient number of women bobsledders and pilots to fill additional quota places. There were unquestionably enough licensed and ranked women bobsledders and pilots to fill the 18 additional quota places that would have provided the 2-woman and monobob events with the same number of places afforded to men (58).
- iii. That there was a lack of athletic skill and training in women to hold a 4-woman bobsleigh event in the OWG 2022. This is not a legitimate justification because it is factually inaccurate. Claimant was skilled enough (having competed in monobob for 3 seasons) and if only one additional spot was open, she would have qualified. Moreover, the IBSF never established any multi-year experience or training requirement for men seeking to qualify for the OWG 2022, so it cannot be expected from women.
- iv. That about 20% of both male and female licensed bobsleigh athletes qualified

for the OWG 2022 or that a greater percentage of women bobsledders competing at international level qualified for the OWG 2022. This is not a legitimate justification because it is likely the IBSF's discriminatory policies that led to the smaller number of overall female bobsledders. Moreover, even if men's interest in the sport was higher, this does not justify having a system that does not give equal opportunity to those women interested in competing. This was shown in the sport of skeleton which reached gender equality in the OWG 2022 despite the pool of licensed male skeleton athletes (180 individuals) being nearly 50% higher than licensed female skeleton athletes (138). The only relevant question is whether there were enough qualified female bobsleigh athletes to compete which, undeniably, there were.

- v. That there were alleged safety concerns preventing an increase in women quota places. There is no evidence that increasing women quota places would put athlete safety at risk.
- vi. That Respondents amended "over the years" to increase the number of female teams in the 2-woman bobsleigh from 15 to 20 and had taken

other actions to benefit women bobsleigh athletes (such as giving them financial support, awarding them equal prize money, providing maternity leave and creating a Diversity and Gender Equity Working Group). These are not legitimate justifications because they do not excuse or compensate for the creation and maintenance of a Qualification System that violated the most fundamental gender equity requirement of an equal opportunity to compete.

vii. That Rule 45 of the Olympic Charter caps spots to 170 athletes for all bobsleigh disciplines. This is not a legitimate justification because nothing prevented the IOC from increasing the number of spots (over which it has full control and which it has not strictly enforced in the past) or the IBSF from dividing the 170 quota places equally between men and women. In fact, as part of its Agenda 2020 for the OWG 2022, the IOC added and reallocated quota places and reached full gender balance in 10 out of 15 disciplines, but did not do the same for bobsleigh.

viii. The fact that there is a larger number of licensed male bobsledders than licensed women bobsledders. This is

not a legitimate justification because in skeleton, which is the most comparable sport to bobsleigh, the IOC removed 5 men's quota places and added them to the women's skeleton events in the OWG 2022, despite the fact that there were significantly more male than female athletes licensed in the sport. The same could and should have been done with bobsleigh. Instead, the IBSF rejected its own WWG's suggestions to have a 4-woman bobsleigh event in the OWG 2022 that would have eliminated the discrimination in order to preserve spots for men.

ix. That the Combined Ranking Rule allegedly brings new female pilots to bobsleigh. As a result of this rule, only 2 monobob-only athletes got to compete in the 2022 Olympics; the other 18 spots went to athletes who also compete in 2-woman bobsleigh. The Combined Ranking Rule only offered more opportunities for the same women to compete in more events, and denied other capable female monobob pilots from competing in the OWG 2022.

q. The fact that bobsleigh is to reach gender equality for the 2026 OWG is an implicit admission that the Qualification System for the OWG 2022 was

discriminatory, since Respondents reached gender equality with the total athlete quota remaining the same and no evidence that the number of women licensed in bobsleigh has changed significantly.

r. Due to this gender discrimination, the Claimant has been unjustly and unjustifiably excluded from the OG, causing her to suffer actual and potential economic damages for which Respondents are liable pursuant to Article 41 SCO. The expert witness, Mr. Quinn (founding partner of Chicago Sports & Entertainment Partners, a full-service sports and entertainment marketing, management, and consulting agency), after interviewing the Claimant, reviewing her endorsements and other sponsorships, and analyzing data regarding her sports-related earnings, estimated that her exclusion from the OWG 2022 resulted in the following losses:

- i. The loss of [...] from her [...] sponsorship for qualifying for the OWG 2022 and the opportunity for an additional [...], [...] and [...] for medalling gold, silver or bronze at the OWG 2022;
- ii. The lost opportunity to earn from her [...] sponsorship [...] for gold, [...] for silver and [...] for bronze at the OWG 2022;

- iii. The lost opportunity to earn more money via sponsorship agreements and endorsement deals (for example, [...] decided not to renew her sponsorship and Mr. Quinn estimated that the [...] renewal deal would have been [...] higher had she not been excluded from the OG);

- iv. The lost opportunity for higher earnings and more speaking engagements (for which she had earned a total of [...] in 2021, but only [...] in 2022 after her exclusion from the OWG 2022 and an expected [...] lower than that in [...] leading up to the next Olympics);

- v. The loss of sales of her children's book *Sleigh, Sleigh, Sleigh All Day* which would have received higher media attention;

- vi. The loss of media coverage, in particular a stunted growth of her social media account.

s. Mr. Quinn submits that the Claimant suffered estimated damages in the total amount of [...], calculated as follows: [...]. This does not include additional losses from the Claimant's endorsement earnings, social media activity, and publishing business. Claimant is also entitled to moral damages pursuant to Article 49 SCO for the Respondents' breach of her personality rights. She has

suffered a loss of reputation, as evidenced by her loss in social media growth, decrease in speaking engagements and contracts which were never executed due to the breach.

B. The First Respondent: IBSF

63. In its prayers for relief, submitted in its Answer, the First Respondent requests the Panel to rule as follows:

In the Answer to the Request for Arbitration:

- “(1) *to dismiss the Claimant’s Requests for Relief to the extent they are admissible;*
- 2) *to order that the Claimant shall pay the entire costs of this arbitration procedure;*
- 3) *to order that the Claimant shall pay a fair contribution to the Respondent’s legal costs and expenses related to the present arbitration procedure”.*

In the Answer to the Statement of Claim:

- “(1) *To terminate the present procedure because of the Claimant’s late filing of her complaint (Article R49 CAS Code);*
- (2) *Subsidiarily: to dismiss all of the Claimant’s Requests for Relief.*
- (3) *To order that the Claimant shall bear the costs of this arbitral proceeding.*
- (4) *To order that the Claimant shall pay a fair contribution to the legal costs and expenses of the First Respondent and*

that the CAS shall return the share of the Advance on Costs paid by the First Respondent to the IBSF”.

In the Rejoinder:

- “(1) *To terminate the present procedure because the Claimant’s complaint is inadmissible;*
- (2) *Subsidiarily: to dismiss all of the Claimant’s Requests for Relief;*
- (3) *In any event, to order that the Claimant shall bear the costs of this arbitral proceeding;*
- (4) *In any event, to order that the Claimant shall pay a fair contribution to the legal costs and expenses of the First Respondent and that the CAS shall return the share of the Advance on Costs paid by the First Respondent to the IBSF”.*

64. In support of its position, the First Respondent submits the following:

On admissibility:

- a. The Claimant’s action is procedurally inadmissible because she failed to (i) timely challenge the IBSF’s decision to adopt the Qualification System or the IBSF’s final decision, communicated to the NOCs and the NFs on 24 January 2022, on who was admitted to the OWG 2022, and (ii) exhaust legal remedies at the IBSF before submitting her claim to the CAS. Claimant’s complaint qualifies as an appeal and, as such, she had to exhaust legal remedies and submit her appeal within 21-days of the challengeable decision.

Moreover, Claimant's request to change the Qualification System "*on a going-forward basis*" is inadmissible because it deals with future policy choices.

- b. There is a requirement of exhaustion of legal remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes. Article 18 provides an internal dispute resolution procedure to the exclusion of any other remedies or means. A dispute can only be submitted to CAS if it was first heard and decided by the IBSF Appeals Tribunal. If a party fails to comply with the pre-arbitration requirement of Article 18, the CAS must declare any claim filed directly with it inadmissible and dismiss it for lack of a precondition for arbitration.
- c. Swiss jurisprudence related to exhaustion of internal remedies and Article 75 CC apply to CAS proceedings because the IBSF and the IOC are subject to Swiss law and, more generally, because Swiss law applies to the dispute. A challenge of a decision of an association under Article 75 CC may be brought before an independent arbitral tribunal such as the CAS if so provided by the statutes of that association. Such a challenge requires the applicant to exhaust any internal remedies and for the association to issue a final decision. The allocation of a case as an appeal or ordinary procedure before the CAS is only administrative and

affects only the set of procedural CAS rules to be applied; it does not prejudice in any way the "nature of the claim", nor does it preclude the fulfilment of the exhaustion of legal remedies. The requirement of exhaustion of internal remedies only comes into play if a "true internal remedy" is available and applies to both CAS appeals and ordinary arbitrations. The IBSF did provide an internal remedy for the Claimant's challenge: a claim before the IBSF Appeals Tribunal. Therefore, she had to exhaust it.

- d. The exhaustion of legal remedies under Article 75 CC is an admissibility and not jurisdictional requirement under Swiss law.
- e. As a consequence (and considering the imperative character of the exhaustion of internal remedies as a requirement under Art. 75 CC), the requirement of exhaustion of internal remedies may be waived under the truly exceptional circumstances, that otherwise, the time needed to exhaust the internal remedies would make the appeal to the court or arbitral tribunal ineffective. Such waiver may not easily be implied, as it is a true exception to the otherwise mandatory rule. In addition, such waiver must be limited to the requirement of exhaustion of internal remedies but cannot be extended to any other admissibility requirements. Therefore, a waiver of the

exhaustion of internal remedies must require an explicit statement of the waiving party. These strict requirements have not been met in the present case. The IBSF accepted the jurisdiction of CAS but never waived the requirement of the exhaustion of internal remedies or any other admissibility condition required by Art. 75 CC or Art. 18 of the IBSF Statutes or Art. R47 CAS Code, neither explicitly nor implicitly. There was no urgency to do so, since the case was initiated only *after* the closing of the OWG 2022 and had no impact on the starting list for the Olympic competitions.

- f.* Even if the IBSF is found to have waived the exhaustion of internal remedies (*quod non*), this would not affect the Claimant's obligation to comply with the 21-day time-limit. The IBSF never waived the objection of late filing.

On the merits:

- g.* The IBSF did not discriminate against the Claimant on the basis of gender in her attempt to qualify for the OWG 2022. The Claimant fails to even make a *prima facie* case for discrimination. Claimant was never "excluded" from the monobob competition of the OWG 2022. Her NOC simply did not qualify under the clear, transparent and fair Qualification System. The allegation of discrimination has

no factual or legal foundation because:

- i. The IBSF developed and implemented a balanced qualification system for the OWG 2022, carefully taking into account all relevant framework conditions, requirements and policy considerations. It decided to introduce into the OWG 2022 the discipline of women's monobob, by which it (i) added 20 more pilot spots, increasing the opportunity for female athletes to compete in bobsleigh at the international level, and (ii) leveled the number of bobsleigh medal races available to men and women at two each.
- ii. There is no law or rule, which demands the IBSF to have the exact same number of male and female athletes participating in all its disciplines at the Olympic Games.
- iii. The monobob event was open for women only. There is no category for male monobob to which the number of quota places for women's monobob can be compared.
- iv. The goal in sports is not a mathematically equal treatment of both genders but fairness of treatment according to their needs and possibilities. What can be

objectively compared is the number of medal races in all disciplines managed by the IBSF. Here female and male athletes had the opportunity to participate in the same number of bobsleigh medal events – two – in the OWG 2022. What also can objectively be compared are the numbers of IBSF licensed male and female athletes participating in international bobsleigh competitions and the opportunities to make it to the OWG 2022, which show:

- In the 2020/2021 season, the IBSF issued 851 annual licenses for bobsleigh, namely 235 for female athletes and 612 for male athletes.
- In the 2021/2022 season, there were 38 female pilots starting in both the 2-woman bobsleigh and the women's monobob, 10 female pilots starting only in the 2-woman bobsleigh, and 8 female pilots starting only in the women's monobob. When it comes to male athletes, 60 pilots started in both the 2-man bobsleigh and the 4-man bobsleigh, while 23 pilots started in the 2-man bobsleigh only and no male pilot started exclusively in the

4-man bobsleigh. By comparison, 46 Olympic quota places were available for 235 licensed female athletes, which corresponds to a ratio of 19.6%, whereas 124 Olympic quota places were available to 612 licensed male athletes, which corresponds to a ratio of 20%.

- 20 starting positions in the discipline of women's monobob at the OWG 2022 were available to 45 pilots. This means that 44.4% of all women's monobob pilots competing at international level qualified for the OWG 2022.

- v. There was no significant gender discrepancy among bobsleigh pilots in the OWG 2022. There were 26 female bobsleigh pilots participating in the OWG 2022, as compared to 31 male bobsleigh pilots. Indeed, 14 female pilots started in both events at the 2022 OWG. In addition, 6 pilots started only in the 2-woman bobsleigh and 6 pilots started only in the women's monobob. As for the men, 30 pilots started in the 2-man bobsleigh, 27 of whom also started in the 4-man bobsleigh and with

only one 4-man bobsleigh pilot not starting in the 2-man bobsleigh.

b. The Claimant was not assured to have qualified for the OWG 2022 even if more spots had been given to women. In fact, in the OWG 2026, despite general participation for females increasing, the six spots open to monobob without a combined ranking has remained exactly the same. Therefore, there is no causation between the alleged discrimination and her missing out on the OWG 2022.

i. The IBSF does not contest at all that it is a desirable goal to close the gender gap in the sports and disciplines for which it is responsible. The IBSF has taken a number of actions to close that gap including, *inter alia*, the 2-woman bobsleigh event at the OWG 2002, increasing the number of female pilots/crews in 2-women bobsleigh at the OWG from 15 to 20 between 2002 and 2010, attempting to introduce 4-woman bobsleigh in 2014, adding monobob as a second medalling discipline in 2022, providing financial support to educate and train female bobsleigh athletes, making entry of female pilots more attractive and less expensive (by offering NOCs the opportunity to buy pre-financed monobob sleds from the IBSF, which Claimant took advantage of), paying out the same prize money to men and women, creating beneficial maternity leave rules and

establishing a Diversity and Gender Equity Working Group to help the move towards gender equality. Gender equality cannot be reached overnight but by steps, as has been demonstrated by the most recent changes for the OWG 2026, which for the first time will have a majority of female bobsleigh pilots compared to the number of male pilots (31/28).

j. In developing the Qualification System, the IBSF has not discriminated against women. On the one hand, the IBSF has strictly adhered to the content and formal requirements of the IOC (i.e. competition calendar, number of quota places, compliance with the Qualification System Principles) and, on the other hand, it has used the discretion granted to the international federations by the law and the Olympic Charter in such a way as to ensure high-quality and safe bobsleigh competitions with fair consideration of the broader, not primarily performance-oriented interests of the sport of bobsleigh in general and the Olympic Games in particular, including the promotion of female athletes in bobsleigh competitions.

k. The Claimant has failed to demonstrate that the IBSF violated any sporting rules or laws on gender discrimination with the Qualification System:

- i. The Fundamental Principles nos. 4 and 6 of Olympism set out in the Olympic Charter: There is no question that the practice of sport is a human right as set out under the Olympic Charter, but there is no right to participate in the Olympic Games or in the monobob competition. In this respect, the cases of *Chand* and *Semanya* are not relevant. Unlike those cases, the Claimant was admitted to the IBSF competitions without any restrictions or conditions and was never prevented from participating because of her gender or any other personal particularity. She was not deprived of her right to compete but simply failed to achieve the necessary sporting results to qualify for the competition.
- ii. The IBSF Statutes and the Code of Ethics: The IBSF Statutes and IBSF Code of Ethics do explicitly prohibit discrimination. The Claimant, however, was not discriminated against. She was eligible to compete in the women's monobob event at the OWG 2022, but she simply did not qualify based on sporting performance.
- iii. Swiss law: Article 8 of the Swiss Constitution is inapplicable because it does not have horizontal effects.

Article 3 of the Gender Equality Act is inapplicable – directly or by analogy – because it only applies to employment matters and the Claimant is not an employee of the IBSF or IOC. As for Articles 27 and 28 SCC, the fact that the Claimant did not qualify to the OWG 2022 is not a violation of personality rights but the consequence of the correct application of the Qualification System.

- iv. ECHR: Article 14 ECHR prohibits discrimination, but it is not a stand-alone guarantee and only applies when there is a violation of another right or freedom guaranteed by the ECHR or another explicit legal provision. The Claimant invokes Article 8 ECHR. However, that provision does not guarantee that an athlete has a “right to exercise a profession by participating in the Olympic Games”. There is nothing in *Semenya v. Switzerland* that would endorse the theory that the Claimant has such a right. The *Semenya* case is not a gender discrimination case but deals with discrimination against women compared to other women based on sexual differences. Unlike Ms. Semenya, the Claimant has not been excluded from sporting competition, she simply did not qualify to the

OWG 2022 based on sporting criteria and she has not been restricted in the practice of competitive sport. The Claimant had unrestricted access to international competitions in her monobob; she simply did not qualify for the OWG 2022 based on sporting criteria, not because of gender discrimination.

l. The Claimant has failed to demonstrate that men and women are in comparable situations when it comes to the qualification for the bobsleigh events at the OWG 2022. Like must be compared with like. Therefore, the overall numbers of quota places for male and female bobsleigh athletes across all bobsleigh events are irrelevant for determining whether discrimination occurred. The Claimant's claim deals with her alleged exclusion from monobob, a discipline available exclusively for women that, accordingly, lacks a counterpart for comparison in terms of discrimination. As there is no comparator, there is no discrimination.

m. The Claimant actually benefitted from the Qualification System by (i) the introduction of the women's monobob as an additional medal event exclusively for female individual athletes, (ii) the limitation of the number of quota places per NOCs, restricting athletes from

countries with a strong presence in international bobsleigh and (iii) the reservation of six starting places exclusively for female pilots who had not already qualified via the combined ranking list. Thus, the Claimant had not only unrestricted access to a level playing field when it comes to the qualification for the OWG 2022 but she also had a privileged chance to qualify for the women's monobob event at the OWG 2022.

n. Any alleged discrimination is justified and proportionate because the Qualification System pursued legitimate sporting and policy goals. The discrepancy in quota places between male and female athletes is not due to gender discrimination but rather to ensure sporting performance, long-term development, and resource availability in women's bobsleigh. More specifically, in setting up the Qualification System, the IBSF aimed to promote female participation in bobsleigh and took into consideration that:

- i.* bobsleigh has been practiced by women for significantly less time than by men;
- ii.* the number of active female athletes in national and international bobsleigh competitions is significantly smaller than that of men;
- iii.* there are far fewer female license holders than male license holders; and

- iv. the number of female participants in IBSF events has been and still is significantly smaller than that of male participants;
- o. On damages, the Claimant has failed to cumulatively prove (i) a substantiated loss, (ii) an unlawful act by the obliged, (iii) an adequate causal correlation between the unlawful act and the loss, and (iv) culpable conduct by the obligor. With respect to the alleged loss, it is insufficient to offer an expert witness to make general remarks and hypothesize assumptions and draw comparisons to determine her business potential if she had made the OWG 2022. The Claimant has offered no real evidence of a loss. Indeed, there is no evidence that any sponsor or event management terminated or refrained from entering into a contract because she did not qualify the OWG 2022 or that the lower revenues from speaking engagements and other were actually attributable to her non-qualification to the OWG 2022 and not for another reason. All the Claimant has provided are unsubstantiated estimates. Finally, no moral damages are due under Article 49 CO because the Claimant's personality rights were not unlawfully infringed and there is no evidence that her non-qualification led to a lasting negative image.
- p. In her motions for relief, the Claimant asks the CAS to require the "Respondents to provide equal

quota places for comparable male and female bobsleigh events on a going-forward basis" (3rd Request for Relief). However, to order a party how it should draft its rules and regulations "*on a going-forward basis*" is not the mission of the CAS and it would not even have the competence to do so. The CAS shall adjudicate specific and actual disputes that have arisen between two or more parties. The CAS is not a regulatory authority that prescribes to sports organizations how they should manage their own affairs in the future. That would be outside of the scope of the CAS.

C. The Second Respondent: IOC

- 65. In its prayers for relief the Second Respondent requests the Panel to render an award:

In the Answer to the Request for Arbitration:

- "(i) *Dismissing the Claimant's requests for relief; and*
- (ii) *Ordering the Claimant to pay all the arbitration costs and all of the costs incurred by the IOC in connection with the present arbitration proceedings*".

In the Answer to the Statement of Claim and in the Rejoinder:

- "i. *Declaring that the Claimant's requests are inadmissible or, to the extent they are admissible, dismissing the Claimant's requests for relief as unfounded; and*
- ii. *Ordering the Claimant to pay all the arbitration costs and all of the costs*

incurred by the IOC in connection with the present arbitration proceedings”.

66. In support of its position, the Second Respondent submits the following:

On admissibility:

- a. The Claimant’s claim is inadmissible because she did not (i) exhaust legal remedies and (ii) appeal within the applicable 21-day time limit.
- b. With regard to the exhaustion of legal remedies, this is a requirement under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes. Article 18 provides that disputes shall be resolved *“in first instance”* by the IBSF Appeals Tribunal before being brought before CAS and Article 5 reiterates the fundamental obligation of exhaustion of internal remedies by specifically referring to the requirement to *“use the appropriate IBSF appeal and dispute resolution channels”* and specifying that CAS *“will be the final arbitrator of any dispute”*. The requirement to exhaust internal remedies applies to all CAS proceedings in which a party is challenging a decision rendered by a Swiss association, whether the challenge has been (correctly) brought under the CAS Appeals proceedings or (incorrectly) brought under the CAS Ordinary Proceedings.
- c. As to the 21-day time limit, Claimant seeks to circumvent it by purporting her case to be of an “ordinary” nature. The fact

that the CAS Court Office assigned the present proceeding to the CAS Ordinary Division does not prove that there was no appealable decision triggering the limited appeal window. The inability under Article S20 of the CAS Code to challenge this assignment is irrelevant since the allocation is a mere administrative action without any legal consequences apart from defining the applicable arbitration rules.

On the merits:

- d. The reason that the Claimant did not compete in the OWG 2022 is because her sporting results were not good enough and, accordingly, her NOC did not meet the qualification criteria for participation therein. There was no “discrimination”, let alone willful discrimination, based on gender or otherwise against the Claimant. From a legal perspective, the fact that the OWG 2022 do not provide the same number of quotas places for male and female bobsledders is not an unlawful discrimination based on gender.
- e. A fair reading of the IBSF documents related to the proposals for women’s monobob and 4-woman bobsleigh shows that the exchanges of views within the WWG were due to legitimate considerations about the best way to promote women bobsled as an important part of the development of the sport as a

whole and that the goal was certainly not to preserve most of the places for men.

- f.* The IOC strives to achieve gender equality in athlete quotas and medal events at the Olympic Games, but there is no enforceable obligation to do so – and it is a goal for the Olympic Games as a whole, not necessarily the immediate goal for each sport, let alone discipline. Nevertheless, taking guidance from the UN Convention on the Elimination of All Forms of Discrimination Against Women, the IOC has achieved a level of gender equality at the Olympic Games that exceeds that of many other fields of society. Indeed, the IOC has achieved full gender equality with respect to the total number of athlete quotas and the total number of medal events at the impending Olympic Summer Games in Paris 2024. As for the OWG, which covers sports like bobsleigh that, traditionally, have been predominantly if not exclusively practiced by men, the IOC has made significant strides towards full gender equality and the OWG 2026 will see a total number of medal events of 54 for men and 50 for women and a total number of athlete quotas at 1,538 for men and 1,362 for women. This is a 47% total quota spots for women and a steady increase from past OWGs (40% in 2014, 41% in 2018, 45% in 2022). As for bobsleigh specifically, it is remarkable that only 20 years after its first time in

the OWG, it already has an equal number of medal events between men and women and that, at the OWG 2026, there will be a proportionally equal number of quota places for men and women.

- g.* The Claimant does not have a legal “right” to participate in the Olympic Games. Even assuming her sporting results were good enough to earn a quota place for her NOC, the NOC would have been free to choose a different athlete and would not have been obliged to select the Claimant.
- h.* The Claimant’s case is based on the simplistic assumption that she suffered the same kind of discrimination as the athletes in the *Dutee Chand* and *Semenya* cases. Unlike in the present case, in *Dutee Chand* and *Semenya* women athletes were objectively (and admittedly so by the IAAF) discriminated against compared to other women athletes because of their physiological characteristics. In those cases, the panels were concerned with the narrow, and entirely different, question of the “*conflicting rights concerning the rights of female athletes who do, and do not, have DSD [differences of sex developments]*”. In this case, contrary to *Chand* or *Semenya*, the Claimant has entirely failed to prove that there is any discrimination. Indeed, the Claimant has not shown that she has been treated differently than a male athlete in a similar or like circumstance. There is in fact not

even a comparator for discrimination since monobob is an event that exists and was created only for female athletes.

- i. The Claimant has failed to show that any of the following legal instrument provide her with an actionable right for gender discrimination:
 - i. The Fundamental Principles nos. 4 and 6 of Olympism set out in the Olympic Charter: The principles do not specifically guarantee female bobsleigh athletes a proportional quota of spots at the Olympics. Furthermore, the IOC's principles do not explicitly state participation in the Olympics as a guaranteed right. The Claimant's claim that she was discriminated against in the "possibility of practicing sport" is unfounded since the qualification system does not hinder her from practicing bobsleigh.
 - ii. The ECHR: Protocol no. 12 of the ECHR is not applicable and does not form part of Swiss international public policy because Switzerland has neither signed nor ratified it. As for Article 14 of the ECHR, it is not a stand-alone guarantee, but one of "ancillary nature", needing to be combined with another provision of the ECHR. The Claimant

invokes Article 8 of the ECHR, arguing that she suffered unlawful discrimination hindering her right to private life within the meaning of Article 8 ECHR, as it encompasses her right to exercise her profession by participating in the Olympic Games; however, this argument is meritless because professional activities like sports fall within Article 8 ECHR only if they are relevant for private and family life and under very specific conditions. The Claimant has failed to prove how the Qualification System directly affected her right to respect for private life. She has not been restricted access to her profession as such (as the Qualification System does not control access to a profession, but rather sets the preconditions to compete in a selected group at a specific sporting event). Furthermore, for a breach of Article 8, the ECtHR requires that the consequences arising from a certain measure for the applicant's private life must be very serious (so-called consequence-based approach) or that the underlying reasons of the measures are very serious (reasons-based approach). Unlike Ms. Semenya, the Claimant is not being excluded from her

profession, so there is no consequence-based breach. And there is no allegation, let alone evidence, of improper purposes being pursued in the adoption of the Qualification Standard so there is no reasons-based breach.

iii. Swiss international public policy: Claimant does not provide any meaningful discussion of what aspect of the notion of public policy is at stake in the present case. The fact that protection of women's rights and gender equality features amongst the priorities of Swiss policy does not mean that an arbitral award upholding the disputed qualification system would be against public policy within the meaning of Article 190(2)(e) PILA. As to the contention that Article 14 of the ECHR as well as Article 1 of the Protocol No. 12 to the ECHR provide the proper legal basis for the prohibition of gender discrimination in Swiss international public policy, it is conceptually wrong.

iv. Swiss domestic law: Articles 8(2) and 8(3) of the Swiss Constitution are inapplicable because they do not have horizontal effect. As for the Swiss Gender Equality Act, it applies in the context of employment relationships only and the

Claimant is not an employee of the IBSF or IOC.

v. EU law: EU law is not applicable by virtue of Article 19 PILA. Switzerland not being a member of the EU and the law applicable to the merits not being the law of an EU Member State, EU law can be "taken into consideration" by an arbitral tribunal seated in Switzerland only through application by analogy of the requirements of Article 19 PILA. The CAS has taken into consideration mandatory rules of EU law which are not part of the *lex causae* – here Swiss law – under Article 19 PILA but only when three requirements are met. However, these requirements are not met here. The Claimant has failed to show that EU law "wants" to apply to the present dispute, that there exists a close connection between EU law and the present dispute, and that there exists legitimate and clearly preponderant interest to the application of EU law and the present dispute. Even if EU law applied, the Claimant failed to establish any relevant discrimination under EU law.

j. As to damages, Claimant has failed to show the existence of an

unlawful act, a causality link between the alleged damage and the alleged wrongdoing, or any recoverable damages as they are speculative in nature. No moral damages are due because no there is no severe illicit breach of the Claimant's personality rights and the loss in social media growth and decrease in speaking engagements does not prove reputational damages.

- k. As to Claimant's requests for relief, (i) Request no. 3 is inadmissible because it is declaratory, premature and moot and, furthermore, upholding this claim would result in the CAS exceeding its judicial function (the CAS cannot be expected to legislate in an arbitration award prospective matters that are inherently reserved to the autonomy of the IBSF and IOC); and (ii) Request no. 5 should be dismissed because it is totally unspecified – an award rendered based on a “catch-all” prayer for relief or an “indeterminate request” risks being set aside by the Swiss Federal Tribunal for violation of Respondents' right to be heard.

V. JURISDICTION

67. In her Request for Arbitration dated 8 March 2022, the Claimant bases the jurisdiction of the CAS on Section 5 of the IBSF Code of Conduct for Athletes, with respect to the IBSF, and on Rule 61 of the Olympic Charter, with respect to the IOC.

68. The IBSF Code of Conduct for Athletes (the “Code of Conduct”), which must be signed for acceptance by all athletes wishing to obtain an IBSF license and compete or train in IBSF events, was signed by the Claimant on 15 September 2021. Section 5 of the Code of Conduct reads as follows:

“If a dispute arises between the IBSF and me, or any third party involved in bobsleigh or skeleton, I will use the appropriate IBSF appeal and dispute resolution channels, and I acknowledge that ultimately Swiss law and the Court of Arbitration for Sport CAS in Lausanne, Switzerland, will be the final arbitrator of any dispute”.

69. The present dispute arose between an athlete (the Claimant) who, by means of her signature, accepted the Code of Conduct and the sports organization which adopted and published the Code of Conduct (the First Respondent). CAS is indicated in Section 5 thereof as the “*final arbitrator of any dispute*”. Moreover, Section 1 of the same Code of Conduct provides that the athletes who sign such document agree to submit to the IBSF's “*rules, regulations and procedures and to the jurisdiction of the bodies which are in charge of applying them*”. The Panel is thus satisfied that the Code of Conduct provides a legal basis to retain jurisdiction over this case with respect to the dispute between the Claimant and the First Respondent, the IBSF.

70. In turn, Rule 61 of the Olympic Charter reads as follows:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of

Arbitration for Sport in accordance with the Code of Sports-Related Arbitration”.

71. The present dispute concerns the Qualification System for the OWG 2022; therefore, the Panel is satisfied that the dispute is “in connection with” the Olympic Games and that the requirement under Rule 61 of the Olympic Charter is thus met, providing jurisdiction with respect to the dispute between the Claimant and the Second Respondent, the IOC.
72. In their respective Answers to the Request for Arbitration, dated 23 and 27 May 2022, the IBSF “*acknowledges the jurisdiction of the CAS*” and the IOC “*confirms that it agrees to CAS jurisdiction and does not bring any plea of lack of jurisdiction within the meaning of Article 186(2) of the Swiss Federal Act on Private International Law*”.
73. Furthermore, the Claimant and both Respondents confirmed the jurisdiction of the CAS with their respective signature of the Order of Procedure.
74. Therefore, the Panel holds that it has jurisdiction to adjudicate the present matter.

VI. APPLICABLE LAW

75. Article 187.1 of the Swiss Federal Private International Law Act (“PILA”), applicable to the present arbitration because the Claimant has never had her domicile or her habitual residence in Switzerland (see Article 176.1. PILA), provides that the “*arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules*

of law with which the case has the closest connection”.

76. By initiating an arbitration before the CAS and by signing the Order of Procedure, the Parties accepted the application of the CAS Code, whose Article R45 provides that the “*Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono*”. The reference to the “rules of law” (mirroring the language of Article 187.1 PILA), as commonly understood in the Swiss legal community, allows the parties to choose and apply not only State laws but also private sets of rules.
77. Indeed, the Parties have chosen as applicable rules of law in this arbitration the various regulations of the IBSF and Swiss law, as well as the Olympic Charter. As a matter of fact, both the Claimant and the Respondents, throughout these arbitration proceedings, have made reference to and accepted as applicable to this dispute the IBSF rules and Swiss law, as well as the Olympic Charter.
78. Pursuant to Article 7.1 of the IBSF Statutes, “*Members and their individual members are subject to and must comply with the IBSF Statutes, all IBSF Rules and Regulations, the IBSF Anti-Doping Rules, the IBSF Code of Ethics, all relevant Codes of Conduct and to the decisions taken by the Congress and/or the IBSF Executive Committee*”. This provision applies to the Claimant as an individual member of the Bobsled & Skeleton Federation of Nigeria (the “Nigerian Federation”), which is a member of the IBSF. The Claimant must also be considered,

according to the constant jurisprudence of the Swiss Supreme Court (the “Federal Tribunal”), as an indirect member of the IBSF.

79. Furthermore, the Claimant has agreed to Section 1 of the Code of Conduct (which she signed on 15 September 2021). That provision reads: *“I am fully aware, conscious and understand and accept all IBSF Rules and the international rules that IBSF fully adheres to. I accept that my participation at any event which is part of the IBSF calendar is subject to my acceptance of all IBSF rules applicable in connection with such event. I therefore agree to be submitted to such rules, regulations and procedures and to the jurisdiction of the bodies which are in charge of applying them”*. Moreover, Section 5 of the same Code of Conduct makes an express reference to the application of “*Swiss law*” to resolve disputes between an athlete and the IBSF (see *supra*, para. 68).

80. In light of the aforementioned provisions, and as is undisputed by the Parties, the applicable rules of law are the IBSF rules and Swiss law, as well as the Olympic Charter.

VII. ADMISSIBILITY

81. To summarize, the Claimant argues that she has properly brought forward an ordinary arbitration as she has not challenged any decision of the IBSF, but rather filed a tort and damages claim against the federation. As such, she argues that she had no duty to exhaust internal remedies before going before the CAS (and even if she did, the IBSF has waived that requirement) and the only applicable time limit to file her claim is the 3-year limit for torts under Article 60 SCO with which she

complied (for a more detailed exposition of the Claimant’s position on admissibility see *supra* para. 90).

82. The Respondents, on the other hand, argue that the claim is inadmissible because the Claimant has failed to satisfy her pre-arbitration conditions of exhausting legal remedies before the IBSF and filing the appeal within 21-days of the challenged decision of 24 January 2022 (for a more detailed exposition of the Respondents’ position on admissibility see *supra* paras. 64 and 66).

83. Based on the Parties’ disagreement, the Panel, to determine the admissibility of the Claimant’s claims, must decide the following issues:

- (A) whether the exhaustion of legal remedies and time limit for appeals are admissibility requirements;
- (B) what is the consequence, if any, of the CAS Court Office’s designation of a case as ordinary or appellate;
- (C) what is the nature of the Claimant’s claims and whether there was an appealable decision;
- (D) whether the Claimant had a legal interest to challenge any decision of the IBSF;
- (E) whether the Claimant was required to exhaust legal remedies;
- (F) whether the IBSF waived the Claimant’s requirement to exhaust legal remedies and, if so, what are the consequences;

- (G) what was the time limit for the Claimant to file her claim, if any; and
- (H) whether the third, fourth and fifth Claimant's requests for relief are admissible.
84. The Panel will address these questions separately in the sub-sections to follow.
- A. Exhaustion of internal remedies and time limit to appeal as admissibility issues**
85. As is common ground between the Parties, the exhaustion of internal remedies is an admissibility requirement under CAS jurisprudence and Swiss law, not a jurisdictional one; see the following judgments by the Federal Tribunal ("SFT"), i.e. the Swiss supreme court: ATF 147 III 500, 4A_612/2020, para. 5.4; 4A_682/2012, at para 4.4.3.2 *in fine*; ATF 85 II 525, at para. 2. Furthermore, the Panel notes that, under Swiss law, admissibility issues such as the exhaustion of internal legal remedies must be addressed *ex officio* by judges or arbitrators, even if parties do not raise them in their submissions or, *a fortiori*, if they raise them at a late stage of the proceedings (SFT Judgment ATF 85 II 525). In fact, while the IBSF since the beginning of the case has requested the CAS to dismiss the Claimant's requests "*to the extent they are admissible*" (IBSF's Answer to the Request for Arbitration, page 2), the specific issue of exhaustion of internal remedies was first raised in the IOC's Rejoinder (at paras. 58-67) and then discussed by the Parties during the hearing and, prompted by the Panel, within the post-hearing briefs. Therefore, the Panel must assess whether the Claimant exhausted all legal remedies within the IBSF before taking her case to CAS.
86. With regard to the time limit to appeal, this is also undisputedly an admissibility requirement under CAS jurisprudence and Swiss law (see e.g. SFT 4A_2/2023, para. 3.3) when a Swiss association's decision is challenged by one of its direct or indirect members. Article 75 SCC provides for a time limit of one month to challenge a decision of a Swiss association; however, if the association has inserted an arbitration clause in its rules, the time limit is that provided by the arbitration clause or the applicable arbitration rules (as is the case of the CAS Code). The Panel notes that both Respondents raised this issue in their respective answer briefs and, accordingly, the Panel will also address whether the Claimant had a time limit within which to file her claim and, if so, whether she complied with it.
- B. Effect of the CAS Court Office's designation of a case as ordinary or appellate**
87. The Claimant argues that this is an ordinary arbitration, that the CAS Court Office correctly designated it as such, and that the CAS Court Office's assignment can no longer be challenged under Article R20 of the CAS Code. In support, the Claimant invokes a CAS award which stated that "*the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard the arguments put forward by the parties with respect to the characterization of*

this arbitration as an ‘appeal’ or an ‘ordinary’ arbitration” (CAS 2004/A/748).

88. The Panel finds that the Claimant has misconstrued the quoted CAS award. To clarify, the CAS Court Office designating the case as an ordinary arbitration merely defines the procedural framework within which the case will be administered, i.e. it establishes the set of CAS Code provisions applicable to the CAS proceedings. However, the designation assigned by the CAS Court Office may not alter the inherent nature of a case. It does not affect whether in substance a case is truly ordinary or appellate and, in turn, what requirements of admissibility are applicable (in particular, whether the time limit to file a claim provided by the CAS Code for appeal procedures is applicable). Precisely for this reason, the assignment of a case to one or the other CAS Division has been deemed in CAS 2004/A/748 as “administrative in nature” and not requiring any arguments, reasons or allowing appeals – because it does not change substantively what type of case truly it is.

89. If one were to accept that the CAS Court Office’s assignment of a case to the ordinary or appellate division – which is a mere administrative deed – may fundamentally alter the nature of the case, it would open the door to abuse by the parties to manipulate the procedural designation of a case. That is, a party that has missed the deadline to appeal against a decision would attempt to circumvent the appeal deadline (in most cases 21 days) by filing its appellate case in the guise of an ordinary claim inserted in a request

for arbitration, in the hopes that the CAS Court Office would simply characterize the case as “ordinary” under the CAS Code, not realizing – due to lack of information, time pressure, and/or a claimant’s disguised presentation of the issues – that the claimant is actually challenging a decision and, thus, in truth and substance the case should have been filed by the claimant through a statement of appeal and treated by the Court Office as an appeal procedure.

90. The Panel is of the view that the power to characterize a given CAS case as substantively ordinary or appellate, and the related responsibility, must logically lie with those who are appointed to adjudicate the case (the arbitrators) and not with those who are merely tasked to oversee the arbitration proceedings and take care of its organizational and administrative aspects (the CAS Court Office). This view is corroborated, for example, by the case CAS 2007/O/1237 (award on jurisdiction), where the panel had no hesitation in discussing and determining whether the case was substantively ordinary or appellate, regardless of the CAS Court Office’s administrative characterization of the case.

91. The Panel thus holds that, even though the CAS Court Office has designated the present case as an “ordinary” arbitration under the CAS Code, this does not determine in a binding manner whether it is in substance an ordinary arbitration and not an appeal against a challengeable decision of the IBSF and IOC. The Panel must therefore determine what is the proper nature of the present case, looking in particular at the Claimant’s motions for

relief. For the sake of clarity, the Panel does not consider its determination of this issue to be a challenge to the CAS Court Office's assignment of the present arbitration. The case was submitted as ordinary by Claimant and consequently designated as such by the CAS Court Office. Rather, this is an assessment of what is the true nature of the case and, in turn, what are the applicable admissibility requirements.

C. Nature of the claim and existence of a challengeable decision

92. The Claimant argues that the nature of the claim is ordinary – as designated by the CAS Court Office – because she does not challenge any decision of the IBSF, but rather presents an independent right of action – a tort and discrimination claim for damages against the federation based on Article 41 SCO, Articles 27 and 28 SCC and Articles 8 and 14 ECHR.
93. The Panel does not agree and, looking at the first and second of the Claimant's requests for relief (*supra* at para. 89), considers that the Claimant, by asking the Panel to determine that the Olympic Bobsleigh Qualification System is unlawful because it discriminates against women without any justification and that it is only because of this gender discrimination that Ms. Adeagbo was excluded from the OWG 2022, is actually challenging a "decision" – in fact, more than one decision – of the IBSF and the IOC within the meaning of CAS jurisprudence and Swiss law.
94. The concept of what constitutes an "appealable decision" has been well established in CAS jurisprudence (see

e.g. CAS 2005/A/659 at paras. 10-12, CAS 2004/A/899 at paras. 12-14, CAS 2014/A/3744-3766 at para. 191; CAS 2015/A/4266 at para. 51). A decision is a statement or communication issued by a sports organization in whatever type of document – letter, email, press release, etc. – that contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee or of other parties; it is a statement or communication characterized by an "*animus decidendi*", that is, by its objective content and irrespective of its form, it conveys the will of the sports organization to decide on a matter. In other words, and summarizing CAS jurisprudence, a statement or communication from a sports organization must be characterized as a true "decision", and thus deemed as appealable to the CAS, if the following cumulative criteria are met: (i) it is a unilateral act brought to the attention of one or more addressees, being irrelevant that such act is not formally characterized as a decision, (ii) it is not of a mere informative nature but denotes the sports organization's *animus decidendi* (i.e. will to decide on a matter), and (iii) it has a content which affects the legal situation of the addressee(s) or of other concerned parties.

95. Taking into consideration the above criteria, the Panel finds that the IBSF and the IOC made three separate decisions relevant to the present case (see *infra* at paras. 96-98). In this connection, preliminarily, the Panel must observe that, under Rule 40 of the Olympic Charter and the related Byelaw (see *supra* at para. 6), the rules governing the athletes' qualification for

and participation in the Olympic Games are, first, drafted by the IFs in close collaboration with the IOC and, then, adopted by the IFs with the indispensable IOC's approval. In fact, this is what occurred with the Qualifications System for the OWG 2022 bobsleigh competitions. As a consequence, the below-described decisions related to the Qualification System, although formally enacted and published by the IBSF, must be ascribed to both the IBSF and the IOC; this is corroborated by the fact that (i) the Claimant attributed all along the responsibility of her missed qualification to both the IBSF and the IOC – see e.g. the Claimant's witness statement of 26 August 2022 at para. 46: *"the Olympic Bobsleigh Qualification System created by the IBSF and the IOC denied me the opportunity to compete in the 2022 Olympic Winter Games"* – and (ii) the IOC did not argue that it lacked standing to be sued and never denied the shared parenthood with the IBSF of the Qualification System and related decisions.

96. The Panel finds that the first decision was the publication on the IBSF's website and communication by email to the NFs, on 5 December 2019, of the Qualification System, which had been shaped in collaboration with the IOC (the "First Decision"). The publication of the Qualification System qualifies as a decision because it was a unilateral act that was meant to definitively decide the qualification system for the OWG 2022, including the number of quota spots to be allocated to male and female bobsleigh athletes, and affected the legal situation of the addressees – the NOCs, the NFs

and, in turn, all concerned athletes of those committees and federations.

97. The second decision was the publication on the IBSF's website and communication by email to the NOCs and NFs, on 17 January 2022, of the ranking determining the allocation of the quota spots for monobob at the OWG 2022, which informed that, based on Claimant's ranking, the Nigerian NOC was second in line for a reallocation quota in case one of the qualifying NOCs decided to waive its spot (the "Second Decision"). This communication qualifies as a decision because, with it, the IBSF pronounced which NOCs qualified for the competition and offered them a spot. It affected the legal situation of the addressees – the NOCs, the NFs and, in turn, the concerned athletes of those NOCs and NFs – because it determined who qualified and who did not qualify for the Olympic bobsleigh competitions. Indeed, it left unqualified the Nigerian NOC and, in turn, the Nigerian bobsleigh athletes such as the Claimant.

98. This was followed up by a third and final decision made on 24 January 2022, when the IBSF published on its website and communicated by email to the NOCs and NFs the final quota allocation for monobob at the OWG 2022, indicating that the spot waived by the British NOC would be assigned to the first in line, the Italian NOC (the "Third Decision"). This communication qualifies as a decision because, with it, the IBSF definitively closed the list of qualified participants for the Olympic monobob competition, affecting the legal situation of those that qualified and

those, such as the Nigerian NOC and its monobob athletes (and thus the Claimant), who did not qualify.

99. The Panel observes that, pursuant to well-established CAS jurisprudence, the publication by an international federation of the list of eligible and/or qualified athletes or NFs or NOCs into a specific competition, in particular into the Olympic Games, has been considered a “decision” in the sense of the CAS Code. Indeed, there have been several cases administered by the CAS Appeals Division in relation to the qualification of athletes to various editions of the Olympic Games, in which an international federation’s publication of the results of the allocation or re-allocation of quota places for the Olympic Games was appealed by a non-qualified athlete (and/or her or his NF or NOC) and considered by the CAS arbitrators as an appealable decision. For example, the award CAS 2021/A/8140 so states at paras. 10-12: *“on 21 June 2021, the Respondent published the official list of countries that had qualified quota places in trampoline gymnastics for the 2020 Olympic Games for both men and women. Canada qualified two female quota places, yet no male quota for the 2020 Olympic Games in trampoline gymnastics. The dispute herein arose on the interpretation and application of such criteria as the Appellant contends that the Respondent incorrectly applied its Olympic Qualification System, which consequently did not lead to the qualification of Canadian athlete Jérémy Chartier under Criteria 3 of the Olympic Qualification System. In a correspondence dated 7 July 2021, and in accordance with Articles R47, R48, and R51 of the Code of the Court of Arbitration for Sport (the ‘Code’), the Appellant filed with the Court of Arbitration for Sport (the*

‘CAS’) a Statement of Appeal, serving as Appeal Brief, with respect to Respondent’s decision, published on 21 June 2021, ‘not to allocate Canada a quota place in men’s trampoline gymnastics’ (the ‘Appealed Decision’)” (paragraph numbers omitted, emphasis added). In a similar vein, with regard to the reallocation of quota places for the Olympic Games, see also CAS 2015/A/4222.

100. There also have been many cases administered by the CAS Ad Hoc Division at various editions of the Olympic Games in which an international federation’s publication of the results of the allocation or re-allocation of quota places for the Olympic Games was challenged by a non-qualified athlete (and/or its NF or NOC) and considered by the CAS panel as a challengeable decision (see for example CAS OG 02/002, CAS OG 02/005, TAS OG 12/008). In the case CAS OG 10/002, concerning the qualification system decided by the IBSF (known then as “FIBT”) for participation in bobsleigh competitions at the Vancouver OWG 2010, the Panel so stated: *“the allocation of a certain place in the Olympic competition is not based on a single decision, but on a whole series of decisions which built one upon another. In a first step, the FIBT has to decide which teams are allowed to enter or participate in the World Cup and other competitions for the purpose of qualification. In a further step, points have to be allocated to the various athletes in the competitions according to the nature of the competition and the competition results obtained by the athletes. Then, at the end of the qualification period, a ranking is compiled on the basis of the competition results. Finally, the Qualification System has to be applied to the FIBT ranking as it stands at the end of the qualification period. It is disputed between*

the Parties whether when appealing the last (and final) step of the qualification process the Panel's scope of review extends to all preceding steps or decisions" (paras. 12-14, paragraph numbers omitted, emphasis added).

101. Even at the very same OWG 2022, in two cases also dealing with IBSF competitions, the CAS panel clearly regarded the final allocation of Olympic quota places in skeleton and bobsleigh as "decisions" adopted by the IBSF:

- *"On 23 January 2022, the IBSF published the final allocation of 25 quota places for men's skeleton and which did not include a quota place for the OFI's athlete (the 'Decision')"* (CAS OG 22/005, para. 2.8).
- *"On 31 January 2022, the Applicant submitted a petition [...] against 'the decision of the IBSF Executive Committee awarding the France NOC the last 2-woman bobsleigh Olympic Qualification spot for the 2022 Beijing Winter Olympics'. The Athlete challenged the point ranking table and the allocation of the final 2-woman Bobsleigh quota spot to France instead of Jamaica"* (CAS OG 22/007, para. 14).

102. The Panel further observes that even the Claimant herself in some passages of her written submissions characterized the IBSF's determinations as to the Qualification System and to the allocation of quota spots as "decisions" and complained that the IBSF "excluded" her from the OWG 2022. For example, Claimant made reference to (i) *"the decision to deny Claimant a spot to compete at the 2022 Olympic Winter Games"*, and *"the decision*

to create a discriminatory System", (ii) the *"decision to perpetuate gender discrimination"*, and (iii) the *"discriminatory decision that cannot be justified by the IOC quota caps"* (respectively, pages 14, 15 and 18 of the Claimant's Reply, emphasis added), as well as to the fact that (iv) the Qualification System *"determined by the International Bobsleigh & Skeleton Federation (IBSF)' in collaboration with the International Olympic Committee (IOC)' used a discriminatory quota allocation scheme to qualify athletes for the bobsleigh sports"* with the result that she *"was narrowly excluded – by a single quota place – from the monobob event at the 2022 Olympic Winter Games"* (page 2 of the Claimant's Statement of Claim, emphasis added).

103. Although the Claimant presents her claim as a tort and discrimination claim for damages untied to any specific decision, in reality – with the first and second of her requests for relief – she is challenging the legality of the eligibility/qualification decisions of the IBSF (in collaboration with the IOC) with regard to the women's monobob competition at the OWG 2002, and the requested compensation for damages (included in the Claimant's fourth request for relief, *supra* at para. 89) is simply the consequence thereof. Before awarding damages to the Claimant, this Panel would necessarily have to find that the IBSF adopted and applied to the Claimant qualification rules that are unlawful under one of the various legal paradigms referred to by the Claimant (to be found in the IOC rules, ECHR, EU law and/or Swiss law). By challenging the legality of the mentioned decisions of the IBSF, the Claimant is trying to fulfil a necessary pre-condition to then be awarded compensation for damages.

104. Therefore, the Panel finds that the Claimant's first and second motions for relief (*supra* at para. 89) evidently have an appellate character and should have been submitted through a timely statement of appeal challenging (at least) the last of the relevant decisions, that is, the Third Decision communicated to the Claimant through her national federation on 24 January 2022 (see *supra* at para. 98). As to the request for damages included in the fourth Claimant's motion for relief, in principle this might be properly brought to the CAS as an ordinary arbitration. However, if the alleged damages were caused by one or more decisions of the Respondent (as occurs in the present case), the unlawfulness of those decisions must first be determined, otherwise a fundamental element under Swiss law to obtain compensation for damages is missing and the request for compensation becomes moot (see *infra* at para. 192).

D. Claimant's legal interest

105. According to well-established CAS jurisprudence only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision (see e.g. CAS 2014/A/3744 & 3766; CAS 2009/A/1880-1881, award of 1 June 2010, at para. 29).
106. The Panel does not consider that the Claimant already had a legal interest to challenge the First Decision of the IBSF because she could still qualify for OWG 2022. A challenge back on 5 December 2019 would have been premature as the Claimant had not yet lost the chance to compete in the

Olympic Games (had not yet been "excluded" from the OWG 2022, as she puts it in her submissions). On the other hand, the Claimant had clear and sufficient legal interest to challenge both the Second and Third Decisions, which determined her non-qualification to or "exclusion" from (as characterized by the Claimant) the OWG 2022. Pursuant to Article 18 of the IBSF Statutes, the Claimant should have appealed those decisions.

E. Requirement to exhaust internal remedies

107. The principle of exhaustion of internal remedies holds significant importance within the Swiss law of associations. At its core, exhaustion of legal remedies serves to uphold the freedom, autonomy and associational life of the relevant association, by granting it the right to make a first decision on matters concerning its own members and to internally redress any incorrect decision, thus limiting costly and time-consuming external litigation. In fact, exhaustion of legal remedies is mandatorily required under Swiss law. Swiss jurisprudence has established, as a general requirement (based on the principle of the freedom and autonomy of associations), that any direct or indirect member of an association must exhaust the internal remedies of the association before suing the association before a Swiss court (see ATF 118 II 12 dated 25 March 1992, citing the landmark judgment ATF 85 II 525 dated 10 December 1959). As arbitration is an alternative to State courts, this Swiss law requirement also applies to arbitration (if and when an association has in its statutes an arbitration clause).

108. Accordingly, international federations constituted as Swiss associations commonly shape their rules so as to require that their direct or indirect members – national federations, clubs and athletes – exhaust the available avenues for dispute resolution within the federation’s internal structures before seeking external intervention by an ordinary judge or, if there is a CAS arbitration clause, by a CAS panel. The CAS Code has duly recognized this principle of Swiss law and has inserted it in Article R47, within the context of the CAS appeals procedure. However, this principle would apply in CAS arbitration even without the express provision of Article R47 (that is, when sports federations based in Switzerland are concerned). In fact, even in the context of a case brought to CAS as an “ordinary” arbitration, it is required that internal remedies be exhausted, if any are available. This was stated in the case CAS 2003/O/466, where the panel analyzed whether the internal legal remedies had been exhausted, given that “*under Swiss case-law related to Art. 75 CC a member of an association is expected to exhaust any internal remedies prior to challenging a decision of the association before an outside tribunal*”, notwithstanding the fact that the “*present procedure is an ordinary arbitration procedure [and] the provisions of the CAS Code applicable to the ordinary arbitration procedure do not require explicitly the exhaustion of internal legal remedies prior to the CAS arbitration*”.
109. To determine whether there is a requirement to exhaust legal remedies in the present case, the Panel must first look at IBSF rules, given that all Parties agreed that the IBSF rules are applicable to the present case (see *supra*,

paras. 77-80). The Panel observes that the IBSF rules do require the exhaustion of internal remedies before submitting a case to the CAS. Indeed, pursuant to Article 18 of the IBSF Statutes, “*any dispute*” between the IBSF and an individual who is affiliated to a national federation must be filed with the IBSF Appeals Tribunal before appealing to the CAS:

“18.1 Any dispute arising between Members, or between one or more Members and the IBSF (including any dispute as to sanctions imposed by the Executive Committee), or between the IBSF and any individual or entity that is a member of or affiliated to a Member (each, a Dispute), shall be resolved exclusively by the means set out in this Article 18, to the exclusion of any other means. All of the aforementioned parties waive (to the fullest extent permitted under applicable law) any rights of recourse they might otherwise have to any court or other forum for resolution of such Disputes.

18.2 In the first instance, a Dispute shall be referred to the IBSF Appeals Tribunal for hearing and determination in a fair and impartial manner in accordance with these Statutes and the IBSF Appeals Tribunal Rules. [...].

18.3 Decisions of the IBSF Appeals Tribunal shall be final and binding on the parties, and may only be challenged by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland (CAS), which is independent of the IBSF and which will resolve the dispute definitively in accordance with the CAS Code of Sports-Related Arbitration. The time limit for filing the appeal against a decision of the IBSF Tribunal is twenty-one days after receipt of the decision” (emphasis added).

110. Section 5 of the IBSF Code of Conduct (quoted *supra* at para. 68), i.e. the provision invoked by the Claimant to establish CAS jurisdiction, also requires that an athlete first go through the internal remedies channel. Section 5 provides that if a dispute arises between an athlete and the IBSF, the athlete “*will use the appropriate IBSF appeal and dispute resolution channels*”, and only “*ultimately*” will go to the CAS that “*will be the final arbitrator of any dispute*”.
111. The Claimant argues that there is no requirement of exhaustion of legal remedies because no internal remedy existed at all or was of an illusory character. More specifically, the Claimant argues that Article 18 of the IBSF Statutes provides no internal procedure suitable for adjudication of a tort or damages claim and that, where no internal remedy is readily available, exhaustion is not required. The Panel finds, however, that an internal remedy did exist and was not illusory, as the IBSF internal dispute settlement system was readily available to the Claimant. Article 18 of the IBSF Statutes, combined with Section 5 of the Code of Conduct, is very clear in making reference to “*any dispute*” (thus including one that, besides challenging some IBSF decisions, encompassed a request for compensation) and in specifying that an athlete must submit its claim to the IBSF Appeals Tribunal “*to the exclusion of any other means*” before “*ultimately*” referring her or his case to the CAS. In fact, other parties that had not qualified to the OWG 2022 resorted to such IBSF internal remedy before lodging their complaint with the CAS (see CAS OG 22/003, CAS OG 22/005 and CAS OG 22/007). It can be noted, in particular, that with respect to the cases CAS OG 22/003 and CAS OG 22/007, the IBSF Appeals Tribunal was remarkably efficient as it rendered its decision, respectively, just one day and two days after receiving the athlete’s petition, so allowing a prompt appeal to the CAS Ad Hoc Division (see *infra* at para. 122).
112. Indeed, the Claimant was aware of the legal need for this procedural passage through the IBSF Appeals Tribunal, as she wrote the following in her email to the IBSF on 18 January 2022 (see *supra* at para. 35): “*From an athlete’s perspective, can you please let me know what steps I can take to also file a formal objection to this quota allocation selection? Stephen H. Hess is listed as the Chairman of the Appeals Tribunal and I would like to engage him to action a formal appeals process. Can you please provide his email address so I can reach out to him immediately?*” (emphasis added). The IBSF answered on the very same day advising the Claimant that there was “*always the possibility to go the legal way*” and that the “*way to contact Stephen Hess, is contacting the secretary general of the IBSF, they forward your mail*” (see *supra* at para. 36). On 2 February 2022, the Claimant expressed thanks for the information and wrote that she had “*no further questions at this time*” (see *supra* at para. 38). Unfortunately, the Claimant did not follow the course of action that had been confirmed as correct by the IBSF and did not lodge a complaint with the IBSF Appeals Tribunal prior to submitting her case to the CAS. So to speak, she did not “check the box” as she was required to do.
113. The Panel further observes that, with specific regard to the IOC, one could argue that no internal remedies are

provided by the IOC rules and that, therefore, no internal remedies should be exhausted vis-à-vis the IOC. However, no distinct decisions attributable only to the IOC have been brought to the attention of the Panel. The decisions that are at stake in this case are to be attributed, in terms of accountability, to both the IBSF and the IOC (see *supra* at para. 95), but they were ultimately adopted by the IBSF and must follow the procedural course provided by the IBSF rules, which, as acknowledged by all Parties, constitute the applicable law governing this case, complemented by Swiss law (see *supra* at paras. 75-80).

114. In light of the foregoing, the Panel finds that, regardless of the characterization of this arbitration as “ordinary” by the CAS Court Office, the Claimant was required to exhaust the available internal remedies by filing a claim with the IBSF Appeals Tribunal before referring her case to the CAS.

F. No waiver of exhaustion of legal remedies

115. The Claimant submits that the IBSF waived the requirement of exhaustion of legal remedies and that, accordingly, her claim is admissible. In the Claimant’s view, the IBSF waived the exhaustion of legal remedies requirement by not raising that objection in its Answer to the Request for Arbitration. The Claimant argues that any procedural objection is waived if not raised in a timely manner.
116. The Panel recognizes that an association may waive the requirement of the exhaustion of internal remedies prior to the appeal to the CAS. For

example, this occurred in the case CAS OG 22/005 at the Beijing OG, where the IBSF willingly waived this requirement because its internal Appeals Tribunal had not yet issued its decision under Article 18 of the IBSF Statutes (“*Even though the above-referenced Petition was still pending, to the extent no written decision had been delivered up before the hearing on the Application, in its written submissions and on the record at the hearing the IBSF waived the requirement under Article 1 of the CAS Ad Hoc Rules for the Applicant to have exhausted all the internal remedies available pursuant to the IBSF statutes*”).

117. In another Beijing case (CAS OG 22/004) where the IBSF was a respondent, the panel applied the following exception provided by Article 1 of the CAS Ad Hoc Rules: “[...] *In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to her/him pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective*”. Indeed, the CAS panel stated as follows: “*given the exceptional circumstances of the case, amplified by the pandemic context within which OWG Beijing 2022 are taking place, the need for the Athlete to fulfil several administrative and health-related formalities [...], the Panel accepts that the Applicants could reasonably not be expected to instigate proceedings before the IBSF Appeals Tribunal, obtain a decision and eventually file an application with the CAS Ad Hoc Division in due time for the appeal before the CAS to be effective*” (CAS OG 22/004,

- para. 65). This CAS panel also mentioned that “*the burden to prove the existence of exceptional circumstances justifying a depart [sic] from the principle of exhaustion lies on the applicant, which shall prove the ‘illusory character’ of the internal legal remedies*” (*id.*, para. 64), quoting the Commentary on the CAS Code authored by M. Reeb and D. Mavromati, who write – in reference to the appeals procedure under Article R47 of the CAS Code – that “*the exhaustion of legal remedies may be waived if the remedies do not exist or are illusory*” (para. 35).
118. The Panel also notes that the award CAS 2003/A/534 similarly held: “*The exhaustion of local remedies is one of the most established common rules in the international judicial process. It is compulsory even in the absence of a specific instrument. The rule is based on the principle that a local remedy is better than a more complex international judicial process and on the assumption that the rule of law is strictly upheld. Given these premises, the fulfilment of the prescription may be waived if the legal remedies are non-existent or illusory. In such cases, a litigant seeking to establish the existence of a fact bears the burden of proving the non-existence and illusory character of local remedies*” (para. 20, citations omitted).
 119. In light of the above, the question for the Panel is thus whether the IBSF waived said requirement in the present case and/or whether the Claimant has proven that the internal remedy had an illusory character.
 120. First, the Panel observes that there is no indication that the IBSF waived the requirement. Nor does the Panel agree that the internal remedy is non-existent and illusory in character so as to deem the requirement to exhaust it waived. Indeed, as explained above at para. 111, the Claimant had to take her case to the IBSF Appeals Tribunal since the pivotal issue of her case was, and is, the alleged illegality of the Olympic qualification decisions adopted by the IBSF (see *supra* at paras. 95-98) and, therefore, the internal remedy was existent and not illusory.
 121. Second, the Panel observes that under Swiss law, as already mentioned (*supra* at para. 85), admissibility issues such as the exhaustion of internal remedies must be addressed *ex officio* by judges or arbitrators even if parties do not raise them in their submissions or only raise them at a late stage of the proceedings; therefore, no waiver can be implied from the fact that the Respondents initially did not raise this issue (as mentioned, it was first raised in the IOC’s Rejoinder).
 122. Then, the Panel notes that, generally speaking, the exhaustion of legal remedies can be waived but only in truly exceptional circumstances – for instance, where the time necessary to exhaust internal remedies would make the appeal ineffective (see CAS OG 22/004, CAS OG 22/005 and CAS 2003/A/534). As such, a waiver may not, in the Panel’s view, be easily implied. In the present case, the Panel is of the view that Claimant had the time to attempt to exhaust the existing internal remedy, considering that on 18 January 2022 she received confirmation that her complaint had to be lodged with the IBSF Appeals Tribunal (see *supra* at para. 112) before going to the CAS. In fact, this is exactly what occurred in the CAS Olympic cases of the US skeleton athlete Megan

Henry (CAS OG 22/003), the Irish Bobsleigh & Skeleton Association or “IBSA” (CAS OG 22/005), and the Jamaican bobsleigh pilot Jazmine Fenlator-Victorian (CAS OG 22/007):

- CAS OG 22/003: Ms. Henry, seeking a quota place in the OWG 2022, challenged the skeleton equivalent of the Third Decision adopted by the IBSF (*supra* at para. 98), by (i) first petitioning on 24 January 2022 the IBSF Appeals Tribunal to select her for the open quota spot allocated for the women’s skeleton event, and (ii) then filing on 28 January 2022 an application with the CAS Ad Hoc Division, challenging the IBSF Appeals Tribunal’s decision of 25 January 2022 that had rejected her petition.
- CAS OG 22/005: The IBSA, also seeking a quota place in the OWG 2022, challenged the men’s skeleton equivalent of the Second Decision adopted by the IBSF (*supra* at para. 97) by (i) first petitioning on 22 January 2022 the IBSF Appeals Tribunal, arguing that the IBSF skeleton qualification system was arbitrary and caused gender discrimination having a disparate impact against male athletes from emerging nations with only one athlete, and (ii) then filing on 29 January 2022 an application with the CAS Ad Hoc Division, given that the IBSF Appeals Tribunal had not delivered any decision yet and the IBSA’s petition was still pending (and,

consequently, at the hearing the IBSF waived such requirement).

- CAS OG 22/007: Ms. Fenlator-Victorian, seeking a quota place in the OWG 2022, challenged the IBSF’s point ranking table published on 17 January 2022 and the related allocation of the final 2-woman bobsleigh quota spot to France instead of Jamaica by (i) first petitioning on 31 January 2022 the IBSF Appeals Tribunal, and (ii) then filing on 5 February 2022 an application with the CAS Ad Hoc Division, challenging the IBSF Appeals Tribunal’s decision of 2 February 2022 that had rejected her petition.

123. The Claimant argues that she was allowed to skip the procedural step of the IBSF Appeals Tribunal because the IBSF did not answer when her counsel sent on her behalf a letter to the IBSF and the IOC (*supra* at para. 40) to ask whether there was an internal IBSF procedure that should first be exhausted before filing a petition with the CAS. Even leaving aside the justification put forward by the IBSF that its personnel was at that time very busy with the ongoing OWG 2022, the Panel does not find this Claimant’s submission persuasive because Articles 18 of the IBSF Statutes and 5 of the Code of Conduct are very clear in requiring the previous exhaustion of internal remedies and they cannot be considered as virtually abolished because a letter asking about this matter was not answered (however deplorable it is that the letter remained unanswered), especially considering that (i) the Claimant already knew at

least as of 18 January 2022 (see *supra* at para 112) that she had to first file her complaint with the IBSF Appeals Tribunal, and (ii) other athletes or NFs wishing to challenge the Qualification System and related IBSF's decisions complied with said procedural requirement (see *supra* at para. 122).

124. The Panel, therefore, finds that the IBSF and the IOC never waived the requirement of exhaustion of internal remedies and rejects this Claimant's submission. Nor did the Claimant prove that the IBSF Appeals Tribunal was an illusory remedy; on the contrary, the fact that two other athletes wishing to contest the IBSF allocation of quota places did go to the IBSF Appeals Tribunal and quickly obtained a decision that they then challenged before the CAS (cases CAS OG 22/003 and OG 22/007) proves that the IBSF's internal remedy was existent and non-illusory.

G. Failure to submit the claim within the 21-day time limit

125. Even assuming *arguendo* that the requirement of exhaustion of internal remedies had been implicitly waived (*quod non*), it would not result in a waiver of the 21-day time limit to file an appeal. By waiving the exhaustion of legal remedies, the organization that adopted a decision simply waives the procedural passage through the internal remedy, meaning that the party challenging that decision is then allowed to take the case directly to the CAS. That party must still, however, comply with the time limit to appeal, which is a separate and independent requirement that the IBSF and IOC never waived. In fact, in the present

case, both the IBSF and the IOC did strongly argue in their Answers to the Statement of Claim that the Claimant had missed the deadline to appeal due to the late filing of her claim with the CAS.

126. According to Article 18 of the IBSF Statutes any appeal against a decision of the IBSF Appeals Tribunal shall be "*twenty-one days after receipt of the decision*". In the present case, however, there is no decision of the IBSF Appeals Tribunal because the Claimant did not internally challenge the qualification decisions of the IBSF. Therefore, the time limit of Article 18 of the IBSF Statutes must necessarily apply to the decision that has been challenged, that is (in the most favourable scenario for the Claimant) the Third Decision adopted on 24 January 2022 (*supra* at para 98).
127. Even if one were to consider that the time limit of Article 18 of the IBSF Statutes may not be applied when there is no decision of the IBSF Appeals Tribunal, Article R49 of the CAS Code provides for the same 21-day time limit in instances where the applicable statutes of the federation do not provide a time limit. Indeed, Article R49 of the CAS Code states: "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against*". So, even if Article 18 were inapplicable, as there is no other provision in the IBSF or IOC rules and regulations establishing a time limit to challenge an IBSF's or IOC's decision to the CAS, the time limit of Article R49 would apply.

128. The count of the 21-day deadline must necessarily start, at the latest, on the date of the decision (published on 24 January 2022) which left out the Claimant's NOC from those having the right to send an athlete to compete in the monobob event. Indeed, in the context of qualification for a competition, the essence of the 21-day time limit is to ensure timely submission of appeals from the date of the decision stating who is in and who is out, given that athletes need to swiftly know if they qualify for a competition or not. Even if the Claimant – as she argues – had the right to disregard the internal remedies process (*quod non*), the decision that triggered her right to appeal was the one by which she was left out from the OWG 2022. Therefore, the time limit to appeal started from the date of that decision (as said, in the most favourable scenario for the Claimant, the Third Decision adopted on 24 January 2022). The Panel rejects the Claimant's claim that the time limit started on 25 February 2022, 10 days from the letter of 15 February 2022 in which Claimant gave the IBSF and the IOC 10 days to confirm whether she was required to exhaust legal remedies, given that a party wishing to challenge a decision may not extend the time limit to appeal at will by sending a letter asking for an answer within a given deadline.
129. The Panel has already underlined that the last of the decisions taken by the IBSF on the eligibility/qualification of the Claimant – the Third Decision – was made on 24 January 2022 (*supra* at para 98). Therefore, the Claimant had until 14 February 2022 to file her appellate claim. However, she did not

challenge that decision until 8 March 2022. As a result, the Panel holds that her claim of an appellate nature is untimely and inadmissible.

H. Admissibility of the third and fifth Claimant's requests for relief

130. In her third motion for relief (quoted *supra* at para. 89), the Claimant asks the Panel to order the Respondents to enact non-discriminatory regulations for comparable male and female bobsleigh events "*on a going-forward basis*".
131. The Panel finds that, under Swiss law, this request for relief is inadmissible because an arbitral tribunal (or a judge for that matter) may not issue an order based on a wholly hypothetical scenario (that in the future the Respondents will unjustifiably discriminate against female bobsleigh athletes). If and when the Respondents adopt decisions or engage in conduct that the Claimant will deem to be illegally affecting her, she will be able to bring a legal action either before a State judge or, if there is a CAS arbitration clause, to the CAS. In any event, looking at the future, the qualification system for the OWG 2026 appears to be essentially compliant with the Claimant's requests to achieve gender balance, by even providing more spots to female bobsleigh pilots than to male bobsleigh pilots (see *supra* at para. 41 and *infra* at para. 143).
132. In her fifth motion for relief (quoted *supra* at para. 89), the Claimant requests the Panel to order "*any other relief*" that "*the CAS Tribunal shall deem appropriate*" to eliminate gender discrimination by Respondents.

133. The Panel finds that, under Swiss law, this type of vague “catch-all” motion for relief is too indeterminate to be admitted by an arbitral tribunal seated in Switzerland (see BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 4th ed., 2021, p. 438). In addition, to uphold such request would translate into the necessity for this Panel to make some policy choices and become a rule-maker for the sport of bobsleigh, something which clearly is foreign to the mandate of an arbitral tribunal. Even in circumstances where such motions for relief are admitted by some courts outside of Switzerland, it is not for the purposes of some vague proactive orders to be made by a tribunal but, for example, to cover any ancillary relief for which a basis has been made out and which could not be specifically detailed in the other prayers for relief.
134. Therefore, the Panel dismisses as inadmissible the third and fifth Claimant’s motions for relief.

VIII. MERITS

135. The Panel is of the view that, even if the Claimant’s claims were found to be admissible (*quod non*), it would reject them on the merits for the reasons to follow in the next subsections. While the Panel acknowledges and appreciates the Claimant’s efforts in advocating for gender equality and supports the broader mission of gender equality in sports, the Panel finds that in the particular circumstances of this case the Claimant has failed to prove any unlawful discrimination committed by the IBSF and/or the IOC against her or any

breach of the various legal sources invoked by the Claimant (the Olympic Charter, IBSF Statutes, IBSF Code of Ethics, Swiss law, Swiss international public policy, the ECHR or EU law). In this case, the issue of gender equality is as between male and female athletes. References to gender should be understood in this context.

A. The Olympic Charter and the 2020 Agenda

136. The Claimant submits that the Respondents have violated the Fundamental Principles of Olympism set forth in the Olympic Charter and the 2020 Agenda, which provide:
- Principle no. 4 of the Olympic Charter: “*The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play*”; and
 - Principle no. 6 of the Olympic Charter: “*The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as... sex...*”;
 - Recommendation 11 of the Olympic Agenda 2020: “*The IOC to work with the International Federations to achieve 50 per cent female participation in the Olympic Games and to stimulate women’s participation and involvement in sport by creating more participation opportunities at the Olympic Games*”.

137. While the Claimant acknowledges that the Fundamental Principles of Olympism do not guarantee a right to participate in the Olympic Games, she believes they do guarantee the right to have the “*possibility of practicing sport ... without discrimination*” and “*right to have the opportunity to qualify for the Olympics in a system free of gender discrimination*” and that the Respondents have violated said right with the Qualification System. The Claimant contends the Qualification System discriminated against female athletes, on the basis of gender, because it employed a quota allocation scheme that allocated disproportionately fewer quota places to women than to men in their respective bobsleigh events, without any justification. The Claimant relies on *Semenya* (CAS 2018/O/5794 & 5798) and *Chand* (CAS 2014/A/3759) in support of her claim that the Respondents violated the Fundamental Principles of Olympism, arguing that her case is analogous with the discrimination found in those cases. The Claimant believes that, as in those cases, her case “*involves mandated differential treatment between male and female athletes whereby limits are placed on the number of Olympic quota places available to women that are not similarly imposed on men*”.
138. The Panel accepts that, as set out in the Fundamental Principles of Olympism, the practice of sport is indeed a human right. In the Panel’s view, the Respondents have not, however, breached this aspect of the Olympic Charter based on the particular facts and circumstances of this case. The Claimant has not been denied the right to practice the sport of bobsleigh or to compete in IBSF and Olympic competitions and, for the reasons discussed below, the Qualification System did not constitute unlawful gender discrimination.
139. The Claimant notes that the Qualification System allocated fewer quota places to women than men. The Panel does not agree, however, that such disparity amounted to unlawful gender discrimination under the Olympic Charter, because the Qualification System represented a good faith, ongoing, and ultimately successful effort to improve gender parity, which took into account matters of practical implementation. The Olympic Charter combined with the 2020 Agenda – the latter being a policy plan rather than a legally binding instrument – did not promise female bobsleigh athletes the same number of quota as men at the Olympic Games. Together the two instruments only set out the IOC’s objective to foster gender equality and proceed towards gender parity in the whole of the Olympic Games – that is, considering all Olympic sports together, given that, as commonly known, there are also Olympic sports having a prevalent female participation (e.g. artistic swimming) – but did not establish a hard rule or obligation to reach gender parity immediately and in every single Olympic competition or event. If anything, the IOC pledged to pursue, together with all international federations, a *process* towards gender parity in athletes’ Olympic participation (and, as was publicly announced, the total number of male and female athletes competing in the 2024 Paris Olympics is the same).

140. The Panel believes that the IBSF and IOC have achieved this objective, set out in the Olympic Charter and the 2020 Agenda, of working towards gender parity. The Panel takes note of the efforts made by them towards that goal – the IBSF and IOC analyzed in depth the situation of how to promote gender balance in bobsleigh and skeleton, even introducing the WWG to advance those initiatives – and pushed in that direction. Indeed, the Panel observes that the IBSF, with the explicit purpose of pursuing gender parity, presented both the option of the 4-woman bobsleigh and the option of the monobob to the IOC, noting the benefits and drawbacks of each type of competition and that, ultimately, it was decided in agreement with the IOC that monobob was the better option to advance gender equality while taking into account the practicalities of the sport. The Panel finds that the IBSF and IOC conducted a *bona fide* process to determine what female event to add at the OWG 2022.
141. The Panel does not find any evidence of “wilful discrimination” or of a prioritization by the IBSF and IOC to maintain male athlete quotas at the expense of advancing opportunities for women and achieving gender balance. While reports from the WWG acknowledge the importance of promoting equality and increasing female participation in bobsleigh, merely recognizing the benefits of a proposed 4-woman bobsleigh competition does not necessitate its adoption over monobob. As is evident from the record, there were legitimate concerns about the viability of adding the 4-woman bobsleigh to the OWG 2022, among them, (i) the major cost

of the 4-woman sled – a 4-woman sled costs about three or four times more than a monobob – and the related risk of having only a few NOCs (those of the countries that are traditionally powerful in bobsleigh) that would ultimately participate in the competition and invest in a 4-woman program, (ii) the lack of an existing program (unlike the monobob which already had a program due to the inclusion of said discipline in the 2020 Youth Olympic Games), (iii) the number of female athletes available and interested in competing in the new discipline, and (iv) the general uncertainty on whether it would be successful. Conversely, the IBSF and IOC expressed confidence in the successful implementation of the monobob and they were satisfied that it would bring gender equality in the number of medal events in the OWG 2022, thereby taking a fundamental step towards full gender balance. It is no secret that throughout the process the WWG did, in fact, consider as objectives to “*simultaneously maintain at least the same number of men’s nations at OWG (to avoid a negative impact on men’s bobsleigh and skeleton)*” and that, at one point, the WWG considered requesting additional quota spots from the IOC to “*avoid significant damage to bobsleigh*” as “*reducing men’s quota dramatically could devastate the whole sport*”. The Panel does not, however, find this to be evidence of discrimination. The WWG simply and correctly sought to pursue the process advocated by the IOC and promote gender equality while at the same time ensuring the financial stability and popularity of the sport. Indeed, it must be underlined that women competed in bobsleigh for the first time at the OWG 2002 in Salt

Lake City and, more than twenty years later, the number of male athletes licensed by the IBSF to compete in bobsleigh is still much higher than the number of female athletes (in the season prior to the OWG 2022, out of 851 annual bobsleigh licenses issued by the IBSF, 612 were issued to men and 235 to women).

142. The Panel considers that the introduction of the monobob in the OWG 2022 was a considerable step towards achieving gender balance, as it increased the number of events and medals in bobsleigh available for women to equal those available to men (2 each). It also increased the total number of women quota spots to 46 from the 40 allotted in 2018 and the number of female pilots to 26 from the 20 competing in 2018. Importantly, at the OWG 2022, 26 female pilots competed in two female bobsleigh events, while 31 male pilots competed in two male bobsleigh events; accordingly, the percentage of spots for female bobsleigh pilots (as the Claimant is) out of the total of pilots present at the OWG 2022 was of 45,6%, thus getting quite close to parity. In short, the OWG 2022 marked a clear improvement from the OWG 2018 for female bobsleigh athletes, in particular for pilots (and, as was mentioned at the hearing, pilots are the most technically skilled and, thus, the most relevant athletes in the sport of bobsleigh, compared to the brakemen and pushers). Considering that, prior to the OWG 2022, the total number of male pilots competing internationally in bobsleigh was still considerably higher than the total number of female pilots (83 vis-à-vis 56), the improvement was remarkable.

143. Moreover, the Panel notes that the introduction of the female monobob – and thus the achieved gender parity in medal events – was only a step in the process and that, thereafter, the IBSF and IOC have continued to move even further towards gender balance. In fact, the Panel observes that for the OWG 2026, as acknowledged at the hearing by the Claimant, there will be a more balanced situation in terms of teams and sleds and pilots. The Panel notes that there is still a difference in the total quota spots for male and female bobsleigh athletes but this is attributable to the 4-men bobsleigh which requires more athletes, but that in terms of sleds and pilots the Respondents have essentially reached gender balance. In the OWG 2026, the men will have 28 sleds in each of the 4-men bobsleigh and the 2-men bobsleigh, with the requirement that they compete in both events, meaning that there will be a total of 28 male pilots. The women will have 25 sleds in each of the 2-woman bobsleigh and the monobob, and will have a total of 31 pilots, 25 pilots in the 2-woman bobsleigh and 6 female pilots in the monobob (with the other 19 monobob sleds piloted from women competing also in the 2-woman bobsleigh). That is, for the first time in the history of bobsleigh, there will be more women as bobsleigh pilots than men at the OWG. In the Panel's view, the fact that the IBSF and IOC were able to reach some gender balance in the OWG 2026 – notwithstanding the fact that (i) traditionally (and until not so long ago) bobsleigh was a men-only sport, and (ii) still now the gender of bobsleigh pilots competing at international level is predominantly male – is not proof of discrimination in the previous edition

of the competition, since, as stated above, it was a process that the IBSF and IOC committed to do, and this process was conducted *bona fide* and with the aim of achieving gender balance while considering various practical aspects of the sport.

144. Additionally, in the Panel's view, the fact that the IBSF was able to reach full gender balance in the skeleton competition with 25 quotas for each male and female, and that the IOC saw 10 out of 15 reach equal gender numbers, does not mean that the IBSF and IOC did not meet their objectives under the Olympic Charter to work towards equality. This is because the process of achieving such parity across different sports and disciplines varies due to factors such as historical participation rates, infrastructure development, and overall athlete interest and talent pool. Each sport faces unique challenges and considerations in moving towards gender balance, and while progress has been made in some areas, it does not necessarily require parallel and uniform advancements in all sporting disciplines.

145. As for the Claimant's reliance on *Semenya* and *Chand* in support of her claim that the IBSF and IOC violated of the Olympic Charter, the Panel finds that it is misplaced. In those cases, the athletes were prevented from participating in their elected competitions based on biological factors, whereas in the Claimant's case, the IBSF and IOC have simply adopted a qualification system setting out the criteria for qualifying to the 2022 OWG. The Claimant was not prevented from participating in

bobsleigh and had an opportunity to qualify for the OWG through the Qualification System, which, as stated above, the Panel does not find to have breached the Olympic Charter's principle against discrimination.

146. In light of the foregoing, the Panel finds that the Claimant's claim for discrimination based on the IBSF and IOC's alleged breach of the Olympic Charter and the 2020 Agenda is unfounded.

B. IBSF Statutes and Code of Ethics

147. The Claimant submits that the Respondents violated Article 1 of the IBSF Statutes and Article 4 of the Code of Ethics. Those provisions state the following:

- Article 1 of the IBSF Statutes:
"The IBSF does not allow any kind of discrimination on improper grounds, in particular discrimination on grounds of... sex ..."
- Article 4 of the Code of Ethics:
"Individual dignity must always be safeguarded, and no form of discrimination or harassment shall be permitted. ... Likewise, in the preparation of elections or appointments, no discrimination of any type shall be tolerated. The same principle must apply to any sporting regulation"

148. As with the Olympic Charter, the Panel does not consider that either of these provisions were breached by the Respondents (apart from the fact that the IOC is not legally bound by the IBSF Statutes). Article 1 of the IBSF Statutes prohibits discrimination on

improper grounds, including sex. However, for the reasons stated in the previous sub-section, the Panel finds that the allocation of quota spots by the IBSF and IOC was not discriminatory under the facts and circumstances of this case; rather, it was a result of a legitimate process aimed at promoting gender balance in bobsleigh while considering the actual situation and practicalities of the sport. Similarly, Article 4 of the Code of Ethics emphasizes safeguarding individual dignity and prohibiting discrimination or harassment. The Panel finds no evidence to suggest that the actions of the IBSF and IOC violated this provision.

149. The Panel thus dismisses the Claimant's claim for discrimination based on an alleged violation of Article 1 of the IBSF Statutes and Article 4 of the Code of Ethics.

C. Swiss public policy

150. The Claimant submits that CAS is bound by Article 190.2(e) PILA to apply Swiss international public policy to her case. This, as per the Claimant's assertion, encompasses the general principle of equality between women and men and the prohibition of gender-based discrimination. According to the Claimant, this general principle emanates from European and universal laws including Article 14 ECHR in combination with Article 8 ECHR (as well as Article 1 of Protocol 12 of the ECHR), Article 23 of the Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental Rights"), Articles 1 and 13(c) of the UN Convention on the Elimination of All Forms of

Discrimination Against Women of 1979 ("CEDAW Convention") and Articles 1 and 2 of the Universal Declaration of Human Rights adopted in 1948 by the UN General Assembly ("UN Universal Declaration of Human Rights").

151. The Panel recognizes that, under Article 190.2(e) PILA, it has a duty to ensure that it issues an award that does not run counter to public policy and risk being overturned by the SFT. The Panel must ensure that its decision aligns with the fundamental values and legal principles that underpin Swiss public policy and, accordingly, will consider whether the ECHR, EU Charter of Fundamental Rights, CEDAW Convention or UN Universal Declaration of Human Rights provide support for the Claimant's claim of unlawful gender-based discrimination.

i) **ECHR**

152. The Claimant argues that the principles of equality between men and women and protection against gender discrimination are enshrined in Article 14 ECHR, which reads in the relevant part: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex [...]*". The Panel notes that the Claimant also invokes Protocol no. 12 to the ECHR which extends the prohibition of discrimination of Article 14 ECHR to all rights protected by law, regardless of whether they are explicitly mentioned in the ECHR; however, the Panel finds that this provision is inapplicable because Switzerland has not ratified Protocol no. 12. As a consequence, this international instrument has not become part of

Swiss law and will not be dealt with in this award.

153. The Panel must first point out that, as confirmed by the jurisprudence of the ECtHR, Article 14 ECHR is not a stand-alone guarantee and does not grant *per se* an enforceable right against discrimination. Rather, it only prohibits discrimination in the enjoyment of the rights and freedoms set for in the ECHR. That is, it operates as a provision that complements other rights and freedoms guaranteed by the ECHR. It ensures that these rights are enjoyed without discrimination based on certain grounds listed in the ECHR. Article 14 must therefore be invoked in conjunction with other articles of the ECHR when alleging violations of rights due to discriminatory treatment. Indeed, the Grand Chamber of the ECtHR so stated in a 2022 judgment: “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” (ECtHR Judgment of 11 October 2022, no. 78630/12, *Beeler v. Switzerland*, at para. 47).
154. To that end, the Claimant invokes Article 8 ECHR, which provides that everyone “has the right to respect for his private and family life, his home and his correspondence”. The Claimant argues that the Qualification System affected her participation in bobsleigh competitions at the international level and had a direct impact on the exercise of her profession. She claims that she “suffered unlawful discrimination hindering

her right to private life within the meaning of Article 8 ECHR, as it encompasses her right to exercise her profession by participating in the Olympic Games”.

155. The Claimant compares her case to that of *Semenya v. Switzerland* where the ECtHR found that the right to private life as guaranteed by Article 8 ECHR may extend to professional activities. She specifically cites the passage where “the Court considers that the applicant is seriously hindered in the exercise of her profession since the [challenged rules] prevent her from taking part in the international competitions in which she has achieved her greatest successes. Insofar as this regulation has its own logic concerning the sexual characteristics, in particular the genetic characteristics, of athletes, the Court considers that the ‘reasons’ behind the adoption of the disputed regulations relate the applicant’s private life”. Relying on this passage, the Claimant contends that the Qualification system has endangered her professional career and her ability to achieve economic success by depriving her of the opportunity to take part in a major international competition that is essential to her professional life.
156. The Panel observes that in *Semenya v. Switzerland*, the Court found that the applicant’s sexual characteristics fell within the scope of her private life within the meaning of Article 8 ECHR and that her personal identity was affected since, due to her differences in sex development (“DSD”), she would be forced to undergo medical treatment to avoid exclusion from participation in women’s athletics competitions. The ECtHR held that, given that personal autonomy is protected under Article 8 ECHR and

that the intrusive choice she faced necessarily affected rights falling within the scope of Article 8 (including her right to practice her profession), her case fell within the ambit of Article 8. The ECtHR found that Ms. Semenya was seriously hindered in the exercise of her profession since the DSD Regulations adopted by IAAF (now World Athletics) prevented her from taking part in her profession. The ECtHR thus concluded that Ms. Semenya could rely on Article 8 of the ECHR to invoke Article 14 ECHR.

157. The Panel finds the Claimant's case to be markedly distinguishable from *Semenya v. Switzerland*. The Qualification System did not affect the rights and liberties granted to her under the ECHR. It did not prevent the Claimant from practicing her profession. Nothing in the Qualification System denied or even limited the Claimant from exercising her profession as a bobsleigh athlete and taking part in international competitions. She has not been put in the situation of Ms. Semenya, where she had to choose between medical treatment and being totally excluded from the sporting competitions in which she excelled. The Qualification System has simply set out the sporting, not personal, preconditions to qualify, as part of a selected group, to a specific sporting event – the OWG 2022.

158. Based on the jurisprudence of the ECtHR, including *Semenya v. Switzerland*, the Panel finds that professional and business activities fall within the substantive scope of application of Article 8 ECHR only if they are of sufficient relevance for the right to private and family life (ECtHR

Judgment of 5 September 2017, no. 61496/08, *Bărbulescu v. Romania*, at para. 71; ECtHR Judgment of 12 June 2014, no. 56030/07, *Fernández Martínez v. Spain*, at paras. 109-110; ECtHR Judgment of 9 January 2013, no. 21722/11, *Volkov v. Ukraine*, at para. 165). In other words, the ECHR does not grant a general right to exercise a given profession unless the professional activities are relevant for private and family life.

159. Furthermore, the Panel notes that, when assessing the applicability of Article 8 ECHR, what matters is whether the challenged action generated a restriction of access to a profession as such (see e.g. ECtHR Judgment of 27 July 2004, nos. 55480/00 and 59330/00, *Sidabras and Džiautas v. Lithuania*, at para. 47; ECtHR Judgment of 27 June 2017, no. 50446/09, *Jankauskas v. Lithuania* (no. 2), at para. 56; ECtHR Judgment of 27 June 2017, no. 48427/09, *Lekavičienė v. Lithuania*, at para. 36; ECtHR Judgment of 2 February 2016, no. 18650/05, *Sodan v. Turkey*, at paras. 57-60; ECtHR Judgment of 25 September 2018, no. 76639/11, *Denisov v. Ukraine*, at paras. 101, 104-105, 108 and 109). Accordingly, the ECHR does not grant a right to reach certain professional results.

160. Different from the aforementioned cases, the Claimant was not denied any access to her profession as a bobsleigh athlete and did not face any general prohibition on working in that field. This also distinguishes the present case from the ECtHR judgments of 24 June 1993, no. 14518/89, *Schuler-Zgraggen v. Switzerland*, and of 2 December 2014, no. 61960/08, *Emel Boyraz v. Turkey*, on

which the Claimant relies, where the applicants were dismissed from their positions and thus denied access to employment. The Qualification System does not control access to a profession but simply adopts qualification provisions in relation to the access to a single high level competition.

161. Furthermore, neither *Semenya v. Switzerland* nor any of the aforementioned ECtHR cases support the notion that the Claimant would have a protected, enforceable right under Article 8 ECHR beyond that of participating in her profession when private and family life are at risk. The ECtHR jurisprudence does not support that the Claimant would have a right in participating in a specific event such as the OWG 2022. In any case, the Claimant was not even prevented from doing so. She had the right to participate in that competition, but failed to qualify under a Qualification System the Panel has found to be lawful.

162. In light of the foregoing, the Panel concludes that, based on the facts and circumstances of this case, the Claimant may not rely on Article 8 of the ECHR to invoke Article 14 ECHR. Therefore, the Claimant's assertion that the Qualification System breaches the principles of equality and prohibition of gender-based discrimination under Article 14 ECHR, in conjunction with Article 8 ECHR, is ungrounded.

ii) EU Charter of Fundamental Rights

163. The Claimant also argues that the principle of gender equality and the prohibition against gender

discrimination is established by Article 23 of the EU Charter of Fundamental Rights. That article states as follows: *"Equality between women and men must be ensured in all areas, including employment, work and pay"*.

164. The Claimant acknowledges that, as Switzerland is not a member of the European Union, the EU Charter of Fundamental Rights does not apply directly within the Swiss legal system, but contends that it is a *"critical contextual resource demonstrating that the principle of equality is so widely recognized that it has, across the EU, the value of a general principle, which is a component of Swiss public policy"*.

165. The Panel finds that the EU Charter of Fundamental Rights does not apply, directly or indirectly, to the present dispute. First, the EU Charter of Fundamental Rights does not apply in Switzerland because it is part of a foreign legal system. Second, the EU Charter of Fundamental Rights only applies as a protection vis-à-vis the rules and deeds of the institutions, bodies, offices, and agencies of the EU, as well as of the EU Member States when they are implementing EU law, and to national authorities of the EU member States when they are implementing national law within the scope of EU law. Indeed, the scope of application of the EU Charter of Fundamental Rights is defined in Article 51 thereof, pursuant to which:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights,

observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”.

166. The Panel notes that the jurisprudence of the EU Court of Justice confirms that the provisions of the EU Charter of Fundamental Rights are addressed (i) to the EU institutions, bodies and agencies, including when they act outside the EU legal framework and accept international agreements (see e.g. Court of Justice Judgment of 20 September 2016 [Grand Chamber], C-8/15P to C-10/15P, *Ledra Advertising*; Court of Justice Opinion 1/15 of 26 July 2017, *EU-Canada PNR Agreement*), as well as (ii) to the EU Member States and their national authorities, but only when they are implementing EU law or act within the scope of application of EU law; in this respect, the Court of Justice pointed out that it could not examine the compatibility with the EU Charter of Fundamental Rights of national legislation of a Member State lying outside the scope of EU law (see e.g. Court of Justice Judgment of 26 February 2013 [Grand Chamber], C-617/10, *Akerberg Fransson*).

167. Therefore, the EU Charter of Fundamental Rights does not extend to protect individuals against the rules and deeds of the IBSF and IOC because, being private associations headquartered in Switzerland, they obviously are not part of the EU

institutional framework and are not public authorities of a EU Member State acting within the scope of EU law. Moreover, given the above, the EU Charter of Fundamental Rights certainly cannot be considered to be part of Swiss public policy.

168. In light of the foregoing, the Panel concludes that the Claimant may not rely on the EU Charter of Fundamental Rights to support her claim of gender-based discrimination or breach of the principle of equality as a violation of Swiss public policy.

iii) UN Universal Declaration of Human Rights and CEDAW Convention

169. The Claimant also contends that Articles 1 and 2 of the UN Universal Declaration of Human Rights and Articles 1 and 13(c) of the CEDAW Convention should be considered in the context of Swiss public policy.

170. Articles 1 and 2 of the UN Universal Declaration of Human Rights provide that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” and “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as [...] sex [...]”.

171. Article 1 of the CEDAW Convention defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political,

economic, social, cultural, civil or any other field” and, then, Article 13(c) of the CEDAW Convention provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: [...] the right to participate in recreational activities, sports and all aspects of cultural life”.

172. The Panel finds, however, that the UN Universal Declaration of Human Rights serves as a foundational and inspirational document outlining fundamental human rights and freedoms aspiring to be vertically granted to individuals by sovereign States, but its provisions are not legally binding to sovereign States (unless demonstrated to have become part of international customary law) and, certainly, not to private parties unless specifically incorporated into domestic legislation rendering them horizontally applicable. Accordingly, the IBSF and IOC are not directly bound by the UN Universal Declaration of Human Rights and the Swiss public policy filter cannot transform those vertical principles into horizontal ones to be applied between private parties.

173. With regard to the CEDAW Convention, the Panel finds that it only imposes obligations upon its contracting States and requires implementation through domestic legislation. The Panel is thus of the view that Article 13(c) of the CEDAW Convention is not directly applicable in the context of relationships between private parties and does not grant rights horizontally enforceable against private organizations, and Swiss public

policy may not be invoked to transform those vertical principles into horizontal ones.

174. In light of the foregoing, the Panel concludes that the Claimant may not rely on the UN Universal Declaration of Human Rights or the CEDAW Convention to support her claim of gender-based discrimination as a violation of Swiss public policy.

D. Swiss domestic law

175. The Claimant submits that the Respondents violated various provisions of Swiss law, notably Articles 8, paras. 2 and 3, of the Swiss Constitution, Article 3 of the Swiss Gender Equality Act, Article 10 of the Constitution of the Canton of Vaud, and the Law of application in the Canton of Vaud of the Federal law of 24 March 1995 on equality between women and men (the “LVLeg”). Those provisions of Swiss law stipulate as follows:

– Article 8 of the Swiss Constitution so provides in the relevant paragraphs:

“(2) No person may be discriminated against, in particular on grounds of... gender....

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

– Article 3 of the Swiss Federal Act on Gender Equality (the

“Gender Equality Act”) so provides:

- “1. *Employees must not be discriminated against on the basis of their sex, whether directly or indirectly, including on the basis of their marital status, their family situation or, in the case of female employees, of pregnancy.*
2. *This prohibition applies in particular to hiring, allocation of duties, setting of working conditions, pay, basic and continuing education and training, promotion and dismissal.*
3. *Appropriate measures aimed at achieving true equality are not regarded as discriminatory”.*

- Article 10 of the Constitution of the Canton of Vaud dated 14 April 2003 so provides:

“1. All human beings are equal before the law.

2. No one shall be discriminated against in particular because of their... sex....

3. Women and men are equal in law. The law provides for equality in law and in fact, in particular in the areas of the family, training and work”.

- The relevant provision of the LVLeg so states:

“The Cantonal Office for Gender Equality promotes gender equality in all areas and works to eliminate all

forms of direct or indirect discrimination” (free translation from the French original).

176. With regard to paras. 2 and 3 of Article 8 of the Swiss Constitution, the Claimant argues that it imposes on the legislator and the authorities which apply the law the obligation to take the measures necessary to achieve legal and substantive equality in all areas of life for both sexes and that the SFT considers that this obligation applies directly between private persons.

177. The Panel is of the opinion, however, that the prohibition against gender discrimination of Article 8, paras. 2 and 3, of the Swiss Constitution is directed at the Swiss Confederation and does not apply horizontally between private parties, with the exception of the third sentence of Article 8, para. 3, which only deals with employment relationships and which is thus inapplicable in the present case, since the Claimant has no such employment relationship with the IBSF or IOC. Indeed, as held by SFT in its Judgement 4P.253/2002: “*Article 8 para. 3, 3rd sentence Cst provides that men and women have the right to equal pay for work of equal value. This constitutional norm, which has a direct horizontal effect, was concretized by the Equality Law*” (para. 2.2, free translation from the French original). Swiss jurisprudence has held that the other parts of Article 8, paras. 2 and 3, are addressed to the State and do not, in principle, have direct horizontal effect on relations between private persons (see SFT Judgements 4A_248/2019 and 4A_398/2019, citing ATF 137 III 59 at para. 4.1; 136 I 178 at para. 5.1; ATF 133 III 167 at para. 4.2; 5D_76/2017 of 11 May 2017

at para. 5; 5A_362/2016 of 20 February 2017 at para. 6.3; 5A_847/2015 of 2 March 2016 at para. 4.1).

178. As for Article 3 of the Swiss Gender Equality Act, it does not apply to the present case because it is effective only for employment relationships. As already underlined, however, the Claimant is not an employee of the IBSF or IOC.
179. Regarding Article 10 of the Constitution of the Canton of Vaud, its scope is primarily limited to matters within the jurisdiction of the Canton of Vaud. As such, it does not extend to governing the regulatory actions of private international sporting bodies such as the IBSF or IOC, even if they are headquartered in the Canton of Vaud. Article 10 is fundamentally a provision of local law intended to govern relationships and affairs within the Canton, and it lacks extraterritorial applicability. Since the Qualification System had worldwide effect and both the Olympic qualifying competitions and the OWG 2022 primarily occurred outside the jurisdictional bounds of the Canton of Vaud, Article 10 does not provide a suitable legal basis for adjudicating the Claimant's claim of gender discrimination.
180. Finally, the LVLeg is also inapplicable. The Claimant points out that the LVLeg established the Cantonal Office for Equality between Women and Men to, as set out in Article 4(1) of that legislation, promote the achievement of gender equality in all areas of the law and not just employment-related areas. The Panel notes, however, that according to Article 4(3) of that same

legislation, the function of said Office is to deal with disputes related to the Gender Equality Act (*"Dans les litiges relevant de la LEg, l'autorité appelée à statuer peut demander au Bureau cantonal de l'égalité d'émettre une appréciation sur la base du dossier. Elle peut également requérir du Bureau de l'égalité toutes les informations nécessaires à l'accomplissement de sa tâche"*). It follows that since the Gender Equality Act is limited to employment matters, the LVLeg does not provide a mechanism for addressing gender equality issues that go beyond the scope of employment law.

181. In light of the foregoing, the Panel holds that none of the Swiss domestic laws cited by the Claimant are applicable nor provide a proper basis for the Claimant's claim for alleged gender discrimination.

E. EU law

182. The Claimant submits that the Qualification System infringes the prohibition of gender discrimination and the principle of equality between men and women which, in the her view, are mandatory rules of EU law applicable by virtue of Article 19 of PILA. The Claimant argues that mandatory rules of EU law are applicable to the present dispute even though (i) Swiss law is the law directly applicable to the dispute, (ii) the Claimant is not an EU citizen, and (iii) the IBSF and IOC are based in Switzerland. The Claimant relies on CAS 2016/A/4492, CAS 98/201 and CAS 98/200, where the CAS panels took into account EU competition law for disputes in which the parties had agreed on the applicability of Swiss law.

183. The Panel recognizes that, as found in the aforementioned awards, drawing inspiration from Article 19 PILA, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met: (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called “*lois d’application immediate*”); (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.

184. The Panel finds, however, that these cumulative requirements have not been met in the present case and, therefore, EU law should not be taken into account pursuant to (the application by analogy of) Article 19 PILA. In particular, there is a lack of close connection between the subject matter of the dispute – the alleged gender discrimination of the IBSF and IOC against a Nigerian athlete based on the Qualification System for the Beijing OWG 2022 – to the EU. The Panel observes that the Claimant is not an EU national, resides outside of the EU and is making a discrimination claim located outside the EU territory and related to a qualification system for a sporting event that is adopted and applied by sporting federations – the IBSF and IOC – seated outside of the

EU in order to qualify for a competition held in China. The present case is thus distinguishable from those cited by the Claimant, where the CAS panels found that there were close connections between the subject matter and the EU since the disputes concerned directly or indirectly football clubs headquartered in EU Member States and the relevant geographic market affected by the UEFA regulatory and disciplinary power certainly encompassed the EU territory.

185. In light of the foregoing, the Panel concludes that the Claimant’s claim that the Respondents violated EU law is ungrounded.

F. Personality rights under Articles 27 and 28 SCC

186. The Claimant submits that the Qualification System violates her personality rights recognized under Articles 27 and 28 SCC. Those provisions provide as follows:

Article 27:

“1. No one may, even partially, waive the enjoyment or exercise of his or her civil rights.

2. No one may alienate his freedom, nor prohibit the use of it to an extent contrary to law or morality.

Article 28:

“1. Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.

2. An infringement is unlawful unless it is justified by the consent of the person whose

rights are infringed or by an overriding private or public interest or by law”.

187. The Claimant argues that personality rights under Swiss law give her a “*right to have an equal opportunity to the opportunity of male athletes to qualify for her chosen Olympic event*”. The Claimant believes that due to the alleged discriminatory rules of the Qualification System her personality rights to professional and economic freedom and to participate in a sporting activity of her choice have been violated. In Claimant’s view, the alleged discrimination has led to severe damage to her professional and economic existence, “diminishing” her revenues and potential to develop her economic activity in the field of bobsleigh.
188. The Panel observes that CAS panels and the SFT have recognized personality rights under various instances, such as with respect to the freedom to participate in sporting activity of one’s choice (TAS 2012/A/2720), the right to private life (TAS 2011/A/2433) and the right to professional and economic freedom (see *Matuzalem v. FIFA* SFT Judgement 4A_558/2011 dated 27 March 2012). However, personality rights do not extend to the right to compete at a specific event. The Panel also observes the SFT has found that “*for a restriction of economic freedom to be considered excessive within the meaning of the case law of the Federal Tribunal, it must force the person who has obliged itself to the arbitrariness of its co-contractor, suppresses its economic freedom or limits it in such a measure that the bases of its economic existence are endangered*” (see SFT Judgement 4A_248.2019 & 4A-

398/2019, 25 August 2020, at para. 10.5).

189. The Panel finds that the Claimant was not deprived of her professional and economic freedom or her right to participate in the sporting activity of her choice. She simply failed to qualify to the OWG 2022 based on the Qualification System, and this did not prevent her from participating in bobsleigh or from making a living therefrom. The Claimant’s case is thus markedly different from *Matuzalem* where the player was subject to an unlimited occupational ban that imperilled his possibility to gain his living as a professional. In the Claimant’s case, there is no such restriction placed on her economic freedom; in fact, she did not claim, let alone prove, that the alleged decrease of her bobsleigh-related revenues endangered her economic subsistence. There was also no restriction to the Claimant’s possibility to practice her chosen profession or threat to her physical integrity, which clearly distinguishes her case from that of Ms. Semenya (see *supra* at paras. 157-161).
190. The Panel thus rejects the claim that the Respondents violated the Claimant’s personality rights under Articles 27 and 28 SCC.

G. Conclusion on the alleged unlawfulness of the Qualification System

191. The Panel concludes that, even if her claims could be considered as admissible (*quod non*), the Claimant failed to prove that the Qualification System discriminated against her in breach of any of the legal instruments

she cited and, thus, failed to demonstrate its unlawfulness.

H. Request for damages

192. Under Swiss law, Articles 41 and 97 SCO require, among the fundamental elements to award compensation for damages, proof of an unlawful act committed by the Respondents. As the Claimant did not prove that the Respondents acted unlawfully against her, any damages she allegedly suffered by failing to qualify to compete in the OWG 2022 are not subject to be compensated by the Respondents. The Panel thus dismisses the claim for damages.

I. Further or different motions

193. All further or different motions or requests of the Parties are rejected, to the extent that they are admissible.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The claims filed by Ms. Simidele Adeagbo on 8 March 2022 are inadmissible and dismissed.
2. (...).
3. (...).
4. All further or different motions or prayers for relief are dismissed.

Football; Contractual disputes – termination of the employment contract by the player; FIFA’s jurisdiction; Liberty of parties to opt out of Article 22 (b) of FIFA RSTP; Interpretation of an arbitration agreement; Competent adjudicatory body in case of fora’s competences overlapping

Panel

Prof. Eligiusz Krześniak (Poland), President
Mr Michele Bernasconi (Switzerland)
Mr Manfred Nan (the Netherlands)

1. Article 22 of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides, *inter alia*, that *“Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: [...] b) employment-related disputes between a club and a player of an international dimension [...]”*.
2. According to the first sentence of Article 22 of FIFA RSTP, FIFA’s competence in employment-related disputes is not absolute. It entitles the Parties to seek redress either before the FIFA’s adjudicatory bodies or before local courts. Should the Parties opt for a local forum, the FIFA adjudicatory bodies are no longer competent. However, as Article 22 of FIFA RSTP is the cornerstone of the legal protection to which football professionals are

entitled, opting out of Article 22 (b) of FIFA RSTP should not be accepted easily. The Parties may only opt out if they do so freely and willingly, so as to avoid any misuse undermining the Parties’ access to due process under Article 22 of FIFA RSTP.

3. The primary factor in interpreting an arbitration agreement is the parties’ actual mutual intention. If no such intention can be established regarding the arbitration agreement, it ought to be interpreted on a trust basis, i.e. the presumed intention is to be established as what the respective declaration recipient could and should have understood in good faith. In interpreting an arbitration agreement, one must consider its legal nature, particularly, that waiving common courts’ jurisdiction significantly restricts appeal avenues. Such a waiver may not be easily assumed, which is why a restrictive interpretation is required if in doubt.
4. In the case of a jurisdiction clause granting competence to different bodies (for example civil court and FIFA), should this one specify that for labour disputes national civil courts are to adjudicate and settle the matter at hand, unless there are extraordinary circumstances that would justify objecting to the chosen jurisdiction, in case of a labour dispute, the parties’ preference should be honoured, meaning that FIFA would not be competent to deal with such labour dispute.

I. PARTIES

1. Mezőkövesd Zsóry Futball Club (the “Appellant” or the “Club”) is a professional football club incorporated in Mezőkövesd, Hungary. The Club is registered with the Hungarian Football Federation (“HFF”), which in turn is affiliated with the Fédération Internationale de Football Association.
2. Mr. Matija Katanec (the “First Respondent” or the “Player”) is a Croatian professional football player.
3. The *Fédération Internationale de Football Association* (the “Second Respondent” or “FIFA”) is the international football governing body. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide. FIFA is an association established in accordance with Article 60 ff. of the Swiss Civil Code and it is incorporated in Zurich (Switzerland).
4. The Player and FIFA are hereinafter jointly referred to as the “Respondents” and together with the Club as the “Parties”.

II. FACTUAL BACKGROUND

A. Introduction

5. The present dispute revolves around two decisions rendered by respective bodies of FIFA. The first one has been issued in case file number FPSD-7151 (the “Decision”) by the FIFA Dispute Resolution Chamber (the “FIFA DRC”) in the merits, on 12 April 2023. The grounds for the Decision were received by the Appellant on 17 August 2023. The second one was issued on 17 August

2023 in case file number FDD-15697 by the FIFA Disciplinary Committee as a follow to an alleged non-compliance with the Decision (the “Registration Ban Decision”).

6. The Decision pertains to a contractual dispute between the Appellant and the First Respondent, and it concerns the termination of the Player’s employment contract and the consequent financial claim for unpaid remuneration and breach of contract compensation. The Ban Decision introduces a ban from registering new players internationally.
7. The pertinent facts and allegations based on the Parties’ written submissions and on the CAS file are summarized below. References to additional facts and allegations found in the Parties’ written and oral submissions and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to those submissions and evidence it deems necessary to explain its reasoning.

B. Background facts

8. On 1 July 2021, the Player and the Club signed an employment contract in effect between 1 July 2021 and 30 June 2023 (the “Contract”). According to the Contract, the Club undertook to pay the Player a monthly salary of Hungarian Forint (HUF) 3,000,000.
9. Article II para. 10 of the Contract establishes that: *“the professional management or the management of the Employer may determine in his/her sole discretion at what team -or in line with the*

content of sub-point 8.a) -individually, or otherwise shall the Employee perform his/her training work, or in the matches of what team he/she is obliged to participate."

10. Article XI paras. 47 and 49 of the Contract, stipulate as follows:

"47. The Employee acknowledges that if he/she is not included in the first team of the Employer, or based on the decision of the professional management he/she is transferred to the second or further teams of the Employer, his/her base wage will be reduced to the percentage determined in the Personal Conditions of the amount given in point 15 - but to max. its 50 % • from the 15th day of the month following the decision".

"49. The Parties agree that they shall make efforts to settle their possible dispute in amicable way by negotiations. If these efforts fail - in cases determined by the rules of MLSZ and FIFA - the Parties may turn to the organizational units with MLSZ or FIFA scope of authority, in case of labour dispute to the Administrative and Labour Court having competence and scope of authority, and in all other disputes arising out of their legal relationship the Parties stipulate the exclusive jurisdiction of the Sports Standing Arbitration Court based on the Article 4 7 of the Sports Law. The number of arbitrators is three; the procedure is determined by the Procedural Rules of the Arbitration Court".

11. Article XII of the Contract, *inter alia*, stipulates as follows:

"Parties agree that if the employee will not play at least the 50% of the league games (at least 720 minutes in the season) in the season of 2021/2022 the employer has the option to terminate this contract until the 30th of June, 2021. Employer has to notify the employee until the 15th of June, 2021.

The Parties agree that the Employee shall work in time framework and in unequal working

time. The Employee acknowledges that the Employer determines his working time in a six months' time frame, based on the 8 hours daily working time. Within the working time framework, the professional management of the Employer has the right to distribute the work".

12. On 8 March 2022, the Club informed the Player, in a letter, that from then on (i.e. as of 8 March 2022) he would be playing for the Club's second team.
13. On 11 March 2022, the Player replied to the Club informing it that he had been taken from "*its first team without any reason and without any prior notice which actions of the Respondent constitute abusive behavior*", hence he requested that the Club ceases to breach the Contract and immediately reintegrates him into the first team.
14. On 22 April 2022, the Player sent the Club another letter in which he, *inter alia*, asked the Club to continue paying his full monthly salary and to immediately reintegrate him into the first team's training process.
15. On 10 June 2022, the Club notified the Player of the following: "*you as a professional soccer player would not be the member of the first soccer team of Mezőkövesd Zsóry FC Kft. and in accordance with the decision of the management of Mezőkövesd Zsóry Football Club starting on the 10th of June 2022, you would become a member of the Mezőkövesd Zsóry II soccer team. From the aforementioned date you are obligated to train together with the Mezőkövesd Zsóry II soccer team*".
16. On 4 July 2022, the Player sent the Club a default notice and reiterated his requests to be reintegrated into the first team, to be allowed to rejoin the first team's training process, and to be paid his May 2022 salary, granting the Club a

15-day deadline to comply, however to no avail.

17. On 12 July 2022, the Player sent the Club a final default notice with a 15-day deadline in which he, *inter alia*, requested that the Club:

- i. *[to] stop breaching the Employment contract, and*
- ii. *[to] reintegrate him in the training process of the first team of the Club, and*
- iii. *[to] pay him May 2022 salary of net HUF 3,000,000.00 (three million Hungarian Forint), which matured on 10 June 2022, and*
- iv. *[to] pay him June 2022 salary of net HUF 3,000,000.00 (three million Hungarian Forint), which matured (in the meantime) on 10 July 2022.*

18. On 28 July 2022, the Player unilaterally terminated the Contract, due to the Club's failure to answer his default notices and its failure to fully comply with his requests (the Club only paid the May 2022 salary of net HUF 3,000,000.00).

19. On 3 August 2022, the Club sent the Player a letter to the effect that:

"We reject in its entirety the terms of Matija Katanec's termination of his contract sent to us on 28th July 2022, and We do not accept the terms of his termination. Matija Katanec seriously breached the Employment Contract between the parties and the rules of employment law applicable to the employment relationship by unlawfully dismissing the applicant.

Matija Katanec particularly breached the Chapter IX 39 point of Employment Contract because He would have been entitled to

terminate his employment contract with immediate effect if the Employer is in min. 1,5 month (45 days) delay with the payment of the Employee's wage, and the Employee called upon the Employer to fulfill the contract within 15 (fifteen) days deadline and this date has expired without success.

As previously informed to Matija Katanec in detail on several occasions that his performance during the fall/spring season He could not included to the first team of the MEZŐKÖVESD ZSÓRY FC. The decision of the professional management of MEZŐKÖVESD ZSÓRY FC according to which Matija Katanec obliged to train with the second team of MEZŐKÖVESD ZSÓRY FC and to play in its matches is a temporary measure, which would have lasted only until Matija Katanec was fit and healthy enough to return to the first team".

20. According to the FIFA Transfer Matching System, the Player signed with the Croatian club, NK Varazdin, for the period between 23 August 2022 and 15 June 2023 at a monthly salary of HRK 33,000. The contract was mutually terminated on 10 January 2023.

21. The Player then signed with the Romanian club, Politehnica Lasi, for the period between 15 January 2023 and 15 June 2023 at a monthly salary of RON 24,630.

C. Proceedings before FIFA

22. On 22 August 2022, the First Respondent lodged a claim against the Appellant before FIFA. The First Respondent claimed just cause for terminating the Contract, citing financial breaches and exclusion from team training by the Appellant. The relief sought included a declaration of just

cause termination, payment of net HUF 5,709,677.60 in outstanding amounts, net HUF 33,290,322.40 in compensation, provision of tax certificates, and a 5% per year default interest on the overdue amounts.

23. On 13 September 2022, the Appellant asserted that the Hungarian law governs the employment relationship, contending that it is the Miskolc Labour Court, rather than FIFA, that holds jurisdiction over the case. Moreover, it maintained that the Player's removal from the first team was a temporary measure due to health concerns, and that he had been informed about his transfer to the second team until meeting the required fitness levels. The Appellant argued that it had not breached the Contract, emphasizing that the salary delay was within the acceptable limits upon termination. The Appellant refuted any salary reduction allegations, asserting that it had fulfilled its payment obligations. Finally, the Appellant requested that the proceedings before FIFA be discontinued, urging reliance on the Contract and on the Hungarian labour law, and if the proceedings were to continue, it sought rejecting the Player's claim in its entirety and reimbursing for the associated costs.
24. On 28 October 2022, the First Respondent emphasized that the Appellant's prayers for relief did not constitute a counterclaim and should be treated as a response to the Player's claim. The First Respondent rejected all of the Club's allegations as unfounded attempts to avoid payment. After receiving the outstanding remuneration of net HUF 5,709,677.60, the First Respondent revised the relief sought, emphasizing just cause termination,

default interest, breach of contract compensation of net HUF 33,290,322.40, tax certificates, and sporting sanctions against the Appellant. The First Respondent requested that the FIFA Football Tribunal reject all prayers for relief sought by the Club.

25. On 14 November 2022, the Appellant contested the Player's argument that the counterclaim dated 13 September 2022 should not be deemed as such. The Appellant maintained that its counterclaim precisely outlined the factual and legal circumstances, urging the FIFA DRC to reject the Player's unestablished claim based on specific grounds. The Appellant reiterated its request to discontinue the proceedings or reject the Player's claim, qualifying the dispute as a labour matter governed by the Contract and the Hungarian labour law, and prayed that the First Respondent cover the costs if the FIFA DRC should elect not to terminate or stay the proceedings.
26. On 12 April 2023, the FIFA Tribunal ruled as follows:

"1. The Football Tribunal has jurisdiction to hear the claim of the Claimant, Matija Katanec.

2. The claim of the Claimant, Matija Katanec, is partially accepted.

3. The Respondent, Mezokovesd Zsory FC, must pay to the Claimant the following amount(s):

*- **only 5% interest p.a.** on the late payment of the amount of HUF 3,000,000 as from 11 July 2022 until 19 September 2022;*

*- **only 5% interest p.a.** on the late payment of the amount of HUF*

2,709,677.60 as from 28 July 2022 until 19 September 2022;

- **HUF 25,989,106.58 as compensation for breach of contract without just cause plus 5% interest p.a. as from 28 July 2022 until the date of effective payment.**

4. *Any further claims of the Claimant are rejected.*

5. *Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.*

6. *Pursuant to art. 24 of the Regulations on the Status and Transfer of Players, if full payment (including all applicable interest) is not made **within 45 days** of notification of this decision, the following **consequences** shall apply:*

1. *The Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid. The maximum duration of the ban shall be of up to three entire and consecutive registration periods.*

2. *The present matter shall be submitted, upon request, to the FIFA Disciplinary Committee in the event that full payment (including all applicable interest) is still not made by the end of the three entire and consecutive registration periods.*

7. *The consequences **shall only be enforced at the request of the Claimant** in accordance with art. 24 par. 7 and 8 and art. 25 of the Regulations on the Status and Transfer of Players.*

8. *This decision is rendered without costs”.*

27. The Decision, along with its grounds, was communicated to both the

Appellant and the First Respondent by way of the notification dated 9 June 2023, but – as transpired later – it was only successfully communicated to the Appellant on 17 August 2023.

28. On 16 August 2023, the Player requested that FIFA impose the sanctions provided for in the Decision pursuant to Article 24 RSTP, as the Club had failed to pay the amounts provided for therein. Given the above, “a ban from registering new players internationally” was imposed on the Appellant as of 17 August 2023 by virtue of the Registration Ban Decision.

29. On 24 August 2023, the Appellant decided to appeal both the Decision and the Registration Ban Decision to CAS, alleging, *inter alia*, that it had only been notified of the FIFA DRC Decision on 17 August 2023.

30. On 11 September 2023, FIFA confirmed that even though the grounds for the FIFA DRC Decision were uploaded to the Legal Portal on 9 June 2023, they only became visible to the Appellant on 17 August 2023. As a consequence, FIFA lifted the Registration Ban Decision on 8 September 2023. In other words, the Registration Ban Decision ceased to have any effect as of that date.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 24 August 2023, the Appellant filed with CAS the Statement of Appeal against the Decision pursuant to Article 57 (1) of the FIFA Statutes and to Article R47 and Article R48 (1) of the Code of Sports-Related Arbitration (the “CAS Code”) and requested that the appeal be submitted to a sole arbitrator.

32. On 29 August 2023, the CAS Court Office acknowledged receipt of the Statement of Appeal and provided the other Parties with a copy. The Respondents were also invited to inform the CAS Court Office, within five days following receipt of the letter, whether they agree to the appointment of a sole arbitrator.
33. On 30 August 2023, the Second Respondent informed that it agrees to submitting the matter to a sole arbitrator, appointed by the President of the CAS Appeals Division if he/she is selected from the football list, as provided for in Article R54 of the CAS Code. That letter was acknowledged by the CAS Court Office on the same day.
34. On 31 August 2023, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.
35. On 1 September 2023, the CAS Court Office acknowledged receipt of the Appeal Brief and informed the Respondents that the document is available. Pursuant to Article R55 of the CAS Code, the Respondents were given 20 days to submit their answers.
36. On 1 September 2023, the First Respondent requested to have the deadline to file his position extended until 15 September 2023 and informed that he agrees to submitting the case to a sole arbitrator. On 4 September 2023, the CAS Court Office granted the extension as requested (i.e., until 15 September 2023).
37. On 4 September 2023, the CAS Court Office also informed that the Second Respondent requested, on 1 September 2023, that the deadline to file its answer be set once the Appellant has paid its share of the costs advance. Pursuant to Article R55 (3) of the CAS Code, the deadline for the Second Respondent to file its answer was set aside and a new deadline was to be fixed upon the Appellant's payment of its share of the costs advance.
38. On 5 September 2023, the CAS Court Office informed that the First Respondent requested, on 4 September 2023, that the deadline to file his answer be set once the Appellant has paid its share of the costs advance. Pursuant to Article R55 (3) of the CAS Code, the deadline for the Second Respondent to file its answer was set aside and a new deadline was to be fixed upon the Appellant's payment of its share of the costs advance.
39. On 11 September 2023, the CAS Court Office acknowledged receipt of the First Respondent's letter of 8 September 2023 in which the First Respondent requests that his matter be submitted to a three-member panel and nominates Mr. Manfred Nan as an arbitrator. Therefore, the CAS Court Office invited the Parties to state their positions on the three-member panel, the costs and the nomination proposal by 14 September 2023.
40. On 12 September 2023, the CAS Court Office acknowledged receipt of the Second Respondent's letter of 11 September 2023 and noted that the Registration Ban Decision was lifted on 8 September 2023 and the Appellant is requested, by 15 September 2023, to state whether it withdraws its challenge against the FIFA letter which implemented the Registration Ban Decision and whether it maintains its appeal against the Decision.

41. On 14 September 2023, the CAS Court Office noted that the Appellant – in its letter of 12 September 2023 – objects to the First Respondent’s request to submit the present proceedings to a three-member panel. It was also noted that the Appellant withdraws its challenge against the FIFA letter which implemented the Registration Ban Decision but maintains its appeal against the Decision. The Respondents were invited to ignore the deadline set in the CAS letter of 29 August 2023 and the following deadline extension.
42. That same day, the First Respondent confirmed that he will cover his share of the costs advance in this matter if it should be referred to a three-member panel, and the CAS Court Office communicated the First Respondent’s letter on that to the other Parties.
43. Also that same day, the Second Respondent informed that FIFA does not object to the First Respondent’s request to submit this matter to a three-member panel and to the nomination of Mr. Manfred Nan as an arbitrator, which was noted by the CAS Court Office on 15 September 2023.
44. On 19 September 2023, the CAS Court Office informed that pursuant to Article R50 (1) of the CAS Code, the Deputy Division President decided to submit this matter to a three-member panel, provided that the First Respondent pays his share of the costs advance. Therefore, the Appellant was invited to nominate an arbitrator by 25 September 2023.
45. On 26 September 2023, the CAS Court Office noted that the Appellant, in its letter of 25 September 2023, nominates Mr. Michele A.R. Bernasconi as an arbitrator in this matter.
46. On 6 October 2023, the CAS Court Office provided the Parties with the copies of both “Arbitrators’ Acceptance and Statement of Independence” forms completed by the nominated arbitrators and informed that the Parties may challenge the arbitrator nomination pursuant to Article R34 of the CAS Code.
47. On 24 October 2023, the CAS Court Office informed that the Appellant and the First Respondent have both paid their shares of the costs advance and, therefore, set a 20-day deadline for the Respondents to submit their answers in this matter.
48. On 1 November 2023, the CAS Court Office noted that no challenges have been filed against the nominations of Mr. Michele A.R. Bernasconi and Mr. Manfred Nan.
49. On 8 November 2023, the Second Respondent requested a 20-day extension of the deadline to file its Answer, which was noted by the CAS Court Office. Therefore, the Appellant was invited to comment on that request no later than by 9 November 2023, while its silence will be deemed acceptance.
50. On 9 November 2023, the CAS Court Office acknowledged receipt of the First Respondent’s letter of 8 November 2023, in which he requested a 10-day extension of the deadline to file his Answer. Pursuant to Article R32 (2) of the CAS Code, the request was granted.
51. On 10 November 2023, the CAS Court Office noted that the Appellant does not oppose to the Second Respondent’s

- deadline extension request and, therefore, it was granted, i.e. the Second Respondent was invited to submit its answer by 4 December 2023.
52. On 4 December 2023, the CAS Court Office acknowledged receipt of the Second Respondent's correspondence regarding the request for an extension of the deadline to submit the Answer by 14 December 2023, which was granted.
 53. On 13 December 2023, the CAS Court Office acknowledged receipt of the Respondents' Answers. The Parties were invited to inform the CAS Court Office, by 20 December 2023, whether they prefer a hearing to be held in this matter and whether they request a case management conference with the Panel. Pursuant to Article R54 of the CAS Code, the Parties were informed that the Panel appointed to decide the case is constituted as follows: President – Prof. Dr. Eligiusz Krześniak, Arbitrators – Mr. Michele A.R. Bernasconi and Mr. Manfred Nan.
 54. On 18 December 2023, the CAS Court Office noted that the Appellant – in its letter of 15 December 2023 – did not request holding a hearing in this matter and that the Panel may issue an award based on the Parties' written submissions.
 55. On 21 December 2023, the CAS Court Office acknowledged receipt of the Respondents' letters of 20 December 2023. The Second Respondent considered that a hearing is not necessary, while the First Respondent preferred for a hearing to be held.
 56. On 27 December 2023, the CAS Court Office invited the Parties to indicate their preferences for a hearing in this matter to be held in person or by videoconference.
 57. On 28 December 2023, the CAS Court Office noted that the Second Respondent – in its letter of 27 December 2023 – preferred to hold a hearing by videoconference.
 58. On 4 January 2024, the CAS Court Office noted that the Appellant – in its letter of 2 January 2024 – preferred to hold a hearing by videoconference.
 59. On 8 January 2024, the CAS Court Office noted that the First Respondent – in his letter of 8 January 2024 – preferred to hold a hearing by videoconference.
 60. On 12 January 2024, the CAS Court Office notified the Parties that the hearing had been scheduled for 11 March 2024.
 61. On 30 January, the CAS Court Office sent the Parties the Order of Procedure, which was returned duly signed by the Parties within the prescribed deadline.
 62. On 11 March 2024, the scheduled hearing was held by videoconference before the Panel. Apart from the Panel and Mr. Fabien Cagneux, Managing Counsel, the hearing was attended by:

For the Appellant:
 - Dr. Ádám Gyökér, Counsel
 - Dr. Hajnalka Ritter, CounselFor the First Respondent:
 - Mr. Matija Katanec, Respondent
 - Mr. Tomislav Kasalo, Counsel
 - Mr. Ivan Ostojić, Counsel

For the Second Respondent

- Mr. Roberto Nájera Reyes, Senior
Legal Counsel

63. At the outset of the hearing, the Parties confirmed that they had no objections in respect to the Panel and that the Panel had jurisdiction over the present dispute. In their opening statements, the Parties reiterated the arguments already put forward in their respective written submissions.

64. At the conclusion of the hearing, the Parties expressly stated that they had no objections in respect of the Panel's formation, nor of their right to be heard and to be treated equally in the arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

65. This section of the Award does not exhaustively list the Parties' contentions, its aim being to summarize the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including the allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

66. The Appellant's submissions may, in essence, be summarized as follows:

i. The Club has been denied its right to appeal due to the circumstances of delivering the Decision, the detailed notification of the

grounds for the Decision and the Registration Ban Decision.

ii. Emphasizing the international labour law principles and the Contract, the Club argues for Hungarian law's governance due to the work being conducted in Mezőkövesd, Hungary. It asserts clarity of the Contract's jurisdiction clause, exclusively designating the Hungarian Administrative and Labour Court for labour disputes and highlights its mandatory nature for Hungarian football teams. The Club contends that any deviation from the Contract's provisions is invalid, citing CAS jurisprudence (CAS 2022/A/8571) to challenge the FIFA DRC's competence in deciding the employment-related dispute. Summarizing, the Club insists that the Decision violates the exclusive jurisdiction of the Hungarian Administrative and Labour Court. The Appellant is disputing the FIFA DRC's competence in this employment matter.

iii. The Club contends that temporarily transferring the Player to the second team aligns with the terms of the Contract, emphasizing that the Club provided detailed reasons for the decision. The Club argues that the transfer was a lawful and justified measure, citing the compulsory nature of the Contract terms established by the Hungarian Football Federation. The measure was explicitly temporary, of which the Player had been well aware, as the Appellant had been

- continuously assuring him about the first team's reliance on his contributions. The Club maintains that it would consistently acknowledge the Player's value and communicate the temporary nature of the transfer, aiming at his return to the first team.
- iv. The Club asserts that the immediate termination initiated by the Player was unlawful, as the Club was not in default of any payment, a prerequisite for such termination according to the Contract and the FIFA Regulations on the Status and Transfer of Players ("FIFA RSTP"). The Appellant asserts that when the Contract was terminated, the payment was only 18 days late, concluding that the First Respondent had no legitimate reason to terminate the Contract so abruptly. Despite ongoing verbal communications, the Player opted for exchanging notice letters instead of cooperating with his employer.
- v. The Appellant contends that the Player breached the Contract in that he did not make every effort to improve his physical condition and perform at his best, as he scored well below the team average in the physical and health assessment.
- vi. Additionally, the Club opposes the Player's compensation claim, requesting information on his contract with NK Varazdin to determine the appropriate deductions. The Appellant questions the realism of the Player's claim in that regard and notes the absence of any contractual provisions having been referenced.
- vii. The Club contends that it upheld all of its contractual obligations, adhering to FIFA and Hungarian Football Federation regulations and legal provisions, and it did not obstruct the Player's ability to continue his employment.
67. In its Appeal Brief, the Appellant submitted the following requests for relief [verbatim transcription]:
- "The Appellant kindly requests the CAS:*
- 1., annuls and set aside in its entirety the Decision issued by the Council of the FIFA DRC (Ref. Nr. FPSD-7151) received on 17th August 2023 having regard Matija Katanec had his employment terminated unlawfully and in the labour law dispute the Hungarian national labor court has jurisdiction according to the Employment Contract between the Parties and the stipulated law*
 - 2., determine that the decision of the FIFA DRC FPSD 7151 was not communicated to MEZŐKÖVESD ZSÓRY FC within the time-limit set by FIFA and FIFA therefore infringed the to MEZŐKÖVESD ZSÓRY FC's right to apply for judicial review and unlawfully imposed sanctions as a legal consequence*
 - 3., annuls and set aside in its entirety the Decision issued by the FIFA Disciplinary Committee (Ref. no. FDD-15697) on 17th August 2023 having regard to the fact that our appeal against the decision under case number FPSD 7151 has not yet been considered in the present proceedings, and that*

therefore no sanction or decision can be imposed as a result.

4., grants the relief sought by Appellant,

5., release the Appellant from the financial obligation to pay laid down in the Decision issued by the Council of the FIFA DRC (Ref.Nr. FPSD-7151),

6., suspend the execution issued by the FIFA Disciplinary Committee (Ref. no. FDD-15697) on 17th August 2023 given that the notification of the grounds of the decision under case number FPSD 7151 has not been sent to the MEZŐKÖVESD ZSÓRY FC before as of 17th August 2023 neither by e-mail nor by FIFA Legal Portal, therefore, the contested decision cannot be final and binding, since the Appellant did not have the opportunity to exercise right of appeal earlier than 17th August 2023

7., to charge all costs of these proceedings to Matija Katanec, FIFA”.

B. The First Respondent’s Position

68. The First Respondent’s submissions may be summarized as follows:

- i. The Player does not contest CAS’ jurisdiction in this matter according to the applicable CAS Code and FIFA Statutes, and in his opinion, the FIFA Regulations shall be primarily applicable to the substance of this matter, as it was rightfully sustained in the Decision, along with the subsidiarily applicable Swiss law.
- ii. The First Respondent argues that FIFA has jurisdiction over international employment disputes, unless the parties opt for a national arbitration tribunal. The

Player challenges the Club's interpretation of the Arbitration Clause, asserting it provides alternative forums, including FIFA. He emphasizes that filing the claim before FIFA was a binding choice. The Player questions the Club's lack of evidence for bringing the matter before an unspecified court and cites CAS jurisprudence supporting FIFA's jurisdiction. He contends that any contractual ambiguity should be interpreted against the Club. Ultimately, the Player asserts that FIFA was competent due to the international nature of the dispute and his choice of forum.

iii. As to the salary payment and the Contract termination, the Player challenges the Club's assertion that a 45-day salary payment delay was necessary for unilateral termination. He cites specific clauses from the Contract and the FIFA Regulations, emphasizing that the Club's failure to fully comply with his financial requests, as outlined in the default letter, constituted just cause for termination under the FIFA Regulations.

iv. Concerning his exclusion from the first team, the Player disputes the Club's argument that such exclusion was a temporary measure, presenting evidence that it lasted for almost five months. He argues that the Club's statements about his alleged poor physical performance were unfounded, especially considering

he was fit and not injured during the exclusion period.

- v. The Player cites relevant provisions from the Contract, FIFA RSTP, and CAS jurisprudence to support his position. He underscores the mandatory nature of certain FIFA RSTP provisions, such as the requirement for clubs to fully remedy any salary payment default within 15 days to avoid players unilaterally terminating their contracts.
 - vi. The Player argues that the Club's conduct, including persistent exclusion and failure to comply with financial obligations, amounted to a breach of contract. He asserts that such behaviour not only violated FIFA RSTP, but also his personal right to train and play with the first team, constituting a "*per se*" just cause for contract termination.
 - vii. Concluding, the Player contends that the Club's actions, both in terms of financial obligations and exclusion from the first team, provided him with legitimate grounds to terminate the Contract with just cause, as per FIFA Regulations and established CAS jurisprudence. Consequently, the Player contends that the Club is now obligated to make the payments determined in the Decision.
69. In the Answer to the Appeal Brief, the First Respondent submitted the following requests for relief [verbatim transcription]:

"In view of the foregoing, the First Respondent respectfully requests the honorable CAS Panel:

- to deem the Appeal as inadmissible,*
 - to order the Appellant to pay all the costs of the proceedings before CAS, and*
 - to order the Appellant to pay a significant contribution towards the legal fees and other expenses incurred by the First Respondent in connection with these proceedings of at least CHF 10,000.00.*
- or, in the event that the Appeal shall not be deemed as inadmissible:*
- to reject all reliefs sought by the Appellant in its Requests for Relief from the Appeal Brief, and*
 - to order the Appellant to pay all the costs of the proceedings before CAS, and*
 - to order the Appellant to pay a significant contribution towards the legal fees and other expenses incurred by the First Respondent in connection with these proceedings of at least CHF 10,000.00".*

C. The Second Respondent's Position

70. The Second Respondent's submissions may be summarized as follows:
- i. The jurisdiction of the CAS over the Appellant's appeal, as per Article 57 (1) of the FIFA Statutes and Article R47 of the CAS Code, is undisputed, with the Second Respondent not contesting the admissibility of the appeal against the Decision, which became available to the Club on 17 August 2023. Nevertheless, FIFA considers the appeal against the Registration Ban Decision moot,

- since the ban was lifted on 8 September 2023, rendering the decision ineffective as of that date.
- ii. FIFA rebuts the Club's allegations, asserting the Contract's non-exclusive jurisdiction, dismissing *lis pendens*, and demonstrating the Player's just cause due to the Club's abusive conduct.
 - iii. Due to FIFA confirming that the Decision was not accessible for the Appellant until 17 August 2023, and the subsequent lifting of the Registration Ban Decision, rendering it moot, the Second Respondent asserts that the Appellant's requests for relief numbers 2, 3, 4, and 6 are moot.
 - iv. FIFA asserts its jurisdiction in the dispute between the Appellant and the Club, highlighting Article 22 FIFA RSTP, which establishes FIFA's authority in international disputes. The jurisdiction clause in the Contract is considered unclear and non-exclusive, as it allows filing claims with five different forums, failing to exclude FIFA's competence. FIFA contends that the Parties' behaviour and communications demonstrate their intention to leave open the possibility of filing claims with FIFA, supporting the Decision to retain jurisdiction. Additionally, FIFA disagrees with conclusions from the award CAS 2022/A/8571, emphasizing the need to consider party intent, reliance, and the principle of interpreting ambiguous clauses against the drafter.
 - v. The Second Respondent rejects the Appellant's *lis pendens* claim, asserting that the Appellant has not provided convincing evidence to meet the "triple-identity" criteria, which requires the same parties, object, and facts in other proceedings. Moreover, FIFA emphasizes that even if there was another legal dispute, the Appellant failed to prove the serious reasons required for a stay, highlighting the absence of any serious inconvenience.
 - vi. FIFA asserts that the dispute falls under its jurisdiction, with its regulations, especially the FIFA Statutes and FIFA RSTP, serving as the applicable law. The Appellant's claim for the Hungarian law to govern the employment relationship is rejected, as FIFA highlights the voluntary submission to FIFA's jurisdiction, implying acceptance of FIFA's regulations and jurisprudence. FIFA emphasizes the consistent global application of its regulations to ensure equal treatment and maintain predictable justice administration in football disputes.
 - vii. The Second Respondent argues that the Player had just cause to terminate the Contract based on Article 14 of FIFA RSTP, emphasizing the provision allowing termination in case of abusive conduct by a party aiming to force the counterparty to terminate or alter the contract terms. FIFA cites instances of the Club's abusive behaviour, such as unilaterally demoting the Player to

the second team without justifiable reasons and failing to communicate the alleged temporary nature of the demotion. Referring to a similar CAS decision, FIFA contends that the Player's exclusion from the first team, coupled with delayed salary payments, constituted a breach of trust, providing just cause for contract termination. The Club's recurrent pattern of such behaviour only strengthens the Player's case. Consequently, FIFA asserts that the Player had valid grounds to terminate the Contract due to the Club's abusive, bad-faith, and unjustifiable conduct.

- viii. The Second Respondent asserts that its involvement in the proceedings is a result of the Appellant's attempt to challenge FIFA's jurisdiction and discredit its authority. Having established jurisdiction and confirmed the Club's abusive behaviour, FIFA deems the dispute 'horizontal' and expresses disinterest in debating its financial aspects, directing the Panel to uphold the Decision.
 - ix. Summarizing, FIFA contends that the appeal should be rejected in its entirety.
71. In the Answer to the Appeal Brief, the Second Respondent submitted the following requests for relief [verbatim transcription]:

“Based on the foregoing, FIFA respectfully requests CAS to issue an award on the merits:

- (a) rejecting the reliefs sought by the Appellant and dismissing the appeal in full;*

- (b) confirming the Appealed Decision;*

- (c) ordering the Appellant to bear the full costs of these arbitration proceedings”.*

V. JURISDICTION OF THE CAS

- 72. Pursuant to Article 186 (1) of the Swiss Private International Law (“PILA”), the CAS has the power to decide upon its own jurisdiction.
- 73. Article R47 of the CAS Code states that:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.
- 74. Article 57 (1) of the FIFA Statutes (2022 edition) provides as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.
- 75. In addition, the Appealed Decision provides as follows:

“According to article 57 par. 1 of the FIFA Statutes, this decision may be appealed against before the Court of Arbitration for Sport (CAS) within 21 days of receipt of the notification of this decision”.
- 76. As a result, CAS has jurisdiction to hear and adjudicate the present matter.

VI. ADMISSIBILITY OF THE APPEAL

77. Pursuant to Article R49 of the CAS Code:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties”.

78. Article 57 (1) of the FIFA Statutes (2022 edition) provides as follows:

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.

79. The Decision was issued on 12 April 2023 and notified to the Appellant with the grounds on 17 August 2023. The Appellant filed its Statement of Appeal on 30 August 2023. FIFA confirmed the notification date, and thus the timely filing of the appeal.

80. Therefore, the Appeal is admissible.

VII. APPLICABLE LAW

81. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the

absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

82. Since FIFA is incorporated in Switzerland, the Panel deems the applicable regulations to be the FIFA Statutes, the various regulations of FIFA, and subsidiarily the Swiss law.

VIII. MERITS

83. The very first issue to determine is the scope of the appeal.

84. The second issue to address is whether the FIFA DRC had jurisdiction to rule in this case. Only after this has been established will it be possible to proceed to assessing whether the Contract had been breached and whether the compensation claims are valid.

A. What is the scope of the appeal

85. During the CAS proceedings, the Appellant withdrew its challenge against the FIFA letter which implemented the Registration Ban Decision but maintained its appeal against the Decision.

86. This leads to the conclusion that the Appellant's requests for relief numbers 2, 3, 4, and 6 have been withdrawn. The Appellant confirmed the above during the hearing. Therefore, only the requests for relief 1, 5 and 7 remain to be addressed.

B. What does this matter concern?

87. The Appellant objects to the FIFA jurisdiction and finds that the competence to decide employment-related disputes rests exclusively with the Hungarian courts because of the jurisdiction clause in the Contract. The Respondents, on the contrary, challenges the Club's interpretation of the Arbitration Clause, asserting it provides for alternative forums, including FIFA. Furthermore, the Respondents assert that FIFA was competent due to the international nature of the dispute.

88. Article 22 of FIFA RSTP provides – in its pertinent parts – as follows:

“Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs;[...].”

89. Additionally, Article 23 (1) of FIFA RSTP reads as follows:

“The Dispute Resolution Chamber of the Football Tribunal shall adjudicate on any of the cases described in article 22 paragraphs 1 a), b), d), e) and f).”

90. Furthermore, Clause XI.49 of the Contract states as follows:

“The Parties agree that they shall make efforts to settle their possible dispute in amicable way by negotiations. If these efforts fail — in cases determined by the rules of MLSZ and FIFA - the Parties may turn to the organizational units with MLSZ or FIFA scope of authority, in case of labour dispute to the Administrative and Labour Court having competence and scope of authority, and in all other disputes arising out of their legal relationship the Parties stipulate the exclusive jurisdiction of the Sports Standing Arbitration Court based on the Article 47 of the Sports Law. The number of arbitrators is three: the procedure is determined by the Procedural Rules of the Arbitration Court”.

C. International aspect

91. A player's nationality is an important factor when determining whether a dispute qualifies as international under Article 22 (b) of FIFA RSTP. There is CAS case law denying the case an international aspect if the player or coach holds the same nationality as the club or a dual citizenship at the time of the event giving rise to the dispute (see e.g. CAS 2016/A/4441).

92. The First Respondent is and had been a Croatian national and the Club is incorporated in Hungary, hence this case does have an international aspect.

D. The Parties' agreement in Clause XI.49 of the Employment Contract

93. As a point of departure, the Panel notes that both Parties are indirectly affiliated with FIFA and, therefore, subject to the FIFA regulations (including the FIFA RSTP). Furthermore, the Panel notes that the Parties have contractually submitted themselves – inter alia – to

FIFA regulations. Therefore, Articles 22 *et seq.* of FIFA RSTP apply, in principle, to this matter.

a) *Were the Parties at liberty to opt out of Article 22 (b) of FIFA RSTP?*

94. According to Article 22 (b) of FIFA RSTP, FIFA's competence in employment-related disputes is not absolute. According to the first sentence of Article 22 of FIFA RSTP, FIFA is only competent subject to "to the right of any player, coach, association, or club to seek redress before a civil court". Article 22 of FIFA RSTP, thus, entitles the Parties to seek redress either before the FIFA's adjudicatory bodies or before local courts. Should the Parties opt for a local forum, the FIFA adjudicatory bodies are no longer competent.
95. The question is whether the parties to a contract can limit the choice provided for in Article 22 of FIFA RSTP by entering into an agreement that obligates the party seeking judicial recourse to do so only before the local forum. The Panel finds that parties, in principle, do have such autonomy (cf. also CAS 2016/A/4554 paras 60 *et seq.*). This follows from Article 22 (b) of FIFA RSTP, whereby the parties can substitute the FIFA adjudicatory bodies for "an independent arbitration tribunal". If, however, the parties can substitute one option for the other, better arguments speak in favour of granting the parties full autonomy with respect to choosing the competent adjudicatory instance. Thus, the Panel finds that the parties may enter into a contractual or procedural agreement that excludes recourse to FIFA and obliges them to seek judicial redress only before the local courts. Merely for informative purposes

and as a digression, the Panel refers to CAS 2013/A/3278, where the panel found in paras 66 *et seq.* as follows:

"66. At the same time, under the freedom of contract and Swiss provisions on choice-of-forum clauses (e.g. article 5 of the PIL Act and article 17 of the CPC) parties to an international contract are entitled to include a choice-of-forum clause in their contract; and under Swiss law, a choice-of-forum clause is deemed exclusive, unless expressly provided otherwise.

67. Consequently, in light of the above legal framework, the question here is whether in the circumstances of this case, the Appellant and the Respondent could validly include a choice-of-forum clause in their Second Agreement and, if so, whether it also had the effect of excluding the competence of the FIFA internal bodies (in this case the Single Judge of the FIFA PSC) as the primary instance to pronounce itself on a dispute deriving from their contract.

68. With respect to the first aspect, given that we are dealing with an international contract between indirect members of FIFA and a purely contractual dispute which does not involve FIFA as a party or any sanctions taken by FIFA, the Panel finds that under Swiss law the Appellant and Respondent were entitled to validly adopt between themselves a choice-of-forum clause in favour of State courts (here the common courts of Funchal's Judicial District).

69. Concerning the second aspect, i.e. the scope of the parties' contractual choice-of-forum clause/exclusion of FIFA's competence, the majority of the Panel finds that the intent of the parties to the Second Agreement was clearly to choose the common courts of Funchal's Judicial District as the only body to decide any contractual dispute between them, since clause 5 of the Second Agreement refers to those courts 'For all legal consequences..' and there is no wording included which indicates the parties deemed the Portuguese courts in question would

merely be an appellate body against a primary decision by FIFA; while at the same time this was a commercial contract and there is a presumption under Swiss law that a choice-of-forum is exclusive.

70. For the above reasons, the majority of the Panel finds that when including clause 5 in the Second Agreement the parties' intention was to exclude – in favour of the common courts of Funchal's Judicial District – any resort to a FIFA body in case of a dispute, and finds that such choice of the parties was valid under Swiss law”.

96. The Panel further digresses referring to the FIFA Dispute Resolution Chamber decision dated 25 February 2020 (Petkovski v/ Vicente et al.), in which the adjudicatory body found as follows:

“II.6. Taking into account all the above, the Chamber emphasised that in accordance with art. 22 of the Regulations, FIFA is competent to hear employment-related disputes between a player and a club with an international dimension ‘without prejudice to the right of any player or club to seek redress before a civil court for employment related disputes.

II.7. In the present matter, the FIFA DRC duly noted that the player and the club had unambiguously and exclusively decided that any dispute that would arise from the contract would be the ‘Labor Court of the Judicial Court of Barcelos’.

II.8. The DRC recalled that parties may freely agree to give jurisdiction to a civil court, and that such choice shall always prevail. In fact, the Chamber, recalling its jurisprudence as well as CAS jurisprudence in this regard, and in particular CAS 2013/A/3278, highlighted that even if the choice of law does not specify which courts are

competent (e.g. a generic reference is made to a region/city), FIFA is not competent when the parties have exclusively agreed to the jurisdiction of a civil court. In addition, the DRC emphasized that art. 22 of the Regulations provide a clear hierarchy in favor of contractual autonomy.

II.9. In view of all the above, the Chamber concluded that it was not competent to hear the dispute between the player and club, and consequently declared the claim of the player inadmissible”.

97. The Panel is well aware that Article 22 of FIFA RSTP is the cornerstone of the legal protection to which football professionals are entitled. Thus, opting out of Article 22 (b) of FIFA RSTP should not be accepted easily. The Parties may only opt out if they do so freely and willingly, and only then will such arrangement be accepted, so as to avoid any misuse undermining the Parties' access to due process under Article 22 of FIFA RSTP.

b) Did the Parties opt out of Article 22 (b) of FIFA RSTP?

98. Whether the Parties had wanted the employment-related dispute to be decided solely and exclusively by the Hungarian courts needs to be assessed through interpreting the relevant language of the Contract while taking into account all relevant facts. The Panel applies Swiss law to the interpretation question, since the adjudicatory body that had allegedly been derogated from (the FIFA DRC) is located in Switzerland. Furthermore, the Parties did not make any submissions indicating that applying the Hungarian law to this

interpretation question would have led to a different outcome.

99. Now, moving to the Contract itself the relevant part of Clause XI.49 of the Contract reads as follows:

“[...] the Parties may turn to the organizational units with MLSZ or FIFA scope of authority, in case of labour dispute to the Administrative and Labour Court having competence and scope of authority, and in all other disputes arising out of their legal relationship the Parties stipulate the exclusive jurisdiction of the Sports Standing Arbitration Court based on the Article 47 of the Sports Law”.

100. Moreover, the relevant part of the FIFA Commentary on the Regulations on the Status and Transfer of Players (2023 edition) reads as follows:

“The DRC unambiguously recognises the right to bring certain cases before ordinary courts, and refrains from accepting jurisdiction where the parties to a dispute have explicitly chosen to have employment-related cases heard by a civil court. CAS has confirmed this approach and has acknowledged that a club and a player may agree in their contract to refer any employment-related disputes to state employment tribunals. If the parties in a case opt for it to be heard before a state court, this decision must be respected. [...]”

However, jurisprudence dictates that jurisdiction clauses must be sufficiently clear, including at the very least the designation of a specific place or (civil) court. This requirement ensures that the parties involved have a clear understanding of the agreed forum for resolving potential disputes, thereby promoting predictability and certainty in the resolution of disputes. The relevant clause must also be exclusive, in favour of the relevant court to exclude the jurisdiction of the FT. [...]”

Where a clear and exclusive jurisdiction clause has been agreed upon by the parties, the case will

still be heard by the DRC provided that the international dimension is present and both parties agree (even tacitly) that the DRC should adjudicate. In other words, despite the existence of a jurisdiction clause in the contract, if a claim is lodged before the FT and the respondent does not challenge the jurisdiction of the FT, the DRC will accept jurisdiction to hear the matter. A challenge to the competence of the DRC in principle must therefore be invoked by the respondent, otherwise it is deemed that the jurisdiction of the DRC is accepted by both parties”.

101. At first glance, the language of the Clause is quite unclear. It refers to several different adjudicatory bodies, i.e. MLSZ, FIFA, the Administrative and Labour Court and to the Sports Standing Arbitration Court. As expressed in the Clause, the different bodies have each a different competence. This follows from the language of the Clause, whereby, for instance, the departments of FIFA and MLSZ are only competent to the extent of their “scope of authority”. In view of the factual circumstances of the present case, the majority of the Panel does not consider it necessary to assess what may have been the intention of the Parties with the reference to FIFA and MLSZ, i.e. which types of disputes would fall under the competence of FIFA and MLSZ. Furthermore, the Clause provides that the Hungarian Administrative and Labour Court are supposedly competent for “labour disputes” and that the Sports Standing Arbitration Court has venue “in all other disputes”. On one hand, the construction of the Clause might dictate that each different forum is only competent for specific types of disputes yet on the other hand it not entirely clear from the Contract itself whether this was indeed the intention of the Parties.

102. The pertinent question is which jurisdiction prevails if the fora's competences should overlap - contrary to the Parties' assumption - i.e. if not only the state courts, but also the FIFA adjudicatory bodies can, in principle, be competent to handle the labour disputes (Article 22 of FIFA RSTP). Such jurisdictional conflicts may be resolved - in principle - either by giving preference to the FIFA bodies or to the local courts.

103. If interpreted only in literal terms, the majority of the Panel finds that one should conclude that in Clause XI.49 of the Contract the Parties had bindingly granted the competent Hungarian Administrative Court and the Labour Court jurisdiction to adjudicate and settle the matter which is the object of the present case between them. This is because the present matter is a labour dispute and the local courts' competence had not been restricted to national or local disputes. Instead, Clause XI.49 of the Contract seems to stipulate that Hungarian courts are competent for all labour disputes.

104. The Panel further notes that several CAS Panels have already scrutinized similar, but not identical contractual clause in a number of previous matters under different factual circumstances and with different outcomes.

105. Starting with CAS 2021/A/7775, the CAS Panel opined that the parties had, in fact, opted out of FIFA jurisdiction and found as follows:

"The Panel finds that – when interpreting the clause in light of the principle of good faith – the latter interpretation best reflects the interests and intentions of the Parties. By referring explicitly to "labour disputes" and conferring jurisdiction for such disputes expressly to the state courts, the

Parties wanted to establish exclusive jurisdiction in favour of such courts. Since the present case is – undisputedly – an employment-related dispute, it follows from Clause XI.4 of the Employment Contract that the Parties bindingly conferred jurisdiction to the competent Administrative and Labour Court in Hungary to adjudicate and decide the matter between them. In addition, the Panel notes that the competence of the local court was not restricted to national or local disputes. Instead, the Clause XI.4 of the Employment Contract states that Hungarian courts are competent for all matters pertaining to labour disputes. Thus, based on the principle of reasonableness and good faith, the Panel finds that the Parties by agreeing on Clause XI.4 excluded the option to seek redress before the FIFA organs in labour-related disputes and opted for a single forum, i.e. the competent national "Administrative and Labour Court in Hungary". Such agreement shall override the FIFA rules and regulations, particularly Articles 22 and 23 of the FIFA RSTP".

106. Further, the Panel refers to CAS 2022/A/8571, where the CAS Sole Arbitrator concluded that *"the Contract established the exclusive jurisdiction of the Administrative and Labour Courts in employment-related disputes between the Parties. This clear and unequivocally agreement between the Parties to refer employment-related decision exclusively to Administrative and Labour Courts must be respected by the FIFA DRC".*

107. The CAS Sole Arbitrator in CAS 2022/A/8571 further reasoned, *inter alia*, as follows:

"When analysing the wording of Article 49 of the Contract, the Sole Arbitrator notes that it refers to four possible different fora of dispute resolution, competent to decide in case of a contractual dispute between the Parties. These fora are (i) the "organizational units of

MLSZ”, (ii) the “organizational units of FIFA”, (iii) the “Administrative and Labour Court” and (iv) the “Sports Standing Arbitration Court”. In view of the Sole Arbitrator, the jurisdiction clause is not clear on its face. However, a closer look at the wording of Article 49 of the Contract reveals that the provision itself distinguishes between different types of disputes upon which the jurisdiction of the respective fora is to be determined. More specifically, the Administrative and Labour Court has exclusive competence “in case of labour dispute”, whereas the Parties may file claims before FIFA “in cases determined by the rules of MLSZ or FIFA” that are not of an employment-related dispute. Consequently, when agreeing on Article 49 of the Contract, the Parties opted out of Article 22 lit. b) of the FIFA RSTP and, at the same time, clearly and exclusively opted in Article 22 of the FIFA RSTP in favour of the jurisdiction of the Administrative and Labour Court.

Against this background, the Sole Arbitrator finds that the national ordinary court was exclusively competent to examine the dispute at hand, irrespective of whether or not a claim had already been filed with the Labour Tribunal in Miskolc. Accordingly, the FIFA DRC had no competence to deal with the dispute between the Parties in first instance pursuant to Article 22 of the FIFA RSTP in conjunction with Article 49 of the Contract. The Appellant further objected to the jurisdiction of the FIFA DRC in the proceedings before FIFA”.

108. However, contrary to the outcomes in CAS 2021/A/7775 and CAS 2022/A/8571, in a previous CAS award CAS 2018/A/6016, a Sole Arbitrator concluded that the FIFA bodies had correctly accepted jurisdiction.
109. The Panel further notes that there is not only ample CAS jurisprudence concerning the issue at hand, but it has

also been addressed by the Federal Tribunal of Switzerland (4A_2/2023, Judgment of 6 October 2023), which heard the appeal against one of the above-mentioned CAS awards (i.e. CAS 2021/A/7775).

110. The Federal Tribunal upheld the CAS award and pointed in its reasoning that the primary factor in interpreting an arbitration agreement is the parties’ actual mutual intention. The Swiss Federal Tribunal then went on to say if no such intention can be established regarding the arbitration agreement, it ought to be interpreted on a trust basis, i.e. the presumed intention is to be established as what the respective declaration recipient could and should have understood in good faith. In interpreting an arbitration agreement, one must consider its legal nature, particularly, that waiving common courts’ jurisdiction significantly restricts appeal avenues. Per the Federal Tribunal case law, such a waiver may not be easily assumed, which is why a restrictive interpretation is required if in doubt. In other words, the Federal Tribunal said that in case of doubt, one must not assume that the parties’ intention was to go to arbitration. On the contrary, one should in such case assume that the parties’ intention was to go for the two-stages (first instance and then appeal proceedings) process, which the majority of the Panel finds to be typical in common courts and atypical in arbitration.
111. Having referred to the existing CAS jurisprudence and the Swiss Federal Tribunal body of rulings, the Panel will - nevertheless - examine the matter at hand in detail. In the Panel’s view, the very fact of the preexisting CAS

jurisprudence - even that upheld by the Swiss Federal Tribunal - does not automatically warrant a similar ruling in a different matter. Simply put – bad judgments should not be followed.

112. Ultimately, the specific facts and circumstances of each case may render it necessary to issue a different ruling. Although in both the above matters (CAS 2021/A/7775 and CAS 2022/A/8571), the adjudicating authorities found that such clauses override the FIFA rules and regulations, particularly Articles 22 and 23 of FIFA RSTP, the Panel believes it important to examine whether there had been any extraordinary circumstances in the present matter that would justify a departure from the two afore-mentioned CAS Awards and a confirmation of the CAS Award in CAS 2018/A/6016. Accordingly, the Panel indicates below which circumstances of the present matter should be additionally considered.
113. First, the Panel notes that it is possible for a less experienced party to be unaware of the implications and meaning of a similar clause. The present dispute is between the Club and the Player, not between a club and a football coach (as was the case in CAS 2021/A/7775). Football coaches, in principle, have much more life and football-related experience, hence they are more aware of the language and ramifications of the contracts they enter into. They may have a particularly better understanding of whether a certain clause may also extend jurisdiction to national courts or if it may limit FIFA's authority. However, the matter at hand did not involve a young or inexperienced player, but an experienced professional, with many years of football career. Advanced and skilled players should be aware of the importance and ramifications of any legal documents they sign (an experienced player was also a party in CAS 2022/A/8571).
114. Second, the Panel considers the Parties' equality circumstances, it being understood that vague phrasing may not be interpreted against the affected party. Based on the submissions made and the evidence offered by the Parties, the majority of the Panel is satisfied that the relationship between the Parties was not divergent. In particular, as it concerns the jurisdiction Clause, the circumstances of the matter indicate that although such a provision had been a standard one from which the Parties were not expected to deviate, the majority of the Panel finds that the Player could have requested clarification or questioned such a provision. However, no such actions have been demonstrated.
115. Further, the language itself of the Clause, even if it is as clear as it could have been, understrikes the competence for state judiciary bodies for labour disputes.
116. Considering the above, the majority of the Panel does not recognize that there had been unequal bargaining power between the Parties, that the choice of forum had been arbitrary or detrimental from the outset for either of the Parties, that the Player had been unaware that despite the reference to disputes within the competence of FIFA and the competence of the FIFA DRC set forth in Article 22(b) of FIFA RSTP, FIFA would nonetheless not be competent in a labour dispute, or that undue influence (whether economic or otherwise) had

been exercised to pressure the Party into accepting the Contract terms and conditions.

117. The Panel further agrees with the Swiss Federal Tribunal that waiving the chosen jurisdiction should not be interpreted extensively. Thus, unless there are no extraordinary circumstances that would justify objecting to the chosen jurisdiction, the Parties' preference should be honoured. The majority of the Panel finds that the starting point for such analysis is Clause XI.49 of the Contract and not Article 22 (b) of FIFA RSTP. In the present matter, neither Party has pointed to any circumstances that might obstruct a fair ruling in the Hungarian Administrative and Labour Court. Nor did the Panel itself note any such circumstances. The majority of the Panel finds that, the Parties willingly opted for the Administrative and Labour Court as the competent authority to adjudicate labour disputes. That said, insufficient evidence has been shown to indicate the Parties' willingness to deviate from their choice.
118. Having analyzed all the circumstances, such as the literal wording of the Clause, the circumstances of entering into the Contract, the actual intentions and behaviour of the Parties, the majority of the Panel finds that FIFA had no jurisdiction, because the Parties did validly opt out of Article 22 (b) of FIFA RSTP.
- c) *Did the Appellant forego its right to object to FIFA's jurisdiction?***
119. The First Respondent submits that the Appellant, in any event, forewent its right to object to FIFA's jurisdiction due to exceeding the deadline prescribed by

the applicable FIFA Statutes, i.e. within 21 days as of the Decision notification date. The Panel disagrees. According to FIFA, the Decision was notified to the Appellant with the grounds on 17 August 2023. The Appellant filed its Statement of Appeal on 30 August 2023. The Panel notes that the Appellant, in its letter to FIFA, raised this body's incompetence in the matter and consequently requested discontinuation of the proceedings, which indicates that the Appellant did not accept FIFA's jurisdiction. Nevertheless, FIFA continued the proceedings and issued the Decision.

120. The Panel also contemplated whether the Appellant forewent its right to object to FIFA's competence by accepting the CAS's jurisdiction. The Panel, however, finds that this is not the case. First, the Panel notes that the Appellant stated that "*the FIFA DRC incorrectly decided to have jurisdiction to deal with the dispute between the Parties*" and its principal claim is to annul and set aside in its entirety the Decision having regard that "*in the labour law dispute the Hungarian national labor court has jurisdiction according to the Employment Contract between the Parties and the stipulated law*". Thus, by appealing to CAS, the Appellant did not accept the previous instance's jurisdiction. Second, the Panel finds that such procedural behaviour on the part of the Appellant is not contradictory. If the FIFA adjudicatory body had wrongly accepted jurisdiction, there must be an option to guarantee the Appellant due process by way of setting aside the Decision. This is all the more true considering that a FIFA decision can be enforced against a party outside the court enforcement system.

E. Conclusion

121. Concluding, the majority of the Panel finds that the Parties have contractually derogated from the default competence of the FIFA DRC pursuant to Article 22 (b) of FIFA RSTP. Clause XI.49 of the Contract explicitly gives precedence to the jurisdiction of the competent Hungarian Administrative and Labour Court in employment-related disputes. Consequently, the FIFA DRC did not have jurisdiction to decide the matter and the Decision must be set aside.
 122. Since the Panel, in appeals arbitration proceedings, is only mandated to decide the dispute within the limits of the previous instance, it cannot enter into the merits of the case but must accept the appeal and set aside the Decision.
 123. Against the above background, all further requests and prayers submitted shall be dismissed.
6. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 24 August 2023 by Mezőkövesd Zsóry Futball Club against the decision rendered on 12 April 2023 by the Dispute Resolution Chamber of the FIFA Football Tribunal is upheld.
2. The decision issued on 12 April 2023 by the Dispute Resolution Chamber of the FIFA Football Tribunal is set aside.
3. (...).
4. (...).
5. (...).

Arbitrations CAS 2023/A/10114 & 10117-10119 & 10121-10122

Tel Aviv Holdings Ltd. v. Fédération Internationale de Football Association (FIFA)

20 May 2025

Football; Disciplinary sanction for failure to comply with a decision; Specificities of CAS arbitration; Statutes of limitations; Impact of state proceedings; Sporting succession; Sporting continuity ; Overall circumstances; Scope of the dispute

Panel

Mr Stephen Sampson (United Kingdom),
President

Prof. Petros Mavroidis (Greece)

Mr José Juan Pintó (Spain)

1. CAS proceedings should not be suspended, unless exceptional circumstances or compelling reasons justify a derogation from access to justice. They involve at least one round of written submissions, including relevant arguments, witness statements and expert reports, the probative value of which may be limited in the absence of cross-examination. They are mostly resolved based on applicable sports regulations, Swiss law, and/or any other legislation deemed appropriate.
2. FIFA can prosecute disciplinary violations within the time limits provided by its Disciplinary Code (FDC). Such limits are interrupted by all procedural acts, starting afresh with each interruption, regardless of the existence of previous disputes.
3. Article 59 of the FDC does not entail the automatic closure of disciplinary proceedings in the presence of state proceedings. In that context, a balancing of interests must be conducted on a case-by-case basis.
4. Article 21 of the FDC is not intended to provide an exhaustive list and contains elements of varying importance that may lead, without not all of them being met, to the conclusion that a club must be regarded as a “sporting successor”. It has a broad scope, encompassing cases where state bankruptcy or liquidation proceedings have already been opened.
5. The concept of sporting continuity is distinguished from that of sporting succession by the fact that the club itself, or the entity targeted by the decision/contract that serves as the basis for the claim, has never ceased to exist or been detached from its activity. In both cases, the sporting elements, including the federative licence, domestic competitions, name, history, titles and sporting achievements, colours, logo, registered address/headquarters, stadium and internet domain, play an important role.
6. The overall conduct of the club, in particular its willingness to assume pre-existing debts during the acquisition process, may be considered to reinforce its liability. Conversely, the principles of diligence, bad faith and double jeopardy are of no avail if they have no practical impact on the case.
7. The amounts and interest provided

for in the infringed decisions cannot be reviewed again during disciplinary proceedings.

I. INTRODUCTION

1. The present Arbitral Award deals with six appeal proceedings involving the same Parties, which, however, are independent from each other (the “Appeals”). Given that they involve the same issues, the Parties agreed to submit them to the same Panel in accordance with Article R50 of the Code of Sports-related Arbitration (the “CAS Code”), to be heard together in a single audience and adjudicated in a single award. Therefore, the present Arbitral Award embodies the grounds and the findings of all the Appeals. Where necessary, the Panel will explicitly refer to the single appeal procedure and case number. If not stated otherwise, the below considerations shall apply to all the Appeals.
2. The Appeals were filed against six separate decisions (the “Appealed Decisions”) of the FIFA Disciplinary Committee (the “FIFA DC”), by means of which “Poalei Tel Aviv Holdings” was found guilty of failing to comply with five previous decisions of the FIFA judicial bodies (“the Infringed Decisions”) and with one award rendered by the Court of Arbitration for Sport (the “CAS”), all of them of financial nature. Specifically, the Infringed Decisions and CAS award ordered the payment of certain amounts (the “Debts”) to third parties (“the Creditors”).

3. In particular, the Appealed Decisions are the following:
 - i. Decision FDD-12648 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10114) regarding the non-fulfilment of the decision of the Single Judge of the Players’ Status Committee of FIFA (“FIFA PSC”) of 6 March 2018.
 - ii. Decision FDD-12650 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10117) regarding the non-fulfilment of the decision of the FIFA Dispute Resolution Chamber (“FIFA DRC”) of 31 October 2019.
 - iii. Decision FDD-12651 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10118) regarding the non-fulfilment of the decision of the FIFA DRC decision of 7 June 2018.
 - iv. Decision FDD-12652 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10119) regarding the non-fulfilment of the decision of the FIFA DRC of 11 April 2019.
 - v. Decision FDD-12654 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10121) regarding the non-fulfilment of the decision of the FIFA PSC of 12 August 2016.
 - vi. Decision FDD-13657 of the Deputy Chairperson of the FIFA DC of 31 July 2023 (CAS 2023/A/10122) of 24 July 2018 regarding the non-fulfilment of the CAS award of 24 July 2018.

4. The six disciplinary proceedings conducted by the FIFA DC due to the non-fulfilment of the Infringed Decisions and related CAS award will be hereinafter jointly referred to as the “Disciplinary Procedures”¹.

II. THE PARTIES

5. Poalei Tel Aviv Holdings Ltd (the “Appellant” or “Poalei Tel Aviv”, also referred to as the “Nissanov Group”) is the legal entity owning and operating the Israeli club Hapoel Tel Aviv FC (the “Football Club”), which is affiliated to the Israeli Football Association (“IFA”) and participates in the “Liga Leumit”, the second division of professional football in Israel.
6. Poalei Tel Aviv succeeded Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (“Harel Holdings”, in liquidation), which was created in September 2008 and owned the Football Club until January 2017.
7. The Fédération Internationale de Football Association (“FIFA” or the “Respondent”) is the international governing body of football at worldwide level, and has its headquarters in Zurich, Switzerland.

III. BACKGROUND

8. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and the evidence adduced by them. Additional facts and allegations found in the Parties’ written submissions,

pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in these six proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Harel Holdings’ insolvency proceedings

9. On 12 December 2016, upon the request of Harel Holdings, the District Court of Tel Aviv-Jaffa (the “District Court”) issued a “stay of proceedings order” by means of which the District Court ordered the stay of all the proceedings that were being conducted against Harel Holdings and opened insolvency proceedings against it. In this same order, the District Court appointed two Trustees in the insolvency proceedings (the “Trustees”) who were authorised to take steps to examine the feasibility of, and formulate a, creditors’ arrangement.
10. On 13 December 2016, the District Court upheld the request of the Trustees to open a tender to invite investors to submit bids for the acquisition of the footballing business, rights and assets within the insolvency proceedings, since it was not possible to maintain the activity of the Football Club due to the lack of economic resources of Harel Holdings. The last

¹ Four other appeals, docketed under CAS 2023/A/10113, 10115, 10116 and 10120, were withdrawn after the exchange of written submissions and hearing following the conclusion of settlements with

the Creditors. They are not addressed in this Award and resulted in separate awards on costs.

day fixed for the submission of bids was 27 December 2016.

11. On 27 December 2016, the Trustees submitted a report to the District Court informing it that no offer had been received for the acquisition of the "Hapoel Tel Aviv FC" business. Furthermore, given the lack of economic resources of Harel Holding and its lack of capacity to maintain the activity of the Football Club, the Trustees requested that the Court open liquidation proceedings. The District Court called the parties for a hearing to be held on 4 January 2017, to discuss the Trustees' request.
12. On 3 January 2017, the Trustees filed an additional report, informing the District Court of two offers that had been received from two different groups of investors: the "Nissanov Group" and the "Amrani Group", requesting the Court to approve one of the offers to acquire the activities of the Football Club. In their report, the Trustees emphasised that the difficulty in finding a purchaser for the Football Club was primarily due to the extent of the debts that Hapoel Tel Aviv FC had incurred as a result of judgments and arbitration awards that were issued against it by various tribunals abroad, including FIFA and CAS, as well as claims from abroad, which were assessed by them in a sum of about 30 million of shekels (hereinafter referred to as "NIS").
13. The bid of the Nissanov Group (the "Nissanov Offer") included a section 4h, which reads in its relevant part as follows (emphasis added):

"It is also known to the undersigned that there are judgements of the CAS (the Court of

Arbitration of Sport) and of the Court of Arbitration of FIFA against the Club and/or the team and/or the Companies, and that pending legal proceedings are being conducted against them, and there are also pending demands, all of which are in respect of debts and/or causes of action and/or events relating to the activities of the Companies prior to the purchase (hereinafter. "Claims Abroad") and that it is my responsibility to examine the legal or general implications of the judgment and/or the pending proceedings. [...]

*Against the Offeror's agreement to attempt to contend with debts to an estimated extent of approximately NIS 30 million of Claims Abroad and **subject to the condition that he will be obliged to pay amounts in actual practice accordingly**, therefore upon and after approval of the Offer by the court, the Trustees will assign to the Offeror the following rights [...]"*.

14. On 4 January 2017, a hearing was held in the District Court to consider several applications relating to the continuation of the insolvency proceedings, including whether a creditors' arrangement should be ordered, whether an application for the appointment of a provisional liquidator should be granted, and whether, as recommended by the Trustees, a sale of the activities of the Football Club to the Nissanov Group should be approved. In this hearing the Trustees and the representatives of Harel Holdings, the Nissanov Group, the Amrani Group and the IFA intervened. At the end of the hearing, the Judge of the District Court concluded that "[t]here is no place for an arrangement with creditors proceeding" and "[t]here is no alternative to the trustees'

position but to go through with the sale within the framework of the liquidation proceedings”.

15. The District Court therefore issued a decision (the “Liquidation Order”) by means of which it ordered the provisional liquidation of Harel Holdings and approved the Nissanov Offer for the acquisition of the Football Club’s activities. Furthermore, the District Court appointed the Trustees as liquidators of the Harel Holdings (hereinafter, the “Liquidators” or the “Trustees”, equally). In its relevant part, the Liquidation Order reads as follows (underlining added):

[...]

Background

The company “**Harel Holdings – Hapoel Tel Aviv Football Club Ltd.**” (hereinafter: “**the Club**”) owns the rights of management of the Hapoel Tel Aviv Football Club. The Club, which was founded in 1923, is one of the longest-established clubs in Israel and has won many titles and is also supported by a group of supporters numbering tens of thousands of people. The Club operates youth sections over the country in which thousands of children play, and these are managed by the company “**Harel Holdings Hapoel Tel Aviv Youth Team Ltd.**” (hereinafter: “**the Youth Club**”). As a consequence of financial difficulties and severe cash flow problems, the Club filed an application for the grant of a stay proceedings order. In the application it was contended that the Club’s debts amount to about NIS 100 million and according to the Club’s financial statements as at 31st May 2016 there is a deficit of approximately NIS 98 million. On 12th December 2016 a stay of proceedings order was granted by me on the grounds set forth in the decision and I will

*not repeat these things here (hereinafter: “**the Stay of Proceedings Order**”). I appointed Adv. Shaul Kotler and Chen Bardichev C.P.A. as trustees in the stay of proceedings (hereinafter: “**the Trustees**”) and among other things I authorised them to take steps for formulating an arrangement with creditors and to examine the feasibility thereof. (...)*

On 13th December, 2016 I upheld an application by the Trustees to publish an invitation for the submission of bids for acquisition of the Club by an investor, since it was not possible to go on operating the Club except by way of deficit operation. The application was supported with consent of the Official Receiver. I would add that according to the notices, the publication of which the Trustees initiated, the last date for submission of bids was fixed as being 27th December 2016.

[...]

Discussion and decision

The court record of the hearing which was held in the stay of proceedings files must be regarded as also being the record in the liquidation files by virtue of the fact that in the scope of the hearing the parties expressed their views on the liquidation proceedings and the sale of the activities of the Clubs.

[...]

Sale of the Clubs’ activities

As already mentioned, two offers were submitted to the Trustees for the acquisition of the Club’s activities, one being of the Nissanov Group and the other of the Amrani Group. The Trustees recommended to the court to approve in principle a sale of the Companies’ activities in the Clubs, because otherwise

irreparable damage would be caused, by virtue of the fact that the Companies will not be able to continue to run their business and the Clubs are liable to severe sanctions as prescribed, inter alia, in the constitution of the Football Association. In the scope of these sanctions: a deduction of points, relegation to lower leagues and so forth. The position taken by the Trustees has not been rebutted and it is also supported by the Official Receiver and as stated by counsel for the Official Receiver in the things he said at the hearing.

I have been persuaded that there is indeed extreme urgency for deliberating and deciding on the application for the sale of the Company's rights in the Clubs, because otherwise irreparable damage will be caused. There is no money in the coffers of the Companies through the holders of office which could enable a continuation of the Companies' activities and only a sale of the rights will save the Football Clubs, both of the senior team and also of the youth team.

I have examined the offers which have been put forward also in light of the clarifications and agreements that were given during the course of the hearing and as emerge from statements made by the parties' attorneys. In this regard, I would emphasize that the Nissanov Group is, as already mentioned, not adamant about the suspensive condition to its offer in regard to the non-deduction of points, although it reserves its rights to take proceedings in this connection before the judicial institutions of the Football Association and as specified in the constitutions, all according to law, and it acted wisely in taking this stance. I would further mention that it was explained that the Nissanov Group will continue the operation of the Clubs, including employment of the players, all in accordance with the outlines set forth in the offer and in the scope of this also what is stated in Paragraph 4A regarding the continued employment of the players.

I accept the Trustees' recommendation as to the preferability of the Nissanov Group's offer over that of the Amrani Group, with this being on the strength of a number of advantages in the first offer over the second offer, and I will particularize on this:

The Nissanov Group deposited a sum of NIS 1 million as security for performance of its obligations, whereas Amrani Group did not deposit any amount to secure the implementation of its offer.

The Amrani Group requested an extension of time to study and examine the obligations it is due to assume as stated in Paragraph 3e of the offer, according to which, and in the course of it reserving the right to withdraw the offer within 15 days from the date written notice is given to the Trustees after the examinations that it will carry out. As opposed to that, the Nissanov Group's offer does not allow the bidder to withdraw its offer.

The Nissanov Group has, as stated, taken upon itself the handling and the responsibility with regard to the judgements and the claims abroad, whereas in the Amrani Group's offer responsibility for the debts and the demands in respect of claims abroad will fall on the coffers of the liquidation, and as stated in Paragraph 3g of the Nissanov Group's offer. This aspect is of a very material nature because it reflects the assuming of a possible obligation running into tens of millions of shekels.

The Nissanov Group will operate the Clubs immediately, as distinct from the Amrani Group, in case of which the operation by it is not immediate.

All the aforesaid considerations tip the scales towards accepting the bid by Nissanov Group instead of the bid of the Amrani Group.

Conclusion

Based on everything stated above, I direct as follows:

[...]

I direct the setting aside of the interlocutory injunction that was given by me on 12th December 2016 in regard to the deduction of points, but the revocation of the order will come into force on 9th January 2017 in order to give the Nissanov Group time in which to lodge an application on this issue with the judicial institutions of the Football Association. This decision does not have the effect of deciding anything on the merits of the arguments.

There is no option other than to grant a provisional liquidation order for the Club and for the Youth Club. I appoint Adv. Shaul Kotler and Chen Bardichev C.P.A. as provisional liquidators. The appointment is conditional on the lodging of a personal undertaking in a sum of NIS 150,000 by each of the provisional liquidators in each of the two court files.

All the proceedings against the Clubs are stayed and no proceedings may be commenced against the Clubs, except foreign claims as defined above, in relation to which the arrangements as set forth in the offer and in the decision will apply.

[...]

I give approval to the Trustees to sell the activities of the Clubs to the Nissanov Group in accordance with the offer submitted by the Nissanov Group and in keeping with the clarifications that were given at the hearing and as stated in the court record and in the decision above. During the interim period, namely from the date of this decision and until the necessary approvals are received by the Football Association, the parties will act in accordance with the mechanism that was agreed at the hearing, and as mentioned in the statements of

Adv. Kotler shortly after the intermission in the court hearing. It is expected that all the parties will act in cooperation in order to make the necessary transfer of the rights in the Clubs to the acquiring group as soon as possible [...].”

16. On 8 January 2017, the General Counsel of the IFA sent an email to the Head of the FIFA DC informing it about the Liquidation Order issued by the District Court on 4 January 2017, and of the fact that “the activities of the club and part of its assets, including its rights of participation in the IFA competitions were sold to a new entity free of any previous debts as is the normal and usual case under insolvency laws in Israel. However, the new owners are still in the process of receiving the IFA confirmation to the acquisition, subject to the terms and conditions of the IFA statutes [...].”

17. On 16 January 2017, the IFA sent correspondence to FIFA informing it about the liquidation of Harel Holdings and the fact that the “Hapoel Tel Aviv FC” business had been sold to a new entity which had become a member of the IFA and was going to operate the Football Club. This correspondence reads as follows (emphasis added):

“Dear Sir & Madam,

I refer to your letters dated 16 December, 2016 (Ms. Solémalé) and 4 January 2017 (Mr. Blondin) in respect of our affiliated club Hapoel Tel Aviv FC.

As you were informed by the trustees under bankruptcy proceedings in their letters dated 15 and 18 December 2016, on 12 December 2016 the Honorable President of the Tel Aviv Jaffa District Court, Justice Orenstein, issued a Temporary Order for the freezing of all the proceedings against the Harel Holdings –

Hapoel Tel Aviv Football Company Ltd. (The legal entity which holds and operates Club Hapoel FC). This was made within Bankruptcy proceedings initiated by the club.

Following this Order and as expected from them, the trustees tried to reach a creditors' settlement, while at the same time an effort was made to find a new entity that would be willing to acquire the activities of the club. However, these efforts as such did not succeed.

*As a consequence of this situation, the trustees had no other choice but to approach again the courts asking for a liquidation order for the company while at the same time they succeeded, in the last moment, to **find buyers that were willing to buy the activities of the club, including the right of the club to participate in the Israel Championship.***

*On January 4, after a long court hearing, the court indeed decided to issue a liquidation order which means that **the company (Harel Holdings – Hapoel Tel Aviv Football Company) will be liquidated and actually will cease its activities** and therefore the Club under this structure went on bankruptcy.*

***The activities of the club were sold to a new entity who will from now on operate the club.** This is still subject to the approval of a special committee in the IFA designated for the approval of changings of ownership in clubs.*

We hereby attach, as requested in FIFA's letter of 4 January, the full text of the Decision and Judgement of the Tel Aviv Jaffa District Court, translated into English, as well as a copy of the original decision in Hebrew.

*Answering your specific questions in both letters we would like to clarify that the **new entity that acquired the activity of***

***the Club is now a member of IFA and as such that will operate the club Hapoel Tel Aviv FC.** Thus, the club under the new legal structure continues to be affiliated to the IFA and continues to participate in the competitions of the IFA. However, in accordance with the IFA Statutes, 9 points were deducted from the points achieved by the club in the 2016/2017 season.*

Furthermore, in order for you to have the full picture of the legal situation we would like to stress the following:

Under the laws of the State of Israel, in such circumstances all the debts that arose before the date of the issuing Liquidation Order as part of the Bankruptcy proceedings remain as debts of the legal entity which is now under bankruptcy, while the new buyers of the activities of the club acquired the club free of any previous debts. Therefore the creditors of these previous debts are not considered creditors of the new entity but should address any claim to the liquidators within the bankruptcy proceedings.

One of the duties of the liquidators is to try and collect any possible amounts owed to the entity under bankruptcy or to sell assets of the legal entity under bankruptcy – if exists – and if any such amounts are indeed collected they are supposed to be distributed between the different creditors based on the rules for distributing such amounts subject to the Israeli laws and regulations governing the way of distributing such funds. However, as I said, the new legal entity acquired the activities of the club and will continue to operate the club free of any duty to bare such previous debts whatsoever.

During the hearing that took place on January 4th, and commenting on the request of the counsel of some foreign creditors (ex-coaches of the club) the honorable Chief Justice of the

District Court clarified that the status of these foreign coaches as creditors is exactly equal to any other creditor as there is no possibility to give them any preference under the Israeli law over all the other creditors of the club. Furthermore it was clarified by the honorable Chief Justice of the District Court that preferring one type or group of creditors over the others is forbidden under Israeli law.

As far as we understand, based on the above circumstances as well as other arguments, IFA and the club will maintain the position that any pending proceedings (either at the DRC, PSC or Disciplinary Committee) should be closed by FIFA. Also based on Article 107 (b) of the FIFA Disciplinary Code. In this aspect please see the attached letter sent by the counsel of the Club under its new structure and a letter by the liquidators of the club. [...].”

18. Furthermore, with its letter of 16 January 2017 to FIFA, the IFA forwarded the following letters:

- A letter from Hapoel Tel Aviv’s counsel, acting on behalf of Poalei Tel Aviv, submitting that “any claims regarding the period prior to January 4 2017, should be addressed to the liquidator” of Harel Holdings and requesting “to close the [disciplinary] proceedings as well as any proceedings pending at the DRC and the PSC”.
- A letter from the Liquidators addressed to FIFA in the following terms:

“Following your correspondence dated 4 January 2017, we are hereby to address you as follow:

A. Order of Liquidation by Israeli Court

1. *Following the temporary order of 6 December 2016, on 4 January 2017 Tel Aviv-Jaffa District Court ordered the **liquidation-bankruptcy** of Harel Holdings Hapoel Tel Aviv FC Ltd. (Hereinafter: “**The Debtor**”).*

2. *As the debtor in liquidation proceedings according to Israeli law (chapter 267 to Israeli Company Law and similar to article 206(1) of the Swiss Bankruptcy Act), it is forbidden to carry on or to start any proceedings against the debtor. Furthermore it is forbidden by law to pay to a certain creditor and to prefer one over the other.*

The only action that a creditor may peruse is to submit in the Liquidator’s offices and in the office of the Israeli official receiver a statement of claim.

3. *Hence, all proceedings must be closed immediately and shall be deemed baseless under article 107(b) to FIFA Disciplinary Code. FIFA shall address the Claimant to submit his claim against Debtor at the Liquidator as any other creditor.*

B. *Liquidation affects Israel Football Association Registration*

4. *Due to the dissolution procedure, “Harel Holdings Hapoel Tel Aviv FC Ltd” is no longer affiliated to the Israel Football Association (IFA).*

5. *On account of the above, FIFA cannot deal with cases involving clubs with are not affiliated to their association any longer. Therefore,*

with all due respect, it does not appear to be in a position to intervene in this matter.

6. *Following Israeli Court's liquidation award, a new company is soon to be approved by IFA as an affiliated member at the IFA. The new company has taken over team's activity, including the right to participate in Israeli Premier League, all under the sanctions imposed in accordance with IFA laws and regulations.*

In accordance with Israeli Court's award, no further sanctions but the ones required by law are to be taken above those which were already taken against the new company.

7. *New company shall suffer also the sportive sanctions under IFA rules. As for example, **IFA already deducted 9 league points from the points already aggregated by them.***

However, it fundamentally trusted court's award, and relied upon all laws and regulations. It shall be noted that no rule of the IFA requires a new company, as new licensee by IFA to assume debts of any previous licensee.

8. *New company, if and once approved by IFA, was neither relevant at the time giving rise to the dispute nor at the time of the DRC proceedings were commenced and is therefore exempt from every claim related to this matter.*
9. *Israeli insolvency law and liquidation process is recognized*

worldwide as part of a common agreed insolvency process. Courts around the world recognize and respect Israeli courts decisions. In Israel only a district court is able to take decisions in insolvency law. In this matter of the liquidation of the club dealt with the chief justice of the Tel Aviv district court. A very notable judge with vast experience in insolvency law.

10. *For example in the matter of the liquidation of the global group of better place the Delaware court acknowledged the authority of the Israeli court and decided that the foreign main proceeding will be the Israeli liquidation proceeding. In this aspect the Delaware court ordered that the creditors of better place Inc. a Delaware corporation will have to submit in Israel a statement of claim and will not be entitled to run proceedings in the US. In this aspect we as liquidators believe that FIFA should recognize and respect the Israeli insolvency proceedings and thus closing all proceedings against the club.*

11. *Furthermore the reason for the FIFA rules about foreign players is to avoid the situation that the foreign player will be in a disadvantaged situation in collecting the debt. The situation in Israeli insolvency law is totally different. The law gives the same option to all creditors both Israeli or foreign. All that is needed to do is to submit a statement of claim. It is simple for that can be submitted online or through email. No need to be present in Israel. You don't need*

to hire a lawyer to do so and the liquidators will assist any foreign creditor in doing so.

12. *The Liquidators are collecting money and assets that belong to the club and conducting claims etc. usually in insolvency proceedings it is possible to pay to creditors about 10 up to 20 % of the debt. On this case however based on preliminary checks run by the liquidators we believe that a larger % will be available for the creditors.*
 13. *In view of all the said above we truly believe that FIFA should recognize the Israeli law and that all creditors should submit a statement of claim and avoid using FIFA proceedings against the club.*
- C. Prayers for Relief
14. *In light of new order by Israeli Court 4 January 2017 the proceedings shall be closed. FIFA is requested to avoid from any disciplinary sanction against the team and to decide not to intervene in this case any longer. [...]"*
 19. On 20 February 2017, Poalei Tel Aviv became a member of the IFA.
 20. On 16 March 2017, Hapoel Tel Aviv's counsel informed the FIFA DC about the changes made in "Hapoel Tel Aviv FC" following the commencement of the liquidation proceedings. He also requested the closure of all the procedures that were being conducted by FIFA due to the insolvency proceedings pending before the District Court.
 21. On 12 September 2019, on behalf of Harel Holdings, the Liquidators filed a claim for damages before the District Court against (i) the former owners of Harel Holdings, (ii) the IFA, (iii) the Chairman of the IFA's Budget Control Authority and (iv) two insurance companies, claiming a compensation in amount of NIS 77,986,225 for the damages derived from the insolvency of Harel Holdings.
 22. On 7 March 2023, Poalei Tel Aviv, upon the FIFA DC's request, indicated that "*all foreign creditors of Harel Holdings*" had been included in the "*liquidation proceedings still underway*", and that a "*hearing would be held on 13 March 2023*" at the District Court in order to decide on the issue [of] *whether Poalei Tel Aviv should bear the payments of the debts to Harel Holdings' [...] foreign creditors*".
 23. On 27 March 2023, the District Court referred the relevant stakeholders to mediation, the terms of which were agreed in writing the following month.
 24. On 28 May 2023, the IFA provided FIFA, *inter alia*, with a list of creditors which had been submitted to the District Court with respect to the liquidation proceedings of Harel Holdings, acknowledging that it was updated by the Liquidators from time to time.
 25. On 26 November 2024, according to the Appellant, a separate hearing opposing the Liquidators and two previous individual owners of the Football Club was due to take place in relation to the Nissanov Offer and connected matters.

26. All these proceedings are still pending at the time of issuance of the present Award.

B. Procedural history

- *The First Appealed Decision: CAS 2023/A/10114*

27. On 6 March 2018, the Single Judge of the FIFA PSC issued a decision by means of which it decided, *inter alia*, that “Hapoel Tel Aviv FC” had to pay to Belarusian club Bate Borisov FC (“Bate”) the amount of EUR 100,000, plus 18% interest *p.a.* as from 28 December 2016 until the date of its effective payment.
28. On 5 September 2019, the Secretariat to the FIFA DC (“the Secretariat”) opened disciplinary proceedings against the Football Club for the potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.
29. On 25 September 2019, the Deputy Chairman of the FIFA DC passed a decision by means of which the Football Club was found responsible for failing to comply in full with the PSC Decision. The Football Club was ordered to pay FC Bate Borisov and was fined an amount of CHF 15,000.
30. On 7 November 2022, the CAS rendered an award² partially upholding the appeal(s) filed by Harel Holdings on behalf of the Football Club. The panel considered that FIFA had targeted the wrong legal entities, by directing its adjudication(s) against a

club without legal personality, while allowing its former owner (in liquidation) to intervene as a procedural party at all stages of proceedings based on a power of attorney. It annulled the decision(s) rendered by the FIFA DC and referred the case(s) back to the latter for it to conduct new proceedings against Poalei Tel Aviv and decide on the matter *de novo*.

31. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019 edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.
32. On 6 April 2023, the Secretariat requested Bate to confirm and/or provide additional information and/or documentation, which it did.
33. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
34. On 31 July 2023, the FIFA DC rendered the following decision (the “First Appealed Decision”):

“1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 06 March 2018 (Ref. 17-00068).”

² CAS 2020/A/6778, 2020/A/6779, 2020/A/6827, 2020/A/6828, 2020/A/6829, 2020/A/6936, 2020/A/6937, 2020/A/6967, 2020/A/7146 Hapoel

Tel Aviv FC v. Fédération Internationale de Football Association (FIFA), award of 7 November 2022 (hereinafter: “CAS 2020/A/6778”).

2. Poalei Tel Aviv is ordered to pay to FC Bate Borisov as follows:

- EUR 100,000 plus 18% interest *p.a.* as of 28 December 2016 until the date of effective payment.

3. In particular, it is acknowledged that the amount of NIS 389,050 has been admitted in favour of FC Bate Borisov in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. The following disciplinary measures are imposed on Poalei Tel Aviv:

a. Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 1,000.

b. Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to FC Bate Borisov (cf. par. 2 *supra*), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 *supra*).

5. In the event that the amount(s) listed under par. 3. *supra* are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to FC Bate Borisov.

6. Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to FC Bate Borisov (cf. pars. 4.b. and 5. *supra*), a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.

7. The fine is to be paid within 30 days of notification of the present decision”.

35. On 20 October 2023, FIFA communicated the grounds of the First Appealed Decision to the parties.

- ***The Second Appealed Decision: CAS 2023/A/10117***

36. On 31 October 2019, the FIFA DRC issued a decision by means of which it decided, *inter alia*, that “Hapoel Tel Aviv FC” had to pay to Romanian player Liviu Ion Antal (“Mr Antal”) the amount of EUR 71,000, plus 5% interest *p.a.* as indicated in the decision, as well as EUR 250,000 plus 5% interest *p.a.* as from 4 January 2017 until the date of the effective payment.

37. On 21 April 2020, the Secretariat to the FIFA DC opened disciplinary proceedings against the Football Club for a potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.

38. On 14 May 2020, the Deputy Chairman of the FIFA DC passed a decision by means the Football Club was found responsible for failing to comply with the FIFA DRC Decision, ordered to pay the outstanding amounts to Mr Antal and fined CHF 20,000.

39. On 7 November 2022, the CAS annulled the decision rendered by the FIFA DC and referred the case back to the latter for it to conduct new proceedings against Poalei Tel Aviv and decide on the matter *de novo* (see above para 30).

40. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019

edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.

41. On 6 April 2023, the Secretariat requested Mr Antal to confirm and/or provide additional information and/or documentation, which he did.
42. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
43. On 31 July 2023, the FIFA DC rendered the following decision (the “Second Appealed Decision”):

“1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 31 October 2019 (Ref. 17-00005).

2. Poalei Tel Aviv is ordered to pay to Mr. Antal Liviu Ion as follows:

- EUR 71,000 as outstanding remuneration plus 5% interest p.a. calculated as follows: - 5% interest p.a. over the amount of EUR 20,000 as from 11 September 2016 until the date of effective payment;*
- 5% interest p.a. over the amount of EUR 17,000 as from 11 October 2016 until the date of effective payment;*
- 5% interest p.a. over the amount of EUR 17,000 as from 11 November 2016 until the date of effective payment;*
- 5% interest p.a. over the amount of EUR 17,000 as from 11 December 2016 until the date of effective payment.*
- EUR 250,000 as compensation for breach of contract without just cause plus 5% interest*

p.a. as from 4 January 2017 until the date of effective payment.

3. In particular, it is acknowledged that the amount of NIS 422,248 appears to have been admitted in favour of Mr. Antal Liviu Ion in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. The following disciplinary measures are imposed on Poalei Tel Aviv:

a. Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 15,000.

b. Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to Mr. Antal Liviu Ion (cf. par. 2 supra), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 supra).

5. In the event that the amount(s) listed under par. 3. supra are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to Mr. Antal Liviu Ion.

6. Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to Mr. Antal Liviu Ion (cf. pars. 4.b. and 5. supra), a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.

7. The fine is to be paid within 30 days of notification of the present decision”.

44. On 20 October 2023, FIFA notified the grounds of the Second Appealed Decision to the parties.

- ***The Third Appealed Decision: CAS 2023/A/10118***

45. On 7 June 2018, the FIFA DRC issued a decision by means of which it decided, *inter alia*, that “Hapoel Tel Aviv FC” had to pay to Croatian player Damir Šovšić’s (“Mr Šovšić”) the amount of EUR 37,590, plus 5% interest *p.a.* as from 4 January 2017 until the date of the effective payment.
46. On 16 January 2020, the Secretariat to the FIFA DC opened disciplinary proceedings against the Football Club for a potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.
47. On 11 February 2020, the Deputy Chairman of the FIFA DC passed a decision by means of which the Football Club was found responsible for failing to comply with the FIFA DRC Decision, ordered to pay the outstanding amount to Mr Šovšić and fined CHF 5,000.
48. On 7 November 2022, the CAS annulled the decision rendered by the FIFA DC and referred the case back to the latter for it to conduct new proceedings against Poalei Tel Aviv and decide on the matter *de novo* (see above para 30).
49. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019 edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.
50. On 6 April 2023, the Secretariat requested Mr Šovšić to confirm and/or

provide additional information and/or documentation, which he did.

51. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
52. On 31 July 2023, the FIFA DC rendered the following decision (the “Third Appealed Decision”):

“1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 07 June 2018 (Ref. 17-00636).

2. Poalei Tel Aviv is ordered to pay to Mr. Damir Šovšić as follows:

- *EUR 37,590 plus 5% interest p.a. as from 04 January 2017 until the date of effective payment.*

3. In particular, it is acknowledged that the amount of NIS 146,244 appears to have been admitted in favour of Mr. Damir Šovšić in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. The following disciplinary measures are imposed on Poalei Tel Aviv:

a. Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 1,000.

b. Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to Mr. Damir Šovšić (cf. par. 2 supra), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 supra).

5. *In the event that the amount(s) listed under par. 3. supra are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to Mr. Damir Šovšić.*
6. *Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to Mr. Damir Šovšić (cf. pars. 4.b. and 5. supra), a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.*
7. *The fine is to be paid within 30 days of notification of the present decision”.*
53. On 20 October 2023, FIFA notified the grounds of the Third Appealed Decision to the parties.
- ***The Fourth Appealed Decision: CAS 2023/A/10119***
54. On 11 April 2019, the FIFA DRC issued a decision by means of which it decided, *inter alia*, that “Hapoel Tel Aviv FC” had to pay to Greek player Loukas Vyntra (“Mr Vyntra”) the amounts of EUR 151,669 and ILS 50,000, plus 5% interest *p.a.* as from 27 December 2016, and EUR 237,500, plus 5% interest *p.a.* as from 27 December 2016, until the date of their effective payment.
55. On 28 January 2020, the Secretariat to the FIFA DC opened disciplinary proceedings against the Football Club for a potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.
56. On 27 February 2020, the Deputy Chairman of the FIFA DC passed a decision by means of which the Football Club was found responsible for failing to comply with the FIFA DRC Decision, ordered to pay the outstanding amounts to Mr Vyntra and fined CHF 20,000.
57. On 7 November 2022, the CAS annulled the decision rendered by the FIFA DC and referred the case back to the latter for it to conduct new proceedings against Poalei Tel Aviv and decide on the matter *de novo* (see above para 30).
58. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019 edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.
59. On 6 April 2023, the Secretariat requested Mr Vyntra to confirm and/or provide additional information and/or documentation, which he did.
60. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
61. On 31 July 2023, the FIFA DC rendered the following decision (the “Fourth Appealed Decision”):
- “1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 11 April 2019 (Ref. 16-02234).*

2. Poalei Tel Aviv is ordered to pay to Mr. Loukas Vyntra as follows:

- EUR 151,669 and ILS 50,000 as outstanding remuneration, plus 5% interest p.a. on said amounts as from 27 December 2016 until the date of effective payment.

- EUR 237,500 as compensation for breach of contract plus 5% interest p.a. on said amount as from 27 December 2016 until the date of effective payment.

3. In particular, it is acknowledged that the amount of NIS 632,214 appears to have been admitted in favour of Mr. Loukas Vyntra in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. The following disciplinary measures are imposed on Poalei Tel Aviv:

a. Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 15,000.

b. Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to Mr. Loukas Vyntra (cf. par. 2 *supra*), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 *supra*).

5. In the event that the amount(s) listed under par. 3. *supra* are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to Mr. Loukas Vyntra.

6. Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to Mr. Loukas Vyntra (cf. pars. 4.b. and 5. *supra*),

a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.

7. The fine is to be paid within 30 days of notification of the present decision”.

62. On 20 October 2023, FIFA notified the grounds of the Fourth Appealed Decision to the parties.

- ***The Fifth Appealed Decision: CAS 2023/A/10121***

63. On 12 August 2016, the FIFA PSC passed a decision by means of which it decided, *inter alia*, that “Hapoel Tel Aviv FC” had to pay to Swiss club FC Thun (“Thun”) the amount of EUR 50,000 plus 5% interest p.a. from the expiry date until the date of the effective payment, a fine in the amount of CHF 7,500, and CHF 10,000 as costs of the FIFA procedure.

64. On 5 February 2020, the Secretariat to the FIFA DC opened disciplinary proceedings against the Football Club for a potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.

65. On 27 February 2020, the Deputy Chairman of the FIFA DC passed a decision by means of which the Football Club was found responsible for failing to comply in full with the PSC Decision. The Football Club was ordered to pay Thun and was fined the amount of CHF 7,500.

66. On 7 November 2022, the CAS annulled the decision rendered by the FIFA DC and referred the case back to the latter for it to conduct new proceedings against Poalei Tel Aviv

and decide on the matter *de novo* (see above para 30).

67. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019 edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.
68. On 6 April 2023, the Secretariat requested Thun to confirm and/or provide additional information and/or documentation, which it did.
69. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
70. On 31 July 2023, the FIFA DC rendered the following decision (the “Fifth Appealed Decision”):

“1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 12 August 2016 (Ref. 16-01059).

2. Poalei Tel Aviv is ordered to pay to FC Thun as follows:

- *EUR 50,000 as overdue payables plus 5% interest p.a. to be calculated in accordance with the FIFA decision (Ref. 16-01059);*
- *CHF 2,000 as costs of the proceedings.*

3. In particular, it is acknowledged that the amount of NIS 194,525 has been admitted in favour of FC Thun in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. The following disciplinary measures are imposed on Poalei Tel Aviv:

a. Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 1,000.

b. Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to FC Thun (cf. par. 2 supra), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 supra).

5. In the event that the amount(s) listed under par. 3. supra are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to FC Thun.

6. Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to FC Thun (cf. pars. 4.b. and 5. supra), a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.

7. The fine is to be paid within 30 days of notification of the present decision”.

71. On 20 October 2023, FIFA notified the grounds of the Fifth Appealed Decision to the parties.

- The Sixth Appealed Decision: CAS 2023/A/10122

72. On 19 January 2017, the FIFA DRC issued a decision in the context of an employment-related dispute between Romanian player Mr Mihai Doru Pintilii (“Mr Doru”), the Saudi club Al-Hilal Saudi Football Club (“Al Hilal”) and “Hapoel Tel

- Aviv FC”. It decided, *inter alia*, that Saudi club Al Hilal had to pay to Romanian player Mihai Doru Pintilii (“Mr Doru”) the amount of EUR 150,000, plus 5% interest *p.a.* to be calculated in accordance with the decision, and EUR 901,665, plus 5% interest *p.a.* as of 23 May 2015 until the date of the effective payment.
73. On 24 July 2018, the CAS rendered a decision by which it dismissed the appeal filed by Al Hilal and confirmed the decision of the FIFA DRC. The CAS also determined that the Football Club had to pay the amount of CHF 16,192 to Al Hilal, as partial reimbursement of the advance of the arbitration costs paid by the latter.
 74. On 6 January 2020, the Secretariat to the FIFA DC opened disciplinary proceedings against the Football Club for the potential breach of Article 64 (2017 edition)/Article 15 (2019 edition) of the FDC.
 75. On 28 January 2020, the Deputy Chairman of the FIFA DC passed a decision by means of which the Football Club was found responsible for failing to comply in full with the CAS Decision. The Football Club was ordered to pay Al Hilal and was fined an amount of CHF 2,000.
 76. On 7 November 2022, the CAS annulled the decision rendered by the FIFA DC and referred the case back to the latter for it to conduct new proceedings against Poalei Tel Aviv and decide on the matter *de novo* (see above para 30).
 77. On 17 February 2023, the Secretariat opened disciplinary proceedings against Poalei Tel Aviv for a potential breach of Article 15 (2019 edition)/Article 21 (2023 edition) of the FDC, and invited Poalei Tel Aviv to submit its position, which it did.
 78. On 6 April 2023, the Secretariat requested Al Hilal to confirm and/or provide additional information and/or documentation, which it did.
 79. On 15 May 2023, the Secretariat requested further information from Poalei Tel Aviv and the IFA, which they provided.
 80. On 31 July 2023, the FIFA DC rendered the following decision (the “Sixth Appealed Decision”):
 - “1. Poalei Tel Aviv is considered responsible for the debt(s) incurred by the club Hapoel Tel Aviv FC, while operated by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. and, as such, is found responsible for failing to comply in full with the award issued by the Court of Arbitration for Sport on 24 July 2018, as read in conjunction with the letter communicated by the CAS Secretariat on 25 February 2019 (ref. CAS 2017/A/5228).
 2. Poalei Tel Aviv is ordered to pay to Al Hilal Saudi FC as follows:
 - CHF 16,192 as costs of the arbitration proceedings.

In this respect, the amount of CHF 2,000 due by Al Hilal Saudi FC to Hapoel Tel Aviv FC in accordance with the above award issued by the Court of Arbitration for Sport has been set-off.
 3. In particular, it is acknowledged that the amount of NIS 60,882 appears to have been admitted in favour of Al Hilal Saudi FC in the context of the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd.

4. *The following disciplinary measures are imposed on Poalei Tel Aviv:*

a. *Poalei Tel Aviv is ordered to pay a fine to the amount of CHF 1,000.*

b. *Poalei Tel Aviv is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount(s) due to Al Hilal Saudi FC (cf. par. 2 supra), less the amount(s) admitted within the liquidation proceedings of Harel Holdings – Hapoel Tel Aviv Football Club Ltd. (cf. par. 3 supra).*

5. *In the event that the amount(s) listed under par. 3. supra are not paid (in full) by Harel Holdings – Hapoel Tel Aviv Football Club Ltd. in the context of the liquidation proceedings, Poalei Tel Aviv is granted a final deadline of 30 days as from the conclusion of said liquidation proceedings in which to pay any remaining amount(s) due to Al Hilal Saudi FC.*

6. *Upon the expiry of any of the aforementioned final deadline(s) and in the event of persistent default or failure to pay in full any of the related amount(s) due to Al Hilal Saudi FC (cf. pars. 4.b. and 5. supra), a ban on registering new players will be issued until the relevant amount(s) due is (are) paid.*

7. *The fine is to be paid within 30 days of notification of the present decision”.*

81. On 20 October 2023, FIFA notified the grounds of the Sixth Appealed Decision to the parties.

C. Grounds of the Appealed Decisions

82. The six decisions of the FIFA DC that are under appeal have almost identical grounds, which can be summarised as follows:

➤ The FIFA DC is competent to initiate disciplinary proceedings and

impose sanctions in the instant cases. The Creditors, as players or clubs, and Poalei Tel Aviv, as the legal entity “behind” Hapoel Tel Aviv FC and an indirect member of FIFA registered to the IFA, all fall under the jurisdiction of the FIFA DC pursuant to Articles 3 and 21 of the FDC.

➤ The FIFA DC is not prevented from its assessment by virtue of the liquidation proceedings of Harel Holdings alone, given that such proceedings are entirely separate to any of the specific conditions required for it to initiate disciplinary proceedings and impose sanctions in relation to a FIFA decision or CAS award. Furthermore, the disciplinary proceedings are directed against Poalei Tel Aviv, which is *not* undergoing liquidation proceedings. In any event, Article 59 of the FDC merely provides that proceedings *may* be closed when “*a party is under insolvency or bankruptcy proceedings pursuant to the relevant national law and is legally unable to comply with an order*”.

➤ The potential disciplinary offences, i.e. the failures to comply with FIFA or CAS decisions, were committed both prior to and after the entry into force of the 2023 edition of the FDC. In this respect, whilst keeping in mind the principles enshrined under Article 4 of the FDC, the merits and procedural aspects of all relevant proceedings should fall under the 2023 edition of the FDC.

➤ The relevant 5-year limitation period for prosecuting disciplinary violations is “*interrupted by all*

procedural acts, starting afresh with each interruption” (Article 10(3) of the FDC). The fact that the FIFA DC’s previous proceedings were declared null and void and then reinstated towards Poalei Tel Aviv is irrelevant, all the more so because they were brought with a *de novo* power of adjudication. It follows that FIFA proceedings, in particular those involving Thun, are not time-barred.

- As established by the previous CAS panel, Poalei Tel Aviv is the legal entity which owns the assets, rights and liabilities comprising Hapoel Tel Aviv FC. Its potential liability for the fulfilment of the Debts of Harel Holdings within the Infringed Decisions and related CAS awards must be examined in light of the concept of “sporting continuity”. In accordance with CAS jurisprudence, a situation of sporting continuity must be differentiated from the concept of sporting succession. It exists in circumstances whereby a club *“despite the disappearance of any corporate entities associated with it, remains in business, even taking over the sporting rights of the entity that ceased to exist, without any interruption in its membership of the respective national federation, through at least one entity that subsist”*. As a result, there is no other alternative but to conclude that the debts incurred under the ownership of Harel Holdings, including the payments owed to the Creditors, are those of Poalei Tel Aviv.

- Poalei Tel Aviv is liable for the full payment of the outstanding amounts due to the Creditors. The

substance of the cases decided by the FIFA PSC, FIFA DRC and CAS, in particular the correctness of the amounts ordered to be paid (including the interest rate awarded), cannot be reviewed any more at this stage.

- According to CAS jurisprudence, the motivation behind the concept that enforcement proceedings may be closed under Article 59 of the FDC when a debtor is undergoing insolvency/bankruptcy proceedings pertain to the fact that it would be contrary to public policy to impose a sanction against a debtor where it can no longer dispose of its assets and is bound by the strict rules regarding to the distribution of its estate. In such case it cannot be considered to be at fault for the non-compliance (CAS 2017A/5054, para 87; CAS 2012/A/2759, para 121). Yet, Poalei Tel Aviv is not facing such legal impossibility and can freely dispose of its assets.
- Poalei Tel Aviv did not comply with final decisions and must be sanctioned under Article 21 of the FDC, bearing in mind the specific circumstances of each case. This includes, in all instances, the likelihood of eventual partial payment via the liquidation proceedings of Harel Holdings.

IV. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

83. On 7 November 2023, in accordance with Article R48 of the CAS Code, “Poalei Tel Aviv Holdings Ltd.” filed six Statements of Appeal before the

- CAS against the Respondent, with respect to the Appealed Decisions, giving rise to the CAS procedures CAS 2023/A/10114, 10117, 10118, 10119, 10121 and 10122. In its submissions, the Appellant nominated Prof. Ulrich Haas as arbitrator.
84. On 8 November 2023, the CAS Court Office invited the Respondent to nominate an arbitrator, pursuant to Article R53 of the CAS Code. It also asked the Parties, in accordance with Article R50 of the CAS Code, to state whether they agreed to submit the procedures to the same Panel that handled the previous proceedings between Hapoel Tel Aviv FC and FIFA.
 85. On 9 November 2023, the Appellant agreed to refer all the disputes to the same panel as in the previous proceedings. It also enquired about the possibility of consolidating the proceedings under Article 50 and 52 of the CAS Code.
 86. On the same date, the CAS Court Office took note of the Appellant's agreement. However, it stated, *inter alia*, that no consolidation could occur, in the absence of formally identical decisions. It specified that this formal distinction did not prevent the proceedings from being briefed, heard and decided all together.
 87. On 24 November 2023, the Respondent nominated Mr José Juan Pintó Sala, attorney-at-law in Barcelona, as arbitrator. It objected to the possibility of referring these cases to the same panel that handled the previous proceedings between Hapoel Tel Aviv FC and FIFA. As a result, it requested Prof. Ulrich Haas to refuse his nomination and/or resign from his position, which gave rise to various exchanges of letters.
 88. On 3 January 2024, the CAS Court Office informed the Parties that Prof. Ulrich Haas had decided to resign (from his position). It invited the Appellant to nominate a new arbitrator pursuant to Article R36 of the CAS Code.
 89. On 9 January 2024, the Appellant nominated Prof. Petros C. Mavroidis as arbitrator.
 90. On 28 January 2024, the Appellant, after being granted extensions, filed its Appeal Briefs, separately in each case, within the prescribed deadline, in accordance with Article R51 of the CAS Code. It invited the Panel to stay the proceedings until the District Court makes a decision.
 91. On 8 April 2024, the Respondent, within the deadline previously extended upon agreement between the Parties, filed its Answers to the six Appeals with the CAS further to Article R55 of the CAS Code.
 92. On 9 April 2024, the CAS Court Office informed the Parties that the Panel appointed to decide the disputes was constituted as follows:

President:

Mr Stephen Sampson, Solicitor in London, United Kingdom

Arbitrators:

Mr Petros C. Mavroidis, Professor at Columbia Law School, New York City, with residence in Commugny, Switzerland

Mr José J. Pintó, Attorney-at-Law in
Barcelona, Spain

93. In the same letter, the CAS Court Office invited the Parties to indicate whether they preferred a hearing to be held in these matters, or for the panel to issue a decision solely on the Parties' written submissions. It also enquired about the need to organise a case management conference ("CMC") with the panel in order to discuss procedural issues, the preparation of the hearing (if any) and any issues related to the taking of evidence.
94. On 14 April 2024, the Appellant requested a second round of written submissions under Article R56 of the CAS Code. It argued that the Nissanov Group's alleged commitment to assume previous debts (the "Nissanov Commitment"), discussed in the Answers filed by the Respondent, was not part of the FIFA disciplinary proceedings and required further discussion. It stressed the importance of a hearing in the event of a refusal, while reserving its comments for the remainder.
95. On 16 April 2024, the Respondent submitted that a hearing was not necessary in these matters, in the absence of witness or expert testimonies. It objected to a second round of written submissions, underlining that all relevant issues were addressed, at least indirectly, in the Appealed Decisions and evidence filed by the Appellant. Furthermore, the Appellant was already offered multiple opportunities to develop its arguments during the FIFA and CAS proceedings involving the Football Club, Harel Holdings and Poalei Tel Aviv.
96. On 1 May 2024, the CAS Court Office informed the Parties that the Panel had decided to grant a second round of written submissions. It invited them to file a single, consolidated submission for all proceedings, while clearly identifying the specificities of each case, if any.
97. On 28 May 2024, the CAS Court Office advised the Parties that Ms Alexandra Veuthey, Attorney-at-Law in Lausanne, Switzerland, had been appointed as Clerk to assist the Panel in these matters.
98. On 3 July 2024, the Appellant filed its Reply within the prescribed deadline, previously extended. It stated that some of the Respondent's arguments on the Nissanov Group exceeded the scope of these proceedings, and should be disregarded. It requested that the Liquidator's letters of 26 May 2024 related to proceedings CAS 2023/A/10017 and 10119 be admitted to the case files due to exceptional circumstances under Article R56 of the CAS Code.
99. On 16 July 2024, the Appellant provided the Liquidators' letters dated 26 May 2024, which had not been attached to its Reply "*due to a technical error*".
100. On 12 September 2024, the Respondent filed its Rejoinder within the prescribed deadline, previously extended. It underlined that the discussion on the Nissanov Group had been initiated by the Appellant itself, and that it was therefore entitled to rectify some inaccuracies. It requested that the Liquidator's letters of 26 May 2024 related to proceedings CAS 2023/A/10017 and 10119 be declared

inadmissible, in the absence of exceptional circumstances under Article R56 of the CAS Code.

101. On 13 September 2024, the CAS Court Office invited Poalei Tel Aviv and FIFA to indicate whether they preferred a hearing to be held in these matters or for the Panel to issue an award solely based on the Parties' written submissions. It also enquired of the Parties as to the need for a CMC to discuss procedural and evidentiary issues, if any.
102. On 19 September 2024, the Appellant expressed its preference for a video hearing and CMC to be held in this matter, in view of the legal and factual issues at stake, the witness/expert to be heard, as well as the political situation in Israel. Alternatively, it requested the Panel to allow the Parties to file witness statements and/or complete their legal opinions on three specific questions.
103. On 20 September 2024, the Respondent confirmed that a hearing was not necessary and clarified that it did not request a CMC.
104. On 25 September 2024, the Respondent objected to such requests. It underlined that the Appellant had not formally called any witnesses or experts in its written submissions nor invoked exceptional circumstances to justify a third round of submissions, contrary to Articles R44.2(3), R51(2) and R56 CAS Code. It reiterated that a hearing and CMC were not necessary and should, in the event of a decision to the contrary, be held remotely after 2pm.
105. On 15 October 2024, the CAS Court Office informed the Parties that the

Panel had made the following decisions, with reasons to be communicated in the Final Award, to:

- accept the Liquidators' letters to the case files;
 - accept all the arguments on the Nissanov Group to the case files;
 - deny the need for a third round of submissions (or related evidence) and CMC;
 - reject any request to suspend the proceedings pending insolvency proceedings in Israel, as far as it has not already become moot;
 - hold a single, video hearing, which could take place on 11 or 20 November 2024 with a particular focus on specific issues;
 - hear Prof. Assaf Hamdani, expert, and Mr Zeev Greenberg, witness, quoted in the Appellant's submissions, even if they were not listed in a dedicated rubric;
 - hear "*any of the experts*" mentioned in the Respondent's submissions, namely Profs. Adi Libson and Omer Kimhi, if deemed necessary by FIFA.
106. On 21 October 2024, the CAS Court Office informed the Parties that, in view of their respective availabilities, the hearing would take place on 20 November 2024. It also invited them to provide a list of their hearing attendees.
 107. On 27 October 2024, the Appellant provided the CAS Court Office with a list of its hearing attendees, including its counsel, expert and witness. One

- day later, the Respondent did likewise, including its legal team only.
108. On 29 October 2024, the Respondent reiterated its objection to the testimonies of the Appellant's expert and witness. It waived its right cross-examine them, but reserved the possibility to ask them targeted questions.
 109. On 7 November 2024, the CAS Court Office invited the Parties to clarify whether they intended to examine their own, respectively the opposing witnesses and experts, or if they accepted solely to rely on the written statements in the file. It encouraged them, given the two rounds of written submissions, to focus on three main issues at the hearing: sporting continuity or succession, the "Nissanov Commitment" and the effect of Harel Holdings liquidation proceedings. It sent them the Order of Procedure, reserving the possibility to issue one consolidated arbitral award for all the Appeals.
 110. On 11 November 2024, the Appellant stated that it intended to examine its own expert, Prof. Hamdani, and to cross-examine FIFA's second expert, Prof. Kimhi, if present at the hearing. It returned the Order of Procedure duly signed, without any reservation.
 111. On 13 November 2024, the CAS Court Office apprised the Parties that the Panel intended to hear both Profs. Hamdani and Kimhi together in a witness conference, and enclosed the hearing schedule.
 112. On the same date, the Respondent reiterated its position concerning the Appellant's expert and witness. It stated that it would liaise with Prof. Kimhi regarding his availability for the hearing shortly. It returned the Order of Procedure duly signed, without any reservation.
 113. On 20 November 2024, a video hearing was held in relation with all the procedures.
 114. The Panel was assisted by Ms Alexandra Veuthey, Clerk, and Mr Giovanni Maria Fares, Counsel to the CAS.
 115. In addition, the following persons attended the hearing:
 - a) For the Appellant:
Mr Joseph Gayer, counsel
Mr Omri Applebaum, counsel
Mr Doni Toledano, counsel
Mr Boaz Shapiro, general counsel
Prof. Assaf Hamdani, expert witness
 - b) For the Respondent:
Mr Alexander Jacobs, counsel
Ms Cristina Pérez González, counsel
Prof. Omer Kimhi, expert witness
 116. At the outset of the hearing, the Parties confirmed that they had no objection to the composition and constitution of the Panel, as well as the issuance of one single award. No objections were raised regarding the presence of Mr Toledano as an additional counsel for the Appellant, although he was not announced previously in the Appellant's list of attendees.

117. At the hearing, the Panel heard evidence from Profs Hamdani and Kimhi. Both experts were reminded of their duty to tell the truth subject to sanctions of perjury under Swiss law. They confirmed their written report and had the opportunity to concurrently exchange views during a witness conference. They answered the questions posed by the Panel and the Appellant, while the Respondent renounced its right and opportunity to intervene.
118. The Parties thereafter were given a full opportunity to present their case, submit their arguments and answer the questions posed by the Panel. At the end of the hearing, the Parties confirmed that their right to be heard had been fully respected.
119. On 9 January 2025, the Appellant requested the Panel to “suspend the proceedings” until 1 March 2025 pursuant to Article R32 of the CAS Code in order to facilitate settlement discussion with some or all Creditors.
120. On the same date, the CAS Court Office took note of the existence of settlement negotiations. It specified, however, that there was no need to formally suspend the proceedings, since the evidentiary phase was complete and the Award at an advanced stage of finalisation. It thus put the matters on hold until 1 March 2025, upon receiving written confirmation of the Respondent’s agreement.
121. On 16 March 2025, the Appellant requested a further suspension of the proceedings of one month until 21 April 2025, to which the Respondent objected.
122. On 18 March 2025, the CAS Court Office informed the Parties that the Panel had accepted to suspend the proceedings for three more weeks, until 8 April 2025. It invited the Appellant to provide evidence of any legally binding settlement(s) concluded with any Creditor(s) on or by that date, failing which it would proceed with the notification of the Award, subject to Article R59 of the CAS Code.
123. On 8 April 2025, the Appellant confirmed the existence of settlement discussions, and provided various pieces of evidence in this regard. It invited the Panel to refrain from issuing its Award until 29 April 2025.
124. On 9 April 2025, the CAS Court Office accepted to grant this request and, therefore, to extend the suspension of the proceedings until 29 April 2025.
125. On 30 April 2025, the CAS Court Office observed that the Appellant had not submitted any binding settlements within the period of suspension in the relevant six proceedings. It reiterated that it would proceed with the notification of the Award, subject to Article R59 of the CAS Code.

V. SUBMISSIONS OF THE PARTIES

126. Below is a summary of the facts and allegations raised by the Parties. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in these proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
127. Considering that the Parties’ submissions and grounds of the

Appeals in the six proceedings are almost identical, the Panel addresses them jointly. It discusses the specific arguments advanced in some of the appeals separately only where appropriate.

A. The Appellant

128. The Appellant's submissions in support of its Appeals against the Appealed Decisions may be summarised as follows:

- ***The new ownership of Hapoel Tel Aviv FC and the bankruptcy proceedings***

- Hapoel Tel Aviv FC is not a legal entity under Israeli law. Since the 90's it has been managed and operated by different limited companies which owned it – such as Harel Holdings – and which assumed its legal obligations (contracts, labour relationships, payments, etc.). All the Debts to which the Appealed Decisions refer were created before the issuance of the Liquidation Order over Harel Holdings and hence, under Israeli law, those Debts shall remain as debts of that legal entity. Indeed, Hapoel Tel Aviv FC is currently being managed by a completely different entity, Poalei Tel Aviv, which has no connection with Harel Holdings and is not responsible for the payment of these Debts.
- In the bankruptcy proceedings of Harel Holdings, the Liquidators will collect any possible amounts owed to the company to be distributed among all its creditors

in accordance with the principle of equality of creditors. In this regard, all the Debts have been acknowledged by the Liquidators in the liquidation procedure, and the six Creditors have been included in the list of creditors. Therefore, it is highly probable that, just like the national creditors, the beneficiaries of the Appealed Decisions will recover part of their credits within the liquidation proceedings.

- ***The lack of jurisdiction of the FIFA DC***

- FIFA has no jurisdiction to hear and decide matters that concern the enforcement of debts to creditors of an insolvent entity which is undergoing a liquidation procedure before an Israeli court, without requesting and receiving permission of the competent court. Furthermore, any issue with regards to the liquidation proceedings should be determined in accordance with Israeli law, as it is the law governing Harel Holdings' liquidation proceedings. In this regard, Chapter 267 of the Israeli Companies Law establishes the principle of equal treatment of all the creditors and the avoidance of giving preferential treatment to any single creditor, being thus an absolute prohibition against preferring one creditor over another.
- The object of the Appealed Decisions is the enforcement of the Infringed Decisions and related CAS awards by means of the payment of the corresponding

Debts. Therefore, the disciplinary proceedings were mainly enforcement proceedings, and not pure disciplinary proceedings. For this reason, the execution of the Debts of the foreign creditors by FIFA would infringe the principle of equal treatment of all the creditors by giving the beneficiaries of the Appealed Decisions preferential treatment over the national creditors, which is prohibited not only by Israeli Law but also by Swiss Law. The *lex sportiva* cannot prevail over Israeli insolvency law, which is mandatory. Its application would contradict Israel's public policy, by entailing full payment of the debts to only some of Harel Holdings' creditors.

- The previous CAS panel expressly recognised that Israeli law was relevant to the matter at stake (CAS 2020/A/6778, para 149).

- ***Lis alibi pendens***

- Even if FIFA had jurisdiction to decide the proceedings concerning the enforcement of the Debts created by Harel Holdings prior to the Liquidation Order, it should have refrained from deciding so because there was an ongoing insolvency procedure before the District Court. In light of the existence of a prior and parallel proceeding concerning the same matters before the Israeli Court, FIFA should have stayed all the disciplinary proceedings in accordance with the *lis alibi pendens* principle.

- For the same reasons, the CAS is invited to suspend its proceedings until the issues in dispute have been resolved.

- ***The prevalence of insolvency proceedings over disciplinary proceedings***

- In accordance with the FIFA regulations, specifically Article 107 b) of the former version of the FDC (Article 59 b) of its current version), FIFA should have closed the disciplinary proceedings. In that regard, CAS decisions have stated that bankruptcy proceedings prevail over disciplinary proceedings, it being improper for FIFA to impose sanctions on a club that cannot make payments without the authorisation of an administrator appointed by a national court (CAS 2011/A/2343 and CAS 2012/A/2750; CAS 2020/A/6884).
- The artificial separation between a club and its owner raises legal and practical difficulties from the outset, as a club without a legal personality cannot enter into valid and binding engagements on its own. A fortiori, such a separation cannot be relied upon in the event of liquidation.
- The *lex sportiva* can only prevail over general law when the issue is a purely sporting matter. Allowing foreign creditors to request FIFA to enforce decisions given in their favour while Harel Holdings is under liquidation, when the Liquidators are currently handling

such Debts, and prioritising these foreign creditors over Israeli creditors, violates the principal of equal treatment towards all creditors.

- ***The absence of sporting continuity of Hapoel Tel Aviv FC & related issues***

- Poalei Tel Aviv is not the legal successor of Hapoel Tel Aviv FC and/or of Harel Holdings, nor is it bound by the principle of sporting continuity. The acquisition of Hapoel Tel Aviv FC by Poalei Tel Aviv (Nissanov Group) was done during and as a result of Harel Holding's insolvency proceedings and with the necessary approval from the District Court and the Liquidators. Due to this fact, in accordance with Israeli law, the new entity is not responsible for the debts created by the former entity. The Appealed Decisions wrongly established that Poalei Tel was liable for the payment of the debts of Hapoel Tel Aviv FC under its previous management by Harel Holdings.
- The assets were transferred to Poalei Tel Aviv (Nissanov Group) free and clear from any debt and the previous debts belong to the former owner, Harel Holdings. In line with this, the new owner did not receive rights that would have allegedly belonged to it in case it had acted in the terms held by FIFA (for example, the solidarity compensation due by a Chinese club for the player Eran Zahavi was paid directly to the Liquidators). It never took upon

itself to defray the debts from the former entity or to renounce the separation of their financial accounts.

- The jurisprudence quoted by FIFA in relation to sporting continuity is of no avail. It cannot override state law and does not address the legal situation of a club after liquidation (CAS 2021/A/8060 & 8061).

- ***The absence of Nissanov Group's liability for pre-existing debts of Hapoel Tel Aviv FC***

- Prof. Assaf Hamdani's legal opinion demonstrates that under Israeli law, the acquisition of assets or activities of a corporation or any other entity that is undergoing insolvency proceedings under a court's supervision does not transfer to the purchaser the past debts of that insolvent corporation, absent agreement to this effect by the acquiring entity. Israeli insolvency law requires equality among creditors of a similar priority and any agreement or arrangement that may alter the order of priority among creditors would be unlawful. In accordance with the Israeli Jurisprudence, the regulations adopted by sports organisations are also subject to the equality principle (4031/03 *Hakoah Maccabi Ramat Gan Club v. Balfour Engineering & Damage Restoration*).
- Contrary to FIFA's allegation, the Nissanov Offer does not contain any explicit acknowledgement of responsibility for the payment of

foreign creditors' claims. Such an acknowledgement would contravene Israeli law, the equality principle, as well as the interpretation that the Liquidators and shareholders have of this offer (as per the Liquidators' letter of 16 January 2017 and Mr Greenberg's affidavit). In any event, the Liquidators are the only persons entitled to seek enforcement of this alleged undertaking. Clearly, FIFA has no jurisdiction in this realm and should not circumvent ongoing proceedings.

- The Appealed Decisions confirmed in their operative parts that the Appellant would have to pay any remaining debts after the end of the liquidation proceedings. This demonstrates, again, that Harel Holdings is the main debtor.

- ***The Creditors' lack of diligence within the insolvency proceedings***

- On 16 January 2017, the Liquidators of Harel Holdings informed FIFA of the bankruptcy proceedings and explained that all the foreign Creditors had to claim their debts within the insolvency proceedings and asked FIFA to instruct the creditors accordingly. Furthermore, the Liquidators also informed the Creditors and their legal representatives about the situation of Harel Holdings and requested them to submit the corresponding claims of debts.
- These letters remained unanswered, and the Creditors (with the sole exception of Kaiserslautern) did nothing to

collect their debt in the bankruptcy proceedings. Nevertheless, the Liquidators included the credits of the Creditors in the list of creditors of Harel Holdings. Therefore, pursuant to CAS jurisprudence, the Creditors' lack of due diligence prevents them from requesting the enforcement of their credits through disciplinary proceedings (CAS 2011/A/2646, paras 28ff).

- ***The absence of abuse of process and bad faith***

- There was no abuse of process, lack of good faith, moral flaw or fault by Poalei Tel Aviv or other stakeholders in the context of the insolvency proceedings of Harel Holdings, which could justify a finding of sporting succession and disciplinary sanctions under CAS jurisprudence (CAS 2016/A/4550 & 4576, paras 133ff).

- ***The prohibition of double jeopardy***

- Due to the insolvency proceedings of Harel Holdings, Hapoel Tel Aviv FC was already sanctioned by the IFA with the deduction of nine points in the Israeli league for not paying its debts. The imposition of new sanctions for the same facts would infringe the principle of double jeopardy (or "ne bis in idem"), which prohibits to be sanctioned two times for the same facts.

- ***The imposition of a sanction***

- Poalei Tel Aviv should not be considered liable for the debts incurred by Hapoel Tel Aviv FC while operated by Harel Holdings and is not responsible for failing to comply with the Infringed Decisions and related CAS awards.
- The FIFA DC was wrong to impose fines and sporting sanctions on Poalei Tel Aviv under Article 21 of the FDC. In some instances, it failed to consider the correct amounts admitted in favour of the creditors in the context of the liquidation proceedings of Harel Holdings, and the absence of interest under Israeli law.

- ***Specific submissions***

129. With regard to the procedure CAS 10121, the Appellant submitted the following specific contentions:

- FIFA disciplinary proceedings were time-barred under the 5-year limitation period for prosecution provided for by Article 10 of the FDC. Since the FIFA DC's first disciplinary decision was declared null and void, the connected (previous) proceedings did not interrupt the limitation period nor cause it to start afresh.

- ***Prayers for relief***

130. Based on the foregoing, Poalei Tel Aviv requests the Panel to decide as follows:³

- *"The Decision[s] notified by the FIFA Disciplinary Committee on 31 July 2023 [are] annulled and set aside.*
- *The fine[s] and any other disciplinary measure[s] imposed against the Appellant (and the Club) [(...) are] removed.*
- *The disciplinary proceedings against the Appellant and/or the Club, which concern failure to pay debts created prior to 4 January 2017 and owed by Harel Holdings - should have been closed and are therefore annulled.*
- *The Appellant is not considered liable for the debt(s) incurred by the club Hapoel Tel Aviv while operated by Harel Holdings and is not responsible for failing to comply with the CAS Award in favor of the Creditors.*
- *The Creditor[s] (and all other foreign creditors of Harel Holdings which hold FIFA decisions or CAS Awards in their favor) [are] no different from any other creditor of Harel Holdings and [are] subject to the principle of equal treatment to creditors and prohibition of creditor preference. All and any payments to the Creditor[s] are subject to the Israeli insolvency law and the approval of the District Court in Tel Aviv.*
- *The amount[s] of [(...) see below for cases 10114, 10117, 10118, 10119, 101121 & 10122]:*

³ Poalei Tel Aviv's prayers for relief have been compiled for the sake of efficiency and clarity given

their length (over one page for each case) and repetitive nature.

- NIS 389,050
- EUR 320,000 (and not the amount detailed in the Appealed Decision)
- NIS 146,244
- EUR 389,169 and NIS 50,000 (and not the amount detailed in the Appealed Decision)
- NIS 194,525
- NIS 60,882

[have] been admitted in favor of the Creditor[s] in the context of the liquidation proceedings of Harel Holdings and the Creditor[s] must wait for the liquidation proceedings to end and for the distribution of the liquidation funds to the creditors of Harel Holdings.

- *Even in the event that the full amounts owed to the Creditor[s] will not be paid to the Creditor[s] in the context of the liquidation proceedings of Harel Holdings, the Appellant and the Club are not liable to pay any remaining amounts to the Creditor[s].*
- *No interests are applicable on the amounts owed to the Creditor after 4 January 2017. Interests are not applicable to debts of an Israeli entity under liquidation as of the day liquidation proceedings are taken against it. The Creditor[s] [are] no different from other creditors and [are] subject to equal treatment among other creditors of Harel Holdings. [10122: blank]*
- *The Respondent must pay the Appellant a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel.*

- *Alternatively, the Decision[s] [are] annulled and the disciplinary proceedings taken by the Respondent against the Appellant are to be stayed as long as the insolvency proceedings against Harel Holdings are still in progress and are taking place before the District Court in Tel Aviv”.*

B. The Respondent

131. The Respondent’s submissions may be summarised as follows:

- *The new ownership of Hapoel Tel Aviv FC and the bankruptcy proceedings*

- The present proceedings must be addressed in light of the CAS award previously rendered in this matter, which found that Poalei Tel Aviv is the legal entity with the task of responding to claims of non-payment of the Football Club’s debts (CAS 2020/A/6778, paras 174ff). This award became final and binding, as no appeal was lodged before the Swiss Federal Tribunal.
- In line with the Appealed Decisions, Poalei Tel Aviv is liable under Article 21 of the FDC for the debts generated and not fulfilled by the Football Club when it was controlled by Harel Holdings. The fact that the Creditors could theoretically recover a small part of their claims during Harel Holdings’ insolvency proceedings does not change this finding. Such amounts will simply have to be accounted for and deducted where appropriate.

- ***The jurisdiction of the FIFA DC***

- Poalei Tel Aviv was the subject of the Appealed Decisions as the corporate entity managing Hapoel Tel Aviv FC, owning its assets, rights and liabilities. It is an (in)direct member of FIFA since its affiliation to the IFA in February 2017 and, as such, is bound by the FIFA regulations. It is also clear that the Football Club – which, as confirmed by the CAS, “transcends the legal entities which operate it” – is the sporting entity that falls under the Disciplinary Committee’s jurisdiction. Therefore, nothing prevented the FIFA DC to analyse the present cases.
- The FIFA DC did not rule on the insolvency proceedings of Harel Holdings but on Poalei Tel Aviv’s obligation to comply with the Infringed Decisions and related CAS awards. For this reason, Israeli law is not directly relevant.

- ***Lis alibi pendens***

- The *lis alibi pendens* principle is applicable when international arbitrators sitting in Switzerland are confronted with state proceedings abroad on the same object between the same parties. Yet, the bankruptcy proceedings of the previous entity operating Hapoel Tel Aviv FC have no influence on the liability of the Football Club, operated by Poalei Tel Aviv, towards its debts.

- Similarly, the disciplinary proceedings assess Poalei Tel Aviv’s disrespect of FIFA and CAS decisions while the bankruptcy proceedings govern Harel Holding’s payment of some of its debts. Therefore, the *lis alibi pendens* principle does not apply to the present case.

- ***The non-prevalence of insolvency proceedings over disciplinary proceedings***

- Article 59 of the FDC does not require the automatic closure of the disciplinary proceedings in case of insolvency proceedings. Closure is a matter of balance of interests that the FIFA DC has to evaluate, as it did in the present case. Under no circumstances should the occurrence of insolvency proceedings alone exclude the application of FIFA rules on sporting succession.
- The rationale of this provision is based on the fact that enforcement measures are punitive in nature. Against this background, the CAS considers it contrary to public policy to impose a sanction against a debtor party in insolvency/liquidation proceedings, when it can no longer dispose of its assets and is thereby bound by strict rules regarding the distribution of its estate (CAS 2017/A/5054, para 87). Obviously, Poalei Tel Aviv is not in this situation.
- The existence of a football regulatory framework that applies to all sports entities equally is

justified and implies the adherence of the various stakeholders that want to be part of the “FIFA family”. The particularities of sports have to be taken into consideration and the different remedies available must be adapted in order to avoid unwarranted situations in football that would ultimately reward particular transactions that could cause serious negative effects for other football stakeholders. Any other conclusion would be a misinterpretation of CAS jurisprudence and legal writing (as per the numerous references provided).

– ***The sporting continuity of Hapoel Tel Aviv FC***

- According to CAS jurisprudence, the concept of sporting continuity is distinguished from that of sporting succession by the fact that the club itself, or the entity targeted by the decision/contract that serves as the basis for the claim, has never ceased to exist or been detached from its activity. In both cases, the sporting elements, including the federative licence, domestic competitions, name, history, titles and sporting achievements, colours, logo, registered address/headquarters, stadium and internet domain, play an important role (CAS 2021/A/8060 & 8061, paras 206ff).
- In this instance, Hapoel Tel Aviv FC never ceased to exist and/or maintained its activity without any

interruption before and after 2017, regardless of the change of ownership, as confirmed by IFA’s correspondence of 16 January 2017. It continued to use the same sporting licence, to compete in the same domestic competitions, and maintained the same identity (i.e. same name, history, colours, logo, registered address, stadium and internet domain).

- The contracts from which the debts arise, despite the stamp of Harel Holdings, were signed in most of the cases by Hapoel Tel Aviv FC, generating towards creditors the appearance that the latter would assume the economic obligations agreed therein. They expressly referred to the principle of sporting continuity in the cases of Mr Antal and Mr Vyntra.
- Poalei Tel Aviv is fully identified with the club “Hapoel Tel Aviv FC” and has ensured its sporting continuity. Accordingly, Poalei Tel Aviv must be considered as the entity responsible for paying the obligations assumed by the Football Club and thus liable for its debts when it was under the management of Harel Holdings.
- The alleged solidarity compensation made to the Liquidators by a Chinese club for the player Eran Zahavi is unsubstantiated and irrelevant.

– ***The Nissanov Commitment to pay the claims abroad***

- In any case, Profs. Adi Libson and Omer Kimhi confirmed that the

Nissanov Group committed to pay the pre-existing claims and that such commitment does not violate Israeli Law, being valid and binding. In this regard, the Nissanov Offer to acquire the management rights of Hapoel Tel Aviv FC was completely compatible with Israeli bankruptcy law.

- In particular, in accordance with section 34A of the Israeli Sales Law, the Nissanov Group is able to assume Harel Holdings' Debts to the foreign creditors, even in a sale conducted under insolvency proceedings. Furthermore, pursuant to section 268 and 307 of the Israeli Companies Ordinance, the District Court has adequate authority to confirm the payment to certain creditors or to confirm the sale offers, even when such sales or payments violate the equality principle. In the present case, the Nissanov Offer and the Court's Liquidation Order do not violate the equality principle, since foreign claims may entail more rights than others and be prioritised. Ultimately, the Liquidation Order was not appealed by the creditors, and is hence final and binding.
- Even though under Israeli Law the general rule provides for a clean sale of assets in insolvency, such rule has an exception when the parties stipulate otherwise. In the case at stake, the parties opted to deviate from this rule by explicitly stating in the terms of the sale that the Debts owed by Hapoel Tel Aviv FC would be transferred to

the buyer. They also confirmed this interpretation at the hearing.

- Contrary to the Appellant's allegations, FIFA never identified Harel Holdings as the "main debtor", but merely stated that there was a "likelihood" that the Creditors would eventually receive some payments from it. Equally, it did not intend to substitute its assessment for that of the national courts.
- The "Maccabi case law" is irrelevant, as the transaction in that case contains no explicit obligation for the buyer to assume the club's debts resulting from the arbitration proceedings.

– ***The irrelevance of the Creditors' diligence, the abuse of process or bad faith***

- The matter at stake concerns a situation of sporting continuity. Consequently, the alleged lack of diligence of the Creditors in the context of the bankruptcy or insolvency proceedings of Harel Holdings is irrelevant.
- Be that as it may, the Creditors' debts were included in the list of creditors. The fact that their credit was included *ex officio* rather than as per their request does not make a difference when it comes to analysing Poalei Tel Aviv's liability regarding offsetting the debts caused and not paid by Harel Holdings.
- Likewise, a finding of sporting succession or sporting continuity

does not necessarily have to derive from fraudulent conduct or morally flawed behaviour (see e.g. CAS 2020/A/6884, para 147; CAS 2020/A/7543, paras 95-96; CAS 2020/A/7290, para 88).

- ***The absence of double jeopardy***

- The prohibition of double jeopardy does not apply in the present case. A decision rendered in the context of a disciplinary procedure for the non-compliance with a decision of a FIFA deciding body and/or CAS, is distinct from a decision of a national association (i.e. IFA) issued in the application of the domestic sports regulations for entities entering into insolvency proceedings.

- ***The imposition of a sanction***

- The spirit of Article 21 of the FDC is to enforce decisions rendered by a body, committee or an instance of FIFA or CAS in a subsequent appeal decision. The range of sanctions stipulated in this article serves to put the debtor under pressure to comply with such decisions. Whilst the FIFA DC could be regarded as acting similarly as an enforcement authority, its proceedings are chiefly disciplinary in nature, in that they relate to the imposition of sanctions for breach of the association's regulations.
- The FIFA DC has the sole task of analysing if the debtor complied with the final and binding decision of the relevant body. Moreover,

the CAS should only address the question whether the Appellant respected and fulfilled that decision, but no longer its content. Hence, if the FIFA DC is not provided with a proof that the payment has been made or that a payment plan has been agreed by the parties, it will render a decision imposing a fine and sporting sanctions on the debtor and will grant a final period of grace to the debtor to settle its debt to the creditor.

- By continuing the activity of Hapoel Tel Aviv FC, Poalei Tel Aviv was responsible for respecting FIFA and CAS decisions. It failed to do so, and shall bear the consequences thereof. It did not allege that the sanctions imposed were disproportionate or in contradiction with established jurisprudence.

- ***Specific submissions***

132. The Respondent made some specific submissions related with procedure CAS 10121, which can be summarised as follows:

- Pursuant to Article 10(3) of the FDC, the limitation period for prosecuting violations of the FDC is interrupted by all procedural acts, starting afresh with each interruption. The fact that the previous disciplinary proceedings had been declared null and void is irrelevant and the assertion that such (previous) proceedings did not interrupt the limitation period resulting in the present

proceedings being time-barred, nonsensical.

- ***Prayers for relief***

133. Based on the foregoing, FIFA requests the Panel to issue an award:

“(a) rejecting the requests for relief sought by the Appellant;

(b) confirming the Appealed Decision[s];

(c) ordering the Appellant to bear the full costs of these arbitration proceedings;

(d) ordering the Appellant to make a contribution to FIFA’s legal costs”.

VI. JURISDICTION

134. Taking into account the international nature of the disputes at hand, these arbitration procedures are governed by the provisions of Chapter 12 (i.e. Articles 176ff) of the Swiss Private International Law Act (the “PILA”). In particular, pursuant to its Article 176(1), the provisions of Chapter 12 of the PILA shall apply.

135. Furthermore, as regards CAS jurisdiction, Article R47 of the CAS Code provides:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

136. In this regard, Article 57(1) of the FIFA Statutes and Articles 52 and 61(e)

of the FDC, provide that CAS has jurisdiction to decide appeals filed against final decisions passed by FIFA’s legal bodies.

137. The Panel also notes that both Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure issued by the CAS Court Office in connection with these six procedures.

138. In light of the foregoing, considering that the six Appealed Decisions were rendered by the FIFA DC, which is a FIFA legal body and that all these resolutions are final, the Panel finds that CAS has jurisdiction to decide these arbitration procedures.

VII. ADMISSIBILITY

139. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties”.

140. Pursuant to Article 57(1) of the FIFA Statutes, the Appellant had a 21-day period to challenge the Appealed Decisions before the CAS. In the

present case, the Panel notes that the six independent Appeals against the Appealed Decisions were filed by the Appellant within the 21-day period since the notification of the corresponding grounds. Furthermore, the Statements of Appeal filed by the Appellant complied with all the requirements listed in Article R48 of the CAS Code, and are thus admissible.

VIII. APPLICABLE LAW

141. Article R58 of the CAS Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

142. Article 56(2) of the FIFA Statutes sets forth as follows:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

143. Article 4 of the FDC (2023 edition) states as follows:

“1. This Code applies to all disciplinary offences committed following the date on which it comes into force.

2. This Code also applies to all disciplinary offences committed prior to the date on which it comes into force, subject to any milder

sanction that would apply under previous rules”.

144. It follows from the above that, in deciding these Appeals, the Panel must apply the various regulations of FIFA and, in particular, the FDC (2023 edition), it being specified that the Parties do not rightly invoke the *lex mitior* principle. Furthermore, in case the FIFA regulations contain any *lacuna*, the Panel will apply Swiss law.

145. In this regard, the Panel notes that, even though the Appellant does not formally contest the applicability of the FIFA regulations, it sustains in its submissions that Israeli law governs the matter of the enforcement of the Infringed Decisions and related CAS award. The Respondent refers to FIFA regulations and argues that Israeli law is not directly relevant.

146. The Panel adopts the approach taken in the previous CAS award rendered in this matter (CAS 2020/A/6778, para 149):

“In this respect, the Panel deems it convenient to clarify that, as it has been established by the CAS in preceding cases regarding appeals against Disciplinary Procedures conducted by the FIFA DC for the potential infringement of decisions passed by the FIFA judicial bodies or by CAS of financial nature, the national law regulating the party’s bankruptcy (in this case, the ICL) cannot be qualified as the applicable law to these matters. However, this does not mean that in the present case the ICL shall not be taken into consideration or applied when dealing with issues involving matters that are subjected to the insolvency proceedings that are being conducted in Israel by the District Court, which would have to be decided in accordance with the mandatory bankruptcy law. Situations of bankruptcy and

the effects of bankruptcy proceedings are governed by the personal law of the bankrupt (in the present case, the [Israeli Companies Law], ICL), and hence the ICL might have to be taken into account by the Panel in certain aspects of the dispute. This without prejudice to the fact that, as the CAS jurisprudence has clarified, “in accordance with Article R58 of the CAS Code, in this proceedings these laws do not have the formal condition of “Applicable Law” to the dispute, and hence they must be taken into account by the Panel only when it is strictly necessary, when matters that are not available to the parties or public order are at stake, or issues that, ultimately, fall within the scope of application of this rule or that are subject to the jurisdiction of the Bankruptcy Judge”⁴ (TAS 2019/A/6309). In particular, as remarked by the Sole Arbitrator in the matters CAS 2020/A/6900 and CAS 2020/A/6902, “This conclusion is supported by the fact that pursuant to Article 5 of the FIFA DC (2019), the FIFA DC was supposed to subsidiarily apply Swiss law or any other national law it deemed applicable. [...] In fact, in a matter involving national insolvency proceedings, reference to national insolvency law appears rather essential”.

147. As a result of the foregoing, the Panel concludes that, while taking into account Israeli law for matters related to the bankruptcy proceedings of Harel Holdings (in liquidation), if any, these Appeals shall be decided in accordance with the FIFA regulations, which are the applicable law to these procedures and, additionally, Swiss law.

IX. PRELIMINARY ISSUES

⁴ Free translation into English of the original Spanish version, which read: “No obstante, de acuerdo con lo dispuesto por el Art. R58 del Código del TAS, en este procedimiento dichas leyes no tienen la condición formal de “Ley Aplicable” a la disputa, debiendo ser tenidas en cuenta

A. Stay of CAS proceedings and *lis pendens*

148. In its Appeal Briefs, the Appellant requested the stay of CAS proceedings on the ground of the existence of insolvency proceedings in Israel. The Respondent objected that there was no reason not to proceed and opposed this defence.
149. Article 186(1bis) of the PILA states that an arbitral tribunal “*shall decide on its jurisdiction without regard to any action having the same subject matter that is already pending between the same parties before a state court [...], unless there are substantial grounds for a stay in proceedings*”.
150. Overall, an arbitral tribunal should, in case of doubt, give priority to the principle that the proceedings must be conducted within a reasonable period of time. It may only suspend the arbitration in exceptional circumstances, i.e., either based on specific statutory provisions or for other compelling reasons. Such reasons may exist, for instance, if events occur which affect the legal existence or the capacity of a party, or if questions need to be clarified which are important for the outcome of the case but lie outside the jurisdiction of the arbitral tribunal (SFT 4P.64/2004, para 3.2; SFT 4P.64/2004, para 3.2; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 4th ed. 2021, no. 1182).

por la Formación Arbitral únicamente cuando sea estrictamente necesario, por afectar a materias indisponibles, de orden público o a cuestiones que, en definitiva, se encuentren en el ámbito de aplicación de dicha norma o que estén sometidas a la jurisdicción del Juez Concursal”.

151. The Panel finds that in the two sets of proceedings there is no identity of parties, since the enforcement of the Creditors' claims in the insolvency proceedings is directed against Harel Holdings, not Poalei Tel Aviv Holdings Ltd. It does not see any exceptional circumstances or compelling reasons that would justify an exception. It is also mindful of the need to avoid restricting the Parties' right of access to justice and a substantial delay or denial of justice, it being recalled that some cases were initiated before FIFA bodies almost ten years ago (CAS 2021/A/7915, paras 93ss). Finally, it notes that these CAS proceedings were put on hold for several months in order to facilitate settlement discussions, to no avail, and then reinstated, in line with Article R32 CAS Code *in fine*.

152. The Panel confirms that it does not need to further suspend the proceedings and that these matters are ripe for decision.

B. Statute of limitations

153. The Appellant argued that the relevant 5-year limitation period for prosecution under Article 10 of the FDC had expired and that some of the disciplinary proceedings were therefore time-barred. It submitted that since the FIFA DC's first disciplinary decisions were declared null and void, the connected (previous) proceedings did not interrupt the limitation period causing it to start afresh.

154. The Respondent took the opposing view, stating that there was no logical or legal basis for a finding of limitation or closure of the proceedings.

155. The Panel observes that limitation periods for prosecuting disciplinary violations are "*interrupted by all procedural acts, starting afresh with each interruption*" (Article 10(3) of the FDC). The fact that the previous proceedings were declared null and void and then reinstated towards the Appellant does not change this state of events, all the more so because they were brought with a *de novo power* of adjudication due to the procedural behaviour of both parties (see paras 30 and 216). It follows that the present proceedings are not time-barred.

C. Admissibility of arguments and exhibits

156. In its Reply, the Appellant requested that FIFA's arguments on the Nissanov Commitment be disregarded, as they exceeded the scope of these proceedings. The Respondent opposed this request on the grounds that the issue had been referred to directly and indirectly throughout the prior and present proceedings.

157. The Parties also disagreed on the admissibility of the Liquidators' Letters, which aimed to clarify the amounts admitted by state courts in favour of two players, but were only provided on 16 July 2024 due to administrative oversight.

158. On 15 October 2024, the CAS Court Office informed the Parties that the Panel had decided to accept FIFA's arguments and documents into the case files.

159. The Panel observes that the Appellant itself initiated the discussion on the Nissanov Group, and requested an

additional round of submissions in that respect. It further observes that this discussion was already outlined in the Appealed Decisions. The “principle of double instance” is respected, since it was for the Parties to develop their arguments in greater depth in the first instance.

160. The Panel considers that the same flexibility is justified in relation to the Liquidators’ letters, irrespective of their relevance or otherwise to the present dispute (see section IX.D. below).

D. Third round of submissions, hearing and witnesses

161. On 19 September 2024, the Appellant expressed its preference for a video hearing and CMC to be held in this matter, in view of the legal and factual issues at stake, the experts and witness to be heard, as well as the political situation in Israel. Alternatively, it sought permission to file new witness statements and/or complete their legal opinions in relation to the amounts admitted by state courts in favour of two players, interest under Israeli law and the solidarity contribution paid by a Chinese club.
162. On 25 September 2024, the Respondent objected to such requests. It underlined that the Appellant had failed to formally call any expert or witness in its written submissions, and could not rely on exceptional circumstances to justify a third round of submissions. It stated that a hearing and CMC were not necessary and should, in the event of a decision to the contrary, be held remotely after 2pm. It then reiterated its position on several

occasions, even going so far as to waive the testimony of its own experts.

163. On 15 October 2024 onwards, the Panel decided that there was no need to hold a CMC, to refuse any further written submissions and evidence, to hold a video hearing, to hear Profs. Hamdani and Kimhi (experts) in a witness conference, as well as Mr Greenberg (witness) separately.
164. The Panel recalls that, according to Articles R51 et seq. of the CAS Code, the exchange of written submissions is usually limited to one round, supplemented if necessary by a CMC and hearing. In this case, the Parties had the opportunity to present their arguments in two detailed exchanges of written submissions. They were then able to explore the main issues in greater depth at the hearing, as well as any related topics. They acknowledged at the end of the hearing that their right to be heard had been fully respected, in line with current practice (CAS 2014/A/3669, para 28; CAS 2021/A/8060, para 172; CAS 2021/A/8311, para 203, and references).
165. The Panel fails to see how additional submissions and evidence on some contentious questions would have been useful or justified by exceptional circumstances under Article R56 of the CAS Code. These questions were mostly dealt with by FIFA bodies in decisions that entered into force, and cannot be revisited in disciplinary proceedings. They are not decisive for the outcome of the present dispute (in the same vein, see CAS 2017/A/4271, para 52).

166. The Panel confirms that it was justified to hear Profs. Hamdani and Kimhi, who were repeatedly mentioned in the Parties' written submissions, and drafted the most recent expert reports. It was equally prepared to give limited weight to Prof. Libson report and Mr Greenberg's affidavit, despite their absence at the hearing and resulting lack of cross-examination (CAS 2016/A/4803, para 101; CAS 2023/A/9578-80, paras 109ff).

X. MERITS

167. The main issues to be resolved by the Panel are:

- A. FIFA's jurisdiction and discretion to close the proceedings
- B. The sporting continuity or succession of the Football Club
- C. The "Nissanov Commitment"
- D. The Creditors' diligence
- E. The absence of abuse of process or bad faith
- F. The double jeopardy
- G. The determination of the sanction(s)

A. FIFA's jurisdiction and discretion to close the proceedings

168. The Appellant contests FIFA's jurisdiction. It submits that all disciplinary proceedings should have been closed pursuant to Article 59 of the FDC, since they involved issues pending before Israeli courts.

169. The Respondent asserts that Article 59 of the FDC does not require the automatic closure of the disciplinary proceedings in case of state proceedings, and that such a decision was not warranted in these cases, given that Poalei Tel Aviv could still dispose of its assets.

170. The Panel recalls that Article 59 of the FIFA FDC states as follows (emphasis added):

*"Proceedings **may be** closed when:*

a) the parties reach an agreement;

b) a party is under insolvency or bankruptcy proceedings pursuant to the relevant national law and is legally unable to comply with an order;

c) a club is disaffiliated from an association;

d) the alleged violation has not been proven".

171. The majority of the Panel (hereinafter: "the Panel") concurs with FIFA that Article 59 (formerly Article 107) of the FDC does not entail the automatic closure of disciplinary proceedings in the presence of state proceedings, and that a balancing of interests must be conducted. In CAS 2015/A/4162, para 80, the panel rightly pointed out that:

"Article 107 lit. b of the FIFA Disciplinary Code does not totally forbid enforcement proceedings according to Article 64 of the FIFA Disciplinary Code in case insolvency proceedings have been initiated. Instead, Article 107 (b) of the FIFA Disciplinary Code provides that the closing of the disciplinary proceedings is at the discretion of the FIFA DC. The question thus is under what conditions the FIFA DC may continue

the enforcement proceedings despite the opening of insolvency proceedings. Ultimately, Article 107 (b) of the FIFA Disciplinary Code demands that a balance of interest takes place between the rationale of Article 107 (b) of the Disciplinary Code and the scope of the FIFA Regulations on training compensation (i.e. to “[improve] the game of football constantly and [to promote] it globally” – Article 2 lit. (a) of the FIFA Statutes; to establish the “basic principles that guarantee a uniform and equal treatment of all participants in the football world” – cf. paragraph 1.2 of the Commentary to Article 1 of the Regulations for the Status and Transfer of Players and to establish a level play field among all stakeholders)”.

172. It follows from the above that whether or not recognition is granted depends on a balancing of the interests involved and, therefore, must be decided on a case-by-case basis. In CAS 2013/A/3321, paras 8.8ff, the panel found that:

“The word “may” in Article 107(b) of the FIFA Disciplinary Code implies that the FIFA DC has a discretion to close the proceedings, but no obligation to do so.

The mere fact that a party has been declared subject to insolvency proceedings by a national State Court does therefore not necessarily imply that proceedings must be closed. Accordingly, other factors must also be taken into account in deciding whether or not to close the proceedings.

The Panel notes in this connection that the Respondent has apparently altered its practice after the decision in the case CAS 2012/A/2750 with the effect that there is no automatic termination of disciplinary proceedings, but that the FIFA DC apparently makes a case-by-case evaluation, which is a practice the Panel endorses”.

173. The same considerations can be drawn from sporting succession cases, bearing in mind that FIFA is accustomed to giving weight to state proceedings by recognising the amounts of claims admitted by state courts and assessing the diligence of creditors in this context (see e.g. CAS [2011/A/2646](#), paras 11ff; CAS [2020/A/6941](#), paras 77ff; [CAS 2021/A/8060 & 8061](#), paras 180ff; CAS 2022/A/9044, paras 109ff).

174. The Panel finds that, under the very specific circumstances of these cases, there was no justification to close the proceedings, as Poalei Tel Aviv could not rely on a favourable balance of interest, as will be shown in more detail below.

175. To begin with, the rationale behind the concept that enforcement proceedings may be closed when a debtor is undergoing insolvency/bankruptcy proceedings was primarily aimed at avoiding that a disciplinary sanction be imposed against a debtor party that due to the application of local insolvency law can no longer dispose of its assets and is bound by strict rules regarding the distribution of its estate (potentially subject to criminal sanctions (CAS 2012/A/2759, para 121; CAS 2017/A/5054, para 87). This is clearly not the case here, since the Appealed Decisions are directed against Poalei Tel Aviv, which owns and operates the Football Club and is not undergoing any sort of insolvency or bankruptcy proceedings.

176. Moreover, the Football Club itself has never ceased operation. Although its activities were sold to Poalei Tel Aviv eight years ago, it was able to continue its operation without interruption

despite the existence of foreign claims. Due to the event of insolvency, it was sanctioned with the imposition of a points deduction under the IFA regulations, which, in part, led to its relegation.

177. In the same line, the advancement of the state proceedings before the Israeli authorities cannot benefit the Appellant, since they relate to a different entity (Harel Holdings) and/or subsidiary issues (the Nissanov Commitment). Moreover, these proceedings were only able to progress because of the duration of the FIFA disciplinary proceedings, which had initially been directed against the wrong entity, and had to be restarted *de novo*. Although this error was primarily attributable to FIFA, the CAS award finding this irregularity also emphasised that the Appellant had “*consciously or unconsciously, contributed to create the situation that has led to this serious procedural flaw*” by adopting ambiguous conduct. By way of example, the Appellant filed its appeals in the name of “Hapoel Tel Aviv FC”, while acknowledging that the latter had no legal personality, and provided a power of attorney in the name of Harel Holdings. Similarly, the Appellant created some confusion by indicating that the legal counterparty to the contracts underlying the contractual disputes at stake was the Football Club, either by using its official name or a variant of it under the signature caption. It also incorrectly stated in some of these contracts that the Football Club was a member of the IFA (CAS 2020/A/6778, para 170).

178. The particularities of sports in situations such as the present one, have

to be taken into consideration and the different remedies available must be adapted in order to facilitate harmonisation in football. This includes the application by FIFA of its own regulations before its internal bodies if it can proceed with the case. In this context, the jurisprudence and legal writing quoted by the Appellant are based on different facts, incomplete and of no avail.

179. Consequently, the Appellant’s objections must be dismissed.

B. The sporting continuity or succession of the Football Club

180. The Appellant does not consider itself liable for the debts generated under the management of Harel Holdings. It argues that it is not bound by the principle of sporting continuity, and denies being a legal or sporting successor.

181. The Respondent maintains, on the contrary, that Poalei Tel Aviv is liable, on account of the sporting continuity principle. In its view, the Football Club never became extinct or stopped its activity and, therefore, a new entity did not succeed it.

182. The Panel points out that Article 21 of the FDC reads as follows (emphasis added):

“1. Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee, a subsidiary or an instance of FIFA or a CAS decision (financial decision), or anyone who fails to comply with another final decision (non-financial decision) passed by a body, a

committee, a subsidiary or an instance of FIFA, or by CAS”:

- a) will be fined for failing to comply with a decision and receive any pertinent additional disciplinary measure; and, if necessary;*
- b) will be granted a final deadline of 30 days in which to pay the amount due or to comply with the non-financial decision;*
- c) may be ordered to pay an interest rate of 18% p.a. to the creditor as from the date of the decision of the Disciplinary Committee rendered in connection to a CAS decision on an appeal against a (financial) decision passed by a body, a committee, a subsidiary or an instance of FIFA;*
- d) in the case of clubs, upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a ban on registering new players will be issued until the complete amount due is paid or the non-financial decision is complied with. A deduction of points or relegation to a lower division may also be ordered in addition to a ban on registering new players in the event of persistent failure (i.e. the ban on registering new players has been served for more than three entire and consecutive registration periods following the notification of the decision), repeated offences or serious infringements or if no full registration ban could be imposed or served for any reason; e) in the case of associations, upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period*

stipulated, additional disciplinary measures may be imposed;

[...]

- f) in the case of natural persons, upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a ban on any football-related activity for a specific period may be imposed. Other disciplinary measures may also be imposed.*

2. With regard to financial decisions passed by a body, a committee, a subsidiary or an instance of FIFA, or CAS, disciplinary proceedings may only commence at the request of the creditor or any other affected party who is entitled to be notified of the final outcome of the said disciplinary proceedings, including the motivated decision if so requested.

3. If the sanctioned person disregards the final time limit, FIFA and/or the relevant association (in cases involving clubs or natural persons) shall implement the sanctions imposed. Where a registration ban (in the case of a club), a ban on any football-related activity (in the case of a natural person) or a disciplinary measure (in the case of associations) has been enforced against a debtor in accordance with this article in relation to a financial obligation resulting from a CAS or FIFA decision and where the debtor provides FIFA with reliable evidence of having complied with such decision, such ban or measure may be provisionally lifted.

The creditor will be invited to confirm whether such payment has been made. [...]

4. The sporting successor of a non-compliant party shall also be considered a non-compliant party and thus subject to the obligations under this provision. Criteria to

assess whether an entity is to be considered as the sporting successor of another entity are, among others, its headquarters, name, legal form, team colours, players, shareholders or stakeholders or ownership and the category of competition concerned. [...]”.

183. The Panel is cognisant that, based on Article 21 of the FDC, not only the original debtor shall be subject to disciplinary sanctions, but also its “sporting successor”. Accordingly, this article does not leave any discretion for the adjudicatory body, in that it implies that if a club is considered to be a “sporting successor” of a non-compliant club, it shall also be considered a non-compliant party. Likewise, it is not intended to provide an exhaustive list and contains elements of varying importance that may lead, without not all of them being met, to the conclusion that a club has to be regarded as a “sporting successor”. Ultimately, it is interpreted as having a broad scope, encompassing cases where state bankruptcy or liquidation proceedings have already been opened (CAS [2011/A/2646](#), para 15; CAS 2020/A/6884, para 138; CAS [2020/A/6941](#), para 77; CAS [2020/A/7092](#), paras 73ff and 148; CAS 2020/A/7314, para 148; CAS 2020/A/7543, paras 82ff; [CAS 2021/A/8060 & 8061, para 180](#); CAS 2021/A/8331, para 156; CAS 2022/A/9044, paras 97ff).

184. Drawing from this regulatory basis and relevant jurisprudence, the existence of a sporting succession is rooted in various criteria, including:

- Headquarters;

- Name;
- Legal form;
- Team colours;
- Players;
- Shareholders, stakeholders, ownership, management;
- Category of competition;
- Public information;
- Founding year;
- Licence;
- Acquisition of sporting assets and federative rights;
- Emblem, logo;
- Stadium.

185. The concept of “sporting succession” arose from the willingness to protect players’ and clubs’ entitlements, to ensure contractual stability and fair competition and to discourage fraudulent behaviour on the part of successor clubs, by preventing them from benefiting from their predecessor’s results, fan base and revenues, without assuming the associated liabilities. It developed alongside the fact that a “football club” has been defined by various CAS panels as a “*sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it*”. It was differentiated from the theory of “sporting continuity”, which was created by means of recent rulings to take account of cases where the club in question has in fact never ceased to exist, while relying on similar assessment criteria (CAS 2020/A/7543, para 53; CAS 2021/A/8060 & 8061, paras 204ff; CAS 2021/A/8446, para 141; CAS 2022/A/9044, para 101).

186. The first aspect to be determined is thus whether the matter at stake concerns a situation of sporting succession or sporting continuity. The demarcation was clearly explained in CAS 2021/A/8060, para 209 (emphasis added):

*“In this sense, for us to be faced with a case of possible sporting succession, prior to analysis of the elements that may characterize the entities in question, it is necessary to begin by understanding **whether the club itself, or the entity targeted by the decision/contract that serves as the basis for the claim, ceased to exist or was detached from its activity at some point in time. If the answer to this question is affirmative, the new entity may only assume the responsibilities or liabilities of the previous one when it is declared as its sporting successor; on the contrary, if the targeted entity never ceased to exist or maintained its activity without any interruption, then a situation of plain and simple sporting continuity and not sporting succession may be in question**”.*

187. Against this background, the Panel considers that Hapoel Tel Aviv remained the same club uninterrupted before and after the change of legal entities in January 2017 from Harel Holdings to Poalei Tel Aviv. This constitutes a clear-cut case of sporting continuity. This is evident from an analysis of the Football Club’s characterising elements below, which are undisputed:

- (1) **same federative license:** the Football Club maintained one and the same federative license, as confirmed by the IFA.

- (2) **same competition level:** the Football Club continued to compete with the majority of its squad in the Israeli Premier League (which ended in May 2017). It was only relegated to the “Liga Leumit” at the end of the season 2016/2017 due to its poor performance and following the deduction of 9 points by the IFA. It returned to the Israeli Premier League for season 2018/2019 and was subsequently relegated again in season 2023/24.

- (3) **same name and organisation:** the Football Club continued to present itself as “Hapoel Tel Aviv FC” and act through its corporate entity (being devoid of legal personality).

- (4) **same history, titles and sporting achievements:** The Football Club left the substance of its website unchanged. The website includes a detailed list of entries that explain its history, its past and present icons, players, coaches, and even historical group pictures since its founding year in 1923.

- (5) **Same colors and logo:** the Football Club kept the same colours and logo. The logo represents a sportsman inside a sickle and hammer - the symbols of socialism - and includes the two stars for winning 13 championships (the last one in the 2009/2010 season), each of them awarded for every five championships won.

- (6) **same registered address/headquarters:** The Football Club maintained its headquarters at 8 Halohamim Street, Post Box 8402, IL-61084, Tel Aviv.
- (7) **same stadium:** the Football Club carried on playing in the Bloomfield Stadium, in Tel Aviv.
- (8) **same internet domain:** the Football Club uninterruptedly used the internet domain [htafc.co.il](https://www.htafc.co.il) and the website <https://www.htafc.co.il>.
- (9) **same FIFA TMS ID number:** the Football Club continued to use the same FIFA TMS ID number.
188. The Panel is carefully aware that the application of Article 21 of the FDC to cases where bankruptcy or liquidation proceedings have been opened is based on legal and economic premises which are not without controversy. It is also conscious of the increasing weight granted to national laws and the non-linear and complex nature of FIFA's regulatory system in cases of sporting succession. However, it deems that this system, the interpretation and possible review of which is primarily the responsibility of FIFA, does not disregard the main principles of insolvency laws, since it involves a balancing of interests, and takes into account the amounts of claims admitted by state courts and the diligence of creditors in this context. In particular, it does not violate the principle of equality of creditors and states' monopoly on execution from the standpoint of Swiss public policy, while being justified by the need for harmonisation in football, as recently confirmed by the Swiss Federal Tribunal (SFT 4A_616/2021, paras 5.4ff; see also SFT 4A_246/2022, para 6.3.2; CAS 2016/A/4787, para 137; CAS 2020/A/7061, paras 112 and 150; CAS 2020/A/7065, para 110).
189. The Panel further considers that the Appellant benefitted from acquiring the Football Club's trading name, which remained completely unaltered. It took advantage of all its assets and key features, by making use of its licence, competition level and historic elements (i.e. name, logo, colors, stadium, headquarters, history, trophies, etc.). It should therefore also be liable for the previous Debts as established in the Infringed Decisions and related CAS awards. The subsidiary arguments raised in support of the appeals, such as the means of payment of an alleged solidarity contribution paid by a Chinese club, do not detract from this.
190. In reaching this conclusion, the Panel does not overlook the fact that the concept of "club" must be handled with caution, especially in countries where, as in Israel, they have no legal personality and are owned by a commercial body, at the risk of creating a situation of "endless entities". Moreover, the circumstances of this case, and the submissions advanced in it, are very different from those of the above-cited awards CAS 2021/A/8060 & 8061. In those cases, (i) there was always a "parent" (the association) which granted rights to two corporate entities (a limited company then, two years after its insolvency, a cooperative company); (ii) there was not a transfer of assets within an insolvency

procedure, instead upon the liquidation of the limited company the sporting rights were lost and intellectual property and management rights reverted to the parent association, to then be granted to the new cooperative company two years later; (iii) the liquidation of the limited company was part of the factual pattern and was relied upon to seek to extinguish joint liability, but the thrust of the appellants' submissions concerned the competence of the FIFA DC to issue its decisions in that circumstance and an assessment of whether the factual elements supported a finding of sporting succession.

191. The point remains that, in this particular instance, all the elements converge to recognise not only the existence of continuity but also of liability under the applicable criteria.

C. The "Nissanov Commitment"

192. The Appellant asserts that the transfer of ownership of the Football Club from Harel Holdings to Poalei Tel Aviv (Nissanov Group) was made free of any debt, or past liability and that any other interpretation would violate Israeli law.
193. The Respondent affirms that the Nissanov Group committed to pay certain pre-existing debts, including those that are the subject of these proceedings, and that such commitment complies with Israeli Law.
194. The Panel heard expert evidence from Professor Hamdani for the Appellant and Prof. Kimhi for the Respondent on the principles of interpretation of

contracts under Israeli law and specific features of Israeli insolvency law. In addition, the Respondent filed an Expert Opinion from Professor Libson. As he was not presented to be cross-examined, the Panel has given less weight to his opinion, but observes that it is entirely consistent with the testimony of Prof. Kimhi.

195. The experts agreed on certain elements of Israeli law, including as follows:

- Further to s25 of the Contract Law (General Part), 1973 "[a] contract will be interpreted in accordance with the intention of the parties, but if the intention of the parties is clearly manifested in the contract's language, the contract will be interpreted pursuant to its language". When that contract arises in the context of insolvency proceedings, weight will be assigned to principles of insolvency law.
- Further to s34A of the Sales Law, assets sold by a judicial authority – such as a court approved sale in insolvency proceedings – are generally sold free of any third party's liens or rights in the assets sold. There are, however exceptions: "[w]hen an asset is sold by a court of law...the ownership shall pass to the buyer void from any lien or other right in the asset, except for a right that is not voided as per the terms of the sale...".

196. The experts disagreed on the scope of the exceptions contained in the Israeli Sales Law and equality principle, and held diametrically opposed views on the existence of the commitment and its lawfulness.

197. The Panel is not required to make a final determination on these subsidiary issues, in light of its conclusion as to the existence of sporting continuity. However, it is satisfied from its thorough review of the file that the Nissanov Group was willing to pay pre-existing debts, or at least assumed that it would be liable under FIFA regulations, and agreed to proceed with the acquisition on that basis.

198. The Panel's findings revolve around four main points, which are developed below:

- (1) The language of the Nissanov Offer;
- (2) The record of the District Court's hearing;
- (3) The terms of the Liquidation Order;
- (4) Mr Greenberg's affidavit.

(1) *The language of the Nissanov Offer*

199. The starting point for this analysis is the Nissanov Offer, which set out the offer made by the Nissanov Group to acquire the activities of the Football Club and which was approved by the District Court in its Liquidation Order of 4 January 2017, subject to the clarifications provided at the hearing before it.

200. Clause 4(h) of the Nissanov Offer states in its relevant part as follows (emphasis added):

“It is also known to the undersigned that there are judgements of the CAS (the Court of Arbitration of Sport) and of the Court of Arbitration of FIFA against the Club and/or the team and/or the Companies, and

that pending legal proceedings are being conducted against them, and there are also pending demands, all of which are in respect of debts and/or causes of action and/or events relating to the activities of the Companies prior to the purchase (hereinafter. “Claims Abroad”) and that it is my responsibility to examine the legal or general implications of the judgment and/or the pending proceedings. [...]

*Against the Offeror's agreement to attempt to contend with debts to an estimated extent of approximately NIS 30 million of Claims Abroad and **subject to the condition that he will be obliged to pay amounts in actual practice** accordingly, therefore upon and after approval of the Offer by the court, the Trustees will assign to the Offeror the following rights [...].”*

201. This clause gave rise to differing interpretations by the Parties. The Panel notes, however, that (i) the remainder of the clause assigned to the Nissanov Group rights over certain claims and a cash surplus, (ii) it is followed by a provision (at clause 4(i)) specifying that the purchasers were to have both conduct of and discretion over the proceedings, and strategy, concerning the so called Foreign Claims , and (iii) (by clause 18) the conditions of sale are generally subject to s 34 of the Israeli Sales Law.

(2) *The record of the District Court's hearing*

202. The hearing of the various applications in the insolvency proceedings took place on 4 January 2017. Nineteen different parties were represented by counsel including the Trustees, Harel Holdings, the Nissanov Group and Amrani Group, the IFA, the players'

union, the Israeli tax authorities, the Official Receiver, and different creditors. The Panel was provided with the transcript of the hearing before the District Court, which sets out a verbatim record of the parties' and intervenors' submissions at the hearing.

203. Counsel for the Trustees explained that the Nissanov Offer was the most suitable as it encompassed responsibility for the "claims abroad", with an expected reduction of NIS 30 million of claims from the liquidation estate. He also referred to the Israeli Sales Law, and the disciplinary sanctions that could be imposed by FIFA in case of non-payment of those claims abroad (emphasis added):

"We looked in depth at the issue of the team's foreign debts, i.e. of the players that had brought claims or could bring claims in FIFA institutions, in other institutions, something that constitutes a problematic event in sport because quite serious sporting sanctions can be imposed on the team in relation to non-payments ... This is a matter that is being dealt with outside the present legal case, despite the fact that, in our view, the matter can and should be addressed in accordance with Article 34 of the Sale Law. This article is still not appreciated and recognised in any country of the world.

Where we looked in depth at the problem, thorough work was carried out and it became clear that the exposure is substantial and is as much as NIS 30 million, the purpose of the players' interest and arbitrations that have been submitted and can be submitted abroad to FIFA [...].

Unfortunately, we have to recommend one bid and we are recommending the Nissanov bid. In terms of the principle elements of the bid, legally it is not possible to implement a creditors' settlement and so we have ended up here. It is also a result of the catastrophic situation that I described earlier in relation to the club's situation, even under Article 34(a) of the Sale Law. [...]

On the subject of the bid, what is important is that we are dealing once and for all with the foreign NIS 30 million exposure "hump" logically and in a systematic way...For our part, we have undertaken to help without it burdening us with costs". [...]

As regards the benefit for creditors and the alternatives that are on the agenda - as I said, from a legal point of view, we are going through a liquidation process one way or another, so that the distribution is not within a creditors framework...the sale of a going concern is infinitely preferable to shutting down on a number of grounds:

1. A very large sum of around NIS 30 million will come down from the raft of law suits that will be brought against the liquidation estate for the simple reason that the bidder takes upon itself and, from the point of view of the sport, will be forced to solve it. That is to say, there is no way this "hump" will keep on running and, therefore, we have gained a huge amount. [...]"

[Counsel then summarised other grounds before commenting on the competing Amrani Group bid, noting "[e]ven the treatment of the foreign debts was not taken seriously..."].

204. Counsel for the Nissanov Group submitted:

"The trustees are selling us an operation that is exposing us to losses estimated at around NIS 30 million...only in the upcoming seasons will be begin negotiations with FIFA in order to reduce the exposure that was revealed in the negotiations." [...]

"...the things my colleague [Counsel for the Trustees] said are accurate and clearly show how the creditors' fund has succeeded in getting rich to the tune of millions of shekels as a result of a buyer coming in at a time when the team is still alive..."

205. Counsel for the IFA expressed his satisfaction with the Nissanov Group's willingness to assume foreign liabilities. He explained in detail the mechanisms of FIFA regulations, in particular Article 64 (now Article 21) of the FDC:

*"I was pleased to hear that there is intent to act against foreign liabilities. This is very, very important...In FIFA's world, when a club experiences economic difficulties, the last in the queue are those that have been abroad and the club goes on paying players, goes on buying players, goes on being in contact with trustees when it has problems and then in the end they remain. FIFA balances things according to the normal international outlook. As for the buyer, it must take into account the risk that it needs to pay these amounts, **otherwise the club will be liable to pay amounts and, if it does not pay, it will have points deducted, they will instruct us to relegate it and that has happened. It is an international risk** [...]*

There is a provision in Article 64 of FIFA's Disciplinary Code that every football player is

required to implement the decisions of FIFA and CASS (sic)"

[Adv. Barak then set out a summary of FIFA process focussing on the obligation of the club to pay and the consequences for the club and IFA if it does not].

206. Counsel for the Amrani Group bidders (who had made the alternative offer to that from the Nissanov Group), focused his attention on the need to start the Football Club's operations afresh:

"For example, the foreign claims – if we look at what appears to be written in the bid, "contrary to the bidder's agreement to try and deal with debts..." By this method, we will go back to how Hapoel Tel Aviv is today, if not worse. Without the prudent use of Article 34, it will not be possible to restart operations properly [...]

As for the foreign claims, I do not understand what this creditor preference method is. There are liquidation laws in the world too and, with all due respect to FIFA, FIFA does not generally take immediate action...I think the Nissanov Group's bid is not good in relation to FIFA's claims. If these sums are meant to indemnify these charges, even better, the trustees should do it and will thereby not come up against creditors' preference [...]

I am of the opinion that the only way is the way we have suggested in accordance with Article 34 in order to clear the table".

207. Finally, counsel for an unidentified creditor expressed concern about the security provided by the Nissanov offer and wanted it to be improved:

"There is no obligation on the part of the bidders in the event that they need to deal with FIFA's arbitral awards...I am saying that

the bid can be improved. In fact, they are taking on cold liabilities of 30 million and that is what will happen in a few months' time".

(3) The terms of the Liquidation Order

208. Following that hearing, and the opportunity for any and all interested parties to make submissions, the District Court issued the Liquidation Order. The most salient and relevant features of the Liquidation Order are repeated here for ease of understanding:

- The difficulty in finding a purchaser for the Football Club *"was due primarily to the debts the Club has as a result of judgments and arbitration awards that were handed down against it by various tribunals abroad, including FIFA institutions and the Supreme Court in Lausanne, Switzerland (CASS) (sic) as well as claims from abroad which are assessed by them in a sum of about NIS 30 million"*.
- The court record of the hearing which was held in the stay of proceedings files must be regarded as also being the record in the liquidation files.
- A creditors arrangement was not proposed or possible and it was necessary to order an immediate provisional liquidation and the sale to the Nissanov Group.
- The Nissanov Group offer for the purchase of the Football Club was preferable to that of the Amrani Group for four reasons: (i) the

Nissanov Group had deposited a sum of NIS 1 million as security for its obligations, whereas the Amrani Group had not deposited any amount, (ii) the Amrani Group offer could be withdrawn within 15 days whereas the Nissanov Group offer could not be withdrawn, (iii) the Nissanov Group would operate the Football Club immediately whereas the Amrani Group would not, and (iv) the contrasting approach to the handling of the foreign claims, in relation to which the judgment provides

*"The Nissanov Group has, as stated, taken upon itself the handling and the responsibility with regard to the judgments and claims abroad, whereas in the Amrani Group's offer responsibility for the debts and the demands in respect of claims abroad will fall on the coffers of the liquidation... **This aspect is of a very material nature because it reflects the assuming of a possible obligation running into tens of millions of shekels**"* (emphasis added).

- All proceedings against the Football Club were stayed and no proceedings could be commenced *"except foreign claims as defined above, in relation to which the arrangements as set forth in the offer and in the decision will apply"*.
- Approval was given to the Trustees to sell the activities of the Football Club to the Nissanov Group *"in accordance with the offer submitted and clarifications that were given at the hearing and as stated in the court record and in the decision above"*.

(4) Mr Greenberg's affidavit

209. Mr Greenberg is a member of the Nissanov Group and shareholder in the Appellant. His affidavit dated 18 October 2021 (so over four years after the court hearing) was provided in support of the Liquidators in their action against various parties concerning the affairs of the Football Club prior to its insolvency. His evidence states in part:

"Our agreement does not state and we did not intend it to state in general or vis-à-vis third parties to be responsible for payment of debts as aforementioned, which would have also constituted prohibited creditors' priority. The only thing stated is that we would contend with the proceedings, which means we will finance the administration of those same proceedings, and that if we shall be forced to pay and we shall pay in practice, for example if a grave disciplinary sanction shall be imposed and we shall decide to save the group, only then the rights shall be transferred to us for certain indemnifications....All that is stated in the purchase agreement, and it was acceptable to us, is that we are aware of the fact that there are debts overseas that notwithstanding the liquidation proceedings and the sale it is possible that disciplinary sanctions shall be derived from the and that we shall attempt to contend with the debts in the disciplinary and legal proceedings and prevent imposition of sanctions from overseas".

210. The Panel observes that this evidence supports the proposition that the Nissanov Group acquired the Football Club in the knowledge that it would bear the responsibility to settle the debts that it could not otherwise reduce or extinguish by the conduct of proceedings (at its discretion) and that it would so pay them in order to avoid a disciplinary sanction in the event that it could not reduce or extinguish them.

211. The Panel is cognisant that Mr Greenberg was offered for cross-examination but was not cross-examined as the Respondent did not require him to attend the hearing, presumably because of his relationship of financial dependence with the Liquidators. It considers that his evidence is on the record, with limited value.

(5) Final remarks

212. The Panel is comforted in its view that the position of Poalei Tel Aviv (Nissanov Group) does not hold up under scrutiny. It knowingly committed to pay certain of the Football Club's preexisting debts as part of the sale, regardless of whether or not such commitment was legally binding under Israeli law. It did so after a court hearing in which the sanction regime applied by FIFA in the event of non-payment was the subject of specific submissions and so clearly in the contemplation of the relevant parties. It benefitted from an actual or apparent commitment to pay these debts to distance itself from a rival bidder for the Club failing which its acquisition might not have been possible. It assumed that it would have to settle these debts in order to avoid sanction under the FIFA regulations, and agreed to proceed with the acquisition of the Football Club on that basis in any event. Its refusal to bear responsibility and the resulting disciplinary consequences eight years later appears surprising and inconsistent when placed in the context of the offer, the transcript of the hearing, the Liquidation Order and the evidence of Mr Greenberg.

D. The Creditors' diligence

213. The Appellant claims that the Creditors' alleged inaction during Harel Holdings' insolvency proceedings would impede the imposition of sanctions.
214. The Respondent maintains that the alleged lack of diligence of the Creditors is irrelevant in the context of sporting continuity, and points out that they were in any case included in the list *ex officio*.
215. The Panel sees no *prima facie* reason why the requirement of diligence on the part of the creditors should lose its importance in the context of sporting continuity. Nevertheless, it does not consider it necessary to give a definitive ruling on this issue since, as the Respondent rightly pointed out, all the Creditors' debts were ultimately included in the list. The fact that the inclusion of these claims stems from the proactive approach of the authorities instead of that of the interested parties, had no factual or legal impact, and cannot, on the facts of this case, therefore be held against them.

E. The absence of abuse of process or bad faith

216. The Appellant states that there was no abuse of process or bad faith that could justify imposing sanctions on Poalei Tel Aviv.
217. The Respondent stresses that a finding of sporting continuity or succession does not necessarily have to derive from fraudulent conduct or morally flawed behaviour.

218. The Panel notes that some CAS awards establish that an element of fraud or abuse is a *conditio sine qua non* for the determination of sporting succession between two entities (e.g. CAS 2016/A/4550 & 4576; CAS 2020/A/6873; CAS 2020/A/7183). Nevertheless, the Panel is mindful that this approach is not reflected unanimously in the jurisprudence and moving toward greater flexibility based on the facts and circumstances of each case. As a matter of example, the sole arbitrator in CAS 2020/A/6884 retained that even if this system "*was created to avoid abuse of clubs trying to escape from financial obligations*", it could still apply without such specific circumstances. The same was concluded in CAS 2020/A/7290 and in CAS 2020/A/7543, in accordance to which "[...] *shady practices in itself, or rather fraudulent practices by parties trying to avoid payments, do not constitute a conditio sine qua non in order to conclude that sporting succession occurred. In other words, sporting succession can exist even if there is absence of such practices*" (for more details, see CAS 2023/A/9809, para 106).

219. The Panel is prepared to subscribe to this flexible approach in the context of sporting continuity. It reiterates that, even if it is not alleged that the Appellant committed abuse in relation to the acquisition of the activities of the Football Club, it did not behave irreproachably in the matters that arose thereafter, by assuming liability to settle the foreign claims to obtain authorisation to buy the Football Club, and then refusing to settle those same claims (see section X.C., paras 194ff).

F. The double jeopardy

220. The Appellant argues that imposing further sanctions would breach the principle of double jeopardy, as the Football Club already had points deducted by the IFA in 2017, based on the same facts.
221. The Respondent contends that the principle of double jeopardy is irrelevant, since the FIFA and IFA proceedings had a different purpose and scope.
222. The Panel does not see room for the application of the double jeopardy principle, which presupposes the imposition of sanctions within the same regulatory framework. In the present cases, further to the IFA regulations the Football Club was sanctioned with a points deduction due to undergoing an event of insolvency. That is separate and different to a consideration of whether the Football Club has violated Article 21 of the FDC by failing to respect the Infringed Decision and CAS awards. Ultimately, the consequences of national proceedings are more limited compared to those resulting from FIFA DC's decisions, which entail transfer bans with a worldwide effect (in the same vein, see CAS 2015/A/4343, para 101; CAS 2013/A/3256, paras 156f and 167).

G. The determination of the sanction(s)

223. The Panel observes that the Appellant does not provide any other substantiated argument as to why it should not be sanctioned, or be sanctioned differently under Article 21(1) of the FDC. Accordingly, the consequences imposed by the FIFA

DC under this provision must be confirmed.

224. The Panel recalls for the remainder that it is not for it to review the amounts and interest admitted by FIFA first instance bodies in relation to liquidation proceedings, given that these have been in force for several years (CAS 2006/A/1008, para 16; CAS 2013/A/3323, para 72; CAS 2013/A/3380, para 55; CAS 2015/A/4271; CAS 2017/A/5401, para 56).

XI. CONCLUSION

225. Based on the foregoing, the majority of the Panel holds that:
- (i) The FIFA DC had the authority to initiate disciplinary proceedings.
 - (ii) Poalei Tel Aviv is liable for the Debts generated by the Football Club as set out in the Infringed Decisions and CAS award whilst it was under the management of Harel Holdings (in Liquidation) due to the sporting continuity principle and its overall conduct.
 - (iii) The principles of diligence, bad faith and double jeopardy are of no avail.
 - (iv) Sanctions were rightly imposed under Article 21 of the FDC.
 - (v) The Appealed Decisions are confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

I. In the matter CAS 2023/A/10114:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-12648 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is dismissed.
2. The decision FDD-12648 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers for relief are dismissed.

II. In the matter CAS 2023/A/10117:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-12650 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is dismissed.
2. The decision FDD-12650 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers for relief are dismissed.

III. In the matter CAS 2023/A/10118:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-12651 of the Deputy Chairperson of

the FIFA Disciplinary Committee of 31 July 2023 is dismissed.

2. The decision FDD-12651 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers for relief are dismissed.

IV. In the matter CAS 2023/A/10119:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-12652 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is dismissed.
2. The decision FDD-12652 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers

V. In the matter CAS 2023/A/10121:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-12654 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is dismissed.
2. The decision FDD-12654 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers for relief are dismissed.

V. In the matter CAS 2023/A/10122:

1. The appeal filed on 7 November 2023 by Poalei Tel Aviv Holdings Ltd against the decision FDD-13657 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is dismissed.
2. The decision FDD-13657 of the Deputy Chairperson of the FIFA Disciplinary Committee of 31 July 2023 is confirmed.
3. (...).
4. (...).
5. All other motions and/or prayers for relief are dismissed.

Football; Admissibility of a claim arising out of a settlement agreement in a context of sporting succession; Bifurcation; Statute of limitation; Sporting succession and shift of the event giving rise to the dispute; Referral of the case back to FIFA

Panel

Mr Hendrik Willem Kesler (The Netherlands),
Sole Arbitrator

1. A request for bifurcation of the proceedings should be dismissed where it would not be procedurally efficient e. g., if the issues relating to the admissibility of the player's claims concerning individual payments and the standing of the alleged successor club were interrelated.
2. Pursuant to Article 23(3) of the FIFA Regulations on the Status and Transfer of Players (RSTP), a two-year statute of limitations applies. FIFA is not permitted to vary this limitation period depending on whether the dispute is "vertical" or "horizontal." The limitation period begins when the creditor's claim falls due - not upon formal notice - and the triggering event is the maturity of the debt, i.e., "the event giving rise to the dispute". Only from that point can the player file a claim. Any amounts claimed after the deadline are barred, unless an

exception applies. Recognised exceptions include: (i) acknowledgement of debt by the alleged successor club; (ii) unequivocal refusal from the alleged successor club to perform any amounts under a settlement agreement, including amounts that would fall due in the future, as it could render all future instalments immediately enforceable.

3. A situation of sporting succession may shift the "*event giving rise to the dispute*" to a date after certain instalments have fallen due. This is logical where instalments became due before the succession, as the creditor could only pursue the new entity after the succession occurred. Where ongoing contracts involve multiple instalments, the *dies a quo* should be the later of i) the due date of the specific instalment; or ii) the date of the sporting succession.
4. It is appropriate for the FIFA Dispute Resolution Chamber (DRC) to decide on sporting succession at first instance, as it possesses investigative powers - including the ability to engage the relevant national football association - that CAS does not. Therefore, succession related matters should be remitted to the DRC for determination, with the DRC bound by the CAS panel's ruling on the admissibility of the claims.

I. PARTIES

1. Mr Márkó Futács (the “Appellant” or the “Player”) is a professional football player of Hungarian nationality.
2. Yeni Mersin Idmanyurdu Futbol A.S. (the “First Respondent” or the “Alleged Successor Club”) is a football club with its registered office in Mersin, Türkiye. The Alleged Successor Club is registered with the Turkish Football Federation (the “TFF”), which in turn is affiliated to the *Fédération Internationale de Football Association*.
3. The *Fédération Internationale de Football Association* (the “Second Respondent” or “FIFA”) is the international governing body of football with its registered headquarters in Zurich, Switzerland.
4. The Club and FIFA are hereinafter jointly referred to as the “Respondents” and together with the Player as the “Parties”.

II. INTRODUCTION

5. These proceedings revolve around the non-compliance of the Turkish football club Mersin Idman Yurdu Spor Kulübü (the “Original Debtor”) and the Alleged Successor Club with a settlement agreement (the “Settlement Agreement”) concluded between the Player and the Original Debtor following an employment-related dispute.
6. Following a claim lodged against the Alleged Successor Club by the Player, the Dispute Resolution Chamber of the FIFA Football Tribunal (the “FIFA DRC”) issued a decision (the

“Appealed Decision”) declaring the Player’s claim inadmissible.

7. In the present appeal arbitration proceedings before the Court of Arbitration for Sport (“CAS”), the Player is challenging the Appealed Decision, requesting to be awarded an amount of EUR 330,000 from the Alleged Successor Club.
8. The Alleged Successor Club and FIFA request for a confirmation of the Appealed Decision and that the Player’s appeal be dismissed.

III. FACTUAL BACKGROUND

9. Below is a summary of the main relevant facts, as established on the basis of the written and oral submissions of the Parties and the evidence examined in the course of the proceedings and at the hearing. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

10. On 13 June 2014, the Player and the Original Debtor entered into an employment agreement.
11. On 17 August 2017, following an employment-related dispute between the Player and the Original Debtor, the FIFA DRC passed a decision (the “First FIFA DRC Decision”) ordering the Original Debtor to pay the Player EUR 200,004 in outstanding remuneration, and EUR 133,336 as compensation for breach of contract, both plus interest.

12. On 23 August 2018, due to the non-compliance of the Original Debtor with the First FIFA DRC Decision, the FIFA Disciplinary Committee imposed sporting sanctions on the Original Debtor.
13. On 18 September 2018, the Player and the Original Debtor concluded the Settlement Agreement, by means of which the Original Debtor undertook to pay the Player an amount of EUR 330,000, agreeing in particular as follows:
 - “1.) The Player requests from FIFA DRC to suspend their process for an indefinite period
 - 2.) The [Original Debtor] undertakes to pay the total debt according to a longer payment schedule as follows:

€ 5,000 (in words five thousand euro until 31st Jan 2019)

€ 5,000 (in words five thousand euro until 31st June 2019)

€ 5,000 (in words five thousand euro until 31st November 2019)

€ 2,500 (in words two thousand-five hundred euro until the last calendar day of each month commencing within December 2019)
 - 3.) If any instalment is delaying the Player is entitled to request FIFA to continue the disciplinary process and sanctions without any prior notice
 - 4.) In case if the Club promote to a higher division for each season (in case of rise to professional leagues) the monthly instalments will be doubled”.
14. On 8 October 2018, the Secretariat to the FIFA Disciplinary Committee informed the Player, the Original Debtor and the TFF that the proceedings against the Original Debtor were closed following the conclusion of the Settlement Agreement. They were further informed that “any claim resulting from the breach of the aforementioned agreement signed by the parties will have to be lodged before the Players’ Status Committee or Dispute Resolution Chamber, as applicable, or before the competent bodies at national or international level mutually agreed by the parties”.
15. On 30 June 2019, the Original Debtor was dissolved.
16. On 16 September 2019, the Player requested the FIFA Disciplinary Committee to re-open the disciplinary proceedings against the Original Debtor due to its alleged non-compliance with the Settlement Agreement.
17. On 27 September 2019, the Secretariat to the FIFA Disciplinary Committee reiterated the content of its letter dated 8 October 2018, indicating that “according to the Circular no. 1628 of 9 May 2018, any claim resulting from the breach of the aforementioned agreement signed by the parties will have to be lodged before the Players’ Status Committee or the Dispute Resolution Chamber, as applicable, or before the competent bodies at national or international level as mutually agreed by the parties”.
18. On 6 June 2023, the Player sent a payment notice to the Alleged Successor Club, indicating, *inter alia*, as follows:

“Please wire the sum of € 120.000, - (in words hundred twenty thousand euro) and additional monthly € 5.000,- (in words five

thousand euro) until the last day of each month commencing with 30 June 2023 for 42 months) plus interest at the rate of 5% p.a. commencing from the effective date of each instalment in accordance with the Settlement Agreement [...]”.

19. On 20 June 2023, the Alleged Successor Club replied to the Player’s payment notice, denying that it was the sporting successor of the Original Debtor.

B. Proceedings before the Dispute Resolution Chamber of the FIFA Football Tribunal

20. On 14 August 2023, the Player lodged a claim against the Alleged Successor Club before the FIFA DRC, submitting the following requests for relief:

“Please declare the [Alleged Successor Club] as the (legal and/or sporting) successor of the [Original Debtor] in accordance with article 25-1 RSTP.

Please oblige the [Alleged Successor Club] of payment of the net amount € 330.000,- (in words three hundred thirty thousand euro) plus interest at the rate of 5% p.a. commencing from the effective date of the Settlement Agreement.

For the avoidance of doubts, the entire amount set out in the Settlement Agreement has become due, due to the non-compliance with the payment notice by the Successor Club, sent on 6 June 2023.

Alternatively, please oblige the [Alleged Successor Club] of payment of the net

amount € 135.000,-¹ (in words hundred thirty-five thousand Euro) and additional monthly € 5.000,- (in words five thousand euro) for 39 additional months plus interest at the rate of 5% p.a. commencing from the effective date of each instalment in accordance with the Settlement Agreement” (emphasis in original).

21. The Alleged Successor Club, *inter alia*, denied that it was the sporting successor of the Original Debtor and requested that the Player’s claim be declared inadmissible because it was time barred.

22. On 18 October 2023, the FIFA DRC issued the operative part of the Appealed Decision, which provides as follows:

“1. The claim of the [Player] is inadmissible.

2. This decision is rendered without costs”.

23. On 20 November 2023, the grounds of the Appealed Decision were communicated to the Parties, providing, *inter alia*, as follows:

➤ *“[...] [T]he Chamber referred to art. 23 par. 3 of the [FIFA Regulations on the Status and Transfer of Players – the “FIFA RSTP”], which establishes that the decision-making bodies of FIFA shall not hear any dispute if more than two years have elapsed since the facts leading to the dispute arose. The application of this time*

¹ The following footnote was added to the Player’s requests for relief: “3 × € 5.000,- until 30 Nov 2019, 42 × € 2.500,- (monthly instalments from Dec 2019 until May 2023)

and 3 × 5.000,- monthly instalments from June 2023 to August 2023”.

limit shall be examined ex officio in each individual case.

- *In this context, the Chamber recalled that the present claim was lodged in front of FIFA on 14 August 2023. Therefore, in line with art. 23 par. 3 [FIFA RSTP], any amounts fallen due before 14 August 2021 are affected by the statute of limitations.*
- *The Chamber noted that, in the present case, the Player requested the payment of EUR 330,000 as outstanding amount under the Settlement Agreement stipulated with the [Original Debtor] on 18 September 2018.*
- *In this context, the DRC however noted that, while the Player in his claim referred to 30 June 2019 as the date in which the [Original Debtor] merged with another Turkish club thereby generating the sporting succession of the [Original Debtor] with the constitution of the [Alleged Successor Club], nonetheless the Player waited until 6 June 2023 before sending any formal notice to put the [Alleged Successor Club] in default.*
- *In this respect, the DRC also wished to emphasize that already on 8 October 2018 and on 27 November 2019 the FIFA Disciplinary Committee had clearly informed the Player about the relevant proceedings being closed and that any potential claim resulting from the breach of the Settlement Agreement should have been lodged before the (then existing) Players'*

Status Committee or the Dispute Resolution Chamber ex novo.

- *To this extent, the Chamber considered in particular that (i) it was evident in the Player's understanding that the [Original Debtor] had apparently failed to comply with the Settlement Agreement as of the relevant first instalment, due on 31 January 2019, as well as that (ii) the [Original Debtor] was dissolved on 30 June 2019 and that (iii) to the Player's knowledge, the sporting successor of the [Original Debtor] – allegedly the [Alleged Successor Club] – was founded on the very same date.*
- *With the above in mind, the Chamber determined that aforementioned date shall be considered as the starting moment from which the Player should (or could) have filed his claim in front of FIFA, namely because the perception of the [Alleged Successor Club] as sporting successor of the [Original Debtor] had already been formed in said point in time. By not doing so, the members of the Chamber were unanimous in concluding that the Player has willingly postponed his decision to act in order to collect the alleged outstanding sums, thus losing his rights to file the relevant claim at hand due to the statute of limitations. Put differently, the DRC found that event which trigger [sic] the dispute in the matter at hand, insofar as the sporting successorship is raised by the [Player], is the date of constitution of the alleged successor, i.e., the*

[Alleged Successor Club], *which unequivocally took place more than 2 years before the Player's claim was lodged with FIFA regarding the supposed breach fo [sic] the Settlement Agreement.*

- *Consequently, the DRC established that the Player's entire claim shall be considered inadmissible".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 8 December 2023, the Player filed a Statement of Appeal with CAS in accordance with Articles R47 and R48 of the 2023 edition of the Code of Sports-related Arbitration (the "CAS Code"), challenging the Appealed Decision. In this submission, the Player named the Alleged Successor Club and FIFA as respondents and requested that the matter be referred to a sole arbitrator.
25. On 18 December 2023, the Player filed his Appeal Brief in accordance with Article R51 CAS Code.
26. On the same date, 18 December 2023, FIFA informed the CAS Court Office that it agreed to refer the matter to a sole arbitrator, provided that he or she be selected from the football list.
27. On 28 December 2023, the Alleged Successor Club informed the CAS Court Office that it agreed with the appointment of a sole arbitrator.
28. On 19 January 2024, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division,

the arbitral tribunal appointed to hear the appeal was constituted as follows:

Sole Arbitrator:

Mr Hendrik Willem Kesler, Attorney-at-Law in Enschede, The Netherlands

29. On 24 January 2024, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, The Netherlands, had been appointed as *Ad hoc* Clerk.
30. On 8 February 2024, the Alleged Successor Club filed its Answer in accordance with Article R55 CAS Code.
31. On 14 February 2024, FIFA filed its Answer in accordance with Article R55 CAS Code.
32. On 14 and 15 February 2024, following an inquiry from the CAS Court Office, the Alleged Successor Club indicated its preference for an in-person hearing to be held, the Player indicated his preference for a hearing to be held by video-conference and FIFA indicated that it did not consider it necessary for a hearing to be held.
33. On 19 February 2024, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing by video-conference.
34. On 26 and 27 February 2024 respectively, the Alleged Successor Club, the Player and FIFA returned duly signed copies of the Order of Procedure to the CAS Court Office, provided to them on 26 February 2024.

35. On 12 April 2024, a hearing was held by video-conference. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.
 36. In addition to the Sole Arbitrator, Mr Antonio De Quesada, CAS Head of Arbitration, and Mr Dennis Koolgaard, *Ad hoc* Clerk, the following persons attended the hearing:
 - a) For the Player:
 - 1) Dr. Kristóf Wenczel, Counsel;
 - 2) Dr. Mihály Kovács, Counsel.
 - b) For the Alleged Successor Club:
 - 1) Mr Juan de Dios Crespo-Pérez, Counsel;
 - 2) Mr Umur Varat, Counsel.
 - c) For FIFA:
 - 1) Mr Alexander Jacobs, Counsel;
 - 2) Mr Saverio Spera, Counsel.
 37. At the outset of the hearing, the Sole Arbitrator informed the Parties that the Player's request for a bifurcation of the proceedings was dismissed and that the reasons for such decision would be provided in the final Award.
 38. No witnesses or experts were heard.
 39. The Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator.
 40. Before the hearing was concluded, the Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.
- V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF**
41. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.
- A. The Appellant**
42. The Player's Appeal Brief, in essence, may be summarised as follows:
 - The Settlement Agreement – which was the sole and exclusive ground of the claim – is still today valid, applicable and ongoing. It is absolutely nonsense to make any reference to the statute of limitation. The FIFA DRC wrongly interpreted or entirely misinterpreted the validity of the Settlement Agreement since taking into consideration the full value of such agreement, the final due date of the last instalment should be 31 May 2030.
 - All references to the statute of limitation should be ignored in case of an ongoing agreement. If the date of the merger has any significance regarding the statute of limitation, as a commencing date of the execution of a claim – as it was ruled in the Appealed

Decision – it would only affect a certain part of the entire claim: the instalments due between 31 January 2019 and 14 August 2021. Even in this case, the instalments to be paid between 14 August 2021 and 31 May 2030 are not affected by such argument. Regarding a claim in the future there is no sense to refer to the statute of limitation.

- The FIFA DRC most likely considered the Settlement Agreement as terminated or as an agreement which ceased to exist, but this is not the case.
- If FIFA calculates the starting point of the statute of limitation separately, by taking into account each individual instalment, only EUR 65,000 from the total amount shall be considered time barred. This interpretation is also supported by FIFA's Commentary to the FIFA RSTP.
- The Player acknowledges that his claim should have been formulated differently by only asking EUR 265,000 instead of the total amount of the claim, taking into consideration the already time barred instalments.
- It is the Player's sole and exclusive right to decide when to put the Alleged Successor Club in default. The Player sent a payment notice and put the Alleged Successor Club in default immediately when it was promoted and reached a professional status and changed its name. The FIFA DRC's

argument in para. 28 of the Appealed Decision (*"Player waited until 6 June 2023 before sending any formal notice to put the [Alleged Successor Club] in default"*) is unacceptable. This was the Player's discretion.

- The Player had no knowledge of the creation of the Alleged Successor Club until it changed its name to its current version. The former name did not create a motive for public perception which could have been capable of identifying the Alleged Successor Club as the sporting successor of the Original Debtor. In light thereof, the FIFA DRC wrongly determined *"the starting moment from which the claim should have filed in front of FIFA as the starting moment of the time limit, hence the statute of limitation, should have started from the date on which the name of the [Alleged Successor Club] had been changed to its current version; namely from 4 August 2022 which is the date of the registration of the new name of the [Alleged Successor Club] in the Turkish trade register"*. Given this starting moment, the whole claim, amounting to EUR 330,000, plus interest, should be due and the instalments due before 14 August 2021 should not be considered as time barred.
- The FIFA DRC has already decided in two similar cases that the Alleged Successor Club is the sporting successor of the Original Debtor.

- Proceedings before the FIFA DRC are less favourable for the Player than those before the FIFA Disciplinary Committee due to the calculation of the time limit. The Original Debtor deliberately forced the Player to conclude the Settlement Agreement and requested to suspend the foregoing disciplinary proceedings in bad faith knowing that in case of insolvency, the case should be referred back to the FIFA DRC with less favourable conditions for the Player.
- It is not fair for the FIFA Disciplinary Committee to hear a claim even after five years lapsed, whereas the FIFA DRC would not be competent after two years.
- As set forth in the Settlement Agreement, the conclusion of such agreement should not be considered as a waiver of the right of the Player to initiate disciplinary proceedings against the Original Debtor. The FIFA DRC should not be in a position to hinder the right of the Player to enforce the First FIFA DRC Decision. Therefore, the Player should also have the right to initiate disciplinary proceedings against the Alleged Successor Club without evaluating the Settlement Agreement before the FIFA DRC. Such claim should not be time barred because the statute of limitation for disciplinary cases is five years.
- The Alleged Successor Club is the sporting successor of the Original Debtor. To the Player's knowledge, currently an appeal is pending before CAS where the subject matter relates to the declaration of the Alleged Successor Club as the sporting successor of the Original Debtor. However, this procedure does not have suspensory effect. In light of this, the Player relies on the decisions of the FIFA Disciplinary Committee under reference numbers FDD-14109 and FDD-15539 and requests the Sole Arbitrator to recognise such decisions in the matter at hand and declare the Alleged Successor Club as the sporting successor of the Original Debtor. CAS is competent to decide on this question and there is no need to return the case to the FIFA DRC.
- Finally, no person should be a judge in a case where he has an interest. Mr Juan Crespo Ruiz-Huerta, an employee (external consultant) of the legal representative of the Alleged Successor Club is also an employee (external consultant) of FIFA. He is also the son of two senior partners of the legal representative of the Alleged Successor Club. From this the conclusion can be drawn that there is a conflict of interest between FIFA and the legal representative of the Alleged Successor Club, which raises doubts regarding the outcome of the Appealed Decision, even

though he was not part of the panel of the FIFA DRC deciding on the case. This should be considered as a ground to annul the Appealed Decision. The whole claim should be entirely decided by CAS itself.

43. On this basis, the Player submits the following prayers for relief in his Appeal Brief:

*"We hereby respectfully request the **COURT OF ARBITRATION FOR SPORT (APPEALS ARBITRATION DIVISION)** to deem this **APPEAL BRIEF** to be filed on behalf of **MÁRKÓ FUTÁCS** together with the documents and copies attached and, following the appropriate established procedures, to issue in due course a decision to bifurcate the proceedings for a **PRELIMINARY AWARD ON JURISDICTION** to be rendered by the CAS whereby:*

- *the Appeal is upheld;*
- *the Decision issued by the FIFA DRC on 18 October 2023, and whose grounds were notified on 20 November 2023, with case reference Nr. FPSD-11343 is set aside; and*
- *in so doing, hold that the FIFA DRC did have jurisdiction to entertain the claim lodged by the Player against the Club and the claim shall be deemed admissible;*
- *Alternatively, in the event that CAS decides not to bifurcate the proceedings for*

*a preliminary award to be issued only in respect of FIFA DRC's lack of jurisdiction, the Appellant hereby respectfully requests the **COURT OF ARBITRATION FOR SPORT (APPEALS ARBITRATION DIVISION)** to deem this **APPEAL BRIEF** to be filed on behalf of **MÁRKÓ FUTÁCS** together with the documents and copies attached and, following the appropriate established procedures, to issue in due course an **AWARD** whereby:*

- *the Appeal is upheld;*
- *the Decision issued by the FIFA DRC on 18 October 2023, and whose grounds were notified on 20 November 2023, with case reference Nr. FPSD-11343 is set aside; and*
- *in so doing, hold that the FIFA DRC did have jurisdiction to entertain the claim lodged by the Player against the Club and the claim shall be deemed admissible;*
- *In the alternative:*
- *should the CAS deem that the FIFA DRC did have jurisdiction to entertain, either the entire claim or partly as regards with the instalments due before 14 August 2021 concerning the Settlement Agreement is*

within the statute of limitations or even not affected by it

- *to uphold the right of the Player to receive the net amount € 330,000 plus interest at the rate of 5% p.a. commencing from the effective date of the Settlement Agreement; or*
- *to uphold the right to receive the due amount (due instalments) pursuant to the Settlement Agreement until the date of the Award, namely the net amount of € 135,000 (as of today) plus interest at the rate of 5% p.a. commencing from the effective date of the Settlement Agreement and order the First Respondent to respect the Settlement Agreement by paying the monthly instalments of the Settlement Agreement until the due date of the last instalment; or*
- *alternatively, - in the unexpected case if the Hon. Panel / Arbitrator finds the statute of limitation applicable; - we are requesting the amount equal with the instalments due from 14 August 2021 (two years backwards for filing the*

claim). In this case we are requesting to uphold the right of the Player to receive the net amount € 265,000 [€ 70.000, - until today and € 195.000, - instalments in the future] plus interest at the rate of 5% p.a. commencing from the effective date of the Settlement Agreement of those instalments which are not considered time-barred, namely from 14 August 2021; and

- *to declare the First Respondent as the legal and/or sporting successor of the Old Club and impose disciplinary sanctions on it.*

➤ *In all events:*

- *the Club is ordered to bear all procedural costs and other arbitration expenses of this procedure; and*
- *the Club is also ordered to pay the legal fees and other expenses incurred by the Player in an amount to be determined at the discretion of the CAS” (emphasis in original).*

B. The First Respondent

44. The Alleged Successor Club’s Answer, in essence, may be summarised as follows:

- First and foremost, the Alleged Successor Club has made it extremely clear and in no uncertain terms as well as established with sufficient evidence that it is not the sporting successor of the Original Debtor, as alleged by the Player.
- Whether the Alleged Successor Club is the sporting successor of the Original Debtor is irrelevant, as the statutory period to file the claim has elapsed. The Player in the present case waited four years to file a claim in clear contravention of Article 23(3) FIFA RSTP.
- The Player and the Original Debtor entered into the Settlement Agreement on 18 September 2018. The first instalment was due for payment by the Original Debtor on 31 January 2019. Instead of filing a fresh claim against the Original Debtor before the FIFA DRC or the FIFA PSC, as advised by FIFA, the Player blindly requested the FIFA Disciplinary Committee to re-open an already closed disciplinary procedure against the Original Debtor.
- Even though the Player alleges that 30 June 2019 was the date the Alleged Successor Club became the sporting successor of the Original Debtor, the Player waited until 6 June 2023 to send a formal notice putting the Alleged Successor Club in default of the outstanding amount of EUR 330,000.
- It is important that the period between 31 January 2019 when the first instalment of the Settlement Agreement became due and 14 August 2023, when the Player filed his claim before the FIFA DRC, is more than four full years.
- There are three instances where the limitation period could reasonably be said to have commenced: i) when the first instalment became due for payment on 31 January 2019; ii) when the Original Debtor was dissolved on 30 June 2019; or iii) when the FIFA Disciplinary Committee advised the Player to commence proceedings against the Original Debtor on 27 November 2019.
- Pursuant to Article 130(1) of the Swiss Code of Obligations (the “SCO”), the prescriptive period commences as soon as the debt is due. This position is also supported by CAS jurisprudence. Contrary to the Player’s argument, in cases of similar periodic obligations as seen in the present matter, the prescriptive period for the principal claim commences on the date on which the first instalment in arrears was due. When the principal claim prescribes, so too do all claims in respect of individual payments. This is confirmed by Article 133 SCO.
- The Player should or ought to have known that the Original Debtor was not going to fulfil its

obligations under the Settlement Agreement when the first instalment was not paid on 31 January 2019, thereby triggering the maturity of the other instalments payable later.

- Furthermore, the Player's argument that the two-year deadline only applies to individual payments, rather than to the contractual relationship is baseless and should be disregarded not only for the reasons detailed above but also because none of the instalments in the Settlement Agreement were ever made. The Player's argument would have been plausible had the Original Debtor made payment of some of the first set of monthly instalments, leaving the remainder unpaid.
- It is incomprehensible that after the first instalment remained unpaid for 10 months and when the FIFA Disciplinary Committee advised the Player to lodge a fresh claim, the Player waited for almost four years to do so on the ground that each instalment in the Settlement Agreement had its own due date and that the last instalment was not due until 31 May 2030. If the Player believes that to be the case, then the question is why the Player did not continue to wait until 31 May 2030 to bring up the claim.
- The FIFA DRC determined that the event which triggered the dispute, insofar as sporting

successorship is concerned, is the date of constitution of the alleged successor, which undisputedly took place more than two years before the Player lodged his claim before the FIFA DRC. This view is supported by CAS jurisprudence.

- The Player argued that he had no knowledge of the creation of the Alleged Successor Club until it changed its name to its current version and that the statute of limitation should hence have commenced as from 4 August 2022. This assertion is perplexing, because the Player stated that the alleged merger was approved by the TFF and gained wide media attention one year before the change of name.
- Finally, if the Player had immediately followed the directive of the FIFA Disciplinary Committee of 27 November 2019, the Player's claim against the Original Debtor would have been filed within the two-year limitation period. Yet, the Player not only waited for almost four years to commence such procedure, he also filed his claim against the wrong party, namely against the Alleged Successor Club instead of the Original Debtor.
- The two-year limitation period was also never interrupted at any time.
- If for any reason whatsoever the statute of limitation is deemed unexpired, the appeal should still

be dismissed because the Alleged Successor Club lacks standing. There was no previous decision confirming the sporting succession alleged by the Player, hence the Alleged Successor Club has no standing to be sued. If the Original Debtor failed to honour the Settlement Agreement, the Player needs to start a new procedure against the Original Debtor.

- Whilst the *de novo* power of CAS is duly acknowledged, CAS cannot reasonably be expected to determine *de novo* the issue of sporting succession, standing to be sued or liability of a club under a settlement agreement, as these are matters that must first be examined and decided by the FIFA DRC.
- Mr Juan Crespo Ruiz-Huerta is indeed the son of Mr Juan de Dios Crespo Pérez, counsel to the Alleged Successor Club, but he is not involved in the present proceedings. Mr Juan Crespo Ruiz-Huerta does not work for the firm of counsel for the Alleged Successor Club, but he occasionally provides services for the firm. Mr Juan Crespo Ruiz-Huerta's appointment as independent Integrity Officer has nothing to do with the firm or this case. Counsel for the Player should refrain from making incorrect statements,

otherwise appropriate steps will be taken².

45. On this basis, the Alleged Successor Club submits the following prayers for relief in its Answer:

- "1. *To dismiss this appeal filed by the Player against the Club and FIFA.*
2. *To confirm the decision passed by the FIFA DRC on 18 October 2023, with the reference No. FPSD-11343, communicated to the Parties with the grounds on the 20 November 2023.*
3. *To condemn the Appellant to the payment of the whole CAS administration cost and the Arbitrators fees.*
4. *To fix a sum of **CHF 20,000 (Twenty Thousand Swiss Francs)** to be paid by the Appellant to the Club to assist the payment of its legal fees covering the costs of its legal representation in front of the Court of Arbitration for Sport.*
5. *Any other relief that the CAS may deem appropriate in the circumstances".*

C. The Second Respondent

46. FIFA's Answer, in essence, may be summarised as follows:

- The Player contests the Appealed Decision primarily on the basis that the FIFA DRC

² The content of this paragraph was not included in the Alleged Successor Club's Answer, but it was submitted separately by email dated 19 December 2023. For the

sake of efficiency, it is included in the present summary of the Alleged Successor Club's Answer.

allegedly wrongly interpreted the starting moment of the statute of limitations by arguing that the “*event giving rise to the dispute*” was the moment of non-compliance with the Settlement Agreement on 31 January 2019 (as it related to the Original Debtor). The essence of the matter, in cases of potential sporting succession, is that the “*event giving rise to the dispute*” shifts to the moment that the potential sporting succession appears, and the creditor could objectively have sought recourse against this newly established entity. In the matter at stake, the Player himself provided abundant evidence that indicates that the Alleged Successor Club’s appearance as potential sporting successor occurred in the summer of 2019 (i.e., four years before the Player’s claim was lodged).

- The Player (i) was aware of the Original Debtor’s disaffiliation and the Alleged Successor Club’s appearance in the summer of 2019; (ii) was aware of the requirement to file his claim before the FIFA DRC (as opposed to the FIFA Disciplinary Committee); (iii) issued a formal default notice to the Alleged Successor Club on 6 June 2023; and (iv) ultimately filed a claim against the Alleged Successor Club before the FIFA DRC on 14 August 2023. It is also clear that the Player was aware that the Settlement Agreement had not been complied with already from the

first instalment’s due date of 31 January 2019.

- Essential for the matter at stake is that the present dispute concerns a potential case of sporting succession. This fundamentally affects the statute of limitation, since it alters the “*event giving rise to the dispute*” from being the moment of non-compliance with the Settlement Agreement on 31 January 2019 to shifting to the moment of the Alleged Successor Club’s appearance as a potential sporting successor, as approved by the TFF. As a result, the Alleged Successor Club’s appearance around 30 June 2019 is therefore the starting point from which the Player should (and could) have objectively filed his claim before the FIFA DRC. This is simply because the existence of the Alleged Successor Club as the alleged sporting successor of the Original Debtor had already materialised at that point, for which the Player has provided an abundance of indications. This analysis is supported by CAS jurisprudence.
- The Player is contradicting himself by arguing that he had no knowledge of the creation of the Alleged Successor Club until it changed its name on 4 August 2022. The Player is precluded from bringing forward the new argument that he only found out about the existence of the potential sporting successor following the name change on 4

August 2022 or that the statute of limitation should only be counted from such date.

- Beyond addressing the statute of limitations, the Player raises a series of general arguments attempting to undermine the Appealed Decision, including on (i) *pacta sunt servanda*; (ii) the validity of the Settlement Agreement; (iii) the Player's "*sole and exclusive right*" to default the Original Debtor; (iv) the alleged "*less favourable rules*" of the FIFA DRC compared to the FIFA Disciplinary Committee; (v) the Player never waiving his right to proceed with disciplinary proceedings; and (vi) the alleged "*obvious conflict of interest*" between FIFA and counsel for the Alleged Successor Club.
- First, the Player refers to the principle of *pacta sunt servanda*, Article 12bis FIFA RSTP and to the Commentary to the FIFA RSTP. It is unclear how a reference to these elements is useful to substantively address the Player's procedural inaction that led to the inadmissibility of his claim.
- Secondly, the validity of the Settlement Agreement is not questioned. The FIFA DRC has applied the statute of limitations to the "*event giving rise to the dispute*" as it relates to a claim against the potential sporting successor. The Player continues to insist on the statute of limitations as applied to the due dates of the different instalments. These are however

considered separately for the purpose of the statute of limitations. Again, in a situation of a potential sporting successor, the relevant dates for the statute of limitations are not the individual instalments of the Settlement Agreement, but the date of affiliation of the potential sporting successor or the moment that the Player could reasonably have sought recourse against this newly established entity, as explained in CAS jurisprudence.

- Thirdly, for the purpose of the statute of limitations in cases concerning a sporting successor, the 2-year limitation period starts from the moment the potential sporting successor appears and is affiliated to the relevant federation. This means that at least within a 2-year window, the Player should have lodged the relevant claim against the alleged sporting successor, which he failed to do.
- Fourthly, although it is objectively correct to state that the statute of limitation for claims before the FIFA DRC is two years, as opposed to the five years before the FIFA Disciplinary Committee, the relevance of that is entirely unclear, since the matter at stake concerns a procedure before the FIFA DRC and not before the FIFA Disciplinary Committee.
- Fifthly, this position of the Player seems related to his substantive claim and is

unrelated to any disciplinary proceedings. Also, it remains unclear how a party would be able to unilaterally modify the content of a Circular (Circular 1628) by means of an individual statement.

- Lastly, the argument regarding an alleged conflict of interest between FIFA and counsel for the Alleged Successor Club is nothing short of absurd. The Player did not challenge the composition of the FIFA DRC that rendered the Appealed Decision. Furthermore, Mr Juan Crespo Ruiz-Huerta is not a member of the FIFA DRC. Independent integrity experts support the “*FIFA judicial bodies*”, which are the Disciplinary, Appeal and Ethics Committees (and not the FIFA DRC).

47. On this basis, FIFA submits the following prayers for relief in its Answer:

- “(a) *rejecting the requests for relief sought by the Appellant;*
- (b) *confirming the Appealed Decision;*
- (c) *ordering the Appellant to bear the full costs of these arbitration proceedings and to contribute to FIFA’s legal costs”.*

VI. JURISDICTION

48. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (May 2022 edition), as it determines that “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations,

member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”, and Article R47 CAS Code. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

49. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

50. The appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.
51. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

52. The Player submits that at least the preliminary issue regarding the FIFA DRC’s jurisdiction is to be resolved in accordance with FIFA regulations and Swiss law.
53. The Alleged Successor Club submits that, pursuant to Article R58 CAS Code and Article 57(2) FIFA Statutes, CAS shall primarily apply the various regulations of FIFA, notably the FIFA RSTP and the FIFA Disciplinary Code, and subsidiarily Swiss law.
54. FIFA submits that, pursuant to Article R58 CAS Code and Article 56(2) FIFA Statutes and considering that the Appealed Decision was issued by the FIFA DRC, the FIFA

RSTP are applicable, with Swiss law to be applied subsidiarily should the need arise to fill a possible gap in the FIFA regulations.

55. Article R58 CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

56. Article 56(2) FIFA Statutes (May 2022 edition) provides the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

57. The Sole Arbitrator finds that, in accordance with Article R58 CAS Code and considering the Parties’ agreement, the present dispute is primarily governed by the various regulations of FIFA, in particular the FIFA RSTP (May 2023 edition). This is confirmed in Article 56(2) FIFA Statutes, which also provides for the additional application of Swiss law.

IX. PRELIMINARY ISSUE

A. The Player’s request for bifurcation of the proceedings

58. As indicated above, at the outset of the hearing, the Sole Arbitrator informed

the Parties that the Player’s request for a bifurcation of the proceedings was dismissed and that the reasons for such decision would be provided in the final Award.

59. The Sole Arbitrator considered that it would not be procedurally efficient to bifurcate the proceedings, because the issues related to the admissibility of the Player’s claims for individual instalments arising out of the Settlement Agreement, the Alleged Successor Club’s standing are related to each other.

60. The Sole Arbitrator further noted that the Player requested for a **“PRELIMINARY AWARD ON JURISDICTION”** (emphasis in original). However, the jurisdiction of CAS is not disputed by the Player. Rather, the Player challenged the Appealed Decision insofar it ruled that the Player’s claim was inadmissible. The wording of the Player’s request for bifurcation was therefore misconceived.

61. Despite having been informed of the Sole Arbitrator’s decision at the outset of the hearing, the Player did not raise any objection against the procedure adopted by the Sole Arbitrator and confirmed at the end of the hearing that his right to be heard had been respected.

X. MERITS

A. The Main Issues

62. The main issues to be resolved by the Sole Arbitrator are the following:

- i. Is there a conflict of interest between counsel for the Alleged Successor Club and FIFA?
 - ii. Was the Player's claim against the Alleged Successor Club time barred?
 - iii. Is the Alleged Successor Club the sporting successor of the Original Debtor?
- i. Is there a conflict of interest between counsel for the Alleged Successor Club and FIFA?**
63. The Player maintains that because Mr Juan Crespo Ruiz-Huerta is an employee (external consultant) of counsel for the Alleged Successor Club as well as for FIFA, there is a conflict of interest which raises doubts regarding the outcome of the Appealed Decision, as a consequence of which the Appealed Decision is to be set aside.
64. The Sole Arbitrator finds that such argument is to be summarily dismissed. The Player failed to establish that Mr Juan Crespo Ruiz-Huerta had any involvement in this case, either in a capacity with counsel for the Alleged Successor Club or with FIFA. The Appealed Decision is issued by a panel of three FIFA DRC judges. The Player does not provide the slightest evidence to establish that these three judges would have been conflicted or could reasonably be seen to be conflicted by the mere fact that Mr Juan Crespo Ruiz-Huerta fulfils a role of "*independent integrity expert*" for FIFA.
65. In any event, even if there would have been a conflict of interest, *quod non*, such conflict of interest is repaired by means of the *de novo* nature of the present appeal arbitration proceedings before CAS.
66. Consequently, the Sole Arbitrator finds that there is no conflict of interest between counsel for the Alleged Successor Club and FIFA.
- ii. Was the Player's claim against the Alleged Successor Club time barred?**
67. At the outset, it is recalled that Article 23(3) FIFA RSTP provides as follows:
- "The Football Tribunal shall not hear any case subject to these regulations if more than two years have elapsed since the event giving rise to the dispute. Application of this time limit shall be examined ex officio in each individual case"*.
68. On this basis, the Sole Arbitrator accepts that a statute of limitation of two years applies.
69. The Sole Arbitrator finds that the Player's argument that the applicable statute of limitation should not be two years, but five years, because the FIFA Disciplinary Code applies a statute of limitation of five years, is to be dismissed.
70. The Player did not substantiate why FIFA should not be permitted to vary the applicable statute of limitations between different types of disputes, i.e. vertical disputes in which FIFA itself has an interest and which infringements may not always be immediately apparent, and horizontal

disputes in which FIFA merely rules on a dispute between two members as a dispute resolution body.

71. Consequently, the Sole Arbitrator finds that the applicable statute of limitation is two years as from the “*event giving rise to the dispute*”.
72. Furthermore, the mere fact that the Player and the Original Debtor may have agreed that the Player could initiate disciplinary proceedings before the FIFA Disciplinary Committee is not binding on the FIFA Disciplinary Committee. Such arrangement is a *res inter alios acta* between the Player and the Original Debtor, to which FIFA was not a party. The jurisdiction of the FIFA Disciplinary Committee is determined by the rules and regulations of FIFA and cannot be expanded by means of a contract to which FIFA is not a party.
73. Hence, the crucial issue to be decided by the Sole Arbitrator is what comprised the “*event giving rise to the dispute*”. According to the Player, these are the individual due dates of the instalments set forth in the Settlement Agreement. According to the Alleged Successor Club and FIFA, in sporting succession cases like the one at hand, individual due dates are not relevant, but the “*event giving rise to the dispute*” shifts to the moment that the potential sporting succession appears and the creditor could objectively have sought recourse against this newly established entity.

a) *Individual due dates*

74. Turning first to the Player’s contention that the event giving rise to the dispute

are the individual due dates, the Sole Arbitrator observes that FIFA’s Commentary to the FIFA RSTP provides the following in this respect:

“The two-year deadline is applied to individual payments, rather than to the contractual relationship. This means that if a player claims several outstanding monthly salary payments, the claim for each payment will be analysed individually (i.e. the date on which the payment was contractually due) to see whether it is time-barred or not. The same applies to any payment due in instalments; the due date of each individual instalment will be considered separately to establish whether it falls within the statute of limitations. This approach is applied consistently and without exception in the jurisprudence” (FIFA’s Commentary to the FIFA RSTP, p. 478).

75. The Sole Arbitrator fully agrees with this interpretation, although he notes that despite the indication that no exceptions to such general rule exist, FIFA actually acknowledges that there are various exceptions as addressed in more detail below.
76. The Sole Arbitrator agrees with CAS jurisprudence determining that, in principle, the decisive moment is the date the relevant instalment falls due and not when formal notice is given (as the Player did in this case on 6 June 2023):

“Pursuant to the clear wording of [...] Article 25 para. 5 of the RSTP, the statute of limitation requires the creditor to bring suit within two years and runs from the day his claim fell due and not when a formal notice is given, when the contract is terminated or when a dispute actually arises (as argued by the Player). The triggering moment is the maturity of the debt, which is ‘the event giving

- rise to the dispute'. At that moment only, can the Player file a claim"* (CAS 2015/A/4350, para. 74 of the abstract published on the CAS website).
77. Accordingly, given that the Player filed a claim against the Alleged Successor Club with the FIFA DRC on 14 August 2023, any amounts that fell due before 14 August 2021 are, in principle, time barred based on Article 23(3) FIFA RSTP.
78. This is actually confirmed in the Appealed Decision:
- "In this context, the Chamber recalled that the present claim was lodged in front of FIFA on 14 August 2023. Therefore, in line with art. 23 par. 3 of the Regulations, any amounts fallen due before 14 August 2021 are affected by the statute of limitations".*
79. Although FIFA argued during the hearing that such statement in the Appealed Decision was inaccurate, the Sole Arbitrator finds that this was a correct analysis. There may however be exceptions to such general rule.
80. One of such potential exceptions is if the Alleged Successor Club would have acknowledged or admitted its debt, as recognised in FIFA's Commentary to the FIFA RSTP:
- "One exception is noted in the jurisprudence, i.e. circumstances in which a party acknowledges or admits a debt. Such instances have been recognised by CAS as a valid ground on which a claim should be ruled admissible in spite of the (original) event giving rise to the dispute having occurred more than two years prior to the claim being lodged. Some decisions of the FT also reflect this approach"*
- (FIFA's Commentary to the FIFA RSTP, p. 480).
81. However, this exception is not applicable in the matter at hand. The Club simply remained silent with respect to the Player's claims. Indeed, the Player did not argue that the Alleged Successor Club ever acknowledged or admitted its debt towards the Player.
82. As argued by the Alleged Successor Club, a further exception could potentially be an unequivocal declaration from the Alleged Successor Club to the Player that it was not going to settle any amounts arising out of the Settlement Agreement, including amounts that would fall due in the future. In such case, it could potentially be argued that all claims that would normally only fall due in the future could be enforced immediately.
83. However, the Sole Arbitrator notes that there is no evidence on file suggesting that such unequivocal declaration was ever issued by the Alleged Successor Club, as a consequence of which the Alleged Successor Club's argument is to be dismissed.
84. The Alleged Successor Club's reliance on Article 133 SCO to argue that when the principal claim prescribes, so too do all claims in respect of individual payments is misconceived.
85. Article 133 SCO provides as follows:
- "When the principal claim prescribes, so too do all claims for interest and other accessory claims".*

86. In the matter at hand, there is no principal claim, i.e. all instalments set forth in the Settlement Agreement are equal. Interest would in principle only start to run as from each individual due date and it appears there are no accessory claims of the Player.

87. Consequently, in principle, any instalments deriving from the Settlement Agreement that fell due before 14 August 2021 are time barred, but instalments that fell due as from such date are not.

b) *The specificity of sporting succession cases*

88. The Alleged Successor Club and FIFA argue that the afore-mentioned analysis does not apply in sporting succession cases, because they submit that in such cases the “*event giving rise to the dispute*” shifts to the single moment that the potential sporting successor appears and the creditor could objectively have sought recourse against this newly established entity.

89. During the hearing, FIFA made reference to FIFA’s Commentary to the FIFA RSTP, which provides the following, specifically in the context of Article 23(3) FIFA RSTP and sporting succession:

“[...] [T]he interpretation of CAS of the event giving rise to the dispute is not uniform. Two recent awards dealt with this matter, both concerning the issue of sporting succession. In both cases, the relevant clubs had ceased to be affiliated to their member association and thus FIFA declined to further intervene (consequently rendering the claims inadmissible). In the first case, the sole arbitrator held that the event giving rise to the dispute, i.e. the non-payment of salaries,

had not been interrupted by the filing of the previous claim against the predecessor club on account of the fact that such previous claim had been ruled inadmissible (i.e. not decided on the merits). The DRC decision was hence confirmed. On the contrary, in the second case, the panel overturned the DRC decision and ruled that the claim filed by the player against the successor club was barred by the statute of limitations as the event giving rise to the dispute was the establishment of the successor club” (emphasis in original – FIFA’s Commentary to the FIFA RSTP, p. 480).

90. The Sole Arbitrator considers this commentary compelling insofar it explains that a situation of sporting succession may shift the “*event giving rise to the dispute*” to a date after instalments have fallen due. Indeed, this reasoning makes sense for instalments that fell due before there was any sporting succession, because in such situation a creditor could only claim his credit after he has recourse against the newly established entity. This is also confirmed in CAS jurisprudence:

“Notably and in the context of sporting succession, CAS panels have found that the event giving rise to the dispute occurred after the termination. One such case is CAS 2020/A/7154, where the panel found that, while ‘the event giving rise to the dispute was initially the Player’s unilateral termination of his employment contract with PAE’, the establishment of the sporting successor had become the event giving rise to the dispute (CAS 2020/A/7154, paras. 72, 74). In reaching this finding, the panel found it determinative that, once the sporting successor had been established, the player ‘could objectively have sought recourse against the newly established entity’ (CAS 2020/A/7154, para. 73). Given that the

sporting successor had not been established at the time of the termination, the player could not have sought any relief at that time. Thus, the panel dismissed the argument that the date of termination was the date triggering the limitation period.

In CAS 2020/A/7290 – a case concerning the same entity – a sole arbitrator found that the date giving rise to the dispute was not the date of termination, but rather the date in which the sporting successor became affiliated to the Hellenic Football Federation (CAS 2020/A/7290, para. 74). Again, it was determinative that the date of affiliation was the date in which the player could have brought a claim against the succeeding entity before the FIFA Football Tribunal (CAS 2020/A/7290, para. 73).

The Sole Arbitrator notes that the two aforementioned cases reach a slightly different conclusion based on similar facts (i.e., the establishment of the sporting successor as a corporate entity and the affiliation of said sporting successor to a federation as the possible dates triggering the limitation period). Yet, the reasoning behind reaching these decisions is similar. Particularly, both panels reasoned that the date on which the claimant could have reasonably and objectively sought relief, when the claim being brought could not have been raised at the date of termination, ought to be considered the event giving rise to the dispute” (CAS 2023/A/10143, paras. 62-64).

91. However, this is not the situation in the matter at hand. The pertinent question here is whether the Player should have claimed all his entitlements arising out of the Settlement Agreement (past and future entitlements) within two years of the appearance of the Alleged Successor Club. The Sole Arbitrator

finds that such situation is fundamentally different from the situation where sporting succession takes place after instalments have fallen due.

92. The Sole Arbitrator finds that no compelling reasoning was set forth by the Alleged Successor Club or FIFA why, in a case of sporting succession, amounts that would normally only fall due in the future would have to be claimed within two years of the sporting succession.
93. The Sole Arbitrator finds that, in case of ongoing contracts providing for payment obligations in different instalments, the *dies a quo* is the later of i) the due date of the individual instalment concerned; or ii) the moment of sporting succession.
94. Put differently, the Sole Arbitrator finds that a situation of sporting succession may potentially shift the “event giving rise to the dispute” to a date **after** instalments have fallen due, but it cannot shift the “event giving rise to the dispute” to a date **before** instalments have fallen due.
- c) *The date of the alleged sporting succession*
95. In view of the above conclusion, the Player’s claims for instalments that fell due before 14 August 2021 are in principle inadmissible.
96. However, in line with the exception relied upon by FIFA for cases of sporting succession, it may be that claims that fell due before 14 August 2021 are not to be considered time barred because of the shift of the “event giving rise to the dispute” from the moment

- the instalments fell due to the moment that the potential sporting succession appeared and the creditor could objectively have sought recourse against this newly established entity.
97. The Player submits that the “*FIFA DRC wrongly determined the starting moment from which the claim should have been filed in front of FIFA as the starting moment of the time limit, hence the statute of limitation, should have started from the date on which the name of the Club had been changed to its current version; namely from 4 August 2022*”.
98. If the Player’s argument would be followed, not only claims that fell due as from 14 August 2021 would be admissible, but also claims that fell due two years before 4 August 2022, i.e. the entirety of the Player’s claim in the amount of EUR 330,000.
99. In this respect, the Parties made reference to various dates:
- 31 January 2019: The date the first instalment of the Settlement Agreement fell due.
 - 30 June 2019: The date the Alleged Successor Club merged with the Original Debtor and therefore the date that the Original Debtor was dissolved.
 - 13 July 2019: The date the TFF approved the merger and that the Alleged Successor Club became affiliated with the TFF.
 - 27 September 2019: The date the FIFA Disciplinary Committee advised the Player to commence proceedings before the FIFA DRC.
 - 4 August 2022: The date the Alleged Successor Club changed its name.
 - 20 May 2023: The date the Alleged Successor Club was promoted to the 3rd division of Turkish football.
 - 6 June 2023: The date the Player issued a formal default notice to the Alleged Successor Club.
 - 14 August 2023: The date the Player filed a claim against the Alleged Successor Club before the FIFA DRC.
100. The question whether the Alleged Successor Club is indeed the sporting successor of the Original Debtor is addressed in more detail below, but the Sole Arbitrator notes that the Player submitted, *inter alia*, as follows in his claim before the FIFA DRC:
- “There was no time gap between the disappearance of the Club after the end of the 2018/2019 season and the surfacing of the Successor Club which took part in the 2019/2020 season of the fifth division of the Turkish Football League (SporToto Bölgesel Amatör Lig). The Successor Club started its activity immediately after the merger under the new name and with new colours”* (Player’s claim before the FIFA DRC, p. 10).
101. In the present appeal arbitration proceedings before CAS, the Player suddenly argues that there was a temporal gap between the disappearance of the Original Debtor due to its merger and the date the Alleged Successor Club changed its name roughly three years later.

102. The Sole Arbitrator finds that this argument of the Player is not made in good faith. Indeed, because the Original Debtor ceased to exist due to the merger into the Alleged Successor Club, the Sole Arbitrator finds that, if there was a sporting succession, at least in the present case, this must have been the moment the sporting succession took place. As from such moment, the Player could potentially have opened proceedings against the Alleged Successor Club before the FIFA DRC.

103. The Sole Arbitrator agrees with the Alleged Successor Club and FIFA that the change of name of the Alleged Successor Club is immaterial for determining the “*event giving rise to the dispute*” in this case. If there was sporting succession, this already took place before the Alleged Successor Club changed its name.

104. Consequently, if there was any sporting succession of the Original Debtor by the Alleged Successor Club, such sporting succession occurred more than two years before the Player filed a claim against the Alleged Successor Club before FIFA. The Sole Arbitrator therefore finds that the alleged sporting succession has no impact on the admissibility of the Player’s claim before the FIFA DRC.

d) *Conclusion*

105. Consequently, the Sole Arbitrator finds that the FIFA DRC correctly declared the Player’s claim for instalments that fell due before 14 August 2021 inadmissible. However, claims for instalments that fell due as from 14

August 2021 are not time barred and are therefore admissible.

iii. ***Is the Alleged Successor Club the sporting successor of the Original Debtor?***

106. Whereas the Player claims that the Alleged Successor Club is the sporting successor of the Original Debtor, this is disputed by the Alleged Successor Club. FIFA did not specifically address this issue.

107. The Player relies on two decisions issued by the FIFA Disciplinary Committee in submitting that the Alleged Successor Club is the sporting successor of the Original Debtor (FDD-14109 and FDD-15539).

108. However, as rightly argued by the Alleged Successor Club, such decisions do not have an *erga omnes* effect, i.e. the mere fact that the FIFA Disciplinary Committee decided in two cases that the Alleged Successor Club is indeed the sporting successor of the Original Debtor does not necessarily mean that this is automatically also the case in the matter at hand. There may be specific facts or circumstances warranting a different outcome in another case regarding the same issue of sporting succession. At least, a regulatory provision determining that a decision on sporting succession should have an *erga omnes* effect is lacking.

109. Article R57 CAS Code provides, *inter alia*, as follows:

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or

annul the decision and refer the case back to the previous instance”.

110. On this basis, the Sole Arbitrator finds that he is afforded the discretion to issue a new decision himself, or to refer the case back to the previous instance.
111. The Sole Arbitrator considers it appropriate for the FIFA DRC to decide on the question of sporting succession (and therefore on the question of the Alleged Successor Club’s standing to be sued) in first instance, because the FIFA DRC can conduct its own investigation of the situation, potentially with the involvement of the TFF. Indeed, as becomes apparent from the two decisions issued by the FIFA Disciplinary Committee concerning sporting succession by the Alleged Successor Club, FIFA conducts its own investigation in this respect, and it does so separately for each case. The Sole Arbitrator does not have such investigative tools at his disposal.
112. The Sole Arbitrator also notes that there is only scarce information on file to determine whether the Alleged Successor Club is indeed the sporting successor of the Original Debtor. The Sole Arbitrator also took note of the contention of the Player that appeal proceedings are currently pending before CAS regarding the FIFA decision(s) that ruled on the question of sporting succession by the Alleged Successor Club, which contention remained undisputed by the Alleged Successor Club and FIFA.
113. Furthermore, in view of the explicit request of the Alleged Successor Club

and the Player’s indication during the hearing that it was not necessary to remit the case back to the FIFA DRC, but that he could live with such decision, the Sole Arbitrator considers it appropriate to remit the case back to the FIFA DRC.

114. Consequently, the case is remitted back to the FIFA DRC for further adjudication and a decision, whereby the FIFA DRC is bound by the Sole Arbitrator’s decision with respect to the admissibility of the Player’s claims.

B. Conclusion

115. Based on the foregoing, the Sole Arbitrator holds that:
 - i) There is no conflict of interest between counsel for the Alleged Successor Club and FIFA.
 - ii) The Player’s claims for instalments that fell due before 14 August 2021 are inadmissible, but claims for instalments that fell due as from 14 August 2021 are not time barred and are therefore admissible.
 - iii) The case is remitted back to the FIFA DRC for further adjudication and a decision, whereby the FIFA DRC is bound by the Sole Arbitrator’s decision with respect to the admissibility of the Player’s claims.
116. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 8 December 2023 by Mr Márkó Futács against the decision issued on 18 October 2023 by the Dispute Resolution Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is partially upheld.
2. The decision issued on 18 October 2023 by the Dispute Resolution Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* is set aside.
3. The case is remitted back to the Dispute Resolution Chamber of the Football Tribunal of the *Fédération Internationale de Football Association* for further adjudication and a decision, whereby it is bound by the Sole Arbitrator's decision with respect to the admissibility of Mr Márkó Futács' claims:

Mr Márkó Futács' claims for instalments that fell due before 14 August 2021 are inadmissible, but claims for instalments that fell due as from 14 August 2021 are not time barred and are therefore admissible.
4. (...).
5. (...).
6. All other and further motions or prayers for relief are dismissed.

Football; Disciplinary proceedings regarding sporting succession; Sporting successor; Prescription period; Decision ex officio

Panel

Prof. Petros Mavroidis (Greece), President
Mr Patrick Grandjean (Switzerland)
Mr Mark Hovell (United Kingdom)

1. Successors simply are obliged to incur the debt accumulated by the clubs that they have succeeded to once there has been an assessment by FIFA that the club is a sporting successor. To acknowledge a team as successor, FIFA has to be first asked to assess the facts. Then, based on the relevant facts before it, the competent FIFA body will make a determination to the effect that the new club is the successor of the old club, or not. But under no circumstances is there infringement of a rule prior to that assessment.
2. The prescription period starts running from the date when the final decision has become binding. Only a procedural act may interrupt the prescription limit.
3. CAS has the prerogative to decide *ex officio* whether a claim is time-barred. Indeed, CAS' competence to

adjudicate a dispute is in function of its assessment that claims have been properly submitted before it (*Kompetenz Komepetenz*).

I. THE PARTIES

1. Yeni Mersin Idman Yurdu A.S. ("YM2" or the "Appellant") is a football club headquartered in Mersin, Türkiye, and currently participating in the second professional league of the country. YM2 is the Appellant in the present proceedings.
2. Mr Danilo Petrolli Bueno is a former professional football player ("Mr Bueno", the "Player" or the "First Respondent"). Mr Bueno is the First Respondent in the present proceedings.
3. The Fédération Internationale de Football Association is the world's football governing body, headquartered in Zurich, Switzerland ("FIFA"). FIFA is the Second Respondent in the present proceedings.

II. FACTS

4. The facts of the present dispute are quite complicated and, on occasion, not germane to the resolution of the present dispute. In what follows, the Panel limited itself to a succinct description of those facts that are of direct relevance to the resolution of the dispute.

A. Background

5. The heart of the dispute is whether YM2 is the sporting successor to

Mersin Idman Yurdu SK, which is now called Mersin Talim Yurdu SK (“YM1”), and consequently, also liable for the payment of a debt that YM1 had assumed *vis-à-vis* Mr Bueno. Mr Bueno had been contractually committed to YM1. He had signed his contract with YM1 on 5 January 2012. His contract ran until the end of the 2014/2015 football season. YM1 had not honoured its obligation to pay Mr Bueno the agreed compensation, and he submitted a complaint before the competent FIFA bodies where he prevailed. As he remained unpaid, he introduced a new complaint against YM2 this time, arguing that YM2 was the sporting successor club to YM1, and thus liable (under the FIFA regulations in force) for the debts incurred by the original debtor (YM1). The Panel explains all this in what now follows.

B. Proceedings before FIFA

6. Of direct relevance to the resolution of the present dispute is the decision passed by the FIFA Dispute Resolution Chamber (“DRC”) of 3 September 2015 (Ref. 13-01057).
7. Mr Bueno had introduced a complaint claiming the payment of sums due to him by YM1 (his employer). The DRC agreed with the heart of the complaint and held that YM1 had indeed been in violation of its obligations. Accordingly, it (the “Original DRC Decision”) ordered YM1 to compensate Mr Bueno by effectuating a payment of:

- EUR 29,097;

- Adding an interest rate of 5% per annum payable as of 4 October 2015 (the effective date of the payment due to Mr Bueno).
8. The grounds of the decision were notified to the Parties on 26 January 2016 (the “Original DRC Decision”).
 9. Subsequently, on 6 May 2017, since the amount(s) due had not been paid in accordance with the Original DRC Decision, the FIFA Disciplinary Committee (the “FIFA DISCO”) passed a decision by means of which it found YM1 responsible for failing to comply with the Original DRC Decision. The grounds of the decision were duly notified to the relevant parties on 1 November 2017 (the “First FIFA DISCO Decision”).
 10. This decision opened the possibility to impose sporting sanctions against YM1 contingent upon non-payment of the adjudicated sums.
 11. On 8 September 2023, Mr Bueno introduced a new complaint before the FIFA DISCO, this time against YM2. Mr Bueno was claiming that, as YM2 was the sporting successor of YM1, it was liable for the payment of the amounts due to him by YM1.
 12. On 9 November 2023, the FIFA DISCO confirmed that YM2 was indeed the sporting successor to YM1. Consequently, it was liable for the payment of the amounts due by YM1 to Mr Bueno. The operative part of the decision of the FIFA DISCO in its entirety reads as follows:

“1. Yeni Mersin Idmanyurdu Futbol AS is considered responsible for the debt(s) incurred by the club Mersin Idman

Yurdu Spor Kulübü, and, as such, is found responsible for failing to comply in full with the FIFA decision rendered on 03 September 2015 (Ref. 13-01057).

2. *Yeni Mersin Idmanyurdu Futbol AS is ordered to pay to Mr. Danilo Petrolli Bueno as follows:*
 - *EUR 29,097 as outstanding remuneration, plus 5% interest p.a. as from the expiry of the stipulated time limit.*
3. *Yeni Mersin Idmanyurdu Futbol AS is granted a final deadline of 30 days as from notification of the present decision in which to pay the amount due. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a ban on registering new players will be issued until the complete amount due is paid. 6*
4. *Yeni Mersin Idmanyurdu Futbol AS is ordered to pay a fine to the amount of CHF 5,000.*
5. *The fine is to be paid within 30 days of notification of the present decision”.*
13. The Decision above was notified to the Parties on 9 November 2023, and the grounds on 11 December 2023 (the “Appealed Decision”).
14. It is against this decision of the FIFA DISCO that YM2 lodged the present appeal on 26 December 2023.
- III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**
15. On 26 December 2023, YM2 submitted its Statement of Appeal

against the Appealed Decision with the CAS Court Office in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the “Code”).

16. In its Statement of Appeal, YM2 designated Mr Patrick Grandjean (Switzerland) as an arbitrator.
17. On 12 and 15 January 2024 respectively, the Respondents informed the CAS Court Office of their agreement to submit this matter to the same Panel as in CAS 2023/A/9807 and CAS 2023/A/10043 and, accordingly, implied the nomination by the Respondents of Mr Mark A. Hovell (United Kingdom) as an arbitrator.
18. On 18 January 2024, and following various requests of extension, YM2 filed its Appeal Brief.
19. On 15 March 2024, FIFA submitted its Answer.
20. On 18 March 2024, Mr Bueno filed his Answer.
21. On 19 March 2024 the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed the constitution of the Panel as follows:

President:

Petros C. Mavroidis, Professor at Columbia Law School, New York City

Arbitrators:

Patrick Grandjean, Lawyer, Belmont-sur-Lausanne, Switzerland

Mark Hovell, Solicitor, Manchester, United Kingdom

22. On 27 and 28 June 2024, the Parties signed and returned the Order of Procedure.
23. On 26 June 2024, a virtual hearing was organized by CAS. Physically present at the CAS headquarters in Lausanne, Switzerland, was Mr Fabien Cagneux, Managing Counsel to the CAS.
24. Additionally, the following individuals followed the hearing via Webex

The Panel members;

YM2, which was represented by Mr Juan de Dios Crespo Pérez and Mr Umur Varat, legal counsels;

The Club's representative, its President Mr Metin Saltik, assisted by Mr. Melide Inoluk, interpreter;

Mr Bueno's counsels, namely Ms Débora Trombetta de Mattos Cesário, and Rafael Queiroz Botelho;

FIFA's representatives, Mr Miguel Liétard Fernández-Palacios, Director of Litigation, and Mr Alexander Jacobs, Senior Legal Counsel.
25. Upon request by the Panel, the Parties confirmed that they had no objection to the Panel's composition, nor did they object to the manner in which the process had been handled up to the hearing-stage. At the end of the hearing, both the Appellant and the Respondents explicitly confirmed that their right to be heard had been fully observed throughout the arbitration proceedings.

IV. PARTIES' POSITIONS AND PRAYERS FOR RELIEF

26. The following section summarises the Parties' main arguments in support of their respective requests for relief. Even though the Panel has examined the full record submitted by the Parties to the dispute, in what follows it will be presenting only the claims and arguments which in the Panel's view are relevant in deciding the issues before it.

A. The Appellant

27. The gist of the claims and arguments put forward by YM2 (the Appellant) is that there is no evidence to support that YM2 is the sporting successor of YM1. YM2 claimed before the Panel that the evidence lawfully before the Panel should lead to the conclusion that Mr Bueno was targeting the wrong club. YM2 further claimed that whatever overlap exists between YM1 and YM2, it is largely the result of public pressure exerted upon YM2, and this is no appropriate basis to conclude that it is the successor club to YM1.
28. The Panel divided the Appellant's claims and arguments under the following headings: the appropriate legal basis in the FIFA statutes; the statutory criteria substantiating that the FIFA DISCO erroneously decided in favour of sporting succession; the severity of the sanctions imposed; and the standard of review that this Panel should apply to the pertinent facts of the case. Based on its analysis, YM2 requested from the Panel to reverse the Appealed Decision.

(a) *The Legal Basis in the FIFA Statutes to Decide on Sporting Succession*

29. YM2 identified two provisions of immediate interest to the resolution of the present dispute:

- Article 24ter (1) of the FIFA Regulations on the Status and Transfer of Players (“RSTP”); and
- Article 15 (4) of the FIFA Disciplinary Code (the “FDC”).

While the former provision includes the criteria that are appropriate to decide on sporting succession, the latter explains the legal consequences in case a club has been considered successor to another club that has incurred debts towards third parties. The Panel noted that Article 24ter RSTP had become Article 25 in the 2023 Edition of RSTP and Article 15 (4) had become Article 21 (4) in the 2023 Edition of the FDC. Additionally, the criteria embedded in Article 25 (1) RSTP to show that sporting succession has occurred, echo verbatim those included in Article 21 (4) FDC. Indeed, throughout the proceedings all Parties to the dispute referred primarily to Article 21 (4) FDC when discussing the criteria for deciding on sporting succession. The Panel thus decided to do the same in its award, noting that it is simply irrelevant to refer to one (Article 21 (4) FDC) or the other (Article 25 (1) RSTP) provision in this respect, as the two provisions include exactly the same indicative list of criteria to assess sporting succession.

(b) The Statutory Criteria Substantiating Sporting Succession

30. YM2 first invoked the standing case law of CAS panels according to which

the list of criteria embedded in Article 21 (4) FDC is non-exhaustive. Furthermore, so the argument goes, previous panels have approached questions relating to sporting succession on a case-by-case basis.

31. With this in mind, YM2 went on and assessed the evaluation of the FIFA DISCO regarding the overlap of individual criteria between YM1 and YM2. In what follows, the Panel reproduces the criteria mentioned by YM2 to substantiate its claim that it is not the successor of YM1. Some of them are explicitly reflected in the body of Article 21 (4) FDC, whereas others are not.

32. The claim of YM2 is that both mentioned as well as non-mentioned criteria are relevant as the list of Article 21 (4) FDC has not been treated as exhaustive in past case law. The relevance of criteria explicitly mentioned in the body of Article 21 (4) FDC can be taken for granted. Conversely, the relevance of criteria not explicitly included in the body of Article 21 (4) FDC has to be demonstrated. In the present case, the relevance of criteria not mentioned in the body of Article 21 (4) FDC presented the Panel with no issues at all. The disputing Parties agreed that they were relevant. While the Panel is not bound by similar agreements, it conceded to their relevance as all criteria mentioned during the proceedings can indeed be appropriately taken into account when discussing sporting succession. Past case law as well, had reached the same conclusion.

33. With this in mind, the Panel now presents YM2's views regarding the relevant criteria and their impact on the resolution of the present dispute.
34. *Name of the club:* YM2 argued that the Panel should pay no particular attention to this criterion, as twenty-four clubs in Türkiye included the words "Idman Yurdu" in their name. These two words mean "training center" in Turkish.
35. YM2 had changed its name to include the word "İçel" in 2019 in order to honour the football history of the city. The change occurred in 2019, that is after YM1 had stopped its football operations.
36. In 2022, YM2 changed its name again to "Yeni Mersin Idman Yurdu AS" for reasons that have nothing to do with the intent to create the public perception that it was "usurping" the identity of YM1. "Mersin" is the name of the city where YM2 is playing football, and it is quite typical of clubs in Türkiye to carry the name of their city of origin. The acronym "AS" simply denotes the legal nature of the club (joint stock company).
37. Finally, there is a third club called Idman Yurdu 1925 SK, the name of which is clearly closer to that of YM1 for two reasons. First, 1925 is the year when YM1 was incorporated, and hence the inclusion of this element in the name of the club is clear reference to YM1. Second, Idman Yurdu 1925 SK contains some of the trademark rights of YM1. These elements strongly support the conclusion that, if at all, the public perception should be that it is Idman Yurdu 1925 SK that is the sporting successor to YM1.
38. *History of the club:* the history of YM1 is totally distinct from that of YM2. The former has been around since 1925 whereas the advent of YM2 dates from the 1960s. In fact, the two clubs have been overlapping since that day and have been following different pathways that simply have never met.
39. *Public Perception:* YM2 refutes the allegation that the public perception has been that it has emerged as the successor to YM1. In fact, this has never been the case and the reactions of the public itself in Mersin is the best testimony to this effect.
40. When YM1 was about to exit the football scene altogether, a group of its most dedicated fans, the Red Devils, overtook the management of the club in order to avert its waning into non-existence. The fact that the Red Devils went public stating that they would not be supporting YM2 is, in the YM2's view, the most adequate evidence to the effect that the public has not perceived it as the successor of YM1.
41. *Public Pressure:* this is closely related to the aforementioned criterion. YM2 claimed that the people in Mersin wanted to have a successful club in their city, following the years of topflight football that they had enjoyed with YM1. It is public pressure that pushed YM2 towards changing its name (and adopt the name "Mersin" in the title), and not the autonomous decision of the club aiming to create the public perception that it was in fact the successor to YM1.
42. *Corporate identity and Registered address:* YM1 and YM2 share neither corporate identity nor (corporate) address. While YM1 is an association, YM2 is a joint

- stock company. The two clubs are headquartered in different parts of Mersin. Accordingly, confusion between the two clubs is impossible if based on these criteria.
43. *Team colours:* YM2 does not deny that the two teams wear on occasion the same colours but qualifies the relevance and materiality of this observation in two ways. First, red and blue are the colours of the city of Mersin. Consequently, sharing the same colours is not attempt to influence public perceptions in a particular way, but quite simply the direct consequence of the fact that the two clubs ply their trade in the same city. Second, the overlap is occasional. YM2 has been wearing shirts of different colours, and recently added a new away kit which does not include either the red or the blue colour.
 44. *Logo:* YM2 has claimed that the Panel should not pay much heed to this criterion either. The two clubs have repeatedly changed their logos a few times and will undoubtedly continue to do so in the future. Furthermore, the logos reflect the colours blue and red, which, as already explained above, are the colours of the city of Mersin. Hence, the similarity is not the result of a deliberate attempt to create a certain public perception, but simply the reflection of the fact that the two clubs chose to represent the colours of their city in their respective logos.
 45. *Overlapping players:* YM2 accepts that there are overlapping players between the two clubs, but this is yet another minor element to base an assessment of sporting succession upon. 23 amateur players have moved from YM1 to YM2, but many of them have played in different clubs in the city of Mersin. Amateur players usually stay within the same city, and anyway their overall number is 23 out of 141 players in the books of YM2.
 46. *Management and Administrative staff:* no member of the administrative staff of YM1 has moved to YM2. As to management, three individuals (Mr Sabri Tekli; Mr Besir Acar; and Mr Mehmet Hanifi Isic) were members of the association until 2019-2020. The YM1 President, was also a member of the Board for YM2 only during the 2020-2021 season. Nevertheless, YM2 is a joint stock company. Only Mr Metin Seltik, and Mr Serdard Seltik have acted as managers of YM2, and none of them was member of the management for YM1.
 47. *Stadium:* the stadium where both YM1 and YM2 play does not belong to YM1. It was built in 2013 in anticipation of the Mediterranean games. Besides, the next available stadium is approximately 45 kilometres further away from the headquarters of YM2, so from a pure logistics perspective it makes good sense to have shared the same stadium with YM1.
 48. The analysis above led YM2 to conclude that FIFA's assessment that the two clubs shared seven criteria should be revised downwards. They in fact shared only one in YM2's view, the name. And as already explained, there was a very good reason why this was the case. At any rate, the decision to change the name was not germane to an attempt to create a certain public perception of succession.

49. Furthermore, YM2 brought to the attention of the Panel all relevant case law according to which a hierarchy across the various relevant criteria had been established. Previous panels had distinguished between important, relevant and minor criteria. They, thus, drove a wedge between the relevance and the materiality of criteria employed to assess sporting succession.

50. Under “important”, previous panels had classified the founding year of the original club, its sporting achievements, the category of competition where the original and the successor club played, ownership and management of the original and successor club, the identity of the President for the original and the successor club, as well as the number of overlapping players. YM2 concluded that YM2 shared none of these important criteria with YM1.

51. The overall conclusion thus that YM2 drew from the analysis above was that the Panel could not reach the conclusion that sporting succession had indeed occurred (from YM1 to YM2) by considering the criteria embedded in Article 21 (4) FDC and/or other relevant criteria that past case law had employed to reach similar conclusions. YM2 was, in this line of reasoning, unrelated to YM1.

(c) *The Severity of Sanctions Imposed*

52. YM2 claimed that the monetary fine imposed against it was plainly unfair. This had been the first instance that the FIFA bodies had taken a case against YM2, as fines had been usually imposed against recalcitrant entities. YM2 could hardly be accused for being recalcitrant, as it was unaware that it

would be considered the successor to YM1 until the Appealed Decision was issued. Mr Bueno had initiated his initial complaints against YM1 and only turned against YM2 in his last attempt before the FIFA bodies to secure payment of the sums that he had been entitled to.

53. Imposing a monetary fine against a club which was found to be at fault only once was thus, a disproportional measure.

(d) *The Appropriate Standard of Review*

54. Past case law to which YM2 referred to extensively in its pleadings suggested that sporting succession has been pronounced in quite restrictive way. Past case law, in other words, leaves no doubt that panels have not approached the issue of sporting succession in liberal manner.

55. Consequently, YM2 requested from the Panel to adopt the same standard of review when applying its legal reasoning to the facts of the present case.

(e) *Overall conclusion*

56. For all the reasons explained above, YM2 requests from the Panel:

“1. to accept this Appeal Brief against the Decision.

2. to annul the Decision and issue an award determining that the Appellant is not the sporting successor of the Original Club and, therefore, not liable for the debts incurred by the Original Club towards the Player, not subject to Art.

21 FDC, and there should be no fine and transfer ban against the Appellant.

3. *to determine any other relief the Panel may deem appropriate.*
4. *to fix a sum to be paid by the Respondents, in order to contribute to the payment of the Appellants legal fees and costs in the amount of CHF 20,000.00/- (twenty thousand Swiss francs); and*
5. *to condemn the Respondents to the payment of the whole CAS administration costs and arbitrator fees”.*

B. The First Respondent

57. Mr Bueno, the First Respondent, dismisses the quintessential claim of YM2 to the effect that it does not represent the successor of YM1. The heart of the argument presented by Mr Bueno relies on an analysis one by one of the criteria that YM2 also employed to demonstrate that it is not the sporting successor of YM1. Contrary to YM2 though, Mr Bueno reaches the opposite conclusion.
58. More specifically, Mr Bueno finds that YM1 and YM2 share 8/16 employed criteria, namely, name, history, colours, logo, stadium, management, players, and public perception. Mr Bueno also finds that the remaining criteria do not rebut the public perception that the eight overlapping criteria have established.
59. Mr Bueno and YM2 agree that the name is a criterion that YM1 and YM2 share. This is where similarities in the argument presented stop. Mr Bueno dismisses the analysis presented by

YM2 with respect to all other criteria, and more precisely:

- the history of the two clubs (YM1, YM2) is the same, and the proof is that YM2 has been celebrating various birthdays of YM1;
- the colours are the same, and all YM2 has advanced as argument in this respect is to justify why this has been the case. YM2 nevertheless, did not deny that the colours are indeed identical;
- the logos of the two clubs have indeed changed over time. YM2 nonetheless, has not explained at all why it chose to revert to a logo that YM1 had used in the 1970s;
- the stadium is the same for the two clubs, and YM2 once simply justified it as an economically justifiable choice without denying that indeed it had been using the same stadium as YM1 did;
- the situation regarding management is not exactly what YM2 has presented before the Panel. Four key figures from YM1, namely Mr Sabri Tekli, Mr Besir Acar and Mr Sevet Varan (who took over the presidency of YM2), moved from YM1 to YM2 immediately after the former ended its activities, which is more than enough evidence to prove sporting succession.;
- the fact that 23 players have plied their trade with both clubs is not a minor observation, and/or of

- secondary order of importance. It is a sizeable volume of players that moved from YM1 to YM2 showing thus the strong links between the two clubs;
- finally, YM2 misrepresented the situation regarding public perceptions. In its view, it is well-known in football circles that the current President of YM2 has established strong links with the fans of YM1.
60. Consequently, Mr Bueno claims that 8/16 relevant criteria support the conclusion that YM2 is the sporting successor to YM1. The remaining criteria do not suffice to undo this image.
61. The Panel notes that in his Answer, Mr Bueno also claimed that YM1 and YM2 had “merged”. Nevertheless, it was unclear whether Mr Bueno meant an actual commercial merger. In fact, Mr Bueno did not submit any information from the relevant commercial registry in Türkiye, and but only submitted journal articles to this effect.
62. According to Mr Bueno, and pursuant to Article 10 (1) c FDC, *“the statute of limitation to persecute infringements is subject for claims up to five (5) years as from the event giving rise to the dispute. [...] In light of the particularities of the case at hand, it is essential to clarify that the event giving rise to the dispute occurred on 05 August 2022, i.e. the day when the Appellant changed its name to Yeni Mersin Idman Yurdu and consequently, the Player become aware of the sporting succession”*. Based on the foregoing, Mr Bueno denies that the limitation period for prosecuting YM2 was time-barred when he brought the matter before the FIFA DISCO on 8 September 2023.
63. In conclusion, Mr Bueno claims that YM2 is the sporting successor of YM1. As a result, there are concrete legal consequences stemming from this finding. Mr Bueno, hence, requests from the Panel
- “[...] to admit this Answer and enact an Award upholding the DRC and the DisCo Decision in their entirety, condemning the Appellant to pay to the Player:*
- (i) EUR 29,097 as outstanding remuneration plus 5% interest p.a. as from 04 October 2015.*
- [...] Finally, given the ludicrous nature of the Appeal, the Panel shall condemn the Appellant to support all costs associated with this dispute and fix the sum of at least CHF15,000 to be paid by the Appellant to contribute towards the Player’s legal fees and costs”.*
- C. The Second Respondent**
64. FIFA, the Second Respondent, claims that there are glaring similarities between YM1 and YM2, and the only, inescapable indeed, conclusion is that the latter is the sporting successor of the former.
65. To substantiate its claim, FIFA has divided its arguments into:
- (a) The objective function of sporting succession, that is, the *raison d’être* of this legal institution;
 - (b) How does the overarching idea apply to the specific facts of the present case.

66. In FIFA's view, when discussing sporting succession what matters most is public perceptions. In this vein, to decide whether a club is the sporting successor of another club the key criterion is the "intention to be seen by the general public as the same original club that ceased its activities" (§39 of the Appeal Brief).
67. When applying this benchmark to the facts of the case, the conclusion is that YM2 is the sporting successor of YM1, because:
- the name creates the public perception of succession as there are only two professional clubs sharing the name "Idman Yurdu". Confusion thus with the many other amateur clubs that include this name in their official title is highly unlikely;
 - the colours of YM1 and YM2 are identical. The fact that YM2 changed its original black and white colours to red and blue is further indication of its intent to be perceived as the successor to YM1;
 - the logos of the two clubs are almost identical as they both share the same colours and the same shape;
 - sharing the stadium further corroborates the initial perception of succession. Other clubs from the same region play elsewhere and only YM2 plays its games in the same stadium where YM1 used to play;
 - 5/6 of the original Board of YM2 had previously been Board members for YM1 underscoring thus a perception of continuity across the two clubs;
 - 23 players have played for both clubs, a sizeable amount was one to take into account the overall number of players currently employed by YM2;
 - finally, the public perception that YM2 is the sporting successor of YM1 has been boosted by the frequent celebrations of historical moments of YM1.
68. Paying heed to the analysis above, should lead the Panel towards:
- (a) rejecting the requests for relief sought by the Appellant;*
 - (b) confirming the Appealed Decision;*
 - (c) ordering the Appellant to bear the full costs of these arbitration proceedings;*
 - (d) ordering the Appellant to make a contribution to FIFA's legal costs.*
- ## V. JURISDICTION
69. The jurisdiction of the CAS, which is not disputed by the Parties, derives from Article R47 of the Code and Article 56 (1) of the FIFA Statutes in connection with Article 52 of the FDC.
70. Article R47 of the Code provides:
- "An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the*

- appeal, in accordance with the statutes or regulations of that body”.*
71. Article 56 (1) of the FIFA Statutes states:
- “FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and Players’ agents”.*
72. Article 57 (1) of the FIFA Statutes states:
- “Appeals against final decisions passed by FIFA and its bodies shall be lodged with CAS within 21 days of receipt of the decision in question”.*
73. Article 52 of the FDC states:
- “Decisions passed by the Disciplinary and Appeal Committees may be appealed against before CAS, subject to the provisions of this Code and articles 56 and 57 of the FIFA Statutes”.*
74. The present appeal is directed against a final decision of the FIFA DISCO, hence CAS has jurisdiction to adjudicate it.
75. The jurisdiction of the Panel to adjudicate the instant dispute is further corroborated by two additional factors:
- (a) All disputing Parties signed the Order of Procedure; and
- (b) None of them raised any issues regarding the Panel’s jurisdiction during the hearing (*forum prorogatum*, prorogated jurisdiction)
76. According to Article R57 of the Code, the Panel has full power to review the facts and the law of the case and can even decide the dispute *de novo*. When doing that, the Panel
- may issue a new decision which replaces the decision challenged; or
 - it may annul the appealed decision; or
 - it may refer the case back to the previous instance (the FIFA Disciplinary Committee).
- VI. ADMISSIBILITY**
77. In accordance with Article 57 (1) of the FIFA Statutes:
- “appeals against final decisions passed by FIFA’s legal bodies [...] shall be lodged with CAS within 21 days of notification of the decision in question”.*
78. The Appealed Decision was notified to the Appellant, with grounds, on 11 December 2023. The Statement of Appeal was filed on 26 December 2023, within the statutorily permissible 21 days. To put this point to rest, the Respondents did not raise any claim to the effect that the appeal was inadmissible, neither in their written pleadings, nor during the hearing before the Panel. The appeal is thus admissible.
- VII. APPLICABLE LAW**
79. There is no disagreement between the Parties regarding the applicable law in this dispute. They all three agree that the present dispute should be adjudicated principally within the four

corners of the FIFA regulations, and more precisely, the FDC, and the RSTP. Recourse to Swiss law should be made, only to the extent warranted.

80. The FIFA DISCO that issued the Appealed Decision had to adjudicate the dispute before it, observing Article 5 of the FDC:

“The FIFA judicial bodies base their decisions: a) primarily, on the FIFA Statutes as well as FIFA’s regulations, circulars, directives and decisions, and the Laws of the Game; and b) subsidiarily, on Swiss law and any other law that the competent judicial body deems applicable”.

81. Finally, Article 56 (2) of the FIFA Statutes reads as follows:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

82. The Panel sees no reason to deviate from the above, as none of the Parties claimed the applicability of another body of law in the instant dispute.

83. In light of the above, the Panel decided that, in order to resolve this dispute, it would have recourse to the relevant FIFA regulations, and accessorially to Swiss law, to the extent of course, necessary. There is thus an ordinal relationship between the, in principle, sources of (applicable) law:

- The Panel would first attempt to resolve the dispute by reference to the relevant FIFA regulations; and,

- Only to the extent necessary, it would have recourse to Swiss law.

The legal consequence is that the two bodies of law are not *pari passu* (on equal footing). To the extent of conflict between them, it is the FIFA regulations that prevail. This feature is particularly relevant in the realm of the present dispute as Article 21 (4) FDC and Swiss law do not see eye to eye when it comes to succession: sporting succession is regulated in a manner alien to the regulation of succession of economic agents under Swiss law.

84. The relevant FIFA regulation is the FDC. With regard to the question of which edition of the FDC shall apply, the Panel concludes that the FDC 2023 edition is applicable. The failure to comply with the Appealed Decision was certainly committed after 1 February 2023, the date that is of the entry into force of the 2023 Edition of the FDC.

VIII. MERITS

85. As a preliminary issue, the Panel decided to examine whether the Player’s claim had been time-barred at the moment that the Player had submitted it to the FIFA DISCO on 8 September 2023. If the correct response is in the affirmative, then the Player’s claim should have been rejected right away. Had it been rejected, there would have been no matter to discuss before this Panel.

86. The Panel noted that YM2 had presented no claim to the effect that the Player’s claim had been time-barred. Nevertheless, it is the Panel’s view that it has the prerogative to

decide this issue *ex officio*. Indeed, the Panel's competence to adjudicate the present dispute is in function of its assessment that claims have been properly submitted before it (*Kompetenz/Kompetenz*).

87. A number of international courts have addressed this issue and have come to the conclusion that they can indeed decide *ex officio* whether a claim is properly before them.
88. In *William Ralph Clayton and Others v. Government of Canada* (PCA Case no 2009-04), the Arbitral Tribunal echoing the International Court of Justice in the *Fisheries Jurisdiction* case reached this conclusion (§§341 et seq.). In *Romak v Uzbekistan* (award of 26 November 1999), the Arbitral Tribunal reached the same conclusion by referencing Article 21.1 of the UNCITRAL Rules (§§165 et seq.). And in *Azurix v. Argentina* (Decision of 1 September 2009), the Arbitral Tribunal confirmed this view, by basing its findings on Article 41.1 of the ICSID Convention (§§90 et seq.). It is thus, well-established in arbitration practice that Arbitral Tribunals possess the authority to decide similar issues *ex officio*.
89. It should also be noted that, in his Answer, the Player expressed his position on the question of whether his claim was time-barred, thus further justifying the Panel's consideration of this issue.
90. With this in mind, the Panel proceeded to examine whether the Player's claim had been time-barred. The legal basis for assessing the validity of this claim is, in the Panel's view, Article 10 of the FDC (2023 Edition). The Panel noted

that the previous editions (the 2017 edition included) reflected the same text, which pertinently reads:

1. Infringements may no longer be prosecuted in accordance with the following periods:

a) two years for infringements committed during a match;

b) ten years for anti-doping rule violations (as defined in the FIFA Anti-Doping Regulations), infringements relating to international transfers involving minors, and match manipulation;

c) five years for all other offences.

2. The limitation period runs as follows:

a) from the day on which the perpetrator committed the infringement;

b) if the infringement is recurrent, from the day on which the most recent infringement was committed;

c) if the infringement lasted for a certain period, from the day on which it ended;

d) from the day on which the decision of the Dispute Resolution Chamber, the FIFA Players' Status Committee or the Court of Arbitration for Sport (CAS) becomes final and binding.

3. The limitation periods set out above are interrupted by all procedural acts, starting afresh with each interruption.

91. The Panel proceeded to assess the relevant facts in the present case against this background. On 3 September 2015, the Original DRC Decision was rendered. The FIFA DISCO issued its First FIFA DISCO Decision on 6 May 2017, which was

- notified to the relevant parties on 1 November 2017. At that time, and by virtue of Article 10 (3) FDC, the 5-year limitation period started to run again.
92. The Player submitted its claim to the FIFA body against YM2 on 8 September 2023. This is more than five years after the First FIFA DISCO Decision had been issued, and hence the claim of the Player must be rejected: the decision was notified on 1 November 2017, and became binding on 23 November 2017, that is, twenty-one days after its notification since no appeal against it was ever lodged. The Player submitted his claim to the FIFA body on 8 September 2023, that is, more than five years after the issuance of the First FIFA DISCO Decision.
 93. The Panel was led to this finding through a combined reading of Article 10 (1) c and 10 (2) d of the above-referenced provision.
 94. For the Player to be right in arguing that his claim was not time-barred (and for the FIFA body to have lawfully entertained it) he would have to point to a procedural act interrupting the statutory deadline of five years. He pointed to none.
 95. The Panel further entertained the argument whether the Player could have profited from the letter of the preceding paragraphs, namely, Articles 10 (2) a, 10 (2) b, or 10 (2) c of the FDC. For this to have been the case, the Player should have pointed to “an infringement” beyond the non-payment of his original claim. He pointed to none. Furthermore, the reading of Article 21 of the FDC does not lend to the view that sporting succession is an additional infringement. Successors simply are obliged to incur the debt accumulated by the clubs that they have succeeded to once there has been an assessment by FIFA that the club is a sporting successor.
 96. In other words, to acknowledge a team as successor, FIFA has to be first asked to assess the facts. Then, based on the relevant facts before it, the competent FIFA body will make a determination to the effect that the new club is the successor of the old club, or not. But under no circumstances is there infringement of a rule prior to that assessment. Under Article 21(4) of the FDC, the new club only becomes non-compliant when the assessment has taken place and the final conclusion is that we are indeed in presence of sporting succession. There is no backdating it to when the succession took place.
 97. The limitation period is five years and Article 10 (1) c of the FDC) reads as follows: *“The limitation period runs from the day on which the decision of the Dispute Resolution Chamber, the Players’ Status Committee of the Court of Arbitration for Sport (CAS) becomes final and binding”*. This provision does not mention decisions issued by the FIFA DISCO, like the one before this Panel. Nevertheless, the limitation period of five years started to run from the notification of the Original DRC Decision, that is, on 26 January 2016. In the best-case scenario, provided that the Panel accepts that this limitation period can be interrupted, this five-year period was interrupted by the First FIFA DISCO Decision. It then started to run again from the date of notification of this latter (the “First

FIFA DISCO”) decision. The Original DRC Decision was notified on 26 January 2016. At that moment, the five-year limitation period started running as per Article 10 (2) d of the FDC. The limitation period was interrupted by the First FIFA DISCO Decision which was issued on 6 May 2017 and notified (grounds) on 1 November 2017. It is undeniable that more than five years had elapsed since the last procedural act, that is, the notification of the First FIFA DISCO Decision notified on 1 November 2017, at the time the claim was raised. Consequently, the claim is time-barred. In the present case, on 8 September 2023, when the Player filed a new complaint against YM2 with the FIFA DISCO, more than five years had elapsed since the last procedural act; *i.e.* the notification of the First FIFA DISCO Decision on 1 November 2017 (see Article 10 (3) FDC). Under these circumstances, on 8 September 2023, the FIFA DISCO could not have been asked to assess the facts and make a determination that the New Club is the sporting successor of the Old Club. Without such an assessment, there is no infringement committed by the New Club. As a matter of fact, if non-compliance only occurs after an assessment by the FDC, then, in the Panel’s view, prior infringements (and the ensuing non-compliance) does not concern the successor club. The prior infringements must be imputed exclusively on the old club. This construction though of the provision would fly against the letter and the spirit of sport succession.

98. Consequently, in the Panel’s view, the only rational construction of the provision [Article 10 (2) of the FDC] is

to concede that the five-year period is running from the date when the final decision has become binding.

99. In light of the above, the Panel decided that the FIFA bodies should not have entertained the Player’s complaint lodged on 8 September 2023 (and, consequently, they should not have issued the Appealed Decision). On these grounds, the Appealed Decision is annulled, and the appeal lodged by YM2 is upheld.
100. In light of its conclusion above, the Panel did not deem it necessary to assess the remaining claims and arguments.

IX. CONCLUSION

101. In conclusion, the Panel upholds the appeal and the Appealed Decision is set aside.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 26 December 2023 by Yeni Mersin Idman Yurdu A.S. against the decision of the FIFA Disciplinary Committee issued on 9 November 2023 is upheld.
2. The decision issued by the FIFA Disciplinary Committee on 9 November 2023 is set aside.
3. (...).
4. (...).
5. (...).

6. All other motions or prayers for reliefs are dismissed.

**Procedimiento Arbitral TAS 2024/A/10321
El Quilmes Atlético Club v. Club Deportes
Unión La Calera & Fédération
Internationale de Football Association
(FIFA)**

25 de abril de 2025 (parte dispositiva de fecha
19 de agosto de 2024)

**Fútbol; Procedimiento disciplinario;
Circular No. 1842 de la FIFA –
Implementación del Portal Jurídico;
Constitución errónea de domicilio;
Suspensión del plazo para apelar ante el
TAS**

Formación Arbitral

D. Santiago Durán Hareau (Uruguay), Árbitro
Único

1. Mediante la Circular 1842 de la FIFA, de 6 de abril de 2023, se determinó que, a partir del 1 de mayo de 2023, todos los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA se tramitarán en forma exclusiva a través del Portal Jurídico. Además, en la Circular 1842 se informó que se habían aprobado varias enmiendas al marco reglamentario de la FIFA (Código Disciplinario, Reglamento sobre el Estatuto y Transferencia de Jugadores, Reglamento de Procedimientos y Código de Ética) a efectos de reflejar que todos los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA se gestionen exclusivamente a través del Portal Jurídico.
2. Si una parte en un contrato o en una demanda constituye en forma errónea su domicilio; dicha parte no puede excusarse de su propio error

(principio *nemo auditor propriam turpitudinem allegans*) porque la contraparte (que no tiene por qué conocer ni verificar dicha información) tiene una expectativa legítima de que va a poder notificarlo en el domicilio denunciado o constituido. Sostener lo contrario, implicaría dejar la posibilidad de ser notificado al arbitrio del omiso o causante del error. Por tanto, las notificaciones a esa dirección se deben considerar válidas y el omiso o causante del error debe asumir las consecuencias.

3. El plazo de 21 días establecido por el artículo R49 del Código del TAS y el artículo 57 (1) de los Estatutos de la FIFA no se extiende mediante la aplicación de derecho civil suizo ni se suspende mediante el receso referido en el Código Disciplinario, o cualquier otra disposición procesal similar. El procedimiento de apelación ante el TAS está regulado por el Código del TAS y no por reglas procesales de la FIFA. En ese sentido, el Código del TAS no establece en ninguna parte que el plazo para apelar se suspenda durante días festivos o inhábiles. Por tanto, el artículo 38 del Código Disciplinario, aplica a procedimientos internos de FIFA (a vía de ejemplo, para los plazos establecidos en los artículos 54, 57 y 60 del Código Disciplinario) pero no para la apelación ante el TAS.

I. LAS PARTES

1. El Quilmes Atlético Club (“Quilmes” o “Apelante”) es un club de fútbol profesional, con sede en la ciudad de Quilmes, Argentina, afiliado a la Asociación del Fútbol Argentino (“AFA”).
2. Club Deportes Unión La Calera (“La Calera” o “Primer Apelado”) es un club de fútbol profesional, con sede en La Calera, Chile, afiliado a la Asociación Nacional de Fútbol Profesional de Chile (“ANFP”).
3. La Federación Internacional Fútbol Asociación (la “FIFA” o “Segunda Apelada”) es el órgano rector del fútbol a nivel mundial.
4. La Calera y la FIFA se denominan conjuntamente los “Apelados”. El Apelante y los Apelados se denominan conjuntamente las “Partes”.

II. HECHOS

5. Se relacionan a continuación los hechos más relevantes que han dado lugar al presente procedimiento, en virtud de lo alegado por las Partes en sus escritos y las pruebas presentadas en el procedimiento. A pesar de que el Árbitro Único ha estudiado todos y cada uno de ellos, así como las pruebas documentales aportadas, se hará referencia expresa solamente a los acontecimientos que, en su concepto, considere necesario reproducir como fundamento de sus conclusiones. Asimismo, se mencionarán otras circunstancias que se desarrollarán más adelante.

II.1. Antecedentes

6. Con fecha 14 de febrero de 2020, la

Comisión del Estatuto del Jugador de FIFA condenó al Apelante a pagar al Primer Apelado la suma de US\$ 900.000 por incumplir el pago correspondiente a la transferencia definitiva de un futbolista desde el Primer Apelado hacia el Apelante (“Decisión de la CEJ”). La Decisión de la CEJ no fue apelada y quedó firme y vinculante.

7. El Apelante incumplió el pago de la Decisión de la CEJ y, en virtud de ello, el Primer Apelado solicitó la apertura de un procedimiento disciplinario.
8. Con fecha 7 de mayo de 2021, la Comisión Disciplinaria de FIFA (“Comisión Disciplinaria”) decidió cerrar el procedimiento disciplinario debido a que el Apelante se encontraba en “Concurso Preventivo”.
9. Con fecha 14 de diciembre de 2023, el Primer Apelado solicitó la apertura de un nuevo procedimiento disciplinario bajo el nuevo hecho de que el procedimiento concursal en el que estaba inmerso el Apelante había concluido y el Primer Apelado seguía sin cobrar.
10. El mismo día, la Secretaría de la Comisión Disciplinaria, envió a través del Portal Jurídico de la FIFA (“Portal Jurídico”), la siguiente propuesta (“Propuesta de FIFA”):

“Opening of disciplinary proceedings – Proposal by the Secretariat

Dear Madam, Dear Sir,

We refer to the above-mentioned matter as well as to the investigations conducted by FIFA. In this context, please find below the link containing all the relevant information and documentation constituting the case file:

<https://cargo.fifa.org/> [...]

In particular, it appears that *QUILMES ATLETICO CLUB (the Respondent)* did not comply in full with a decision passed by a body, a committee, a subsidiary or an instance of FIFA, or by the Court of Arbitration for Sport (*the Decision*).

In view of the foregoing, please be informed that this would constitute a potential breach of the following provision(s):

Art. 21 of the FIFA Disciplinary Code (FDC) – Failure to respect decisions

In this context, in accordance with art. 58 FDC as read in conjunction with Annexe 1 FDC, the secretariat to the FIFA Disciplinary Committee proposes the following sanction on the basis of the existing file:

1. The Respondent, *QUILMES ATLETICO CLUB*, **shall pay to UNION LA CALERA (the Creditor)** as follows:

- USD 900,000 plus 5% interest per annum calculated as follows:
 - USD 300,000 net plus 5% interest per annum as of 1 May 2017 until the date of effective payment;
 - USD 200,000 net plus 5% interest per annum as of 31 July 2017 until the date of effective payment;
 - USD 200,000 net plus 5% interest per annum as of 30 October 2017 until the date of effective payment;
 - USD 200,000 net plus 5% interest per annum as of 29 January 2018 until the date of effective payment;

2. The Respondent **is granted a final deadline of 30 days** as from the present proposal becoming final and binding in which to pay the amount(s) due. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the Decision within the period stipulated, a ban on registering new players will be issued until the complete amount due is paid.
3. The Respondent **shall pay a fine to the amount of CHF 30,000.**

In line with art. 58 FDC, the Respondent may reject the proposed sanction and submit its position before the FIFA Disciplinary Committee (along with any document deemed necessary) **within five days of the notification** of this communication. In such case, regular disciplinary proceedings will be conducted, and the FIFA Disciplinary Committee will decide on the case using the file in its possession.

Should the Respondent accept the proposed sanction, or in the absence of any response within the stipulated deadline, said sanction will become final and binding (cf. art. 58 FDC).

Finally, and for the sake of good order, please note that the aforementioned proposed sanction is without prejudice to any future decision issued by the FIFA Disciplinary Committee, in case the proposal at hand is rejected by the Respondent.

The *Argentinian Football Association (the Respondent's association)* is kindly invited to forward this letter to the Respondent immediately”.

11. Además, en la misma fecha la FIFA también envió un correo electrónico a la dirección registrada por el Apelante en la pestaña “General” del TMS (georginafranceshini@gmail.com)

informando lo siguiente:

“Dear Madam or Sir,

We would like to inform you that a new claim has been filed against you in front of the FIFA Football Tribunal and action might be required from you.

In this respect, please be reminded that as of 1 May 2023, proceedings before the Football Tribunal are conducted exclusively through the FIFA Legal Portal (cf. article 10 of the Procedural Rules Governing the Football Tribunal).

In particular, we kindly inform you that your access to the Legal Portal has been recorded with the email address on which you are receiving this email. Therefore, you are invited to register and access the FIFA Legal Portal directly using these credentials.

Should you wish to change your e-mail of registration in the Legal Portal, we kindly invite you to inform us accordingly via the Help Centre in the Legal Portal or via email to legal.digital.support@fifa.org, indicating the new e-mail address which shall be used for your registration. We wish to highlight that such change will affect all your claims (any past, pending and future).

Lastly, please be equally informed that, in accordance with the User Manual and Terms of Service of the Legal Portal, as well of FIFA Circular no. 1842: (i) only one e-mail entry per party or legal representative can be entered in the system; and (ii) upon receipt of this email, you will have three days to create your own account and access the FIFA Legal Portal. Failure to do so will be to your detriment”.

12. Con fecha 20 de diciembre de 2023, al no haberse rechazado la Propuesta de FIFA, la FIFA comunicó la siguiente decisión mediante el Portal Jurídico

(“Decisión Apelada”):

“Proposal by the Secretariat – confirmation letter

Dear Madam, Dear Sir,

We refer to the above-mentioned matter as well as to our previous communication (cf. OC_02).

In this context, and for the sake of good order, we kindly inform the parties that the proposed sanction contained therein is now final and binding.

The Argentinian Football Association is kindly invited to forward this letter to the Respondent immediately”.

13. Además, el mismo día la FIFA envió la Decisión Apelada mediante correo electrónico a la dirección registrada por el Apelante en la pestaña “General” del TMS (georginafranceshini@gmail.com) y a la AFA.
14. Con fecha 1 de febrero de 2024, la FIFA comunicó a través del Portal Jurídico que dado que el Apelante no había cumplido con la Decisión Apelada, se le implementaba la prohibición de inscribir nuevos jugadores. En dicha comunicación también se puso en copia a la AFA y se le requirió que implemente la sanción (la “Decisión Apelada”).

III. EL PROCEDIMIENTO ANTE EL TRIBUNAL ARBITRAL DEL DEPORTE

15. El 2 de febrero de 2024, el Apelante presentó ante el TAS su Declaración de Apelación, de conformidad con los Artículos R47 y R48 del Código de Arbitraje en Materia de Deporte del TAS (en adelante, el “Código”), contra los Apelados, con respecto a la Decisión Apelada. El Apelante solicitó que la

- presente controversia fuese resuelta por un árbitro único y la Segunda Apelada no se opuso a dicha solicitud. El Primer Apelado manifestó su desacuerdo y propuso que el presente procedimiento fuese resuelto por una Formación Arbitral compuesta por tres árbitros. Finalmente, la Presidenta Adjunta de la Formación Arbitral decidió, conforme al Artículo R50 del Código, que el presente arbitraje fuese resuelto por un árbitro único.
16. El 14 de febrero de 2024, el Primer Apelado solicitó que se declare inadmisibles la Declaración de Apelación.
 17. El 27 de febrero de 2024, de conformidad con el Artículo R51 del Código, el Apelante presentó su Memoria de Apelación y la respuesta al planteo de inadmisibilidad.
 18. El 7 de marzo de 2024, la Segunda Apelada solicitó que se declare inadmisibles la Declaración de Apelación.
 19. El 3 de abril de 2024, de acuerdo con el Artículo R54 del Código, la Consejera del TAS, en nombre de la Presidenta Adjunta de la Cámara de Apelaciones del TAS, informó a las Partes de que la Formación Arbitral encargada de resolver la presente disputa estaría integrada por el Dr. Santiago Durán Hareau, abogado, en Montevideo, Uruguay, actuando como Árbitro Único.
 20. El 1 de mayo de 2024, el Árbitro Único comunicó que había decidido no bifurcar el caso y que los motivos se notificarían en el laudo final.
 21. El 31 de mayo de 2024, de conformidad con el Artículo R55 del Código, el Primer Apelado presentó su Contestación.
 22. El 7 de junio de 2024, de conformidad con el Artículo R55 del Código, la Segunda Apelada presentó su contestación.
 23. Con fecha 7 de junio de 2024, la Consejera del TAS invitó a las Partes a que informasen si consideraban necesaria la celebración de una audiencia o si preferían que el Árbitro Único dictase un laudo en base a los escritos presentados por las Partes. Asimismo, dentro del mismo plazo, invitó a las Partes a que informen si consideraban necesario la celebración de una conferencia sobre la conducción del procedimiento a discutir cuestiones procedimentales, la preparación de la audiencia (si la hubiere) y cuestiones relacionadas a la producción de la prueba.
 24. Con fecha 11 de junio de 2024, el Primer Apelado informó que consideraba que no era necesaria la celebración de una audiencia y no se oponía a la celebración de una conferencia sobre el procedimiento en caso que El Árbitro Único decidiera celebrarla.
 25. Con fecha 13 de junio de 2024, el Apelante contestó que sí consideraba necesario la celebración de una audiencia.
 26. Con fecha 15 de junio de 2024, el Apelante solicitó, de conformidad con el Artículo R37 del Código, una petición de medidas provisionales con el fin de suspender la prohibición de fichajes impuesta hasta tanto exista una decisión final en el caso.
 27. Con fecha 20 de junio de 2024, la Segunda Apelada presentó su contestación a la solicitud de medidas cautelares.

28. Con fecha 25 de junio de 2024, el Primer Apelado presentó su contestación a la solicitud de medidas cautelares.
29. Con fecha 26 de junio de 2024, se notificó la decisión dispositiva del Árbitro Único mediante la cual se rechazó la solicitud de medidas cautelares.
30. Con fecha 27 de junio de 2024, el Apelante solicitó que fije audiencia y se dicte la parte dispositiva del laudo antes del 22 de agosto de 2024, o, subsidiariamente, que se reconsidere la solicitud de medidas cautelares antes del plazo señalado.
31. Con fecha 2 de julio de 2024, el Árbitro Único notificó a las Partes que, de conformidad con el Artículo R57 del Código, consideraba necesaria la celebración de una audiencia y que estaría disponible para celebrar la audiencia el 16 o 17 de julio de 2024 por videoconferencia.
32. Con fecha 5 de julio de 2024, el Primer Apelado informó que no estaba disponible en las fechas propuestas por el Árbitro Único. Asimismo, solicitó la posibilidad de celebrar una audiencia de conciliación entre las partes.
33. Con fecha 8 de julio de 2024, el Árbitro Único notificó a las Partes que, sin perjuicio de que el Apelante acepte la propuesta de mediación, proponía celebrar la audiencia el 29 de julio de 2024.
34. Con fecha 9 de julio de 2024, el Apelante rechazó la propuesta de mediación argumentando la imposibilidad de llevarla adelante al tratarse de una deuda pre-concursal y confirmó su disponibilidad para celebrar una audiencia el 29 de julio de 2024.
35. Con fecha 9 de julio de 2024, los Apelados confirmaron que estaban disponibles para celebrar una audiencia el 29 de julio de 2024.
36. Con fecha 10 de julio, la Consejera del TAS informó a las Partes, que el Árbitro Único los convocaba para celebrar una audiencia, mediante videoconferencia, el día 29 de julio de 2024.
37. El 17 de julio de 2024, la Consejera del TAS envió a las Partes la Orden de Procedimiento del presente caso, la que fue firmada por todas las Partes.
38. El 23 de julio de 2024, la Consejera del TAS envió a las Partes un programa tentativo de audiencia, el cual no fue objetado por ninguna de las Partes.
39. El 29 de julio de 2024, se celebró la audiencia ante el TAS (“Audiencia”) mediante videoconferencia. Además del Árbitro Único y de la Dra. Lia Yokomizo, como Consejera del TAS, participaron las siguientes personas:
 - Por el Apelante:
 - El Dr. Ariel Reck, como abogado externo de Quilmes.
 - El Sr. Mateo Magadan, como Presidente de Quilmes.
 - El Dr. Gustavo de la Fuente, como Secretario General de Quilmes y testigo experto.
 - La Sra. Georgina Francheschini, como secretaria de Quilmes y testigo.
 - Por el Primer Apelado:

- El Dr. Hernán Rubiola, como abogado externo de Unión La Calera.
 - El Sr. Christopher Pons Kosky, como Gerente General de Unión La Calera.
 - El Dr. Jorge Mattos, como testigo experto.
 - Por la Segunda Apelada:
 - El Dr. Roberto Nájera Reyes, como abogado interno de la FIFA.
40. En la audiencia, las Partes tuvieron la posibilidad de presentar su caso, exponer sus argumentos y comentar las cuestiones planteadas por la contraparte.
41. Al final de la audiencia, las Partes expresamente declararon que no tenían ninguna objeción respecto a la actuación del Árbitro Único, que habían recibido un tratamiento ecuánime y que la audiencia había sido ajustada a lo establecido en el Código.

IV. CUESTIONES PRELIMINARES

IV.1. Motivos para no bifurcar el procedimiento

42. Los Apelados cuestionaron la admisibilidad de la Declaración de Apelación por lo que el Árbitro Único debía decidir bifurcar o no el procedimiento.
43. En este sentido, el Árbitro Único hace notar que el análisis sobre la admisibilidad del asunto de referencia no revestía precedentes y que había que analizar muchas cuestiones para tomar una decisión; y al momento en que tenía que decidir bifurcar o no el

procedimiento, todavía no contaba con todos los elementos para hacerlo.

44. Además, el Apelante tenía sobre sí una prohibición de inscribir jugadores y si se bifurcaba el procedimiento, se hubiese hecho más largo. Por tanto, ante la eventualidad de que el Árbitro Único pudiera determinar que la Declaración de Apelación era admisible, se estaría muy próximo al período de pases (o de su vencimiento) y corría el riesgo de no poder dictar el Laudo en tiempo y forma sin perjudicar al Apelante (en caso de que el Laudo fuese favorable para sus intereses).
45. Finalmente, el Apelante había planteado que la deuda era pre-concursal, lo que hacía más complejo el asunto y sentía la necesidad de escuchar a los Apelados y que las Partes desarrollen más cada una de sus posiciones.

IV.2. Alegaciones de las partes respecto de la admisibilidad

46. Se relacionan a continuación, a modo ilustrativo, los hechos más relevantes que han desarrollado las Partes en relación a la admisibilidad, en virtud de lo alegado en sus escritos y en la audiencia. A pesar de que el Árbitro Único ha estudiado todos y cada uno de ellos, se hará referencia expresa solamente a los que, en su concepto, considere necesario reproducir como fundamento de sus conclusiones.

(i) Fundamentos del Apelante

47. Al presentar la Declaración de Apelación, el Apelante alegó que si bien la Decisión Apelada es de fecha 20 de diciembre de 2023, recién fue notificado el 1 de febrero de 2024, cuando toma conocimiento de que recaía sobre sí una

- prohibición de inscribir jugadores.
48. El Apelante sostuvo que el usuario del Portal Jurídico de Quilmes fue creado, con un e-mail incorrecto, por la FIFA y no por Quilmes.
 49. Alegó también que Quilmes no tiene otro proceso en el Portal Jurídico, por lo que no tenía motivos para pensar que debía tener un caso abierto. Además, este caso estaba en teoría ya terminado y cerrado, por lo que menos aún podía pensar en la existencia de un reclamo como el presente.
 50. Inclusive, en el caso original el abogado de Quilmes era el mismo que actúa en el presente y que tiene el Portal Jurídico activo con más de 100 casos. FIFA nunca notificó al abogado de la existencia de este proceso.
 51. Además, en la apertura del proceso disciplinario original, de fecha 16 de abril de 2021, la FIFA notificó al abogado por mail y a todos los usuarios del TMS de Quilmes, en particular al e-mail correcto: georginafranceschini@gmail.com.
 52. En las comunicaciones del proceso disciplinario, FIFA señaló luego, con fecha 6 de febrero, que FIFA había creado el usuario del Apelante en el Portal Jurídico usando el e-mail informado en el TMS y que cualquier error era responsabilidad del Club (y no de FIFA) y el club debía asumir la responsabilidad por ello.
 53. Alegó también el Apelante que ha recibido más de 200 e-mails dirigidos por FIFA al e-mail correcto de Quilmes en el TMS (georginafranceschini@gmail.com).
 54. Más allá de estas cuestiones, el Apelante alegó inicialmente en sus escritos que en cualquier caso, aún si se quisiera considerar que hubo un error imputable a Quilmes, Quilmes fue efectivamente notificado de la Decisión Apelada el día 12 de enero de 2024, conforme al artículo 11 del Reglamento de Procedimientos del Tribunal del Fútbol (“Reglamento de Procedimientos”).
 55. En este sentido, alegó el Apelante que la decisión del 20 de diciembre de 2023 fue enviada cuando los plazos procesales estaban suspendidos hasta el viernes 5 de enero inclusive (conforme el artículo 11.5 del Reglamento de Procedimientos). Ese día debe considerarse como el día que se notificó a AFA la Decisión Apelada. Más allá de la responsabilidad por el error en el mail del Portal Jurídico, es evidente que Quilmes no recibió directamente esa comunicación, por lo tanto debe considerarse notificado desde que la recibió por AFA (artículo 11.2 del Reglamento de Procedimientos), es decir, el 8 de enero de 2024 (siguiente día hábil al 5 de enero de 2024). En base a lo expuesto, debe considerarse que el Apelante fue notificado efectivamente 4 días después, es decir el viernes 12 de enero de 2024. Desde el viernes 12 de enero de 2024 hasta el día de la Declaración de Apelación, viernes 2 de febrero de 2024, transcurrieron 21 días.
 56. Además, alegó el Apelante que la forma de computar las fechas, al menos en lo que a la suspensión de plazos por el período 20 de diciembre al 5 de enero, ha quedado incluso reconocida por FIFA en el marco del proceso disciplinario dado que la decisión se notificó el 20 de diciembre de 2023 y estableció un plazo de 30 días para el pago bajo apercibimiento de imponer la

prohibición de fichajes. Esta prohibición fue impuesta por la FIFA en primera medida el 1° de febrero de 2024. Cuando Quilmes se presentó en el expediente realmente y solicitó la anulación de la medida, aunque FIFA lo rechazó, admitió que el plazo de 30 días para imponer la prohibición de fichajes vencía el 5 de febrero y no el 1° de febrero, mencionando expresamente el art.11.5 del Reglamento de Procedimientos. De todas formas, el Apelante termina por agregar que el error que igualmente cometió FIFA fue el de considerar que el plazo comenzaba el 5 de enero cuando en realidad comenzaba el 8 de enero (primer día hábil posterior).

57. Por tanto, a pesar de que el Apelante no fue debidamente notificado, solo se puede considerar reglamentariamente notificado el 12 de enero de 2024, por lo que la apelación interpuesta el 2 de febrero de 2024 resulta tempestiva.
58. Sin perjuicio de lo antedicho, posteriormente en la Audiencia el Apelante se desdijo de todos los argumentos relacionados con la notificación subsidiaria a través de la AFA, en virtud de reconocer que no era aplicable al caso concreto dado que dicha hipótesis es aplicable cuando se desconoce la dirección de correo del club y se lo notifica a través de la federación. Pero este no era el caso.
59. Por tanto, el Apelante termina concluyendo que la Decisión Apelada no le fue notificada y que el único momento en que puede considerarse notificado es el 1° de febrero de 2024, fecha en la cual se le notifica que tenía una prohibición para registrar jugadores.

(ii) Fundamentos del Primer Apelado

60. El Primer Apelado solicitó la extemporaneidad de la Declaración de Apelación conforme al artículo R49 del Código. Indicó que la ley aplicable al presente asunto son los Reglamentos y Estatutos de la FIFA y, en forma especial, el Código Disciplinario de la FIFA (versión 2023) por tratarse de una apelación ante el TAS sobre una resolución firme y vinculante de la Comisión Disciplinaria.
61. Alegó que la Comisión Disciplinaria notificó a Quilmes y a la AFA la Propuesta de FIFA el 14 de diciembre de 2023 y, en esa misma fecha, la FIFA envió un correo electrónico a la dirección del Apelante registrada en el TMS informándole ello.
62. También alegó que la Propuesta de FIFA claramente establecía que el Apelante podría rechazar la propuesta dentro de los 5 (cinco) días hábiles siguientes a que fuere notificado y que, de no hacerlo, la sanción se tornaría firme y vinculante. En virtud de ello, el 20 de diciembre de 2023, la FIFA emite la Decisión Apelada y la notifica a Quilmes y a la AFA.
63. Además, el Primer Apelado alegó que la existencia y vigencia del régimen obligatorio establecido por la FIFA del Portal Jurídico fue establecido en la Circular de FIFA N° 1842 (“Circular 1842”). También que los procesos disciplinarios se deben notificar por medio del Portal Jurídico y actuar de buena fe; que hay un mail registrado en el sistema que posee el Apelante en el Portal Jurídico y en el TMS y que es el Apelante quien tiene la carga de corroborar e ingresar diariamente al Portal Jurídico para ver si hay notificaciones.
64. Además, el mail cuestionado por el

Apelante fue registrado por el Apelante en el TMS el 27 de mayo de 2020 y lo mantuvo hasta marzo de 2024.

65. En cuanto a la evaluación de los supuestos numéricos, indicó que dado que la Decisión Apelada fue notificada el 20 de diciembre de 2023, y que los plazos se suspenden entre el 20 de diciembre y el 5 de enero, el plazo de 21 días debe empezar a correr a partir del 6 de enero y, por tanto, el plazo de 21 días para presentar la Declaración de Apelación venció el 26 de enero de 2024. Al presentar el Apelante la Declaración de Apelación el 2 de febrero, ello fue 44 días siguientes a que fuera válidamente notificado.
66. Agregó además que si bien 20 de diciembre de 2024 es el día inicio del receso ordenado por la FIFA, dicho receso aplica para no contabilizar el cómputo de los plazos, pero que en ningún reglamento se establece que la notificación deba realizarse en un día hábil. No obstante, si se quisiera considerar una hipótesis alternativa de que al ser el 5 de enero un viernes, el primer día hábil siguiente fue el 8 de enero; por lo que aún así, el plazo de 21 días hubiese vencido el 29 de enero de 2024.
67. Como última alternativa, rechazó lo alegado por el Apelante en lo que refiere a que sea aplicable la notificación a través de la Federación a la que hace referencia el Reglamento de Procedimientos, ya que la norma aplicable es el Código Disciplinario.
68. En este sentido, destacó que dicha notificación a través de la federación no es aplicable ya que es para casos en que se desconoce la dirección de una parte y principalmente, para aquellos clubes

amateurs que carecen domicilios registrados en las federaciones.

69. Pero en el improbable caso que se entienda que podría considerarse la notificación a través de la AFA, el artículo 48.4 del Código Disciplinario establece que: "...en caso de que se desconozca la dirección de correo electrónico de la parte y los documentos se hayan enviado a la federación correspondiente a través del portal jurídico de la FIFA, se entenderá que los documentos han sido debidamente comunicados al último destinatario transcurridos cuatro días de haberse efectuado dicha notificación a la federación".
70. Por tanto, la AFA recibe la notificación y al otro día en forma automática, comienzan a correr los 4 días.
71. La norma es clara; no es necesario que la AFA acredite comunicación al afiliado, ni que se cuente algún día de notificación, los 4 días son automáticos desde que la federación recibe la notificación, es decir, en el caso de autos, desde el 20 de diciembre de 2023, siendo el primer día de conteo de los 4 días automáticos reglamentarios el sábado 6 de enero de 2024. Bajo este sistema, el Apelante quedó notificado el 10 de enero de 2024 con vencimiento de la apelación al TAS (21 días), el 30 de enero de 2024.
72. Aún yendo más allá, dado que el Apelante no cuenta el sábado 6 de enero como día de conteo, y considerando la notificación automática de 4 días, si se comienza el lunes 8 de enero como el primer día y siendo el jueves 11 de enero el cuarto día de notificación, la ecuación queda de la siguiente manera: viernes 12 de enero es el primer día para contar de los 21 días a tener en cuenta, venciendo

el plazo para apelar el 1° de febrero de 2024 y no el 2 de febrero de 2024; o sea que también está fuera de término.

(iii) Fundamentos de la Segunda Apelada

73. La Segunda Apelada alega que la Propuesta de FIFA fue notificada el 14 de diciembre de 2023, de conformidad con el Artículo 58 del Código Disciplinario. En dicho documento se estableció claramente que, de conformidad con el Artículo 58 del Código Disciplinario, el Apelante podía rechazar la sanción propuesta dentro de los cinco (5) días siguientes a la notificación de la Propuesta de FIFA y que, de no hacerlo quedaría firme y vinculante.
74. La Propuesta de FIFA fue notificada al Apelante por medio del Portal Jurídico, de conformidad con el Artículo 48 del Código Disciplinario. En lo que respecta a las notificaciones a través del Portal Jurídico, cita la Circular de FIFA N° 1795 (“Circular 1795”), la Circular 1842 y el documento emitido por FIFA de Preguntas y Respuestas conforme lo cual entre, otras cosas, quedaba claro que: (i) la FIFA había anunciado largamente a los interesados en el fútbol que debían crear una cuenta en el Portal Jurídico; (ii) la información de TMS era vinculante para las partes; (iii) conminaba a los clubes a que se inscribieran en el Portal Jurídico
75. En la misma fecha, la FIFA también envió un correo electrónico a la dirección registrada por el Apelante en el TMS.
76. Dado que el Apelante no rechazó la Propuesta de FIFA dentro del plazo otorgado, la FIFA notificó la Decisión Apelada el 20 de diciembre del 2023,

mediante la cual confirmó que la Propuesta de FIFA era, a partir de ese momento, firme y vinculante. De igual manera, FIFA envió un correo electrónico automatizado al Apelante (a la dirección registrada en TMS) y a la AFA notificando la Decisión Apelada.

77. El Apelante decidió recurrir la Decisión Apelada el 2 de febrero de 2024, es decir, 44 días después de la notificación de la Decisión Apelada, excediendo claramente el plazo límite de 21 días que prevé el Artículo 58 de los Estatutos de la FIFA.
78. Más allá de eso, el Reglamento de Procedimientos invocado por el Apelante no aplica al caso concreto y aún en el improbable caso que hubiera que acudir a las previsiones del artículo 48.4 del Código Disciplinario, ello no sería posible porque no se desconocía la dirección de correo del Apelante.

IV.3. Medidas Cautelares

79. Según el artículo R37.5 del Código:
“Para decidir sobre la concesión de medidas provisionales, el/la Presidente/a de la Cámara o la Formación, tendrán en cuenta el riesgo de daño irreparable que corre la parte solicitante, la apariencia de buen derecho del fondo de la reclamación y la importancia de los intereses de la parte solicitante en comparación con los de la contraparte”.
80. Asimismo, la consolidada Jurisprudencia del TAS establece que todos estos requisitos establecidos en el artículo

precedente son acumulativos⁸.

81. De acuerdo con la Jurisprudencia del TAS, quien solicita la aplicación de medidas cautelares debe demostrar que las medidas solicitadas son necesarias para proteger su posición de perjuicios o riesgos que serían imposibles, o muy difíciles, de remediar o anular en una fase posterior. Y la mera alegación de un perjuicio irreparable en sí misma, no sustentada con evidencia, no alcanza la carga de la prueba de demostrar que sufriría un perjuicio sustancial si no se le conceden. Las alegaciones generales de posibles daños y perjuicios no bastan para establecer un daño irreparable: *“Si bastara con alegar la existencia de un perjuicio irreparable para obtener el efecto suspensivo, sin que fuera necesario aportar pruebas del perjuicio, ello equivaldría a que el TAS pronunciaría sistemáticamente un efecto suspensivo cada vez que se prohíbe a un club registrar jugadores”*⁹.
82. En este sentido, el Apelante solo ha hecho referencia a que está jugando en Segunda División, que está en la quinta posición de los play offs y que si no contrata jugadores, ello supondría un grave e irreparable perjuicio en sus pretensiones deportivas, ya que correrá en desventaja respecto de los restantes clubes participantes. Pero más allá de esa alegación, no hay ninguna prueba de que su actual plantel se vaya a ver diezmado porque haya contratos que expiran (y que no pueda renovar) o que tenga jugadores lesionados o que no pueda ascender juveniles o que le hayan ofrecido varios nuevos jugadores o que sus equipos competidores se estén reforzando de una forma excesiva o, en definitiva, ningún elemento que le permita al Árbitro Único concluir que no

puede seguir compitiendo en igualdad de condiciones con el resto o de la forma competitiva que lo ha hecho hasta ahora¹⁰.

83. Además, si bien el Apelante es un equipo histórico de Argentina, ha alternado en primera y segunda división durante toda su historia y ha participado casi la mitad del tiempo en ambas categorías (habiendo participado más temporadas en Segunda División que en Primera División). De hecho, la última vez que estuvo en Primera División fue hace 7 años. Así que no solo el daño irreparable alegado es un hecho hipotético e incierto, sino que (aún cuando el Árbitro Único no desconoce los beneficios que le trae a cualquier club competir en Primera División) tampoco se ha presentado ninguna evidencia que le permita comprender por qué el hecho hipotético de no ascender este año produciría un daño irreparable, cuando dicha situación no es extraña para la institución.
84. Habida cuenta de que la recurrente no ha cumplido con su carga de la prueba en lo que respecta al primer requisito del daño irreparable, y que los tres requisitos se deben cumplir en forma cumulativa, el examen de los restantes criterios exigidos con arreglo al artículo R37 del Código resulta innecesario en aras del principio de economía procesal. Simplemente el Árbitro Único desea mencionar, en lo que respecta a la posibilidad de éxito del Apelante, que el Árbitro Único a esa altura del procedimiento y de un análisis más pormenorizado del caso, entendía que existía una probabilidad muy alta de

⁸ CAS 2013/A/3199; CAS 2010/A/2071, 2007/A/1403, entre otros.

⁹ CAS 2005/A/916.

¹⁰ CAS 2021/A/8161 & 8162, CAS 2023/A/9684.

declarar la apelación inadmisibile.

85. Por tanto, el Árbitro Único determinó que debía desestimarse la solicitud de la Apelante de suspender la prohibición de fichajes impuesta hasta tanto existiera una decisión final.

V. JURISDICCIÓN DEL TAS

86. El Artículo R47 del Código establece:

“Se puede presentar una apelación contra la decisión de una federación, asociación u otra entidad deportiva ante el TAS si los estatutos o reglamentos de dicha entidad deportiva así lo establecen o si las partes han convenido un acuerdo de arbitraje específico y siempre que la parte apelante haya agotado los recursos legales de que dispone con anterioridad a la apelación, de conformidad con los estatutos o reglamentos de dicha entidad deportiva”.

87. El Artículo 56.1 de los Estatutos de la FIFA (edición 2022) establece:

“La FIFA reconocerá al Tribunal de Arbitraje Deportivo (TAS) con sede en Lausana (Suiza) a la hora de resolver disputas entre la FIFA y las federaciones miembro, las confederaciones, las ligas, los clubes, los jugadores, los oficiales, los agentes de fútbol y los agentes organizadores de partidos”.

88. Por último, las Partes reconocieron expresamente la jurisdicción que tiene el TAS para conocer el presente caso y suscribieron la respectiva Orden de Procedimiento, ratificando así el reconocimiento de la jurisdicción del TAS.

89. En razón a lo anterior, el Árbitro Único entiende que el TAS tiene plena jurisdicción para decidir el presente procedimiento.

VI. LEY APPLICABLE

90. El artículo R58 del Código establece:

“La Formación resolverá la controversia de acuerdo con las regulaciones aplicables y, subsidiariamente, con las normas jurídicas elegidas por las partes o, en ausencia de elección, de acuerdo con la ley del país en el que la federación, asociación o entidad deportiva que haya emitido la decisión recurrida esté domiciliada o de acuerdo con las normas jurídicas que la Formación considere apropiadas. En este último caso, la formación deberá motivar su decisión”.

91. Asimismo, artículo 56.2 del Estatuto de la FIFA establece:

“El procedimiento arbitral se regirá por las disposiciones del código de arbitraje en materia deportiva del TAS. En primer lugar, el TAS aplicará los diversos reglamentos de la FIFA y, de manera complementaria, el derecho suizo”.

92. Dado que la Decisión Apelada fue dictada por la Comisión Disciplinaria de FIFA, el Árbitro Único entiende que, de conformidad con lo antedicho, la ley aplicable al fondo de la presente disputa son el Estatuto y Reglamentos de la FIFA (con especial consideración al Código Disciplinario) y, subsidiariamente, el derecho suizo.

VII. ADMISIBILIDAD

93. Según el artículo R49 del Código:

“En ausencia de plazo fijado en los estatutos o reglamentos de la federación, asociación o entidad deportiva en cuestión o en un acuerdo previo, el plazo para presentar la apelación será de veintiún días a partir de la recepción de la decisión que es objeto de apelación”.

94. El artículo 57.1 del Estatuto de la FIFA

establece:

“Los recursos contra los fallos adoptados en última instancia por la FIFA, especialmente por sus órganos judiciales, así como contra las decisiones adoptadas por las confederaciones, las federaciones miembro o las ligas, deberán interponerse ante el TAS en un plazo de 21 días tras la recepción de la decisión”.

95. Por su parte, el artículo 38 del Código Disciplinario establece:

“38. Plazos

- 1. Los plazos empezarán a contar a partir del día siguiente a la notificación del documento correspondiente. Los plazos se considerarán cumplidos si la acción pertinente se completa como muy tarde en la medianoche (hora central europea) del último día del plazo fijado.*
- 2. Las festividades oficiales y los días no laborables estarán incluidos en los plazos. Los plazos quedarán interrumpidos entre el 20 de diciembre y el 5 de enero incluidos.*
- 3. Los plazos que hayan de respetar otras personas distintas a las federaciones comenzarán el día siguiente a la recepción del documento por parte de la federación responsable de remitirlo a la parte en cuestión, a menos que el documento se haya enviado también o únicamente a la persona en cuestión o a su representante legal. En caso de que el documento se haya enviado también o únicamente a las partes o a sus representantes legales, el plazo comenzará a contar al día siguiente de la recepción del documento por parte de los interesados.*
- 4. Cuando un plazo venza en sábado, en domingo o en una festividad del cantón suizo de Zúrich, en el que está situada la sede de la FIFA, se trasladará al siguiente día laborable.*

5. Toda persona que no respete un plazo perderá el derecho procesal en cuestión.

6. Los plazos previstos en el presente código no podrán ampliarse.”

96. En lo que respecta a la admisibilidad, el Árbitro Único deberá resolver las siguientes cuestiones:

- a) Validez de la notificación de la Decisión Apelada.
- b) Fecha de notificación de la Decisión Apelada. Suspensión de plazos durante receso.
- c) Admisibilidad de recepción por parte de la Federación como notificación subsidiaria.

VII.1 Validez de la notificación de la Decisión Apelada

97. El presente caso está precedido de errores, omisiones, actos negligentes e incumplimientos atribuibles al Apelante, así como de contradicciones y omisiones que podrían considerarse atribuibles a los Apelados, que lo hacen de difícil dilucidación (no solo por la decisión en sí misma sino por las consecuencias que puede acarrear). Por lo que, a la hora de tomar una decisión, el Árbitro Único deberá valorar cada uno de ellos en su justa medida. Y para hacerlo, comenzará haciendo un breve desarrollo de los antecedentes relacionados con el “Transfer Matching System” de FIFA (“TMS”) y el Portal Jurídico, para resaltar la evolución que ha tenido el TMS y los procedimientos jurisdiccionales ante la FIFA.

(i) El “Transfer Matching System” de FIFA

98. El TMS fue lanzado oficialmente en octubre del 2010 exclusivamente para las transferencias internacionales de jugadores, entendiéndose a estos efectos en su concepto amplio en el sentido de transferencias de jugadores entre clubes de distintas federaciones (propriadamente dichas), así como el registro de jugadores libres cuyo último club hubiese sido un club extranjero o solicitudes de autorización relativas a menores de edad conforme el artículo 19 del Reglamento sobre el Estatuto y Transferencia de Jugadores de FIFA (“RETJ”). En esa época, los usuarios del TMS debían ingresar al sistema exclusivamente en el marco de una transferencia internacional.
99. Hay que recordar también que, en aquel entonces, las demandas ante FIFA se presentaban vía fax y era normal que los clubes realizaran intimaciones o recibieran notificaciones a través de las Federaciones. Ello en virtud de la dificultad que implicaba muchas veces realizar intimaciones a clubes extranjeros y la certeza que se podía tener de que si se notificaba a la Federación, la Federación notificaría al club.
100. A partir del 1 de octubre de 2015, y conforme la Circular de FIFA N° 1500, todas las reclamaciones (y demás comunicaciones, contestaciones, decisiones, etc.) relacionadas con el Mecanismo de Solidaridad y Derecho de Formación empiezan a tramitarse exclusivamente a través del TMS. Y el reglamento del TMS fue modificado en consecuencia. Se empezó a exigir que los usuarios ingresaran al sistema por lo menos cada 3 días y se establecía que los clubes eran enteramente responsables de las desventajas de carácter procesal por no hacerlo. También se previó que las notificaciones se podrían hacer a través del TMS y que los plazos que se fijen serían legalmente válidos. De modo que a partir de allí, el TMS empieza a tener relevancia en el ámbito procesal y, en consecuencia, la omisión de sus usuarios podía acarrear consecuencias jurídicas negativas.
101. Posteriormente, se amplió el uso del TMS para la tramitación del certificado de transferencia internacional para jugadores de hasta 10 años (anteriormente el límite se fijaba en 12 años), para el fútbol femenino, para el fútbol 11 aficionado y se modificaron diversos reglamentos de FIFA con el fin de otorgarle efectos jurídicos a ciertos actos realizados a través del TMS, como ser la validez de notificaciones al domicilio electrónico que el club hubiese insertado.
102. A partir del 1 de enero de 2018, se deja de usar el fax en los procedimientos jurisdiccionales y la FIFA empieza a aceptar el e-mail como medio apto para realizar notificaciones.
103. En el año 2022 empezó a funcionar la Cámara de Compensaciones de FIFA, mediante la cual todos los procedimientos también se sustancian a través del TMS. Y en ese mismo año se anuncia, mediante la Circular 1795, de 25 de abril de 2022, la creación del Portal Jurídico a partir del 1 de mayo de 2022 (que tendría un período de transición hasta el 31 de diciembre de 2022). Dicho período de transición fue extendido y finalmente, mediante la Circular 1842, de 6 de abril de 2023, se determinó que a partir del 1° de mayo de 2023, todos los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA se tramitarán en forma exclusiva a través

del Portal Jurídico.

104. Además, en la Circular 1842 se informó que se habían aprobado varias enmiendas al marco reglamentario de la FIFA (Código Disciplinario, RETJ, Reglamento de Procedimientos y Código de Ética) a efectos de reflejar que todos los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA se gestionen exclusivamente a través del Portal Jurídico. Destacaremos debajo algunas de ellas.

105. En lo que respecta al Código Disciplinario, su artículo 48 (Comunicación con las partes) establece:

“2. Todas las notificaciones entre la FIFA y la parte afectada que tengan lugar durante los procedimientos ante los órganos judiciales de la FIFA se enviarán exclusivamente a través del portal jurídico de la FIFA. Las notificaciones enviadas a través del portal jurídico de la FIFA se considerarán un medio de comunicación válido y vinculante para establecer plazos y exigir su observancia.

- 3. Las partes y las federaciones deberán comprobar que sus datos de contacto, es decir, la dirección, el número de teléfono y la dirección de correo electrónico, sean correctos y estén siempre actualizados”.*

106. En lo que respecta al Reglamento de Procedimientos, su artículo 10 (Comunicaciones) establece:

“1. Toda la comunicación tendrá lugar a través del portal jurídico que gestiona la FIFA (el «portal jurídico») o el sistema de correlación de transferencias de la FIFA (el «TMS»).

- 3. Las partes deberán revisar a diario el TMS y el portal jurídico para comprobar si han*

recibido comunicaciones de la FIFA. Las partes asumirán la responsabilidad de los perjuicios procesales que resulten del incumplimiento de dicha revisión. Los datos de contacto que se indican en el TMS son vinculantes para la parte que los facilita”.

107. En lo que respecta al RETJ, el Título 3 establece, entre otras cosas, que los clubes son responsables de todas las acciones que realicen sus usuarios del TMS y siempre deberán: a) acceder el TMS periódicamente para asegurarse de cumplir con sus obligaciones en todo momento; b) comprobar que la dirección de correo electrónico de todos los usuarios del TMS autorizados sea válida y esté en funcionamiento; c) velar por que la información introducida sea veraz y correcta; y d) comprobar que sus datos de contacto, es decir, la dirección, el teléfono y el correo electrónico, sean correctos y estén siempre actualizados.

108. En definitiva, hace 14 años que el uso del TMS viene en constante evolución y la FIFA ha venido alertando por medio de distintas modificaciones reglamentarias, circulares y comunicaciones, que es obligación de las partes mantener actualizado en todo momento los datos en el TMS, que es obligación de las partes ingresar al TMS a diario, que la FIFA se puede servir de dichos datos para realizar notificaciones, que dichos datos son vinculantes para la parte que los facilita y que dicha parte es responsable de los perjuicios o desventajas de carácter procesal que puedan ocasionarse.

(ii) El Portal Jurídico de FIFA

109. Con fecha 25 de abril de 2022, mediante la Circular 1795, la FIFA comunicó la creación del Portal Jurídico que empezaría a estar operativo a partir del 1

de mayo de 2022.

110. En la Circular 1795 se estableció, entre otras cosas, que el Portal Jurídico es una plataforma en la cual se llevarán adelante los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA.

111. Asimismo, se informó que los usuarios debían crear una cuenta y que dicho portal sustituiría en forma gradual el actual sistema de correo electrónico. Para ello, se instauró un procedimiento de transición hasta el 31 de diciembre de 2022 (en el cual se podría utilizar el Portal Jurídico para casos nuevos, pero también se permitiría el sistema de comunicación mediante correo electrónico) y se informó que después de esa fecha, los procedimientos se tramitarían únicamente a través del Portal Jurídico.

112. Con fecha 6 de abril de 2023, mediante la Circular 1842, la FIFA determina que a partir del 1 de mayo de 2023, todos los procedimientos ante el Tribunal del Fútbol u órganos judiciales de la FIFA (nuevos o en curso) se tramitarán en forma obligatoria y exclusiva a través del Portal Jurídico (incluida la notificación de las decisiones adoptadas). Por tanto, a partir del 1 de mayo de 2023, se dejarían de admitir alegaciones y otros tipos de correspondencia enviados por otros medios (como correo electrónico).

113. En la Circular 1842 también se establece que quien desee acceder al portal deberá crear una cuenta y se recomienda encarecidamente que utilicen la misma dirección de correo electrónico que figura en la pestaña de “Contacto” del TMS. Y recuerda que la información facilitada a través del TMS y del portal jurídico es vinculante para la parte implicada.

114. Además, la Circular N° 1842 estableció que si una de las partes implicadas en un procedimiento no dispusiera de una cuenta en el portal jurídico, la FIFA le informará por correo electrónico – o a través de la federación miembro o club correspondiente – de los procedimientos en curso y le invitará a crear una cuenta en un plazo máximo de tres días a partir de la notificación. Asimismo, le comunicará a dicha parte que carecer de una cuenta resultaría perjudicial para sus intereses dado que los procedimientos se llevarán a cabo exclusivamente a través del portal.

115. Finalmente, la FIFA también emitió un documento de Preguntas Frecuentes en el que se reiteró que:

“Desde el 1 de mayo de 2023, el portal jurídico es el canal de uso obligatorio y el único medio de comunicación válido [...]. La FIFA también se comunicará con las partes de la demanda a través del portal jurídico usando los datos de contacto que haya facilitado la parte en cuestión, ya sea en el propio portal o en el sistema de correlación de transferencias de la FIFA (TMS). Los datos de contacto que se faciliten en el portal jurídico o en el TMS serán vinculantes para la parte que los haya especificado. Las partes que tengan un identificador de parte interesada del fútbol o cuenta en el TMS deberán cerciorarse de que sus datos de contacto estén siempre actualizados (v. art. 10, apdo. 4 del reglamento de procedimiento). Las federaciones miembro y los clubes asumirán la responsabilidad de los perjuicios procesales que resulten del incumplimiento de dicha revisión” (el subrayado es nuestro).

116. De la lectura de la Circular 1842 se desprende que la FIFA no actuó enteramente en consonancia con lo que allí dice. Y ello es algo que no se puede entender. Porque la FIFA, en lugar de

solicitar al Apelante que cree su cuenta en el Portal Jurídico, le creó una cuenta y utilizó un correo electrónico que Quilmes había insertado en la pestaña “General”, en lugar de tomar el correo electrónico de la pestaña de “Contacto”, que la FIFA encarecidamente había recomendado utilizar.

117. Además, quedó acreditado que en realidad, la FIFA ya le había creado a Quilmes un usuario el 25 de octubre de 2023, es decir casi dos meses antes. De hecho, la propia FIFA en la Audiencia reconoció que ha creado en forma automática usuarios en el Portal Jurídico a clubes que no lo hubiesen hecho.
118. Sin perjuicio de lo anterior, que no tiene coherencia y que debe ser un llamado de atención para la FIFA, el Árbitro Único debe analizar si las contradicciones en el proceder de FIFA son de tal naturaleza que puedan determinar la nulidad de la notificación en este caso concreto.

(iii) El proceder de la FIFA

119. El Árbitro Único entiende que por más “encarecida” que haya sido la recomendación de FIFA de utilizar la dirección de e-mail de la pestaña de “Contacto” del TMS, no deja de ser eso; una recomendación. Pero no existe ningún tipo de obligación de que la dirección de e-mail del Portal Jurídico sea la misma que la del TMS y, tal cual fuera mencionado en forma precedente, todos los datos facilitados en el TMS tienen carácter vinculante y los clubes deben asumir la responsabilidad de los perjuicios procesales que resulten del incumplimiento de su revisión.
120. Además, cuando una parte ofrece varios contactos, las notificaciones pueden ser enviadas a cualquiera de esos contactos,

tal como fuera establecido en el asunto CAS 2020/A/7455:

“In this regard, the Panel agrees with the principles set out by the Sole Arbitrator in CAS 2020/A/7356 that in order for the Opening Letter to be notified to an addressee, ‘[i]f a company or association grants authority to serve as a point of contact to several representatives, communications can be sent to either of the representatives’” (el subrayado es nuestro).

En español (traducción informal):

“En este sentido, el Panel está de acuerdo con los principios establecidos por el Árbitro Único en CAS 2020/A/7356 en el sentido de que para que la Carta de Apertura sea notificada a un destinatario, ‘[s]i una compañía o asociación otorga autoridad para servir como punto de contacto a varios representantes, las comunicaciones pueden ser enviadas a cualquiera de los representantes’”.

121. Asimismo, el Árbitro Único desea resaltar algunos artículos del Código Disciplinario, de aplicación inmediata en función de la creación del Portal Jurídico.
122. La primera de ellas, es el artículo 48.3 del Código Disciplinario que, cuando hace referencia a que los clubes tienen la obligación de mantener sus datos de contacto actualizados, enuncia la dirección, el número de teléfono y la dirección de correo electrónico. Es de notar que dichos datos pueden verse en la pestaña “General” del TMS y el Portal Jurídico, pero no en la pestaña de “Contacto” del TMS que no contiene ningún casillero de dirección.
123. Además, el propio artículo 48.2 del Código Disciplinario limita el accionar de la FIFA porque establece que todas las comunicaciones se enviarán

exclusivamente a través del Portal Jurídico. O sea que la FIFA no puede utilizar otro medio que no sea el del Portal Jurídico porque, de hacerlo, estaría contraviniendo el Código Disciplinario. Y si un club no tiene cuenta en el Portal Jurídico, no podría notificarlo.

124. De un análisis de la comunicación de la FIFA, de fecha 14 de diciembre de 2023, se desprende que si bien la FIFA comunica que le había creado el usuario en el Portal Jurídico, lo invita a cambiar sus datos de contacto o crear una cuenta nueva. Y la Circular 1842 prevé que si una parte no dispusiera de una cuenta, la FIFA le comunicará de los procedimientos en curso (es decir, el procedimiento está en curso y no en suspenso) y le invitará a crear una cuenta en el plazo máximo de tres días a partir de la notificación. Pero ello no implica que los efectos de lo que se estuviese notificando empezaran a correr a partir del tercer día.
125. En definitiva, Quilmes tenía la obligación de crear su usuario y fue alertado con mucha antelación que debía hacerlo al igual que todos los clubes (mediante Circulares, comunicaciones y modificaciones de reglamentos).
126. Además, asumiendo por un momento la posición del Apelante, en el hipotético caso que la FIFA no le hubiese creado la cuenta al Apelante, el resultado hubiese sido el mismo. La FIFA hubiese enviado un e-mail al Apelante informando que había un procedimiento en curso y que tenía que crear la casilla. El e-mail hubiese sido enviado a la dirección que el Apelante introdujo voluntariamente en el TMS, el 27 de mayo de 2020, por medio de una persona que declaró ser

usuaria del TMS hace 7 años. Cabe decir que el e-mail que esa persona introdujo era su propio e-mail y el error alegado fue en la forma en cómo escribió su propio apellido. Al estar la FIFA amparada reglamentariamente a utilizar en sus comunicaciones cualquiera de los datos de contacto proporcionados en el TMS, si hubiese enviado el e-mail a esa dirección informando sobre la apertura del procedimiento y la necesidad de crear una cuenta en el Portal Jurídico (en vez de crearlo directamente, como lo hizo), el Apelante no hubiese abierto la cuenta.

127. Por tanto, ni siquiera se podría sostener que la Circular 1842 indujo en error al Apelante. El error alegado por el Apelante fue cometido antes de la existencia de la Circular 1842 y persistió durante casi 4 años. De hecho, el Apelante no alegó ni en la Declaración de Apelación ni en la Memoria de Apelación estas inexactitudes de la Circular 1842. Recién fueron planteadas con la presentación posterior de las medidas cautelares (alrededor de 4 meses y medio después que se presentara la Declaración de Apelación). Tampoco se alegó que Quilmes hubiese sido omiso en controlar la dirección de e-mail de la pestaña “General” por el hecho de que en la Circular 1842 se hacía referencia a la pestaña de “Contactos”; sino que se limitaron a hacer notar (de forma correcta) las inexactitudes. Pero ello devela que el error y omisión de Quilmes no fue consecuencia de las inexactitudes de la Circular 1842. De lo contrario, hubiese sido el primer argumento que Quilmes hubiese planteado.
128. Tampoco puede dejar de observarse que tanto en la comunicación del 14 de diciembre de 2023, como en la del 20 de diciembre de 2023, la FIFA puso en

copia a la AFA y le solicitó, en las dos oportunidades, que se lo reenvíe inmediatamente al Apelante. En este sentido, cabe recordar que el artículo 48.3 del Código Disciplinario establece: “Las decisiones, así como cualquier otro documento cuyos destinatarios sean los jugadores, los clubes o los oficiales, se remitirán a la federación correspondiente, y será obligación de esta trasladar el documento a los interesados”.

129. Por tanto, el Árbitro Único entiende que la FIFA adoptó todas las medidas que razonablemente tenía a su alcance, conforme la normativa aplicable, para poder notificar al Apelante.

(iv) Recepción de la notificación

130. Lo antedicho nos lleva al análisis de la interpretación que se hace en el derecho suizo sobre la recepción de una notificación. Y en este sentido, es conocida la jurisprudencia del TAS en relación al concepto de la esfera de control o influencia. No obstante, el presente caso no solo debe analizarse desde esa perspectiva, sino también desde una perspectiva o etapa previa.
131. Siguiendo esa línea de análisis, destacamos lo establecido en el asunto CAS 2020/A/7267:

“A preliminary obligation rests on the parties and the national associations. They, in fact, need to ensure that their contacts on the TMS “are valid and kept up to date at all times” in order for FIFA to unequivocally identify their address for notification purposes”.

En español (traducción informal):

“Una obligación previa recae sobre las partes y las asociaciones nacionales. En efecto, deben asegurarse de que sus contactos en el TMS ‘son válidos y se mantienen actualizados en todo

momento’ para que la FIFA pueda identificar inequívocamente su dirección a efectos de notificación”.

132. Además, cabe destacar lo establecido en el asunto CAS 2020/A/7455:

“Based on the above-mentioned proof of delivery of the Opening Letter to the addresses which were indisputably to be found in the TMS as valid contacts for the Club, the Panel is satisfied that the Opening Letter was in fact duly notified to the Club even if, as submitted by the Club, it was not opened by anybody until the receipt of the Appealed Letter. This is in line with CAS jurisprudence (e.g. CAS 2016/A/4817, para. 89).

It follows directly from Article 9bis (3) of the Procedural Rules that “The parties and associations must ensure that their contact details (e.g. address, telephone number and email address) are valid and kept up to date at all times”, and the Panel therefore finds that FIFA was entitled to rely on the contact information inserted by the Club in the TMS...”.

En español (traducción informal):

“Basándose en la prueba anteriormente mencionada de la entrega de la carta de apertura a las direcciones que indiscutiblemente se encontraban en el TMS como contactos válidos para el Club, el Panel está convencido de que la carta de apertura fue, de hecho, debidamente notificada al Club incluso si, como afirma el Club, no fue abierta por nadie hasta la recepción de la carta recurrida. Esto está en consonancia con la jurisprudencia del TAD (por ejemplo, CAS 2016/A/4817, párrafo 89).

Del artículo 9bis (3) del Reglamento Procesal se desprende directamente que ‘Las partes y asociaciones deben garantizar que sus datos de contacto (por ejemplo, dirección, número de teléfono y dirección de correo electrónico) sean válidos y se mantengan actualizados en todo

momento', por lo que el Panel considera que la FIFA tenía derecho a basarse en la información de contacto insertada por el Club en el TMS ...".

133. Además, en el asunto CAS 2022/A/8598 se establece:

"In this context, a recipient's mailbox belongs to the sphere of control when the recipient indicated that it could be reached via such email address. Once a message leaves the sender's sphere of control, it is in principle deemed to be received by the recipient".

En español (traducción informal):

"En este contexto, el mail de un destinatario pertenece a la esfera de control cuando el destinatario indicó que podía ser contactado a través de dicha dirección de correo electrónico. Una vez que un mensaje sale de la esfera de control del remitente, en principio se considera recibido por el destinatario".

134. En forma similar, en el asunto CAS 2020/A/6918 se estableció que:

"Receipt of the decision for the purposes of art. R49 of the CAS Code means that the decision must have come into the relevant party's sphere of control (party her/himself or her/his representative or agent authorized to take receipt). Receipt does not imply that said party actually took note of the content of the decision. Instead, it suffices that the party concerned had a (reasonable) possibility of taking note of the decision. It is recognized in Austrian case law that a recipient's e-mail box belongs to his/her sphere of control, at least if s/he has indicated that s/he can be reached via such e-mail address.

The Panel's assessment is based on extensive case CAS jurisprudence whereby "receipt" does not imply (HAAS U., "The Time Limit for Appeal in Arbitration Proceedings before the Court of Arbitration for Sport", CAS Bulletin

2/2011, p. 11) that the party concerned actually took note of the content 11 CAS 2020/A/6918 Cristina Iovu v. IWF, award of 4 February 2021 of the decision concerned (CAS 2006/A/1153, no. 40; see also CAS 2004/A/574, no. 60; MAVROMATI/REEB, "CAS Code Commentary", Art. 49 no. 95; RIGOZZI/HASLER, Article R49: Time Limit for Appeal, in ARROYO M., Arbitration in Switzerland, Wolters Kluwer 2013, p. 1003 at 9; HAAS U., op. cit. supra)".

En español (traducción informal):

"La recepción de la decisión a efectos del art. R49 del Código del TAS significa que la decisión debe haber llegado a la esfera de control de la parte pertinente (la propia parte o su representante o agente autorizado para recibirla). La recepción no implica que dicha parte haya tomado efectivamente nota del contenido de la decisión. En su lugar, basta con que la parte interesada tuviera la posibilidad (razonable) de tomar nota de la decisión. La jurisprudencia austriaca reconoce que el buzón de correo electrónico de un destinatario pertenece a su esfera de control, al menos si ha indicado que se le puede localizar a través de dicha dirección de correo electrónico.

La apreciación del Panel se basa en una amplia jurisprudencia del TAS según la cual la «recepción» no implica (HAAS U., «The Time Limit for Appeal in Arbitration Proceedings before the Court of Arbitration for Sport», CAS Bulletin 2/2011, p. 11) que la parte interesada haya tomado realmente nota del contenido 11 CAS 2020/A/6918 Cristina Iovu v. IWF, laudo de 4 de febrero de 2021 de la decisión en cuestión (CAS 2006/A/1153, no. 40; véase también CAS 2004/A/574, n° 60; MAVROMATI/REEB, «CAS Code Commentary», Art. 49 n° 95; RIGOZZI/HASLER, Article R49: Time

Limit for Appeal, en ARROYO M., Arbitration in Switzerland, Wolters Kluwer 2013, p. 1003 at 9; HAAS U., op. cit. supra)”.

135. Es imposible obviar en este asunto que fue el propio Apelante quien proporcionó la dirección de e-mail en el TMS. Por tanto, en el mismo sentido que las citas jurisprudenciales de los párrafos anteriores, el Apelante indicó que podía ser notificado a esa dirección de e-mail. Del mismo modo que si una parte en un contrato o en una demanda constituye en forma errónea su domicilio; dicha parte no puede excusarse de su propio error (principio *nemo auditor propriam turpitudinem allegans*) porque la contraparte (que no tiene por qué conocer ni verificar dicha información) tiene una expectativa legítima de que va a poder notificarlo en el domicilio denunciado o constituido. Sostener lo contrario, implicaría dejar la posibilidad de ser notificado al arbitrio del omiso o causante del error. Por tanto, las notificaciones a esa dirección se deben considerar válidas y el omiso o causante del error debe asumir las consecuencias.
136. A entender del Árbitro Único, lo antedicho no implica caer en un formalismo excesivo. Porque el problema en cuestión, no se da exclusivamente por (según fuera alegado por el Apelante) un error de tipeo que tiene, como contrapartida, la imposibilidad de defenderse. Esa sería la fotografía. Pero la película entera, demuestra que hubo un cúmulo de incumplimientos, errores, omisiones y acciones negligentes (que se han perpetuado a lo largo de los años) que determinan este desenlace.
137. Asimismo, admitir la posición del

Apelante sería hasta riesgoso para el sistema jurisdiccional de la FIFA en su conjunto. Porque cualquier usuario de TMS puede cambiar las direcciones de e-mail en cualquier momento. Según fuera declarado por la FIFA en la Audiencia, la FIFA ha creado cuentas en el Portal Jurídico con direcciones que están en el TMS. Admitir como no válidas direcciones que puedan tener un error (cometidas por los propios encargados y obligados a ingresarlas), acarrearía la falta de seguridad jurídica del propio sistema, ya que cualquiera podría darse por no notificado alegando su propio error.

138. Cabe resaltar también que una gran parte de las decisiones de los órganos jurisdiccionales de FIFA son notificadas a más de una parte al mismo tiempo. Y muchas veces ambas partes apelan la decisión. Por tanto, admitir la posición del Apelante llevaría a sostener que puedan existir plazos distintos para apelar y ello también atentaría contra el principio de igualdad de las partes en el procedimiento.
139. La FIFA viene hace años generando conciencia sobre la importancia de mantener los datos de contacto del TMS actualizados. Ha modificado reglamentos en el sentido de determinar que las notificaciones por medio del TMS son vinculantes y que pueden generar perjuicios procedimentales. Ha creado un sistema nuevo que lo comunicó con más de un año de anticipación. La usuaria del TMS de Quilmes maneja el TMS hace siete años, por lo que debiera conocer cabalmente todas las obligaciones y responsabilidades derivadas de su uso, además de recibir (precisamente por su condición de usuaria del TMS) todas las comunicaciones de la FIFA que le

permiten mantenerse actualizada con todas las modificaciones pertinentes. Hubo un período de transición antes de la implementación del Portal Jurídico que le permitió a los actores del fútbol migrar progresivamente al nuevo sistema sin que implique un cambio radical de un día para el otro. Y pese a todo ello, Quilmes mantuvo una dirección que dice ser errónea durante 4 años y no fue capaz de crear su cuenta en el Portal Jurídico.

140. Por tanto, a entender del Árbitro Único, la negligencia del Apelante es de tal entidad que hace que Quilmes deba afrontar las consecuencias negativas de su accionar omiso y que dicho accionar omiso no pueda ir en detrimento del Primer Apelado.

VII.2 Fecha de notificación de la Decisión Apelada. Suspensión de plazos durante receso

141. El artículo 38 del Código Disciplinario claramente señala que los días inhábiles cuentan para el cómputo del plazo y únicamente en caso de que el vencimiento ocurra en sábado, domingo o día inhábil, se trasladará al día siguiente laborable. Considerando que ningún plazo venció (al contrario, empezó) el sábado 6 de enero 2024, no aplica ningún tipo de traslado al día hábil/laborable siguiente.
142. En este sentido, el Árbitro Único está de acuerdo con la posición de los Apelados en lo que respecta a que la notificación es efectiva el día que se hace, independientemente de si dicho día es inhábil o festivo y que la referencia al traslado desde un día inhábil al primer día hábil es exclusivamente cuando el plazo venza el día inhábil. Por tanto, la notificación de la Decisión Apelada debe considerarse válidamente realizada el 20

de diciembre de 2023.

143. Solo con ese elemento, habría que concluir que la Declaración de Apelación fue presentada fuera de plazo.
144. No obstante, el Árbitro Único no comparte la posición de ninguna de las Partes en lo que respecta a la suspensión de los plazos entre los días 20 de diciembre y 5 de enero. En este sentido, conforme al asunto CAS 2022/A/8598:

“Similarly, with regard to the Appellant’s claim that the time limit to file the Statement of Appeal was interrupted from 20 December 2021 until 5 January 2022 inclusive in accordance with Article 34 (2) of the FDC, the Panel finds that there is no reason to revisit the lack of suspension of time limits in CAS proceedings, which has long been recognised by legal writing based on Article R32 of the CAS Code and the need for the highest sports justice to function efficiently (see e.g. Mavromati/Reeb, op. cit., p. 131; Rigozzi/Hasler, op. cit., N16, p. 1603). Article 34 (2) of the FDC, according to which “time limits are interrupted from 20 December to 5 January inclusive”, makes no difference in this respect. Clearly, this suspension is intended to apply only to FIFA’s internal procedures (i.e. the procedures carried out before its Disciplinary and Appeal Committees), rather than to CAS procedures, pursuant to Article 1 of the FDC:

“This Code describes infringements of the rules in FIFA regulations, determines the sanctions incurred, regulates the organisation and function of the FIFA judicial bodies responsible for taking decisions and the procedures to be followed before said bodies.

(...)

Even admitting the opposite, Article 34 (2) FDC would, in any event, be disregarded due to the primacy of the FIFA Statutes over other

potentially contradictory lower-level procedural rules. In this respect, the Panel fully adheres to the view expressed by a CAS Panel in a 2008 award, quoted by the Respondent, and rendered in a similar case:

[...] the question of time limits relating to appeals to CAS are dealt with – exhaustively – in Chapter VIII of the FIFA Statutes. In particular the time limit for appeals to CAS is regulated in Art. 62(1) of the FIFA Statutes [...] No reference is made in chapter VIII of the FIFA Statutes to lower level provisions. No power is granted to specific organs within FIFA to further outline or complement Art. 61(1) of the FIFA Statutes. From this it follows, that changes from the provisions dealing with time limits for appeals to the CAS are in the sole competence of the FIFA Congress (Art. 26(1) of the FIFA Statutes. It is questionable in the case at hand whether Art. 15 of the DRC Procedural Rules materially changes Art. 63(1) of the FIFA Statutes. If that were the case this would amount to a failure to uphold the principle of legality that calls for inferior rules and regulations to be in conformity with the statutes. This would result in Art. 15(1) of the DRC Rules being inapplicable (CAS 2008/A/1705, paras 28-30)”.

En español (traducción libre):

“Del mismo modo, con respecto a la alegación de la recurrente de que el plazo para presentar el escrito de apelación se interrumpió desde el 20 de diciembre de 2021 hasta el 5 de enero de 2022 inclusive, de conformidad con el artículo 34, apartado 2, del CDF, la Formación Arbitral considera que no hay motivo para volver a revisar la ausencia de suspensión de los plazos en los procedimientos del TAS, que ha sido reconocida desde hace tiempo por la doctrina jurídica sobre la base del artículo R32 del Código del TAS y la necesidad de que la más alta justicia deportiva funcione eficazmente (véanse, por ejemplo, Mavromati/Reeb, op. cit.,

p. 131; Rigozzi/Hasler, op. cit., N16, p. 1603). El artículo 34 (2) del CDF, según el cual “los plazos se interrumpen del 20 de diciembre al 5 de enero, ambos inclusive”, no establece ninguna diferencia a este respecto. Evidentemente, esta suspensión está destinada a aplicarse únicamente a los procedimientos internos de la FIFA (es decir, los procedimientos llevados a cabo ante sus Comités Disciplinario y de Apelación), y no a los procedimientos del TAS, de conformidad con el artículo 1 del CDF:

El presente Código describe las infracciones de las normas de los reglamentos de la FIFA, determina las sanciones en que se incurre, regula la organización y el funcionamiento de los órganos judiciales de la FIFA encargados de tomar decisiones y los procedimientos que deben seguirse ante dichos órganos” (el subrayado es nuestro).

(...)

Incluso admitiendo lo contrario, el artículo 34 (2) del CDF debiera ser, en cualquier caso, desestimado debido a la primacía de los Estatutos de la FIFA sobre otras normas procesales de rango inferior potencialmente contradictorias. En este sentido, la Formación Arbitral adhiere plenamente a la opinión expresada por un Panel del TAS en un laudo de 2008, citado por el Demandado, y dictado en un caso similar:

[...] la cuestión de los plazos relativos a los recursos ante el TAS se trata - exhaustivamente - en el Capítulo VIII de los Estatutos de la FIFA. En particular, el plazo para recurrir ante el TAS se regula en el Art. 62(1) de los Estatutos de la FIFA [...] En el Capítulo VIII de los Estatutos de la FIFA no se hace referencia a disposiciones de rango inferior. No se concede ningún poder a órganos específicos de la FIFA para perfilar o complementar el art. 61(1) de los Estatutos de la FIFA. De ello se deduce que las modificaciones de las disposiciones

relativas a los plazos de recurso ante el TAS son competencia exclusiva del Congreso de la FIFA (art. 26(1) de los Estatutos de la FIFA). En el caso que nos ocupa, es cuestionable si el Art. 15 del Reglamento de Procedimientos de la CRD modifica materialmente el Art. 63(1) de los Estatutos de la FIFA. Si así fuera, se incumpliría el principio de legalidad que exige que las normas y reglamentos inferiores sean conformes con los estatutos. Esto daría lugar al Art. 15(1) del Reglamento RDC sería inaplicable (CAS 2008/A/1705, párrafos 28-30)”.

145. La Formación Arbitral concluyó que el plazo de 21 días establecido por el artículo R49 del Código del TAS y el artículo 57 (1) de los Estatutos de la FIFA no se extiende mediante la aplicación de derecho civil suizo ni se suspende mediante el receso referido en el Código Disciplinario, o cualquier otra disposición procesal similar. Cabe destacar además, que se presentó recurso de apelación contra este laudo frente al Tribunal Federal Suizo y fue rechazado¹¹.
146. Por último, el procedimiento de apelación está regulado por el Código y no por reglas procesales de la FIFA. Y el Código no establece en ninguna parte que el plazo para apelar se suspenda durante días festivos o inhábiles. Por tanto, el artículo 38 del Código Disciplinario, aplica a procedimientos internos de FIFA (a vía de ejemplo, para los plazos establecidos en los artículos 54, 57 y 60 del Código Disciplinario) pero no para la apelación ante el TAS.
147. En definitiva, el plazo para apelar no estaba suspendido entre el 20 de

diciembre y el 5 de enero.

VII.3. Admisibilidad de recepción por parte de la Federación como notificación subsidiaria

148. En lo que respecta a este último punto, si bien fue inicialmente planteado por el Apelante en sus escritos, luego el propio Apelante en la Audiencia lo desestimó por entender que no aplicaba al caso concreto. El Árbitro Único concuerda con esta posición, pero por una cuestión de economía procesal no lo analizará en detalle.
149. Sin perjuicio de ello, aún si se hubiese considerado esta segunda hipótesis, el Árbitro Único entiende que ni siquiera así podría haberse considerado que la Declaración de Apelación se hubiese presentado en tiempo y forma.
150. En definitiva, la Declaración de Apelación presentada el 2 de febrero de 2024 es inadmisibile.

VIII. CONSIDERACIONES FINALES

151. El origen de esta apelación se da con la Propuesta de la FIFA. El Apelante no solo cuestionó el hecho de la notificación, sino también la propuesta en sí misma por tratarse de un tema que se había dilucidado en un procedimiento disciplinario previo y que la Comisión Disciplinaria había cerrado porque el Apelante se encontraba en “Concurso Preventivo”. En este sentido, y en lo que respecta a la postura de la FIFA al emitir la Decisión Apelada, cabe decir que el artículo 59 del Código Disciplinario (en su versión en inglés¹²) establece que la

¹¹ 4A_176/2023.

¹² Proceedings **may be closed** when: [...] b) a party is under insolvency or bankruptcy proceedings pursuant to the relevant national law and is legally unable to comply with an order.

- FIFA puede clausurar el procedimiento ante situaciones como las del Apelante, pero no es una obligación. Por tanto, además de que ello no fue objeto de este proceso, el Árbitro Único tampoco puede cuestionar dicho proceder en esta instancia.
152. El Apelante ha planteado diversas alegaciones a efectos de que se declare la nulidad de la notificación de la Decisión Apelada.
 153. Ha quedado debidamente acreditado que el hecho de que el Apelante haya recibido muchas comunicaciones a la dirección de e-mail que dice ser la correcta, fue debido a que dicha dirección había sido insertada en la pestaña de “Contactos” del TMS, y que la supuesta dirección incorrecta estaba en la pestaña “General” del TMS. Por tanto, dichas comunicaciones eran enviadas a quien figuraba como usuaria del TMS. Y según fuera expresado en forma precedente, la FIFA puede servirse de todos los datos de contacto del TMS, ya sea los de la pestaña “General” como los de la pestaña de “Contactos”.
 154. Asimismo, el hecho de que la FIFA no haya notificado al asesor legal que asesoró al Apelante durante el primer procedimiento disciplinario, tampoco es relevante ya que la obligación de FIFA es la de notificar a la parte. De hecho, la FIFA tampoco puede saber si el Apelante mantenía el mismo asesor legal que había llevado adelante dicho procedimiento 3 años atrás.
 155. El Apelante fue variando sus argumentos durante el proceso. Primero argumentó, en la Declaración de Apelación y en su escrito de respuesta al planteo de inadmisibilidad, que no había sido notificado y que recién tomó conocimiento el 1º de febrero de 2024 cuando le notifican la prohibición de registrar jugadores. Pero que aún si se quisiera considerar que sí había sido efectivamente notificado, reglamentariamente se debería considerar notificado el 12 de enero de 2024 (a través de la AFA). Después alegó, en su escrito de solicitud de medida cautelar, que había inconsistencias en la Circular de FIFA, pero no que dichas inconsistencias hubieran inducido en error al Apelante. Y finalmente, en la Audiencia, se desdijo del primero de sus argumentos, relacionado con la notificación a través de la AFA, por entender que no era aplicable y en definitiva alegó que la notificación debería considerarse nula.
 156. El común denominador de este asunto es que cada consecuencia negativa que se observa está siempre precedida de un error, omisión o negligencia de Quilmes. Primero, existió una transferencia de un jugador que Quilmes no pagó. Segundo, la Decisión de la CEJ confirmó el incumplimiento y no fue apelada, lo que devino en cosa juzgada. Tercero, Quilmes incumplió la Decisión de la CEJ. Cuarto, hubo una omisión de Quilmes de cumplir con la obligación de denunciar la deuda ante el concurso, conforme el artículo 11 de la Ley N° 24.522 (Ley de Concursos y Quiebras) de Argentina. Quinto, hubo un supuesto error de Quilmes al momento de insertar la dirección de e-mail en el TMS. Sexto, hubo una omisión de Quilmes en controlar que la información del TMS estuviese correcta (que se mantuvo durante casi 4 años). Séptimo, hubo una omisión de Quilmes de cumplir con su obligación de crear un usuario en el Portal Legal después que la FIFA lo

venía anunciando hace más de 1 año y ya había modificado los respectivos reglamentos en consecuencia.

157. Como contrapartida a todo lo anterior, está Unión La Calera; un club que tiene un crédito contra Quilmes hace 7 años, respaldado en una Decisión de la CEJ que es cosa juzgada. Y todos los errores de Quilmes no pueden ser usados para perjudicar al que tiene un legítimo derecho de cobrar lo que le corresponde.
158. Por tanto, a pesar de que las consecuencias de este caso para el Apelante puedan ser inciertas, el Árbitro Único no puede hacer otra cosa que declarar inadmisibile la Declaración de Apelación y no puede entrar a analizar el fondo del asunto.

EN VIRTUD DE ELLO

El Tribunal Arbitral del Deporte resuelve:

1. La apelación presentada por El Quilmes Atlético Club contra la Decisión FDD-16947 de la Comisión Disciplinaria de FIFA, de fecha 20 de diciembre de 2023, es inadmisibile.
2. Confirmar la Decisión FDD-16947 de la Comisión Disciplinaria de FIFA, de fecha 20 de diciembre de 2023.
3. (...).
4. (...).
5. Las demás solicitudes de las Partes son rechazadas.

Football; Termination of an employment contract with just cause by a football player; Consideration of additional documentation presented by an appellant at a late stage of the proceedings; Rejection of a request for provisional measures that did not meet all the criteria of article R37 of the CAS Code; Potestative nature of a clause giving a club a unilateral power to reduce a player's salary; Calculation of the amount of a player's monthly salary under Article 14bis of the FIFA RSTP; Calculation of the amount payable by a club to a player who terminated the parties' employment contract with just cause; Challenge of the imposition of a registration ban on a club

Panel

Mr Jonathan Hall (United Kingdom),
President
Mr Jacopo Tognon (Italy)
Mr João Nogueira da Rocha (Portugal)

1. Presented with additional documentation at a late stage of the proceedings by an appellant, a panel can decide to consider such documentation within its powers under Article R44.3 of the CAS Code (and not Articles R56 and R57) where it could deem it appropriate to supplement the presentations of the parties and accept additional documents. On this basis an appellant can be allowed to refer to the additional documentation and the panel would decide on its

relevance as part of its decision.

2. If an appellant's potential on-field harm is quite speculative and its financial harm is irrelevant, it is hard at the stage of a request for provisional measures to establish the likelihood of success on the merits of said appellant's claim (not least because the relevant panel has not yet had the opportunity to hear directly from the parties and/or the witnesses in the hearing). In addition, the interest of an appellant club's suffering from an ongoing registration ban does not, on balance, outweigh the interests of FIFA in maintaining contractual stability for all clubs and players operating within its jurisdiction.
3. A clause indicating that 25% of the value of a player's contract is to be set aside and paid after the end of the season in case the player participated in 80% of the club's matches contains a variable part of the player's salary and makes its payment contingent on his participation in matches. Such clause is potestative in nature as it gives the club the unilateral power to decide upon a considerable reduction of the player's salary, since the club, at its sole discretion, could decide on the player's participation or not. On this basis, it has an abusive nature and has no legal effect.
4. For the purposes of calculating a monthly amount of salary under Article 14bis of the FIFA Regulations on the Status and Transfer of Players (RSTP), one has to take into account the full amount owed to a player over the full term of the contract, the actual number of months

representing the full term and the valid deductions of taxes and/or fees.

5. In application of the principle of “positive interest”, which leads to determine an amount of compensation which puts the injured party in the position it would have been in had the contract been performed properly, contractual bonuses with little evidence provided on the likelihood of becoming due over the remainder of the contract and deemed too uncertain, should be discounted from the damages calculation. Additionally, housing allowance should not be taken into account for the remainder of the contract as, following termination, there would be no basis on which this expense could be determined. Furthermore, as Article 17(1) of the FIFA RSTP requires panels to take into account, *inter alia*, the law of the country concerned and considering the aim of the “positive interest” principle, a player should receive as compensation the gross amounts less the taxes/fees that would have been deducted had there been no contractual breach. The amount of compensation corresponding to three monthly salaries arising from the fact that the early termination of the contract was due to overdue payables has to be based on the player’s salary at the time the contract was terminated as this salary corresponds to the most accurate value of the player’s services in the relevant season.
6. In order to assess whether Article 17(4) of the FIFA RSTP should apply to a club, consideration must be given to (i) the outstanding amount

owed by said club and to its representation in the player’s monthly salary under Article 14 and 14*bis* of the FIFA RSTP, (ii) the fact that the club’s breach took place during the protected period and that it is a repeat offender, (iii) the fact that a sanction will inevitably create significant disadvantage for the club, (iv) the fact that a change in the club’s management should not lead to overturning the sanction and (v) the fact that a sanction is required to serve as a deterrent against future breaches and that it would not achieve this if it did not cause the perpetrator a degree of jeopardy.

I. PARTIES

1. Ismaily Sporting Club (the “Club” or the “Appellant”) is a football club with registered office in Ismailia, Egypt. The Club is a member of the Egyptian Football Association (the “EFA”), which in turn is affiliated to the Fédération Internationale de Football Association, the world governing body of football, headquartered in Zurich, Switzerland.
2. Mr Firas Chaouat (the “Player” or the “First Respondent”) is a professional football player of Tunisian nationality, born on 8 May 1996.
3. Fédération Internationale de Football Association (“FIFA” or the “Second Respondent”).
4. The Appellant, the First Respondent and the Second Respondent together are referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' oral and written submissions¹ as lodged with the Court of Arbitration for Sport (the "CAS"). Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceeding, this Award refers only to the submissions and evidence it considers necessary to explain its reasoning.

6. On 1 October 2022, the Player and the Club signed an employment contract in the form of an EFA model contract, titled "*Contract of Professional Football Player*" (the "Contract"), valid from the 2022/2023 season until the end of the season 2024/2025.

7. In accordance with Clause 2 of the Contract, the Player was entitled to a total "gross" amount of USD 999,900, payable as follows:

"First season value 2022/2023

An amount of USD 300,000.00 divided as follows:

1st installment an amount of USD 150,000 paid on 20/10/2022

2nd installment an amount of USD 37,500 paid on 31/01/2023

3rd installment an amount of USD 37,500 paid on 30/04/2023

4th installment an amount of USD 75,000 paid on 30/08/2023

Second season value 2023/2024

An amount of USD 333,300.00 divided as follows:

1st installment an amount of USD 83,325 paid on 22/09/2023

2nd installment an amount of USD 83,325 paid on 31/01/2024

3rd installment an amount of USD 83,325 paid on 30/04/2024

4th installment an amount of USD 83,325 paid on 30/08/2024

Third season value 2024/2025

An amount of USD 366,600.00 divided as follows:

1st installment an amount of USD 91,650 paid on 22/09/2024

2nd installment an amount of USD 91,650 paid on 31/01/2025

3rd installment an amount of USD 91,650 paid on 30/04/2025

4th installment an amount of USD 91,650 paid on 30/08/2025".

8. In addition, the Contract contained the following provisions:

"Third: The Obligations of the two parties

The player is obligated as follows: (...).

2. To the extent reasonable, to respect the rules and regulations of the club and the association and complies with the reasonable instructions of the management".

"Fourth: Binding Terms: (...).

4. It should not consider any supplements out

¹ Several of the documents submitted by the Parties and referred to in this Award contain various misspellings: for sake of efficiency, they are not all identified with a "[sic]". At the same time, the Panel underlines that a number of documents relevant to the dispute between

the Parties had their original in Arabic. The Panel however shall refer in this Award only to their English translation, submitted by the Parties, which remained unchallenged.

of this contract unless agreed upon in writing by the player and the club (...).

6. *The player should bear the taxes of this contract and any fees according to the law, the club shall deduct taxes from the player dues and transfer them to the taxes under his responsibility”.*

“Fifth: Termination of the contract: (...).

2. *The Player or Club cannot unilaterally terminate the contract unless the right to terminate the contract is stipulated in the FIFA Regulations on the Status and Transfer of Player (‘FIFA RSTP’). Particular reference is made to art. 13, art 14, and art 14 bis and 17 of the FIFA RSTP, which state that a party may terminate a contract where there is just cause If there is just cause, the contract may be terminated at any time, even during the course of a season.*
3. *If the Player or Club unilaterally terminates the contract for a just cause reason the other party will be liable to pay compensation, in accordance with the FIFA RSTP and the jurisprudence of the FIFA DRC. Likewise if the Player or Club unilaterally terminates the contract without just cause the party in breach will be liable to pay compensation, in accordance with the FIFA RSTP and the jurisprudence of the FIFA DRC”.*

Sixth: Additional provision: [(in handwriting)] (...).

2. *The player shall receive amount of L.E.7,000 (seven thousand Egyptian pounds) per month for accommodation.*
3. *The player has the right two air tickets per year (...).*
4. *The player has the right to receive an amount*

of \$40,000 (forty thousand US Dollars) net bonus upon signing.

5. *In case the player score (8) eight goals, he will receive a bonus of 10000\$. He also entitled to another amount of 10000\$ net if he reaches (15) goals achieved in Egyptian League.*
6. *The player has the right to an amount of \$25000 (twenty five thousand US dollars) net when he actually participated in (17) matches. In the event he reaches actual (28) participation matches he has the right to (25%) the value of his contract for the entire season will be paid in full according to the club regulation with deduction of an amount of \$15000 in the same item for his participation in (27) matches (...).*
12. *The player acknowledges that he has read all the terms of the financial and administrative regulations for the first team football which is an integral part of this contract and acknowledgment from him that he has received a copy of that regulation; He also acknowledges that comply with all the obligations and penalties stated in this regulation”.*
9. *The Club’s “Financial Regulations for the First Football Team of Ismaily Sporting Club-Season 2021/2022 until the adoption of another financial regulation” (the “Financial Regulations”) stated inter alia the following:*

“PREAMBLE (...).

This regulation is complementary and complementary to the player’s contract with the club during the term of the contract and shall be deemed an integral part thereof’.

Clause 1(C) - “Participation rate”:

“25% of the value of the player’s contract is set aside and paid after the end of the season, in case he participates in 80% of the matches”.

Clause 1(D) - “Participation rate”:

“25% of the value of the player’s contract is set aside and paid after the end of the season, in case he participates in 80% of the matches. This clause applies to all players, whether local or foreign”.

Clause 6 - “General Principles”:

“5. The Players’ housing allowance shall be paid on the condition that they bring their families (wife and children) with them, and submit documents proving this”.

10. On 4 January 2023, the Player put the Club in default of payment of USD 180,000 net and setting a 15-day time limit to the Club in order to remedy its default failing which the Player would be obliged to terminate his contract for just cause in accordance with Art 14*bis* of the FIFA Regulations on the Status and Transfer of Players (the “FIFA RSTP”).

11. On 6 February 2023, the player signed a document called “*Acknowledgement & Commitment*” in which the player acknowledged the following:

“- Acknowledge that I have received an amount of \$60000 (sixty thousand US dollars) from the club as part of my agreed dues in my contract with the club on 1/10/2022.

- My signature on this acknowledgement is considered a final waiver - irrevocable in the future - of the warning sent from me on 4/1/2023 by my lawyer regarding my demand for the club to pay all my dues mentioned in the contract.

- I acknowledge that I have no right to terminate the contract concluded between me and Ismaily Club unless the club is once again late in paying the remaining of my dues on the dates agreed upon with the club’s management, With all the necessary legal procedures for that.

- I also undertake to notify FIFA with a copy of this acknowledgement to end this dispute in a friendly way between me and the Ismaily Club.

And this acknowledgement from me, without pressure or compulsive material or moral”.

12. On 9 June 2023, the Player put the Club in default and requested payment of USD 170,000 corresponding to outstanding remuneration; setting a 15-day time limit in order to remedy the default.

13. On 25 June 2023, the Player sent a termination notice to the Club (hereinafter the “Termination Letter”) stating, *inter alia*, the following:

“Due to your continuous financial failure (this is not the first infringement, the player has no other option than to terminate unilaterally the contract for just cause according to article 14 Bis RSTP”.

14. On the same date, the Club replied to the Player’s Termination Letter explaining that financial deductions had been made on the amounts owed to him in line with the Contract and Financial Regulations of the Club as well as certain penalties.

15. On 13 July 2023, the Player signed an employment contract with the Bahraini club, Muharraq SC, valid as from 1 August 2023 until 31 May 2024 (the “new contract”). According to this

contract, the Player was entitled to receive the following remuneration/benefits:

- “1- Sign-on fee of 30000 USD*
- 2- Monthly salary of 14000 USD*
- 3- Accommodation 550 Dinars of Bahrain / month*
- 4- Bonus equal to one salary in case on winning one of the official competitions*
- 5- Bonus equal to one salary in case of finishing the season as top scorer”.*

16. On 18 July 2023, the Player lodged a claim against the Club in front of FIFA. On 2 August 2023, FIFA invited the Club to provide its position on the Player’s claim. The Club submitted its reply and counterclaim on 1 September 2023. After having been invited to do so, the Player submitted his comments on the Club’s reply and counterclaim on 19 September 2023. The Club did not provide its final comments on the Player’s position.

17. On 19 December 2023, the parties to the proceedings were informed that the case would be submitted to the FIFA DRC for a formal decision on the occasion of its meeting of 12 January 2024.

18. On 12 January 2024, the FIFA DRC issued a decision (“the Appealed Decision”), as follows:

- “1. The claim of the Claimant/Counter-Respondent, Firas Chaouat, is partially accepted.*
- 2. The claim of the Respondent/Counter-Claimant, Ismaily SC, is rejected.*

3. *The Respondent/Counter-Claimant must pay to the Claimant/Counter-Respondent the following amounts:*

- **USD 95,000 as outstanding remuneration** plus 5% interest p.a. as from 21 October 2022 until the date of effective payment;*
- **USD 37,500 as outstanding remuneration** plus 5% interest p.a. as from 1 February 2023 until the date of effective payment;*
- **USD 37,500 as outstanding remuneration** plus 5% interest p.a. as from 1 May 2023 until the date of effective payment;*
- **USD 35,000 as outstanding remuneration** plus 5% interest p.a. as from 25 June 2023 until the date of effective payment;*
- **USD 697,627 as compensation for breach of contract without just cause** plus 5% interest p.a. as from 25 June 2023 until the date of effective payment*

4. *Any further claims of the Claimant/Counter-Respondent are rejected.*

5. *Full payment (including all applicable interest) shall be made to the bank account indicated in the **enclosed** Bank Account Registration Form.*

6. *The Respondent / Counter-Claimant shall be banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the present decision.*

7. *If full payment is not made within 30 days of notification of this decision, the present matter shall be submitted, upon request of the Claimant, to the FIFA Disciplinary Committee.*

8. *This decision is rendered without costs”.*

19. The grounds of the Appealed Decision were communicated to the Parties on 18 January 2024.

III. PROCEEDING BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 7 February 2024, the Club filed with the Court of Arbitration for Sport (“CAS”) a Statement of Appeal in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (2023 edition) (the “CAS Code”) to challenge the Appealed Decision. In its Statement of Appeal, the Appellant named FIFA as a Respondent together with the Player and nominated Mr Jacopo Tognon as an arbitrator, thereby requesting that the case be submitted to a panel of three arbitrators.

21. On 29 February 2024, the Appellant filed its Appeal Brief with the CAS Court Office, in accordance with Article R51 of the CAS Code. The Appeal Brief contained *inter alia* the following evidentiary requests:

“that Mr. Nasr Mohamed Abou Elhasan (President of the Club), Mr. Moustafa Mohamed Ahmed Shalla (Head of Financial Paymaster of the Club) and Mr. Mohamed Ismail Abdelazim (Financial Director of the Club) to be heard as witnesses”.

“that the Player be heard on all the facts of the proceedings”.

“that FIFA produces the complete file of the FIFA procedure”

“that the Player and/or his new club produce the following documents:

- *All contracts concluded (employment, image, etc) with the Player;*
- *All annex agreements, in particular those on bonuses and competition bonuses;*
- *All salary tips of the Player;*
- *A list of all payments made to the Player since the date of conclusion of the employment”.*

22. On 1 March 2024, the CAS Court Office noted that the Respondents had jointly nominated Mr João Nogueira da Rocha as an arbitrator.

23. On 10 May 2024, the CAS Court Office noted that the President of the CAS Appeals Arbitration Division had appointed Mr Jonathan Hall as the President of the Panel.

24. On 22 May 2024, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was therefore constituted as follows:

President:

Mr Jonathan Hall, Solicitor in Dubai, United Arab Emirates;

Arbitrators:

Mr Jacopo Tognon, attorney-at-law in Padova, Italy; and

Mr João Nogueira da Rocha, attorney-

at-law in Lisbon, Portugal.

25. On 24 May 2024, the First Respondent filed his Answer pursuant to Article R55 of the CAS Code.
26. On 21 June 2024, the Second Respondent filed its Answer pursuant to Article R55 of the CAS Code.
27. On 21 August 2024, the CAS Court Office, after consultation with the Parties, confirmed that the hearing would be held by videoconference on 10 October 2024.
28. On 27 August 2024, the CAS Court Office issued an order of procedure (the “Order of Procedure”) on behalf of the President of the Panel and invited the Parties to return a signed copy of it, which the Appellant did on 30 August 2024 and each of the First Respondent and the Second Respondent did on 28 August 2024.

Application by Appellant for Provisional Measures under Article R37 of the CAS Code

29. On 13 September 2024, the Appellant made an application to the Panel under Article R37 of the CAS Code to stay the execution of the Appealed Decision. The written application explained in the Preamble *inter alia* as follows:

“In July 2024, a new registration ban was imposed on the Club relating to a different procedure independent of the present one. Other than the ban imposed by the Appealed Decision, this new ban was the only one in force and, following an agreement with the player, it was lifted in 12 September 2024 so that the only ban in force today is the registration ban imposed by the Appealed Decision”.

“Accordingly, the Club is now entitled to request the stay of the execution of the Appealed Decision: shall the ban be - at least provisionally - lifted, the Club will be able to make transfers so this situation therefore opens the way to provisional measures”.

“The summer registration period in Egypt for male football for the season 2024/2025 opened on 31 August and closes on 25 October 2024”.

“On 31 August 2024, the registration ban provided for in the Appealed Decision - i.e for a duration of two registration periods - came into force. To this date, the ban imposed by the Appealed Decision is the only registration ban in force against the Club”.

“As the hearing before CAS is set on 10 October 2024, it is very unlikely for the Award to be issued before the end of the summer registration period”.

“Thus, shall the application to stay the execution of the Appealed Decision be denied, the Club will face an unavoidable risk of irreparable harm”.

30. On 20 September 2024, the Second Respondent made its submissions to the Panel in which it requested that the Panel reject the Appellant’s application.
31. On 24 September 2024, the First Respondent made its submissions to the Panel in which it requested that the Panel dismiss the Appellant’s application.
32. On 25 September 2024, the Appellant made some complementary submissions in response to the submissions from the Respondents.
33. The Panel considered the Appellant’s application and the Parties’ respective written submissions on 1 October 2024,

including the unsolicited complementary submissions made by the Appellant on 25 September 2024.

34. There being no objection by any of the Parties to CAS's jurisdiction to consider the Appellant's application, the Panel first of all confirmed that it had jurisdiction to hear the application.
35. Whilst the Panel found it unusual that the Appellant was making its application so late on in the proceedings when it had had various opportunities to apply for the provisional measures earlier, it nonetheless agreed to consider the request.
36. The Panel then considered the following aspects of the application in accordance with Article R37 of the CAS Code:
 - whether the relief is necessary to protect the Appellant, as the applicant, from irreparable harm;
 - the likelihood of success on the merits of the claim; and
 - whether the interests of the Appellant, as the applicant, outweigh those of the Respondent(s).
37. The Panel noted that it was well-established CAS jurisprudence that the three elements of R37 of the CAS Code above had to be considered cumulatively. In other words, the Panel needed to satisfy itself that all three elements were met in order to grant the provisional measure requested.
38. The Panel felt that the potential on-field harm to the Appellant was quite speculative and that financial harm was not a relevant factor to be considered

given that it may be remedied by means of compensation at a later stage, if necessary.

39. At this stage the Panel found it hard to establish the likelihood of success on the merits of the Appellant's claim, not least because it had not yet had the opportunity to hear directly from the Parties and/or the witnesses in the hearing.
40. The Panel acknowledged on the one hand the impact on the Appellant of the ongoing registration ban and on the other the important principle of the need to maintain contractual stability under the FIFA RSTP. On balance the Panel was not convinced that the interests of one club, the Appellant, outweighed the interests of the Respondents, in particular FIFA's interest in maintaining contractual stability for all clubs and players operating within its jurisdiction.
41. Overall, the Panel was not persuaded that the Appellant had satisfied all three aspects of Article R37 of the CAS Code (as referenced at paragraphs 35 and 36 above) and that it therefore had to reject the Appellant's application.
42. On 2 October 2024 the CAS Court Office issued to the Parties the Operative part of the Panel's Order on the Appellant's request for a stay of the Appealed Decision as follows:
 - "1. *The Application to stay the Execution of the Appealed Decision, filed on 13 September 2024 by Ismaily SC in the matter CAS 2024/A/10331 Ismaily SC v. Firas Chaouat & FIFA, is rejected.*

2. *The costs of the present order shall be determined in the final Award or in any other final disposition of this arbitration”.*

43. On 10 October 2024, the hearing was held in this case by videoconference. The Panel was assisted by Ms Andrea Sherpa-Zimmermann, CAS Counsel. The Panel was joined at the hearing by:

- i. for the Appellant: Mr Nasr Abou Elhasan (President of the Club), Mr Moustafa Shalla (Head of Financial Paymaster of the Club), Mr Mohamed Ismael (Financial Director of the Club), assisted by Ms Emilie Weible, counsel; Mr Yehia Farrag, interpreter.
- ii. for the First Respondent: the Player, assisted by Mr Ali Abbes, counsel;
- iii. for the Second Respondent: Ms Cristina Pérez González, counsel; and Mr Alexander Jacobs, counsel.

44. At the hearing, as a preliminary matter, the Parties confirmed that they had no objection to the appointment of the Panel and the holding of the hearing by videoconference.

45. At the end of the hearing, the Parties confirmed having no objection regarding the conduct of the proceedings and that their right to be heard had been respected.

IV. THE PARTIES’ SUBMISSIONS

46. The following summary of the Parties’ positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties.

The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellant

47. In its Statement of Appeal, the Appellant submitted the following requests for relief:

- “1. *The Appeal is upheld and the Decision of the FIFA DRC dated 12 January 2024 is annulled.*
2. *To find that the termination of contract by the First Respondent is unjustified.*
3. *To order the First Respondent to pay the amount of USD 1’250’000.00 as compensation plus 5% interest p.a. as from 25 June 2023 until the date of effective payment to the Appellant.*
4. *To fix a sum to be paid by Mr. Firas Chaouat in order to contribute to the Appellant’s legal fees.*
5. *To charge all costs of the arbitration to Mr. Firas Chaouat”.*

48. In its Appeal Brief, the Appellant confirmed the conclusions of its Statement of Appeal, to which the following requests were added:

“Subsidiarily, if the Panel were to admit the just cause for termination of contract by the Player:

- *To reduce the compensation within the meaning of this Appeal Brief but in any case to an amount not exceeding USD 239’934.00.*
- *To say that no additional compensation shall*

be granted to the Player”.

49. In essence, the Appellant submits in this arbitration that the DRC wrongly found that the Player had just cause to terminate the employment with the Club as the DRC had not taken into account all the necessary deductions to be made from the gross amounts payable to the Player or the full amount already paid by the Club to the Player. As a result, the Appellant requests that the Appealed Decision be set aside and that the Player be ordered to pay compensation to the Club for his breach of the Contract or, in the alternative, if CAS finds that the Player had just cause for termination that there should be no further compensation granted to the Player and the amount of compensation should be significantly reduced.
50. In support of its requests, the Appellant submits the following:

- *“Art. 4.6 of the Contract provides that the taxes and fees of the Contract are to be borne by the Player and that the Club shall deduce these taxes from the Player’s dues and transfer them to the tax authority under its responsibility. The application of this clause has not been contested by the Player before FIFA”.*

In particular the taxation system in Egypt includes three applicable taxes: (1) Income tax (25%), (2) Development Tax (10%), and (3) Sports Professions Syndicate Tax (10%) and that the club is obligated to deduct these amounts from the player’s earnings and remit them to the tax authorities.

Accordingly, a total of 45% of the full contract value that must be

deducted from the gross remuneration of the Player.

- By signing the Contract, the Player fully acknowledged that the Club’s financial regulations were an integral part of the Contract and therefore that he was bound by them.

Art. 1 (C) of the Club’s financial regulations provides the following regarding the participation rate:

“25% of the value of the player’s contract is set aside and paid after the end of the season, in case he participates in 80% of the matches”.

The Club was therefore entitled to deduct 25% of each instalment due to the Player, to be set aside and eventually paid to him at the end of the season in the event he participated in 80% of the matches for that season.

- The Club paid the Player \$100,036 as evidenced by the Club in its pleadings and exhibits.
- In view of the above, a maximum amount of \$7,464 was due to be paid on termination of the Contract by the Player on 25 June 2023 and this amount is less than the amount of two monthly salaries which is required to be unpaid in order to trigger Article 14*bis* of the FIFA RSTP.
- The Club also submitted in its Appeal Brief that the Player did not grant the Club a deadline of at least 15 days to comply with its

financial obligations and neither was there any other just cause that would have justified the Players' unilateral termination of the Contract.

- The Player did not have just cause and therefore the Club should be granted compensation. The Player signed a new contract with the club Al-Muharraq SC in Bahrain as from 1 August 2023 until 31 May 2024. According to Article 17 para. 2 FIFA RSTP, the Player's new club is jointly and severally liable for the payment of compensation by the Player to the Club for wrongful termination of the Contract.
- Alternatively, if CAS find that there was just cause for the Player to terminate the Contract then there should be no further compensation awarded and the amount of compensation should be substantially reduced to take into account the various deductions.

B. The First Respondent

51. In his Answer, the First Respondent submitted the following prayers for relief, requesting the CAS:

- “1. To dismiss the appeal.
2. To confirm the decision issued by FIFA Football tribunal on 12 January 2024.
3. The arbitration costs should be carried out by the Appellant.
4. To oblige the Appellant, to contribute to the respondent's advocacy costs which will

be evaluated according to the panel discretion”.

52. In essence, the First Respondent submits in this arbitration that the FIFA DRC came to the correct decision. Therefore, the appeal filed by the Club has to be dismissed and the Appealed Decision confirmed.

53. In support of his requests, the First Respondent submits *inter alia* the following:

- Contrary to the Appellant's allegations, the Development Tax is a tax payable by the Club and not by the Player so it is not deductible, the Sports Professions Syndicate Tax is actually a membership fee and not a tax so it is not deductible and the Club has not provided proof that it has paid the Income Tax on behalf of the Player therefore the Player should receive the gross amounts.
- The Club had not previously argued the 25% deduction under the Club's financial regulations. The Player never signed the financial regulations and has no “*acknowledge*” of their existence (the Panel understood this to mean “knowledge of their existence”). Neither did he receive a copy nor was he notified of their content.
- When it comes to compensation, the Player is entitled to the gross amounts as it is compensation and not “*labour income*”.
- It is up to the Club (not the Player)

to ensure that it has the necessary funds in its bank account to enable the Player to cash cheques given to him by the Club and it is the responsibility of the Club to show that it has actually paid the amounts due to the Player - and it has not done so.

- The amount outstanding was at least two monthly salaries, the Player gave the Club written notice of default and at least 15 days to comply; hence the Player was entitled to terminate the Contract for just cause.
- The FIFA DRC correctly awarded the Player compensation and took into account the mitigating amount from his new club Al-Muharraq SC in Bahrain.

C. The Second Respondent

54. In its Answer, the Second Respondent submitted the following prayers for relief, requesting the CAS to:

- “(a) reject the requests for relief sought by the Appellant;*
- (b) confirm the Appealed Decision in its entirety; and*
- (c) order the Appellant to bear the full costs of these arbitration proceedings”.*

55. In essence, the Second Respondent submits in this arbitration that the FIFA DRC came to the correct decision. Therefore, the appeal filed by the Club has to be dismissed and the Appealed Decision confirmed.

56. In support of its requests, the Second

Respondent submits *inter alia* the following:

- As the Appellant *“has not provided any evidence that it has paid any taxes on behalf of the Player”* the Player is entitled to the full gross salary set out in the Contract.
- The Appellant’s argument regarding the variable remuneration of 25% is wrong as the Contract was clearly governed by the FIFA Statutes and regulations in accordance with Article R58 of the CAS Code and the Appellant did not raise the issue before the FIFA DRC.
- There was no contractual basis or any other form of evidence that justified the deductions made by the Club from the Player’s remuneration.
- As the amount of USD 205,000 was outstanding when the Player sent the termination letter, there was no doubt that more than two (2) months salaries were owed to the Player at that point.
- In line with previous CAS jurisprudence, the 15 days refers to calendar days and not working days so there is no doubt that the deadline pursuant to the Player’s termination letter was 24 June 2023 and the Club failed to make any payments to the Player before that deadline and thus, the Player had just cause to terminate the Contract on 25 June 2023.
- The FIFA DRC correctly awarded

the Player compensation based on the outstanding amounts under 57.the Contract and took into account the mitigating amount from his new club Al-Muharraq SC in Bahrain.

- The FIFA DRC also correctly awarded the Player three (3) months additional compensation based on the clear wording of Article 17(1)(ii) FIFA RSTP.
- Given the Club’s blatant disrespect for the Contract, the FIFA regulations and the principle of contractual stability, the sporting sanction of 2 period registration ban imposed on the Club was more than justified.

V. JURISDICTION OF THE CAS

57. Article R47 of the CAS Code provides as follows:

“Appeal

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

58. Pursuant to Article 57 of the FIFA Statutes (May 2022 edition) (“FIFA Statutes”), FIFA recognises the

jurisdiction of the CAS to “*resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, football agents and match agents*”.

59. The jurisdiction of CAS is not disputed by the Parties and was confirmed by them all when signing the Order of Procedure. It follows that the CAS has jurisdiction to hear to appeal filed by the Appellant against the Appealed Decision.

VI. ADMISSIBILITY

- 60- The admissibility of the Appellant’s appeal is not challenged by the Parties.

61. Article R48 of the CAS Code provides as follows:

“The Appellant shall submit to CAS a statement of appeal containing:

- *the name and full address of the Respondent(s);*
- *a copy of the decision appealed against;*
- *the Appellant’s request for relief;*
- *the nomination of the arbitrator chosen by the Appellant from the relevant CAS list of arbitrators, subject to Article S18, unless the Appellant requests the appointment of a sole arbitrator;*
- *if applicable, an application to stay the execution of the decision appealed against, together with reasons;*
- *a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS.*

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed”.

62. The Statement of Appeal also complied with the requirements of Articles R47, R48 and the requirements of R64(1) of the CAS Code regarding the payment of the CAS Court Office fee.

63. It follows that the appeal is admissible.

VII. APPLICABLE LAW

64. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

65. Pursuant to Article 57(2) of the FIFA Statutes:

“[t]he provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and additionally, Swiss law”.

66. As a result, the Panel finds that the various regulations of FIFA, and chiefly the FIFA RSTP, are primarily applicable; and Swiss law applies subsidiarily.

VIII. MERITS

67. The object of this arbitration is the Appealed Decision, which: (i) found that (a) the Appellant was responsible for breach of the Contract and (b) the First Respondent had terminated the Contract with just cause pursuant to Article 14 of the FIFA RSTP; (ii) ordered the Appellant to pay to the First Respondent the amounts of (a) USD 207,500 plus interest, as outstanding remuneration, and (b) USD 697,627 plus interest, as compensation for the breach of contract.

68. The Appellant requested the Panel to annul the Appealed Decision, to find that the Contract was terminated without just cause by the First Respondent and to order the First Respondent to pay compensation for the damages caused. On the other hand, the First and Second Respondents submitted that the Appealed Decision is correct in every respect and therefore, it should be confirmed as it is.

69. As a result of the foregoing, the Panel notes that it has to deal with two key issues:

- A. Whether the First Respondent was entitled to terminate the Contract with just cause?
- B. What are the financial and sporting consequences deriving from any finding in this respect?

70. Before turning to the examination of those issues, the Panel has to briefly

address one preliminary point which relates to the introduction of various additional documentation and a recent ECJ decision² by the Appellant on the day prior to and on the day of the hearing respectively. Such additional documentation amounted to purported evidence concerning (i) other settlement agreements reached with other players by the Appellant and (ii) tax payments made by the Appellant. At the hearing the Panel heard arguments from all Parties on the admissibility or otherwise of such documentation and the ECJ decision.

71. The Panel first of all noted that there was no objection from the Parties to the reference to the recent ECJ decision in the Diarra matter given that it was a matter of law and not evidence and the Panel accepted that it could be referred to in the hearing and its relevance could be considered as part of the Panel's deliberations.
72. So far as the admissibility of the other documentation introduced by the Appellant was concerned, the Panel was unimpressed by the Appellant introducing this at such a late stage when it had had every opportunity to provide these documents earlier. Nonetheless, the Panel decided to consider this within its powers under Article R44.3 of the CAS Code (and not Articles R56 and R57) where it could deem it appropriate to supplement the presentations of the Parties and accept additional documents. On this basis the Panel allowed the Appellant to refer to the additional documentation and it would decide on its relevance as part of its decision.

² European Court of Justice, *Fédération Internationale de Football Association (FIFA) v BZ* ("Diarra"), C-650/22, 4 October 2024.

73. The Panel can now turn to the main disputed points, to be examined in sequence.

A. Whether the First Respondent was entitled to terminate the Contract with just cause?

74. The main disputed point concerns the termination of the Contract by the Player, as declared on 25 June 2023, and chiefly whether the facts presented by the Player, mentioned in his termination notice to the Club of that date gave him just cause to terminate it. The Appellant argues that the First Respondent had no right to terminate the Contract and therefore, his termination was without just cause. The First and Second Respondents dispute the Appellant's submission and seek the confirmation of the Appealed Decision, which found that the Player had a just cause for termination based on Article 14 of the FIFA RSTP.
75. The Player invoked in the termination notice of 25 June 2023 the Club's failure to pay the amount of USD 170,000, after issuing on 9 June 2023 a default notice for the same amount. The FIFA DRC found that the Player had just cause for termination because the Club owed the Player the amount of USD 205,000 as salary, being more than two (2) monthly salaries.
76. The Club disputes the conclusions reached by the FIFA DRC, in essence denying, on various grounds, that it owed any more than USD 7,464 when the termination notice was issued and

- this was less than two (2) monthly salaries.
77. The question for the Panel to solve is therefore to verify the amount due to the Player, justifying a termination of the Contract with just cause under the FIFA RSTP.
78. In that regard, the Panel notes that under Article 14 para. 1 of the FIFA RSTP:
- “A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause”.*
79. When a CAS panel is required to assess whether a valid reason existed for a unilateral contract termination under such provision, the following principles should be applied, taking into account the specific circumstances of each individual matter:
- only a sufficiently serious breach of contractual obligations by one party to the contract qualifies as just cause for the other party to terminate the contract;
 - in principle, the breach is considered sufficiently serious when there are objective circumstances that would render it unreasonable to expect the employment relationship between the parties to continue;
 - the termination of a contract should always be an action of last resort.
80. It is noted also that Article 14*bis* of the FIFA RSTP provides that a player can terminate a contract with just cause if at least two (2) monthly salary payments are outstanding, and the player has given the club written notice and 15 days to remedy this default before termination.
81. The situation on 25 June 2023, when the termination notice was received, must be evaluated against the above background. In other words, it has to be determined whether the Player was owed any amount justifying the termination with just cause.
82. For the purposes of any determination in that respect a few points need to be considered.
83. First: Several issues regarding the applicability, rates and payment of taxes were raised and discussed in the course of the FIFA DRC proceedings and before this Panel, namely: 25% for income tax; 10% for “State’s Resources’ Development Tax”; and 10% for “Syndicate of Sports Professions’ Tax”. In the Appealed Decision the FIFA DRC decided that no such deductions were permissible by the Club from the “gross” salary specified in the Contract.
84. Taking into account the following:
- i. the clear wording of the Contract that *“the player should bear the taxes of this contract and any fees according to the law”*;
 - ii. the fact that the Player was represented by an agent who the Player relied on to read the Contract on his behalf; and
 - iii. the declarations of the Finance Director of the Club at the hearing regarding the nature of tax and fee deductions in Egypt;

the Panel comes to the conclusion in this case that the Player has to bear all three taxes/fees and that they can therefore be deducted from the “gross” salary *i.e.* a total of 45% to be deducted. As a result, the Appealed Decision wrongly determined the eligibility of these deductions to be made under the Contract.

85. Second: The FIFA DRC considered that the “Participation Rate” provision set out at Clause 1(C) of the Club’s financial regulations could not be applied. Such clause indicated that 25% of the value of the Player’s contract was to be set aside and paid after the end of the season, in case of participation in 80% of the matches. Such clause has been defined by the Parties as containing a variable part of the Player’s salary, contingent on his actual participation in matches played by the Club. The Panel could see no specific reasoning by the FIFA DRC in its decision on this issue, however the Panel agrees with the FIFA DRC that this deduction cannot be made. The Panel concludes that such clause is potestative in nature as it gives the Club the unilateral power to decide upon a considerable reduction of the Player’s salary, since the Club, at its sole discretion, could decide on the participation or not of the Player. On this basis, it has an abusive nature and does not have any legal effect in the relevant employment relationship. As a result, the Appealed Decision correctly determined this point.
86. Third: There was disagreement between the Parties on the amount that had actually been received by the Player from the Club prior to the termination of the Contract. The evidence presented by the

Appellant and First Respondent on this was unclear and a little confusing however the Panel prefers the Appellant’s evidence and concludes that the Appellant has met the necessary burden of proof on this, by which the Player received USD 100,036. However, the Panel also accepts that USD 10,000 of this amount must have been related to a partial payment of the signing-on fee due to the Player (totalling USD 40,000) and not salary. Therefore, the Panel concludes that the Player actually received USD 90,036 by way of salary.

87. Fourth: The Panel concludes that as on the date of the default notice of 5 June 2023, the actual amount of salary due to the Player was a total of USD 225,000 (150,000 + 37,500 + 37,500) less the deduction of 45% as referenced at paragraphs 83 & 84 above *i.e.* USD 123,750 was due to the Player. Therefore, the amount of salary actually outstanding to the Player at that date was USD 33,714 (123,750 due less 90,036 received).
88. Fifth: The Panel further concludes that for the purposes of calculating the two (2) monthly amount of salary under Article 14*bis* of FIFA RSTP, it has to take into account the full amount owed to the Player over the full term of the Contract (USD 990,900), the actual number of months representing the full term (35 months) and the valid deductions (45% taxes/fees). This means that the two (2) monthly amount of salary under Article 14*bis* of FIFA RSTP is USD 31,425.42 ($999,900/35 = 28,568.57$ less valid deductions (45%) = 15,712.71 per month).
89. On the basis of the foregoing the Panel finds that the Player had just cause to

terminate the Contract under the FIFA RSTP (Articles 14 and 14*bis*), since the outstanding payment owed by the Club (USD 33,714) exceeded the amount corresponding to two monthly salaries (USD 31,425.42), thus constituting a just cause for termination under the FIFA RSTP.

B. What are the financial and sporting consequences deriving from the above finding?

90. In light of the conclusion reached above, the Panel must determine the consequences for the Club of the Player's termination of the Contract with just cause.
91. First, the Club has to pay the outstanding remuneration due to the Player.
92. Second, the Club has to compensate the Player for any damages sustained. In fact, also considering the well-established CAS jurisprudence (see, *inter alia*, CAS 2016/A/4605 and CAS 2017/A/5180), a party responsible for, and at the origin of, the termination of the contract is liable to pay the compensation for damages caused as a consequence of the early termination of the contract.
93. In that regard, Article 17(1) of the FIFA RSTP sets the principles and the method of calculation of the compensation due by one party because of a breach or unilateral and premature termination of a contract. In light of the conclusion reached above, the Panel finds that the termination by the Player of the Contract falls within the scope of Article 17 of the FIFA RSTP.
94. According to Article 17(1) of the FIFA

RSTP, the primary role is played by the parties' autonomy. In fact, the criteria set in that rule apply "*unless otherwise provided for in the contract*". Then, if the parties have not agreed on a specific amount, compensation has to be calculated

"*with due consideration*" for:

- the law of the country concerned,
 - the specificity of sport,
 - any other objective criteria, including in particular:
 - the remuneration and other benefits due to the player under the existing contract and/or the new contract;
 - the time remaining on the existing contract up to a maximum of five years;
 - the fees and expenses paid or incurred by the former club (amortised over the term of the contract); and
 - whether the contractual breach fell within a protected period.
95. In the absence of an agreement on compensation between the Appellant and the First Respondent in the Contract, the Panel must determine the measure of the damages sustained by the Player on the basis of Article 17(1) of the FIFA RSTP.
 96. In that respect, the Panel notes that a consensus has emerged in the CAS jurisprudence as to the application of the "positive interest" principle, in order to determine an amount which basically

puts the injured party in the position it would have been in had the contract been performed properly. Such approach is now reflected in Article 17(1), second paragraph of the FIFA RSTP, under which compensation due to a player shall be calculated as follows:

- in case the player did not sign any new contract following the termination of his previous contract, as a general rule, the compensation shall be equal to the residual value of the contract that was prematurely terminated;
 - in case the player signed a new contract by the time of the decision, the value of the new contract for the period corresponding to the time remaining on the prematurely terminated contract shall be deducted from the residual value of the contract that was terminated early;
 - subject to the early termination of the contract being due to overdue payables, the player shall be entitled to an amount corresponding to three monthly salaries. In case of egregious circumstances, this additional compensation may be increased up to a maximum of six-monthly salaries. However, the overall compensation may never exceed the rest value of the prematurely terminated contract.
97. In the present case the Panel remarks (in the case of point vi. below, by a majority) that:

- i. there was little evidence provided

on the likelihood of the various contractual bonuses becoming due over the remainder of the Contract and the Panel felt they were too uncertain and should therefore be discounted from the damages calculation;

- ii. the housing allowance should not be taken into account for the remainder of the Contract as, following termination, there would be no basis on which this expense could be determined;
- iii. based on what was presented to the Panel there was also an outstanding amount of USD 30,000 of the agreed signing-on fee;
- iv. whilst the Contract expresses the sums to be payable in gross amounts, clause 4.6 of the Contract also provides that: *“The player should bear the taxes of this contract and any fees according to the law, the club shall deduct taxes from the player dues and transfer them to the taxes under his responsibility”*;
- v. In calculating compensation, Article 17(1) FIFA RSTP requires the Panel to take into account, *inter alia*, the law of the country concerned. CAS jurisprudence confirms that the aim of the “positive interest” principle is to put the injured party (the Player) in the position that he would have been had no contractual breach occurred. Furthermore, Article 337c para.1 of the Swiss Code of Obligations provides that: *“Where the employer dismisses the employee with immediate effect without good cause, the*

employee is entitled to damages in the amount he would have earned had the employment relationship ended after the required notice period or on expiry of its agreed duration”.

- vi. The Player should therefore receive as compensation the gross amounts less the taxes/fees that would have been deducted had there been no contractual breach (*i.e.* a net amount after the 45% deductions referred to at paragraphs 83 and 84 above).
98. The remaining gross value of the Contract can be determined as follows (amounts in USD):

Season	Portion	Gross of tax/fees
Signing-on fee	Remaining	30,000.00
2022/2023	Remaining (3 months)	85,705.69
2023/2024	Full season	333,300.00
2024/2025	Full season	366,600.00
TOTAL		815,605.70

The Player is therefore entitled to receive the amount of USD 448,583.14 (being USD 815,605.70 less 45%).

99. The Player is also entitled to receive an amount corresponding to three monthly salaries, because the early termination of the Contract was due to overdue payables. The salary at the time the contract was terminated should be used to calculate this as this corresponds to the most accurate value of the Player’s services in the relevant season. Such amount corresponds to USD 47,138.13 (being USD 85,705.69 less 45%).
100. Under the New Contract the Player received a gross salary of USD 140,000

(10 times a monthly salary of USD 14,000) in addition to a signing on fee of USD 30,000 and accommodation allowance of 550 dinars per month for 10 months (total USD 14,628). So, in total he received the amount of USD 184,628 gross.

101. As a result, the Panel concludes by a majority that the Player is entitled to compensation in an amount of:

USD 448,583.14 + 47,138.13 – 184,628;

Total = USD 311,093.27.

102. The Appealed Decision also imposed a sporting sanction of a ban “*from registering any new players, either nationally or internationally, for the next two entire and consecutive registration periods*”.

103. The Panel notes that the Appellant did not raise the issue of sporting sanction in either the Statement of Appeal or the Appeal Brief – other than implicitly by requesting the annulment of the Appealed Decision.

104. However, at the hearing on 10 October 2024, the Appellant put forward that the sporting sanction was not lawful in light of the ECJ decision referred to at paragraph 70 above. At the hearing it also explained that the Club had made efforts to settle its outstanding arrangements with a number of players and was doing its best to resolve matters; and the consequences of a ban were disastrous for the Club as it needed to be able to function.

105. The Second Respondent, in its written submissions, pointed out, *inter alia*, that:

- i. the Club’s breach occurred during

- the protected period;
- ii. the FIFA DRC had observed that the Club had already been found guilty for breaching other contracts in the two years preceding the Appealed Decision and these breaches were an aggravating circumstance; and
 - iii. in short, given the Club's blatant disrespect for the Contract, the sporting sanctions against the Club were more than justified.
106. At the hearing the Second Respondent reiterated the points it made in its written submissions and added that:
- i. the registration ban could not be revisited as it had not been raised by the Appellant in its Appeal Brief; and
 - ii. the ECJ decision was not final, recognised that cases should be determined on a case by case basis and their view was that it had no impact in this matter.
107. It is clear from CAS jurisprudence that Panels are slow to intervene in overturning a sporting sanction imposed by FIFA. For example CAS 2023/A/10011 states that *"a very compelling case must be presented (...) to be able to deviate from applying the very literal and strict wording of Article 17(4) RSTP"* and sanctions imposed by FIFA should only be reviewed by the CAS if these are *"evidently and grossly disproportionate to the offence"* (see CAS 2014/A/3754, CAS 2018/A/5588 and CAS 2009/A/1844).
108. The onus is on the Club to make a compelling case warranting the non-
- application of Article 17(4) of the FIFA RSTP.
109. In this context, the Panel notes the following:
- i. the outstanding amount owed by the Appellant to the First Respondent was in fact only very slightly above the two (2) monthly salary amount that entitled the First Respondent to terminate the Contract for just cause under Article 14 and 14*bis* of the FIFA RSTP and the Panel therefore has some sympathy for the Appellant's view that if this had been the only factor then imposing a sporting sanction on the Appellant in this case would be disproportionate;
 - ii. the Club's breach did indeed take place during the protected period and the Club was a repeat offender;
 - iii. a sanction will inevitably create significant disadvantage for the Club. However a transfer ban only prohibits a club from registering new players (and thus from spending money in transferring (buying) them), but not from transferring players to other clubs (and thus not from earning money);
 - iv. the change in the Club's management should not lead to overturning the sanction (consistent with the decision in CAS 2017/A/5056 and 5069); and
 - v. a sanction is required to serve as a deterrent against future breaches

and it would not achieve this if it did not cause the perpetrator a degree of jeopardy.

110. In this case a majority of the Panel is not satisfied that there is a very compelling reason to reverse the decision of the FIFA DRC to impose the sporting sanction.

111. In summary, the Panel finds (by a majority in the case of points (iv) and (v) below) that:

- i. the First Respondent terminated the Contract with just cause;
- ii. the Appellant has to pay the amount of USD 16,500 as the balance of the net signing on fee outstanding at the time of termination of the Contract;
- iii. the Appellant has to pay the amount of USD 33,714 for remuneration outstanding at the time of termination of the Contract;
- iv. in addition the Appellant has to pay compensation to the First Respondent in the amount of USD 311,093.27; and
- v. the FIFA DRC legitimately imposed a two-period transfer ban on the Club as a sporting sanction.

112. Interest at 5% *per annum* applies on the amounts due by the Club pursuant to Article 104 para. 1 of the Swiss Code of Obligations. Such interest accrues until the date of final payment as from the following dates:

- (a) on the amount of USD 311,093.27

(compensation for breach of contract) from 26 June 2023 (first day after the termination notice);

- (b) on the amount of USD 16,500 (balance of net signing on fee) from 2 October 2022 (first day after signing of contract);

- (c) on the amount of USD 13,089 (unpaid balance of net 2nd instalment 2022/23 season salary) from 1 February 2023 (first day after it became due); and

- (d) on the amount of USD 20,625 (unpaid net 3rd instalment 2022/23 season salary) from 1 May 2023 (first day after it became due).

113. As a result, the appeal filed by the Appellant has to be partially granted. Point 3 of the Appealed Decision has to be modified as per the above findings. The remaining points of the Appealed Decision are to be confirmed and all other prayers for relief submitted by the Parties have to be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 7 February 2024 by Ismaily Sporting Club against the decision rendered by the FIFA Dispute Resolution Chamber on 12 January 2024 is partially upheld.
2. Point 3 of the operative part of the decision rendered by the FIFA Dispute Resolution Chamber on 12 January 2024 is modified as follows:

“The Respondent/ Counter-Claimant [Ismaily Sporting Club] must pay to the Claimant/ Counter-Respondent [Firas Chaouat] the following amounts:

- *USD 16,500 as outstanding signing on fee plus 5% interest p.a. as from 2 October 2022 until the date of effective payment;*
 - *USD 13,089 as outstanding remuneration plus 5% interest p.a. as from 1 February 2023 until the date of effective payment;*
 - *USD 20,625 as outstanding remuneration plus 5% interest p.a. as from 1 May 2023 until the date of effective payment; and*
 - *USD 311,093.27 as compensation for breach of contract without just cause plus 5% interest p.a. as from 26 June 2023 until the date of effective payment”.*
3. The other points of the operative part of the decision rendered by the FIFA Dispute Resolution Chamber on 12 January 2024 are confirmed.
 4. (...).
 5. (...).
 6. All the other motions or prayers for relief are dismissed.

Football; Disciplinary proceedings for
offensive behaviour; Procedural flaws;
Burden and standard of proof; Offensive
behaviour under the FDC; Sanctions

Panel

Mr Lars Hilliger (Denmark), President
Prof. Martin Schimke (Germany)
Mrs Janie Soublière (Canada)

1. Procedural flaws committed by the previous instances are, in principle, healed by CAS *de novo* proceedings.
2. FIFA bears the burden of establishing that alleged incidents constitute a violation of its disciplinary regulations to the comfortable satisfaction of the panel. This standard is lower than “beyond reasonable doubt”, but higher than the “balance of probabilities”. It requires a high degree of confidence in the quality of evidence.
3. Officials must refrain from offensive behaviours and comply with the principles of fair play, loyalty and integrity. Their conduct must be assessed from the perspective of a “reasonable and objective observer”, bearing in mind the overall context, including cultural sensitivities, media coverage and public perception.
4. Initial sanctions imposed may be reviewed if they are “evidently and

grossly disproportionate” or, at least, “disproportionate”. They must reflect mitigating and aggravating factors, in particular the spirit of the regulations, the nature, circumstances and impact of the offence(s) on relevant stakeholders and image of sport, as well as the global behaviour and hierarchical position of the perpetrator.

I. PARTIES

1. Mr Luis Rubiales (“Mr Rubiales” or the “Appellant”) is a Spanish citizen and former president of the Real Federación Española de Fútbol (the “RFEF”) and former vice-president of the Union Européenne de Football Association (“UEFA”).
2. The Fédération Internationale de Football Association (“FIFA” or the “Respondent”) is the world governing body of football, whose headquarters are in Zurich, Switzerland. FIFA is the governing body of international football and is recognised as such by the International Olympic Committee. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.
3. The Appellant and the Respondent are collectively referred to as the “Parties”.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations as established by the Panel based on the decision rendered on 16 January 2024 by the FIFA Appeal Committee (the “Appeal Committee”)

- (the “Appealed Decision”), the written and oral submissions of the Parties and evidence adduced. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, the Panel refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. On 20 August 2023, the Final of the FIFA Women’s World Cup Australia and New Zealand 2023 was played in Sydney, Australia, between the representative teams of Spain and England (the “Match”).
 6. The Match, which ended with a 1-0 victory to the representative team of Spain was broadcast worldwide and the official number of spectators at the stadium was set at 75,784.
 7. Subsequently to the conclusion of the Match, a series of “incidents” (the “Incidents”) occurred, and the Appellant was observed:
 - Celebrating the Spanish victory by grabbing his crotch/genitals in the VVIP area (the “Genitals Incident”);
 - During the award ceremony on the podium where the players were given their medals and greeted by officials, including the Appellant, hugging the Spanish player Jennifer Hermoso (the “Player”), speaking to her briefly, putting his hands on the back of her head and kissing her on the lips (the “Kiss Incident”);
 - Carrying the Spanish player Athenea del Castillo over his shoulder during the post-Match celebrations on the field of play (the “Carrying Incident”); and
 - Giving the Spanish player Olga Carmona a peck on the cheek during the post-Match celebrations on the field of play (the “Peck Incident”).
 8. The Incidents were broadcast on live TV and/or reproduced in media outlets worldwide. In particular, the Kiss Incident was condemned by e.g. several national and international persons, including Spanish and foreign politicians, and representatives of FIFPro and other player unions.
 9. Following the Match, and following the immediate media coverage of the Kiss Incident, in particular, the Appellant made several statements in interviews and individually commenting on the matter, and stated, *inter alia* (translated from Spanish):

“Let’s not pay attention to idiots and stupid people, really. [...] We are not here for bullshit, really Juanma. With everything I’ve been through, no more bullshit and no more assholes. Really, let’s enjoy the good things, and don’t even talk to me about things of suckers who don’t know how to see the positive”.
 10. Following further massive media attention, and in a video published by the RFEF during the Spanish team’s trip back to Spain, the Appellant stated, *inter alia*, as follows (translated from Spanish):

"[...] But there is also a fact, then, that I have to regret, and it is all that has happened between a player and me, with a magnificent relationship between the two, as with others.

And where I have surely made a mistake, I have to admit it, because in a moment of maximum effusiveness without any bad intention, without any bad faith, well, what happened, happened, in a very spontaneous manner, I believe.

I repeat, without bad faith on either side.

From then on, well, it was not understood here, because we saw it as something natural, normal and not at all, I repeat, with any bad faith.

But outside it seems that a commotion has arisen and, of course, if there are people who have been hurt by this, I have to apologize, I have no other choice, right?

And also to learn from this, and to understand that when one is president of such an important institution as the Federation, one has to be more careful, especially in ceremonies and in this kind of matters.

Then, there are also some statements on my part where, within this context, when I said that this seems like an idiocy to me... That is why, because nobody here on the inside gave it the slightest importance, but outside it has been given such importance.

So, I also want to apologize to those people, because I understand that, if it has been seen in a different way from the outside, they will surely have their reasons.

And lastly, I am sorry because, in the face of the greatest success in our history in women's football and one of the greatest in general - this is the second World Cup we have won - this has tarnished the celebration to a certain extent.

I think we have to give credit to these women, to the team led by Jorge Vilda, and this has to be celebrated in style".

11. By letter of 24 August 2023 from FIFA, the Appellant and the RFEF were informed, *inter alia*, as follows:

"We are contacting you in connection to the incidents occurred during the the [sic] FIFA Women's World Cup Final played on 20 August 2023 between Spain and England in Sydney.

In particular, it is alleged that the president of the Spanish Football Federation, Mr Luis Rubiales Bejar, might have misbehaved in violation of the basic rules of decent conduct and in a way that brings football and/or FIFA into disrupt in accordance with Article 13 of the FIFA Disciplinary Code (FDC).

[...]

Based on the foregoing and accordance with art. 55 of the FIFA Disciplinary Code, we are herewith opening disciplinary proceedings against Mr Luis Rubiales Bejar (the Respondent) for the potential breach of the following provision(s):

Art. 13.1 FDC – Offensive behaviour and violations of the principles of fair play

Art. 13.2 a. FDC – Offensive behaviour and violations of the principles of fair play

Art. 13.2 d. FDC – Offensive behaviour and violations of the principles of fair play

In this respect, the Respondent is invited to provide the secretariat of the FIFA Disciplinary Committee with its position, within ten (10) days of the notification of this communication at the latest (cf. art. 38 FDC) [...]"

12. On 25 August 2024, Ms Hermoso published the following statement on the social media platform X:

“After achieving one of the most important objectives of my sports career and after a few days of reflection, I want to sincerely thank my teammates, fans, followers, media and everyone who have made this dream come true; your work and unconditional support were a fundamental part of winning the World Cup.

Sadly, the ability to celebrate that has been cut short. While it is true that I do not want to interfere with the multiple ongoing legal processes, I feel obliged to report that Mr. Luis Rubiales’ words explaining the unfortunate incident are categorically false and part of the manipulative culture that he himself has generated.

I want to make it clear that at no time did the conversation to which Mr. Luis Rubiales refers to in his address take place, and, above all, was his kiss ever consensual. I want to reiterate as I did before that I did not like this incident.

The situation shocked me given the celebrations that were taking place at the moment, and with the passage of time and after delving a little deeper into those initial feelings, I feel the need to report this incident because I believe that no person, in any work, sports or social setting, should be a victim of these types of non-consensual behaviors. I felt vulnerable and a victim of an impulse-driven, sexist, out of place act without any consent on my part. Simply put, I was not respected.

I was asked to make a joint statement to alleviate the pressure on the President, but at that moment all I had in my mind was to enjoy the historic milestone achieved with my teammates. For this reason, I always conveyed to the RFEF and its various interlocutors, as well as to media and people I trust, that I would

not make any individual or joint statements on this matter, as I understood that doing so would take even more prominence away from such a special moment for my teammates and me.

Despite my decision, I must state that I have been under continuous pressure to make a statement that could justify Mr. Luis Rubiales’ actions. Not only that, but in different ways and through different people, the RFEF has pressured my surroundings (family, friends, teammates, etc.) to give a testimony that had little or nothing to do with my feelings.

It is not up to me to evaluate communication and integrity practices but I am sure that as the World Champion, we as a team do not deserve such a manipulative, hostile and controlling culture. These types of incidents add to a long list of situations that the players have been denouncing in recent years. This incident, one in which I have been involved, is just the final straw and what everyone has been able to witness on live television during the celebration also comes with attitudes like the one we saw this morning and have been part of our team’s daily life for years.

For all these reasons, I want to reinforce the position I took from the beginning, considering that I do not have to support the person who has committed this action against my will, without respecting me, at a historic moment for me and for women's sport in this country. Under no circumstances can it be my responsibility to bear the consequences of conveying something I do not believe in, which is why I have refused the pressures received.

I have ZERO TOLERANCE for these behaviors.

I want to conclude by making it very clear that while it is I who is expressing these words, it is all the players from Spain and around the world who have given me the strength to come out with

this statement. In the face of such a display of disrespect and inability to recognise one's own mistakes and take responsibility, I state here and now to everyone of my decision not to play for the National Team again while the current leaders remain.

Thank you all for the messages of support and encouraging words received. I know I am not alone, and thanks to all of you, we will push forward more united than ever. I leave this matter in the hands of TMJ and FUTPRO, and the people I trust. They will continue working on the next necessary steps".

13. On 25 August 2023, the RFEF held an extraordinary general assembly (the "RFEF Extraordinary Assembly"), during which Mr Rubiales addressed the RFEF membership in a 30-minute speech covering the Incidents. The RFEF Extraordinary Assembly was livestreamed. During the same, when addressing the Incidents, Mr Rubiales stated *inter alia*:

"Even people outside of football have shown their support for me. There are many people who are supporting me, even though they may be silent. I'd say there are more people on my side than against me. I want to apologise unreservedly for something that happened in the box (and I'm going to explain that now because I'm here to explain myself), when, in the heat of the moment, I grabbed that part of my body, as you've already seen. I'm going to explain it. I'm looking at Jorge Vilda. We've been through a lot over this last year, Jorge. To a lesser degree, they've wanted to do to you what they're now doing to me: trying to turn a false narrative into the truth.

(...) Of course, I must apologise to Her Majesty the Queen, to the Infanta, to the Royal Family and anyone who was offended because I understand that it was a rather unedifying gesture. So, for that, I would like to reiterate my

sincerest apologies. You know me and I've been at countless ceremonies and in countless boxes and I've never behaved like that before. Emotions were high given everything that had happened... We'd been through a lot. I make no excuses. I apologise.

[...]

Onto the second question: the kiss. The peck, because it was more of a peck than a kiss. I also want to explain and say that, of course, anyone watching the video will understand that, in front of 80,000 people in the moment, in front of millions of TV spectators, in front of everyone there, including some of my family (my daughters), the desire that I could have felt from that kiss could only have been exactly the same as giving one of my daughters a kiss. No more, no less. So, there was no desire and there was no dominant position. And that's also something everyone understands, although they're selling another story in much of the media, both those that are controlled by or doing the bidding of Mr Tebas and those that are doing the bidding of false feminism, which is a great scourge on this country.

[...]

It was spontaneous, mutual, ecstatic and consensual. And that's key. That's the key to all the criticism, to all the brouhaha that has been generated in this country about it being non-consensual. No – it was consensual. See for yourselves. That player missed a penalty. I have a great relationship with all the players and members of staff. We've been like family for more than a month. And we had very affectionate moments in that camp. And when Jenni came along, she lifted me up off the ground. She picked me up by the hips or the legs – I can't remember – and she lifted me off the ground. We almost fell. And when she put me back down, we embraced. She was the one who put her arms around me and pulled me towards

her. We embraced and I said to her: “Forget about the penalty. You’ve been fantastic and we wouldn’t have won this World Cup without you. She responded: “You’re a star.” And I said: “How about a peck?” And she said: “OK.” After the peck, with several slaps on my back throughout, she left with a final back slap and walked away laughing. That was the sequence of events. Everyone understood, nobody thought anything of it and, above all, the most important thing was that she said it was nothing serious [...]”.

14. On 26 August 2023, the RFEF published an official media release, which was subsequently deleted from its website, stating, *inter alia*, as follows (translated from Spanish):

“Once accredited by the RFEF that the player Ms. Jennifer Hermoso lied in the statements she made, through the FutPro Union, we have learned of a new statement - now yes, from the player - where, in a text clearly prepared by third parties, to have the necessary elements for the suspension of the functions of the President of the Federation, we have to state that Ms. Jennifer Hermoso lies in every statement she makes against the President, as we will have the opportunity to prove at the appropriate time.

That we have all the reports and expert opinions that prove what the president has stated and we are going to take the corresponding legal actions against all those people who are falsifying reality and committing very serious crimes.

It is extraordinarily incomprehensible that Ms. Hermoso, despite describing the superficial kiss as “a mere anecdote without transcendence” in her statements to the FIFA welfare officer - immediately after the events occurred -; or to declare to the media that “I can only say that it was the moment, the effusion and the moment, that there is nothing beyond that, and that it will remain an anecdote and that's it, that... people...

if they want to give it hype, they will give it to her and if they don't, they won't”; and that she also posted on social networks a video in which she indicates that she had authorized that kiss. if they want to give it hype, they will give it to them and those who don't will not”; and who also posted on social networks a video in which she points out that she had authorized that kiss as a sign of effusiveness with an “okay”; adding now in that elaborate statement that she considers the referred anecdotes as an “abuse in which there was no consent”, feeling “vulnerable and victim of an aggression, an impulsive and sexist act out of place and without any consent on my part”.

The serious contradictions in the initial account of what happened - which are highlighted in the integrity report - and the serious accusations made by Ms. Hermoso since she has been abducted by the FutPro Syndicate lead us to wonder what interests are behind the surprising change in the initial version and qualification of the facts.

The facts are what they are; and, no matter how many statements are made to distort reality, it is impossible to change what happened. The kiss was consensual. The consent was given in the moment with the conditions of the moment. Later you can think that you have made a mistake, but you cannot change reality”.

15. Later the same day, the RFEF released its second statement in response to a media release from the Spanish women players’ union Futpro, which statement was also subsequently deleted from the website, stating, *inter alia*, (translated from Spanish):

“The RFEF and the President will demonstrate each falsehood that is spread, whether by someone on behalf of the player or, if necessary, by the player herself. Given the gravity of the content in the press release by the Futpro union,

the RFEF and the President will initiate the appropriate legal actions. The RFEF laments that after such an extraordinary sporting success as witnessed in the World Football Championship, the situation cannot be celebrated as it deserves due to entirely non-sporting reasons. In any case, and as it should be, the RFEF respects, as it has always respected, the decisions of the players to participate or not with the Spanish national team in international matches. Nevertheless, it is noted that participation in the national team is an obligation for all federated individuals if called upon to do so”.

16. Finally, on 26 August 2023, by decision of the Chairperson of the FIFA Disciplinary Committee (the “FIFA DC”) (the “Provisional Suspension”), the Appellant was provisionally suspended from exercising any football-related activity for 90 days in accordance with Article 51 of the FIFA Disciplinary Code (the “FDC”). Furthermore, and in accordance with Article 7 of the FDC, the following was decided:

“- Mr. Luis Rubiales Bejar shall refrain, through himself or third parties, from contacting or attempting to contact the player Jennifer Hermoso or her close environment.

- The Spanish Football Federation (RFEF) and its officials or employees, directly or through third parties, are ordered to refrain from contacting the player Jennifer Hermoso or her close environment”.

17. On 29 August 2023, Ms Hermoso filed a formal complaint against the Appellant, prompting Spanish prosecutors to launch an official investigation. And after having formally investigated the case and collected evidence, on 8 May 2024, the Spanish prosecutors decided that the Appellant

should stand trial for a possible criminal offence in connection with the Kiss Incident.

18. On 10 September 2023, Mr Rubiales formally resigned as president of the RFEF and vice-president of UEFA.
19. On 26 September 2023, Ms Hermoso provided her statement in response to the questions that were asked to her by the FIFA DC.
20. On 30 October 2023, the FIFA DC notified the decision it rendered on 26 October 2023 in relation to the Appellant’s conduct within the scope of the Match (the “DC Decision”), thereby imposing a three-year suspension on him for *“having behaved in a manner contrary to the principles enshrined under art. 13 of the FIFA Disciplinary Code”*.
21. The DC Decision stated as follows:

“Mr. Luis Rubiales Bejar is banned from taking part in any football-related activity for a duration of three (3) years for having behaved in a manner contrary to the principles enshrined under art. 13 of the FIFA Disciplinary Code”.

22. On 6 December 2023, the grounds of the DC Decision were notified to the Appellant and on the same date, the Appellant informed FIFA of his intention to appeal the DC Decision to the Appeal Committee.

B. Proceedings before the FIFA Appeal Committee

23. In his appeal before the Appeal Committee, the Appellant requested for the Appeal Committee:

- “Set the [DC Decision] aside as the grounds that allegedly justified its imposition have been all discredited”;
 - “In the alternative, to set it partially aside and to amend the sanction imposed in accordance with the principle of proportionality”;
 - “Finally, and in the further alternative, and in the improbable case that the Appeal Committee still considers that the Genitals Incident, the Carrying Incident and the Peck Incident are subject to sanction, to amend the [DC Decision] by applying any of the other disciplinary measures provided for in Article 6.1 of the FDC in accordance with the principle of proportionality of sanctions”.
24. On 16 January 2024, a hearing was held by the Appeal Committee with the attendance of, *inter alia*, the Appellant and his legal representative.
 25. The Appellant’s position before the Appeal Committee is summarised, *inter alia*, as follows in the Appealed Decision:
 26. On the one hand, the Appellant considered that the DC Decision is contrary to the law as it derives its grounds in a completely biased and distorted assessment of the facts, and without properly considering the evidence presented by the Appellant.
 27. On the other hand, the DC Decision sanctions separate and independent actions by considering them jointly, which leads to a more severe sanction than should have been imposed, if any.
 28. The Appellant expressed once again his deepest regret at everything that had happened and is aware that

independently of the context, and the reasons that led him to do what he did, he should not have celebrated the Spanish victory the way he did nor kissed Ms Hermoso during the award ceremony.

- The “Genitals Incident”

29. It is essential to place in context the circumstances that led the Appellant to make the gesture subject to sanction, since it was a gesture directed directly at the coach of the Spanish team, Mr Vilda, to signify “*well done*”, not least based on the past.
30. The gesture was “unfortunate”; however, the “*highly biased media judgment*” completely disregarded the context in which it occurred.
31. Until now, this gesture has never been considered ground for such a serious penalty when others have done it (including Diego Simeone, Cristiano Ronaldo or Emiliano Martinez).
32. The Appellant has been the only one sanctioned, and the consideration made by the first instance body (that the crotch-grab “*is a taunting gesture almost exclusively done by males, and, as such, widely perceived as misogynist and sexist (literal)*”) is a harsh statement that would be a violation of the principle of *venire contra factum proprium*, as FIFA has never sanctioned anyone in a hostile context in this regard.
33. In sum, there have been similar situations in the past (in terms of gestures, not the meaning) that did not reach the severity of disciplinary consequences seen in this case. Therefore, not only from the perspective

of a reasonable and objective observer, but also due to a comparative injustice, the sanction (if any) to be imposed on the Appellant should, at most, be a fine.

- *The “Carrying Incident”*

34. This incident took place 45 minutes after the end of the game, when the stadium was empty.
35. The Appellant was overcome by joy and happiness and while they were all celebrating, hugging and jumping, he took Ms Castillo on his shoulders, and at no point did she try to request the Appellant to put her down, nor did she appear to feel threatened or uncomfortable with the act.
36. The gesture was an affectionate behaviour towards one of the players of the national team, much in the same way as when the players tossed the Appellant in the air, and thus there should be no disciplinary reproach arising from it. In this respect, the Appellant pointed out that he had done the same with the former male head coach, Luis Enrique Martinez, when Spain eliminated Croatia in the Euro 2020, and such action had had no consequences whatsoever.

- *The “Peck Incident”*

37. It is entirely surprising that (serious) disciplinary consequences arise from a peck on the cheek, since not only it is a worldwide show of appreciation, but also a way of greeting in Spanish culture between men and women.

- *The “Kiss Incident”*

38. The Appellant reiterates that he acknowledges and recognises that it should not have happened, and that he should have maintained the highest level of composure.
39. The exchange was quick, but the player hugged him in the air, they expressed their admiration for each other, and the Appellant told her to forget about the penalty she had missed.
40. Ms Hermoso replied, saying “*you are the best*”, then the Appellant asked: “*can I kiss you?*” and Ms Hermoso said “*pues vale*” (“ok then”), and then the kiss occurred, very quickly, after which she left with a pat on his ribs.
41. A TV news programme conducted a lip-reading analysis which confirmed that the Appellant requested permission to kiss Ms Hermoso and, despite not being able to confirm Ms Hermoso’s response, the available evidence also confirms that she answered in the affirmative.
42. Two videos were recorded in the dressing room after the Match. They provide context to the incident and are “*crucial*” insofar that (i) “*it confirms precisely the fact that the Appellant asked for permission to give the kiss and confirms that she granted such permission*” and (ii) it can be seen from the reaction of Ms Hermoso and the other players (they are laughing) that they made fun of the situation, thus not being uncomfortable or upset.
43. The Integrity Department of the RFEF activated its “sexual harassment protocol” and investigated the matter.
44. On 23 August 2023, the psychologist of the National Team and safeguarding and welfare officer of FIFA for the World

- Cup provided a report confirming that (i) *“Ms. Hermoso considered it something anecdotal and consequence of celebration”*, (ii) *“Mr. Rubiales confirmed the same interpretation”*; and (iii) *“there was no concerning attitude from any of them, neither from Mr. Rubiales nor from Ms. Hermoso”*.
45. Two forensic criminal experts *“confirmed the brevity of the kiss”*, and concluded that (i) there was *“no violent behavior, abuse of power or sexual connotation in the behavior of Mr. Rubiales, as well as behaviors of rejection or disapproval by the player Mrs. Jenni Hermoso, specifically during the kiss at the awards ceremony to the Spanish Women's Football Team in Australia”*, (ii) *“no signs or symptoms of victimization have been observed in the player Ms. Jenni Hermoso directly linked to the kiss of Mr. Rubiales that occurred at the awards ceremony for the Spanish Women's Football Team, in Australia, reactions that are not compatible with the manifesto of the players days later”*, and (iii) *“no objective evidence associated with denouncing elements or expressive signs linked to manipulations in vestige No. 16 has been observed, beyond the editing of the recording and the tuts indicated in the body of this report”*.
 46. No matter how unacceptable the act was (an aspect that the Appellant has never questioned), the first instance body should have conducted a more thorough analysis of the context and not relied solely on an investigation that, from the moment Mr Rubiales was provisionally suspended, considered only evidence that was prejudicial to the Appellant.
 47. The Appellant does not seek to justify the Kiss Incident, but simply to ensure that the sanction imposed for it be appropriate and proportionate, and not the result of a value judgement that was passed even before the opening of this disciplinary proceeding.
 48. Moreover, the Appellant has not only been sanctioned for the Kiss Incident (along with the other three Incidents), but also for his attitude after that incident, despite there not being any charges for those behaviours. To that end, and since the Appellant had no opportunity to comment on these facts (being unaware that they were also the subject of this procedure), the Appeal Committee can only reject them and consequently review the sanction to be imposed without taking them into account.

- Standard of proof – Article 13 FDC and the “reasonable and objective observer”
 49. The DC Decision is contrary to the law since it has been adopted not only based on an entirely biased interpretation that lacks even the slightest evidential support, but, and more seriously, by ignoring the evidence presented by the Appellant.
 50. The first instance body has succumbed to the media judgement that had already condemned the Appellant even before he could provide his version and, more importantly, disregarding the evidence submitted to this disciplinary proceeding.
 51. Instead of adhering to the applicable standard of proof which requires a higher level of evidence for more severe actions, the first instance body has deemed a set of assessments (not evidence) sufficient to sanction the Appellant, each of which has been refuted one by one by the Appellant.

52. As expressly stated in the DC Decision, the behaviour should be analysed from the perspective of a “reasonable and objective observer”, but also it is equally important to take into account the context in which those incidents occurred when assessing them.

53. Notwithstanding the above, the first instance body considered a biased context of what occurred, accepting all the explanations provided in the case file as valid with the clear exception, of course, of those provided by the Appellant.

- Proportionality of the sanctions

54. The Appellant cannot agree with the first instance body when it is established that the four incidents should result in the same sanction (i.e. a ban), when the FDC provides for a wide range of sanctions to be imposed on natural persons. In fact, each violation of the FDC should entail its own specific sanction since, as the Appealed Decision itself asserts, not all the incidents are equally serious or severe.

55. From a disciplinary standpoint, it is disproportionate to compare the Carrying Incident, the Genitals Incident and the Peck Incident to the Kiss Incident.

56. The truth is that the only reason the four incidents are being considered together is to justify a longer suspension, as if only the Kiss Incident had occurred, undoubtedly the ban sanction would not have been for three years, but less.

57. In accordance with the principle of proportionality, there is no other interpretation but to: (i) Consider each

of the incidents as individual infractions; and (ii) If applicable, sanction each of them separately, considering their specific context and gravity while considering them individually.

- Previous cases under the FDC and the FIFA Code of Ethics

58. When comparing decisions imposed for the violation of the FDC and the Code of Ethics by FIFA officials, the Appellant found that the sanction imposed on him does not relate to those imposed on other officials having engaged in corruption, bribery and requesting of personal benefits, even the highest officials.

59. Having confirmed its competence and the admissibility of the appeal of the DC Decision, the Appeal Committee considered that the merits of the appeal should be analysed in light of the provisions of the 2023 edition of the FDC, giving particular attention to Article 13 FDC.

60. Regarding the merits of the dispute, the Appeal Committee acknowledged that the Appellant did not dispute the occurrence of the Incidents. Therefore, the questions to be decided on appeal were as follows:

- a) Did the Appellant breach Article 13 FDC? and, in the affirmative
- b) Are the sanctions imposed on the Appellant by the first instance body proportionate?

a) *Did the Appellant breach Article 13 FDC?*

61. The Appeal Committee first noted that the Appellant’s submissions seek to

provide the “real” context of each of the Incidents with the aim to demonstrate that the first instance body assessed them in a “*biased and distorted*” manner. While accepting that the Incidents were widely reported worldwide and the Appellant’s behaviour during and after the Match was considered improper, indecent and/or offensive by most (if not all) objective observers, the Appeal Committee assessed each of the Incidents separately, analysing the context in which each occurred, as perceived respectively by the FIFA DC and by the Appellant.

- *The “Kiss Incident”*

62. As a starting point, the first instance body concluded that (i) “kissing a player, more importantly without her consent, undoubtedly constituted a behaviour contrary to the very basic principles contained under Article 13 FDC”, particularly “when taking into account the hierarchical link between the Appellant and the Player”, (ii) the events that followed the Kiss, when taken together, undoubtedly denoted a behaviour incompatible with the general principles of fair play, loyalty and integrity enshrined under Article 13 FDC and (iii) the Appellant’s attitude in relation to the Kiss Incident undoubtedly tarnished the image of football and/or FIFA, bringing both into disrepute. As such, the first instance body held that from the very first moment he initiated the Kiss to the moment its decision was rendered, the Appellant repeatedly and continuously violated the basic rules of decent conduct, thereby infringing Article 13 FDC.

63. In turn, in his submission, the Appellant essentially noted that (i) the first instance body should have conducted a more thorough analysis of the context and not relied solely on an investigation that, from the moment the Appellant was provisionally suspended, had taken into account exclusively evidence that might be considered to go against him, and (ii) the conclusions of the first instance body are categorically false, and this can only be the result of not having carefully considered the Appellant’s submissions or, worse still, having completely ignored the evidence he presented.
64. In its findings, the Appeal Committee was comfortably satisfied that the Appellant kissed the Player without her consent. To that end, the Appeal Committee emphasised that, not only was this its firm opinion, but that it was also precisely how this incident had widely been perceived from the perspective of reasonable and objective observers (as found by the first instance body).
65. In any event, as held by the first instance body, if one was to follow the Appellant’s submissions (i.e. that the Kiss was consensual), it remained that, such a behaviour would not be the one expected from the president of an association having won the World Cup and would still be seen as contrary to the basic rules of decent conduct. Indeed, the image of a man, president of a football association, grabbing the head of a female player and kissing her during the Women’s World Cup Final cannot be tolerated. It was in total contradiction with the tournament’s aim to unite and inspire people around the world through the power of the FIFA Women’s World Cup and women’s football.

66. By way of consequence, and regardless of the explanations and/or evidence provided by the Appellant, the Appeal Committee saw no reason to deviate from the first instance body's conclusions that kissing a player, and more importantly without her consent, undoubtedly constituted a behaviour contrary to the very basic principles contained under Article 13 FDC. In other words, the Appeal Committee found that the Kiss was inappropriate and unacceptable – whether consented to or not.

- *The “Genitals Incident”*

67. The first instance body concluded that the Genitals Incident constituted a breach of Article 13 FDC because it was contrary to the very basic rules of decent conduct. In addition, and while putting in perspective the media coverage of such a gesture, the first instance body also found that, by grabbing his crotch in one of the most exclusive areas of the stadium, in the presence of the most prominent dignitaries and during the most important match of the competition at stake, the Appellant clearly behaved in a way that brought the sport of football and/or FIFA into disrepute.
68. In reply thereto, the Appellant argued that the analysis made by the first instance body completely disregarded the context in which it occurred. While conceding that it was an ugly gesture, the Appellant insisted on the fact that (i) it “means nothing more than ‘*olé tus huevos*’”, a typical and widespread expression in Spain to tell someone that they have done something well and (ii) it was not aimed at offending anyone but directed

solely and exclusively at Mr Vilda. Furthermore, the true context of the gesture should have been taken into account, rather than discrediting the Appellant by portraying him as sexist and macho.

69. In its findings, and despite the Appellant's allegations, the Appeal Committee observed that these explanations had in fact already been considered by the first instance body. It had (i) conceded that one explanation for the gesture could be that the Appellant was touching his genitals to show his support to the coach, as an expression of a Spanish cultural gesture, but (ii) emphasised that regardless of the justification behind it, it remained that, from the perspective of any reasonable and objective observer, the gesture performed by the Appellant could only be seen as an insulting and/or offensive gesture contrary to the basic rules of decent conduct.
70. The Appeal Committee underscored that gesture(s) or word(s) which could be considered insulting or offensive (as *in casu*) must be determined by how they could be perceived by a reasonable and objective observer (as emphasised in the DC Decision) and not by the intention with which they were made (as erroneously submitted by the Appellant).
71. The Appeal Committee finally held, rejecting the Appellant's submission in this regard, that the fact that other individuals may have made a similar gesture in the past, was irrelevant to the analysis of whether it was contradictory to Article 13 FDC in this case.

72. The Appeal Committee was thus satisfied that the assessment made by the first instance body in relation the genital grabbing incident should be confirmed given that – from the perspective of a reasonable and objective observer – the gesture is undoubtedly contrary to the basic rules of decent conduct, and, as such, contrary to Article 13 FDC.

- *The “Carrying and the Peck Incidents”*

73. While conceding that these incidents did not bear the same seriousness as the first two incidents, the first instance body nevertheless found that they were incompatible with the principles of Article 13 FDC, emphasizing that they did not constitute behaviour expected from the highest-ranking official in Spanish football. The Appellant’s conduct towards women and/or female players was completely unacceptable.
74. Conversely, the Appellant argued that it was completely unrealistic to allege that giving a player a peck on the cheek and carrying another one was inappropriate behaviour.
75. In its findings on this point, the Appeal Committee stressed that those incidents (and specifically the behaviour of the Appellant) must be assessed from the perspective of a reasonable and objective observer within the context in which they occurred.
76. The Appeal Committee then found, as did the first instance body, that at the time of those incidents, the Appellant was – the highest-ranking official in Spanish football and held prominent positions within European football. He was thus fully acquainted with celebration protocols and aware of the

exemplary behaviour expected from him in a context as unique as a World Cup final.

77. On that basis, the Appeal Committee deemed that the first instance body findings in relation to those incidents should be confirmed as the Appellant clearly and undoubtedly appeared to have abused his position as president of the RFEF to approach and/or treat players in a completely intolerable and outrageous manner by carrying and/or kissing them in a controversial manner. The fact that these players may not have protested and/or objected to those physical contacts at the time is completely irrelevant in the assessment of whether the Appellant’s behaviour was contrary to Article 13 FDC, particularly considering that the players were all under a *de facto* hierarchical link with the Appellant.

b) *Are the sanctions imposed on the Appellant by the first instance body proportionate?*

78. Regarding the proportionality of the sanctions, the Appeal Committee recalled, *inter alia*, that:
- In the exercise of its regulatory discretion, the measure of a sanction imposed by a disciplinary body can only be reviewed when such sanction is evidently and grossly disproportionate to the offence.
 - According to CAS, a decision-making body fixing the level of pecuniary sanctions should, amongst others, take into consideration the following elements: (a) the nature of the

- offence; (b) the seriousness of the loss or damage caused; (c) the level of culpability; (d) the offender's previous and subsequent conduct in terms of rectifying and/or preventing similar situations; (f) the applicable case law; and (g) other relevant circumstances.
- Disciplinary measures serve different purposes: On the one hand, a sanction is intended to help to undo harm that has been inflicted by the offender. On the other hand, and more importantly, a disciplinary sanction is intended to prevent re-offending by the offender. Consequently, harsher sanctions are warranted in case of serious infringements, structural non-compliance with the various obligations and in case of recidivism.
79. Therefore, as far as the proportionality of the sanctions is concerned, the FIFA DC, and then the Appeal Committee hold a responsibility to determine the type and extent of the disciplinary measures to be imposed (i) in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances (cf. Article 25.1 FDC) and (ii) taking into account all relevant factors of the case, including the circumstances and the degree of the offender's guilt and any other relevant circumstances (cf. Article 25.3 FDC). Both these determinations must consider the seriousness of the facts and other related circumstances as well as the damage that the penalised conduct may entail for the parties involved, for the federation in question and for its sport.
80. After having discussed both the aggravating and mitigating circumstances of the case, the Appeal Committee pointed out that Article 13 FDC does not provide for specific and/or minimum sanctions. In other words, anyone who contravenes in any way Article 13 FDC may be subject to disciplinary measures, such measures being listed under Article 6 FDC. The first instance body – and now the Appeal Committee – is therefore at liberty to determine the most appropriate sanction from among these measures.
81. In such circumstances, and in the absence of any directly applicable sanction in case of related breach of said provision, FIFA's judicial bodies (the Appeal Committee *in casu*) found that it needed to impose a sanction which, in light of the facts of the case as established, was relevant to the type of misconduct, proportionate, reasonable, just and fair.
82. The president of a member association holds a responsibility to always behave in an exemplary and irreproachable manner, and even more so when carrying out his duties. The Appellant's behaviour during (and after) the Match was completely unacceptable, inappropriate, intolerable and, even more deplorable given his position. Severe sanctions commensurate with the impact that the said behaviour may have had on the player(s) concerned, on FIFA, and on the world of football and women's football in particular were thus justified.
83. The Appeal Committee found that mild sanctions such as a warning, a reprimand or a fine were insufficient consequences to the seriousness of Appellant's

breaches of Article 13 FDC. The only appropriate discipline was the imposition of a ban from taking part in any football-related activity.

84. As to the length of such ban, the comparison made by the Appellant between the one imposed on him and the ones imposed on other individuals (relating to on-pitch incidents or ethics-related abuses related to financial infringements) was irrelevant given that those infringements were of a different nature.
85. Consequently, mindful that it had to defer to the first instance body's decision, the Appeal Committee found that the imposition of a three-year ban from all football-related activities was appropriate and further noted that in light of the Appellant's serious infringements of Article 13 FDC, a harsher sanction could have been imposed.
86. Finally, and with reference to the Appellant's submission that a suspension would represent the "*end of his career*", the Appeal Committee recalled that, in accordance with the pertinent CAS jurisprudence, a ban from taking part in any kind of football-related activity does not violate the applicable international standards of human rights, specifically the fundamental right to freely exercise a profession, i.e. their economic freedom. As a matter of fact, as emphasised by CAS, the sanction imposed on the Appellant simply limits his capability of performing any football activity during a temporary and limited period of time.
87. As such, the Appeal Committee was comfortably satisfied that the sanction

imposed by the first instance body was proportionate to the offences committed and should be confirmed.

88. Following its deliberations, on 16 January 2024, the Appeal Committee rendered the Appealed Decision and decided that:

"1. The appeal lodged by Mr. Luis Rubiales Bejar against the decision passed by the FIFA Disciplinary Committee on 26 October 2023 is dismissed. Consequently, said decision is confirmed in its entirety.

2. The costs and expenses of the proceedings (in the amount of CHF 1,000) are to be borne by Mr. Luis Rubiales Bejar. This amount is offset against the appeal fee of CHF 1,000 already paid".

89. On 12 February 2024, the grounds of the Appealed Decision were communicated to the Appellant.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

90. On 3 March 2024, the Appellant filed his Statement of Appeal against FIFA, in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "CAS Code") against the Appealed Decision.
91. On 29 March 2024, and following a granted extension of the time-limit, the Appellant filed his Appeal Brief in accordance with Article R51 of the CAS Code.
92. By letter of 18 April 2024, and in accordance with Article R54 of the CAS Code, the Parties were informed by the CAS Court Office that the Panel had been constituted as follows: Mr Lars

Hilliger, Attorney-at-Law, Copenhagen, Denmark (President of the Panel), Prof Dr Martin Schimke, Attorney-at-law, Düsseldorf, Germany (nominated by the Appellant) and Ms Janie Soublière, Attorney-at-law, Beaconsfield, Canada (nominated by the Respondent).

93. By letter of 13 May 2024 from the CAS Court Office, the Appellant was “*invited to submit an English translation of all the exhibits to his written submission which are in Spanish [...]*”, which the Appellant did on 20 May 2024.
94. On 28 May 2024, and following a granted extension of the time-limit, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.
95. On 25 June 2024, a Case Management Conference was held by videoconference.
96. By letter of 3 July 2024 from the CAS Court Office, and in line with the preference of the Parties, the Parties were informed that the Panel had decided to hold a hearing in this matter.
97. Both Parties duly signed and returned the Order of Procedure, confirming, *inter alia*, the jurisdiction of the CAS to hear this dispute.
98. On 8 November 2024, a hearing was held in Miami, Florida, USA.
99. In addition to the Panel and Mr Antonio de Quesada, Head of Arbitration, the following persons attended the hearing:

For the Appellant:

- Mr Luis Rubiales

- Mr Enric Ripoll, Counsel
- Ms Sophia Burke, Counsel
- Mr Tomas Alonso de Corcuera, Expert witness, via videoconference
- Mr Oscar Francisco Díaz Santana, Expert witness, via videoconference
- An Interpreter

For the Respondent:

- Mr Miguel Liétard Fernández-Palacios
- Mr Carlos Schneider
- Mr Francisco Mendoza, Expert witness, via videoconference
- An Interpreter

100. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel.
101. The Panel heard the evidence of Mr Luis Rubiales, Mr Tomas Alonso de Corcuera, Mr Oscar Francisco Diaz Santana and Mr Francisco Mendoza. The witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine the witnesses and Mr Luis Rubiales.
102. The Parties and their witnesses were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.
103. After the Parties’ final submissions, the Panel closed the hearing and reserved its final award. The Panel considered in its subsequent deliberations all the evidence and arguments presented by the Parties although they may not have been

expressly summarised in the present Award.

104. Upon the closure of the hearing, the Parties expressly stated that they had no objections in respect of their right to be heard and to have been treated equally and fairly in these arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

105. In his Appeal Brief, the Appellant requested the CAS to:

- “1) *Set the Appealed Decision aside.*
- 2) *In the alternative, to set it partially aside and to amend the sanction imposed in accordance with the principle of proportionality.*
- 3) *Finally, in the further alternative, and in the improbable case that the Panel still considers that the incidents are subject to sanctions, to amend the Appealed Decision by applying any of the other disciplinary measures provided for in article 6.1 of the FIFA DC in accordance with the principle of proportionality of sanctions”.*

106. The Appellant’s submissions, in essence, may be summarised as follows:

Standard of proof and burden of proof

- As stressed in the Appealed Decision and in accordance with Article 39.3 FDC, “*The standard of proof to be applied in FIFA disciplinary proceedings is the comfortable satisfaction of the competent judicial body*”.

- As set out in, among others, CAS 2021/A/7840, “*The standard of proof of comfortable satisfaction is greater than a mere balance of probability, but less than a proof beyond a reasonable doubt. The more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven*”.

- The Appealed Decision is contrary to the law since it has been adopted not only based on an entirely biased interpretation that lacks even the slightest evidential support, but, and more seriously, by ignoring the evidence presented by the Appellant, leading to conclusions and sanctions that are based on a misunderstanding of the facts and a clear lack of understanding of the context in which they really happened and the cultural relevance of them.

- Instead of adhering to the applicable standard of proof, which requires a higher level of evidence for more severe actions, the Appeal Committee has deemed a set of circumstantial indications (not evidence) sufficient to sanction the Appellant, each of which has been refuted one by one by the latter.

- The burden of proof lies on FIFA regarding any alleged violation of Article 13 FDC.

Article 13 of the FDC

- Article 13 FDC contains a general obligation for players, officials and any other person carrying out a function on behalf of associations

and clubs to behave properly in accordance with the principles of fair play, loyalty and integrity.

- As expressly stated in the Appealed Decision, the particular behaviour should be analysed from the perspective of a “*reasonable and objective observer*” but also, quoting the Appealed Decision, “[...] *it was equally important to take into account the context in which those incidents occurred when assessing them*”.
- The context considered by the Appeal Committee is entirely biased compared to what occurred and is by no means a true reflection of the reality and context in which the events subject to this disciplinary proceeding occurred.
- FIFA never proved that any of the Incidents constituted a violation of Article 13 FDC.

Procedural issues

- The FIFA proceedings against the Appellant have been a series of procedural violations, and instead of acting as the world governing body, FIFA bodies have acted as a party to a dispute.
- For example, on 26 August 2023, when the President of the Disciplinary Committee imposed a provisional suspension of 90 days, just 2 days after granting a 10-day deadline to the Appellant to explain himself (i.e. without having even heard his position), and without allowing the Appellant to file an appeal against the decision until 19 September 2023 as the

latter had to await the grounds of the decision.

- Furthermore, the lack of efforts during the investigation, the non-examination of not only witnesses, but also affected individuals, the non-disclosure of evidence and the denial of their existence are examples of corrupt prosecution practices.
- The job of a public prosecutor is to investigate all the relevant facts and consider all the evidence available, not only the evidence that supports its case. In the disciplinary proceedings that were conducted under their umbrella, FIFA acted as judge and prosecutor, which grants them an extraordinary amount of power and discretion but also imposes on them an extra duty to respect the obligations of impartiality and due process.
- Maybe one of the worst violations happened right at the end of the appeals procedure before the Appeal Committee, when FIFA did not respond to the Appellant’s request to postpone the hearing, which was announced less than 2 weeks in advance, and changed the composition of the Panel with an individual that never showed his face, let alone his credentials, which, combined with all the other procedural violations, in our opinion may contradict Article 6 of the European Convention of Human Rights.

“The Kiss Incident”

- Firstly, the Appellant has recognised that it should not have happened and acknowledged that because of his position as President of the RFEF, he should have maintained the highest level of composure.
- However, before the incident occurred, the Appellant asked the Player (in Spanish): *“can I kiss you?”*, to which the Player replied: *“ok then”*. The whole exchange including the kiss lasted around 3 seconds.
- Considering all this, it seemed clear that when Ms Hermoso left the stage, happy and smiling, she was not concerned about anything and the version of the Appellant is sustained not only by the images but also supported by video footage, where during a TV news programme, it is affirmed having conducted a lip-reading analysis, confirming that the Appellant requested permission from the Player.
- This version of events is the same maintained by the Appellant on radio and television and in public statements both written and oral, as can be seen in the file provided by FIFA, on Friday, 25 August 2023, and on Twitter on Friday, 1 September 2023.
- During a radio interview given by the Player minutes after the final, the Player (“JH”) stated, *inter alia*, as follows (translated from Spanish):

“JC: You know the mess we have in Spain with the kiss that Rubiales has given you.

JH: My goodness I don’t want to imagine it because ehbb I didn’t even expect it but well.

JC: Man, of course, a kiss has to be given...

JH: Let others drop them because I don’t care, I mean, I’m the world champion and that’s what I’m going to take with me tonight.

JC: I know.

JH: I didn’t like it.

JC: But there are people who are offended, are offended.

JH: Let’s see today everything is going to be frowned upon by the eyes of those who look at it and I can only say that it has been the moment, the excitement and of the moment, that there is nothing further and that it will stay in an anecdote and that’s it, there will be people that will want to make a fuss of it and others that won’t, but well [...]”.

- Minutes later, while celebrating the victory in the locker room, the Player appeared to be happy and joking with the Appellant and actually stated to a teammate that she had answered: *“sure, why not”*, when asked by the Appellant if he could kiss her, thereby confirming that the Appellant had in fact asked for permission before the kiss.
- Later, the Player and other members of the team joked about the kiss in the bus when leaving the stadium.
- The Appellant admits that he should never have asked for permission and should never have kissed the Player; however, the kiss

was consensual, and the Appellant cannot be accused of sexual aggression or of having kissed Ms Hermoso without her consent.

- The RFEF was aware of everything that happened, which is why the sexual harassment protocol was activated by its Integrity Department. In the report provided on 23 August 2023 by Mr Javier Lopez Vallejo, National Team Psychologist and FIFA Safeguarding and Welfare Officer, found, *inter alia*, that the players and the entire delegation gave very little importance to the kiss and that, subsequently, neither the Player nor the Appellant showed a concerned attitude.
- Furthermore, in the Expert Criminological Report of 25 August 2023, also requested by the Integrity Department of the RFEF, the two experts, Dr Oscar Francisco Díaz Santana and Mr Tomas Alonso de Corcuera, concluded that (freely translated from Spanish):

“The technical and compositional analysis of the digital evidence analyzed, allow to extract the following considerations:

FIRST. – *we found no violent behavior, abuse of power or sexual connotation in the behavior of Mr. Rubiales, as well as behaviors of rejection or disapproval by the player Mrs. Jenni Hermoso, specifically during the kiss at the awards ceremony to the Spanish Women's Football Team in Australia.*

SECOND. – *no signs or symptoms of victimization have been observed in the player Mrs. Jenni Hermoso directly*

linked to the kiss of Mr. Rubiales that occurred at the awards ceremony for the Spanish Women's Football Team, in Australia, reactions that are not compatible with the manifesto of the players days later.

THIRD. – *No objective evidence associated with denouncing elements or expressive signs linked to manipulations in vestige No. 16 has been observed, beyond the editing of the recording and the cuts indicated in the body of this report”.*

- It was only in her later declaration to FIFA that the Player switched to a version of the incident in which she had never consented to the kiss.
- FIFA should have conducted a more thorough analysis of the context and not relied solely on an investigation that, from the moment the Appellant was provisionally suspended, had considered exclusively evidence that was prejudicial to him.
- The FIFA DC and then the Appeals Committee decided to consider the “absolutely prepared questionnaire of the Player, biased media images, various statements and, worse still, the testimonies of the Presidents of the NZF and the FA”, without that evidence having been tendered to them in the course of the proceedings. All this so-called evidence was given more weight than a video in which the Player explicitly explains to her teammates not only that the Appellant asked her for permission before kissing her, but also that she said “*pues vale*” (“ok then”).

- In conclusion, and without delving into whether the Kiss Incident deserves disciplinary reproach or not, what matters is the real context of the incident and, above all, the fact that the Player consented to the kiss, which should have a direct impact on the term of the sanction imposed (if any) on the Appellant.
- The Appellant submits that he is been sanctioned for the Kiss Incident (along with the other three incidents) and being judged for his attitude after the incident, despite there being no charges for those behaviours.
- Finally, the Appellant apologises for letting his emotions control his acts, but none of them was done with the intention of harming the Player, FIFA, the football family or anyone that might have felt offended by his acts.
- The Appellant does not seek to justify the Kiss Incident, but simply to ensure that the sanction imposed as a result be appropriate and proportionate rather than the result of a value judgement that was resolved even before the opening of this disciplinary proceeding.

“The Genitals Incident”

- Prior to any further analysis, the Appellant points out once again the importance of reading and understanding the context of his actions, to be able to keep them

inside the natural limits that should contain them.

- The Appellant’s action catalogued as the “Genitals Incident” is nothing else and nothing more than a cultural expression in Spain, typically made by men but also women to communicate in a non-verbal way how, through effort and hard work, an endeavour has been successfully performed. (*“Ole tus bueros”, “Way to go” or “You are the best”*).
- The gesture performed by Mr Rubiales was not and can never be deemed an insult, as culturally it is not considered as such, particularly when made in a friendly exchange between friends.
- It is also unclear to the Appellant why FIFA would decide to create an issue in relation to this gesture when multiple personalities of the football world have made very similar gestures in competition-like contexts without suffering any repercussions.
- In the context of the Appellant’s gesture, it was clearly directed solely and exclusively at Mr Vilda, a fact that FIFA did not deny in any of the two prior instances, and with the sole intention of congratulating him, in a way that they both would understand and correlate, for his outstanding work. It is also crucial to understand that this was made *“inter amicus”* and in a non-verbal conversation highly influenced by Spanish tradition and culture.

- At no point did the Appellant try to disrespect anyone or to bring any disrepute to football and/or FIFA.
- If, in a completely different context such as the celebration of goals or titles against the opponent fans (like Diego Simeone, Cristiano Ronaldo and Emiliano Martínez) or insulting them (like Diego Armando Maradona), this behaviour warranted at most a fine, there is no reason to impose such a serious sanction on the Appellant where the context was one of celebration with Mr Vilda. In other words, there have been similar situations in the past (in terms of the gesture, not the meaning) that did not reach the severity of disciplinary consequences seen in this case. Therefore, not only from the perspective of a reasonable and objective observer, but also due to a comparative injustice, the sanction (if any) to be imposed on the Appellant should, at most, be a fine.

“The Carrying Incident”

- The Appellant acknowledges that he should not have carried Ms Castillo over his shoulder during the post-match celebration.
- However, at that point the stadium was empty, and the medal ceremony was over. And Ms Castillo never appeared to feel threatened or uncomfortable with the act and as FIFA never sought out a witness statement from Ms. Castillo they cannot assume or allege otherwise.

- This behaviour was nothing but an expression of happiness, comparable to what Mr Rubiales did with the then Head Coach of the Men National Team, Luis Enrique Martinez, on another occasion when Spain eliminated Croatia during the Euro 2020.
- It is unacceptable that FIFA, in a lack of any seriousness while determining the precedents available to qualify an action as an “incident” or a “behaviour incompatible with the principles of Art. 13 FDC”, enlarges the extent of an action to something that should not even be considered more than a natural act within the context of a celebration.
- Also, it must be noted that the players of the national team celebrated their victory, *inter alia*, by tossing the Appellant up in the air.

“The Peck Incident”

- Even though, initially, this “incident” was not reported, for whatever reason FIFA considered the Peck Incident to be an issue, too.
- That serious disciplinary consequences can arise from a peck on the cheek is surprising since not only is it a worldwide sign of appreciation, but also a greeting between men and women in Spanish culture.
- Curiously, nobody had a problem with the Appellant when he effusively kissed male players after

the Spanish National Team victory against Croatia in the UEFA Nations League.

- To allege that giving a player a peck on the cheek and carrying another is inappropriate behaviour is unrealistic given the scenario.

“Proportionality of sanctions”

- The proportionality of sanctions is a well-established principle within *lex sportiva*. As a general proposition, the principle of proportionality dictates that the most extreme sanction must not be imposed before other less onerous sanctions have been exhausted (CAS 2011/A/2670).
- “*The steady line of CAS jurisprudence provides that the sanctions imposed must not be evidently and grossly disproportionate to the offence*” (CAS 2013/A/3139).
- The Appealed Decision sanctions the Appellant for the occurrence of four different incidents that “*undoubtedly constituted individual breaches of art. 13 FDC*”, but then also states that “*the sequence of incidents also seems to indicate that they were all inextricably linked, one leading to the other*”.
- This led the FIFA DC to impose a sort of general sanction consisting of a three-year ban the Appellant’s disagrees with. The four incidents should not result in the same sanction (i.e. a ban), given the wide range of sanctions available for imposition on natural persons under the FDC.

- Unlike what is ruled in the Appealed Decision, each violation of the FDC should entail its own specific sanction since, as the Appealed Decision itself asserts, not all the incidents are equally serious or severe.

- In other words, it is disproportionate from a disciplinary standpoint to compare the Carrying Incident, the Genitals Incident and the Peck Incident to the Kiss Incident. There is no other option but to consider each of the incidents as individual infractions and to sanction each of them separately, considering their specific context and gravity

- Based on the circumstances of the case and given the existence of other punitive measures in the FDC, there is no reason to apply a ban, the most severe of punitive measures, to these four incidents, especially when previous similar cases have either not been pursued by FIFA or been resolved with the imposition of a fine.

- There are only three cases in which the FIFA DC has applied Article 13 FDC, and the Appellant’s is one of them.

- Indeed, the only two previous cases under Article 13 FDC (FDD-12714 and FDD 12712) involved players investigated for assaulting members of the referee team during the World Cup in Qatar. The sanctions imposed on them was a “*suspension for a specific number*

of matches or for a specific period”, specifically, four matches.

- Because FIFA applies Article 13 FDC to discipline an assault on referees after a match during the World Cup, and to a consensual kiss after the Spanish team’s victory in the FIFA Women’s World Cup, a comparison must be made between those cases and the Appellant’s. Additionally, compared to sanctions FIFA has previously imposed in cases which involved officials having engaged in corruption, bribery, requesting of personal benefits, sexual harassment and rape, the sanction imposed on the Appellant is grossly disproportionate.
- Therefore, when comparing this case to previous cases decided under the FDC and the Code of Ethics, the sanction imposed on the Appellant is clearly disproportionate. This is the only case in which the FIFA DC has applied the most severe of sanctions to a natural person, namely, a ban on taking part in football-related activity for three years.
- In conclusion:
 - (i) The Appellant profoundly regrets all the Incidents that occurred.
 - (ii) The FIFA DC have analysed the Incidents from an improper context and ignored a great amount of the Appellant’s evidence.

- (iii) The FIFA DC have wrongly analysed all the Incidents jointly. This led to the imposition of a sanction more severe than the one that should be applied if the Incidents had been considered and sanctioned separately.

B. FIFA

107. In its Answer, FIFA requested the CAS to:
- “a. Reject the relief sought by the Appellant.*
 - b. Confirm the Appealed Decision in full.*
 - c. Order the Appellant to pay a contribution to FIFA’s legal costs and expenses. FIFA hereby asks to be allowed to make specific submissions on cost at or following the hearing”.*
108. FIFA’s submissions, *in essence*, may be summarised as follows:

Standard of proof and burden of proof

- The burden of proof in the present matter lies initially on the accuser, i.e. FIFA, and is established in Article 41(1) FDC, which states: *“The burden of proof regarding disciplinary infringements rests on the FIFA judicial bodies”.*
- Despite FIFA bearing the burden of proof, Article 41(2) FDC foresees that *“[a]ny claiming a right on the basis of an alleged fact shall carry the burden of proof of this fact”.*
- This is a mere replication of the consistent application of Article 8 of the Swiss Civil Code (“SCC”) in

CAS jurisprudence which has found that *“if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate its allegations with convincing evidence”*.

- Even when FIFA bears the initial burden of proving the facts that it alleges, the Appellant has the duty to prove all the facts and assertions on which he intends to rely in these proceedings, and the Appellant has not made substantiated rebuttals to the facts or evidence established by the Disciplinary or Appeal Committees.
- As Article 39(3) FDC provides, it is not disputed that the standard of proof here is *“comfortable satisfaction”*, however, that there would be a sort of *“sliding scale, based on the allegations at stake”* is disputed.
- FIFA relies on CAS 2018/A/5920 in this regard which reads: *“84. In the view of the Panel, this does not mean that there is some sort of “sliding scale” within the standard of “comfortable satisfaction” depending on the seriousness of the charge, but that in case of serious allegations, the adjudicatory body should have a high degree of confidence in the quality of the evidence”*.
- In any case, the Appellant does not dispute the occurrence of the facts of which the Appellant is accused (i.e. the Incidents).
- In view of the above, after a cumulative evaluation of all the evidence, FIFA’s standard of proof in the present matter must be to convince the Panel to its

comfortable satisfaction that the Appellant breached Article 13 FDC.

Article 13 of the FDC

- The Appellant does not appear to seriously contest that the Incidents occurred or that these constitute breaches of the FDC. He concedes that he should not have behaved the way he did.
- The FDC serves as a critical foundation for maintaining high ethical standards in football, requiring all participants – players, officials, clubs and national associations – to exhibit behaviours that uphold the sport’s core values. This means not only adhering to the rules of the game, but also demonstrating profound respect for opponents, officials and the ethos of fair play.
- The FDC pays particular attention to the conduct of football officials, who are held to the highest standards due to their influential roles and the significant impact they have on the integrity of the sport. Their behaviour, both on and off the field, must exemplify dignity, impartiality and integrity.
- The impact of these behaviours extends beyond the immediate victims. They tarnish FIFA’s image and damage the reputation of football as an inclusive and respectful sport. This is detrimental not only in the eyes of the global community but also impacts the grassroots level where the future of the sport is nurtured.

Young players look to officials for guidance and emulate their behaviour, making it crucial that officials always demonstrate integrity and respect.

- Sexist behaviours, which include any actions or language that discriminate or demean individuals based on gender, are particularly damaging. Examples might include an official making derogatory comments towards female players or staff or using gestures that perpetuate gender stereotypes. Such behaviour is not only offensive, but also undermines the inclusive environment that football strives to promote.
- The FDC outlines a rigorous and comprehensive approach to managing incidents involving indecent gestures as well as sexist and sexual behaviours, especially when perpetrated by officials, who are expected to uphold the highest standards of conduct.

- An evaluation of the immediate setting of the incident is crucial. The location – whether on the field, in the locker room or during a team event – and the timing, particularly – whether it occurred during a high-pressure moment of a match or in a relaxed setting – can significantly influence how the actions are perceived as well as their subsequent impact on the sport.

- The history of the perpetrator is also examined – whether they have previously been involved in similar incidents can affect the stringency of the sanctions imposed.
- FIFA also conducts an in-depth evaluation of the perpetrator's behaviour following the incident. An acknowledgment of wrongdoing and any signs of genuine remorse or apology to the affected parties can also play a mitigating role in the disciplinary process. These actions suggest a willingness to acknowledge and understand the misconduct's impact and an openness to correction and learning.

Procedural issues

- All the Appellant's allegations regarding procedural breaches that may have occurred in the previous proceedings must be rejected.
- Even if such alleged procedural issues had occurred, and if not already moot, those would be cured by the Panel's *de novo power of review* pursuant to Article R57 of the CAS Code. Therefore, they are irrelevant.
- This is confirmed by CAS jurisprudence that has consistently held that: "*the virtue of an appeal system which allows for a full rehearing*

before an appellate body is that issues relating to the fairness of the proceedings before the authority of first instance fade to the periphery”(see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, cases and materials, 2015, p. 513, paras. 29-30)”.

“The Genitals Incident”

- For Mr Rubiales to have grabbed his genitals right after the end of the Match, in the presence of public authorities, is a stark example of indecency and seriously puts the image of football and FIFA into disrepute (cf. Article 13 FDC).
- Such gesture reflects the deeply ingrained symbolic association of the male genitals with power, dominance and masculinity. This action is emblematic of how these gestures, and associated symbols, have historically been used to assert male authority and control, often reinforcing patriarchal systems.
- The action of grabbing one’s genitals can be interpreted as an assertion of dominance and power. This behaviour, especially in a public and formal setting like the Women’s World Cup, serves to reinforce traditional gender roles where men are seen as dominant figures. It perpetuates the notion of male authority and control, relegating women to subordinate positions.
- In their decisions, the FIFA judicial bodies conclude that the Genitals Incident undoubtedly constitutes a breach of Article 13 FDC, insofar that it is contrary to the very basic rules of decent conduct. In addition, while putting in perspective the media coverage of such a gesture, the FIFA judicial bodies also deem that, by grabbing his crotch in one of the most exclusive areas of the stadium, in the presence of the most prominent dignitaries and during the most important match of the competition at stake, the Appellant clearly behaved in a way that brings the sport of football and/or FIFA into disrepute.
- The Appellant argues that the analysis made by the FIFA judicial bodies completely disregards the context in which it occurred. While conceding that it is an ugly gesture, he insists that it means nothing more than “*olé tus huevos*” (“bravo to your balls”), a typical and widespread expression in Spain to tell someone that they have done something well, and that it was not aimed at offending anyone, but was directed solely and exclusively at national team coach Mr Vilda. Thus, the true context of the gesture should be considered, and not biased speculations to discredit him as sexist and macho.
- However, these explanations had already been taken into account by the FIFA judicial bodies, which agreed that one explanation for the gesture could be that the Appellant grabbed his genitals to show his support to the coach as an expression of a Spanish cultural gesture, but emphasised that

regardless of the justification behind it, it remains that the gesture performed by the Appellant can only be seen as an indecent, sexist and offensive gesture contrary to the basic rules of decent conduct, especially when seen by an objective observer (which were in the millions). In its oral submissions, FIFA also alleged that in their experience, the gesture is not in fact widely accepted in Spain but rather would be considered indecent to most.

- To provide legal context to discriminatory chants/words, FIFA refers by analogy to the reasoning adopted in CAS 2016/A/4788, para 124:

“even if in many of the cases this kind of words or expressions are not used with the intention of offending a specific person but, in any case, they are however deeply offensive and harmful to third parties and groups of people. Therefore, in the Panel’s view, even if those expressions and words are not used with the intention to discriminate or offend the specific player or players to which they are addressed, they still can be considered discriminatory or insulting in nature.

In particular, the fact that the meaning and the use of a word could have been trivialized by part of the society and that in some contexts or moments such word is being used without intending to insult, disrespect or humiliate to whom it is addressed does not mean that the word itself has lost its discriminatory, insulting and harmful connotation, or that the expression is harmless and legitimate. (...) In this regard, the Panel agrees with the opinion of CONAPRED and

considers that an insulting word like “Puto” does not lose its negative or insulting nature and harmful effect just because at a given time the use of such word becomes a custom, a habit or even a tradition”.

- That other individuals involved in football may have made a similar gesture in the past is irrelevant to the Panel’s analysis of whether, the gesture and the context in which it was made by the Appellant was contrary to Article 13 FDC.
- As such, FIFA seeks a confirmation of the FIFA judicial bodies assessment and findings: From the perspective of a reasonable and objective observer, the gesture is undoubtedly contrary to the basic rules of decent conduct, and contrary to Article 13 FDC.

“The Kiss Incident”

- Lack of consent and non-full consent in sexual aggressions are critical issues that require a comprehensive understanding of consent, power dynamics and the impact on victims. Consent must be clear, voluntary and enthusiastic, and any deviation from this standard constitutes a violation of an individual’s autonomy and bodily integrity.
- Consent is the cornerstone of any sexual interaction. It must be given freely, without coercion, pressure or manipulation. True consent is an active, ongoing process that can be revoked at any time.

- Non-full consent, on the other hand, involves situations where consent is obtained through manipulation, pressure or coercion. This can include verbal threats, emotional blackmail or the exploitation of a power imbalance. Partial consent, especially in the context of power imbalances, further complicates the issue. Power imbalances can exist in various forms, such as between an employer and an employee, a teacher and a student or a coach and an athlete.
- The Kiss Incident involving the Appellant and Ms Hermoso after the Match is a notable example of such a power imbalance. The Appellant was clearly seen grabbing Ms Hermoso's head with two hands and kissing her on the lips without her explicit consent.
- Ms Hermoso later stated that she did not consent to the Kiss and felt uncomfortable with the gesture. This incident underscores the impact of power imbalances on consent, as Ms Hermoso, a player under Mr Rubiales's authority in the Spanish national team and UEFA, might have felt pressured or unable to react against the unsolicited Kiss due to his powerful position.
- Video evidence clearly shows that the way Mr Rubiales forcibly grabbed Ms Hermoso's head did not allow her to free herself from his grasp or physically deny the action. Indeed, Mr Rubiales did not ask her whether he could give her the Kiss; rather, there was an

affirmation, as evidenced by a forensic lip-reading report which concluded that Mr. Rubiales said, "*Give me a kiss*" ("dame un beso"). Mr Rubiales was not seeking consent. He was advising Ms Hermoso, without giving her a choice, of his impending actions.

- Even if Ms Hermoso had given her clear, voluntary and enthusiastic consent to being kissed, which FIFA submits cannot be ascertained from the Appellant's expert, given the significant power imbalance between her and Mr Rubiales. The sequence of events was so rapid that it is highly unlikely Ms Hermoso could properly evaluate the situation or react. Even if her consent could be perceived as partial, it would only have been driven by fear of repercussions or implicit pressure due to a power disparity. In such a context, partial consent is insufficient and invalid.
- That Ms Hermoso's did not consent to the kiss is reinforced by the fact that she has consistently defended her stance, even when pressured to do otherwise by her own federation. She pressed charges before the criminal courts, gave testimony to public prosecutors and judges and always stood firm in her description of what happened. This unwavering consistency in her statements and actions underscores the lack of consent and highlights the profound impact of the power imbalance in this situation.

- FIFA submits that the Panel should be comfortably satisfied that, from the Player's perspective, the Kiss had, at no point, been consented to. This is not only FIFA's submission, but as found by the FIFA judicial bodies, it is also precisely how the Kiss would be and has been perceived by reasonable and objective observers.
- FIFA argues that two critical aspects are central to Mr Rubiales's appeal fall well short of their objective: the forensic analysis of the alleged consent provided by the Appellant and the credibility of the so-called psychological report.
- The forensic analysis purportedly determining the presence of consent has numerous shortcomings that undermine its conclusions. The vague assertions, incomplete references and lack of concrete evidence call into question the reliability of this analysis. The forensic analysis concludes that no violent, abusive or sexually connotative behaviours were observed in Mr Rubiales's actions and that Ms Hermoso did not exhibit signs of victimisation. Such conclusion is surprising, given the evidence and Ms Hermoso's consistent statements about her discomfort and lack of consent. Furthermore, the superficial nature of the examination fails to consider key aspects such as power dynamics and the immediate context of the incident, which are essential in assessing true consent.
- Overall, the forensic analysis filed by the Appellant is incomplete and lacks a rigorous analysis of the available evidence. The conclusion that the Appellant's actions were spontaneous and consensual is not supported by the evidence and contradicts Ms Hermoso's consistent accounts of the event.
- As to the so-called psychological report, it is unreliable on the sole basis that it was prepared by an employee of RFEF, i.e. a person falling under the Appellant's professional authority as president of RFEF at the time the report was prepared, it is also deeply flawed due to the inadequate qualifications and expertise of the individual who conducted it.
- The evaluation process for potential trauma resulting from sexual abuse is inherently complex and cannot be adequately addressed through a brief, superficial interview. A comprehensive assessment is essential to gain a full understanding of the victim's experiences, symptoms and needs.
- Yet, Mr Javier Lopez Vallejo, the head of the RFEF psychological department who prepared the report, did not even speak to Ms Hermoso other than a short conversation after the match (no evidence of which has even been provided), did not truly evaluate her state, lacks specific training in handling sexual abuse cases and provides a fundamentally unreliable assessment. Without professional communication with

the victim in an environment that allows for such evaluation, any assessment or conclusion about her psychological state is fundamentally flawed.

- Moreover, the author's qualifications and expertise in dealing with sexual abuse cases are questionable. The document he signed does not include any reference to his experience and training in handling sexual abuse cases. His knowledge of psychology appears to be limited to a master's degree in Sports Psychology, and his primary experience has been as a goalkeeper coach. This background is clearly inadequate for addressing the complexities of trauma resulting from sexual abuse. In its oral submissions, FIFA also clarified that at no time was this individual a FIFA safeguarding Officer – unlike the Appellant wrongly claimed in its submissions.
- As such, the evidence provided by the Appellant is not reliable as he claims.
- FIFA also argues that Mr Rubiales has failed to submit any evidence that could undermine Ms Hermoso's credibility. He has failed to present any tangible proof, such as communications, witnesses or documents that would substantiate his claims. Furthermore, there is no plausible explanation from him as to why Ms Hermoso would persistently assert her version of events, willingly subject herself to intense media

scrutiny and public attacks or go through the significant personal and legal burden of filing and maintaining a criminal complaint against him. Her consistent actions and statements suggest a genuine pursuit of justice rather than any deceitful motive.

- FIFA relies on the FIFA judicial bodies' lengthy and developed reasoning which concluded that kissing a player, and more importantly without her consent, undoubtedly constitutes behaviour contrary to the basic principles contained in Article 13 FDC, particularly when considering the hierarchical link between Mr Rubiales and the Player.
- The events that followed the Kiss further denote behaviour incompatible with the general principles of fair play, loyalty and integrity enshrined under Article 13 FDC, and Mr Rubiales's attitude in relation to the Kiss Incident undoubtedly tarnishes the image of football and FIFA, bringing both into disrepute. As such, the FIFA judicial bodies held that, from the very first moment he initiated the Kiss to the moment its decision was rendered, Mr Rubiales repeatedly and continuously violated the basic rules of decent conduct, thereby infringing Article 13 FDC.
- In any event, and if one were to follow the argumentation of Mr Rubiales that the Kiss was consensual (*quod non*), it remains that, as emphasised by the FIFA judicial bodies, such behaviour

would never be the one expected from the president of an association having won the FIFA Women's World Cup and would still be seen as a very serious incident contrary to the basic rules of decent conduct. Indeed, the image of a man, the president of a football association, grabbing the head of a female player with both hands, pulling her head towards his and kissing her during an internationally televised and streamed medal ceremony cannot be tolerated and is in total contradiction with the tournament's aim to unite and inspire people around the world through the power of the FIFA Women's World Cup and women's football in general.

- FIFA submits that no evidence in the case file, not even the Appellant's, indicates that Ms Hermoso consented to the Kiss in any way.
- A kiss – emanating from the president of an association towards a player of the opposite sex of one of the national teams under his leadership and responsibility – is completely unacceptable.
- FIFA seeks a confirmation of the conclusions of the FIFA judicial bodies and submits that kissing a player, especially without their consent, undoubtedly constituted behaviour contrary to the basic principles set out in Article 13 FDC.

“The Carrying Incident” and “the Peck Incident”

- Gender microaggressions are small, seemingly innocuous comments and actions that can accumulate over time, impacting a person's sense of self and identity. These microaggressions are often so pervasive and normalised that they go unnoticed by many. Yet, they contribute significantly to a culture of inequality and disrespect. The actions of Mr Rubiales, particularly the incidents of carrying a female player on his shoulders and giving another female player an unsolicited peck on the cheek, are plain examples of such microaggressions and illustrate their damaging effects.
- As the highest-ranking official in Spanish football and a prominent figure within European football, Mr Rubiales held a significant position of authority over the female players. Carrying a woman on his shoulders, regardless of her immediate reaction, reduces her to an object or trophy, stripping away her dignity and reinforcing a power imbalance. It conveys a message that her value is tied to being an object of display rather than as an autonomous individual with equal rights and deserving of respect.
- It is not unsurprising that the Appellant himself now *“acknowledges he should not have done it”*. Such a candid admission that his behaviour in connection to the Carrying Incident was inappropriate – despite trying to justify his conduct and avoid accepting full responsibility for his actions – also supports the

conclusions that he breached of the general principles of decent conduct set out in Article 13 FDC.

- Mr Rubiales insists that this gesture of giving an unsolicited peck on the cheek of a female player is a worldwide show of appreciation and a common greeting in Spanish culture between men and women. But the lack of consent makes it problematic. That there is no evidence suggesting that any of the players were uncomfortable about the situation during or after the Peck Incident does not negate the inappropriate nature of the act. Kissing someone without their consent blatantly disregards their personal boundaries and autonomy, reducing the individual to a mere object of male gratification.
- FIFA submits that all the Incidents and the Appellant's behaviour, must be assessed within the context in which they occurred. To FIFA, they are all manifestations of gender microaggressions.
- FIFA recalls that at the time of those Incidents Mr Rubiales was well acquainted with celebration protocols and aware of the exemplary behaviour expected from him as president of one of teams playing in the final of such an important competition as the Women's World Cup. To the contrary, Mr Rubiales adopted a deplorable attitude with unacceptable sexist connotations by engaging in improper physical contact with female players under

his leadership by either carrying or kissing them. The fact that these players may not have protested or objected to those physical contacts is completely irrelevant in assessing whether Mr Rubiales's behaviour is contrary to Article 13 FDC, particularly considering that the players were all under a *de facto* hierarchical link with Mr Rubiales, thereby limiting their possibility to protest or call him out for his actions

- FIFA thus submits that the conclusions reached by the FIFA judicial bodies in relation to these incidents should also be confirmed.

Concluding submissions regarding the Incidents

- FIFA concludes by submitting that on its assessment of all the facts, evidence and circumstances in this case, Mr Rubiales blatantly and very seriously violated Article 13 FDC through his indecent conduct and by putting FIFA's and football's image into disrepute.
- Mr Rubiales's actions were not only indecent but also deeply damaging to the image of football and FIFA. The indecent Genitals incident, the Kiss, given without consent, and his other inappropriate physical interactions with female players, highlight a gross abuse of power and a failure to uphold the principles of respect and integrity.
- Mr Rubiales's persistently defiant behaviour after the incidents, and

paradigmatically at the RFEF assembly, as well as his use of the organisation's platform to defend his actions reveal a troubling misuse of institutional power. His initial dismissive response and subsequent attempts to manipulate the narrative only further underscored his lack of accountability and understanding of the gravity of his actions. His derogatory remarks about feminism and attempts to portray himself as a victim of a political conspiracy demonstrate a deeply ingrained patriarchal attitude and a refusal to accept responsibility.

- Mr. Rubiales' conduct is in direct contradiction to the values FIFA aims to promote, including fairness, respect and equality. The holistic review of the incidents, from the initial inappropriate conduct to the escalating coercive behaviour, paints a comprehensive picture of a severe breach that has rightly drawn widespread condemnation.
- FIFA finally submits that any sanction imposed by the Panel because of these Article 13 FDC breaches must be determined in accordance with Article 25 FDC.

"in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances" and "[taking] into account all relevant factors of the case, including any assistance of and substantial cooperation by the offender in uncovering or establishing a breach of any FIFA rule, the circumstances and the degree of the offender's guilt and any other

relevant circumstances". This principle was confirmed in CAS 2014/A/3665, 3666 & 3667.

The proportionality of sanctions

- CAS has held that *"the principle of proportionality under Swiss law implies that there must be a reasonable balance between the misconduct of the actor and the applicable sanction. More specifically, the principle of proportionality requires that: (i) the measure taken by the disciplinary body is capable of achieving the envisaged goal; (ii) the measure is necessary to reach the envisaged goal; and (iii) the constraints which the affected person will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal"* (CAS 2019/A/6219).

- In the same case, CAS established several criteria to consider when evaluating the proportionality of a sanction in disciplinary matters, namely:

- "a. the nature and circumstances of the violation;*
- b. the impact of the violation on the public opinion;*
- c. the importance of the competition affected by the violation;*
- d. the damage caused to the image of FIFA and/or other football organizations;*
- e. the substantial interest of FIFA, or of the sporting system in general, in deterring similar misconduct;*
- f. the offender's assistance to and cooperation with the investigation;*
- g. whether the violation consisted in an isolated or in repeated action(s);*
- h. the existence of any precedents;*

- i. *whether the offender acted alone or involved other individuals in, or for the purposes of, his misconduct*
 - j. *the position of the offender within the sports organization;*
 - k. *the degree of the offender's guilt;*
 - l. *the education of the offender;*
 - m. *the personality of the offender and its evolution since the violation; and*
 - n. *the extent to which the offender accepts responsibility and/or expresses regret”.*
- FIFA submits that the following circumstances, *inter alia*, clearly establish how the sanction imposed on Mr Rubiales is fully proportionate to the offences committed:
 - Any sanction imposed in a matter such as the one under scrutiny must have not only a punitive effect on the individual charged, but also a deterrent effect for any official who would consider behaving in such manner in the future. The message must be clear: there is no place in football for offensive sexist gestures and there is no place in football for unconsented kissing or other touching of individuals of an intimate nature.
 - By addressing such breaches decisively, FIFA reaffirms its commitment to upholding the highest standards of conduct and fostering a culture of equality and respect within the sport. Such a measure is crucial in maintaining the sport's reputation and ensuring that all individuals, regardless of gender, are treated with respect and dignity.
 - Because the Incidents were broadcast live during the Match and the medal ceremony and therefore seen by the record-setting viewership worldwide, they were highly scrutinised by the media and public opinion. The Appellant's violations were so serious that millions of objective observers concluded that all his actions were unbecoming not only of a football official, but also of any citizen. The Genitals Incident and the Kiss Incident both caused public outrage at what are considered unacceptable actions in any scenario.
 - With the unacceptable Incidents occurring in the final of FIFA's flagship women's football competition, the damage caused to the image of FIFA and/or other football organisations above was immense. Such actions clearly damaged FIFA's and RFEF's image, to the point where the latter faced an unprecedented institutional crisis in the aftermath of the Match.
 - The Incidents were not “*an isolated [...] action*”, but rather a series of continued misconducts (if not “*repeated action(s)*”) by Mr Rubiales, committing several

disciplinary breaches in the fervour of his own sense of impunity from the moment the final whistle blew, continuing during the medal ceremony and post-Match celebrations, and even beyond that point through his behaviour in the aftermath.

- At the time the disciplinary violations were committed, the Appellant was (i) president of RFEF (i.e. the highest-ranking official in Spanish football) and (ii) vice-president of UEFA (i.e. one of the highest-ranking officials in European football).
- The fact that Mr Rubiales has not been sanctioned for prior disciplinary violations does not diminish the fact that, in the matter at hand, he consistently committed several Article 13 breaches from the final whistle of the Match. In any event, any previous sanctions would only be considered as aggravating factors justifying a harsher sanction.
- The Appellant's actions after the Match demonstrate an unacceptable pattern of obstruction and an absolute lack of remorse. Contrary to what the Appellant attempts to portray, he has at no time apologised to Ms Hermoso or shown sincere remorse for the Incidents.

- FIFA further argues in rebuttal to the Appellant's submission that the regulations do not provide that a sanction should be determined on the basis of each specific violation, especially when the specific offences under scrutiny do not foresee any individual sanction.
- Having said that, FIFA has already explained how each individual incident would warrant the sanction imposed, and if one were to consider all the Incidents jointly (as foreseen in the applicable regulations), the sanction is actually lenient.
- In any event, even if one were to accept the Appellant's arguments that an individual assessment of the Incidents would lead to one of these not warranting a sanction (*quod non*), CAS jurisprudence (CAS 2017/A/5393, para 236) has confirmed otherwise:

"The mere fact that the Panel has some doubts as to whether certain individual Allegations would legitimately justify the imposition of a suspension – such as for instance the TFM's request to the IOC to "suspend membership of NOSC with IOC" (lit. b) – this does not in its view necessarily warrant a reduction of the period of suspension, particularly considering that other, in the Panel's view more severe, allegations are considered proven".

- Regarding the Appellant's comparison of his situation to those of others, it must be stressed that CAS has consistently followed the principle that *"Similar cases must be treated similarly, but dissimilar cases*

could be treated differently". None of the cases referred to by the Appellant are like the present case. His desperate attempt to draw comparison to other cases which are unrelated to the Incidents under scrutiny from both a factual and a regulatory perspective does not serve his cause.

- Therefore, FIFA submits on the one hand that despite his attempts to minimise the scope of his actions (which he acknowledges having committed), the Appellant has failed to demonstrate how, under all the circumstances, the sanction that was imposed on him by FIFA's judicial bodies is disproportionate. On the other hand, FIFA argues that it has satisfied its burden of establishing that the Incidents committed by the Appellant amount to a pattern of serious breaches of Article 13 FDC and that the sanction imposed on Mr Rubiales by the FIFA Judicial Bodies is more than proportionate. Therefore, their imposition of a three-year suspension from football related activities should be confirmed.

V. CAS JURISDICTION

109. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

110. With respect to the Appealed Decision, the jurisdiction of the CAS derives from Article 56 and Article 57(1) of the FIFA Statutes.
111. Neither the Appellant nor the Respondent objected to the jurisdiction of the CAS, and both Parties confirmed the CAS jurisdiction when signing the Order of Procedure.
112. It follows that the CAS has jurisdiction to decide on the appeal of the Appealed Decision.

VI. ADMISSIBILITY

113. Article R49 of the CAS Code provides, *inter alia*, as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against [...]"

114. It follows from Article 57 of the FIFA Statutes that *"appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members or leagues shall be lodged with CAS within 21 days of receipt of the decision in question"*.
115. The grounds of the Appealed Decision were notified to the Appellant on 12 February 2024, and the Appellant's Statement of Appeal was lodged on 3 March 2024, i.e. within the statutory time limit of 21 days set forth in Article R49 of the CAS Code and in Article 57 of the FIFA Statutes, which is not disputed. Furthermore, the Statement of Appeal and the Appeal Brief complied

with all the requirements of Articles R48 and R51 of the CAS Code.

116. It follows that the appeal is admissible.

VII. APPLICABLE LAW

117. Article 56(2) of the FIFA Statutes determines the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law”.

118. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

119. Based on the above, and with reference to the Parties’ submissions, the Panel is satisfied that the various regulations of FIFA are primarily applicable and, subsidiarily, Swiss law should the need arise to fill a possible gap in the various regulations of FIFA.

VIII. PROCEDURAL ISSUES

120. The Panel notes that several procedural issues were raised by the Appellant in the course of the written and oral procedure in the present dispute.

121. The Appellant submits, *inter alia*, that he has been subjected to numerous due process violations in the previous FIFA proceedings, and that FIFA, instead of acting as the world governing body of football has acted via its bodies as a party to a dispute.

122. FIFA rejects such submissions and further submits that even if such alleged procedural issues or flaws occurred, if not already moot, those would in any case be cured by the Panel’s *de novo power of review* pursuant to Article R57 of the CAS Code.

123. Without going into a thorough analysis of whether the alleged procedural violations actually occurred in the proceedings before the FIFA Disciplinary Committee and the Appeal Committee, the Panel finds as argued by FIFA that any such procedural breaches would now be cured by the present CAS arbitration proceedings in light of Article R57 of the CAS Code which provides, *inter alia*, that: *“The Panel has full power to review the facts and the law”*. This has long been the position of CAS panels in application of Article R57, and this Panel sees no reason to deviate from the same. (see e.g. CAS 2019/A/S6669, para 148).

124. Moreover, and to leave no stone unturned, the Panel further finds the Appellants has adduced insufficient evidence to support his allegations regarding a breach of Article 6 of the European Convention of Human Rights.

IX. MERITS

125. At the outset, the Panel notes that the factual circumstances pertaining to this matter are for the most part undisputed.

The following elements relevant to the Panel's reasons are also undisputed:

- On 20 August 2023, the Match, which was played in Sydney, Australia, was broadcast worldwide and the official number of spectators at the stadium was set at 75,784.
- After the conclusion of the Match, a series of Incidents involving the Appellant occurred, which subsequently caused a media storm directed against the Appellant and FIFA.
- Initially, the Appellant publicly chose to deny any wrongdoing and several written statements were published by the RFEF in his defence.
- The media coverage of the Incidents for the most part condemned the Appellant and his behaviour.
- On 26 August 2023, by decision of the Chairperson of the FIFA DC, the Appellant was provisionally suspended from exercising any football-related activities for 90 days, and on 10 September 2023, the Appellant formally resigned as President of the RFEF and as Vice-president of UEFA.
- On 26 October 2023, the FIFA DC issued its Decision, sanctioning the Appellant with a three-year ban from taking part in any football-related activity for having behaved in a manner contrary to the principles enshrined under Article 13 FDC.
- On 16 January 2024, the FIFA Appeal Committee dismissed the

Appellant's appeal and confirmed the FIFA DC Decision in its entirety.

126. The Appellant submits that the Incidents, which he admits to for the most part, occurred in a state of euphoria and did not constitute any violation of Article 13 FDC; and if they did, that a proportionate sanction for the same should be no more than a fine. FIFA argues that all the Incidents amount to severe violations of the principles set out in Article 13 FDC, that the Appellant's apology was tardy, insincere and lacking any true remorse, and that the three-year ban imposed on the Appellant should be confirmed.
127. In short, the Parties disagree on whether the Appellant's behaviour in connection with the Incidents constitutes a violation of Article 13 FDC and, in the affirmative, what consequences should arise as a result.
128. Thus, the main issues before the Panel are:
 - a) Did the Incidents constitute a violation of Article 13 FDC? and in the affirmative,
 - b) Is the sanction imposed on the Appellant for violating Article 13 FDC proportionate?

Standard of proof and burden of proof

129. Lawfully, the Panel notes that the standard of proof is defined as the level of conviction that is necessary to conclude that a certain fact occurred (SFT 5C_37/2004, 3.2.3). As the alleged violations and sanctions appealed by the Appellant are governed by the FIFA

FDC, the standard of proof set out therein applies.

130. As established in Article 39(3) FDC, the Parties agree, that the applicable standard of proof in the present matter is that of a “*comfortable satisfaction*”. This is lower than the standard of “*beyond a reasonable doubt*”, but higher than the standard of “*balance of probabilities*”.
 131. On this, the Panel refers to and applies CAS 2018/A/5920 (para 84), which found that: “*In the view of the Panel, this does not mean that there is some sort of “sliding scale” within the standard of “comfortable satisfaction” depending on the seriousness of the charge, but that in case of serious allegations, the adjudicatory body should have a high degree of confidence in the quality of the evidence*”.
 132. As established in Article 41(1) FDC, the Parties and Panel further agree that the burden of proof in the present matter lies initially on the accuser, FIFA. Article 41(1) FDC reads: “*The burden of proof regarding disciplinary infringements rests on the FIFA judicial bodies*”.
 133. FIFA thus bears the burden of establishing that the Incidents, either individually or cumulatively, constitute a violation of Article 13 FDC.
 134. Despite FIFA’s initial burden of proof, the Appellant conversely holds a duty to prove all the facts and assertions on which he intends to rely in these proceedings, also to the comfortable satisfaction of the Panel. Importantly, should an Article FDC violation be confirmed by the Panel, the Appellant bears the burden of persuading the Panel that the sanction imposed on him by FIFA is disproportionate to his impugned behaviour.
 135. As additional legal basis for the foregoing, the Panel adheres to Article 8 of the Swiss Civil Code (“SCC”) which states that unless the law provides otherwise the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact, as well and to CAS jurisprudence providing: “*in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them (..). The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some fact and persuade the deciding body, it must actively substantiate its allegations with convincing evidence*” (e.g. CAS 2003/A/506, para 54; CAS 2009/A/1810&1811, para 46; and CAS 2009/A/1975, paras 71ff).
- a) ***Did the Incidents constitute a violation of Article 13 FDC?***
136. Any decision rendered by a sports-related body, including a decision which imposes a sanction on somebody, must adhere to the principle of legality, and thus necessitates a distinct and unequivocal regulatory foundation.
 137. Formally, neither Party disputes that a finding that an individual subject to the FIFA FDC has violated Article 13 FDC constitutes sufficient legal basis for imposing a sanction pursuant to Articles 6 and 25 FDC.
 138. Article 13 FDC reads:

“13. Offensive behaviour and violations of the principles of fair play

1. Associations and clubs, as well as their players, officials and any other member and/or person carrying out a function on their behalf, must respect the Laws of the Game, as well as the FIFA Statutes and FIFA’s regulations, directives, guidelines, circulars and decisions, and comply with the principles of fair play, loyalty and integrity.

2. For example, anyone who acts in any of the following ways may be subject to disciplinary measures:

a) violating the basic rules of decent conduct;

b) insulting a natural or legal person in any way, especially by using offensive gestures, signs or language;

c) using a sports event for demonstrations of a non-sporting nature;

d) behaving in a way that brings the sport of football and/or FIFA into disrepute;

e) actively altering the age of players shown on the identity cards they produce at competitions that are subject to age limits”.

139. As already mentioned, the Parties do not, in general, dispute the factual occurrence of the Incidents.

140. In the Appealed Decision, the Appeal Committee confirmed that *“all Incidents constituted individual breaches of art. 13 FDC, and assessed collectively clearly damages the image of the FIFA and the sport of football more generally”*. Moreover, the Appeal Committee found itself *“comfortably satisfied that the Appellant had behaved in a manner contrary to the principles enshrined under art. 13 FDC, both during and after the Match, as rightly concluded by the first instance”*.

141. Based on the Appealed Decision and the Parties’ submissions, and as set out above, the first divisive issue to be decided by this Panel is whether the Incidents, either individually or collectively, “violated the basic rules of decent conduct” and/or whether the Incidents “brought the sport of football and/or FIFA into disrepute”, thereby violating Article 13 (2) a) and d) FDC respectively?

142. Article 13 FDC appears to be drafted in a wide and generic way to ensure that varying prohibited behaviours can be captured and disciplined under the same, including in a situation where the prohibition of unforeseeable behaviour is not captured by other FIFA rules. As regulations must generally be interpreted using their plain language, the Panel plainly interprets Article 13 FDC as purposely setting out a very wide range of possible breaches and behaviours in relation to integrity, safeguarding, ethics and rules of “basic decency” that are subject to discipline under article 13 (2) a) FDC.

143. The Panel further notes for the sake of good order and as set out in CAS 2007/A/1291 that the mere fact that behaviour can “potentially” bring football and/or FIFA into disrepute is not sufficient to constitute a violation of Article 13 (2) d) FDC. In other words, for the Appellant’s behaviour in the relation to the Incidents to constitute a violation of Article 13 (2) d) FDC, they must as a matter of fact have caused the public opinion of the sport and/or of FIFA be negatively affected. FIFA bears the burden of establishing the same.

144. Ultimately, a Panel must first determine if the conduct in question is captured or

prohibited by Article 13 FDC, and once a violation is established, it is in the next phase of the legal assessment that a Panel may then determine what reasonable and proportional discipline may arise out of the violation.

145. As found by the FIFA Appeal Committee and the FIFA DC, which is undisputed by the Parties, in the first step of the Article 13 FDC assessment, the Appellant's behaviour and role in the Incidents must be analysed from the perspective of a "reasonable and objective observer within the context in which they occurred" to determine if Article 13 FDC violations occurred.

146. The Panel appreciates that "*reasonable and objective*" observers might not all have the same view or the same understanding of basic decency or of how incidents and the context in which they occur may bring sport into disrepute. A "*reasonable and objective*" observer of today might not have the same view as a "*reasonable and objective*" observer might have had years ago or, perhaps, will have in the future. The Panel also acknowledges that cultural, religious or geographical differences may play a significant role in the way incidents and context are assessed by a "*reasonable and objective*" observer. This is all the more evident for incidents which occur in connection with global sporting events.

147. The Panel refers to the reasoning of the panel in CAS 2016/A/4788, which to some extent can be relied upon in analogy to the Incidents, when it states (regarding discriminatory chants/words):
"even if in many of the cases this kind of words or expressions are not used with the intention of offending a specific person but, in any case, they

are however deeply offensive and harmful to third parties and groups of people. Therefore, in the Panel's view, even if those expressions and words are not used with the intention to discriminate or offend the specific player or players to which they are addressed, they still can be considered discriminatory or insulting in nature.

In particular, the fact that the meaning and the use of a word could have been trivialized by part of the society and that in some contexts or moments such word is being used without intending to insult, disrespect or humiliate to whom it is addressed does not mean that the word itself has lost its discriminatory, insulting and harmful connotation, or that the expression is harmless and legitimate. (...) In this regard, the Panel agrees with the opinion of CONAPRED and considers that an insulting word like "Puto" does not lose its negative or insulting nature and harmful effect just because at a given time the use of such word becomes a custom, a habit or even a tradition".

148. Regardless of differing cultural perspectives and the dynamic ever-evolving concept of a "*reasonable and objective observer*", the Panel finds that the Appellant's behaviour and the Incidents that occurred must be analysed from the perspective of a reasonable and objective observer "of today" within the context in which they occurred.

149. The Panel is mindful of the impact that social media may have had in impacting how and to what extent a certain incident or statement is perceived by the public. In this regard, the Panel appreciates that the media coverage of the Incidents and the Appellant was very comprehensive and that similar incidents involving different persons at a different venue would likely not have occasioned the same media coverage and

- public discourse. This, to the Panel renders the contextual element of the assessment becomes even more important.
150. Indeed, the Incidents occurred in connection with the Match, which is the single most prestigious women's football match in the world, on the biggest stage, with world-wide viewership and streaming numbers in the multi-millions. Additionally, the Appellant, as then President of the RFEF and Vice-president of UEFA, was already exceedingly familiar with garnering media attention.
 151. As FIFA in no way controls or has significant influence over the media, the Panel finds that the media and public perception and reaction to the Incidents is, as FIFA argues, relevant to the Panel's assessment of the Incidents, notably in terms of the possible disrepute and negative impact they brought to FIFA and to football, and woman's football to be even more precise.
 152. The Panel now turns its attention to each of the Incidents and assesses first individually, and if needed collectively, if they amount to breaches of Article 13 FDC.
- *The Kiss Incident*
 153. The Appellant has, albeit not in a timely manner, expressly acknowledged that the Kiss should not have happened and that under the circumstances he should have maintained a higher level of composure as President of the RFEF. He submits that he should never have kissed Ms Hermoso and that it was in no way a display of sexual aggression. But, to him, the kiss was consensual.
 154. To FIFA, the Kiss was not consensual. In making this assertion, FIFA relies on Ms Hermoso's statement, among other evidence, including the testimony of its expert witness Mr Mendoza, a lip reader who rebutted the Appellant's version of what was said at the time notably refuting that the Appellant asked permission prior to kissing the Player. To FIFA the Kiss was a blatant example of patriarchal abuse of power and dominance which has no place in women's football and certainly not on the biggest stage possible.
 155. The Panel found Mr Mendoza's lip-reading testimony to be compelling. However, whether the Appellant flatly affirmed he would kiss the Player without seeking consent (*"Dame un Besito- give me a kiss"*), as Mr Mendoza opines and the Player has explained occurred, or whether the Appellant asked permission to kiss her, and the Player consented (*Pues Vale – ok then*), as the Appellant submits she did, this is not seminal to the Panel's finding of whether or not a violation of Article 13 FDC occurred.
 156. The Panel finds that because of the way the Kiss was given (holding the Player's head firmly with two hands with no possibility to say no or indeed consent) what was said matters little to the Panel. The Panel finds, on the evidence, that the Player was given no option and had no possibility not to consent to the Kiss given the factual circumstances in which it was given. Therefore, there is no need to assess the weight to be given or the extent of the probative value accorded to Mr Mendoza's testimony because in the end, it is not determinative to the Panel's findings vis-à-vis FIFA's standard of proof under Article 13 FDC.

157. Relying on Ms Hermoso's compelling and persuasive statement (reproduced in its entirety *supra*) and consistent stance, and the other evidence in the case file and expert evidence heard at the hearing, the Panel finds that the Kiss was not consensual.
158. The Appellant has neither discharged his burden of proving that he asked for permission before the Kiss nor his burden of proving that Ms Hermoso fully consented to the same clearly and voluntarily. In any event, the Panel finds that the Player was in no position to clearly and fully voluntarily consent to such alleged request. Furthermore, and for the sake of good order, the Panel notes, that even the act of asking for permission could in the Panel's view constitute a breach of Article 13 FDC considering the context of the situation, the relation of hierarchy between the Parties and the position of the Appellant.
159. The Panel accepts FIFA's evidence, *inter alia*, that at the time and in the context in which the Kiss occurred, Ms. Hermoso was very exposed and vulnerable and in a very difficult situation. The Spanish team had just won the Women's World Cup, and the Appellant was the President of the RFEF. A hierarchical order/material power imbalance existed between them. He grabbed his head with two hands with the clear intention of kissing her during the medal ceremony in front of millions of spectators. He then effectively kissed her on the lips, which was impossible for her to avoid in that context. She was given no choice, and she had no choice.
160. While the Panel acknowledges that in the videos submitted by the Appellant, Ms Hermoso seems to be laughingly brushing off the Kiss incident in the locker room and on the team bus, the Panel accepts that the timing and context of those videos was not one when she wanted to bring attention to this issue, and also not one when she would have had the time to process what had occurred. As she stated, they had just won the World Cup, and it was a time for celebration. The Panel finds that Ms Hermoso has consistently defended her stance, has pressed criminal charges against the Appellant and has always stood firm in her description of what happened, expressing her lack of consent and discomfort. The Panel thus rejects the Appellant's submissions that Ms Hermoso's behaviour immediately after the Kiss supports his allegation that the Kiss was consensual and that it was not a big deal for her.
161. The Panel is comfortably satisfied that the Appellant kissed Ms Hermoso without her clear and voluntary consent. As the Panel sees it and on the perception of a reasonable and objective observer within the context in which it occurred, this constitutes offensive behaviour contrary to the principles of basic decency and integrity enshrined under Article 13 (1) and 13 (2) a) FDC.
162. Furthermore, taking into consideration the media coverage and the negative public opinion which followed as well as FIFA's submissions in this regard, the Panel is comfortably satisfied that the Appellant's behaviour towards Ms Hermoso tarnished the Match, the medal ceremony, FIFA and football in general, thus bringing them all into

disrepute pursuant to Article 13 (2) d) FDC.

163. Based on the above, the Panel finds that the Appellant's behaviour in connection with the Kiss Incident does constitute a violation of Article 13 FDC.

- The Genitals Incident

164. The Appellant acknowledges that it was an *"ugly gesture"* and that it should not have happened; but submits that for him to grab his genitals in the context of the Spanish women's World Cup win was nothing more than a celebratory cultural expression in Spain to demonstrate that through effort and hard work, an endeavour has been successfully performed. Moreover, also contextually, the gesture was made *"inter amicus"* towards Mr Vilda and should never been perceived as insulting.
165. FIFA submits that the Appellant's repeated indecent and vulgar gesture, which FIFA argues is not a commonly accepted cultural celebration in Spain, and the context in which it was made – in front of millions of viewers, beside dignitaries, notably the Queen and Princess of Spain – can only be considered a violation of the rules of basic conduct and decency, and that the widespread attention it received undoubtedly brought FIFA and the sport of football into disrepute.
166. The Panel may accept that in certain limited circles, the expression *"Óle tus huevos"* might typically be used by people in Spain to express admiration for a job well done. However, and as set out in CAS 2016/A/4788 (cited at para 98 *supra*),

"[...] the fact that the meaning and the use of a word could have been trivialized by part of the society and that in some contexts or moments such word is being used without intending to insult, disrespect or humiliate to whom it is addressed does not mean that the word itself has lost its discriminatory, insulting and harmful connotation, or that the expression is harmless and legitimate".

167. In this regard, the Panel agrees with FIFA that the gesture of grabbing one's genitals, besides being vulgar, can be perceived to a reasonable and objective observer at least as being offensive, but also as an assertion of dominance and power, serving to reinforce traditional gender roles in which men are seen as dominant figures.
168. The Panel finds that even if the Appellant grabbed his genitals only to show support and congratulate Mr Vilda, quite simply, the Appellant chose the wrong time and the wrong place to do so.
169. Based on the above, the Panel agrees with the Appeal Committee that by grabbing his genitals in one of the most exclusive areas of the stadium during the most important match of the World Cup and in the ultimate presence of the most prominent dignitaries, the Appellant must be considered, from the perspective of a reasonable and objective observer, to have contravened the basic rules of decency.
170. Moreover, taking into consideration the media coverage and the condemning public opinion which followed, and FIFA's ample submissions relating the same, the Panel finds that the Genitals Incident also brought football and/or

FIFA into disrepute pursuant to Article 13 (2) d FDC.

171. To dispel the Appellant's allegations in this regard, the Panel notes that whether similar gestures have been sanctioned in the past was of no relevance to its assessment. Every case needs to be assessed on its merits and within its own context. Certainly, none of the other examples relied upon by the Appellant can be compellingly compared to the context in which he made the gesture in this case.
172. Based on the above, the Panel finds that the Appellant's behaviour in connection with the Genitals Incident constitutes a violation of Article 13 FDC.

- The Carrying Incident

173. The Appellant acknowledges that while it should not have happened, the stadium was empty at the time and Ms Castillo never appeared to feel threatened or uncomfortable with the act. He submits that for him to carry her on his shoulder was nothing more than an expression of happiness, comparable to when the Appellant carried the then coach of the Men's national team in 2020.
174. FIFA submits that it is but another indecent and sexist example of the Appellant exhibiting his dominance over players by acting without their consent and without heeding any semblance of decorum or propriety.
175. While the Panel appreciates that the Carrying Incident might have been, as alleged by the Appellant, a mere expression of happiness, this behaviour is not one which should be condoned by

a high ranking official. The Panel accepts FIFA's submission that officials who hold positions of authority are viewed as role models within the sport and that when such officials engage in misconduct such as making indecent gestures or displaying sexist behaviours towards female players, like carrying them over their shoulder, they breach the core principles of decency and respect that FIFA mandates.

176. The Panel finds that while perhaps not egregious on their face (e.g.: carrying a player over one's shoulder), such actions by officials must not be normalized. Rather, they are particularly egregious because the behaviour of officials sets a tone for what is perceived as appropriate conduct both on and off the field. Power imbalances are everywhere in sport. Actions and microaggressions that reinforce the same by disrespecting women are offensive and prohibited under Article 13 FDC. For the (male) President of a federation to carry a (female) player over his shoulder without her consent is not appropriate or decent conduct at any time. It would serve a great injustice to women's sport and to FIFA's efforts to promote equality and respect among players and fans alike to find otherwise.
177. The Panel also notes that the Appellant was fully acquainted with celebration protocols and aware of the exemplary behaviour expected from him as an extremely high ranking official in the final of the Women's World Cup. Nevertheless, the Panel finds that the Appellant engaged in physical contact with a female football player under his leadership by carrying her over his shoulder in violation of the rules of basic

conduct thus underlining the intrinsic power imbalance between the two.

178. Based on the above, and even if the Panel does not find the Carrying Incident as egregious as the Kiss or Genitals Incident, the Panel finds that the Appellant's behaviour in connection with the Carrying Incident and the context in which it occurred does constitute a violation of Article 13 FDC.

- The Peck Incident

179. The Appellant submits that it is entirely surprising for him to give a Player a peck on the cheek has been perceived as a violation of Article 13 FDC since it is not only a global expression of appreciation, but also a way of greeting between men and women in Spanish culture.
180. FIFA argues that the peck was unsolicited and another example of the Appellant exhibiting his dominance and power over players. Ms Carmona was in the middle of giving an interview when the Appellant, again without her consent and without thought as to the consequences, exhibited his dominance by kissing her on the cheek, as though he was free to do as he pleased.
181. The Panel accepts that a peck on the cheek would not in many circumstances be condemned. Nonetheless, as also mentioned above, the Appellant was fully acquainted with celebration protocols and aware of the exemplary behaviour expected from him as an extremely high-ranking official in the final of the Women's World Cup and should have refrained from such behaviour.

182. Whether or not the player in question was comfortable with the situation does not, in the Panel's view negate that, from the perspective of a reasonable and objective observer, for the highest ranking official of a federation to give a female player an unsolicited peck on the cheek whilst she was giving an interview is contrary to basic decent conduct.

183. Based on the above, and even if the Peck Incident is to be considered the least serious of the four, the Panel finds that the Appellant's behaviour in connection with the Peck Incident and the context in which it was given also constitutes a violation of Article 13 FDC.

- Subsequent behaviour and further considerations

184. Without having to address whether the Appellant's behaviour subsequent to the Incidents could be considered as an additional violation of Article 13 FDC, the Panel finds that the Appellant's initial defiance and accusatory declarations in the media and other mediums in which he *inter alia* attacked Ms Hermoso's credibility and called out "false feminists" did not help in any way to restore the disrepute that he had brought on football and FIFA.
185. FIFA has submitted that "*this is a moment of reckoning for football as a whole*" and that "*The world is watching and how we decide will affect how leaders should act*". The Panel agrees. For a national federation President to forcefully kiss one of his players on the lips without her consent, to grab his genitals in public and to take liberties like pecking and carrying athletes over his shoulders should not and must not be normalized. Such actions, even in the heat of the moment,

cannot simply be treated as insignificant, certainly even more so because of the circumstances and context in which they were done. What a normal and reasonable observer perceives as indecent cannot be dismissed as a simple act of euphoria. Human standards of integrity and decency and decorum must always prevail.

186. Indeed, the Panel appreciates the importance of celebration and the joy that may be felt after winning big games, championships and medals and does not in any manner wish to dampen such festivities or their raw and euphoric nature. They are to a very large extent natural and human ways of responding to sporting success and life success. However, such celebrations must remain within a reasonable range of civility, decency and decorum. Celebrations must not be offensive, must not violate rules of decent conduct and must not bring the sport of football or FIFA into disrepute – that is precisely what Article 13 FDC expressly provides. Accordingly, where celebrations do fall well outside the boundaries of acceptable and decent behaviour, then pursuant to Article 13 FDC they amount to violations that are subject to discipline.
187. The Panel thus finds that the Appellant's behaviour cannot be dismissed as a mistake in the heat of a moment of euphoria over winning a very important match.
188. The Appellant's behaviour vis-à-vis each Incident thus constitutes a violation of Article 13 FDC and is subject to discipline.

189. Having answered the first question in the affirmative the Panel now turns to the second issue for determination.

b) Is the sanction imposed on the Appellant for violation of Article 13 FDC proportionate?

190. Regardless of their severity, established violations of Article 13 FDC are subject to sanctions under Article 6 FDC.
191. Pursuant to Article 6 FDC, a violation of Article 13 FDC may be disciplined with sanctions ranging from a mere warning to life bans. While, to some, this provision may be questioned as lacking legal certainty, to the Panel it is quite the opposite. As provided *supra* there is a very wide range of prohibited human behaviours that might be subject to discipline under Article 13. They cannot be exhaustively listed. Conversely, it is impossible to exhaustively list all the possible sanctions applicable to each prohibited behaviour. The sections of Article 13 FDC pertinent to the Panel's determination have been drafted to ensure, *inter alia*, that all offensive and indecent behaviours and all actions (or inactions) which may bring FIFA and the sport of football into disrepute may be disciplined – so long as the discipline imposed is reasonable and proportional – and so long as the body which imposes the discipline respects Article 25 FDC.
192. Article 25 FDC reads as follows:

"1. The judicial body determines the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances."

- 2. Disciplinary measures may be limited to a geographical area or to one or more specific categories of match or competition.*
- 3. When determining the disciplinary measure, the judicial body shall take into account all relevant factors of the case, including any assistance of and substantial cooperation by the offender in uncovering or establishing a breach of any FIFA rule, the circumstances and the degree of the offender's guilt and any other relevant circumstances.*
- 4. In exercising its discretionary powers, the relevant FIFA judicial body may scale down the disciplinary measure to be imposed or even dispense with it entirely”.*
193. The FIFA Judicial Bodies’ assessment of the evidence in this matter and application of relevant FIFA Regulations, cf. Article 13, 6 and 25 FDC, resulted in a three-year ban being imposed upon the Appellant as a reasonable and proportionate sanction for his Article 13 breaches. According to FIFA the sanction accounts for the fact that notwithstanding that he was President of RFEA and VP of UEFA and was at the pinnacle of influence in global football, the Appellant used his platform in way that was demanding, indecent and abusive. As such, FIFA submits that his actions violated fundamental principles of decency and brought FIFA and the entire sport of football into disrepute.
194. The Panel accepts, as FIFA submits, that its judicial bodies are owed deference, especially in relation to the nascent jurisprudence related to safeguarding and integrity issues. In this regard, the Panel recognizes that FIFA wishes to use this case as a deterrent and a cautionary tale to avoid Article 13 prohibited behaviours akin to those of the Appellant being normalized within the world of football and sport in general. As FIFA stated during their opening statements, *“this case and its outcome transcends football. It is about justice and the examples FIFA wants to set for football, sport and society”.*
195. The principle of deference is well-established in CAS jurisprudence (cf. CAS 2022/A/9053, para 123). CAS panels have often found that they should exert self-restraint in reviewing the level of a sanction imposed by a first instance disciplinary body (cf. CAS 2017/A/5086, para 206; CAS 2015/A/3875, para 108; CAS 2012/A/2824, para 127; CAS 2012/A/2702, para 160; CAS 2012/A/2762, para 122; CAS 2009/A/1817 & 1844, para 174; CAS 2007/A/1217, para 12.4).
196. Moreso, according to the CAS jurisprudence, CAS panels should reassess first instance disciplinary sanctions only if they are evidently and grossly disproportionate to the offence or if a different conclusion than that of the first instance body is reached on the substantive merits of the case (cf. CAS 2017/A/5086, para 206, CAS 2009/A/1817 & 1844, para 174 with references to further CAS case law; CAS 2012/A/2762, para 122; CAS 2013/A/3256, paras 572-572; CAS 2016/A/4643, para 100; CAS 2019/A/6344, para 501).
197. The above does not mean that CAS’s powers are somehow formally limited. Rather, it means that – far from excluding or limiting the power of a CAS panel to review *de novo* the facts and the law of the dispute at hand (pursuant to

Article R57 of the CAS Code) – a CAS panel should tend to pay respect to a fully-reasoned decision and would not easily “tinker” with a well-reasoned sanction, not considering it proper to just slightly adjust the measure of the sanction (cf. CAS 2015/A/3875, para 109; CAS 2011/A/2645; para 94; CAS 2011/A/2515, paras 66-68; CAS 2011/A/2518, para 10.7; CAS 2010/A/2283, para 14.36).

198. In other words, according to one current of CAS precedent – CAS Panel’s should defer to the sanction imposed by first instance bodies where the same conclusion is reached on the substantive merits of case, so long as the sanction imposed is not evidently or grossly disproportionate.
199. According to another current, some CAS Panels applied a lower threshold of review: “[t]here is well-recognized CAS jurisprudence to the effect that whenever an association uses its discretion to impose a sanction, CAS will have regard to that association’s expertise but, if having done so, the CAS panel considers nonetheless that the sanction is disproportionate, it must, given its *de novo* powers of review, be free to say so and apply the appropriate sanction” (see CAS 2022/A/9053, para 274). Similarly, in yet another CAS decision, the panel stated that the jurisprudence according to which CAS should reassess sanctions only if they are evidently and grossly disproportionate to the offence “*should be interpreted (and applied) with care*” since CAS “*powers to review the facts and the law of the case are neither excluded nor limited*” (see CAS 2018/A/5808).
200. Given the unique nature of the case at hand and that Article 13(2) d) FDC is partly the basis upon which the

sanctions have been imposed, FIFA is best placed to assess the disrepute that behaviours have brought to the sport it governs worldwide and to its organisation. Thus, this Panel favours the “evidently and grossly disproportionate approach” in its standard of review.

201. In any event, and as set out below, regardless of whether this Panel’s standard of review to justify amending the FIFA Disciplinary Bodies’ sanction is that it was “*evidently and grossly disproportionate*” or “*disproportionate*”, the outcome would be the same.
202. In the Appealed Decision, the Appeal Committee presented a detailed discussion and explanation as to why it deemed the sanction imposed on the Appellant by the FIFA DC to be appropriate and proportionate. As such, to arrive at its decision, this Panel may analyse the provided explanation along with its own reasons in assessing the appropriate measure of the sanction in accordance with the principle of proportionality.
203. With respect to the factors to consider in determining a sanction, the Panel, as other panels before it, finds the reasoning of the panel in CAS 2019/A/6219 (and in CAS 2019/A/6344) helpful, *mutatis mutandis*:

“*In the Panel’s opinion [...] when imposing a sanction, account has to be taken [...] of the following relevant factors:*
 - *the nature of the violation;*
 - *the impact of the violation on the public opinion;*
 - *the importance of the competition affected by the violation;*”

- *the damage caused to the image of FIFA and/or other football organizations;*
- *the substantial interest of FIFA, or of the sporting system in general, in deterring similar misconduct;*
- *the offender's assistance to and cooperation with the investigation;*
- *the circumstances of the violation;*
- *whether the violation consisted in an isolated or in repeated action(s);*
- *the existence of any precedents;*
- *the value of the gift or other advantage received as a part of the offence;*
- *whether the person mitigated his guilt by returning the advantage received, where applicable;*
- *whether the offender acted alone or involved other individuals in, or for the purposes of, his misconduct;*
- *the position of the offender within the sports organization;*
- *the motives of the violation;*
- *the degree of the offender's guilt;*
- *the education of the offender;*
- *the personality of the offender and its evolution since the violation;*
- *the extent to which the offender accepts responsibility and/or expresses regret".*

204. Whilst the above list is a helpful guideline, no criteria however detailed, should obscure the fact that a sanction can only be applied to a particular prohibited conduct on a case-by-case basis in consideration of all the evidence, circumstances, severity and context of the violation. This is even more important when assessing the appropriate sanction to apply to

violations of a regulatory provision like Article 13 FDC, which prohibits a wide range of behaviours and ethical or integrity breaches like those established in this unique case.

205. Similar principles have been raised in earlier CAS awards which have also found that while CAS rulings can be a useful guide, each case must be decided on its own merits and "*although consistency of sanctions is a virtue, correctness remains a higher one; otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport*" (see CAS 2011/A/2518, para 10.23, see also CAS 2019/A/6344).

206. Thus, there is no "standard" sanction to be found for a violation of Article 13 FDC. While, in time, cases with similar factual or evidentiary circumstances might be heard and decided, and perhaps allow for future panels to consider and be guided by the sanctions imposed in those similar circumstances, ultimately, given what can only be described as the inherently unique and varying nature of many Article 13 ADC violations, like the ones in the case at hand, each individual matter will need to be determined on its face.

- Individual vs collective assessment

207. Turning to the Appellant's contention that FIFA erred in considering his violations collectively, the Panel notes that applicable FIFA regulations, particularly the FDC, are silent on the issue of whether each violation of the FDC must be sanctioned independently. To be clear, there is nothing in the FDC which provides that each individual violation committed is to carry its own sanction.

208. As such, the Panel does not find that the FIFA DC, and subsequently the Appeal Committee, erred when not imposing individual sanctions for each of the Incidents. Instead, the sanction imposed on the Appellant by the judicial bodies correctly covered and considered all four Incidents.
209. In this regard, as argued by FIFA, the Panel relies on the principle set out in CAS 2017/A/5393, para 236 and applies it here by analogy. Even if the Panel does have some reservations as to whether the Peck or Carrying Incident warrant the imposition of a 3-year suspension – this does not warrant a reduction of the period of suspension imposed, particularly considering that the more severe Article 13 FDC breaches, the Kiss and the Genitals Incidents, have been considered proven.

- The Article 25 FDC assessment

210. As mentioned above, pursuant to Article 6 FDC a wide range of sanctions may be imposed as discipline for violations of Article 13 FDC.
211. Ultimately, this is where a (disciplinary) panel's role becomes determinative. Once a violation has been established, pursuant to Article 25 FDC, a thorough analysis of all the available evidence must be conducted including the context of the violation, the spirit of the regulations and the conduct at the time of the violation and post violation, all of which assist the panel to assess what may be a reasonable starting point, and/or mitigating and aggravating elements may be taken into consideration by the panel in making a determination of the appropriate, reasonable and

proportionate sanction to impose as a result of the confirmed violation.

212. Under the current FIFA regime, the first instance panel(s) entrusted to make this determination are the FIFA judicial bodies, who – given their position as the regulators of their sport – are in the best position to make this initial thorough assessment. The fact that similar actions and/or gestures might have taken place in the past without being sanctioned and, if so, merely with a fine, as alleged the Appellant alleges, does not alter this. To the Panel, FIFA as the regulator of its sport, is best placed to determine what prohibited behaviours it does not wish to normalise and condone and what reasonable measures may be imposed to discipline such behaviours.
213. Article 25 FDC provides that a panel must *“determine the type and extent of the disciplinary measures to be imposed in accordance with the objective and subjective elements of the offence, taking into account both aggravating and mitigating circumstances”*.
214. The FIFA judicial bodies have in their respective Decisions conducted this assessment to arrive at the three-year sanction they have imposed on the Appellant. The Appeal Committee even stated that *“[...] a harsher sanction could properly have been imposed but was mindful that it was bound by the decision of the first instance”*.
215. The Panel shall now conduct its own assessment to determine if the measures imposed and confirmed by the judicial bodies should be amended or overturned for lack of proportionality.
216. While there are four separate offences (together the Incidents), as provided

above, the Panel is to conduct the preponderance of its assessment based on the more serious violation(s): the Kiss Incident and the Genitals Incident, which are both considered proven.

217. Pursuant to Article 25 (1) FDC, the Panel first notes several circumstances and factors which must be taken into consideration as mitigating circumstances when deciding on the reasonableness and proportionality of the sanction. The list below also includes a consideration of the various factors set out in CAS 2019/A/6219 at para 154 cited *supra*:

- The Appellant had not been previously sanctioned for any disciplinary violations.
- The Incidents occurred in connection with the joy and celebration over winning the World Cup, and it has not been proven to the Panel that the Appellant did in fact have any sexual or derogatory intentions when acting as he did.
- While the overall testimony provided by Mr. Sanchez, the Appellant's expert, is not determinative, the Panel accepts his opinion that to a reasonable observer the Kiss was not violent or sexual.
- The Kiss in the Panel's view was not a sign of violence.
- Although tardy, the Appellant apologized for his actions.
- To some objective observers with lasting perceptions of what was reasonable or acceptable in the

past, the Kiss has been overreacted to.

- To some objective observers with lasting perceptions of what reasonable behaviour in the past, Ole Tus Huevos is a common celebration of success and has been overreacted to.

218. As did the FIFA Appeal Committee, the Panel finds several factors in connection with the Incidents which serve as aggravating circumstances when deciding on whether the sanction imposed is reasonable and proportional. These clearly overshadow the mitigating circumstances. The list below also includes a consideration of the various factors set out in CAS 2019/A/6219 cited at para 154 *supra*:

- The Incidents occurred in connection with the final of the FIFA Women's World Cup Australia and New Zealand 2023 and were, at least as far as some of them are concerned, broadcast live to a record-setting number of viewers in addition to the fans at the stadium.
- The Appellant was, at the time of the Incidents, the President of RFEF and Vice-President of UEFA, i.e. one of the highest-ranking officials in European football.
- The Appellant's behaviour included not one but four separate established violations of Article 13 FDC. This was not a situation that involved one isolated incident.
- The public opinion and reaction to the Incidents, particularly the Kiss

Incident, was overwhelmingly critical and condemning towards both the Appellant and FIFA.

- The Kiss, the Peck and The Carrying Incidents may each serve as examples of gender-based microaggressions. Behaviour which includes actions or language that discriminate or demean any individual based on gender is particularly damaging to the reputation of football and of FIFA.
- FIFA and the sports world in general, have a profound and legitimate interest in protecting the image of football and making sport safe for all genders. The Appellant's behaviour has jeopardized FIFA's interests by tarnishing the today's public opinion of the sport.
- The Kiss Incident and the Genitals Incident and the disrepute they have caused to the sport constitute serious violations of Article 13 FDC.
- Even though the Appellant subsequently publicly stated that the majority of the Incidents should not have happened and that, because of his position he should have maintained the highest level of composure, such statements were made relatively late after the Incidents occurred and, at least in the Panel's view, did not afford much assistance to restoring the damage inflicted on FIFA and football, as they did not appear to be wholeheartedly genuine or remorseful. In fact, the Appellant himself stated to media

outlets *"I have no other choice but to apologize"*.

- The Appellant's initial and persistent defiance, accusatory declarations, attacks on and vulgar dismissal of *"false feminists"*, *"idiots and stupid people"* and *"assholes"* did not serve him.
- While the Appellant has conceded that his actions were not those of a professional in his position, FIFA submits that his apologies and defence, anchored in self-preservation, were given at the expense of the integrity of the sport and those he harmed. On the evidence, the Panel favours FIFA on this point and agrees that the Appellant's conduct post-Incidents amount to aggravating circumstances.

219. Accordingly, even if it does not find each Incident to be equally severe or deserving of a three-year ban, the Panel sees no reason to consider the sanction imposed on the Appellant as discipline for all four Incidents to be grossly disproportionate or even disproportionate when taking into consideration the totality of the circumstances. The Appealed Decision is well-reasoned and takes into consideration most, if not all, the facts and circumstances that the Panel also found material in its assessment of the sanction imposed on the Appellant.

220. For the sake of good order, it must also be noted that the Panel neither finds that the suspension can *per se* be considered as representing the "end of the Appellant's career" nor can it be considered to violate any applicable

international standards of human rights, specifically the fundamental right to freely exercise a profession or any other fundamental rights of the Appellant. The Panel is aware that in individual cases and under certain circumstances, imposing a multi-year ban on an athlete - who has a short-term career - could perhaps amount to a disproportionate suspension because it could end the athlete's career (e.g. because qualifying competitions or camps will occur before the end of the period of ineligibility whose successful completion is necessary for competing in the next season or in the future thereby effectively resulting in a longer prohibition from competition). However, that the suspension imposed on the Appellant might end his football-related career is in no way apparent and/or has not been established the present case.

5. All other motions or prayers for relief are dismissed.

221. Based on the above, the Appellant's appeal is dismissed, and the Appealed Decision is confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 March 2024 by Mr Luis Rubiales against the decision rendered by the FIFA Appeal Committee on 16 January 2024 is dismissed.
2. The decision rendered by the FIFA Appeal Committee on 16 January 2024 is upheld.
3. (...).
4. (...).

Arbitration CAS 2024/A/10551

Espérance Sportive Troyes Aube Champagne (ESTAC) v. Torino Football Club S.P.A. & Fédération Internationale de Football Association (FIFA)

17 April 2025

Football; Transfer – training compensation; Reacquisition of amateur status and training compensation entitlement; Training compensation entitlement in EU/EEA cases – requirements; Contract offer requirement; Discretion of CAS panels to order document production

Panel

Mr Manfred Nan (The Netherlands), Sole Arbitrator

1. In accordance with article 3(2) of the FIFA Regulations on the Status and Transfer of Players (RSTP), if a player re-registers as a professional within 30 months of being reinstated as an amateur, his new club shall pay training compensation in accordance with article 20 of the FIFA RSTP.
2. Following Article 6(3) of Annexe 4 of the FIFA RSTP, for players moving from one association to another inside the territory of the European Union (EU)/ European Economic Area (EEA), *“If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract, subject to the temporary exception below. Such an offer shall furthermore be at least of*

an equivalent value to the current contract. [...]”.

3. In order to satisfy the requirements of article 6(3) Annexe 4 of the FIFA RSTP, the claiming club must not only show that a contract offer has been given to the player but also that said offer was at least of an equivalent value to the current contract. Therefore, to assess the equivalent value, both the contract offer and the current contract must be provided by the club.
4. Following article R44.3 of the CAS Code, CAS panels have discretion to order the parties to produce additional documents. However, when a party fails to produce an essential piece of evidence for its appeal, while it had ample opportunities to do so, a CAS panel by ordering such document production at a late stage in the proceeding would be “helping” the party to cure an omission for which it had only itself to blame, thereby unjustifiably disadvantaging the opposing party.

I. PARTIES

1. Espérance Sportive Troyes Aube Champagne (the “Appellant” or “ESTAC”) is a professional football club composed of i) the Association Esperance Sportive Troyes Aube Champagne; and ii) the SASP Esperance Sportive Troyes Aube Champagne, with its registered office in Troyes, France. ESTAC is registered with the French Football Federation (*Fédération Française de Football* – the “FFF”), which in turn is affiliated to the

Fédération Internationale de Football Association.

2. Torino Football Club S.P.A. (the “First Respondent” or “Torino”) is a professional football club with its registered office in Torino, Italy. Torino is registered with the Italian Football Federation (the *Federazione Italiana Ginoco Calcio* – the “FIGC”), which in turn is affiliated to the *Fédération Internationale de Football Association*.
3. The *Fédération Internationale de Football Association* (the “Second Respondent” or “FIFA”) is an association incorporated under Swiss law with its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.
4. Torino and FIFA are hereinafter jointly referred to as the “Respondents”, and together with ESTAC as the “Parties”.

II. INTRODUCTION

5. These proceedings revolve around ESTAC’s claim for training compensation following Torino’s registration of Mr Ali Bina Dembele, born on 5 January 2004, with French nationality (the “Player”).
6. Following this registration, the FIFA General Secretariat (the “FIFA GS”) notified a decision on 17 April 2024 (the “Appealed Decision”), considering that “[n]o club is entitled to training compensation”.

7. In the present appeal arbitration proceedings before the Court of Arbitration for Sport (“CAS”), ESTAC is challenging the Appealed Decision, requesting the annulment of the Appealed Decision and the issuance of a new decision ordering Torino to pay training compensation to ESTAC in the amount of at least EUR 239,534.25, plus interest. Torino and FIFA request for a confirmation of the Appealed Decision.

III. FACTUAL BACKGROUND

8. Below is a summary of the main relevant facts, as established based on the Parties’ written and oral submissions and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background Facts

9. Between 6 July 2018 and 31 July 2020, the Player was registered with ESTAC as an amateur.
10. On 1 August 2020, the Player signed his first employment contract as a professional football player with ESTAC and he remained registered with ESTAC until 1 July 2022. The financial terms of this first employment contract are unknown.
11. On 25 April 2022, ESTAC offered the Player a trainee contract (*contrat de joueur stagiaire*) for two football seasons with the following monthly remuneration:

- 2022-2023 season: EUR 1,061 in *Ligue 1* / EUR 778 in *Ligue 2*;
 - 2023-2024 season: EUR 1,202 in *Ligue 1* / EUR 1,061 in *Ligue 2*.
12. The Player never replied to ESTAC with respect to the offer of 25 April 2022.
13. On 11 July 2022, Torino offered the Player the following employment conditions for his registration with Torino:
- “Season 2022/2023:*
- *Scholarship EUR 800,00 [...] for 10 (ten) months*
 - *Food and accommodation at International Training Centre of the ILO in Torino (our Club House);*
 - *Private Italian lessons;*
 - *Tutoring H24 for 7/7 days;*
 - *Private Insurance;*
 - *FIGC Insurance;*
 - *2 flights go and back*
- In case of the Professional contract from July 2023, the following conditions:*
- Season 2023/2024:*
- *EUR 20,000,00 [...] net.*
- Season 2024/2025:*
- *EUR 25,000,00 [...] net.*
- Season 2025/2026:*
- *EUR 30,000,00 [...] net.*
- Bonus:*
- *Every matches in Serie A in which the player plays at least 30 minutes with [Torino] first team EUR 3,000,00 [...]. The bonus once reached will cumulate on the season after”.*
14. On 28 July 2022, the Player was registered as an amateur with Torino by the FIGC. According to Torino, no employment contract was concluded with the Player, but that the Player only signed the FIGC registration form titled “*VARIAZIONE DI TESSERAMENTO PER CALCIATORI GIOVANI DI SERIE*” (the “Registration Form”).
15. On 24 August 2022, the Player announced the following on Instagram: “*Very happy to sign my first professional contract with [Torino]*”. Various other social media publications reported that the Player signed a professional employment contract with Torino.
16. On the same date, ESTAC contacted Torino for the first time, requesting the payment of training compensation for the Player. This request was declined by Torino, principally holding that the Player was registered with Torino as an amateur, that no employment contract had been concluded and that therefore no training compensation was due. Following this exchange of correspondence, various further correspondence was exchanged between ESTAC and Torino.
17. On 4 October 2022, in a published interview between journalist Christophe Mallet and the Player, the Player is quoted as follows: “*The initial project of the Torino with me is the professional team. I signed a four-year contract. But, for now, I play with the Primavera, it’s a championship of young pro clubs, you will play everywhere in Italy. It’s a stepping stone*”.
18. On 3 January 2023, the Player was inserted in the LEGA policy, a mandatory insurance for players to participate in the Serie A.

19. Between 4 and 21 January 2023, the Player was called up by Torino for three Serie A matches and one match in the Italian Cup, but he did not make any appearance in these matches.
20. On 17 July 2023, the Player signed a professional employment contract with Torino for a period of four football seasons, valid until 30 June 2027.
21. On 18 July 2023, the Player was registered as a professional football player with Torino by the FIGC.

B. Proceedings before the FIFA General Secretariat

22. On 17 April 2024, and based on the Electronic Players' Passport (the "EPP") review process in the FIFA Transfer Matching System ("FIFA TMS"), in which, *inter alia*, the Parties were involved, the FIFA General Secretariat notified the final EPP (the "Appealed Decision"), with the following operative part:

"Conclusion

11. *In consideration of the above and in accordance with the [FIFA Clearing House Regulations – the "FCHR"] and annexes 4 and 5 to the [FIFA Regulations on the Status and Transfer of Players – the "FIFA RSTP"], the FIFA general secretariat has determined the entitlement of clubs to training rewards for the above as follows.*
12. *No club is entitled to training compensation.*
13. *All of the above determinations and decisions are reflected in the EPP in question and/or will be considered in the generation of any Allocation*

Statement from this EPP for the calculation and distribution of training rewards in accordance with article 13 of the FCHR".

23. The grounds of the Appealed Decision, *inter alia*, provide as follows:

"Determination of the FIFA general secretariat on EPP 32695 (cf. article 10 FCHR)

7. The FIFA general secretariat hereby determines the registration history of the player from the start of the calendar year of the player's 12th birthday until the aforementioned training rewards trigger. This registration history is considered true and accurate for the period in question, in accordance with the information provided by the member associations that participated in the generation and review of the EPP, in accordance with article 10 of the FCHR. The registration history as determined by the FIFA general secretariat is as follows:

Club and member association	Start of registration	End of registration	Status	Nature of registration
TORINO F.C. S.P.A. FIGC, Italy FIFA ID: 1092XJJ Status: Affiliated Training category: 1	18/07/23	Currently registered	Professional	Permanent
TORINO F.C. S.P.A. FIGC, Italy FIFA ID: 1092XJJ Status: Affiliated Training category: 1	17/07/23	17/07/23	Amateur	Permanent
TORINO F.C. S.P.A. FIGC, Italy FIFA ID: 1092XJJ Status: Affiliated Training category: 1	28/07/22	30/06/23	Amateur	Permanent
ES TROYES AC FFF, France FIFA ID: 143F72E Status: Affiliated Training category: 1	01/08/20	01/07/22	Professional	Permanent
ES TROYES AC FFF, France FIFA ID: 143F72E Status: Affiliated Training category: 1	06/07/18	31/07/20	Amateur	Permanent
F.C. BOURGET FFF, France FIFA ID: 143F8UF Status: Affiliated Training category: 4	01/01/16	30/06/18	Amateur	Permanent

Considerations for entitlement to training rewards (cf. article 10 FCHR)

8. *For the purpose of distribution of training rewards, the FIFA general secretariat makes the following determinations in consideration of the documents and information provided by the parties within the EPP review process.*

9. ***Registration with [ESTAC] between 1 August 2020 and 1 July 2022, 6 July 2018 and 31 July 2020:***

9.1. *The player reacquired professional status in the sense of*

art. 3 par. 2 RSTP with [Torino] after having originally terminated his professional activity with [ESTAC] on 1 July 2022.

9.2. *In this scenario, only the club(s) with which the player was registered as an amateur directly prior to their 're-registration' as a professional is (are) entitled to training compensation. Any previous club of the player would not be entitled to training compensation.*

9.3. *[ESTAC] is therefore not entitled to training compensation for the registration of the player at the club during the aforementioned period(s).*

[...].

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 6 May 2024, ESTAC filed a Statement of Appeal with CAS, challenging the Appealed Decision, in accordance with Articles R47 and R48 of the 2023 edition of the Code of Sports-related Arbitration (the "CAS Code"). In this submission, ESTAC requested to establish French as the language of the proceedings and that the case be submitted to a sole arbitrator. Furthermore, it requested Torino to produce certain documents.

25. On 14 May 2024, FIFA informed the CAS Court Office that it did not agree to establish French as the language of the proceedings, submitting that the present procedure was to be conducted in English. Furthermore, FIFA agreed with the appointment of a sole arbitrator on

- the condition that the sole arbitrator would be selected from the football list.
26. On 14 and 15 May 2024, Torino informed the CAS Court Office that the current proceedings should be conducted in English and that it did not object to the appointment of a sole arbitrator.
 27. On 17 May 2024, ESTAC informed the CAS Court Office that it consented to establishing English as the language of the proceedings, which was subsequently confirmed by the CAS Court Office.
 28. On 6 June 2024, ESTAC filed its Appeal Brief in accordance with Article R51 CAS Code. In its Appeal Brief, ESTAC filed the following evidentiary requests: i) the document production requests as detailed in its Statement of Appeal were reiterated; ii) the Panel was requested to call the Player as a witness; and iii) ESTAC requested permission for a second round of written submissions to be filed.
 29. On 5 and 8 July 2024 respectively, FIFA and Torino filed their Answers in accordance with Article R55 CAS Code.
 30. On 15 July 2024, upon being invited to express its preference in this respect, ESTAC informed the CAS Court Office of its preference to hold a case management conference and an in-person hearing. Furthermore, ESTAC requested the Panel i) to summon the Player (who is under the control of Torino) as a witness; and ii) to order Torino to produce the following documents and the opportunity to supplement its Appeal Brief upon receipt thereof:

“All agreements concluded or documents exchanged by and between [Torino] and the Player in direct or indirect relation to the latter from January 1, 2022 and until August 31, 2023;

All exchanges (such as emails, WhatsApp’s, messages) occurring directly or indirectly between [Torino] and the Player, and/or his representatives and/or his family and/or agents, from January 1, 2022 and until August 31, 2023;

All the documents / agreements / contractual commitments concluded between the Player and [Torino] from January 1, 2022 and until August 31, 2023;

Indication of the payments made to the Player, and/or his representatives and/or his family and/or agents directly or indirectly by [Torino] since January 1, 2022 and until August 31, 2023;

All the salary slips of the Player with [Torino] since his registration with [Torino].”
 31. On 16 July 2024, Torino and FIFA indicated that the dispute could be resolved based on the Parties’ written submissions without a hearing.
 32. On 17 July 2024, the CAS Court Office invited the Respondents to comment on ESTAC’s evidentiary requests.
 33. On 18 July 2024, the CAS Court Office informed the Parties that, pursuant to Article R54 CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the arbitral tribunal appointed to hear the appeal was constituted as follows:

Sole Arbitrator: Mr Manfred Nan,
Attorney-at-Law in Amsterdam, The
Netherlands

34. On 19 July 2024, FIFA informed the CAS Court Office that, as ESTAC's evidentiary requests pertained only to the status of the Player with Torino, FIFA would refrain from commenting thereon and left it to Torino to comment, as the party directly affected by the relevant requests.
35. On 24 July 2024, Torino requested the Sole Arbitrator to reject ESTAC's evidentiary requests.
36. On 29 July 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties as follows:

"The Sole Arbitrator took note of [Torino's] submission that no agreements, documents or contracts are concluded with the Player, except for the Registration Form. However, for the sake of good order, [Torino] is ordered to produce any such documents to the extent they exist. If the Sole Arbitrator ultimately finds that [Torino] failed to produce any existing documents, the Sole Arbitrator may draw adverse inferences therefrom.

[Torino] is ordered to produce correspondence with the Player and/or his agent(s) in the period 1 April 2022 – 1 August 2022 and evidence of payments, including salary slip(s), to the Player from July 2022 up until 31 August 2023.

[Torino] is invited to provide English translations of the not translated part of the Italian documents in exhibit III.

[ESTAC] is invited to provide an English translation of the French Statement of Appeal".

37. On 7 August 2024, ESTAC provided the CAS Court office with a free translation into English of the Statement of Appeal.
38. On 13 August 2024, Torino provided the CAS Court Office with multiple documents, explaining that the Registration Form is indeed the only existing document relating to the Player's registration with Torino.
39. On 19 August 2024, the CAS Court Office informed the Parties that the Sole Arbitrator considered that the Parties had complied with the instructions as set out in the CAS Court Office letter dated 29 July 2024, inviting ESTAC to comment on the documents produced by Torino.
40. On 4 September 2024, ESTAC filed its comments.
41. On 30 September 2024, further to an invitation to do so by the CAS Court Office, Torino filed its observations to ESTAC's comments, also providing two new documents.
42. On 3 October 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties as follows:
- "The Sole Arbitrator took note of the Parties' correspondence, in particular [ESTAC's] letter dated 4 September 2024, and [Torino's] letter dated 30 September 2024.*
- Having considered these submissions, the Sole Arbitrator is not convinced by [Torino's] argument regarding the correspondence of Mr. Michele di Bari that it 'cannot provide such information in order to comply with both the CFR, GDPR and Italy's own Decree pertaining to data protection and privacy regulations'.*

The Sole Arbitrator repeats the position communicated to the Parties by the CAS Court Office on 29 July 2024 that ‘if the Sole Arbitrator ultimately finds that [Torino] failed to produce any existing documents, the Sole Arbitrator may draw adverse inferences therefrom’. This is without prejudice to any position the Sole Arbitrator may eventually take with respect to Mr. di Bari’s correspondence.

Should [Torino] wish to produce any correspondence of Mr. di Bari, it is invited to do so [...].”

43. On 7 October 2024, Torino informed the CAS Court Office that an authorisation from Mr Di Bari “to access his email account and any correspondence relevant to the matter at the crux of these proceedings [...] would meet the requirements of the applicable law”, requesting an extension of the time limit granted “in order to allow the carrying out of the authorisation process and, possible, the perusing of any relevant email exchange”, which extension was granted.
44. On 17 October 2024, Torino confirmed the CAS Court Office that “it has been granted such authorisation”, enclosing a written and duly signed authorisation of Mr Di Bari.
45. On 25 October 2024, Torino filed its comments including ten enclosures, requesting the Sole Arbitrator to not disclose the enclosures to ESTAC and FIFA “due to the confidential nature of certain emails e.g. Torino’s monetary responsibilities” and “to ensure that the GDPR and the Italian Legislative Decree 101/2018 are complied with”.
46. On 28 October 2025, the CAS Court Office invited ESTAC and FIFA to comment on Torino’s request.

47. On the same day, FIFA informed the CAS Court Office that, as the issue exclusively concerned the clubs, it did not have any comments.

48. On 30 October 2024, ESTAC informed the CAS Court Office that “access to all the documents is indispensable, especially considering the financial aspects” and therefore it “must be given the opportunity to comment on such evidence to ensure the impartiality and fairness of the procedure”.

49. On 1 November 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties as follows:

“The Sole Arbitrator took note of the Parties’ correspondence regarding [Torino’s] request to not disclose the enclosures with its letter dated 25 October 2024 to [ESTAC] and [FIFA] ‘due to the confidential nature of certain emails e.g. Torino’s monetary responsibilities’ and ‘to ensure that the GDPR and the Italian Legislative Decree 101/2018 are complied with’.

Having considered these submissions, the Sole Arbitrator notes that [Torino] in its letter dated 7 October 2024 confirmed that Mr Di Bari’s written authorisation ‘would meet the requirements of the applicable law to access his email account and any correspondence relevant to the matter at the crux of these proceedings’. Further, by letter dated 17 October 2024, [Torino] filed Mr Di Bari’s duly signed written authorisation in which Mr Di Bari, inter alia, authorises [Torino] ‘to use, and therefore to produce copies of, any e-mail messages selected by you in the consultation referred to in the preceding sentence, in the context of the arbitration proceedings pending between Torino Football Club S.p.A. and the French club ESTAC concerning the FIFA decision relating to the training compensation for the [Player], without any limitation whatsoever’.

Furthermore, the Sole Arbitrator deems it important for [ESTAC] and [FIFA] to be granted an opportunity to comment on the e-mails provided to respect due process and the right to be heard of [ESTAC] and [FIFA].

Finally, [Torino's] general reliance on the GDPR and the Italian Legislative Decree 101/2018 remained insufficient substantiated.

Based on the above, the Sole Arbitrator finds that [ESTAC] and [FIFA] are to be provided with the pertinent enclosures.

Regarding the alleged confidential nature of certain emails, including [Torino's] monetary responsibilities, the Sole Arbitrator refers to Article R59(7) of the Code, which provides that (i) in any event, all elements of the case record shall remain confidential and that (ii) the award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. On this basis, once an award is issued, [Torino] may file a substantiated request for certain parts of the award or the entire award to remain confidential”.

[ESTAC] and [FIFA] may file their comments with respect to the content of the enclosures to [Torino's] letter dated 25 October 2024 [...]”.

50. On 6 November 2024, FIFA informed the CAS Court Office that it had no comments regarding the content of the enclosures to Torino's letter of 25 October 2024 as these enclosures were provided solely to clarify the issue of the Player's status with Torino, which FIFA considered to be an issue exclusively concerning the clubs.
51. On 8 November 2024, ESTAC filed its comments regarding the content of the enclosures to Torino's letter of 25

October 2024 and requested the production of several documents and translations.

52. On 11 November 2024, the CAS Court Office invited Torino to comment or to produce the documents and translations sought by ESTAC on a voluntary basis.
53. On 18 November 2024, Torino filed its comments, producing the requested translations and new documents, some of them “for the eyes of the Sole Arbitrator alone”.
54. On 21 November 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties that ESTAC's document production and translation requests can be considered satisfied, inviting ESTAC and FIFA to comment on Torino's request not to share some exhibits. Furthermore, the Parties were informed that the Sole Arbitrator had decided not to permit a second round of submissions, that he did not consider it necessary to hold a case management conference but that he, considering the Parties' positions, had decided to hold a hearing.
55. On 22 November 2024, FIFA informed the CAS Court Office that it did not intend to attend the hearing, unless required by the Sole Arbitrator, and that it did not have any specific comments on the non-disclosure of some of Torino's exhibits.
56. On 27 November 2024, Torino informed the CAS Court Office of its preference to hold a hearing by videoconference and arguing that FIFA's presence at the hearing was required.

57. On 2 December 2024, ESTAC informed the CAS Court Office of its preference for the hearing to be held by videoconference.
 58. On 3 December 2024, the CAS Court Office informed the Parties as follows:

“The Sole Arbitrator has considered the parties’ comments regarding the hearing.

[FIFA] is advised that, according to the CAS Code, it is a decision by each Party whether or not to attend a hearing. In accordance with Article R57 (4) of the Code, if ‘any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.’ The Sole Arbitrator does not see any reason in the present matter to deviate from the rules of the Code and, therefore, it is up to [FIFA], as for any of the other Parties, to decide whether or not they wish to participate or not, acknowledging that the Sole Arbitrator will be entitled to proceed with the hearing and deliver its Award.

Be as it may, the Sole Arbitrator notes [Torino’s] comments on this issue, in particular regarding the application of Article 3(2) FIFA RSTP ‘and the qualification of what the FIFA Commentary outlines as ‘shortly afterwards’. The Sole Arbitrator finds that this is an issue for FIFA to consider” (emphasis omitted).
 59. On 4 December 2024, FIFA informed the CAS Court Office that it would not attend the hearing, addressing the issues raised by Torino in its letter dated 27 November 2024.
 60. On 5 December 2024, on behalf of the Sole Arbitrator, the CAS Court Office invited the Parties and their witnesses to appear at the hearing by videoconference on 23 January 2024.
- Furthermore, the CAS Court Office invited the Parties to sign and return the Order of Procedure enclosed to such letter.
61. On the same date, FIFA returned a duly signed copy of the Order of Procedure, confirming its non-attendance at the hearing, and informing the CAS Court Office that FIFA’s right to be heard has been respected up to such date.
 62. On 12 December 2024, ESTAC and Torino returned duly signed copies of the Order of Procedure.
 63. On 20 January 2025, and on behalf of the Sole Arbitrator, the CAS Court Office ordered Torino to make the Player available at the hearing.
 64. On 23 January 2025, a hearing was held by videoconference. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.
 65. In addition to the Sole Arbitrator, and Mr Fabien Cagneux, CAS Managing Counsel, the following persons attended the hearing:
 - a) For ESTAC:
 - 1) Mr Mehdi Khellaf, Legal Manager of ESTAC;
 - 2) Ms Patricia Moyersoen, Counsel;
 - 3) Mr Nicolas Bône, Counsel;
 - 4) Mr Shiv Ghangiany, Interpreter.
 - b) For Torino:

- 1) Mr Andrea Bernardelli, General Secretary of Torino;
 - 2) Mr Paolo Lombardi, Counsel;
 - 3) Mr Luca Pastore, Counsel;
 - 4) Ms Emily Anne Williams, Counsel;
 - 5) Ms Samantha Cipollina, Interpreter.
- c) FIFA did not attend the hearing.
66. The following witnesses were heard, in order of appearance:
- 1) Mr Ali Bina Dembele, the Player, witness requested by ESTAC, ordered by the Sole Arbitrator and made available by Torino;
 - 2) Mr Michele di Bari, Torino's former Academy Sporting Secretary, witness called by Torino.
67. Both witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Sole Arbitrator had full opportunity to examine and cross-examine the witnesses.
68. The Parties were given full opportunity to present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator.
69. Before the hearing was concluded, the Parties expressly stated that they had no objection to the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.
70. On 24 January 2025, on behalf of the Sole Arbitrator, the CAS Court Office granted the Parties a deadline until 7 February 2025 to liaise and submit a settlement agreement.
71. On 12 February 2025, in the absence of any information provided by the Parties by 7 February 2025, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties that it was understood that they had apparently not succeeded in reaching a settlement, closing the evidentiary phase of the proceedings.
- V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF**
72. The Sole Arbitrator confirms that he carefully heard and took into consideration in his decision all the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.
- A. The Appellant**
73. ESTAC's submissions, in essence, may be summarised as follows:
- The Player has been a professional with Torino since July 2022***
- Notwithstanding the registration as an amateur with the FIGC, the Player must be considered a professional in accordance with Articles 2 and 20 FIFA RSTP, as ESTAC has serious and consistent evidence that the contract concluded between the Player and Torino in July 2022 was a professional one.

- All publicly available information, including announcements of the Player himself and two agencies, press articles, post messages with pictures, indicates that the Player and Torino signed a professional contract for the duration of four years. Pictures posted on social media also demonstrate that the Player signed a written contract with Torino.
- This is confirmed by the documents provided by Torino, which show that the Player accepted Torino's offer dated 11 July 2022 by signing the registration form on 15 July 2022. Therefore, it can be concluded that there is a written contract between Torino and the Player with the terms set out in the signed letter. This written contract meets the requirements of Article 2(2) FIFA RSTP.
- Considering the existence of the written contract and that the Player – similar to the remuneration and benefits offered by ESTAC – clearly was paid more for his football activity than the expenses he effectively incurs, as is confirmed by Torino's offer dated 11 July 2022 and the WhatsApp conversation between Mr Cherif and Mr Ludergnani, the prerequisites regarding the professional status set out in Article 2(2) FIFA RSTP are met. In this regard, it is not relevant to the assessment of his professional status that the Player was registered as a '*giovanni di serie*'. The name and type of registration are completely irrelevant to the status of the Player in light of Article 2(2) FIFA RSTP.
- Furthermore, it is incomprehensible how a player who has been offered a professional contract by his training club would accept to sign an amateur contract with a club from a different country. The fact that both ESTAC and Torino made the Player offers that exceed the minimum monetary threshold of Article 2(2) FIFA RSTP, confirms his ability to play football at a professional level in the summer of 2022.
- The amount of salary the Player receives is by far the most among the players receiving a scholarship at Torino, exceeding the second highest amount by 60%. This is a clear indication that Torino valued the services of the Player a lot higher than the ones of the other players that were paid with a scholarship. Furthermore, it appears that the Player was also entitled to receive an amount of EUR 15,000, which amount is not correlated to the scholarship in the amount of EUR 8,000. It increases the total amount of money attributed to the Player and must thus be considered in the assessment of his status in the 2022/23 season.
- Also, the level at which the Player has been playing with Torino strongly suggests that he has been a professional player ever since the beginning of his first contract with Torino, *inter alia*, being called up for three *Serie A* matches in the 2022/23 season

and for one match in the Italian Cup.

- The fact that the Player was inserted in the LEGA policy one day before he was part of the first team squad on 4 January 2023 cannot have any indicative effect on Torino's intention. More important is that the Player was already included in the first team's training since at least 4 October 2022.
- Torino had the clear intention to avoid paying training compensation by circumventing the applicable regulations, artificially splitting up a contract of a total duration of 4 years in two parts (1+3), as can be seen in the WhatsApp communication between Mr Mohamed Cherif and Mr Ludergrani, in which Mr Ludergrani says *"If I'd do more, we're at risk because otherwise this would be like a contract"*.
- The mere existence of new negotiations does not prove that an agreement was not already in place in the summer of 2022. On the contrary, there was already an agreement in place for 2023-2026.

In the alternative, Torino should still pay the training compensation for the re-registration of the Player as a professional

- In the alternative, and with reference to FIFA's Commentary on the Regulations on the Status and Transfer of Players (the "FIFA Commentary") and CAS case law, Torino should still pay training compensation for the re-

registration of the Player as a professional in accordance with the exception laid down in Article 3(2) FIFA RSTP, as the Player regained professional status less than 30 months after he had lost it.

- Any interpretation to the contrary leads to the creation of a loophole in the FIFA training compensation system, because it would allow clubs to i) transfer a player and register him as an amateur; ii) use the player in professional football matches; iii) re-register the player as a professional shortly afterwards; and iv) circumvent the FIFA training compensation system by not paying any kind of compensation.
- The Player never lost his ability to play at a professional level. Torino's way of acting constitutes a *venire contra factum proprium* and therefore violates the principle of *bona fides*. The contradictory behaviour of Torino is not consistent with the *ratio legis* of Article 3(2) of the FIFA RSTP. There is no need to pay training compensation only if a player loses his ability to play football, which, as has been clearly demonstrated, is not the case here. Awarding training compensation to ESTAC is therefore not only in line with the *ratio legis* of Article 3(2) FIFA RSTP, but also essential for the integrity of the training compensation system.

74. On this basis, ESTAC submits the following prayers for relief in its Appeal Brief:

“1. On these grounds, the Appellant requires the CAS to:

- Under Article 44.3 of CAS Code, order Torino FC to produce all agreements concluded and all documents exchanged by and between the Respondent and the Player in direct or indirect relation to the latter (within ten days of CAS decision on it);
 - Under Article 44.1 of the CAS Code, the Appellant requires for a second round of written submission to be take place;
 - Under Article 57 of CAS Code, the Appellant considers that a hearing is necessary for the appropriate resolution of the present proceedings
 - Under Article 51 of CAS Code, the Appellant requests the CAS to call the Player, Mr Ali Bina DEMBELE, as a witness.
2. Even if the procedural requests are not admitted, to:
- Rule that the Player has been a professional with Torino FC since his first registration on 28 July 2022;
 - Annul the determination made by the FIFA General Secretariat on 17 April 2024 concerning Mr DEMBELE's EPP;
 - Reform said determination and acknowledge the ESTAC's right to training compensation;
 - Order Torino FC to pay the ESTAC a training compensation amounting to at least € 239.534,25 plus interest at a rate of 5% per annum from 28

August 2022 until the date of actual payment.

3. In the alternative, the CAS is asked to rule that:

- The First Defendant has tried to circumvent the FIFA compensation system;
 - Even if it did not have the intention to evade the FIFA compensation system, the First Defendant still has to pay the ESTAC a training compensation pursuant to Article 3 paragraph 2 RSTP;
 - The determination made by the FIFA General Secretariat on 17 April 2024 concerning Mr DEMBELE's EPP shall be annulled;
 - Order Torino FC to pay the ESTAC a training compensation amounting to at least € 239.534,25 plus interest at a rate of 5% per annum from 18 August 2023 until the date of actual payment.
4. In any case:
- To fix a sum to be paid by the Respondents, in order to contribute to the payment of the Appellant legal fees and costs in the amount of CHF 20.000 (seventy thousand Swiss francs).
 - To order the Respondents to bear any and all CAS administration costs and arbitrator's fee”.

B. The First Respondent

75. Torino's submissions, in essence, may be summarised as follows:

The Player was registered with Torino as an amateur from 28 July 2022 until 17 July 2023

- The Player was registered with Torino as an amateur (*“giovane di serie”*), a specific type of registration which applies to players between the ages of 14 and 19 pursuant to the FIGC’s internal regulations, from 28 July 2022 until 17 July 2023, which is confirmed by all official documents, including the Player’s player passport issued by the FIGC. There is no pre-agreed contract for the 2023-2026 football seasons, which is also proven by the negotiations that took place in June 2023.
- The only document signed by the Player and Torino was the FIGC registration form titled *“VARIAZIONE DI TESSERAMENTO PER CALCIATORI GIOVANI DI SERIE”* (the “Registration Form”), which does not constitute a written contract and therefore does not satisfy the conditions held within Article 2(2) FIFA RSTP pertaining to the criteria for a player to be considered professional.
- The qualification as *“giovane di serie”* originates from the signing of the Registration Form, required for a player to be fielded and play for a club competing in one of the Italian professional leagues. The Registration Form cannot be considered as an employment contract within the FIFA regulatory framework, not only because its scope and nature are completely different from that of an employment contract, but also because it lacks the essential elements required for an employment contract to be valid.
- There is no written employment contract. The Player did not sign the offer sent to the Player’s agent on 11 July 2022, but only the Registration Form. ESTAC’s idea that the *essentialia negotii* required for an employment contract to exist can be found in different documents and combined together, has no legal ground and cannot be accepted. Even if the parties verbally agreed on specific terms and conditions, in the absence of a contract providing all *essentialia negotii* in writing, no professional employment contract can be considered concluded for the purposes of Article 2(2) FIFA RSTP.
- The Player did not receive more for his footballing activity than the expenses he effectively incurs, as the Player was only offered a scholarship in order to comply with the requirements provided by the FIGC.
- The differentiation between the amounts paid to players in scholarship is strictly applied to each player’s level of education and their educational needs. As to the EUR 15,000 evidenced under the table header *“Primavera purchases and procurement”* this is associated with the Player, but the money itself was not received by the Player; the amount refers to the commissions paid to intermediaries and scouts who were involved in the process that led to the registration of the

Player with Torino as a professional.

- As confirmed by the FIGC, the registration as “*giovane di serie*” is a status included in the amateur category pursuant to the FIFA regulations. Torino just provided the Player with the benefits indicated by the FIGC for all players aged 14 to 16 registered in Italy as “*giovane di serie*”. These conditions within the scholarship are more than reasonable for a young amateur player and do not entail the Player having acquired professional status.
- ESTAC’s assumption that the Player never lost his ability to play football at a professional level is incorrect. Despite the Player having the potential to become a professional player, such skills and capabilities required to be a professional were not already at the Player’s disposal at the time the Player was registered as an amateur with Torino. The Player, at the time 18 years old, was to play and train with the U19 squad competing in the *Campionato Primavera 1*, which is not a professional football league, but rather a youth development competition for the U19 teams of Italian Serie A and B clubs.
- The Player never made any official appearances within the matches of the first team as referred to by ESTAC but was merely provided an opportunity to be part of the first team and being introduced in the professional atmosphere of the Serie A competition. According

to the FIGC rules, a young player does not require professional status in order to be named on the bench for, or in fact even play in, an official match for a Serie A club’s first team. As in the case for the Player, young players may retain amateur status until the end of the season of their 19th birthday.

- The trainee contract with gross amounts offered by ESTAC to the Player cannot be considered a professional contract within the FIFA regulatory framework as it was not enough to cover his living costs in Troyes.
- In light of the above, there can be no doubt that when the Player joined Torino on 28 July 2022, both clubs considered that he did not have the “*ability required to play football at professional level*” – otherwise Torino or ESTAC would have offered him a professional contract.

Subsidiarily, no training compensation shall be paid by Torino to ESTAC for the re-registration of the Player as a professional player

- After the re-acquisition of amateur status, Torino is the only club who invested in the development of the Player. ESTAC should therefore not be entitled to receive any training compensation, even more considering that following his registration with ESTAC, the Player lost the ability required to play football at professional level.

- Torino trained and educated the Player for one whole year before offering him a professional contract after he eventually reached the level required to re-acquire professional status. Such a period certainly cannot be considered as a “short period” of time as referred to in Article 3(2) FIFA RSTP.
- ESTAC has significantly fallen short of meeting the burden of proof in relation to the fact that Torino acted in an abusive manner.

Alternatively, ESTAC failed to prove its entitlement to training compensation pursuant to Article 6(3) of Annexe 4 FIFA RSTP

- Even if the Sole Arbitrator decided that ESTAC is entitled to receive training compensation from Torino pursuant to Article 3(2) FIFA RSTP, *quod non*, ESTAC’s right to receive training compensation is contested, unless ESTAC succeeds in proving that the requirements provided under Article 6(3) of Annexe 4 FIFA RSTP were met.
- Indeed, ESTAC must prove that it offered the Player a contract that complies with the requirements established under Article 6(3) of Annexe 4 FIFA RSTP.
- The mere offer of a “*contrat stagiaire*” to the Player after four years of training with ESTAC, two of which as a professional player, indicates that ESTAC did not have a genuine interest in the Player, nor did they hold the

Player to be at a professional level when the Player left ESTAC to register with Torino.

The bad faith of ESTAC

- ESTAC clearly acts in bad faith, which attitude must be taken into account regarding the allocation of costs. Regardless of the extensive and reiterated explanations provided by Torino to ESTAC, the latter decided to file the present appeal anyway.

76. On this basis, Torino submits the following prayers for relief in its Answer:

- “a) **REJECTING** the Appellant’s requests in their entirety;
- b) **CONFIRMING** the Determination;
- c) **ORDERING** the Appellant to cover all procedural costs related to these proceedings;
- d) **ORDERING** the Appellant to cover the First Respondent’s legal costs related to these proceedings, in the highest amount that is deemed appropriate” (emphasis in original).

C. The Second Respondent

77. FIFA’s submissions, in essence, may be summarised as follows:

- When the Player was registered as a professional with Torino, it was not the first time the Player was registered as a professional. Thus, Article 20(1) FIFA RSTP was not applicable. Furthermore, it was not a subsequent transfer of a professional player. Thus, Article

- 20(2) FIFA RSTP was not applicable either.
- The Player joined Torino as an amateur player, and one year later, signed as professional with the latter. This information was expressly confirmed by the FIGC. Given that the Player only regained his professional status one year after being registered as an amateur, it cannot be considered that he was re-registered as a professional “*shortly afterwards*” as clarified in the FIFA Commentary on Article 3(2) FIFA RSTP.
 - Consequently, the Appealed Decision is a sound and well-grounded decision, and therefore no training compensation is due as Article 20(2) RSTP does not apply.
 - In any event, bearing in mind that ESTAC has provided evidence suggesting that the Player could have signed as a professional with Torino already in July 2022, Torino will be in a better position to comment on this specific issue and provide the necessary evidence to the Sole Arbitrator.
 - Differently put, considering that this argument (the argument that the Player was registered as a professional as of the beginning of his employment relationship with Torino in July 2022) was not put forth during the EPP review process, FIFA refrains from addressing it in its Answer, and leaves it to the Sole Arbitrator to consider the positions of ESTAC and Torino on the issue.
 - If the Sole Arbitrator were to find that the Player signed as a professional as of the beginning of his employment relationship with Torino, i.e., as of July 2022 (although according to the Player’s passport and as confirmed by the FIGC, Torino had registered him as an amateur on July 2022), then the Sole Arbitrator would be in a position to exercise his/her *de novo* power of review and issue a new decision on the matter, in light of Article R57 CAS Code.
78. On this basis, FIFA submits the following prayers for relief in its Answer:
- “(a) *Rejecting the requests for relief sought by the Appellant;*
 - (b) *Confirming the Appealed Decision;*
 - (c) *Ordering the Appellant to bear the full costs of these arbitration proceedings”.*
- ## VI. JURISDICTION
79. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (May 2022 edition), as it determines that “[a]ppeals against final decisions passed by FIFA’s legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”, and Article R47 CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by the Parties.
80. Moreover, Article 10.5(b) FCHR provides as follows:

“The FIFA general secretariat will notify the final EPP and the Allocation Statement to all parties in the EPP review process.

[...]

b) *This notification shall be considered a final decision by the FIFA general secretariat for the purposes of article 57 paragraph 1 of the FIFA Statutes and may be appealed to the Court of Arbitration for Sport (CAS)”.*

81. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

82. The appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 CAS Code, including the payment of the CAS Court Office fee.

83. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

84. Article R58 CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

85. Article 56(2) FIFA Statutes provides the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

86. ESTAC submits that, in accordance with Article R58 CAS Code and Article 57(2) FIFA Statutes, *“the hierarchy of the rules taken into consideration by the CAS is as follows: a) The applicable regulation (i.e. the FIFA Statutes, FIFA Regulations as Clearing House Regulations or [the FIFA RSTP]. b) The Swiss law. c) The rules of law that the Panel deems appropriate”.*

87. Torino contends that, in accordance with Article R58 CAS Code and Article 57(2) FIFA Statutes *“the dispute shall be primarily resolved in accordance with the regulations of FIFA. Subsidiarily Swiss law shall apply”.*

88. FIFA argues that, in accordance with Article R58 CAS Code and Article 56(2) FIFA Statutes, *“the FIFA Statutes and regulations – namely the FCHR and the [FIFA RSTP] (ed. May 2023), constitute the applicable law to the matter at hand, and Swiss law shall be applied subsidiarily should the need arise to fill a possible gap in the FIFA regulations”.*

89. The Sole Arbitrator finds that, as undisputed between the Parties, the present proceedings are primarily governed by the various regulations of FIFA, more specifically the FIFA RSTP (edition May 2023) and, additionally, Swiss law.

IX. MERITS

90. The present dispute concerns, in essence, whether ESTAC is entitled to receive training compensation from Torino, following the Player's registration with the latter.
91. The Sole Arbitrator notes that the Parties dedicated most of their submissions and pleadings to the questions i) whether the Player was a professional football player immediately upon joining Torino in July 2022; and ii) if this was not the case, whether Torino should still pay training compensation to ESTAC on the basis of Article 3(2) FIFA RSTP for the re-registration of the Player as a professional within one year of joining Torino.
92. However, the Sole Arbitrator notes that Torino also invoked an alternative argument that, if upheld, would thwart ESTAC's entitlement to receive training compensation from Torino. More specifically, Torino argued that ESTAC did not satisfy the requirements set forth in Article 6(3) of Annexe 4 FIFA RSTP, as a consequence of which it is not entitled to training compensation.
93. Article 6(3) of Annexe 4 FIFA RSTP provides as follows:
- “3. *If the former club does not offer the player a contract, no training compensation is payable unless the former club can justify that it is entitled to such compensation. The former club must offer the player a contract in writing via registered post at least 60 days before the expiry of his current contract, subject to the temporary exception below. Such an offer shall furthermore be at least of an equivalent value to the current contract. This provision is without prejudice to the right to training compensation of the player's previous club(s)*”.
94. The Sole Arbitrator observes that this line of reasoning relied upon by Torino was clearly set forth in Torino's Answer and that the issue was reiterated and discussed at the hearing.
95. The Sole Arbitrator addresses this issue first, because he is of the view that ESTAC indeed did not establish that it satisfied the requirements of Article 6(3) of Annexe 4 FIFA RSTP, as a consequence of which ESTAC's claim for training compensation is to be dismissed on this basis, and as a result of which the other contentious issues between the Parties are no longer determinative for the outcome of the present appeal arbitration procedure.
96. Turning to the reasoning for such conclusion, the Sole Arbitrator notes that it is not disputed between the Parties, and ESTAC provided evidence of the fact that, on 25 April 2022, it offered the Player a trainee contract (*contrat de joueur stagiaire*) for two football seasons.
97. ESTAC argued, and Torino did not dispute, that the Player's first employment contract with ESTAC was concluded on 1 August 2020 and expired on 1 July 2022. On this basis, the Sole Arbitrator is satisfied that ESTAC offered the Player a new employment contract “at least 60 days before the expiry of his current contract”.
98. However, the Sole Arbitrator finds that ESTAC failed to prove that the offer of 25 April 2022 was “at least of an equivalent value to the current contract”, i.e. to the first employment contract concluded on 1 August 2020. Indeed, there is no

evidence on file establishing what the Player's salary under the first employment contract with ESTAC was. This first employment contract was not submitted into evidence by ESTAC.

99. Even upon receipt of Torino's Answer where it was specifically argued that "[Torino] *firmly contests ESTAC's right to receive training compensation unless the latter succeeds in proving that the requirements provided under Article 6 par. 3 of Annexe 4 of the RSTP were met*", ESTAC did not seek leave from the Sole Arbitrator to submit the first employment contract that had apparently been concluded with the Player on 1 August 2020 into evidence in accordance with Article R56 CAS Code. It was only at the very end of the hearing, i.e. after ESTAC's rebuttal, that ESTAC, answering a question posed by the Sole Arbitrator, for the first time indicated it was prepared to provide a copy of the first employment contract if this was deemed necessary by the Sole Arbitrator. It was not a request in accordance with the requirements of Article R56 CAS Code. Furthermore, ESTAC also did not invoke any extraordinary circumstances that would justify the late production of such evidence.
100. In the absence of this first employment contract, the Sole Arbitrator is not enabled to assess whether ESTAC's offer to the Player of 25 April 2022 was "*at least of an equivalent value*" to the first employment contract.
101. Article R44.3 CAS Code (which provision is also applicable to appeals arbitration proceedings on the basis of

Article R57 (third paragraph) CAS Code) provides as follows:

"If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts".

102. The Sole Arbitrator notes that this provision provides him with the discretion of ordering the Parties to produce additional documents and the Sole Arbitrator has indeed considered utilising such discretion, as he indicated to the Parties during the hearing. The Sole Arbitrator was reluctant to do so, because ESTAC had had ample opportunity to provide this document at an earlier stage, but he nonetheless stated at the end of the hearing that "*if there is a reason for me to ask for another production of a document we discussed today I will do that, but, yeah well, I will go over everything and I will render an award, as they say, in due course*".
103. Eventually, the Sole Arbitrator decided against the possibility of ordering ESTAC to produce the Player's first employment contract with ESTAC. The Sole Arbitrator did not take this decision lightly, as he was well-aware of the consequences thereof. However, overall, the Sole Arbitrator considered that ordering ESTAC, *ex officio*, to produce an essential piece of evidence for its appeal to potentially be upheld that was not submitted into evidence by ESTAC at such a late stage, would encroach too much on the prevailing view in legal doctrine suggesting that

restraint is to be applied by arbitral tribunals:

“CAS panels recognize the principle ‘ei incumbit probatio qui dicit, non qui negat’, that is, each party has the burden of proving the facts necessary to establish its claim or defense, not the facts which it denies. This is a general principle of law, accepted in international arbitration as well as in national legal systems (e.g. in Switzerland, it is provided by Art. 8 of the Swiss Civil Code). In practice, it means that each party must submit all the written and oral evidence useful to persuade the arbitrators of the truth of its allegations and to refute the opposite party’s contentions.

[...]

It is true that a CAS panel has, under Art. R44.3 of the CAS Code, the power to ask for evidence ex officio [...]. However, a party should not rely on the panel’s exercise of such ex officio power to look for evidence. In this regard, the CAS made it clear that the exercise of such power is discretionary and not compulsory.

In a dispute between two football clubs, one of the clubs invoked Art. R44.3 of the CAS Code and argued that ‘the Panel has an obligation to instruct the case ex officio and cannot simply take its decision on the basis of the evidence submitted by the parties, if it deems it insufficient’; it added that it was ready to present evidence ‘should the Arbitral Tribunal ask for more information or documents’. However, the CAS panel did not accept such argument and stated that, although Art. R44.3 empowers the arbitral panel to supplement the presentations of the parties, ‘in the Panel’s opinion, this is clearly a discretionary power which a CAS panel may exert with an ample margin of appreciation – ‘if it deems it appropriate’ – and which cannot be characterized as an obligation. In particular, the CAS Code does not grant such discretionary power to panels in order to substitute for the parties’ burden of introducing evidence sufficient

to avoid an adverse ruling; this is clearly confirmed by the circumstance that, in CAS practice, panels resort very rarely to such power. Indeed, it is the Panel’s opinion that the CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. In other terms, in CAS proceedings a party cannot simply declare to be ready to present evidence [...]; if a party wishes to establish some facts and persuade the arbitrators, it must actively substantiate its allegations with convincing evidence’.

The above approach by CAS arbitrators is consistent with the prevailing view in the international arbitration community that there is ‘much in general to recommend arbitrator passivity as regards the obtaining of factual and legal evidence’ and that it ‘will only be in limited special circumstances where arbitrators will take initiatives in evidence with a view to favouring a more correct award, independently of the parties’ submissions” (COCCIA M., The ‘Supreme Court’ of International Sports Law: The Court of Arbitration for Sport, in: International Sports Justice, 2024, pp. 126-127, with reference to: CAS 2003/O/506, para. 54; LANDOLT P., Arbitrators’ Initiatives to Obtain Factual and Legal Evidence, in: Arbitration International, 2012, vol. 28, no. 2, 222-223).

104. It has also long been held in CAS jurisprudence that “in CAS arbitration, any party wishing to prevail on a disputed issue must discharge its burden of proof, i.e. it must meet the onus to substantiate its allegations and to affirmatively prove the facts on which it relies with respect to that issue. In other words, the party which asserts facts to support its rights has the burden of establishing them. The Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. Hence, if a party wishes to establish some facts and persuade the deciding body, it must actively substantiate

its allegations with convincing evidence” (CAS 2014/A/3546, para. 7.3 and references).

105. ESTAC may not have submitted the first employment contract into evidence because it knew that it would then turn out that its offer was not “*at least of an equivalent value*” to the first employment contract and therefore intentionally did not produce it, or it may simply have overlooked the importance of Torino’s argument and inadvertently omitted to submit it into evidence. Whatever the reason is, the fact remains that ESTAC did not submit the first employment contract of 1 August 2020 into evidence, barring the Sole Arbitrator from assessing whether ESTAC’s offer to the Player of 25 April 2022 was of “*at least an equivalent value*” than the Player’s first employment contract. The Sole Arbitrator considered that ordering ESTAC to produce the first employment contract at such a late stage in the proceedings would be tantamount to “helping” ESTAC to cure an omission for which it had only itself to blame, thereby unjustifiably disadvantaging Torino.
106. During the hearing, ESTAC referred to a domestic regulatory regime of the FFF, from which it would allegedly follow that its offer to the Player of 25 April 2022 was necessarily of a higher value than the Player’s first employment contract with ESTAC. However, this contention remained unsupported by any evidence. Also no questions were asked to the Player in this respect during his testimony.
107. Consequently, the Sole Arbitrator finds that ESTAC failed to prove that the criteria set forth in Article 6(3) of

Annexe 4 FIFA RSTP were satisfied, as a consequence of which, as set forth in such provision, “*no training compensation is payable*”.

108. As a corollary, ESTAC’s appeal is dismissed, and the Appealed Decision is confirmed.
109. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 6 May 2024 by Espérance Sportive Troyes Aube Champagne against the decision issued on 17 April 2024 by the General Secretariat of the *Fédération Internationale de Football Association* is dismissed.
2. The decision issued on 17 April 2024 by the General Secretariat of the *Fédération Internationale de Football Association* is confirmed.
3. (...).
4. (...).
5. All other and further motions or prayers for relief are dismissed.

Table tennis; Athletes' registration date determination under the ITTF Statutes for the purpose of a change of sporting nationality; Request for production of documents; Conditions for granting declaratory relief; Standing to appeal; Application of principle of trust and legitimate expectation to the interpretation of a federation's communication; Early registration under ITTF regulations

Panel

Prof. Martin Schimke (Germany), Sole Arbitrator

1. Pursuant to Article R56 of the CAS Code, a party's request for production of documents by the other party shall be denied if the CAS panel does not consider them relevant for its decision-making.
2. Declaratory relief may only be granted under specific conditions: first, the party requesting such declaratory relief must show a legal interest and such declaratory judgment must be necessary to resolve a legal uncertainty threatening the requesting party; second, the legal uncertainty must relate to the existence or non-existence of a claim or a defined legal relationship between the parties to the dispute. On the other hand, legal interest is missing if a declaratory judgment is insufficient or falls short of protecting the claimant's interests. The latter is the case – *inter alia* – if a

party must file a further claim or request to obtain the judicial relief sought or if there are better or easier ways to pursue and protect the claimant's legal interest.

3. To have standing to sue, the appellant must have an interest worthy of protection or a legitimate interest. This is found to exist if (i) the appellant is sufficiently affected by the appealed decision, and if (ii) a tangible interest of a financial or sporting nature is at stake. It is of fundamental and elementary importance for every athlete to know which nationality he or she has in the sporting field after the change of the legal nationality, independently of the question of nomination for a particular national or international competition based on specific selection criteria. This is a matter of confirming the recognition of a player's nationality at a sporting level. A decision in the relationship between the national table tennis federation and the ITTF, which concerns a highly personal matter i.e. the nationality of an athlete, may be taken up by the athlete directly against the ITTF based on specific factual circumstances and then before the CAS once the internal legal remedies within the ITTF have been exhausted.
4. Swiss law principles of trust and legitimate expectation are applicable in sports arbitration, particularly where federations make statements that can reasonably be interpreted as confirmations of registration. Ambiguous communications from sports federations must be interpreted according to how a

reasonable recipient would understand them, and any ambiguity should be resolved against the federation (*contra preferentem* principle).

5. Under ITTF rules, i.e. the ITTF Eligibility Guidelines, athletes may be registered with a new national federation before acquiring the legal nationality of that country, with waiting periods potentially commencing from the earlier registration date rather than citizenship acquisition.

I. PARTIES

1. Ms Yangzi Liu (the “Appellant” or “Athlete”) is an international-level table tennis player born on 6 June 2002 in Hernan, China, with Australian nationality.
2. The International Table Tennis Federation (the “Respondent” or “ITTF”) is the international non-governmental, non-profit organisation for table tennis based in Lausanne, Switzerland.
3. The Appellant and the Respondent are jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute.

Additional facts may be set out, where relevant, in connection with the legal discussion. While the Sole Arbitrator has considered all the facts, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning and conclusions.

5. This case concerns a dispute between the Appellant and the Respondent relating to an eligibility issue in the context of a change of the Appellant’s sporting nationality.
6. The Appellant was registered with the Portuguese table tennis federation before 23 April 2019.
7. From 23 April 2019 onwards, the Appellant commenced living in Australia. Initially, she held a student visa which entitled her to study in Australia.
8. On 3 February 2020, Table Tennis Australia (“TTA”), the national federation for the sport of table tennis in Australia and a member association of the Respondent, sent an enquiry to the Respondent regarding the requirements to register the Appellant as an Australian player.
9. On the same date, the Respondent asked for the Appellant’s player ID and the first and last name in order to check her eligibility to represent Australia.
10. On 4 February 2020, TTA sent the Appellant’s details to the Respondent, including a copy of her passport and her student visa.
11. On 10 February 2020, the Respondent informed TTA that the matter of the

Appellant's eligibility to represent Australia had been *"taken up by the Players Eligibility team. The case is now under consideration to check her eligibility for participation in events and will get back to you once there is a decision"*.

12. On 3 March 2020, the Respondent issued an email stating:

"LIU Yangzi is eligible to participate in Singles and Doubles events for International Open tournaments based on the documents which you have provided and also the current profile which is reflecting in our system. For this case, Singles and/or Doubles events for World Tour, Challenge or World Junior Circuit.

If you would like her to participate in World Title events (World Junior Championships, Continental Championships, etc.), Team events and Olympic Games, there is a need to prove her nationality. Please provide documents to prove that her nationality will be changed (e.g. Australian passport).

Otherwise, she is good to go!"

13. On 28 September 2021, the Australian Government granted the Appellant a distinguished talent visa.
14. On 28 January 2022, TTA asked the ITTF why the Appellant did not appear on the ITTF Eligibility Registration list.
15. On 15 March 2022, the Appellant was conferred with Australian citizenship and supplied with an Australian Passport on 6 June 2022.
16. On 6 June 2022, TTA requested the Respondent to make an update to the ITTF system as the Appellant was now an Australian citizen. The Appellant's passport was attached for this purpose.

17. On 4 March 2023, in response to TTA's requests, the Respondent's Eligibility Working Group ("EWG") issued a decision regarding the registration date of the Appellant. In its decision, the Respondent *inter alia* stated that:

"Ms Liu's registration date does not commence on 4 February 2020 but rather, the earlier of 28 January 2022 or the date on which she was granted her Australian nationality".

18. The EWG gave the following reasons for its decision:

"The applicable rule is Article 4.1.3.2 of the ITTF Statutes (as well as Articles 4.3.6.1, 4.4.6.1 and 4.5.1.3.3 which apply analogously):

4.1.3.2 In addition to provisions of 3.8, players who have acquired a new nationality and wish to represent the association corresponding to the new nationality shall register with ITTF through this new Association. A player is considered as registered either from the date of ITTF player registration confirmation or from the date the player is granted his or her new nationality, whichever is earlier. Having reviewed the correspondence between TTA's Mr John Murphy (Mr Murphy) and ITTF's former employee, Mr Barry Goh (Mr Goh), the Eligibility WG considers that there has been no confirmation of Ms Liu's registration, as required under Article 4.1.3.2 of the ITTF Statutes.

Mr Goh's email on 3 March 2020 clearly explained that Ms Liu was only eligible to participate in International Open tournaments at that time and if TTA would like her to participate in World Title events, documents must be submitted to prove that her nationality will be changed. There was no reply from TTA until Mr Murphy's email on 28 January 2022, and therefore, no effective registration confirmation.

Even with a generous interpretation of Article 4.1.3.2, the Eligibility WG considers that the earliest date Ms Lin's registration confirmation would be implied as 28 January 2022.

Therefore, pursuant to Article 4.1.3.2, the effective date of Ms Lin's registration would be 28 January 2022 or the date on which she was granted her Australian nationality, whichever is earlier”.

19. On 10 March 2023, TTA filed an appeal against the EWG's decision with the ITTF Eligibility Commission. In its appeal, TTA requested the registration date to be set to 4 February 2020.
20. On 22 March 2023, TTA was informed that this appeal was dismissed by the ITTF Executive Board on 17 March 2023, along with the confirmation that the Appellant's registration date for eligibility purposes was 28 January 2022.
21. On 2 May 2023, TTA requested to commence proceedings in this matter before the ITTF Tribunal against this Executive Board decision issued on 17 March 2023.
22. This request, however, was rejected by the ITTF Tribunal Chair, since the deadline to appeal (the decision dated 17 March 2023) expired on 12 April 2023.
23. On 22 September 2023 and 19 December 2023, the Appellant in her own name submitted a request to the EWG of the Respondent applying for unrestricted eligibility in international competitions to compete for Australia.
24. On 15 January 2024, the EWG denied the Appellant's request. It considered that there were no new and material facts that differed from what was submitted by TTA in its original appeal request.

B. Proceedings before the ITTF Tribunal

25. On 2 February 2024, the Appellant filed an appeal with the ITTF Tribunal against the decision of the EWG dated 15 January 2024.
26. On 11 March 2024, the Respondent filed an Answer before the ITTF Tribunal, asking in its conclusion for the ITTF Tribunal to decline the Appellant's request for an appeal to be heard, *inter alia*, because of the lack of standing of the Appellant.
27. On 26 March 2024, the ITTF Tribunal Sole Arbitrator provided the Respondent with a deadline of 7 days to take a position on the Appellant's request of production of all records, database and documents in the ITTF's possession or control, relating to any application for a change of sporting nationality.
28. On 2 April 2024, the Respondent submitted a statement which included again a defence on the lack of standing of the Appellant.
29. On 4 April 2024, the ITTF Tribunal Sole Arbitrator granted the Appellant 7 days to comment on the Respondent's argument regarding the lack of standing of the Appellant raised in the Respondent's answer of 11 March 2024 and further specified in the Respondent's submission dated 2 April 2024.
30. On 10 April 2024, the Appellant commented on the lack of standing defence raised by the Respondent.
31. On 25 April 2024, the ITTF Tribunal Sole Arbitrator ruled that the request for

proceedings filed on 2 February 2024 by the Appellant was dismissed due to the Appellant's lack of standing (the "Appealed Decision").

32. The operative part reads, in its relevant parts, as follows:

"1. The Request for proceedings filed on 2 February 2024 by Mrs Yangzi Liu is dismissed".

33. In essence, the ITTF Tribunal Sole Arbitrator concluded that it is only TTA's responsibility to register the change of the Appellant's sporting nationality and not the Appellant. The latter cannot override this prerogative by requesting an application and registration directly.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

34. On 13 May 2024, the Appellant filed her Statement of Appeal with the Court of Arbitration for Sport ("CAS") against the Respondent with respect to the Appealed Decision, pursuant to Articles R47 *et seq.* of the CAS Code of Sports-related Arbitration (the "CAS Code"). In her Statement of Appeal, the Appellant nominated Mr Robert Weber SC or in the alternative Mr Anthony Lo Surdo SC as an arbitrator.
35. On 23 May 2024, the Appellant filed her Appeal Brief in accordance with Article R51 of the CAS Code. In her Appeal Brief, the Appellant requested to refer the case to a sole arbitrator.
36. On 28 May 2024, the Respondent agreed to submit the present matter to a sole arbitrator and proposed the joint

appointment of a sole arbitrator by the Parties.

37. On the same date, the CAS Court Office invited the Appellant to comment on the Respondent's proposal for a joint appointment of the sole arbitrator within three days.
38. On 4 June 2024, the CAS Court Office informed the Parties that it had not received a response from the Appellant within the granted time limit and, consequently, the sole arbitrator would be appointed by the President of the CAS Appeals Arbitration Division, or her Deputy, in accordance with Article R54 para. 1 of the CAS Code.
39. On 11 July 2024, within the extended time limit, the Respondent filed its Answer in accordance with Article R55 of the CAS Code.
40. On 19 July 2024, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division, confirmed that Prof. Dr. Martin Schimke, Attorney-at-Law in Düsseldorf, Germany had been appointed as Sole Arbitrator in accordance with Article R54 of the CAS Code.
41. On 2 August 2024, the CAS Court Office informed the Parties, pursuant to Article R57 para. 2 of the CAS Code, that the Sole Arbitrator has decided to hold a hearing in this matter, which would be held by videoconference.
42. On 16 August 2024, the CAS Court Office provided the Parties with an Order of Procedure, which was duly signed and returned by the Parties on 16 August 2024 and 26 August 2024, respectively.

43. On 8 October 2024, the CAS Court Office notified the Parties that the Sole Arbitrator decided to hold a remote case management conference (“CMC”).
44. On 5 November 2024 the CMC was held. At the conclusion of the CMC, the Sole Arbitrator confirmed that the objection as to the admissibility of the Respondent’s evidence was not being upheld by the Appellant. Regarding the Appellant’s request for the production of documents, related to any change of sporting nationality, the Respondent argued that the request was too extensive and could not be fulfilled to this extent for various reasons.
45. After the CMC, on 11 November 2024, the Respondent provided a letter with five appendices that, she argues, exemplify the ITTF’s decision-making process as to player eligibility in cases such as this one.
46. On 13 November 2024, the CAS Court Office invited the Appellant to inform whether her request for production of documents had been satisfied.
47. On 14 November 2024, the Appellant informed the CAS Court Office that she was not satisfied with the documents and that the problem concerned the access to the ITTF’s eligibility database (which used to be publicly available on the Respondent’s website), but to which TTA and the Appellant no longer had access.
48. On 19 November 2024, the Respondent commented on the Appellant’s letter and asked the Sole Arbitrator to disregard the Appellant’s new submissions.
49. On 25 November 2024, a hearing was held by videoconference. Apart from the

Sole Arbitrator and Dr Björn Hessert, CAS Counsel, the hearing was attended by:

For the Appellant:

- a. Mr Darren Kane (Counsel)
- b. Ms Yangzi Liu (Party)
- c. Ms Shelly Sun (support person)

For the Respondent:

- d. Mr Raul Calin (ITTF Secretary General)
- e. Mr Jorge Ibarolla (ITTF Tribunal Chair, Counsel)
- f. Mr Flavio Pirrello (ITTF Tribunal Chair, Co-Counsel)

50. At the outset of the hearing, the Parties declared that they had no objections as to the appointment of the Sole Arbitrator.
51. The Parties thereafter were given a full opportunity to present their case, submit their arguments and submissions and answer the questions posed by the Sole Arbitrator.
52. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and that their right to be heard had been fully respected.

IV. SUBMISSIONS OF THE PARTIES

53. The following outline of the Parties’ request for relief and positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator, however, confirms that he carefully

heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

A. The Appellant's Position

54. The Appellant's submissions, in essence, may be summarised as follows:

Standing to Appeal

The Appellant has standing, in her own right, to appeal against the Appealed Decision. The ITTF Tribunal in its decision did not consider the merits of the Appellant's substantive appeal.

The application concerns the Appellant's personal sporting nationality. Thus, she has an obvious and stark legal interest in changing her personal sport nationality status. Therefore, she must have standing to bring the request for proceedings.

Registration Date

The Appellant's ITTF player registration confirmation was made on 3 March 2020. At this point in time, the Appellant was aged 17 years. Therefore, Articles 4.1.3.3.2, 4.3.6.2.2, 4.4.6.2.2 and 4.5.5.3.4.2 of the ITTF Statutes, which contain regulations in regard to the representation of new Associations for athletes aged 15 – 17 years, are applicable, resulting in a 5-year waiting period from the date of such registration. As a result, the Appellant would be eligible to represent TTA and the Australian Olympic Committee (the "AOC") as of 3 March 2025.

The Athlete was entitled to assume that the Respondent would take all necessary steps to change the Appellant's sporting nationality, based on the correspondence between TTA and the Respondent. This is clear from the email of 3 March 2020, in which the Respondent wrote to TTA that the Appellant is "good to go".

The "ITTF player registration confirmation" referred to in the ITTF Statutes is to be considered as the Respondent's confirmation that a player is registered in the context of a change of sporting nationality. The email of 3 March 2020 is clearly such a confirmation and cannot be understood otherwise. The Appellant cannot be "good to go" if she has not been registered.

Furthermore, because the date of player registration on 3 March 2020 is before the date on which the Appellant obtained her Australian citizenship, the five-year retention period is to be calculated from 3 March 2020. The construction of each of the registration provisions in the ITTF Statutes expressly contemplates that the ITTF player registration confirmation might be issued before the acquisition of citizenship of the new country.

Applicability of Provisions

- a) Considering that the registration date was 3 March 2020 as set out above, the applicable ITTF Statutes are Articles 4.1.3.3.2, 4.3.6.2.2, 4.4.6.2.2 and 4.5.5.3.4.2.
- b) The wording "ITTF player registration confirmation" is used in Articles 4.1.3.2, 4.3.6.1, 4.4.6.1 and 4.5.1.3.3.

55. In her Appeal Brief, the Appellant sought for the following request of relief:

“The Appellant’s prayers for relief, as set out in the Statement of Appeal, are claims for the following relief to be granted by this Court:

- a) That the Appellant’s appeal to the Court of Arbitration for Sport is admissible.*
- b) That the CAS has jurisdiction to hear the Appellant’s Appeal.*
- c) That the Decision Appealed Against is set aside.*
- d) A declaration that the Appellant has standing, in her own right, to appeal against the Respondent’s decision made on 15 January 2024, concerning the Appellant’s application to change her sport nationality, by reason of the Appellant having a sufficient stake in the Respondent’s decisions made in relation to her application to change her sport nationality to Australian sport nationality under the ITTF Statutes 2023 and ITTF Statutes 2024.*
- e) A declaration that the date of the Athlete’s ‘ITTF player registration confirmation’, for the purpose of **clause 4.1.3.2, 4.3.6.1, 4.4.6.1 and 4.5.1.3.3** of the ITTF Statutes 2023 and ITTF Statutes 2024, and for all purposes under all applicable sections of the ITTF Statutes 2023 identified in the Appellant’s Application for Registration dated and made on 22 September 2023, is 3 March 2020.*
- f) A declaration that the provisions of **clauses 4.1.3.3.2, 4.3.6.2.2, 4.4.6.2.2 and 4.5.1.3.4.2** of the ITTF Statutes 2023 and ITTF Statutes 2024 are the correct provisions that apply in relation to the Athlete’s eligibility to*

participate in, and represent Australia in the table tennis competitions, tournaments, matches and events referred to in each of those provisions.

- g) That the Respondent make an appropriate contribution to the Appellant’s legal costs and expenses incurred in connection with these proceedings.*
- h) That the Respondent be ordered to bear the costs of the arbitration.*
- i) Any further or other relief as to this Court seems fit”.*

B. The Respondent’s Position

56. The submissions of the Respondent may be summarised as follows:

Inadmissibility of the Appellant’s request for declaratory reliefs

In her Appeal Brief, the Appellant seeks declaratory reliefs in relation to her standing to appeal, the date of her international registration and the provision of the ITTF Statutes that should apply.

Under Swiss law, the possibility for an Appellant to obtain a declaratory relief is subject to strict conditions, which have been confirmed by CAS jurisprudence. To meet these conditions, the Appellant must prove a special legal interest which requires the following three requisites:

- a. Existence of legal uncertainty*
- b. Unacceptability of the legal uncertainty*
- c. No other options to resolve the uncertainty*

But there is no declaratory relief for abstract legal questions or to determine factual circumstances.

The Appellant has no special legal interest. All the three conditions are lacking. The Appellant could have sought condemnatory prayers for relief by requesting the CAS to rule that her registration date is 3 March 2020. In addition, the Appellant tends to establish factual circumstances, when she requests the CAS to declare that the date of her “ITTF player registration” is 3 March 2020.

Lack of Standing to initiate Proceedings before ITTF

The Appellant had no standing to initiate proceedings before the EWG and the ITTF Tribunal and in consequence she does not have standing to appeal to CAS either. From the wording of the provisions in Articles 4.1.3.2, 4.3.6.1, 4.4.6.1, 4.5.1.3.3 of the ITTF Statutes, an athlete may only register with the ITTF for the Olympic title competitions and World Title events through his/her association. Athletes are not entitled to request their own registration. During major games, athletes do not compete in their own names but represent their national associations, so the Appellant cannot claim to register directly with the ITTF. The Appellant thus cannot validly invoke the rights which she puts forward.

Alternatively: Referral to the ITTF

If the claim does not fail due to a lack of legal standing, the case should be referred back to the ITTF Tribunal Sole Arbitrator to decide on the issue of the Appellant’s registration, because the ITTF Tribunal Sole Arbitrator did not

decide on the merits of the case regarding the Appellant’s eligibility, especially regarding the issue of the registration of the Appellant for international competitions.

Alternatively: Registration date was the 28 January 2022

The Appellant may not be registered under TTA before 28 January 2022. The Respondent confirmed on 3 March 2020 that TTA had the right to enter the Appellant into any international competition, except World Title events, Team events and Olympic Games, for which there was a need to prove her nationality.

In order for a player to be eligible to represent a new member association, the latter must submit a proper and complete application to register the player under their new nationality.

The email of 3 March 2020 is very clear and no player registration confirmation can be drawn from the statement “*Otherwise, she is good to go*”. The email clearly explains that TTA must prove the nationality of the Appellant in order for her to be allowed to compete in World Titles, Team events and the Olympic Games. The statement “*Otherwise, she is good to go*” must be understood in this way. This phrase only referred to the first part of the email, according to which the Appellant can compete for TTA in International Open tournaments and she is therefore good to go if TTA does not want the Appellant to compete in World Title events, Team events and Olympic Games. After this email, TTA did not get in touch and did not submit any further documents to complete the registration.

In a final decision dated 22 March 2023, the ITTF Executive Board ruled that TTA had not submitted a sufficient registration for the Appellant. Therefore, the registration date would be 28 January 2022, unless the Appellant had been granted her Australian citizenship earlier. The Appellant is now trying to circumvent the ITTF Executive Board's final decision by applying for registration herself. TTA therefore never submitted a sufficient registration, and the Appellant was never entitled to apply for one.

57. In its Answer, ITTF sought the following request for relief:

“The International Table Tennis Federation applies for the Court of Arbitration for Sport to rule as follows:

I. The appeal filed by Ms Yangzi Liu against the decision of the International Table Tennis Federation ITTF Tribunal of 25 April 2024 is dismissed.

II. Ms Yangzi Liu shall bear all the arbitration costs.

III. Ms Yangzi Liu shall be ordered to pay to the International Table Tennis Federation a contribution towards its legal and other costs incurred within the framework of these proceedings, in an amount to be determined at the full discretion of the Sole Arbitrator”.

V. JURISDICTION

58. Article R47 of the CAS Code provides, *inter alia*, that:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if

the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

59. Article 8.37.1 of the ITTF Statutes (2024 edition) states that:

“Subject to R8.37.2, the ITTF Tribunal’s decision may be appealed to the Court of Arbitration for Sports (‘CAS’) by a party to the proceedings”.

60. The Appealed Decision was rendered by the ITTF Tribunal and the Appellant was a party to this proceeding.

61. The jurisdiction of CAS is not contested by the Parties and is further confirmed by the Order of Procedure, duly signed and returned by both Parties.

62. Considering the foregoing, the Sole Arbitrator is satisfied that the CAS has jurisdiction to decide the present Appeal.

VI. ADMISSIBILITY

63. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

64. Article 8.37.3.1 of the ITTF Tribunal Regulations stipulates the following:

“Appeals made pursuant to R. 8.37.1 shall be filed no later than 21 days from the date of receiving the full decision by the appealing party”.

65. In accordance with these articles, the time limit for filing the appeal is 21 days from the date of the Appealed Decision. The Appealed Decision was issued and notified to the Appellant on 25 April 2024. The Appellant filed her Statement of Appeal with the CAS on 13 May 2024. Therefore, the present Appeal was submitted within the 21-day time limit.
66. The Sole Arbitrator further notes that the admissibility of the appeal is not contested by the Respondent.
67. Consequently, the Sole Arbitrator finds that the present Appeal is admissible.

VII. APPLICABLE LAW

68. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

69. Article 8.37.3.3 of the ITTF Statutes states that:

“Appeals made pursuant to R8.37.1 shall apply CAS’ Code of Sports-related Arbitration (as published, modified and supplemented by CAS) and be governed by Swiss law”.

70. As specifically addressed by the Sole Arbitrator to the Parties at the hearing, the ITTF has published several versions of the ITTF Statutes in the years covering the present dispute. In

particular, the Sole Arbitrator has indicated, with reference to the decision CAS 2014/A/3776, that in addition to the versions of the ITTF Statutes from 2023 and 2024 referred to by the Parties in their written submissions, the ITTF Statutes that were in force at the time the TTA initiated the registration procedure in February 2020 could also apply. In this context, however, the Parties have consensually declared that, as far as the subject matter and the provisions in dispute are concerned, there are no relevant differences in the various Statutes, which the Sole Arbitrator can also confirm after his own examination. Therefore, where reference in this Award is made to the ITTF Statutes, it is to be construed as the 2024 version of the ITTF Statutes (in force at the time of the Appealed Decision), unless stated otherwise.

71. As for the document entitled “*Eligibility Registration*” (the “*Eligibility Registration Guidelines*”), which are stated on the cover as having been last updated on 4 December 2023, and which were subsequently submitted by the Respondent on 11 November 2024, insofar as the content of this is to be decisive at all, there is also no dispute between the Parties regarding the question of which version should apply. The Respondent states that an “*equivalent*” of these guidelines was provided to all national associations also in April 2019. In her written submission of 14 November 2024, the Appellant does not dispute this.

72. Accordingly, the applicable regulations in the present case are the ITTF Statutes (including said *Eligibility Registration Guidelines*), subsidiarily, Swiss law. The Sole Arbitrator notes that the Parties

agree that these are the applicable regulations.

VIII. PROCEDURAL MATTERS/PRAYERS FOR RELIEF

A. Request for Production of Documents

73. The Sole Arbitrator observes that the Appellant in her Appeal Brief requested the CAS Court Office pursuant to Article R44.3 of the CAS Code

“to order that the Respondent produce, at the time that the Respondent files its Answer, all records, databases and documents in the Respondent’s possession or control, relating to any application for a change of sport nationality, made by any athlete in the sport of table tennis or approved by the Respondent and its committees including the Eligibility Working Group, at any time between 1 January 2009 and 31 December 2023 (both dates inclusive)”.

74. The Respondent submitted examples of previous registration applications after discussing the request for production of evidence in the CMC.
75. The Sole Arbitrator notes that the Appellant was not satisfied by the submission of the Respondent. However, the Sole Arbitrator denies ordering Respondent to produce further documents according to the Appellant's request above in addition to the submitted registration examples, because he does not consider them relevant for his decision-making, as is shown by the following grounds for the decision.

B. Prayers for Relief

76. The Sole Arbitrator notes that, in addition to the Appellant’s request for relief to set aside the Appealed Decision

(and other requests as to admissibility, jurisdiction and costs), she also makes several specific requests for declaratory relief in this case. The Sole Arbitrator will first deal with these requests for declaratory relief (i.e. requests d), e) and f) of the Appellant’s Statement of Appeal). In the absence of a specific regulatory regime for processing declaratory requests for relief in the ITTF Statutes or CAS Code, the Sole Arbitrator shall, in line with CAS jurisprudence, apply Swiss law subsidiarily in order to resolve these requests.

a. The Appellant’s Standing

77. In request for relief d) that she has standing in her own right to appeal against the Appealed Decision. The Respondent submits that this request is inadmissible and shall thus be dismissed. The Sole Arbitrator finds that based on Swiss law and the CAS jurisprudence, a declaratory relief may only be granted under specific conditions: first, the party requesting such declaratory relief must show a legal interest and such declaratory judgment must be necessary to resolve a legal uncertainty threatening the requesting party (see CAS 2020/A/7590 & 7591, CAS 2011/A/2612, CAS 2009/A/1870, CAS 2011/O/2574 and CAS 2013/A/3272); second, the legal uncertainty must relate to the existence or non-existence of a claim or a defined legal relationship between the parties to the dispute (see CAS 2020/A/7590 & 7591, CAS 2011/A/2612, CAS 2009/A/1870 and STF 137 II 199).

78. According to constant Swiss jurisprudence a legal interest is missing if a declaratory judgment is insufficient or

falls short of protecting the claimant's interests (ATF 116 II 196; 96 II 131). The latter is the case – *inter alia* – if a party must file a further claim or request in order to obtain the judicial relief sought or if there are better or easier ways to pursue and protect the claimant's legal interests (ATF 123 III 429; 99 II 174).

79. Likewise, the Swiss Federal Tribunal requires that there is a legal interest by the claimant to obtain declaratory relief, specifying that such legal interest does not merely pertain to abstract, theoretical legal issues but to concrete right and duties (ATF 137 II 199 consid. 6.5).
80. In the Appealed Decision, the ITTF Tribunal dismissed the Appellant's request for proceedings solely based on the lack of standing. Further requests as to the registration of the Appellant were not considered in the ruling. Therefore, the issue of the Appellant's standing is at the heart of the case between the Parties, and the Appellant has a special legal interest to clarify her rights in this regard.
81. In conclusion, the Sole Arbitrator deems the request admissible.

b. Declaration of the Registration Date

82. In request for relief e) the Appellant further requested a declaration as to the correct date of her player registration confirmation for the purposes of the ITTF Statutes.
83. Applying the Swiss law test for the granting of declaratory relief referred to above, the Appellant's legal and personal interest in the determination of the date on which she received her registration is indisputably given, as examined in detail

in the 'Merits' section of this Award below.

84. Insofar as the Respondent states that the Appellant "*does not allege that the three conditions for establishing a special legal interest have been met, and for a good reason: all three conditions are lacking. This is particularly true with regard to the third condition, namely that there must be no other way of resolving the legal uncertainty (if any), given that the Appellant could have sought condemnatory prayers for relief by requesting the Court of Arbitration for Sport to rule that her registration date was 3 March 2020*", the Sole Arbitrator is unable to follow this argumentation. In her request for relief e) the Appellant is pursuing exactly this relief – the resolution of a legal uncertainty between the Parties which is at the heart of the Appealed Decision and the present dispute.
85. The date of the Appellant's registration confirmation for the purposes of the ITTF Statutes is personal to the Appellant, and is a legally important matter as it relates to her sporting nationality. The Appellant's sporting nationality is important for the Appellant as it something which could ultimately (subject to the various relevant selection processes, the rights and considerations of her national federation and others involved, and the fulfilment of all other relevant eligibility criteria, all of which are beyond the scope of this Appeal), affect the Appellant's eligibility for participation in future competitions pursuant to the terms of those statutes. The determination of the date of the registration confirmation is also to be seen as compulsory in relation to her legal position and as a prerequisite for its determination and has therefore legal consequences for the Appellant. Therefore, the requested declaration of

the registration date is not simply a fact but is necessary to resolve a legal uncertainty threatening the Appellant within the context of a legal relationship between the Parties.

86. Having exhausted any internal legal remedies within the ITTF structure, the Appellant appears to have no other available legal remedy than to seek an appeal to CAS, which the ITTF identifies in its statutes as the arbitral tribunal with jurisdiction over appeals against decisions of the ITTF Tribunals. No other mechanism is available to protect the Appellant's legal interests in this respect.
87. For that reason, the Sole Arbitrator considers the request admissible.

c. *Declaration of the applicable Rules*

88. As to the final request for declaratory relief f) by the Appellant, namely whether the provisions of Articles 4.1.3.3.2, 4.3.6.2.2, 4.4.6.2.2 and 4.5.1.3.4.2 of the ITTF Statutes 2024 are the correct provisions that apply in relation to the Athlete's eligibility to participate in, and represent Australia in the competitions referred to in each of those provisions, the Sole Arbitrator also applies the test under Swiss law for the granting of declaratory relief set out above.
89. In this instance, it is not clear to the Sole Arbitrator that the declaratory judgment of this question is necessary to resolve the legal uncertainty at the heart of this Appeal. It does not appear that this was a matter considered in the Appealed Decision, which relates to the date of the Appellant's player registration confirmation for the purposes of the ITTF Statutes covered by request for

relief (e), and the Appellant's standing to appeal against that decision covered by request for relief (d). Whether or not the Appellant was duly registered and/or should be declared eligible for nomination by TTA for any particular competitions (or levels of competition) falls outside the scope of the Appealed Decision, and this Appeal.

90. Further, in practical terms, it appears to the Sole Arbitrator that the question of which provisions of the ITTF Statutes apply in this respect are a simple practical question, the answer to which flows directly from the outcome of the Appellant's request for relief (e) referred to above. As such, this motion merely requests the clarification of an abstract legal question, namely the confirmation that certain provisions are to be applied, in view of the answer to a separate legal question.
91. Therefore, the Sole Arbitrator finds the request under f) to be inadmissible.

IX. MERITS

92. Having dealt with the admissibility of the various requests for relief of the Appellant, the Sole Arbitrator now turns to his analysis the merits of the dispute. In essence, the following two questions need to be addressed in this case:
 - Does the athlete have standing to appeal?
 - In the affirmative, is her request to declare that Athlete's player registration confirmation by TTA is 3 March 2020 for the purposes of the ITTF Statutes justified?

A. Standing to appeal

93. As described above, the Appellant's standing to appeal is contested. The plea relating to the lack of standing to sue (as well as standing to be sued) is – according to settled jurisprudence of the CAS (see e.g., CAS 2021/A/7768, CAS 2015/A/3140; CAS 2015/A/3959; CAS 2015/A/4131, CAS 2009/A/1869), – a question related to the merits of the case.
94. As far as the relevant requirements for standing to sue (or to appeal) are concerned, the Sole Arbitrator takes comfort in the guidance set down by the CAS panel in CAS 2015/A/4282 where the CAS panel provided the following summary of the CAS case law and Swiss Federal Tribunal.

“Regarding CAS jurisprudence, in order to have standing to sue, the appellant must have an interest worthy of protection (CAS 2013/A/3140 para. 8.3) or a legitimate interest (CAS 2015/A/3880 para. 46 with further references). This is found to exist if (i) the appellant is sufficiently affected by the appealed decision, and if (ii) a tangible interest of a financial or sporting nature is at stake (CAS 2015/A/3880 para. 46 with further references; see also to that effect CAS 2013/A/3140 para. 8.3; CAS 2014/A/3665, 3666 & 3667 para. 47; CAS 2015/A/3959 par. 143 et seq.). According to CAS 2009/A/1880 & 2009/A/1881 para. 29, only an aggrieved party who has something at stake and thus a concrete interest in challenging a decision adopted by a sports body may appeal against that decision to CAS and the Swiss Federal Tribunal

The Appellants also rely on the application of the Swiss rules of administrative procedure. (...)

In this respect, the Panel notes that both academics and the jurisprudence hold that a non-addressee of a decision only has a right to appeal

in very restricted cases (ATF 131 II 649 consid. 3.1 and references). As a general rule, the appellant's interest must be concrete, legitimate, and personal (Yves Donzallaz, Loi sur le Tribunal Fédéral, p. 909, para. 2366 and 2369, Berne 2008 and quoted cases). A purely theoretical/indirect interest is not sufficient (ATF 133 II 353). In addition, the decision being challenged must affect the appellant directly, concretely, and with more intensity than others (ATF 131 II 649; consid. 3.1; see also CAS 2009/A/1880, 1881 par. 29). (...)

Hence, the Swiss Federal Tribunal held that appellants who wanted to buy a piece of land adjacent to their own property for personal convenience had no standing to appeal against the decision approving the sale of this land to a foreigner. In this case, the Supreme Court found that they had not demonstrated a sufficiently direct interest in having their appeal admitted. Along the same vein, the Swiss Federal Tribunal ruled that a shareholder who held nearly half of a company's capital had no legitimate interest in appealing a decision denying authorization for the company to acquire a building because the shareholder was not affected directly enough by the decision; it would likely not be otherwise for a sole shareholder (ATF 131 II 649, consid. 3.4(...)).

95. These principles and requirements have been confirmed time and again by CAS panels (see, for example, CAS OG 22/007 and CAS 2023/A/9611).
96. The matter in dispute here is the question of whether and when the Athlete correctly changed her sporting nationality under the applicable rules. This question is, by its very nature, also related to the question of an athlete's legal nationality status (as the present case also shows).

97. The question of one's own legal and/or sporting legal status is undeniably a very personal right. The interest in a measure or decision *vis-à-vis* an athlete that affects this status could therefore be more direct and legitimate for this athlete in the sense of the above-cited case law.
98. The Respondent does not appear to want to explicitly dispute the Appellant's direct concern and immediate interest in a decision regarding her sporting nationality. Rather, in its denial of the Appellant's right to bring an appeal, the Respondent primarily relies on the fact that it follows from the wording of the relevant rules that an athlete may only register with the ITTF for the Olympic title competitions and World Title Events through their association, in this case TTA.
99. In this regard, the Respondent refers to the Appealed Decision, which also argues in this context that it is up to each national association to decide which athlete will represent the association and the country in which it has authority with the result that athletes are not entitled to request directly their own registration. In view of this, the Respondent continues, only TTA was entitled to request the Appellant's registration with ITTF.
100. The Parties' submissions and the arguments in the Appealed Decision initially give cause to clearly and strictly distinguish between two processes (and thus between two possible subject matters of a dispute). These are in general and so too in the present case: (i) the *registration* after obtaining a new (legal) nationality on the one hand and (ii) the *nomination* (i.e. selection) for competitions on the other.
101. The nomination for competitions such as World Title events and the Olympic Games is not at issue here. Such nominations are generally made by the national association (here: TTA) on the basis of fixed performance criteria and after comparison with other eligible athletes. With regard to admission to the Olympic Games, the national sports federation usually only has a right to propose candidates, while the corresponding nomination for the Olympic Games is made by the National Olympic Committee, which also still has discretion (see Rule 44 Olympic Charter ("OC")).
102. As far as this process is concerned, the Sole Arbitrator agrees with the Respondent that the nomination based on certain performance criteria, if refused, can in fact only be legally enforced by the governing national sport federation, subject to extreme arbitrary or other exceptional cases. For example, athletes were granted a direct claim against the IOC for admission to the Olympic Games if the nominating National Olympic Committee had clearly misapplied its own nomination principles and there was no time for other legal remedies immediately before the start of the Olympic Games (CAS 2000/A/260, CAS 96/153, CAS 2000/A/278).
103. Therefore, the case law cited in the Appealed Decision in paras. 22-25 is not helpful for the present case. These cases all concern the classic nomination procedure, particularly the admission to the Olympic Games. However, as stated above, the present case does not concern such a nomination for a specific competition (let alone an exceptional case, as mentioned above).

104. Rather, the issue at hand is whether and when the athlete correctly changed her nationality for sporting purposes (i.e. a matter of registration as opposed to nomination). According to the ITTF Statutes, there are two conditions for this. Firstly, it is necessary that the athlete has acquired a new legal nationality at state level with a corresponding passport. In addition, a corresponding registration is required, which may entail further conditions such as a waiting period. The two conditions mentioned above are also mentioned in the ITTF Statutes (see the wording “... *acquired a new nationality ... and ... register with the ITTF through this new association ...*” in Articles 4.1.3.2, 4.3.6.1, 4.4.4.6.1 and 4.5.1.3.3 of the ITTF Statutes).
105. It is true that, according to the ITTF Statutes, registration must be done by the national association (here TTA). However, this initial registration process must be distinguished from the separate, secondary step of a selection decision of the national sports federation as to whether the person concerned should be nominated for a particular international competition and represent the colours of the association's country.
106. This is demonstrated by the (hypothetical) consideration that even an athlete who, for whatever reason, would indisputably never meet the criterion of being nominated for one of these international competitions, should at least be entitled to have their nationality for sporting purposes clarified, not least from the point of view of equal treatment and anti-discrimination. Therefore, it is of fundamental and elementary importance for every athlete to know which nationality he or she has in the sporting field (after the change of the legal nationality), independently of the question of nomination for a particular (national or international) competition based on specific selection criteria. This is a matter of confirming the recognition of a player's nationality at a sporting level.
107. At this point, the Sole Arbitrator emphasises again that, in his opinion, this case is not about selection procedures and nomination for certain competitions, such as world championships or the Olympic Games. It is about the Appellant's registration status with respect to her sporting nationality (her new sporting passport so to say).
108. If the ITTF has doubts as to this registration status there must be a way for the Athlete herself to have this clarified by the competent adjudicatory bodies.
109. Only after such clarification of the Athlete's registration status for general eligibility is positively determined is the next step the nomination for the Olympic Games or World Championships, which, if refused, can in fact only be obtained – as the Respondent rightly points out – through the national association.
110. The Sole Arbitrator cannot find any special provision in the ITTF Statutes, according to which the Athlete can have her nationality change issue clarified. But then she must have her own right to clarification. If the ITTF denies her this right or makes the wrong decision about it, the Athlete must be granted a right of her own to have it clarified, if necessary, before the CAS.

111. Finally, there is also no rule stating that actions of TTA (in general and/or in the context of registration with the ITTF) are attributable to the Athlete or that TTA is to be regarded as the Athlete's agent, with the possible consequence that the Athlete must ultimately accept that missed deadlines or other uncorrectable errors on the part of TTA are attributable to her, and that she can no longer assert claims against the ITTF but only secondary claims such as compensation against TTA.

112. In this context, the Sole Arbitrator took note of the submitted correspondence dated 15 January 2024. In its letter to the Appellant, ITTF states that the EWG sees no basis for a new decision regarding the registration based solely on the absence of a separate notification to the Appellant. Instead, the Respondent argues that it is TTA's duty to ensure that decisions of ITTF's official bodies are binding on their athletes. This is laid down in Art. 1.12.1 of the ITTF Statutes which read as follows:

"In accordance with Article 1.11.1.3., each Association's statutes must comply with the principles of good governance and shall contain at least provisions relating to the following matters: (...)

1.12.1.4 to ensure all relevant stakeholders recognise and exclusively submit to the jurisdiction and authority of the ITTF Tribunal and such other judicial powers recognised by the ITTF".

113. It is not apparent, nor is it clearly expressed in this regulation, that the general obligation of the national federation to ensure the binding effect of ITTF decisions always excludes an athlete's standing to sue/appeal for every conceivable individual case in

respect of such a decision. As explained, the question in this case is whether a decision in the relationship between TTA and the ITTF, which concerns a highly personal matter (here the nationality of the Athlete), may also be taken up by the Athlete directly against the ITTF based on specific factual circumstances.

114. With her actions, the Athlete does therefore not challenge the responsibility and authority of the ITTF in the familiar pyramid-shaped structure of organised sport (from the club to the regional association over the national governing body up to the world/international umbrella association). On the contrary, by requesting a decision from the ITTF, the Athlete emphasises her willingness to submit to the jurisdiction and competence of the ITTF.

115. Apart from the Respondent's argument, the Sole Arbitrator also does not overlook Article 8.20.4 of the ITTF Statutes which covers regulations in regard to the ITTF Tribunal and states that:

"Notices or other communication to a person who is a member of a member association of ITTF or of an associated organisation of ITTF may be accomplished by delivering such notice or other communication to that member association of ITTF or that associated organisation of ITTF, respectively".

116. Apart from the unresolved question of whether, when and how it can be assumed that the decisions issued to date have been notified/communicated to the Athlete, the Appellant has not been involved in the previous legal proceedings between ITTF and TTA as an official party to the dispute. If at all, it is therefore in any case in the present

case not possible to construe any exclusion of the Athlete's standing to sue/appeal from the above-mentioned provision.

117. Based on the forgoing, the Sole Arbitrator rules that the Appellant has standing to appeal against the Respondent's decision rendered on 15 January 2024 and, consequently, in the present case.

B. The Athlete's Player Registration Confirmation

118. As far as the determination of the registration date is concerned, the following undisputed facts should be noted in advance:

- The decisive subject matter of the dispute is the *"ITTF player registration confirmation"*. Although this term is regularly used in the ITTF rules, there is no clear explanation or definition of the meaning of this term.
- The existence of different categories or types of registrations and/or multiple registration dates for the various levels of competition is not provided for in the ITTF Statutes.
- It is clear from wording of ITTF Statutes that it is possible for players to be registered with a new national federation *before* they have acquired the nationality of the country in which that federation is domiciled.

119. According to the correspondence between the Respondent and TTA, it is indisputable that the Appellant was

already registered (as a representative of Portugal) at the time of TTA's request to the Respondent by email dated 3 February 2020. It is the date of this subsequent registration by TTA of the Athlete for Australia for the purposes of the ITTF Statutes which is at the heart of the dispute in the present case. This is of practical relevance for the Athlete because this determines both the starting point and the duration of the waiting period which she (as an athlete switching sporting nationalities) must observe before becoming eligible to be nominated by TTA to represent Australia in the aforementioned highest levels of competition in the sport.

120. In this context, the Sole Arbitrator notes that while the waiting periods referred to in the ITTF Statutes for athletes switching nationalities only apply to certain levels of competition, it is also clear that there is no further separate (second or third etc.) classic registration act for either the Athlete or TTA to complete in respect of those various levels of competition. As mentioned above, the rules do not provide for this. Moreover, this is confirmed by the ITTF's statements when, after confirming that registration (for Portugal) has already taken place, they write in the ITTF email of 3 February 2020 (from Barry Goh Yu Chang) *"... this is a question about her eligibility to represent Table Tennis Australia ..."* and the latter again says in the email of 10 February 2020 *"... this matter has been taken up by Players Eligibility Team. The case is now under consideration to check her ability for participation in events ..."*.

121. The Parties also make reference to the Eligibility Registration Guidelines, which appear to provide guidance

and/or instructions for national federations in respect of the ITTF player registration process.

122. The Eligibility Registration Guidelines contain (i.a.) the following wording:

“To complete the registration Player must already have ITTF ID corresponding to the new Association (if player is currently registered with another Association, first proceed with Association change procedure).

For Eligibility registration you have to fill all the necessary fields in the form (not all fields are required if not applicable at the moment of registration), uploading also:

- a. An official letter on the letterhead of the ITTF Member Association signed by the President or Secretary General of the Association (or equivalent) requesting the eligibility registration of the player.*
- b. A scanned copy of the current passport and/or citizenship certificate and/or proof of original date of residence in the new country.*
- c. The new passport and citizenship certificate must be uploaded once the player acquires it.*

[...]

IMPORTANT NOTE

Registration can be made without having yet acquired the new citizenship, and, in this case, the registration period will count from the moment you present the requested information/documentation, provided that the player does not compete again with the association of origin. The new passport and/or citizenship certificate should be provided as soon as the player gets it. Players cannot represent the new association at listed events until they obtain

it. In that case, the waiting period will be extended until obtaining such citizenship”.

123. The Eligibility Registration Guidelines therefore again make clear that it is possible for a player to be registered with a national federation before having acquired citizenship of that federation’s country. Similarly, it is envisaged that the waiting periods associated with a player transferring nationalities may start from a date of registration preceding acquisition of that new nationality. Indeed, a procedure is specifically provided for a scenario where a player reaches the end of the relevant post-registration waiting period without having yet acquired their new passport and/or citizenship certificate.

124. If the ITTF wished to provide that registration is only possible from the date on which a player acquires the nationality of the respective federation (whether in reference to potential selection at all levels of competition or only some) it was open to it to do so. Neither in the ITTF Statutes nor the Eligibility Registration Guidelines does the ITTF appear to take this position. Even if the wording in the ITTF Statutes and Eligibility Registration Guidelines on this point is found to be ambiguous, such ambiguity must be resolved against the ITTF and in favour of the Appellant in this case, in accordance with the principle of *contra preferentem*.

125. Therefore, having considered the wording of the ITTF Statutes and the Eligibility Registration Guidelines, the Sole Arbitrator considers that after a (first) registration (for any country) and a later application by a national association for another country, the key

consideration for the player in question is:

- a. what is the (sole) date of player registration with the new association for the purposes of the ITTF Statutes?
126. It is the answer to this question which, in turn, determines other relevant matters under the ITTF Statutes such as:
- a. depending on the age of the player at the time of this new registration, which of the waiting periods in the ITTF Statutes apply before they can represent their new federation at certain levels of competition (subject to them providing proof of associated nationality in due course); and
 - b. the date on which the clock starts running on the relevant waiting periods (this being the above date of registration).
127. The relevant question as to the Athlete's registration in this case (which in turn determines the waiting periods which apply to the Athlete pursuant to the terms of the ITTF Statutes) is therefore the date on which the ITTF's player registration confirmation to represent Australia was achieved by TTA within the meaning of those ITTF Statutes. The Sole Arbitrator therefore turns his attention to the submissions of the Parties on the date of registration of the Player by TTA in this case.
128. In this respect, the position of the Parties is clear:
- a. The Appellant argues that the date of registration is 3 March 2020, being the date on which the ITTF

sent an email which the Appellant argues it took to confirm the confirmation of her registration with TTA.

- b. The Respondent, in turn, argues that the date of registration was 28 January 2022 or whenever the Appellant was granted Australian nationality (whichever is earlier)

129. The Sole Arbitrator turns his attention to the ITTF's email of 3 March 2020 to TTA, which is at the centre of the dispute, set out at paragraph 12 above and repeated again here for reference:

"Liu Yangzi is eligible to participate in Singles and Doubles events for International Open tournaments based on the documents which you have provided and also the current profile which is reflecting in our system. For this case, Singles and/or Doubles events for World Tour, Challenge or World Junior Circuit.

If you would like her to participate in World Title events (World Junior Championships, Continental Championships, etc.), Team events and Olympic Games, there is a need to prove her nationality. Please provide documents to prove that her nationality will be changed (e.g. Australian passport).

Otherwise, she is good to go!"

130. This email contains three separate paragraphs. The first two paragraphs deal with the question of which events the Appellant may be eligible to compete in, when and under what conditions. The third paragraph then contains the separate statement *"Otherwise she is good to go!"*.
131. Contrary to the Respondent's opinion, the statement *"Otherwise she is good to go"*

refers anything but clearly to the first and/or second paragraph, with the consequence that it should only be expressed that as long as the Appellant's Australian passport cannot be presented, she is not eligible for World Titles Events and Olympic Games. If this was (exclusively) the purpose of the third paragraph, then it would only be a completely unnecessary repetition of what was previously said, as the first and second paragraphs are so clearly and unambiguously formulated that no further explanation would have been necessary.

132. From the point of view of a reasonable recipient, who must be taken into account when interpreting declarations, it is therefore reasonable to assume that the third paragraph should have a separate/independent meaning. This corresponds to recognised principles of interpretation according to which, in case of doubt, it must be assumed that a sentence or a passage is intended to have a specific meaning of its own. Further, and again in application of the principle of *contra preferentem*, any remaining ambiguity in the wording of this email may be resolved against the party who drafted it (in this case, ITTF).

133. In view of this, TTA could reasonably assume in good faith that the third paragraph in the ITTF email of 3 March 2020 quoted above in fact represented ITTF's confirmation of the Athlete's player registration with TTA, especially in consideration of the following circumstances:

- By email dated 4 February 2020, TTA had - as requested - sent a copy of the Appellant's Australian student visa with the express

request "*Please let me now (sic) should you require any further information*".

- The important meaning that the term and date of the "registration confirmation" has (namely the reference point for the duration of a waiting period for the athlete depending on his/her age).
- The parameters mentioned above, namely: (i) no definition of the meaning of the term "registration confirmation"; (ii) no apparent different categories or types of registration and/or multiple registration dates for the various levels of competition (iii) that registration may take place prior to the receipt of legal nationality.
- The apparent lack of any certificate of registration provided by ITTF to its national federations when a player is deemed registered with that federation.

134. Against this background, TTA (and the Appellant) could trust all the more that the Respondent wanted to confirm with the sentence "*Otherwise she is good to go*" that - apart from the proof of Australian citizenship - all formalities of whatever kind had been fulfilled by TTA and that everything necessary had been set in motion correctly. In particular, it would have been necessary, reasonable and appropriate, within the context of the principle of legitimate expectation, for the ITTF to have made an additional clear remark/warning/reference to the fact that the email was not a confirmation of the Athlete's player registration within the meaning of the ITTF Statutes, if that was the ITTF's standpoint.

135. This corresponds to Swiss law, according to which once the addressee of a declaration does not understand the statement contained in the declaration in the sense wished by its sender, one has to rely on an interpretation based on the principle of trust (*principe de la confiance*; *Vertrauensprinzip*) which stems from Article 2 para. 1 of the Swiss Civil Code. According to this principle, a declaration has to be interpreted in the sense that the addressee could and should have given to it, taking in account all circumstances of the case and the rules of good faith (see CAS 2005/A/811, CAS 2000/A/262; 2019/A/6468 & 2019/A/6478; 2020/A/6914; 2020/A/7529).
136. Further, the Sole Arbitrator must consider why the ITTF Statutes explicitly provide that the date of registration of a player to represent a country may be before the player has acquired legal nationality of that country, if not for a situation such as this one. The ITTF has not provided a satisfactory answer to this question.
137. In this context, the Sole Arbitrator is not persuaded by the Respondent's argument that the formalities of the player's registration were only completed by TTA/the Athlete on (i) 28 January 2022, or alternatively (ii) when the Athlete acquired Australian nationality.
138. In respect of (i) there is no evidence that the Appellant or TTA performed any additional positive action or step towards registration between 3 March 2020 and 28 January 2022. If the ITTF allows registration on 28 January 2022, even though no further documents or a changed registration or similar were submitted prior to that date by the Appellant or TTA, the question arises: why not also recognise 3 March 2020, since at that time exactly the same "registration" was first submitted. Based on the wording of the Eligibility Registration Guidelines, the only formality which appears to have been lacking at the time of the email of 3 March 2020 was the "*official letter on the letterhead of the ITTF Member Association signed by the President or Secretary General of the Association (or equivalent) requesting the eligibility registration of the player*". However there is no evidence that such "official letter" was ever requested by ITTF or provided by TTA in the period between 3 March 2020 and 28 January 2022. In the absence of such, it may be construed that the ITTF was satisfied that the email request to register the Player made via email by TTA in the email chain prior to 3 March 2020 may have been taken by ITTF as an "equivalent" request for the "*eligibility registration*" of the Player. In this respect, the only document explicitly mentioned by the Respondent in the email of 3 March 2020 was the Player's passport.
139. In respect of (ii), as already analysed in detail above, it is apparent from the ITTF Statutes and Eligibility Registration Guidelines that it is specifically foreseen and permitted for a player to be registered by a national federation prior to their acquisition of the legal nationality of that federation.
140. Finally, no overriding interests of the Respondent worthy of protection are apparent that could possibly justify a different view. In particular considering the fact that the Athlete did not represent another national federation in the intervening 2-year period between 2020 and 2022, the Sole Arbitrator must

ask himself what the difference in practice is for the ITTF in this scenario. What detriment has the ITTF or any other team/national federation/player suffered if it is determined that a 5-year waiting period applies (from 2020), as opposed to a 7-year waiting period (from 2022)? Nor is there any evidence that such a decision would be contrary to any consistent application of key principles to be found in the ITTF Statutes as regards the timing or form of player registration.

141. In any case, nothing has been submitted about this by the Respondent beyond the small number of letters in other cases of national federations seeking to register their players in a similar manner to TTA in this case. In practice these letters suggest that the wording and approach used by national federations to (apparently successfully) register players who had acquired nationality with that federation's country required little, if anything by the way of formality, and in many cases are a simple letter of one or two sentences.
142. The ITTF has not submitted anything which speaks persuasively as to why the email exchange between the Parties on and preceding 3 March 2020 should not be taken to satisfy all the requirements of player registration referred or alluded to in the ITTF Statutes.
143. In these circumstances, the Sole Arbitrator finds that the ITTF's attempts to subsequently argue that the date of registration of the Athlete was a later date (being one which would lead to a longer waiting period applying to the Athlete before she could become eligible for nomination by TTA to represent Australia at certain competitions) are

directly at odds with the reasonable, good faith belief of the Appellant and TTA that the ITTF had, in fact, already confirmed that she been registered on 3 March 2020 in accordance with the provisions of the ITTF Statutes.

144. The Sole Arbitrator finds it appropriate, and in accordance with long-standing CAS jurisprudence (see e.g. CAS 98/200, paras. 84 *et seq.*) to apply the principle of legitimate expectation to the facts of this matter. The Sole Arbitrator finds that, on the balance of probabilities, the Appellant and TTA relied in good faith on the assumption that the Appellant would be registered based on the "good to go" statement email received from ITTF. The Appellant and TTA had a legitimate expectation that this email represented the ITTF's confirmation of the Athlete's player registration, and that all that was required to fulfil the formalities under the ITTF Statutes in this respect was for TTA to present the ITTF with a copy of the Athlete's proof of Australian nationality (i.e. an Australian passport) once received. As such, in accordance with the principle of legitimate expectation, the ITTF's email of 3 March 2020 shall be considered as the date of her registration confirmation for the purposes of the ITTF Statutes.
145. In consideration of the above and all the specific circumstances of the case, the Sole Arbitrator concludes in respect of the Appellant's request for relief e) that the ITTF email dated 3 March 2020 constitutes the ITTF player registration confirmation according to the provisions of the ITTF Statutes.
146. The decision as to this point is also not suitable for referral back to the ITTF.

Firstly, the Appealed Decision is not a classic partial judgement. Rather, the Appellant's request was rejected on substantive grounds (i.e. the Appellant's lack of standing). Moreover, the clarification of the date of the disputed player registration is in every respect ripe for a (final) decision. A further postponement of this decision as to this specific point does not seem appropriate due to the time that has now elapsed and the unnecessary continued uncertainty that this would cause for the Appellant.

147. The Sole Arbitrator notes that any further consequences of the impact of this date of player registration fall outside the scope of the Appealed Decision, and therefore of this Appeal.

ON THESE GROUNDS

The Court of Arbitration of Sports rules that:

1. The Appeal filed by Yangzi Liu against the International Table Tennis Federation (ITTF) with respect to the decision issued on 25 April 2024 by the ITTF Tribunal is partially upheld.
2. The decision rendered on 25 April 2024 by the ITTF Tribunal is set aside.
3. The Appellant has standing, in her own right, to appeal against the decision rendered on 15 January 2024 by the International Table Tennis Federation (ITTF).
4. The date of the player registration confirmation for the purposes of the ITTF Statutes for Yangzi Liu by Table Tennis Australia is to be determined as 3 March 2020.

5. (...).
6. (...).
7. All other and further motions or prayers for relief are dismissed.

Athletics (hurdle race); Doping (Epitrenbolone (metabolite of trenbolone)); Admission of expert report based on exceptional circumstances, Article R56 CAS Code; Period of ineligibility in case of presence of non-Specified Substance and *ne ultra petita*; No requirement to establish source of the Prohibited Substance to establish lack of intent; Burden of proof regarding lack of intent and duty to cooperate by the opposing party; Standard of proof to establish lack of intent; Means of evidence; Evidentiary value of multiple pieces of evidence ('strands in a cable'); Evidentiary value of written witness statement by witness not attending hearing; Precedent; Evidentiary weight of athlete's testimony

Panel

Mr Heiner Kahlert (Germany), Sole Arbitrator

1. In circumstances where the appealed decision refers to the view of an expert proffered by one party in the context of the first instance proceedings (*e.g.* an assertion that meat contamination is the most likely source of an adverse analytical finding (AAF), and where none of the parties to the CAS proceedings has submitted that expert report in the CAS proceedings, the CAS Panel may decide to admit to the case file, if it deems *e.g.* necessary in order to comfortably make a finding on the contamination assertion, another, related expert review belatedly proffered in the CAS proceedings by

another party, based on exceptional circumstances in the meaning of Article R56 CAS Code.

2. If, in case of an adverse analytical finding of a non-Specified Substance, lack of intent is not established, the standard period of ineligibility is four years pursuant to Article 10.2.1.1 Japan Anti-Doping Code 2021 ("JADC"). Otherwise, it is two years in accordance with Article 10.2.2 JADC. In case an athlete, on whom a two-year period of ineligibility has been imposed, has not filed its own appeal, or a cross-appeal, against the respective first instance decision, but is, in the context of an appeal to CAS by WADA, merely seeking the dismissal of WADA's appeal, the CAS Panel cannot, without violating the principle of *ne ultra petita*, lower the athlete's period of ineligibility to below 2 years, *e.g.* based on Article 10.5 or 10.6 WADC.
3. While the definitions of No Fault or Negligence and No Significant Fault or Negligence expressly require athletes to establish how the Prohibited Substance entered their system, there is no indication in the wording of Article 10.2.1.1 JADC, or in the definition of the term "intentional" in Article 10.2.3 JADC, of a requirement to establish the source of the prohibited substance. Accordingly, proof of source is not required to establish lack of intent. Any evidence related to the source of the AAF is one, albeit particularly important, strand of the evidentiary cable to prove lack of intent. In this vein, it is established CAS jurisprudence that without evidence as to how the prohibited substance

entered the athlete's system, it is usually very difficult to prove lack of intent. This is why such scenario is "*extremely rare*".

4. It follows from the clear wording of Article 10.2.1.1 JADC that the burden is on the athlete to prove that the Anti-Doping rule violation ("ADRV") was not intentional. Furthermore, in view of Article 10.2.3 JADC, this requires the athlete to disprove both a deliberate ADRV ('direct intent') and a reckless ADRV ('indirect intent'). This means that the athlete is to prove a negative (and subjective) fact which, according to the Swiss Federal Tribunal, entails a certain duty of cooperation of the counterparty, *i.e.* WADA, to cooperate in the investigation and clarification of the facts of the case, in order to avoid procedural unfairness. Therefore, while WADA does not bear the burden of proving alternative scenarios, a paucity of sufficiently plausible alternative scenarios may assist the athlete in meeting his burden of proof. Put differently, the above difficulties do not lead to a reallocation of the risk if a specific fact cannot be established. Instead, this risk will always remain with the party having the burden of proof.
5. According to Article 3.1 JADC, the standard of proof applicable to the Athlete's burden to prove lack of intent is by a balance of probability. This requires less than the comfortable satisfaction, but rather that "*the occurrence of a specified circumstance is more probable than its non-occurrence*". Put differently, the athlete must establish that the

likelihood of the occurrence of the relevant circumstance is greater than 50%.

6. As the JADC does not provide for any restrictions regarding the means of evidence an athlete may rely upon to meet his burden of proof, any means of evidence - subject to general restrictions on admissibility of evidence - are admissible. There is no *a priori* reason or basis to hold that certain types of evidence, such as testimony by the athlete, evidence for lack of sporting incentive *etc* should *per se* be incapable of assisting the athlete in proving lack of intent on the basis that they are not "actual, concrete evidence". Put differently, evidence from the same categories could, under the circumstances of another case, assist an athlete in proving lack of intent, in particular taking into consideration that the specific pieces of evidence and the combination of different pieces of evidence will hardly ever be identical between two cases, and neither will the factual matrix to which the evidence relates be identical. However, for any evidence (from whichever category) to carry any material weight, it will need to be concrete and persuasive. Uncorroborated speculation is to no avail of an accused athlete, and, in fairness, it should not avail the accuser either.
7. Multiple pieces of evidence can have a cumulative effect: while each strand of evidence by itself may not be strong enough to meet the burden of proof, the cable created by all strands together may be sufficient to prove the relevant fact ('strands in a cable')

metaphor). Each case must be decided on its own facts and evidence, and it is for the CAS Panel to – freely - assess the totality of particular facts and evidence before it rather than to exclude certain types of evidence from the outset. Accordingly, it may *e.g.* be held that no single strand of evidence adduced is strong enough for the athlete to discharge the burden of proving lack of intent, but that the cumulative weight of the evidence (*e.g.* the athlete's credible denial, scientific evidence showing that the AAF could have been caused by the consumption of contaminated *e.g.* beef liver, statistical evidence establishing that the athlete's case is very atypical, evidence on the athlete's bodyweight, clean testing history and the sporting characteristics of the sport in question (400mH), making it unlikely that the athlete used the prohibited substance *e.g.* to gain muscle mass), while not considered sufficient to exclude that the Athlete knowingly used prohibited substance, is considered sufficient to discharge the Athlete's burden of proving that it is more than 50% likely that he did not use the prohibited substance deliberately ('direct intent').

8. While written witness statements are also an admissible means of evidence, if the respective witness is not called to appear at the hearing, this may affect the evidentiary value of the witness testimony, in particular if the counterparty challenges the contents of the written witness statement in question or has indicated that it seeks to cross-

examine the witness.

9. The CAS does not have a doctrine of binding precedent. However, in the interest of a harmonized application of the WADC and the regulations that are based on it (such as the JADC), it may be appropriate to take guidance from past jurisprudence on the interpretation of the relevant rules. As regards however the assessment of the facts and the evidence to which those rules must be applied, no case is identical to the other with the result that each case needs to be decided on its own particular circumstances.
10. Article 3.2.5 WADC/JADC allows hearing panels to draw adverse inferences from an athlete's refusal to appear at the hearing and answer questions. Similarly, the fact that according to Article 3.2 JADC, an ADRV may be proven by admission, necessarily implies that an athlete's testimony may (if credible) carry substantial evidential weight against the athlete. It would hardly be reconcilable with procedural fairness and equal treatment if, in the opposite scenario of the athlete appearing and testifying, this could likewise only work against the athlete, but not to the athlete's benefit. Accordingly, while the CAS Panel has the duty to assess the credibility of the testimony of the accused, an athlete's express denial ("protestations of innocence"), - in person at the hearing - of having taken the prohibited substance intentionally may be considered by the panel as carrying some material weight. This is even more the case if the athlete has submitted multiple pieces of actual and concrete – albeit

circumstantial – evidence to corroborate his own testimony.

I. PARTIES

1. The World Anti-Doping Agency (“Appellant” or “WADA”) is the international anti-doping agency. It has its registered seat in Lausanne, Switzerland, and has its headquarters in Montreal, Canada.
2. The Japan Anti-Doping Agency (“First Respondent” or “JADA”) is the National Anti-Doping Organisation in Japan. It operates under the Japan Anti-Doping Code 2021 (the “JADC”).
3. Mr Masaki Toyoda (“Second Respondent” or “Athlete”) is a 400m hurdle race (“400mH”) athlete from Japan, born on 17 January 1998. He has competed at international track and field events in the 400mH since 2015.
4. The First Respondent and the Second Respondent are hereinafter jointly referred to as the “Respondents”. The Appellant and the Respondents are hereinafter jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts based on the Parties’ submissions (this term including oral pleadings and evidence adduced). Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts transpiring from the Parties’ submissions in the present proceeding,

he refers in his Award only to the facts he considers necessary to explain his reasoning.

A. The Athlete’s testing history, testing pool affiliations and competitions prior to 19 May 2022

6. From 13 May 2019 until before the doping test at issue here, the Athlete was subject to seven doping controls, including on 13 December 2021 and 25 February 2022. None of those tests resulted in any Adverse Analytical Finding¹ (“AAF”).
7. On 2 June 2021, the Athlete was notified of his inclusion in the JADA’s testing pool, rendering him obligated to submit his whereabouts information.
8. On 11 March 2022, he was notified that he was included in JADA’s Registered Testing Pool (the “RTP”).
9. On 24 April and 1, 3, 8 and 15 May 2022, the Athlete competed in 400mH races.

B. The Adverse Analytical Finding

10. The Athlete underwent an Out-of-Competition test conducted by JADA on 19 May 2022 between 6:01 and 6:25 a.m. (the “Test”). During the Test, the Athlete provided a urine sample with the sample number 4637867 (the “Sample”). On the doping control form signed by the Athlete (the “DCF”), he indicated having used the following supplements: “*HULKFACTOR CREATINE, WINZONE WHEY PROTEIN, [Sun Chlorella tablets]*”.

¹ Capitalized terms not defined herein have the meaning ascribed to them in the JADC.

11. The WADA-accredited laboratory in Tokyo, Japan (the “Tokyo Laboratory”) analysed the “A” Sample and reported, on 7 June 2022, an AAF for epitrenbolone. This is a metabolite of trenbolone, which is a non-specified substance prohibited In- and Out-of-Competition pursuant to section 1.1 of the 2022 WADA Prohibited List (anabolic androgenic steroids, “AAS”).
12. On 11 June 2022, the Athlete competed at the 2022 Japan Championships and finished third.
13. On 21 June 2022, the Athlete returned from a competition overseas to Japan and was notified of the AAF via telephone by the head of JADA’s Results Management Department.
14. Still on the same day, shortly after the verbal notification by JADA, the Athlete called Mr Shunji Karube (the Athlete’s coach at Hosei University) and Mr Shinji Takahira (the Athlete’s coach at Fujitsu’s track and field team), informing them about the AAF.
15. Later on the same day, the Athlete was also informed in writing about the AAF and was provisionally suspended by JADA in accordance with Article 7.4.1 JADC.
16. On 20 July 2022, based on the Athlete’s request, the Tokyo Laboratory conducted an analysis of the “B” Sample. This was attended, inter alia, by the Athlete, his lawyer Mr Yoji Kudo, and a representative from JADA. On this occasion, Mr Masato Okano, the Head of the Tokyo Laboratory explained, among other things, the following:
 - The concentration of epitrenbolone detected in the “A” Sample was estimated at 1.4 ng/mL, which Mr Okano referred to as “*extremely low*”. He explained that WADA’s Technical Documents required WADA-accredited laboratories to be able to detect concentrations of 2.5 ng/mL of trenbolone.
 - Trenbolone has a powerful muscle-strengthening effect and is therefore often used in bodybuilding. In cases of intentional consumption for bodybuilding, the urinary concentration would be around 50 or 100 ng/mL.
 - Trenbolone is not approved as a drug in Japan and is not available over the counter.
 - While trenbolone is prohibited in Japan as a growth promoter in animals, it is used as such in the United States and Australia. There is data showing that trenbolone can be detected in the animal’s liver, but it may also be present in ordinary cuts of meat. While the Japanese authorities conduct sample checks for prohibited substances, it does not check every item. Therefore, it is unknown whether imported meat sold at Japanese supermarkets may contain trenbolone.
17. On 21 July 2022, the Athlete was notified that the analysis of his “B” Sample had confirmed the AAF, with the estimated concentration again being 1.4 ng/mL.
18. On 20 February 2023, the Athlete was charged by JADA with the commission

of an anti-doping rule violation (“ADRV”) under Articles 2.1 and 2.2 of the JADC.

C. The decision of the Japan Anti-Doping Disciplinary Panel

19. On 6 July 2023, the Athlete was heard before the Japan Anti-Doping Disciplinary Panel (the “JADDP”).

20. On 5 January 2024, the JADDP issued its decision (the “JADDP Decision”) as follows, in the English translation provided by WADA in this arbitration:

“- Violations of Articles 2.1 and 2.2 of the Code are found to have occurred.

- In accordance with Article 10.10 of the Code, all of the individual results of the Athlete obtained from May 19, 2022, the date of sample collection, through June 21, 2022, the commencement date of the provisional suspension period shall be disqualified, and all medals, points and prizes obtained during such period shall be forfeited.

- In accordance with Articles 10.2.2 and 10.13.1 of the Code, ineligibility shall be imposed for a period of two years starting from May 21, 2022”.

D. The decision of the Japan Sports Arbitration Agency

21. On 25 January 2024, JADA appealed to the Japan Sports Arbitration Agency (the “JSAA”) requesting a partial reversal of the JADDP Decision by seeking a period of ineligibility of four years instead of two.

22. By a decision dated 2 April 2024 (the “Appealed Decision”), the JSAA dismissed JADA’s appeal.

23. On 3 April 2024, JADA notified WADA that JADA’s appeal of 25 January 2024 had been dismissed.

24. On 8 April 2024, WADA received the Appealed Decision.

25. On 9 April 2024, World Athletics received the Appealed Decision.

26. On 22 April 2024, WADA submitted a case file request and received elements of the case file on the same day.

27. On 23 April 2024, WADA requested additional documents and World Athletics submitted a case file request of its own.

28. On 24 April 2024, the requested additional documents were provided to WADA.

29. On 26 April 2024, World Athletics received elements of the case file.

30. On 16 May 2024, JADA provided WADA and World Athletics with further translated documents.

31. On 21 May 2024, the Athlete resumed his sporting activities.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 6 June 2024, the Appellant filed its Statement of Appeal within the meaning of Article R48 of the Code of Sports-related Arbitration (2023 edition) (“CAS Code”) before the Court of Arbitration for Sport (“CAS”). In its Statement of Appeal, the Appellant requested that the dispute be decided by a sole arbitrator.

33. On 12 June 2024, the CAS Court Office initiated the procedure CAS

- 2024/A/10655 WADA v. JADA & Masaki Toyoda* and notified, among other information, the Statement of Appeal to the Respondents.
34. On 18 June 2024, the Second Respondent requested the President of the Appeals Arbitration Division to appoint three arbitrators.
 35. On 27 June 2024, the Appellant filed the Appeal Brief (within the deadline as extended by the CAS).
 36. On 2 July 2024, the CAS Court Office invited the Respondents to submit their Answers within the meaning of Article R55 of the CAS Code.
 37. On 24 July 2024, the First Respondent submitted its Answer.
 38. On 5 August 2024, the Second Respondent submitted its Answer (within the deadline as extended by the CAS).
 39. On 6 August 2024, the CAS Court Office asked the Parties to confirm whether they preferred for a hearing and a case management conference (“CMC”) to be held.
 40. On 13 August 2024, the Second Respondent requested a hearing as well as a CMC.
 41. On 13 August 2024, the Appellant requested a hearing but stated that it did not consider a CMC necessary.
 42. On 20 August 2024, the CAS Court Office informed the Parties pursuant to Article R50(1) of the CAS Code that the Deputy President of the CAS Appeals Arbitration division had decided to submit the case to a sole arbitrator.
 43. On 26 September 2024, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that pursuant to Articles R33, R52, R53 and R54 of the CAS Code, the arbitral tribunal had been constituted as follows:

Sole Arbitrator: DR. Heiner Kahlert, Attorney-at-Law in Munich, Germany
 44. On 1 October 2024, on behalf of the Sole Arbitrator, the CAS Court Office requested the Parties to indicate whether they preferred a hearing in person or via video conference, noting that the final decision on this matter would be taken by the Sole Arbitrator in accordance with Article R57 of the CAS Code.
 45. On 3 October 2024, the First Respondent indicated that, for cost reasons, it requested a hearing via video conference.
 46. On 4 October 2024, the Second Respondent indicated that he preferred a hybrid hearing as that would allow himself and a witness to testify in person.
 47. On the same day, the Appellant requested a hearing in person but confirmed that did not object for other parties to attend via video conference.
 48. On 8 October 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties that, pursuant to Article R57 of the CAS Code, a hybrid hearing would be held in Lausanne and by video conference.
 49. On 30 October 2024, the Appellant notified the CAS Court Office of its view that the Second Respondent’s arguments before CAS concerning the

- establishment of the source of the AAF had changed compared to the previous instances.
50. On 31 October 2024, on behalf of the Sole Arbitrator, the CAS Court Office invited the Appellant to indicate as soon as possible, but no later than 8 November 2024, whether it requested to be granted the opportunity to file a further submission in respect of the source of the prohibited substance.
 51. On 7 November 2024, the Second Respondent emphasized that, in his view, his legal position had remained consistent throughout all instances and that any further submissions by WADA would be unfairly late.
 52. On 7 November 2024, on behalf of the Sole Arbitrator and after having confirmed the Parties' availability, the CAS Court Office informed the Parties that the hybrid hearing would be held on 29 January 2025.
 53. On 8 November 2024, the Appellant replied to the Second Respondents' letter of 7 November 2024 and provided an expert report by Prof. Christiane Ayotte (the "First Ayotte Report").
 54. On 12 November 2024, on behalf of the Sole Arbitrator, the CAS Court Office invited the Respondents to comment on the First Ayotte Report until 15 November 2024.
 55. On 15 November 2024, the Second Respondent requested that the First Ayotte Report not be admitted.
 56. On 27 November 2024, the Appellant was granted a deadline of 4 December 2024 to provide further comments on whether the requirements for admitting the First Ayotte Report under Article R56 of the CAS Code were met.
 57. On 29 November 2024, the Appellant provided such comments, maintaining its position that the First Ayotte Report should be admitted to the case file.
 58. On 2 December 2024, on behalf of the Sole Arbitrator, the CAS Court Office granted the Respondents until 6 December 2024 to submit observations further to the Appellant's comments of 29 November 2024.
 59. On 4 December 2024, the Second Respondent submitted his observations.
 60. On 11 December 2024, a CMC conference was held by videoconference. The Appellant and the Second Respondent were represented in the CMC.
 61. On 19 December 2024, the Appellant was invited to clarify, by 15 January 2025, whether Professor Ayotte would testify during the hearing also on "*the relevance of anabolic steroids such as trenbolone in track-and-field*", as alluded to in the Appeal Brief, and (if so) to submit a supplementary expert report on that issue (the "Second Ayotte Report").
 62. On 23 December 2024, on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties that the First Ayotte Report was admitted to the file and that the reasons therefor would be provided in the final Award.
 63. On 14 January 2025, the First Respondent returned a signed copy of the Order of Procedure and confirmed that it did not wish to make any oral argument or examine any of the witnesses.

64. On 15 January 2025, the Appellant and the Second Respondent returned signed copies of the Order of Procedure. Moreover, the Appellant submitted the Second Ayotte Report.
65. On 22 January 2025, the Second Respondent made use of the opportunity granted by the Sole Arbitrator to submit a supplementary report by Professor Ohe in response to the Second Ayotte Report.
66. On 23 January 2025, the CAS Court Office informed the Parties of the tentative hearing schedule and provided a list of questions that the Sole Arbitrator invited the Parties to address at the hearing.
67. On 29 January 2025, a hybrid hearing was held in person and by videoconference. In addition to the Sole Arbitrator, Ms Andrea Sherpa-Zimmermann (Counsel at the CAS) and Ms Juliane Schneider (observer), the following persons participated in the hearing:

For the Appellant:

Mr Ross Wenzel (General Counsel)
Mr Nicolas Zbinden (counsel)
Mr Robert Kerslake (counsel)

For the First Respondent:

Mr Masaki Toyoda (the Second Respondent)
Mr Daniel Allen (counsel)
Mr Yoji Kudo (counsel)
Ms Yuko Kanamaru (counsel)
Mr Hiromu Taga (counsel)
Mr Kengo Iida (counsel)
Mr Takao Ohashi (counsel)

Mr Koichiro Mochizuki (counsel)
Mr Masayuki Tanamura (counsel)
Mr Michael Sekine (interpreter)

68. The following expert witnesses testified before the Sole Arbitrator:
 - Professor Christiane Ayotte (called by the Appellant)
 - Professor Tomoyuki Ohe (called by the Second Respondent)
 - Professor Satoru Tanigawa (called by the Second Respondent)
69. At the outset of the hearing, the Parties confirmed that they had no objections to the arbitral procedure thus far. At the conclusion of the hearing, the Parties confirmed that they had no complaint regarding the conduct of the hearing, in particular, as regards their right to be heard and to be treated equally.
70. On 13 March 2025, the Appellant provided a copy of the award rendered in CAS^o2023/A/9916 & 9966.
71. On 19 March 2025, the Second Respondent submitted that it considered the Appellant's communication of 13 March 2025 procedurally inappropriate and reserved its rights in this regard.
72. On 26 March 2025, the Sole Arbitrator informed the Parties that he had decided to admit the award issued in CAS 2023/A/9916 & 9966 into the record without admitting further submissions from the Parties, *inter alia* because the said award did not contain any finding (relevant to this arbitration) that went beyond the CAS jurisprudence already

addressed in the Parties' written submissions and oral pleadings.

IV. SUBMISSIONS OF THE PARTIES

73. The following summary of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by them. The Sole Arbitrator confirms that he has carefully considered all submissions made, regardless of whether there is any specific reference to them in this Award.

A. WADA's submissions and requests for relief

74. WADA's submissions, in essence, may be summarised as follows:
- Pursuant to Article 13.2.3.2 of the JADC, WADA has the right to appeal to the CAS.
 - The Statement of Appeal was lodged in a timely fashion. In accordance with Article 13.6.1 of the JADC, World Athletics' deadline for appeal was 21 days from the receipt of the case file. As it received elements thereof on 26 April 2024, World Athletics' deadline to appeal was, at the earliest, 17 May 2024. Accordingly, pursuant to Article 13.6.1(b)(i) of the JADC, WADA's deadline could not be any earlier than 7 June 2024.
 - As it is undisputed that the Athlete has committed an ADRV, the only question to be decided is the applicable sanction.
 - The burden to prove lack of intent lies solely on the Athlete, as

confirmed by CAS jurisprudence (*e.g.* CAS 2012/A/2759, paras. 11.31 *et seq.*; CAS 2014/A/3615, para. 52; CAS 2017/A/5016 & 5036, para. 131). As intentionality includes indirect intent, the Athlete must not only disprove rational and informed cheating, but also recklessness. Per Article 3.1 of the JADC, the standard of proof for lack of intent is on the balance of probabilities. As per CAS jurisprudence, it is not for WADA to come up with alternative scenarios. Instead, one only needs to analyse the scenario put forward by the Athlete.

- The Athlete argued that the AAF was a result of contamination but was unable to establish the source of the prohibited substance in his Sample. As noted in the Appealed Decision, this was uncontroversial amongst the parties at second instance. While the Athlete has argued before CAS that meat contamination was the most likely source of the AAF, he has failed to provide sufficient evidence to meet his burden of proof in this regard. Specifically, there is no analytical evidence that beef liver was contaminated. Moreover, the Athlete accepted in his oral testimony that it is not clear whether he even ate beef (liver) the day before the Test. In addition, the Athlete's evidence as to his consumption of beef liver must be approached with caution: During cross-examination, he agreed that he added the beef liver photo to the summary of his diet (the "Diet Summary") after he had instructed his lawyers, while the

text in that document neither referred to liver nor to Australian beef (WADA referred in this regard to CAS 2019/A/6319, which WADA argued showed the significance of a change in position as to the consumption of beef liver). Further, as confirmed by the expert testimony of Professor Ayotte, meat contamination is highly improbable as a source of the Athlete's AAF. Professor Ohe's testimony, by contrast, is entirely speculative as it refers to the maximum residue limit ("MaxRL") permissible in Japan. This does not reflect reality because it is much higher than the concentration of trenbolone found in any study of beef livers. It is also fair to assume, contrary to Professor Ohe, that the Athlete urinated between eating beef liver and being tested, for otherwise the Athlete would have surely mentioned this at some stage of the proceedings.

- There is consistent CAS jurisprudence holding that the Athlete must necessarily establish source to successfully prove that the substance was not taken intentionally (*e.g.* CAS 2017/A/5295, para. 105; CAS 2017/A/5335, para. 137; CAS 2017/A/5392, para. 63; CAS 2018/A/5570, para. 51; CAS 2016/A/4377, para. 51; CAS 2016/A/4563, para. 50; CAS 2016/A/4845, para. 41). Other CAS panels have decided that while proof of source is not a strict requirement for establishing the lack of intentionality, it is still a

"crucial, almost indispensable element for an athlete to disprove intent" (CAS 2023/A/9377, para. 66) such that the absence of proof of source "*leaves the narrowest of corridors through which such athlete must pass*" (CAS 2016/A/4534, para. 37; endorsed by CAS 2022/A/8653, para. 233(d)), meaning that "*in all but the rarest cases the issue is academic*" (CAS 2016/A/4919, para. 66).

- It follows from the comment to Article 10.2.1.1 of the JADC, which mirrors identically the language contained in the equivalent comment of the 2021 World Anti-Doping Code (the "WADC"), that there exists only a theoretical, yet highly unlikely, possibility for an Athlete to prove that the ADRV was not intentional without establishing the source of the prohibited substance. In other words, absent proof of source, a four-year period of ineligibility applies, save in the most exceptional and extremely rare circumstances. The rationale is that absent proof of source, a key piece of evidence is missing to substantiate the claim that the substance was consumed inadvertently, requiring the tribunal to make a logical leap (*cf.* CAS 2016/A/4761, para. 40, citing with approval a decision of the Sport Dispute Resolution Centre of Canada in the matter of Tylor Findlay), which is not possible save in the most exceptional circumstances where alternative evidence can show the lack of intention.

- The Athlete’s testimony is only a protestation of innocence, not concrete actual evidence. In accordance with CAS jurisprudence, such protestations are not sufficient proof of an unintentional ADRV and will thus carry no material weight in the assessment of whether the ADRV was intentional (CAS 2020/A/6978 & 7068, para. 163; CAS 2017/A/5016 & 5036, para. 125; CAS 2017/O/5218, para. 166; CAS 2018/A/5584, para. 139). Even in a rare outlier case where lack of intent was found in the absence of proof of source, the panel emphasized that it was *“disinclined to give weight to uncorroborated assertions of the accused and persons close to him or her”* (CAS 2020/A/7579 & 7580, para. 172). In any case, the Athlete’s testimony was flimsy as to his consumption of beef, and when he included beef liver in his statement. He also admitted that he took protein and creatine to improve his explosive power, which gainsays his argument that the use of trenbolone makes no sense.
- Moreover, there is no scientific evidence ruling out an intentional violation and no other exceptional circumstances have been identified proving lack of intent. Instead, the Appealed Decision relies mainly on “evidence” allegedly showing that the Athlete had no incentive to dope as trenbolone allegedly would not have a performance-enhancing effect on a 400mH competitor. This finding was not based on objective facts. In particular, undue weight was attributed to the Athlete’s and his coach’s testimony in asserting that trenbolone would not have a performance enhancing effect. The Athlete’s testimony is again merely a protestation of innocence. His coach is not to be regarded an independent witness (which is reinforced by the Athlete’s coach giving evidence in support of the good character of the Athlete and his reaction to the AAF), nor was his opinion given on the basis of scientific evidence.
- In any case, CAS jurisprudence confirms that much more than an (alleged) lack of incentive to dope is required to establish that the ADRV was not intentional (CAS 2017/O/5218, para. 166; CAS 2017/A/5016 & 5036, para. 125; CAS 2019/A/6213, para. 65; CAS 2018/A/5584, para. 139). Indeed, deciding otherwise would be to assume that every ADRV is well thought out and calculated on the part of athletes, which is not always the case. If an athlete could prove lack of intent by establishing that there was no potential increase in performance, this would undermine the purpose of anti-doping regulations in keeping participants safe and sport fair.
- Similarly, to the extent that the Appealed Decision referred to *“the words and actions of the Respondent after the Testing and after the notification of the test results, as well as the fact that the Respondent’s side implemented an analytic investigation in order to discover the route of entry into*

his system by using enormous energy and expenses”, this contradicts CAS jurisprudence according to which diligent but unsuccessful attempts by the athlete to discover the origin of the prohibited substance are insufficient to prove lack of intent (CAS 2017/O/5218, para. 166; CAS 2018/A/5584, para. 139).

- Moreover, the statistics do not support the Athlete’s allegation that 400mH athletes would never use steroids, given that other 400mH athletes have tested positive for the use of steroids and have faced four-year periods of ineligibility as it was deemed intentional. The statistics also illustrate that the Athlete’s case is not such a large outlier that one could automatically rule out direct intention. Rather, the statistics show that use of trenbolone in short distance athletics is not uncommon. This is also supported by multiple CAS precedents involving short distance track and field athletes who were sanctioned with periods of ineligibility of four years for ADRVs involving trenbolone (*e.g.*, CAS OG 20/06 & 08; CAS 2017/A/5105; CAS 2019/A/6319; CAS 2021/O/8111). Moreover, Professor Ayotte’s expert testimony confirms that trenbolone is used by track-and-field athletes, which also disproves Professor Tanigawa’s evidence that, allegedly, no 400mH athlete would take trenbolone.
- Also, the allegation is not that the Athlete was on a course of 200mg

trenbolone for eight weeks. It is unknown what happened, the point is that the Athlete failed to provide evidence showing that he lacked intent. Therefore, the Athlete’s argument that he did not gain weight is a red herring. In fact, the athlete in CAS 2019/A/6319, who likewise tested positive for trenbolone, was a diminutive athlete who was nonetheless found to have used a steroid intentionally. Moreover, the Athlete has only submitted six weight figures across three years at random points. There could be all sorts of reasons for this loss of weight. No scientific evidence was presented that would show that this loss of weight means anything, and Professor Ayotte confirmed that trenbolone is useful also for maintaining (*i.e.*, not necessarily gaining) weight.

- Adducing evidence of shock or a clean sporting record is likewise insufficient (*see* regarding the latter CAS 2017/O/5218, para. 166). Otherwise, floodgates would be opened and the four-year sanction, which was introduced in 2015 primarily due to requests by athletes, would become the exception.
- All of the Athlete’s arguments are mounted against direct intent, while he has not sought to disprove indirect intent.
- In light of all of the above, it was not proven that the ADRV was unintentional. Consequently, the mandatory four-year period of

ineligibility as per Article 10.2.1 of the JADC shall apply.

75. WADA made the following requests for relief in its Appeal Brief:

- “1. *The appeal of WADA is admissible.*
2. *The decision dated 27 February 2024 rendered by the Japan Sports Arbitration Agency is set aside.*
3. *Masaki Toyoda is found to have committed an anti-doping rule violation pursuant to Articles 2.1 and 2.2 of the Japan Anti-Doping Code.*
4. *Masaki Toyoda is sanctioned with a four (4) year period of ineligibility starting on the date on which the CAS Appeals Division award enters into force. Any period of provisional suspension or ineligibility effectively served by Masaki Toyoda before the entry into force of the CAS Appeals Division award shall be credited against the total period of ineligibility to be served.*
5. *All competitive results obtained by Masaki Toyoda from and including 19 May 2022 until the date on which the CAS Appeals Division award enters into force are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
6. *The Japan Anti-Doping Agency, or in the alternative the Respondents, jointly and severally, are ordered to pay the arbitration costs of these proceedings (if any).*
7. *The Japan Anti-Doping Agency, or in the alternative the Respondents, jointly and severally, are ordered, jointly and*

severally, to pay a contribution to WADA’s legal and other costs”.

B. JADA’s submissions and requests for relief

76. JADA submits that, because it has no right to appeal the Appealed Decision, it considers appropriate not to involve itself in the dispute between WADA and the Athlete, but rather to take a “*neutral and silent position*”. Therefore, JADA refrains from making any substantive arguments. However, JADA considers unfair to be requested to pay the arbitration costs, or to contribute to WADA’s legal and other costs.

77. JADA made the following requests for relief:

“Therefore, JADA respectfully requests that the arbitration costs are ordered to be paid in equal shares by the Appellant and the Respondents. [...]

Therefore, JADA respectfully requests that [WADA’s request against JADA for a contribution to WADA’s legal and other costs] be dismissed”.

C. The Athlete’s submissions and requests for relief

78. The Athlete’s submissions, in essence, may be summarised as follows:

No intentional ADRV

- The applicable standard of proof for lack of intent is “*by the balance of probability*” (Article 3.1 of the JADC). Accordingly, the probability of the “*ADRV is not intentional*” only needs to be slightly higher than the probability of the “*ADRV is intentional*”.

- WADA overemphasizes the importance of establishing source. First, it is precisely those athletes whose ADRV was unintentional who will find it difficult to prove source. Secondly, proof of source may often be important, but is not indispensable, as confirmed by CAS jurisprudence (CAS 2020/A/7579 & 7580), the comment to Article 10.2.1.1 of the JADC and a comparison with the definitions of No (Significant) Fault or Negligence. Even without proof of source, the “corridor” for innocent Athletes to exculpate themselves must be wide enough and the specific objective and subjective circumstances of the case must be considered, recognizing that no case is the same as the other (CAS 2019/A/6313, paras. 75 and 76; CAS 2020/A/6978 & 7068, para. 136).
- During the second consultation phase of the 2021 WADC Review, it was pointed out by some stakeholders that *“the capability of laboratories to detect lower and lower concentrations of banned substances opens the door to more and more unintentional anti-doping rule violations for the presence of a prohibited substance”*. This has resulted in inconsistent CAS jurisprudence on proving lack of intent without establishing source. WADA itself acknowledges that this lack of consistency has led to unequal treatment of athletes (*see* “Concepts for Consideration and Feedback regarding the WADA-Code & IS Update Process”). This situation is caused by an ambiguity of Article 10.2.1.1 of the WADC, by which the Athlete must not be disadvantaged. The legal concept of strict liability under the WADC already puts athletes in a difficult position. One should not make it even more difficult for them to establish their case by limiting them to scientific and analytical evidence. Rather, lack of intent, which is a past subjective circumstance, can only be determined by a comprehensive evaluation of various indirect facts. As facts vary from case to case, there is a great risk of wrong decisions in some cases if facts or evidence are to be restricted and excluded from the consideration. Instead, it is essential to properly consider and evaluate all facts and evidence, including circumstantial ones, as supported by CAS jurisprudence (CAS 2020/A/6978 & 7068, para. 136; CAS 2017/A/5016 & 5036, para. 124).
- The evidence shows that the source of the prohibited substance is most likely the meat eaten by the Athlete prior to the Test. Therefore, his ADRV was most likely unintentional. This is supported by the following evidence:
 - No prohibited substances were to be detected in the supplements and skin creams used by the Athlete prior to the Test.
 - While trenbolone is not used in Japan, it is used outside of Japan as a veterinary drug to improve

rearing efficiency and promote growth in beef cattle. A very large quantity of meat, including beef, is imported to Japan and there is no way to investigate all such quantity of imported beef to be able to determine the presence or amount of trenbolone.

- The Athlete ate imported meat, including beef and beef liver, on more than one occasion during the period immediately preceding the Test. The Athlete's statement that he also ate beef liver is particularly credible because it was sent to his attorney on or before 20 July 2022 – before the Athlete and his attorney first learned that trenbolone is particularly prone to remain in beef liver, namely during the opening of the "B" Sample on 21 July 2022.
- The Athlete's AAF is consistent with the amount of meat eaten. As confirmed by Professor Ohe, consuming 200g of beef liver containing trenbolone at the MaxRL applicable in Japan would result in a urinary concentration of trenbolone of 1 ng/mL after 24 hours, assuming that one litre of urine has passed by that time. This is also confirmed by the testimony of WADA's expert witness, Professor Ayotte, on the rate of excretion. At the

JADDP hearing, the Athlete stated that he usually consumes about 300g of beef liver per meal. Thus, the concentration would be 1.5 ng/mL after 24 hours, thus corresponding with the 1.4 ng/mL detected in the Athlete's "A" and "B" Sample. In addition, as it is impossible to investigate all the vast quantity of beef imported into Japan, there is the possibility that the beef liver consumed by the Athlete contained trenbolone above the maximum residue limit.

- In CAS 2019/A/6313 and the New Era Arbitration Tribunal case of Erriyon Knighton, the tribunals acknowledged the possibility of meat being contaminated by trenbolone, resulting in no period of ineligibility being imposed.
- Even if the source of the prohibited substance is not proven, holistic considerations of the scientific, circumstantial and human evidence as well as application of common sense, rule of thumb and plausibility shall lead to the conclusion of the Athlete successfully establishing that his ADRV was unintentional on a balance of probabilities. There is significant circumstantial evidence that the Athlete did not intentionally take trenbolone.

- To begin with, the Athlete has appeared before the Sole Arbitrator and, after having been told about the possibility of criminal sanctions, has credibly denied having intentionally used trenbolone. He was shocked when he learnt of the AAF and he did not even know what trenbolone was.
- In addition, there is a plausible alternative explanation for the AAF, namely ingestion of contaminated beef liver. WADA tried to frame this as a binary issue, which it is not. Even if contaminated beef cannot be proven to be the source, it is a plausible alternative source that cannot be just ignored in the overall assessment of evidence.
- Moreover, as trenbolone is not approved as a drug in Japan, the Athlete would have had to acquire it while overseas, or from overseas, or through another athlete, none of which is the case. It is clear from his travel history that he did not purchase trenbolone while overseas. As proven by his current and previous passport, his last international travel before the Test was to Qatar in October 2019. If the Athlete were to have purchased trenbolone on that occasion, he would have begun continuous use. Yet, no prohibited substances were detected in subsequent tests. It is not plausible that the Athlete purchased a trenbolone product during his travel in October 2019 or earlier, only to then start suddenly using it after receiving the RTP inclusion notice in March 2022. Moreover, the Athlete's purchasing history from online shopping websites and his credit card statements show that he did not purchase trenbolone from overseas (or otherwise). Finally, it is inconceivable that the Athlete could have acquired a trenbolone product from another athlete. No Japanese track and field athlete has ever tested positive for trenbolone before. In fact, even the existence of the substance was virtually unknown in the Japanese track and field community until the media reported on the JSAA's arbitral award against the Athlete and the case of Erriyon Knighton in 2022.
- Further, there was no incentive for the Athlete to take trenbolone:
 - As proven by the expert testimony of Mr Tanigawa, 400mH is characterized by (1) requiring "speed endurance" rather than explosive power and (2) races being decided by technical skill as well as adaptability. Trenbolone has a particularly pronounced muscle hypertrophy effect, resulting in it typically being used by bodybuilders and similar athletes. It would be counterproductive for any 400m hurdler to use trenbolone in-season, given the decrease in endurance and sudden change in physical balance arising out of an increase of caloric

- intake and bodyweight due to extreme hunger caused by the substance. If at all, trenbolone use could make sense during winter, when it is common for 400m hurdlers to do more weight training, before excess muscle is trimmed and the body is brought in line with race specifications before the start of the competitive season in April/May.
- The foregoing applies with even greater force to the Athlete, who is a “second-half” or speed endurance athlete who competes on hurdling technique. He would therefore suffer even more from the negative effects of trenbolone than those 400mH athletes who compete on higher speed in the first half of the race.
 - In 2022, the Athlete’s winter training season proceeded without incident, and his results were highly promising in the 2022 season. If he continued to perform at this level at the Japan Championships in early June 2022 (as he eventually did), he was assured a second appearance at the World Athletics Championships in late July. Hence, there was no incentive for the Athlete, in May 2022, just prior to his most important competition, to intentionally take trenbolone, which could disrupt his race pattern as explained by Mr Tanigawa.
 - The Athlete fully understood the risks and seriousness of doping. Specifically, he had completed multiple anti-doping education courses with JADA and other organizations. In addition, his coach had told him that doping can affect the lives of others, using as an example his own story of a changed Olympic medal ten years after the race due to an ADRV.
 - In addition, the Athlete is the only Japanese athletics athlete who ever tested positive for trenbolone; the other Japanese positive tests were in strength sports. WADA even confirmed that he is the only 400mH athlete world-wide who ever tested positive for trenbolone. WADA’s expert, Professor Ayotte, likewise testified that trenbolone is used for increasing muscle mass and therefore mostly used in power sports.
 - Also, the following facts are not consistent with intentional consumption of trenbolone:
 - As confirmed by the Head of the Tokyo Laboratory, the concentration of trenbolone detected in the Athlete’s Sample was extremely low, even below the analytical precision

required by WADA for analytical laboratories. Had the Athlete taken trenbolone intentionally, a higher concentration would have been found in his Sample. In addition, the Athlete competed in back-to-back competitions during the period from early to mid-May 2022, resulting in a higher possibility of an in-competition test. It is inconceivable that the Athlete would intentionally take a prohibited substance during such time. If he would have done so intentionally, it would have only made sense for him to have consumed the substance immediately after the series of competitions ended on 15 May 2022, thus just before the Test on 19 May 2022. However, in that case, the detected concentration would have been much higher.

- As the use of trenbolone would have required a daily intake of 10.000 kcal or more, the Athlete's bodyweight would have been higher in 2022 than in previous years had he taken trenbolone. However, this was not the case: As proven by his bodyweight records, his weight even slightly dropped in 2022 compared to the previous two years.
- As confirmed by Professor Ohe, trenbolone must be

taken continuously over a period to have any significant effect. In addition, if a 400m hurdler were to take trenbolone, it is unthinkable that he would take it suddenly just before his most important competition, because he would need to relearn how to run the race in a state of muscle hypertrophy after taking trenbolone. Hence, the Athlete would have needed to take trenbolone continuously well before May 2022. However, the Athlete tested negative on 13 December 2021 and on 25 February 2022, demonstrating that he was not using trenbolone long-term.

- Although a relatively large proportion of top athletes run 13 strides between hurdles in the early stages of the race, the Athlete runs 14 strides in the early stage of the race, resulting in a race pattern where he catches up in the second half. As confirmed by Mr Tanigawa, if the Athlete were to intentionally consume a substance known to have a particularly pronounced muscle hypertrophy effect, he would surely attempt to learn how to race with fewer strides between hurdles than before (by using the 13-stride pattern in the early stage). This is because, if the body's own power output is

increased by muscle hypertrophy without changing the stride pattern between hurdles, the surplus of power output will result in “bunching up” strides between hurdles. However, he never attempted to change his stride pattern after 2019. Instead, as confirmed by Mr Tanigawa, at the 11 June 2022 Japan Championships race, the Athlete continued to use 13 strides in the early stages of the race.

- Prior to the Test, the Athlete was tested seven times since May 2019. The last two of those tests occurred on 13 December 2021 and 25 February 2022, *i.e.*, only two months apart. On 11 March 2022, the Athlete was included in the RTP. The Athlete has testified that he knew this would mean that the frequency of tests would go up. In such a situation, it is highly unlikely that the Athlete would newly and intentionally begin to take a prohibited substance fully knowing that an out-of-competition test could come at any time.
- As confirmed by the video of 11 June 2022 Japan Championships race, the Athlete did not show any of the effects or side-effects of trenbolone, including

muscle growth or extreme acne.

- Moreover, the Athlete’s behaviour surrounding the Test is inconsistent with intentional doping:
 - The Athlete has never had a single missed test or filing failure for whereabouts information and consciously designated 6:00 a.m. at his home as the one-hour time slot for testing because a senior athlete had advised him that this decreased the risk of any change of plans that could result in a missed test.
 - He underwent the Test without evasive action even though he knew that the ringing of his bell at exactly 6:00 a.m. could only mean a doping test as no courier or other service would arrive that early in the morning. Had the Athlete intentionally taken a prohibited substance, he would have tried to avoid the Test by pretending not to be home, especially as he had not previously missed any tests.
 - The Athlete’s behaviour before and after the test did not change as he went on to calmly train for the Japan Championships, placing third in line with his abilities at the competition. If the Athlete would have taken

trenbolone, he would have been psychologically as well as athletically out of balance. However, his athletic performance was not affected in any way.

- Right after learning about his AAF and before receiving the PDF of the notice, the Athlete went on to call Mr Karube and Mr Takahira in a state of confusion and exhaustion. Such immediate reaction would have been different if he had intentionally taken the substance. In such case, he would have carefully considered how to proceed when reporting and explaining his situation, rather than calling his coaches in a state of confusion and exhaustion after mere verbal notice of the positive result.
- The Athlete's efforts in the process of analysing his supplements and skin creams by a laboratory have been carried out intensively at the expense of time and effort. If the Athlete had intentionally taken a prohibited substance, he would have known the source of the prohibited substance found in his body from the beginning, so he would not have bothered to put in the expense, time, and effort required to conduct the multiple analyses that he did – after all, he would

reason that the sooner the analytical results were obtained, the sooner he could return to competition.

- The Athlete adequately took precautions regarding supplements he consumed, specifically choosing Japan-made products because he believed that such products were more credible than those being made overseas. It is difficult to imagine that the Athlete would take such precautions regarding his supplements while at the same time intentionally taking trenbolone, a prohibited substance.
- The people around the Athlete have unanimously attested that he is a sincere person who respects discipline and is quiet and cautious. Everyone familiar with the Athlete is confident that he did not intentionally take trenbolone.
- While most of the above evidence was already presented to the JADDP and/or the JSAA, none of it was addressed in the Appeal Brief. Instead, the Appeal Brief referred to another CAS case in which one central piece of evidence was the athlete's body-mass index, as is the case here.
- Based on his race schedule, the only reason one could imagine for the Athlete to take trenbolone before the Test is for recovery. However, there is no evidence it

could be used in that way, how much one would take, and in what form. In fact, Professor Ayotte confirmed there is no data on this. Accordingly, this is a very speculative theory. That said, had the Athlete taken trenbolone after 15 May 2022 to recover, it is highly likely that the concentration in his Sample would have been higher.

- WADA’s reference to case law on mere protestations of innocence has nothing to do with the current case. Similarly, the Athlete does not argue in the abstract about lack of sporting incentive and situation that are inconsistent with intent to dope. Instead, the Athlete’s case is based on his own specific and individual situation, considering the characteristics of 400mH, the scientific features of trenbolone and numerous other factors, as supported by scientific and analytical evidence based on expert testimony. Based on such facts and evidence, the Athlete has established that him having ingested trenbolone innocently is more likely on balance than that he either intended to take trenbolone or was recklessly oblivious to the risk of contamination during his activities.

Delays not attributable to the Athlete

- In accordance with Article 10.13.1 of the JADC, the Athlete’s period of ineligibility should have started on 21 May 2022 due to delays in the disciplinary procedure not attributable to the Athlete.

- Specifically, the Athlete was only notified by JADA on 21 June 2022, *i.e.* 33 days after the Test. The JADDP Decision confirms that such notification would have been possible approximately 10 days after sample collection. There was no exceptional reason for such a delay in notifying the AAF in this case.

- Further, after the hearing before the JADDP on 6 July 2023, the JADDP requested additional submissions. While the Athlete promptly prepared and filed an additional brief on 15 September 2023, JADA submitted a rebuttal only on 31 October 2023, requiring another rebuttal from the Athlete on 7 November 2023. The JADDP, in turn, took approximately two months between the final submission and the issuing of its decision, showing at least one month of additional delay without attribution to the Athlete.

- Moreover, while the Appealed Decision was rendered on 2 April 2024, WADA appealed only on 6 June 2024. There is no justification for the delay in JADA providing the complete file to WADA.

- In accordance with CAS jurisprudence, the Athlete “*has a right to an expeditious hearing and timely completion of the adjudicative process*” (CAS 2009/A/1759-1778, para. 95). Discretionary backdating of the period of ineligibility can compensate for the undue delays in the disciplinary process for which WADA or

JADA, but not the Athlete, bears responsibility.

No disqualification of results in competition

- In the event of non-application of Article 10.13.1 of the JADC and the two-year period of ineligibility being upheld, the Athlete would only be suspended approximately one month following the CAS Award. If, however, in accordance with Article 10.10 of the JADC, the Athlete's results in competitions during the period starting from the date of the Appealed Decision until the commencement of the ineligibility would be disqualified, this would result in his competition-results being disqualified for more than two years, which would be unreasonable and contrary to fairness within the meaning of Article 10.10 of the JADC.
79. The Athlete made the following requests for relief:
- “(i) dismiss the Appeal in its entirety;*
 - (ii) affirm the Appealed Decision in its entirety;*
 - (iii) confirm that the Athlete is suspended for a period of 2 (two) years commencing as 21 May 2022; and*
 - (iv) order WADA or, alternatively JADA, to pay:*
 - a. costs of the arbitration; and*
 - b. the legal fees and other expenses incurred in connection with the present*

proceedings”.

V. JURISDICTION

80. Pursuant to Article R47 of the CAS Code:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body [...]”. (emphasis added)

81. As the Appealed Decision was issued by JSAA, which is governed by the JADC, the wording “*regulations of the said body*” in Article R47 of the CAS Code is a reference to the JADC. According to Article 13.2 of the JADC,

“a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation [...] may be appealed exclusively as provided in this Article 13.2”.

82. The Appealed Decision is such a decision. Consequently, Article 13.2 of the JADC exhaustively provides for the appeal mechanism for the Appealed Decision.

83. If the Athlete qualifies as an International-Level Athlete, the jurisdiction of CAS follows from Article 13.2.1 of the JADC, which provides that

“[...] in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS”. (emphasis added)

84. However, CAS also has jurisdiction if the Athlete does not qualify as an International-Level Athlete: Article

13.2.2.3.4 of the JADC, which refers to decisions of the JSAA rendered in cases of athletes who are not International-Level Athletes, provides that such decisions “*may be appealed as provided in Article 13.2.3*”. Article 13.2.3.2, in turn, provides in its last paragraph that

“WADA [...] shall also have the right to appeal to CAS with respect to the decision of the [JSAA]”. (emphasis added)

85. Accordingly, it does not fall to be decided whether the Athlete qualifies as an International-Level Athlete. In either case, CAS would have jurisdiction. In addition, neither of the Respondents challenged CAS jurisdiction at any time and all Parties have expressly confirmed CAS jurisdiction by signing the Order of Procedure. Therefore, the Sole Arbitrator finds that he has jurisdiction to adjudicate the present case.

VI. ADMISSIBILITY

1. WADA’s right to appeal

86. Depending on whether the Athlete qualifies as an International-Level Athlete, WADA has a right to appeal under Article 13.2.3.1(f) or 13.2.3.2 in fine of the JADC.

2. The timeliness of the appeal

87. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against [...]”.

88. Accordingly, Article R49 of the CAS Code accords priority to any time limit for appeal provided for in the regulations of the governing body that issued the decision appealed against. In that regard, Article 13.6.1 of the JADC relevantly provides as follows:

“[...] the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed:

- (a) Within fifteen (15) days from the notice of the decision, such party/ies shall have the right to request a copy of the full case file pertaining to the decision from the Anti-Doping Organisation that had Results Management authority;*
- (b) If such a request is made within the fifteen (15) day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.*

The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:

- (a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed, or*
- (b) Twenty-one (21) days after WADA’s receipt of the complete file relating to the decision”.*

89. World Athletics, which is the Athlete’s International Federation and, thus, a party having a right to appeal under Article 13.2.3.2 in fine of the JADC, received the Appealed Decision on 9 April 2022. It submitted a case file request on 23 April 2022, i.e. within the deadline for such request provided for in letter (a) of the first paragraph of Article 13.6.1 of the JADC. Further to its

request, World Athletics received elements of the case file on 26 April 2022. Assuming in the Respondents' favour that this case file was complete, it follows from letter (b) of the first paragraph of Article 13.6.1 of the JADC that World Athletics' deadline to appeal expired 21 days after 26 April 2022, *i.e.* on 17 May 2022. Accordingly, pursuant to letter (a) of the second paragraph of Article 13.6.1 of the JADC, WADA's deadline cannot have expired any earlier than 21 days after 17 May 2022, *i.e.* 7 June 2022.

90. Therefore, WADA's Statement of Appeal, which was received by CAS on 6 June 2022, was filed in time. As there are no indications in the file that the appeal could be inadmissible for any other reasons and noting that no Party has raised any objections as to the admissibility of the appeal, the Sole Arbitrator determines that the appeal is admissible.

VII. OTHER PROCEDURAL MATTERS

91. As mentioned above, the Sole Arbitrator admitted the First Ayotte Report into the record and indicated that the reasons for this decision would be provided in this Award. The decision was made mainly because there is a reference in the Appealed Decision to an expert statement by Mr Fedruk, who according to the Appealed Decision opined that *"if trenbolone had been detected from the Respondent's sample due to the Respondent's intake of meat in this case, it would have been necessary to take over 6 kg of beef in the 24 hours prior to the sample collection, which is 'very unlikely'"*. This expert view contradicts the Second Respondent's assertion in this arbitration that meat contamination is the most likely source

of the AAF. In order to be comfortable making a finding on this assertion by the Second Respondent, the Sole Arbitrator would have had to at least review the contradicting expert statement of Mr Fedruk expressly referenced in the Appealed Decision. However, neither Party submitted that expert statement in this arbitration. While the Sole Arbitrator could have ordered that document to be produced as part of the case file pursuant to R57(1) of the CAS Code, he found it more helpful to hear live testimony from the expert proffered by the Appellant in respect of the meat contamination argument. This situation amounted to exceptional circumstances within the meaning of Article R56 of the CAS Code.

VIII. APPLICABLE LAW

92. Article R58 of the CAS Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

93. Both the Appealed Decision and the Parties' pleadings on the merits referred to the JADC, which the Sole Arbitrator agrees are applicable to this case. Subsidiarily, Japanese law shall apply, being the law of the country in which the JSAA is domiciled. However, the Sole Arbitrator also notes that none of the Parties made any reference to Japanese law in its pleadings and that, pursuant to

Article 29.2 of the JADC, any issues of interpretation shall be resolved autonomously, not by reference to any national law.

V. MERITS

94. It is undisputed that epitrenbolone was present in both the “A” Sample and the “B” Sample, and that it is a Metabolite of trenbolone, which in turn is a Prohibited Substance under section 1.1 of the 2022 WADA Prohibited List. Accordingly, there is sufficient proof of an ADRV pursuant to Article 2.1.2 of the JADC. While the estimated concentration of epitrenbolone was very low, it follows from Article 2.1.3 of the JADC that this is irrelevant for the existence of an ADRV as there is no Decision Limit for trenbolone. Since there are also no special reporting criteria within the meaning of Article 2.1.4 of the JADC, the Sole Arbitrator finds it established, and no Party has disputed, that the Athlete has committed an ADRV under Article 2.1 of the JADC.

95. Consequently, what is left to be decided is the applicable sanction. The Sole Arbitrator will first turn to the period of ineligibility before addressing the disqualification of competitive results (with resulting consequences).

A. Period of ineligibility

1. Length

i. Legal standard

96. Article 10.2 of the JADC provides, in its relevant parts, as follows:

“The period of Ineligibility for a violation of Article 2.1 Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential elimination,

reduction or suspension pursuant to Article 10.5, 10.6 or 10.7:

10.2.1 The period of Ineligibility [...] shall be four (4) years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

[Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one’s system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

10.2.1.2 The anti-doping rule violation involves a Specified Substance or a Specified Method and JADA can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply [...] the period of Ineligibility shall be two (2) years.

10.2.3 As used in Article 10.2, the term “intentional” is meant to identify those Athletes or other Persons who engage in conduct which they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. [...]”.

97. Trenbolone is not a Specified Substance. Hence, if lack of intent is not established, the standard period of ineligibility is four

years pursuant to Article 10.2.1.1 of the JADC. Otherwise, it is two years in accordance with Article 10.2.2 of the JADC. While the JADC provides for certain cases in which the standard period of ineligibility, whether two or four years, can be increased or reduced, the Sole Arbitrator finds that the relevant provisions can be disregarded in his further analysis, for a combination of three reasons.

98. First, there is no suggestion by any Party, and the Sole Arbitrator sees no indication in the record, that the standard period of ineligibility would need to be increased, specifically under Articles 10.4 and 10.9 of the JADC.
99. Secondly, while the Athlete's argument of meat contamination could, if accepted, mean that the requirements of Article 10.5 or 10.6 of the JADC might be met, the Sole Arbitrator notes that those provisions require a finding of No (Significant) Fault or Negligence. Such finding, in turn, would be tantamount to a finding that the ADRV was not intentional within the meaning of Article 10.2.1.1 (to same effect, *e.g.*, CAS 2017/A/5282, para. 73; CAS 2023/A/9451, 9455 & 9456, para. 342 with further references). In that case, the applicable standard sanction would be two years, per Article 10.2.2 of the JADC. It follows that the sole purpose of applying Article 10.5 or 10.6 of the JADC would be to lower the period of ineligibility to below 2 years. This, however, is something that the Sole Arbitrator is unable to do: The Athlete has not (cross-) appealed the Appealed Decision, instead he is merely seeking the dismissal of WADA's appeal. Consequently, even if the Athlete were to meet the requirements of Article 10.5

or 10.6 of the JADC, the principle of *ne ultra petita* would prevent the Sole Arbitrator from applying such reduction in this arbitration.

100. Thirdly, should the four-year period of ineligibility as provided for in Article 10.2.1.1 of the JADC be the applicable standard sanction in this case, the Sole Arbitrator fails to see, and none of the Parties has submitted, how this sanction could be reduced to a period between two and four years. In particular, Article 10.8.1 of the JADC clearly does not apply.

101. For those reasons, the Sole Arbitrator finds that his decision on the applicable period of ineligibility is a binary one: Depending on whether lack of intent is established, the period of ineligibility is either two years or four years. For this reason, the following analysis will be limited to the issue of intentionality.

ii. Burden of proof

102. It follows from the clear wording of Article 10.2.1.1 of the JADC – and is not called into question by the Athlete – that the burden is on the Athlete to prove that the ADRV was not intentional. The Sole Arbitrator agrees with WADA and the Athlete that, in view of Article 10.2.3 of the JADC, this requires the Athlete to disprove both a deliberate ADRV ('direct intent') and a reckless ADRV ('indirect intent').
103. However, as rightly pointed out by the Athlete, this means that he is to prove a negative (and subjective) fact. This entails, according to the Swiss Federal Tribunal, a certain duty of cooperation of the counterparty, *i.e.* WADA, to avoid procedural unfairness (*see* CAS 2011/A/2386, paras. 102-106; CAS

2017/A/5045, paras. 106-109). Therefore, while WADA does not bear the burden of proving alternative scenarios, a paucity of sufficiently plausible alternative scenarios presented to the Sole Arbitrator may assist the Athlete in meeting his burden of proof (cf. CAS 2011/A/2386, para. 111; CAS 2019/A/6443 & 6593, para. 181).

iii. *Standard of proof*

104. As to the standard of proof applicable to the Athlete's burden to prove lack of intent, Article 3.1 of the JADC provides as follows, in its relevant part:

"The standard of proof shall be whether JADA has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete [...] alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances [...] the standard of proof shall be by a balance of probability". (emphasis added)

105. Accordingly, the Athlete must prove lack of intent by a balance of probability, which requires less than the comfortable satisfaction. According to the prevailing line of CAS jurisprudence, this requires that *"the occurrence of a specified circumstance is more probable than its non-occurrence"* (CAS 2006/A/1067, para. 7; to same effect, e.g., CAS 2009/A/1926 & 1930, para. 31; CAS 2012/A/2759, para. 11.6; CAS 2012/A/2789, para. 7.4; CAS 2012/A/2797, para. 61; TAS 2013/A/3320, para. 95; TAS 2014/A/3475, para. 79; CAS

2016/A/4377, para. 51; CAS 2017/A/4944, para. 62; CAS 2017/A/5295, para. 107; CAS 2019/A/6541, para. 80; CAS 2020/A/6978 & 7068, para. 162; CAS 2021/O/8111, para. 72). Put differently, the athlete must establish that the likelihood of the occurrence of the relevant circumstance is greater than 50% (*see, in particular, CAS 2009/A/1926 & 1930, para. 31; TAS 2014/A/3475, para. 79; CAS 2014/A/3615, para. 57; CAS 2017/A/5296, para. 52; CAS 2023/A/9451, 9455 & 9456, para. 355*).

106. The Sole Arbitrator is aware that there is another line of CAS jurisprudence whereby it is sufficient for athletes to prove that the theory put forward by them is the most likely among several scenarios (*see, e.g., CAS 2007/A/1370 & 1376, para. 58; CAS 2008/A/1515, para. 116; CAS 2012/A/2986, para. 69; CAS 2011/A/2384 & 2386, paras. 111-113*). However, the Sole Arbitrator considers that it is not necessary for him to take any position on those two diverging views as he would not arrive at different conclusions under any of them. This holds true, in particular, as there are only two alternatives for the main fact to be proven by the Athlete – either his ADRV was intentional, or it was not intentional. Pursuant to both lines of jurisprudence, the Athlete needs to establish by a probability of greater than 50% that the ADRV was not intentional: According to the 'more likely than not' approach, this is always the required probability. Under the 'most likely among several scenarios' approach, the existence of only two scenarios (intentional or not) means that for one of the two scenarios to be 'the most likely', it must likewise be more than 50% probable.

iv. *Admissible means of evidence*

107. As to the means of evidence that the Athlete may rely upon to meet his burden of proof, the JADC does not provide for any restrictions. It follows that any means of evidence are admissible, subject of course to general restrictions on admissibility of evidence (same view CAS 2020/A/7579 & 7580, para. 171; CAS 2023/A/9451, 9455 & 9456, para. 356). This view finds additional support in the reference to “any reliable means” in Article 3.2 (see CAS 2011/A/2384 & 2386, para. 243; CAS 2023/A/9451, 9455 & 9456, para. 356).
108. For the avoidance of doubt, the Sole Arbitrator notes that written witness statements are also an admissible means of evidence. However, if the witness is not called to appear at the hearing, this may affect the evidentiary value of the witness testimony (see NOTH/HAAS, in Arroyo, M.: Arbitration in Switzerland – The Practitioner’s Guide, 2nd ed, Article R44, para. 41; cf. also Swiss Federal Tribunal, judgment of 31 May 2012, 4A_682/2011, paras. 4.1 *et seq.*). This holds true, in particular, if the counterparty challenges the contents of the written witness statement or has indicated that it seeks to cross-examine that witness.

v. *Principles for the assessment of evidence*

109. It is generally accepted that there is no concept of binding precedent in CAS jurisprudence (see, e.g., CAS 2014/A/3668, para. 66; CAS 2016/A/4643, para. 82; CAS 2020/A/6978, para. 135). Nonetheless, the Sole Arbitrator finds it appropriate, in the interest of a harmonized application of the WADC and the

regulations that are based on it (such as the JADC), to take guidance from past jurisprudence on the interpretation of the relevant rules. However, when it comes to the assessment of the facts and the evidence to which those rules must be applied, it is trite that no case is identical to the other, meaning that each case needs to be decided on its own particular circumstances (see CAS 2011/A/2515, para. 71; CAS 2014/A/3685, para. 72; CAS 2015/A/4233, para. 114; CAS 2020/A/6978 & 7068, para. 136).

110. Moreover, the Sole Arbitrator notes the following finding of the Swiss Federal Tribunal (4A_538/2012, decision of 17 January 2013, at E.5.1):

“Aussi bien, comme l’intimée le souligne à juste titre, si chaque partie pouvait décider par avance, pour chaque pièce produite, quelle sera la conséquence probatoire que le tribunal arbitral sera autorisé à en tirer, le principe de la libre appréciation des preuves, qui constitue un pilier de l’arbitrage international (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2e éd. 2010, n° 1238), serait vidé de sa substance”.

Translation into English:

“Also, as the respondent rightly points out, if each party could decide in advance, for each document produced, what evidentiary consequences the arbitral tribunal would be authorised to draw from it, the principle of the free assessment of evidence, which is a pillar of international arbitration (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, no. 1238), would be stripped of its substance”. (emphasis added)

111. In view of the above, the Sole Arbitrator considers that his task is to assess the totality of facts and evidence before him to determine the likelihood of the Athlete's ADRV having been unintentional. This task would not be fulfilled if he were to merely adopt conclusions that other tribunals reached based on their assessment of different facts and different evidence. For this reason, the Sole Arbitrator is not persuaded by what he understands to be WADA's argument, namely that certain types of evidence, such as testimony by the athlete ("*protestations of innocence*"), evidence for lack of sporting incentive, evidence of diligent attempts to discover the origin of the prohibited substance, or evidence of a clean record are per se incapable of assisting the Athlete in proving lack of intent, allegedly because they are not "actual, concrete evidence". It may well be that in other cases, CAS tribunals came to the conclusion that specific pieces of evidence before them falling into those categories were insufficient to prove lack of intent. This does not mean, however, that evidence from the same categories could not, under the circumstances of another case, help an athlete in proving lack of intent. This holds true, in particular, as the specific pieces of evidence and the combination of different pieces of evidence will hardly ever be identical between two cases, and neither will be the factual matrix to which the evidence relates. In short, the Sole Arbitrator shares the view expressed by the panel in CAS 2023/A/9451, 9455 & 9456, para. 363:

"In this respect, the Appellants (principally WADA) contended that protestations of innocence, however credible they appear, 'carry no material weight in the analysis of intent' and

that the same applies to a lack of a demonstrable sporting incentive to dope, diligent attempts to discover the source of the Prohibited Substance and/or the Athlete's clean record. The Panel is of the view that these contentions go too far. These matters will carry whatever weight they will carry in the particular circumstances of the particular case. There is no a priori reason or basis to dismiss such evidence out of hand". (emphasis added)

112. However, it goes without saying that for any evidence (from whichever category) to carry any material weight, it will need to be concrete and persuasive, as emphasized repeatedly in CAS jurisprudence (*see, e.g., CAS 2016/A/4919, para. 71; CAS 2017/A/5369, para. 148; CAS 2020/A/2978, para. 134*).
113. Finally, the Sole Arbitrator notes that multiple pieces of evidence can have a cumulative effect (CAS 2013/A/3124, para. 12.3; CAS 2017/A/4937, para. 51). This is sometimes described by a 'strands in a cable' metaphor: While each strand of evidence by itself may not be strong enough to meet the burden of proof, the cable created by all strands together may be sufficient to prove the relevant fact (CAS 2015/A/4059, paras. 120, 139, 141; CAS 2017/A/5434, para. 212).

vi. No requirement to prove source

114. The Sole Arbitrator agrees with the Athlete that proof of source is not a requirement under Article 10.2.1.1 of the JADC. There is no indication in the wording of that Article, or in the definition of the term "*intentional*" in Article 10.2.3 of the JADC, of any such requirement. This stands in stark contrast to the definitions of No Fault or Negligence and No Significant Fault or

Negligence, which expressly require athletes to establish how the Prohibited Substance entered their system. Had the draftspersons of the JADC (or rather of the WADC) sought to introduce such requirement also for proof of lack of intent, they would presumably have used the same language there. Instead, they did the opposite by expressly acknowledging in the comment to Article 10.2.1.1 of the JADC (which, according to Article 27.2 of the JADC, shall be used as an interpretative tool) that it is possible for an athlete to establish lack of intent without establishing source.

115. Under those circumstances, the Sole Arbitrator sees no basis for reading into Article 10.2.1.1 of the JADC a requirement to prove how the Prohibited Substance entered the athlete's system. The Sole Arbitrator is comforted by the fact that many CAS tribunals have reached the same conclusion (*see, e.g.*, CAS 2016/A/4534, para. 37; CAS 2016/A/4676, para. 72; CAS 2016/A/4828, para. 136; CAS 2016/A/4919, para. 66; CAS 2017/A/5016 & 5036, para. 122; CAS 2017/A/5178, para. 88; CAS 2017/A/5112, para. 111; CAS 2018/A/5768, para. 142; CAS 2019/A/6313, para. 77; CAS 2020/A/7579 & 7580, para. 171; CAS 2021/O/8111, para. 73; CAS 2023/A/9451, 9455 & 9456, para. 357). The Sole Arbitrator notes that most, if not all, of the CAS tribunals that took a different view were faced with the 2015 WADC, which did not yet include the above-mentioned comment to Article 10.2.1.1 of the JADC (*see, e.g.*, CAS 2016/A/4377, para. 51; CAS 2016/A/4662, para. 39; CAS 2017/A/5175, para. 67; CAS

2017/A/5335, para. 137; CAS 2017/A/5392, para. 63; CAS 2017/A/5295, para. 105; CAS 2018/A/5570, para. 46).

116. It follows from the foregoing that any evidence related to the source of the AAF is simply one strand of the evidentiary cable relied upon by the Athlete to prove the only fact he must prove, namely lack of intent. The Sole Arbitrator fully agrees with CAS jurisprudence that any such evidence regarding source is a particularly important strand of this cable (*see, e.g.*, CAS 2017/A/5016 & 5036, para. 123; CAS 2021/A/7579 & 7580, para. 171). Indeed, compelling evidence of a source that suggests non-intentional ingestion may sometimes even be sufficient, in and of itself, for athletes to meet their burden of proving lack of intent. However, the Sole Arbitrator agrees with the Athlete that just because evidence as to source is less compelling, such evidence does not become irrelevant (*see also* CAS 2017/A/5248, para. 55; CAS 2019/A/6313, paras. 65, 80 and 90; CAS 2020/A/7579 & 7580, para. 155). Instead, given the cumulative effect of evidence, it is for the Sole Arbitrator to decide on the totality of evidence, and not for certain pieces or types of evidence separately, whether the Athlete discharged his burden of proving lack of intent.
117. For the avoidance of doubt, the Sole Arbitrator does not disagree with the well-established CAS jurisprudence that without evidence as to how the prohibited substance entered the athlete's system, it is usually very difficult to prove lack of intent (*see, e.g.*, CAS 2021/O/8111, para. 73). This is why such scenario is "*extremely rare*" (*see, e.g.*

CAS 2016/A/4534, para. 37; CAS 2016/A/4676, para. 72; CAS 2016/A/4828, para. 136; CAS 2017/A/5016 & 5036, para. 123; almost identical terminology is used in CAS 2016/A/4919, para. 66; CAS 2018/A/5768, para. 142). However, for the reasons set out above, the Sole Arbitrator subscribes to the view of the panel in CAS 2023/A/9451, 9455 & 9456, para. 362:

“[...] It is very difficult for the Panel to form a view as to the intention of the Athlete without evidence as to how she happened to ingest the [prohibited substance] in this case. It is important, however, not to elevate these observations to statements of dogma lest doing so obscures the true nature of the task to be undertaken by the Panel. The task of the Panel is to weigh the evidence adduced by the Athlete and to form a view as to whether that evidence as a whole is sufficient to meet the Athlete’s burden of proving that she did not intend (directly or recklessly) to commit the ADRV”.

vii. Analysis of the evidence on record

118. The Sole Arbitrator will now turn to the evidence before him. As the fact to be proven by the Athlete, *viz.* lack of intent, is both a subjective fact and a negative fact, the Sole Arbitrator finds it appropriate to first address the only direct evidence that the Athlete can possibly proffer for lack of intent, namely his own testimony (*see* section (a) below). Subsequently, the Sole Arbitrator will analyse all other evidence, which is necessarily circumstantial and aims at proving objective circumstances that allow for an inference that the AAF was not intentional (*see* sections (b) to 0 below). Finally, the Sole Arbitrator will weigh the totality of the evidence to determine whether the Athlete

discharged his burden of proving that the AAF was, more likely than not, unintentional (*see* section 0 below).

(a) The Athlete’s denial

119. The Athlete appeared at the hearing in person and expressly denied having taken trenbolone intentionally. The Sole Arbitrator does not share WADA’s view that such denial carries no material weight *per se*. In this regard, the Sole Arbitrator refers to his general considerations in respect of the admissibility of any means of evidence, and the free assessment of such evidence (*see* paras. 107 and 111 above). Moreover, Article 3.2.5 of the JADC allows hearing panels to draw adverse inferences from an athlete’s refusal to appear at the hearing and answer questions. It would hardly be reconcilable with procedural fairness and equal treatment if, in the opposite scenario of the athlete appearing and testifying, this could likewise only work against the athlete, but not to the athlete’s benefit. Similarly, the fact that an ADRV may be proven by admission, as clarified by Article 3.2 of the JADC, necessarily implies that an athlete’s testimony may (if credible) carry substantial evidential weight against the athlete. This again begs the question why the same should not be true for (credible) testimony to his benefit. In summary, the Sole Arbitrator fails to see why the tribunal’s personal impression of the accused and his testimony should be irrelevant. He is comforted by the fact that several CAS tribunals have likewise considered an athlete’s testimony relevant in anti-doping cases (*see, e.g.,* CAS 2002/A/385, para. 57; CAS 2016/A/4534, para. 37; CAS 2016/A/4676, para. 72 and 76; CAS

2017/A/5016 & 5036, para. 123; CAS 2017/A/5112, para. 111; CAS 2019/A/6313, para. 87; CAS 2019/A/6443 & 6593, para. 182; *see also* Lewis/Taylor, Sport: Law and Practice, 4th edition, 2021, para. C5.10).

120. Of course, denials may be untruthful (as may admissions, even though presumably much more rarely). This is why it is for the tribunal to assess the credibility of the testimony of the accused.
121. At the hearing, the impression that the Athlete's overall demeanour left on the Sole Arbitrator was that of a very serious and sincere young man. The Sole Arbitrator notes that this impression aligns with the descriptions of him in the written witness statements given by Mr Kishimoto (a teammate at Fujitsu's track and field team), Mr Karube and Mr Takahira. Of course, neither of them was called to testify at the hearing and all three of them belong to the Athlete's "*camp*". These are factors that limit the evidentiary weight that the Sole Arbitrator is prepared to give to their written statements. However, their written statements as to the personality of the Athlete benefitted from the fact that they went beyond abstract descriptions of his character. Instead, all of them included concrete examples of his behaviour in certain situations that lent credibility to their statement. Moreover, the Sole Arbitrator accepts Mr Kishimoto's explanation that while he is a teammate of the Athlete, they are at the same time rivals competing in the same discipline for a limited number of national team slots for the Olympic Games and World Championships. In addition, WADA itself relied on factual allegations contained in the written

witness statement of Mr Takahira in its cross-examination of the Athlete (*see* para. 123 below). Based on those considerations, the Sole Arbitrator finds that those three written statements do lend some support to his impression of the Athlete at the hearing.

122. Moreover, the Athlete's credibility was helped by the fact that from the very beginning of this case, and as confirmed again in cross-examination without any hesitation, the Athlete acknowledged that he no longer remembered what precisely he ate the days before the Test. Similarly, even though he testified (understandably, in the Sole Arbitrator's view) that he could not clearly remember the precise timeline, he was promptly willing to accept WADA's proposition in cross-examination that he instructed his Japanese attorneys on 28 June 2022 (WADA relied in this regard on the written witness statement of Mr. Takahira). The Athlete also did not hesitate to confirm that it was only about half a month later that he took the photo of a package of Australian beef liver of the kind he says he regularly consumed. As all those acknowledgements by the Athlete have an obvious potential to hurt his case, they go to the Athlete's credit.
123. That said, there were two parts of the Athlete's testimony that WADA picked up at the hearing to challenge his credibility. The first one was the Athlete's testimony on the quantity of beef liver allegedly consumed by him, which WADA found "*hard to believe*". The Sole Arbitrator notes that the Athlete initially referred, in direct examination, to "*about 200-300g*" per meal. When shown, during cross-examination by WADA, the picture of the beef liver package that he says he consumed, he

corrected the quantity, without being asked about it, to 220-330g because the label of the package said that it contained 110g (the Athlete testified that he would eat two to three such packages a meal). The Sole Arbitrator does not consider that this correction by 20-30g called into question the Athlete's credibility, nor does he understand WADA to have so suggested. Instead, WADA appeared to doubt only that the Athlete would eat such a large quantity of beef liver in a single meal. While the Sole Arbitrator agrees that 330g of beef is quite a large portion, he does not find it entirely implausible for a professional athlete to eat such a quantity. In any case, the Athlete himself clarified that he usually ate only two such packages, *i.e.* 220g. Contrary to WADA's suggestion during its closing argument, this clarification was made spontaneously by the Athlete on his own motion, *i.e.* not only after being pressed by WADA that 330g would seem rather excessive. This voluntary acknowledgement that he usually consumed less than 330g again goes to the Athlete's credit. Under those circumstances, the Sole Arbitrator does not find that this part of the Athlete's testimony hurt his credibility.

124. The second point that, according to WADA, should cause the Sole Arbitrator to approach the Athlete's testimony with caution was related to the Diet Summary. As mentioned before, the Athlete accepted in cross-examination that the picture of the package of Australian beef liver shown in the Diet Summary was taken only after he had instructed his lawyers. He further testified that the text of the same document was written at an earlier point in time (even though it remained unclear whether this was before or after he

instructed his attorneys). He acknowledged that such text did not contain any reference to beef liver specifically, or to Australia. The Athlete's explanation for the discrepancy between the text and the photo was that when he first drew up the Diet Summary, he went to the supermarket and took pictures of all meat products he consumed in the time before the Test; however, at the time, beef liver was not in stock, which is why he returned at a later point in time, took a picture of beef liver then and added it to the Diet Summary thereafter. According to the Athlete, he forgot to add also a textual reference to beef liver and Australia.

125. WADA's call for caution obviously alludes to the possibility that the Athlete learnt from his lawyers, who he confirmed are sports law experts, that (epi-)trenbolone is particularly prone to remain in beef liver, and that he decided thereafter to falsely claim that he had eaten beef liver before the Test. The Sole Arbitrator notes that WADA did not openly confront the Athlete with the proposition that he was lying about having eaten beef liver (from Australia or at all). Also, WADA did not in fact challenge the Athlete's submission that "[t]he Athlete and his attorney first learned that trenbolone is particularly prone to remain in beef liver by Mr. Masato Okano, head of the Anti-Doping Laboratory, when observing the analysis of the B Sample on 21 July 2022" and that this was after the Athlete had emailed the Diet Summary, which includes the beef liver photo, to his lawyers. The Athlete confirmed on re-direct that the first time he heard about beef liver being prone to retain trenbolone was during the opening of the "B" Sample, and that this was after he took the photo of the beef liver that is contained in Diet Summary.

WADA did not challenge this testimony on re-cross.

126. In any case, while the course of events apparently insinuated by WADA is of course possible, the Sole Arbitrator considers it unlikely, for a combination of two reasons. First, to the extent that this implies any improper behaviour on the part of the Athlete's lawyers, it would be a most serious matter. The Sole Arbitrator is not prepared to make any assumptions to this effect in the absence of any concrete assertion by WADA, let alone any evidence for such misconduct. It should be mentioned that WADA, to its credit, seemed to carefully avoid making any such accusation at the hearing. Secondly, had the Athlete learned from his lawyers that beef liver could contain higher quantities of trenbolone and had he thereafter decided to include beef liver in the Diet Summary before sending it to his lawyers, he would no doubt have asserted in that same document that he ate beef liver the night before the Test. Yet, this is not what he has done. Instead, he has very candidly admitted from the very beginning (already during the first instance proceeding) that he does not remember precisely what he ate the days before the Test. It seems rather implausible that he would bother to lie about having regularly eaten Australian beef liver, only to volunteer with the acknowledgement that he does not even remember what type of meat he ate before the Test. The Sole Arbitrator finds the Athlete's explanation significantly more plausible, *i.e.* that he forgot to update the text in the Diet Summary after he had managed to take a picture of the beef liver during his second trip to the relevant supermarket. In addition, the text of the Diet

Summary does not specify any body parts of the chicken, pork or beef that he says he ate. Had beef liver been the only body part specifically mentioned in the test of the Diet Summary, this might have rather supported than undermined the very suspicion raised by WADA.

127. For the above reasons, the Sole Arbitrator does not consider that the timeline of the preparation of the Diet Summary, or the Athlete's failure to mention Australian beef liver in the text of that document, diminishes the credibility of the Athlete's testimony. WADA's reference in this context to the award in CAS 2019/A/6319 is of no avail because, in that case, the athlete acknowledged that she had given false testimony at the first instance as to her diet before the relevant doping test. WADA fairly acknowledged in its closing argument that it was not saying this is what happened in the present case. Indeed, the Sole Arbitrator is not persuaded that the Athlete's testimony that he regularly consumed beef liver in the time before the Test, which he maintained through all three instances, was false.
128. In conclusion, the Sole Arbitrator considers that the Athlete's testimony does carry evidentiary weight which, while not enough to meet his burden of proof in and of itself, it is not insignificant either.

(b) Evidence of meat contamination

129. The following facts are common ground in this arbitration: Trenbolone is approved as a veterinary drug in beef cattle in Australia and the USA. The same is true for a few other countries, but not for Japan. However, a large

quantify of the beef meat sold in Japan is imported, including from Australia and the USA. Administration of trenbolone in beef cattle entails that meat sourced from such cattle may contain trenbolone (in muscles) or epitrenbolone (in livers). The MaxRL for trenbolone in beef liver is 10 ng/g. However, as the Japanese authorities do not test all beef meat imported into Japan, it is unknown to what extent trenbolone could have been present in any beef meat eaten by the Athlete. The human consumption of beef meat containing trenbolone or epitrenbolone will result in the presence of epitrenbolone in the urine of the person who ingested such meat. The Sole Arbitrator also notes that in at least two other cases (CAS 2019/A/6313 and New Era Arbitration Tribunal, Case 24052801), sports tribunals have accepted that an AAF for trenbolone was caused by ingestion of contaminated beef meat.

130. According to Professor Ohe's calculation, consumption of 200g of beef liver contaminated with the MaxRL of trenbolone (2 µg) would result in a urinary concentration of 1 ng/mL after 24 hours. This calculation relies on a study referred to by both Professor Ohe and Professor Ayotte, which found (among other things) that 50% of trenbolone is excreted through urination within the first 24 hours after ingestion.
131. While the concentration of 1 ng/mL resulting from Professor Ohe's calculation is 0.4 ng/mL lower than the (estimated) concentration of epitrenbolone in the Athlete's Sample, the Sole Arbitrator notes that according to both experts, excretion differs between individuals. In addition, the Athlete testified having regularly

consumed 220g of beef liver instead of 200g as underlying Professor Ohe's calculation (who explained that he had not been provided with any information as to the Athlete's actual consumption of meat). Moreover, as the Sample was provided on or before 6:21 a.m. (when the Sample was sealed pursuant to the Doping Control Form), significantly less than 24 hours would have passed between ingestion of epitrenbolone and the Test if the Athlete had beef liver for lunch or dinner on the day before the Test. Accordingly, the Sole Arbitrator does not find it difficult to see that based on Professor Ohe's testimony, consumption of 220g (let alone 330g) of beef liver the day before the Test could have caused a urinary concentration of 1.4 ng/mL in the Athlete.

132. Professor Ayotte did not challenge the accuracy of Professor Ohe's calculation as such. Instead, she challenged some of his assumptions underlying the calculation. However, for the following reasons, the Sole Arbitrator is not satisfied that any of those challenges make it *impossible* for meat contamination to explain the estimated urinary concentration found in the Sample (and the Sole Arbitrator did not understand this to be Professor Ayotte's position).
133. First, Professor Ayotte testified that the excretion pattern differs depending on whether one ingests trenbolone or epitrenbolone. However, Professor Ohe disagreed with this statement, saying that both substances have a similar pharmacokinetic profile. To support her diverging view, Professor Ayotte referred to a study performed by herself in 2021, according to which epitrenbolone was no longer detectable in two individuals' urine five to ten hours

after they had each ingested 1 µg of epitrenbolone (in meat or liquid). However, the Sole Arbitrator is unable to conclude, from those numbers alone, that the excretion patterns of epitrenbolone and trenbolone are in fact different. When being asked about that very study in cross-examination, Professor Ayotte acknowledged that excretion differs between individuals and that the purpose of her study in 2021 was merely to *“give some idea and background of what we can expect in urine”*. In addition, it is not clear how sensitive the measuring equipment used in that study was. Therefore, it is unknown how high a concentration of epitrenbolone may still have been present in the urine samples 5 to 10 hours after ingestion. It is also unclear what this may mean for a scenario in which the dosage of epitrenbolone was higher (as was the case with all studies on trenbolone referred to by the experts, and as may have been the case if the Athlete ingested 220g of Australian beef liver). In particular, it is unclear whether, had Professor Ayotte’s study been based on higher dosages of epitrenbolone, it would have likewise detected epitrenbolone after 24 hours and would have found that the half-life of epitrenbolone was 24 hours, as for trenbolone. In this regard, the Sole Arbitrator also notes that in his second written report, Professor Ohe stated that the study performed by Professor Ayotte on the excretion of 1 µg of epitrenbolone was consistent with the results of his calculation on the excretion of 2 µg of trenbolone, which statement was not specifically challenged by WADA at the hearing.

134. Secondly, Professor Ayotte highlighted that excretion of a substance is not flat,

meaning that during the 24-hour half-life of trenbolone, excretion would first peak and then go down. However, Professor Ohe testified (and Professor Ayotte did not challenge) that epitrenbolone does not leave the body without urination, and that depending on the amount and timing of urination, the urinary concentration of epitrenbolone could be several dozen times higher than could normally be expected. If the Athlete had beef liver for dinner the day before the Test, the Sole Arbitrator does not consider it far-fetched that he did not urinate large amounts (if at all) after relevant quantities of epitrenbolone had reached his bladder and before the Test began, which was at 6:01 a.m. the next morning.

135. Thirdly, Professor Ayotte criticized the assumption underlying Professor Ohe’s calculation that the beef liver consumed was contaminated with the MaxRL of trenbolone. She testified that between 2015 and 2021, the Canadian Food Inspection Agency tested 1725 beef livers and found epitrenbolone in 115 of them, with the highest concentration ever found being 6 ng/g. She further testified that this was consistent with other studies. The Sole Arbitrator finds that there is force to this argument, even though it is unclear if the practical use of trenbolone in cattle may differ between Canada and Australia. However, even if one assumed contamination with only 6 ng/g as suggested by Professor Ayotte in her first expert report, this would still result in 1.32 µg for 220g of beef liver (or 1.98 µg for 330g of beef liver). For the reasons mentioned in paras. 130 and 134 above, the Sole Arbitrator would still not find it excluded that such dosage of epitrenbolone could explain the Athlete’s AAF.

136. For the above reasons, the Sole Arbitrator finds that based on the data and science presented to him in this arbitration, it is possible that the AAF was caused by the Athlete having ingested contaminated beef liver. The Sole Arbitrator is comforted in this finding by the fact that WADA itself did not go as far as excluding that possibility, arguing instead that such contamination was highly unlikely to have occurred.
137. That said, meat contamination being a scientifically plausible explanation of the Athlete's AAF does not, of course, mean that this is necessarily what happened or is even likely to have happened. Instead, as the actual meat consumed by the Athlete prior to the Test is not available for inspection, the focus must be on other circumstantial evidence that could indicate the likelihood of meat contamination being the source of the AAF. In this regard, the Sole Arbitrator notes that it is unclear whether the Athlete ate beef liver at all on the days immediately preceding the Test. There is no contemporary evidence in this regard, such as purchase receipts or witness statements. The Athlete's own testimony is equally of no help in this regard as he candidly admitted not remembering the specific meals he ate prior to the Test. The Sole Arbitrator further notes that none of the eleven meat products tested by the Athlete after the notification of the AAF, including one package of beef liver, showed any presence of trenbolone. Of course, this does not exclude that, more than a month earlier, trenbolone may have been present in beef liver that the Athlete may have eaten shortly before the Test. However, had the meat tested positive, this would have certainly increased the likelihood that the same could have been the case a few weeks earlier.
138. Moreover, it is undisputed that the Tokyo Laboratory reported only six AAFs for trenbolone from 2015 to August 2024, which represents approximately 0.01% of all samples analysed by the Tokyo Laboratory during that time, including approximately 6,200 tests during the 2021 Olympic Games in Tokyo. Three of those AAFs involved Japanese athletes, amongst them the Athlete, and there was no suggestion by any Party that any other WADA-accredited lab ever reported a trenbolone AAF for any Japanese athlete. The Sole Arbitrator agrees with Professor Ayotte's assessment that if there was any widespread problem of meat available on the Japanese market being contaminated with relevant amounts of trenbolone, one would have expected more AAFs for trenbolone in Japan, or in respect of Japanese athletes, during a period of almost 10 years (cf. also CAS 2015/A/4049, para. 91). In the Sole Arbitrator's view, this holds true even if one takes into account that the detection window for trenbolone is relatively short because no long-term metabolite is known to date (per Professor Ayotte's testimony), that at least some Japanese athletes are encouraged to avoid foreign beef if possible (per Professor Tanigawa's testimony), and that not all athletes may eat beef liver. Meat contamination with trenbolone thus apparently not being an endemic problem reduces, in turn, the likelihood that any meat ingested by the Athlete was contaminated with sufficient amounts of trenbolone to explain the AAF.

139. Further, while it is scientifically possible for the AAF to have been caused by the consumption of beef liver, this possibility is not straight-forward as it depends on a number of assumptions in the Athlete's favour: Unless one assumes that the Athlete's individual excretion profile is more beneficial to his case than that of the individuals involved in the relevant studies, the level of trenbolone contamination of the meat ingested must have been quite significant, the time between the ingestion of the beef liver and the Test must not have been longer than 24 hours, and he must not have urinated too much (if at all) between the time relevant amounts of epitrenbolone reached his bladder and the time he underwent the Test.

140. In summary, based on the above-mentioned evidence, the Sole Arbitrator finds it possible, but not very likely, that the Athlete's AAF was caused by his having eaten contaminated beef liver. That said, the passage of time between the Test and the notification of the AAF, which was more than a month, made it objectively more difficult, through no fault of the Athlete, for him to furnish compelling evidence regarding the source of the AAF (*see* also CAS 2019/A/6313, para. 84). In particular, it is not surprising that he would not know, more than a month after the fact, what precisely he ate on the day(s) before the Test. Similarly, if one assumes that meat contamination with trenbolone is not a wide-spread problem in Japan, the passage of time also reduced the likelihood that if any beef liver ingested by the Athlete before the Test was in fact contaminated, the same would be true for a similar product bought more than a month thereafter. When weighing the significance of the relative weakness of

the evidence proffered by the Athlete on meat contamination, the Sole Arbitrator finds it appropriate to take this difficulty of obtaining such evidence into account.

(c) *Evidence regarding supplements and skin products used prior to the Test*

141. The Athlete submitted that being very aware of his anti-doping responsibilities, he exercised particular care in selecting his supplements, specifically by trying to avoid any foreign-made supplements. He further submitted that after being notified of the Test, he sent all supplements and skin creams that he had used in the weeks prior to the Test to a WADA-accredited laboratory in the USA, which found no trenbolone in any of those products. In the case of a creatine product, a protein product and two skin creams, the Athlete provided to the laboratory the unsealed packages that he says he used prior to the Test, whereas for an amino acid product and a chlorella product, he provided sealed packages with the same lot number or from the same box as the package that the Athlete says he consumed prior to the Test.

142. Those submissions were not contested by WADA. They were also supported by the Athlete's own written statement, the written witness statement by Mr Takahira, purchase receipts, photos of the relevant packages, waybills and analysis results. On this basis, the Sole Arbitrator accepts those submissions to be true.

143. However, the Sole Arbitrator considers that the only conclusion that can be drawn from the test results regarding the above-mentioned products used by the Athlete before the Test is that

contamination of the creatine and protein products as well as the skin creams can be ruled out as the source of the AAF, and that it is very unlikely that the amino acid or chlorella products were that source. This conclusion does not, in the Sole Arbitrator's view, make it less likely (or more likely) that the AAF was non-intentional. Instead, it merely increases in equal degrees the likelihood of all other potential sources, including intentional doping, meat contamination or any unknown sources. Therefore, the Sole Arbitrator finds that the result of the testing of the supplements and skin creams does not assist the Athlete in showing that the AAF was non-intentional.

144. Similarly, regarding the undisputed fact that the Athlete exercised specific care when it came to his selection of supplements, the Sole Arbitrator is not persuaded by the Athlete's argument that this would make it less likely for him to deliberately take any prohibited substances. Not exercising sufficient diligence in the use of supplements creates a risk of its own in terms of committing an ADRV. This risk comes on top of any other risk created or tolerated by an athlete. Therefore, an athlete who deliberately takes a prohibited substance has at least the same incentive to avoid taking contaminated supplements as a clean athlete, lest the risk of testing positive is increased even further.
145. By contrast, the Sole Arbitrator considers that the Athlete's undisputed care as regards supplements, and the negative test of all products used by him prior to the test, reduces the likelihood of any reckless behaviour as a cause of the ADRV.

(d) *Statistical evidence*

146. According to the ADAMS data referred to in Professor Ayotte's expert reports, there have been 616 AAFs for trenbolone internationally across all sports from 2015 to August 2024. 65.9% of those AAFs related to bodybuilding and powerlifting. Another 6.2% (representing 38 cases) related to athletics. Moreover, as mentioned already in the context of the evidence related to meat contamination, out of the approximately 60,000 urine samples analysed by it between 2015 and August 2024, the Tokyo Laboratory reported only six AAFs for trenbolone. Three of those six trenbolone AAFs involved Japanese athletes, one of them being the Athlete, the other two being bodybuilding and wrestling athletes. The three non-Japanese nationals testing positive for trenbolone were bodybuilding and powerlifting athletes. There is no suggestion by any Party that any other WADA-accredited lab ever reported any trenbolone AAF for any Japanese athlete. There is also no suggestion that the Tokyo Laboratory reported any further trenbolone AAFs before 2015 or after August 2024. Accordingly, based on the record, the Athlete is the only Japanese athlete outside bodybuilding and wrestling who ever tested positive for trenbolone.
147. Looking at trenbolone AAFs in hurdlers, it is undisputed that there has never been any trenbolone AAF worldwide for any 400mH athlete except for the Athlete's AAF. Moreover, from 2015 to August 2024, there was only one other trenbolone AAF for any hurdler worldwide. This concerned a 60/100m hurdler, who was tested in 2015 by the Russian National Anti-Doping Agency

(RUSADA), and whose sample showed the presence of both trenbolone and metenolone. The Sole Arbitrator finds it likely that this case formed part of the Russian doping scheme in place at the time, given the timing of the test, the involvement of RUSADA and the substances found, both of which were ingredients of the cocktail of steroids designed by Dr Rodchenkov, as confirmed by the testimony of Professor Ayotte. According to an interview with Dr Rodchenkov referenced by Professor Ayotte, it took him years to design the cocktail, and athletes received detailed instructions on how to use the cocktail to avoid testing positive. As there is no suggestion that any doping scheme of remotely similar sophistication existed in Japan around the time of the Test (or at all), the Sole Arbitrator finds it difficult to draw from this only other trenbolone AAF in hurdling any reliable inferences as to the likelihood that the Athlete may have used trenbolone intentionally.

148. Even when one looks beyond hurdlers and considers also 400m sprint and 4x400 relay athletes (who would seem largely comparable to 400mH athletes in terms of the speed/endurance profile, but not in terms of technical requirements), there were only three trenbolone AAFs between 2015 and August 2024 (and the Sole Arbitrator was not made aware of any further AAFs before or after). One of those three AAFs concerned an athlete who tested positive for trenbolone and oxandrolone in 2015, with RUSADA being the Testing Authority and Results Management Agency. Again, it seems likely that this was part of the Russian doping scheme. As to the other two trenbolone AAFs among 400m sprinters, while there is no indication

that they were part of the Russian doping scheme, it is noteworthy that in each of them there was an AAF also for another substance in addition to trenbolone (in one case another AAS, in the other a stimulant). Also, one of those two athletes competed also in 100/200m sprint, which has a different speed/endurance profile than 400mH.

149. Based on those statistics, the Sole Arbitrator disagrees with WADA's (and Professor Ayotte's) view that the Athlete's case is not so atypical statistically as to cast doubt on him having doped intentionally. While the Sole Arbitrator agrees that athletics accounting for a mere 6.2% of all trenbolone AAFs between 2015 and August 2024 does not make trenbolone AAFs sufficiently atypical as such, he does not consider that the entirety of track and field athletes (which includes, *e.g.*, shot-putters and hammer and discus thrower) is the appropriate comparison group for assessing the likelihood of the Athlete having used trenbolone intentionally. Amongst Japanese track and field athletes, the Athlete's AAF is the only trenbolone case. The same is true for hurdlers (of any distance) worldwide, except for one case likely linked to the Russian doping scheme, where a sophisticated cocktail of steroids used by many Russian athletes included, *inter alia*, trenbolone.
150. The Sole Arbitrator is not persuaded that WADA's references to statistics for AAFs involving AAS more generally (or other anabolic agents) in 400mH, or in all sprint and hurdling disciplines up to and including 400m, would make the Athlete's case appear significantly less atypical.

151. First, while WADA has provided a list showing 313 AAFs between 2015 and August 2024 for AAS (including trenbolone) or other anabolic agents in all sprint and hurdling disciplines up to and including a distance of 400m, JADA did not act as Testing Authority or Results Management Authority in any of those cases (apart from the Athlete's case). There is also no suggestion by any Party that any athlete on that list, other than the Athlete, was Japanese, or that any Japanese athlete in those disciplines tested positive for an AAS before the period covered by WADA's list. Hence, at least as far as Japanese athletes in short-distance racing and hurdling are concerned, this list provides further confirmation that the Athlete's AAF is very atypical.
152. Secondly, as will become clear in section 167 below, the Sole Arbitrator accepts that the sporting characteristics of 400mH differ significantly (in a way relevant to the characteristics of trenbolone) from both shorter distance hurdling disciplines and from sprint disciplines. While this does not mean that comparing the Athlete with athletes competing in those other disciplines has no value at all, it does limit the meaningfulness of such comparison.
153. Thirdly, while WADA has provided a list allegedly showing 24 cases from 2015 to August 2024 in which 400mH hurdlers tested positive for AAS other than trenbolone, seven of those cases in fact relate to other anabolic agents. Moreover, the list includes numerous athletes who competed also in other disciplines than 400mH (including shorter distance sprinting), raising again the issue of comparability. In addition, many of the samples were taken at a time that, depending on the individual race calendar, may well have been during the 400mH winter season for the athlete in question (which is relevant because the normal use of trenbolone, *i.e.* to bulk up, would be counterproductive in 400mH during the competition season, *see* section 167 below). If one focuses on those cases in which athletes competing only in 400mH tested positive for an AAS at a time that was most likely during their competition season, this leaves one to three cases, depending on how early the competition season and the winter season began for the individual athlete.
154. Fourthly, WADA has not made any submissions on how comparable those other AAS (and, even more so, other anabolic agents) are to trenbolone. While it is safe to assume that all those substances are believed to have an anabolic effect, the magnitude of that effect is relevant here because the Sole Arbitrator finds it plausible that the Athlete needs to avoid muscle hypertrophy during the competition season (*see* section 167 below). Also, the extent of any androgenic or side-effects could make those substances more or less relevant for a comparison with the present case.
155. Fifthly, the Sole Arbitrator was not provided with any information as to whether any of those other 312 other athletes testing positive for anabolic agents were found to have doped intentionally. While, realistically, such finding will have been made at least for some of them, the actual number is relevant to be able to calculate a statistical probability of intentional doping among those athletes. In particular, it is unclear whether any (and, if so, how many) of the other 400mH

athletes who tested positive for AAS other than trenbolone were found to have doped intentionally. It is not for the Sole Arbitrator to speculate about any findings on (lack of) intent that may have been made in those other cases. Accordingly, based on the record, it is very difficult for the Sole Arbitrator to follow WADA's suggestion that those other cases would stand in the way of the Athlete disproving lack of intent.

156. Similarly, the Sole Arbitrator is not persuaded by WADA's suggestion that the Athlete's case is not atypical because there are four CAS cases in which track and field athletes were sanctioned with four-year periods of ineligibility for ADRVs involving trenbolone. To begin with, while WADA claimed that those four athletes were short distance athletes like the Athlete, the athletes in CAS 2019/A/6319 and CAS 2021/O/8111 were actually race walkers competing in 10-20 km and 3-20 km, respectively. The athletes in CAS 2017/A/5105 and CAS OG 20/06, in turn, were 60/100 m and 100/200 m sprint athletes. Even leaving aside the fact that the evidence in those cases was very different from the case at hand, the Sole Arbitrator is not satisfied that those four cases in disciplines with decisively different sporting requirements (*see* section 167 below) carry significant weight in the statistical analysis, at least when compared to the fact that the Athlete is the only Japanese track and field athlete, the only 400mH athlete worldwide and the only hurdler worldwide (except for a case likely connected to the Russian doping scandal) to ever have tested positive for trenbolone, and is also the only Japanese athlete competing on distances up to and

including 400mH to ever have tested positive for an anabolic agent.

157. Hence, the Sole Arbitrator concludes that the Athlete's case is very atypical statistically. It goes without saying that this does not exclude intentional doping by the Athlete. Rather, it remains perfectly possible that he is the first 400mH hurdler worldwide, the first hurdling athlete worldwide (except for one case connected to the Russian doping scheme), and the first Japanese athlete outside bodybuilding and wrestling to have used (or at least to be caught using) trenbolone. Likewise, it is perfectly possible that he is the only Japanese runner in distances up to and including 400m to have used (or at least to be caught using) any anabolic agent. However, possibility is not the same as likelihood, and the Sole Arbitrator finds that the statistically atypical nature of the Athlete's AAF reduces the likelihood of intentional doping. This relates not only to deliberate doping but also to reckless doping, given that the statistics suggest that there is no significant risk of ingesting trenbolone unwillingly in Japan that the Athlete should have been aware of but chose to manifestly disregard.

(e) Evidence of acquisition of trenbolone

158. In support of his argument that he could not have acquired trenbolone while abroad, the Athlete submitted copies of his passports issued on 28 May 2015 and 22 November 2019. Based on this evidence, the Sole Arbitrator accepts (and WADA did not contest) that his last overseas travel before the test was to Qatar in October 2019. He further accepts that it is unlikely that Athlete purchased trenbolone in or before 2019 abroad, to use it only in mid-2022.

159. To prove his point that he could not have purchased trenbolone online, the Athlete submitted purchasing histories from the only two online shopping website he claims to be using. He further submitted credit card statements for three credit cards, which he alleged were the only credits cards used by him. WADA did not contest that those were the only online shops and credits cards used by the Athlete and the Sole Arbitrator found nothing in the record that could call the veracity of those assertions into question. It is undisputed that neither the purchase history from the two online shops nor the credit card statements contain any indication that the Athlete may have purchased any product that may have contained trenbolone.

160. Moreover, the Sole Arbitrator accepts the Athlete's submission that in view of him being the first Japanese track and field athlete ever to have tested positive for trenbolone, it is rather unlikely that he was able to obtain trenbolone from fellow athletes or athletic staff.

161. Of course, it remains possible that the Athlete purchased (or otherwise obtained) a trenbolone product elsewhere and paid for it in a different fashion (if at all). However, just as it is not enough for an Athlete to speculate about the origin of the AAF, the Sole Arbitrator does not find it appropriate to speculate himself about ways in which the Athlete could have purchased trenbolone, given that WADA neither suggested any nor challenged the Athlete's testimony on this topic in cross-examination. Under those circumstances, the Sole Arbitrator finds that this evidence reduces the likelihood

of the Athlete having doped intentionally.

(f) *Athlete's bodyweight*

The Athlete argues that any intentional use of trenbolone is disproven by the fact that he did not gain any weight during the relevant period of time. In support of this argument, he has submitted the following measurements of his bodyweight, which were taken at company health checkups during the season and at the Japan Institute of Sports Sciences during winter training:

	Winter	In-season
2020	71.6 kg (27 January 2020)	68.7 kg (11 June 2020)
2021	71.9 kg (12 February 2021)	68.3 kg (24 November 2021)
2022	71.3 kg (25 February 2022)	67.9 kg (5 July 2022)

162. The accuracy of those measurements was not contested by WADA and is supported by contemporaneous documentation submitted in this arbitration. The Sole Arbitrator therefore accepts that the Athlete's bodyweight was as mentioned in the above table.

163. The Sole Arbitrator also accepts the Athlete's submission, which WADA did not dispute, that trenbolone is regarded as "the ultimate anabolic steroid" because it is known for particularly pronounced muscle hypertrophy compared to other AAS, while facilitating the burning of fat at the same time. This submission was supported by two internet articles already submitted by

JADA in the previous instance proceedings. Among other things, those articles suggest that trenbolone is five times more effective than testosterone. Similarly, relying on multiple scientific publications, Professor Ayotte described trenbolone as a “highly potent anabolic steroid” that derives its anabolic efficacy “from its ability to bind to androgen receptors with an affinity 3 times superior to testosterone”.

164. Of course, as rightly noted by WADA, the times at which the Athlete’s bodyweight was measured (especially during the competition season) appear quite random. In particular, his in-season weight 2022 was measured roughly one and a half months after the Test, and almost two weeks after the notification of the AAF. It cannot be excluded that he had in fact gained weight in the weeks before the Test, but lost it again by the time he was weighed. However, without any specific questions about this mere possibility being put to the Athlete, and taking into account that he was regularly competing prior to the Test, the Sole Arbitrator does not find it very likely that the Athlete’s in-season bodyweight in 2022 was significantly higher before the Test. Therefore, he accepts that the Athlete did not gain significant weight as compared to previous years, and agrees that this tends to suggest that he was not using trenbolone for the purpose that this substance seems to be mainly used for, namely to facilitate rapid muscle hypertrophy.

(g) *Clean testing history*

165. The Athlete argues that his clean testing history prior to the Test speaks against him having used trenbolone, given that

he would have had to use it long-term to achieve any relevant effect.

166. The Sole Arbitrator accepts that for trenbolone to have any muscle-strengthening effect, it must be taken consistently for cycles of several weeks (while performing strength training and taking in very large amounts of calories). Professor Ohe stated as much in his written expert report, referring also to a scientific article that mentioned 2-3 cycles of 6-18 weeks per year, albeit for AAS generally. This is also in line with one of the internet articles provided in this arbitration, which suggested the use of trenbolone in cycles of eight weeks. While Professor Ayotte testified that there were indications that lesser dosages of trenbolone taken at lesser frequencies might help prevent the loss of muscle mass, this does not contradict Professor Ohe’s testimony on the usage of trenbolone to achieve muscle hypertrophy.
167. It is undisputed that the Athlete tested negative on 13 December 2021 and on 25 February 2022. This makes it very unlikely that he was using trenbolone before those dates for purposes of gaining muscle. Of course, the Sole Arbitrator cannot exclude that there was just enough time between those two tests, and between the 25 February 2022 test and the Test, to undergo a cycle of trenbolone use and still test negative (even though Professor Ohe testified that use of the requisite dosages of trenbolone would be excreted over at least 10 days). However, those negative tests do reduce the likelihood that this is what happened, given that the Athlete would have had to be quite lucky to time his cycles neatly between those testing dates not known to him in advance.

Moreover, if one combines the clean testing history with the lack of any weight gain, the Sole Arbitrator considers it unlikely that the Athlete was using trenbolone to achieve a muscle-strengthening effect as described by Professor Ohe.

(b) *Evidence of lack of incentive for the Athlete to use trenbolone around the time of the Test*

168. The Athlete argued that considering the general characteristics of 400mH and his own sporting characteristics among 400m hurdlers, it would not make any sense for him to use trenbolone in-season. While WADA submitted that this argument was insufficient to prove lack of intent, it did not dispute the sporting characteristics invoked by the Athlete as such. Similarly, while WADA argued that the Athlete's coach, Mr Karube, whose written witness statement supported the Athlete's position, was not an independent witness, WADA did not make the same argument regarding Professor Tanigawa, whose testimony was aligned with that of Mr Karube.

169. Indeed, the Sole Arbitrator finds no reason to doubt the independence of Professor Tanigawa, whose testimony on the sporting characteristics of 400mH in general, and of the Athlete in particular, the Sole Arbitrator found convincing. Therefore, the Sole Arbitrator accepts that 400mH differs significantly from other short-distance disciplines in terms of what is required from athletes to be successful. In particular, both endurance and technical factors play a much bigger role in 400mH. This holds true even more for the Athlete, whose stride pattern means

that his success is more contingent than that of other 400mH athletes on his endurance (because he is slower than most competitors in the first half of the race) and his technique (because he must change his leading leg more often than most of his competitors).

170. Further, the Sole Arbitrator finds it established, based on Professor Tanigawa's persuasive testimony, that while rapid muscle hypertrophy might help a 400mH athlete during winter (when they usually undergo more intensive weight training), it would have a significant negative impact in-season because it would disrupt the athlete's stride pattern. The Sole Arbitrator notes for completeness that the same point was confirmed by the written testimonies of Mr Karube and Mr Kishimoto, even though they were not called to testify at the hearing. Contrary to WADA, the Sole Arbitrator does not consider that Professor Tanigawa's credibility in this regard was adversely affected by his statement that he found it "*unthinkable*" for any 400mH to use trenbolone during competition season, given the rapid hypertrophic effect that it is said to have (Professor Tanigawa volunteered to acknowledge that he is not an expert on the effects of trenbolone himself). The Sole Arbitrator does not agree with WADA's view that the four CAS cases in which runners were banned for four years due to the use of trenbolone, or the statistics on AAFs in 400mH involving other AAS and anabolic agents, establish that 400mH athletes are in fact using trenbolone (or substance with a similarly pronounced hypertrophic effect) during the competition season. As mentioned above, the CAS cases did not concern 400mH athletes and there are multiple

issues with the list of AAFs for other anabolic agents (*see* section 0 above).

171. Finally, the Sole Arbitrator accepts, based on the undisputed submission by the Athlete, the testimony of Professor Tanigawa and the race data submitted, that the Athlete did not change his stride pattern at the 2022 Japan Championships, compared to previous races.
172. The decisive question is, however, to what extent those facts help the Athlete to establish that the AAF was not intentional. As correctly noted by WADA, multiple CAS tribunals have found that the athletes before them were unable to discharge their burden of proving lack of intent despite allegations of lack of sporting incentive having been made. However, as mentioned before, each case must be decided on its own facts and evidence and it is the Sole Arbitrator's task to assess the particular evidence before him rather than to exclude certain types of evidence from the outset (*see* para. 107 above). In this regard, the Sole Arbitrator notes that contrary to many of the CAS cases referenced by WADA, the Athlete did not merely make assertions. Instead, he relied on what the Sole Arbitrator found to be convincing expert testimony by Professor Tanigawa on the sporting characteristics of 400mH and the Athlete himself (in addition to the statements of Mr Karube and Mr Kishimoto). Also, the Athlete's argument was not that he had no incentive to dope *per se*, but rather that using this very specific substance at the very specific time of the season when the Test occurred was non-sensical. Therefore, the Sole Arbitrator is not prepared to consider this evidence immaterial from the outset.
173. That said, the Sole Arbitrator agrees with WADA that one must not too readily conclude that simply because, objectively, a certain substance is of little or no use as a doping agent in a particular sport or discipline, the athlete in question cannot have taken the substance intentionally. Indeed, as argued by WADA, such conclusion would imply that every ADRV is well thought out and calculated on the part of athletes, which may not always be the case. At the same time, however, the Sole Arbitrator finds it equally unconvincing to assume, by default, that athletes willing to dope would randomly take prohibited substances without informing themselves about, among other things, the potential of those substances to enhance their sporting performance. Rather, it is for the Sole Arbitrator to assess, with respect to the particular athlete before him, how likely it is for him to have intentionally taken a doping agent that is not fit for purpose. In the words of the panel in CAS 2020/A/7579 & 7580, at para. 169:

"Foolishness is of course not a defence; intent is not excluded if the marathon runner ingests a product designed for bulk. The question is rather the implausibility of either in the case of a particular athlete".
174. As mentioned above, the Athlete appears to be a serious and sincere young man, and it has remained undisputed that he exercised significant diligence in selecting his supplements. The Sole Arbitrator does not find it likely that the Athlete is the kind of person who, assuming he is willing to dope, would take the next best substance without thoroughly informing himself of the (side-)effects and the potential to enhance his performance.

175. Against this background, the Sole Arbitrator considers that given the evidence presented on the sporting characteristics of 400mH, and of the Athlete specifically, and in combination with the evidence on his bodyweight and testing history, it is unlikely that the Athlete was using trenbolone to bulk up. The Sole Arbitrator is not persuaded by WADA's argument that this is gainsaid by the Athlete's statement that he used protein and creatin to improve his "*explosive power*". Even disregarding the Athlete's explanation in cross-examination that this was to be understood rather as a reference to sharpness in movement, any effect that protein and creatine may have in terms of increasing muscle is obviously not comparable to the rapid hypertrophic effect of trenbolone. Hence, even if the Athlete's use of protein and creatine aimed at increasing muscle power, this does not contradict the conclusion that he is unlikely to have used "*the ultimate anabolic steroid*" to bulk up during his competitive season.
176. To the extent that WADA suggested for the first time at the hearing that the Athlete may have used trenbolone to maintain (as opposed to gaining) weight, there is no indication in the record that the Athlete had any problems maintaining his weight. In fact, based on the bodyweight measurements mentioned above, the Athlete lost less weight in 2022 from winter season to competition season (3.4kg) than in the previous year (3.6kg). Also, when asked by the Sole Arbitrator – before there was any suggestion that trenbolone could have been used to maintain weight – whether there was any reason why his in-season weight seems to have decreased slightly from 2020 to 2022, the Athlete did not seem to be aware of any significant weight loss and explained that he had prioritized aerobic training in the winter season 2021/2022. This was not only a plausible explanation (that remained unchallenged by WADA) for the slight weight loss but also one that does not suggest any ongoing weight loss during the competition season that could have caused the Athlete to use trenbolone to avoid losing further weight.
177. At the hearing, WADA also suggested for the first time that the Athlete may have used trenbolone to speed up recovery. Indeed, Professor Ayotte's written expert reports mentioned that trenbolone (like other AAS) could speed recovery, and Professor Ohe agreed with that statement during cross-examination. However, the Sole Arbitrator notes that, as confirmed by Professor Ayotte, due to the absence of any studies, very little is known about this type of use, in particular which dosage would need to be applied. Also, Professor Ohe explained in his first expert report that trenbolone was "*generally*" used in cycles to gain muscle. This is also precisely how trenbolone is characterised by the online sources on record. It does not seem very likely that an athlete who is trying to avoid hypertrophy and is merely looking for ways to recover more quickly would choose trenbolone of all substances – a substance that is described as "*ultimate anabolic steroid*" and that is associated throughout with bodybuilding. There is also no indication in the record that, contrary to long-term use for gaining muscle, there is any public information on how to use trenbolone if the goal is to speed up recovery while not bulking up. In the absence of such evidence on record, it

seems probable that use of trenbolone exclusively for recovery purposes would require rather sophisticated methods, as the one described by Dr Rodchenkov in the interview referenced by Professor Ayotte (according to that interview, the cocktail and the very specific manner of application were designed to help athletes “*recover quickly [...], allowing them to compete in top form over successive days*”). Given that there has never been any trenbolone AAF of any Japanese track and field athlete before the Athlete’s AAF, it is not very likely that the Athlete could have obtained the necessary guidance from someone in the Japanese track and field community.

178. Moreover, the Sole Arbitrator agrees that the Athlete’s inclusion in the RTP approximately two months prior to the Test is likely to have reduced any incentive he may have felt to use a prohibited substance at that time.
179. Of course, despite the above, it is not excluded that the Athlete was unfazed by his inclusion in the RTP just two months ago, that he learnt of the potential of trenbolone to facilitate recovery (or to maintain muscle mass), and that he either attempted to figure out himself how this worked (even though this would seem a bit out of character, see para. 174 above) or somehow managed to find someone to help him do it. However, based on the evidence on record, the Sole Arbitrator does not find it very likely that this is what happened. In this regard, the Sole Arbitrator also notes the finding of the panel in CAS 2020/A/7579 & 7580, at para. 168:

“If anything is speculative, it is the recovery theory now put forward by the Appellants without any indication of the Athlete’s need to

take a risk to achieve it in a new and unsupervised way. [...] Uncorroborated speculation is said not to avail an accused athlete; it should not in fairness avail the accuser either”.

(i) *Sporting performance before and after the Test*

180. It is not in dispute that the Athlete performed well before the Test: He finished second at the Shizuoka International on 3 May 2022 (first among Japanese athletes) and fourth at the Seiko Golden Grand Prix on 8 May (second among Japanese athletes). It is likewise undisputed that if he continued to perform at the same pace, he was positioned to qualify for the World Athletics Championships at the Japan Championships in the first half of June 2022 (as he eventually did, finishing third at that event). The foregoing is also confirmed by the written witness statement of Mr Karube, to which attached were the results from the Seiko Golden Grand Prix and the Japan Championships.
181. That said, the Sole Arbitrator does not consider that those facts carry any significant weight in proving lack of intent. The use of a prohibited substance will not necessarily show in a spike in sporting performance, in particular if, as is the case here, the evidence anyway suggests that the Athlete did not consume trenbolone long-term with significant dosages. Moreover, even if one expected a spike in performance, the relative stability of the Athlete’s results in May and June could also be explained by him having used trenbolone both before the May competitions and before the June competition. Viewing the Athlete’s sporting performance in isolation, the

Sole Arbitrator does not view any of the two scenarios significantly more likely than the other. However, one can say at least that the Athlete's sporting performance does not provide any evidence in favour of intentional doping, neither in terms of uncharacteristically poor performances (in May) that could have provided him with an incentive to dope, nor uncharacteristically strong performances (in June) that could raise the suspicion that he was doped at that time (cf. CAS 2015/A/4059, para. 124; CAS 2020/A/7579 & 7580, para. 147).

(j) *The Athlete's behaviour during the Test*

182. The Athlete argued that had he doped intentionally, he could have simply pretended not to be home when his bell rang for the doping control, given that he had never missed any doping test before and that it was clear that his bell ringing at 6 am, at the beginning of his one-hour time slot indicated for testing, could only mean a doping test. WADA did not dispute those circumstances or challenge the Athlete's testimony in this regard in cross-examination.
183. Of course, assuming that the Athlete had knowingly taken trenbolone, it is possible that his opening of the door could also have been due to the fact that he just woke up and did not think clearly, or that he thought the trenbolone would have already left his system. However, if the Athlete knew that he had ingested a Prohibited Substance, the Sole Arbitrator finds it more likely on balance that he would not have taken the risk and instead pretended not to be home, especially since his anti-doping education (*see* section 0 below) supports the suggestion that he was aware that an

isolated missed test would not constitute an ADRV.

184. That said, based on published CAS decisions alone, guilty athletes have tested positive out-of-competition before in situations where they could have avoided the doping control. Therefore, the Sole Arbitrator is not prepared to attach significant weight to this strand of evidence.

(k) *The Athlete's behaviour after the Test and after the notification of the AAF*

185. The Athlete argued that had he doped intentionally, he would have been out of balance psychologically and athletically after the Test, while he did not in fact appear different at all after the Test, instead training calmly for and competing successfully in the Japan Championships. In support of this argument, the Athlete submitted written witness statements from Mr Takahira, Mr Karube, and Mr Kishimoto, all of whom confirmed that the Athlete seemed his usual self after the Test. The Sole Arbitrator also notes that WADA did not dispute that the Athlete's behaviour or outward appearance did not change after the Test, even though WADA did question in general the evidentiary weight of witness testimony by teammates and coaches.
186. Similarly, the Athlete argued that after the verbal notification of the AAF, he was in a state of shock, immediately calling Mr Takahira and Mr Karube, rather than waiting first for the written confirmation and devising a strategy what to say to his coaches, as could be expected had he doped intentionally. The timeline of his calls with Mr Takahira and Mr Karube is evidenced by

phone records from the Athlete's and Mr Takahira's phones. In addition, the written witness statement of Mr Takahira mentioned that during their call, the Athlete was in tears and sounded exhausted. Mr Karube's written witness statement described the Athlete as having been "*simply stunned*" during their call and that he sounded like "*his mind was completely blank*". The Sole Arbitrator notes that WADA did not dispute those descriptions of the Athlete's behaviour right after the verbal notification of the AAF but, as mentioned before, called for the Sole Arbitrator to approach the relevant evidence with caution.

187. Finally, the Athlete argued that had he doped intentionally, he would have known the source of the AAF and would not have bothered to put in the expense, time, and effort to conduct multiple analyses of supplements, skin creams and meat products (the latter requiring him to travel to Tokyo twice as had had moved back to his family home away from Tokyo in the meantime). In support of his investigative efforts, the Athlete submitted the relevant shipping documents, test results, and the written witness statements by Mr Takahira and Mr Taga. WADA did not dispute that those efforts were made, but questioned their evidentiary value.
188. Regarding the first two points, *i.e.* the Athlete's demeanour right after the Test and after the notification of the AAF, the Sole Arbitrator notes that it is inherently difficult to reliably deduct a person's state of mind from his outside appearance. For instance, if he had doped intentionally, the Athlete's focus on practice and competition could have been a way for him to repress any concerns he may have had regarding the

outcome of the Test. Similarly, his state of shock after notification of the AAF could just as well have been due to such repression mechanism being suddenly blown away by the reality that he had been caught cheating. That said, in view of the Athlete's personality as displayed at the hearing and as described in the witness statements of Mr Karube, Mr Takahira and Mr Kishimoto, the Sole Arbitrator is minded to accept that the Athlete having called his coaches in an emotionally devastated state right after the verbal notification of the AAF seems a bit out of character and therefore tends to indicate genuine surprise on his part about the AAF. However, if the Athlete had doped intentionally, this surprise and emotional devastation may also be explained by a thwarted expectation that he would not be caught (*e.g.* because he thought trenbolone would no longer be in his system when tested). For the foregoing reasons, the Sole Arbitrator is unable to conclude that the Athlete's demeanour right after the Test and the notification of the AAF is a clear enough indication against him having doped intentionally. Therefore, the Sole Arbitrator is not prepared to accord any material weight to the related evidence.

189. As to the third point, *i.e.* the Athlete's investigative efforts after notification, the Sole Arbitrator disagrees with the Athlete's argument that he would have been unlikely to undertake such efforts had he known how trenbolone had entered his system. First, the Athlete himself has submitted, and it has remained undisputed, that it was Mr Takahira who told him to test the supplements, skin creams and meat. Even if the Athlete had doped intentionally, he hardly could have ignored this advice of his coach without

raising great suspicion. Secondly, there was an obvious risk that any tribunal would likewise find it suspicious if the Athlete argued contamination but did not bother to make any investigations in this regard. Thirdly, regardless of whether the Athlete doped intentionally, there was at least a possibility that one of the products would test positive for trenbolone, which would have helped the Athlete's defence in any scenario. For those reasons, the Sole Arbitrator does not consider that the Athlete's investigative efforts provide any material support to his assertion that he did not dope intentionally. For completeness, the Sole Arbitrator also notes the concerns of the panel in CAS 2020/A/7579 & 7580, at para. 107, that it would be an *"unacceptable prospect that guilty athletes could spend their way out of trouble by engaging in extensive post-violation investigations"*.

(l) *Athlete's awareness of risks and seriousness of doping*

190. In support of his argument that he was acutely aware of risks and the seriousness of doping, the Athlete referred, firstly, to six anti-doping courses that he attended between January 2020 and April 2022. This was corroborated by attendance certificates from those courses. Secondly, the Athlete submitted that he understood how doping was not only problematic for those who doped but could also change the lives of other athletes, given that his coach, Mr Takahira, had shared with him (and his teammates) his personal experience of being awarded an Olympic silver medal only 10 years after the race, when it turned out that there had been doping on the team that initially won the silver medal. This aspect

was confirmed by Mr Takahira in his written witness statement. WADA did not dispute those submissions.

191. Of course, anti-doping education does not immunize athletes against the temptation to further their athletic success through doping. However, arguably the main purpose of such education is to reduce the risk of doping. Against this background, the Sole Arbitrator accepts that the Athlete's participation in multiple anti-doping courses and, more importantly, the very personal experience that Mr Takahira shared with him, will have had an impact on the Athlete's stance on doping. Realistically, the combination of both will have made it more difficult for the Athlete to be able to justify doping before himself (making deliberate doping less likely) and will have increased his diligence in trying to avoid risks of ADRVs (reducing the likelihood of reckless doping).

192. That said, it is trite that awareness of the consequences of misbehaviour (for the culprit and others) often is not enough to discourage such misbehaviour. Therefore, while the Sole Arbitrator accepts that the Athlete's awareness of the risks and seriousness of doping make intentional doping less likely, he finds that this evidence forms a rather thin strand in the evidentiary cable.

(m) *Assessment of the totality of evidence*

193. Based on the above, the Sole Arbitrator is unable to accept WADA's contention that the Athlete has failed to provide any actual evidence, or has offered at best a mere protestation of innocence, in support of his assertion that his ADRV was not intentional. One may hold

different views on whether the evidence adduced is sufficient to meet the Athlete's burden of proof on a balance of probability, but the Athlete clearly submitted multiple pieces of actual and concrete – albeit necessarily circumstantial – evidence to corroborate his own testimony.

194. The Sole Arbitrator does not consider that any single strand of the said evidence is strong enough for the Athlete to discharge his burden of proving that the ADRV was not intentional. However, albeit not without hesitation, the Sole Arbitrator has concluded that the cumulative weight of the evidence is sufficient to meet the burden of proof on a balance of probability.

195. Specifically, the Sole Arbitrator finds that the following evidence, when viewed cumulatively, discharges the Athlete's burden of proving that he did not use trenbolone deliberately ('direct intent'):

- The Athlete's credible denial.
- The scientific evidence showing that the AAF could have been caused by the consumption of contaminated beef liver, taking into account also the fact that the time that passed between the Test and the notification of the AAF made it more difficult for the Athlete to prove what precisely he ate on the days before the Test, and whether it may have been contaminated with trenbolone.
- The statistical evidence establishing that the Athlete's case is very atypical.

- The evidence on the Athlete's bodyweight, his clean testing history and the sporting characteristics of 400mH and the Athlete himself, making it unlikely that the Athlete used trenbolone to gain muscle mass, combined with the rather speculative nature of the suggestion that he may have used trenbolone for other purposes.
- The evidence on his not having acquired any trenbolone product abroad, through the online shops he uses or with the credit cards he uses.
- The evidence that he knew he was about to be tested, was aware that a missed test would not amount to an ADRV, but did not attempt to evade the Test.
- The evidence regarding the Athlete's anti-doping education and the personal experience with ADRVs (of other athletes) that Mr Takahira shared with him.

196. To be clear, none of the above-mentioned evidence excludes that the Athlete knowingly used trenbolone. However, this is not the applicable standard of proof. Instead, it is sufficient for the Athlete to show that it is more than 50% likely that he did not take trenbolone deliberately. Based on the above-mentioned evidence, the Sole Arbitrator finds that the Athlete succeeded in doing so.

197. Regarding the Athlete's burden to also prove that he did not use trenbolone recklessly ('indirect intent'), the Sole Arbitrator considers that this is a

particularly difficult form of a proof of a negative, at least if the source of the AAF remains unclear. It is simply not possible for an athlete to prove that in unknown situations that could have caused the AAF, the athlete either did not know about the existence of a significant risk of an ADRV or did not manifestly disregard that risk. Therefore, the Sole Arbitrator finds that it must be sufficient for an athlete to establish the absence of recklessness (by a balance of probability) in relation to those situations for which, based on the record, there is at least a possibility that they could have caused the AAF. Therefore, while WADA does not bear the burden of proof, the fact that it did not suggest any situations in which the Athlete may have acted recklessly makes it easier for the Athlete to meet his burden of proof in this regard (*see*, in general, para. 103 above).

198. For the only two situations transpiring from the record that could have caused the AAF (apart from deliberate doping and unknown other sources), the Sole Arbitrator is satisfied that no recklessness exists:

- In respect of possible meat contamination, the statistical evidence shows that the Athlete had no reason to be particularly cautious with the consumption of meat in Japan.
- In respect of his use of supplements, it has remained undisputed that the Athlete exercised particular care. Hence, even if trenbolone should have been present in the amino acid or chlorella products (which is not excluded as the Athlete could only test sealed containers with same

lot number or from the same box as the ones he used before the Test), there is no indication of any recklessness on the part of the Athlete.

199. Having found that the Athlete established that the ADRV was not intentional, the period of ineligibility shall be two years pursuant to Article 10.2.2 of the JADC.

2. Starting date

200. As to the starting date of the period of ineligibility, the Athlete argued that due to delays in notifying the AAF to him and completing results management at first instance, the period of ineligibility should start on 21 May 2022, according to Article 10.13.1 of the JADC. Given that the Athlete was provisionally suspended from 21 June 2022, a starting date of 21 May 2022 would effectively result in a one-month retroactive period of ineligibility.

201. The Sole Arbitrator notes that the Athlete's request as to the starting date was granted both the JADPP and the JSAA. He further notes that in this arbitration, neither WADA nor JADA made any specific arguments regarding the starting date (even though, in its request for relief, WADA did request that the period of ineligibility start on the date of the CAS Award in this matter). In particular, they did not dispute that the notification of the AAF could have been quicker, and that there were certain delays in the procedure before the JADPP that were not attributable to the Athlete. Moreover, the Sole Arbitrator notes that the first instance decision by the JADPP was issued more than one and a half years after the notification of

the AAF, while the ISRM provides a period of six months as a guideline for the duration of this process.

148. All other motions or prayers for relief are dismissed.

202. Under those circumstances, the Sole Arbitrator finds it appropriate to apply Article 10.3.1 of the JADC and to confirm the starting date indicated in the Appealed Decision, *i.e.* 21 May 2022.

B. Disqualification of competitive results

203. Pursuant to Article 10.10 of the JADC, all (individual) competitive results of the Athlete obtained from 19 May 2022 (the date of the Test) through 21 June 2022 (the commencement of the provisional suspension) shall be disqualified, including forfeiture of any medals, points and prizes obtained during that period. For completeness, the Sole Arbitrator notes that for the period between 21 May 2022 and 21 June 2022, *i.e.* the period of retroactive ineligibility, this is also confirmed by Article 10.3.1 in fine of the JADC.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by WADA on 6 June 2024 is dismissed.
2. The decision rendered by the Japan Sports Arbitration Agency on 2 April 2024 in the matter of Masaki Toyoda is confirmed.
3. (...).
4. (...).

Arbitration CAS 2024/A/10660

Ronan Labar & Lucas Corvée v.
Badminton World Federation (BWF) &
Fédération Française de Badminton
(FFBaD)

7 May 2025

Badminton; Eligibility (Selection for the Olympic Games); CAS jurisdiction; Standing to appeal; Olympic Games Qualification System and CAS power of review; Discretion of IF whether to recommend the creation of additional quota places to the IOC; Doctrine of legitimate expectations and procedural fairness; Purpose of publication of weekly ranking by BWF

Panel

Ms Annett Rombach (Germany), Sole Arbitrator

1. The section to the BWF Complaint Procedure which stipulates that the BWF Chair of the Events Committee reviews decisions responding to a Complaint and provides that the decisions of the Chair of the Event Committee “... *shall be final and not subject to appeal*” must be interpreted restrictively. Specifically, the finality and non-appealability of the mentioned decisions only prohibits internal appeals before the Independent Hearing Panel (or any other internal appeal body within BWF), but does not restrict external appeals, which are primarily and exhaustively addressed by Articles 30.1 e) and g) BWF Constitution. Articles 30.1 e) and g) BWF Constitution constitute an umbrella clause providing persons bound by the BWF Constitution with access to

CAS against any BWF decision for which the internal remedies (if any) have been exhausted. This is because read in conjunction, while Article 30.1 e) BWF Constitution highlights that the CAS shall be the ultimate external judicial forum for any appeal against decisions taken by the BWF, Article 30.1 g) designates the CAS as the only and exclusive external court to decide over an appeal. In fact, access to an independent judicial authority (including state courts and independent arbitral tribunals such as the CAS) is a fundamental legal right of any person, enshrined, *e.g.*, in Article 29a of the Swiss Constitution or Article 6 European Human Rights Convention (ECHR). Irrespective of the (non-)applicability of these legal regimes to BWF, the fundamental right of an athlete to obtain an external and independent judicial review of decisions and measures taken by sports federations also belongs to a good governance mandatory for all international sports federations that are signatories to the Olympic Charter.

2. Because of the substantive nature of the issue of standing to appeal, the law applicable to this question is defined by Article R58 CAS Code, under which, *in casu*, the law to be applied is, primarily, the BWF rules and regulations, and, subsidiarily, Malaysian law. While the BWF rules are silent on the question of standing to appeal, and when none of the Parties has pleaded Malaysian law, CAS jurisdiction may be based on the fact that the Respondents have not contested the Appellants’ standing to appeal the decision, despite the fact that the Appellants were not the

addressees of the appealed decision. Further, the Appellants are aggrieved by the appealed decision, *i.e.* they have something at stake as the appealed decision directly affects their legal rights and interests given that as a result of such decision, the Appellants are deprived of the desired quota place for the Olympic Games and therefore, the Appellants could not be concerned more directly. Therefore, and given that according to CAS jurisprudence on the question of standing, a party has standing to appeal provided it can show “sufficient legal interest” in the matter being appealed, the Appellants – despite not being the addressees of the appealed decision – have standing to appeal such decision.

3. The BWF Qualification System for the Olympic Games is a multi-step qualification system characterized by a clear distinction of competences and responsibilities of each involved federation or committee. *E.g.*, the recommendation of athletes to the National Olympic Committee (“NOC”) is within the exclusive competence of the respective athlete’s national federation, the international federation (“IF”) cannot override such competence. A CAS Panel must respect the limits of these competences, it would act *ultra vires* by obliging a respondent party to do something outside its respective competence, as this would amount to an award that is (legally) impossible to be complied with. Accordingly, an athlete’s/appellant’s request to direct an international federation to recommend the appellant as participant of the

Olympic Games to the NOC must be dismissed because the international federation – even if designated a proper respondent in the proceedings – has no authority to recommend athletes to the NOC. Similarly, the Panel cannot render an award against a third party that is not a party to the CAS proceedings (*e.g.* here the IOC and NOC) and whose interests would be directly affected by the award, and respective requests have to be dismissed. This is because if accepted, said third party would be deprived of its right to be heard, namely its right to state its defence, adduce evidence and file submissions. Accordingly, if the appellant believes that it should have been selected for the Olympic Games, then, for the entirety of its prayers for relief to be reviewed by the CAS, it has to bring, at a minimum, the IOC, its own national federation and the National Anti-Doping Committee into the CAS proceedings.

4. It is within each IF’s discretion to decide whether, and if so, under which circumstances, to (exceptionally) recommend to the IOC the creation of additional quota places beyond those originally established. It can only be under exceptional circumstances that an athlete may have a direct right to request such a recommendation from the IF, because the imposition of an obligation on the IF to apply for an additional quota place would erode its discretion and interfere with its legally protected autonomy of associations. Therefore, only when circumstances are present under which the IF’s discretion is reduced

to zero, *i.e.* in which the IF has no discretion not to apply for the additional quota, the concerned athlete has an immediate right that the IF takes the requested action. A relevant scenario in which the required reduction of the IF's discretion to zero (with a corresponding right by an athlete) has been accepted is the doctrine of "legitimate expectations".

5. The doctrine of legitimate expectations provides a procedural and, in some jurisdictions, a substantive right, where representations have been made to a person by someone in authority. It is designed to protect individuals from an abuse of process. A procedural legitimate expectation is based on the presumption that a person in authority will follow a certain process in making decisions, while a substantive legitimate expectation arises where a person in authority makes a lawful representation that an individual will receive a substantive benefit. The doctrine of legitimate expectations is a manifestation of the more general principle of good faith and the principle of trust, which *e.g.* apply to IFs when establishing and applying qualification systems for major events. Accordingly, in case *e.g.* an IF, over a prolonged period of time (here: 11 months), weekly publishes wrong rankings, without undertaking any effort to examine the ranking, despite mistakes having been discovered in other rankings, the athlete/pair concerned by this publication may be found entitled to rely (*e.g.* regarding their strategic decisions as regards competition planning) both on the correctness of

the information published, but also on the doctrine of legitimate expectations. Therefore, if the athlete's/pair's reliance on the publication of the incorrect rankings leads to the non-qualification of the respective athlete/pair for a specific event (here: the Olympic Games), and where the injustice resulting from the athlete's/pair's non-qualification can be undone most appropriately by entering both affected athletes/pairs to the competition (a result which is foreseen by the IF's regulations for a similar situation, albeit for a different type of event), due to exceptional circumstances, the IF has to do everything under its control to achieve entry of the disadvantaged athlete/pair through a respective application for an additional quota place with the IOC, including *e.g.* a recommendation to the IOC that an additional quota place be created.

6. The purpose of the publication by the BWF of the weekly "live" ranking in the interim Race to Paris Ranking List on its website is to indicate to athletes their ranking at a specific point in time during the Qualification Period, the ranking of their direct opponents as well as the "live" difference in points. Information which is important for athletes to be able to determine and manage their qualification strategy, in particular a decision as to which further tournaments to play at what time – decisions which require due consideration and planning in terms of training, travelling, recovering, as well as financial budget. Athletes have no other means to manage their qualification strategy than to rely on

the correctness of the information weekly published by the BWF and are therefore principally entitled to rely on the correctness of such weekly published information.

I. THE PARTIES

1. Mr Ronan Labar and Mr Lucas Corvée (the “Appellants” or “Labar/Corvée Pair”) are international-level badminton players of French nationality.
2. The Badminton World Federation (the “First Respondent” or “BWF”) is the international governing body for the sports of badminton, recognized as such by the International Olympic Committee (“IOC”). It has its headquarters in Kuala Lumpur, Malaysia.
3. The Fédération Française de Badminton (the “Second Respondent” or “FFBaD”) is the governing body for the sports of badminton in France and a member of the BWF.
4. BWF and FFBaD are collectively referred to as the “Respondents”. The Appellants and the Respondents are collectively referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, she refers in this

Award only to the submissions and evidence it considers necessary to explain her reasoning.

A. The Dispute

6. The present appeal concerns the Appellants’ challenge of a decision taken by the First Respondent to correct its ranking list relevant for qualification for the Men’s Doubles competition at the Paris 2024 Olympic Games. The correction directly affected the Appellants in that they fell behind another French pair (the “Popov/Popov Pair”), which qualified, as the highest-ranked French pair, and as a direct result of the correction, for the Paris 2024 Olympic Games. While not challenging the qualification of the Popov/Popov Pair, the Appellants seek an award that BWF shall ensure, through the IOC, their participation in the Paris 2024 Olympic Games as a second French pair, due to exceptional circumstances.

B. The facts giving rise to the Dispute

7. On 11 May 2023, BWF published its “Qualification System” for the Paris 2024 Olympic Games (“BWF Qualification System”). According to the BWF Qualification System, 16 pairs (*i.e.* 32 players) were to participate in the Men’s Doubles competition. France had one of these quota places.
8. The allocation of the quota places was based on the so-called “Race to Paris Ranking List”, which recorded the results obtained by badminton players at special qualification competitions during a period of one year from 1 May 2023 to 28 April 2024 (the “Qualification Period”), as described in the “Qualification System” as follows:

“The ‘Race to Paris Ranking Lists’ of 30 April 2024 will be used to allocate the quota places in Men’s and Women’s Singles, and Men’s, Women’s and Mixed Doubles. Each list will be based on results achieved during the period 1 May 2023 and 28 April 2024”.

[...].

9. *“The ‘Race to Paris Ranking Lists’ of 30 April 2024 will be used to allocate 48 pairs quota places [Men’s Doubles, Women’s Doubles, Mixed Doubles], to the 16 highest ranked pairs in each event, respecting the maximum quota allocation per NOC per event”.*
10. The FFBaD sporting regulations made direct and exclusive reference to the Race to Paris Ranking List for determining the players who would be nominated by it for the Men’s double competition for the Paris 2024 Olympic Games.
11. During the Qualification Period, the Appellants competed in a total of 25 competitions, beginning with the BWF Sudirman Cup Finals in May 2023, and ending with the 2024 European Championships held from 8-14 April 2024. Since the first competition played in May 2023, and all along the entire Qualification Period, the Appellants were the highest ranked French pair in the Race to Paris Ranking Lists. While the final Race to Paris Ranking List was to be published only on 30 April 2024, after the end of the Qualification Period, the BWF regularly published on its website “live” rankings for players to have an indication where they were ranked at a specific point in time during the Qualification Period. The “interim” character of these published live rankings was indicated by BWF as follows:

“Note: This ranking is not a final list of qualifiers for the Paris 2024 Olympic Games Badminton competition, nor in any way guarantees invitation to, or acceptance in, the Paris 2024 Olympic Games Badminton Competition for any particular player or pair. It is a representation of who could qualify should the accumulation of world ranking points from tournaments within the Olympic Qualifying Period as of this week be used to determine the list of qualifiers. Furthermore, this list does not account for either the host wildcard spots in Men’s and Women’s Singles, or any Tripartite Spots, as provided for in the regulations”.

12. After the last qualification competition, the Appellants were ranked 38th in the Race to Paris Ranking List. As such, they were the highest ranked French pair (before the Popov/Popov Pair, which was ranked 41st).
13. On 9 April 2024, the FFBaD announced that the Labar/Corvée Pair was ahead of the Popov/Popov Pair in the relevant rankings for the Olympic Games.
14. By e-mail of 15 April 2024, the National Technical Director of the FFBaD congratulated the Appellants on their “Race to Paris” ranking and invited them to take part in an “Olympic Team Day” and an “Olympic Media Day” hosted for French athletes qualified for the Olympic Games (pending their official selection by the FFBaD).
15. On 19 April 2024, the BWF issued a press release, informing that the Race to Paris Ranking List had to be corrected as a result of a “processing error”. In relevant part, the statement reads as follows:

“The Badminton World Federation (BWF) can respond to recent questions about a rankings processing error and point modifications updated in the most recent Olympic Games Race To

Paris Ranking Lists’.

Following stakeholder feedback on inconsistencies with team tournament points calculations, a full review was undertaken of all team tournaments including the TotalEnergies BWF Sudirman Cup Finals 2023 last year.

The processing error is linked to the implementation of a new rule effective 2023 regarding points calculations at team tournaments based on players’ average points and bonus points for winning matches.

It has, therefore, been necessary this week to make point modifications related to some team tournament points.

*Unfortunately, the consequences of the point modifications meant a few changes to Olympic qualifying positions, **most notably in relation to two French men’s doubles pairs, where the point modifications were enough to switch the ranking positions between Lucas Corvee/Ronan Labar and Christo Popov/Toma Jnr Popov, with the latter now ahead.***

After our checks and manual verifications over the last 48 hours, we can confirm all point calculations and ranking positions are now correct on the published ranking.

It is with deep regret that this ranking processing error was made, but the updates have been implemented to ensure the correct ranking positions are accurate.

The Olympic badminton qualification period officially ends 28 April 2024, with the final ‘Race To Paris Rankings Lists’ published 30 April”.

[emphasis added]

16. Through an explanatory note, the FFBaD explained that BWF’s error was made in calculating the points obtained by all the pairs having participated in the BWF Sudirman Cup Finals 2023, which took place from 15 to 21 May 2023. Because of this error, the Race to Paris Ranking List of 72 pairs changed, including the Appellants, falling from the 36th to the 37th place.

17. By letter of 23 April 2023, the Appellants asked BWF for “a solution to be found so that they can take part in the next Olympic Games”.

18. On 24 April 2024, the FFBaD, through its President, filed a “Complaint” within the meaning of BWF’s Complaint Procedure in accordance with Section 3.2 of the BWF Statutes, in which it supported the Appellant’s motion. In relevant part, the Complaint provided as follows (convenience translation provided by the Appellants):

“As soon as it is published, the World Rankings become official, so it is inconceivable that a correction could be made almost a year after the points were awarded to establish the rankings.

Lucas Corvée and Ronan Labar have suffered loss of opportunity to qualify for the 2024 Olympic Games, obvious moral prejudice and proven financial prejudice, in particular due to the costs incurred over the last three years, the loss of qualification bonuses and the very likely loss of support from the sponsors with whom they are in contact. [...].

To compensate for these losses, which are the direct consequence of a double error by the BWF and a breach of Article 3.2.8 BWF Statutes, Section 5.3.9: REGULATIONS FOR ELIGIBILITY AND PROCESSING OF ENTRIES FOR WORLD CHAMPIONSHIPS, the FFBaD is

requesting the exceptional qualification of Lucas Corvée and Ronan Labar for the 2024 Olympic Games in the men's doubles draw, in addition to the one of Toma Junior and Christo Popov.

As the French Olympic Federation, in agreement with the French National Olympic and Sports Committee, we will be taking steps with the International Olympic Committee and the Organising Committee of the 2024 Olympic Games to ensure that France has a 2nd pair of men's doubles following your error. We hope to find a way of rearranging the competition tables.

[...]

The FFBaD will use all possible means of recourse if the BWF does not accede to our request”.

[emphasis added]

19. By letter of 5 May 2024, the BWF, through its Secretary General, rejected the Appellants’ and FFBaD’s complaints. While expressly acknowledging that a computation error in the Race to Paris Ranking List had occurred, the BWF concluded that the Appellants could not derive any rights from such error. It also indicated that the invitation of a second French pair for the doubles competition in the Olympic Games would be violating the qualification regulations approved by the IOC.
20. By letter of 13 May 2024, the Appellants asked the FFBaD to ensure that the Olympic Selection Advisory Commission of the French Olympic Committee (“CNOSF”) responsible for validating the nomination of athletes would consider “fairness” and “human

values” in choosing the participants for the Olympic Games.

21. By e-mail of 14 May 2024, the President of the FFBaD wrote the following to the Appellants:

“The federation must respect the rules that have been established with the CNOSF [French Olympic Committee], which the latter has confirmed to us. The BWF ranking was therefore taken into account during today’s CCSO.

Please note, however, that we continue to activate all levers to validate your participation in the Olympic Games (which, if necessary, may be confirmed during future CCSOs organized until July 5) taking into account the various elements linked to the regulations, case law, the transparency of the BWF and the ethics of sport”.

22. On 15 May 2024, the Olympic Selection Advisory Commission of the CNOSF published the list of athletes selected by the FFBaD for the Olympic Games. This list included the Popov/Popov Pair, but not the Appellants.
23. On 16 May 2024, the CNOSF addressed the IOC to obtain an additional quota place for the Men’s Doubles Competition on behalf of France. The IOC replied by letter of 7 June 2024, informing the CNOSF that “[w]hile noting the points outlined in your letter, we must respect the role of the [...] World Badminton Federation (BWF) in implementing the Olympic qualification system and determining the eligibility of the athletes”, and that “the IOC is unfortunately not in a position to grant additional quota places in the Olympic badminton competition for the French pair”.
24. On 20 May 2024, the President of the BWF confirmed, after a final review of

the Chair of the Events Committee, that the BWF would not recommend an exception and the qualification of a second French pair for the Paris 2024 Olympic Games (the “Appealed Decision”). In relevant part, the Appealed Decision reads as follows:

“In summary we can therefore inform you that:

- *The BWF Council during its meeting on 28 April 2024 did not take any decision or had a position on the FFBaD letter of 25 April addressed to the BWF Executive Board. The Council referred the case to be conducted according to the BWF Complaint Procedures, due to and in respect of your Complaint letter sent to BWF on 25 April 2025.*
- *The Complaint was responded to on 5 May 2024 – including responding to claims made by the players themselves (through their lawyer). This review was carried out by the Secretary General being the most senior management staff to ensure the highest level of priority on the matter.*
- *A Council Meeting was called on 12 May 2024 following your email of 10 May 2024 and the letter of 8 May 2024 sent by the lawyer of the players. The Council discussed the case and agreed with the process undertaken was in of the Olympic qualification case.*
- *The BWF Council however referred the final review to the Chair of the Events Committee being the appropriate person to conduct a final review. This to ensure the greatest level of scrutiny was applied to this case.*
- *The Chair of the Events Committee agreed with the initial decision and furthermore confirmed that BWF would not recommend an exemption to qualify*

a second French pair for the Paris 2024 Olympic Games.

The BWF sees the Complaint Procedures as exhausted and decisions as final. The qualification results as they stand today are therefore final.

It is finally worth noting that the BWF Council and the BWF Administration have looked very carefully into this case and treated it with the utmost caution, scrutiny, respect and impartiality.

It is very clear that BWF does not want such a situation to occur again. It creates unnecessary confusion and has led to an amplified disappointment for your two players from the host country, Ronan Labar and Lucas Corvée, for not qualifying as the first pair from France in Men’s Doubles.

Despite the unfortunate circumstances we hope for your understanding and please express my deepest sympathies to the players. As a former Olympian, I do understand how the confusion must have created a lot of frustration”.

25. The BWF’s refusal to recommend the Appellants, based on exceptional circumstances, as a second French pair to participate in the Men’s Doubles Competition at the Olympic Games is at the centre of this appeal.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 9 June 2024, the Appellants filed their Statement of Appeal with the Court of Arbitration for Sport (“CAS”) against the Appealed Decision, pursuant to Articles R47 et seq. of the CAS Code of Sports-related Arbitration (the “CAS Code”) (the “Appeal”). The Appellants requested the appointment of a sole arbitrator.

27. On 13 June 2024, the CAS Court Office informed the Parties about the Appeal, requested the Appellants to file their Appeal Brief in accordance with Article R51 of the CAS Code and noted the Appellants' choice to proceed with its Appeal in the English language. In addition, the Respondents were invited to inform the CAS Court Office whether they agree to the appointment of a sole arbitrator.
28. On 19 June 2024, the Appellants filed their Appeal Brief in accordance with Article R51 of the CAS Code.
29. On 20 June 2024, the CAS Court Office acknowledged receipt of the Appeal Brief and invited the Respondents to submit their respective Answers within twenty (20) days, pursuant to Article R55 of the CAS Code.
30. On 21 June 2024, the First Respondent (not yet represented by legal counsel) submitted a letter to CAS containing a challenge of the CAS's jurisdiction and of the admissibility of the Appeal. The First Respondent requested that the Appeal be decided by a panel of three arbitrators and nominated Prof. Luigi Fumagalli as arbitrator, should the case proceed to the merits. It further agreed to English as the language of the proceedings. The CAS Court Office confirmed receipt of the First Respondent's letter on the same day and invited the Appellants and the Second Respondent to comment on the jurisdiction of the CAS by 25 June 2024. Furthermore, the CAS Court Office noted, in the same letter, the Appellant's request that a final award be rendered by 5 July 2024 and invited the Parties to comment, by no later than 25 June 2024, on the implementation of an expedited procedure pursuant to Article 52 (4) of the CAS Code.
31. On 24 June 2024, the Appellants provided comments on the First Respondent's challenge of jurisdiction and admissibility. The Appellants further submitted a formal request for the establishment of an expedited procedure. On the same day, the First Respondent wrote that it *"would be open to an expedited procedure, provided it is given adequate time to provide its Answer [...]"*.
32. By correspondence of 25 June 2024, in view of the Appellants' and First Respondent's principal agreement to an expedited procedure, the CAS Court Office suggested to the Parties a procedural calendar for expedited proceedings.
33. On the same day, the Second Respondent informed the CAS Court Office that it *"should not formally be considered a respondent in these proceedings"* because *"none of the contested decisions [...] was taken by it"*. The Second Respondent confirmed its agreement to an expedited procedure, but informed the CAS Court Office that it did not see any need to respond to the First Respondent's procedural objections. The CAS Court Office invited the Appellants to indicate, by no later than 26 June 2024, whether they maintain their appeal against the Second Respondent.
34. On 26 June 2024, the First Respondent proposed a different procedural schedule for the expedited proceedings (with a longer time limit for the filing of its Answer and no hearing). It requested that the jurisdiction of the CAS be decided on a preliminary basis prior to its Answer, for reasons of procedural economy. On the same day, the CAS

Court Office (i) invited the Appellants to comment on the schedule proposed by the first Respondent, including the necessity of a hearing, (ii) advised the Parties that in the absence of an agreement on the procedural calendar, no expedited procedure would be implemented, and (iii) informed the Parties of the decisions of the Deputy Division President to refer the matter to a sole arbitrator (to be appointed in accordance with Article R54 (1) of the CAS Code) and not to deny, on a *prima facie* basis, the jurisdiction of the CAS at that stage of the procedure.

35. Still on 26 June 2024, the Appellants informed the CAS Court Office that (i) they maintain their appeal against the Second Respondent, and (ii) agree to the procedural calendar proposed by the First Respondent, but request that a hearing be held via videoconference. The Second Respondent also confirmed its agreement with the procedural calendar proposed by the Appellants.
36. On 27 June 2024, the First Respondent (i) reiterated its request that the jurisdictional issue be decided preliminarily by the sole arbitrator, once appointed, and (ii) deferred the decision as to the holding of the hearing to the sole arbitrator.
37. On 1 July 2024, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to decide the present matter was constituted as follows:

Sole Arbitrator:

Ms Annett Rombach, Attorney-at-law,
Frankfurt am Main, Germany.

38. On 2 July 2024, the CAS Court Office informed the Parties of the Sole Arbitrator's decision that the CAS has jurisdiction to entertain the appeal. In light of this decision, the CAS Court Office confirmed the time limit set for the Respondents' answers.
39. On 3 July 2024, the CAS Court Office, on behalf of the Sole Arbitrator, provided instructions to the First Respondent with respect to substantive issues to be addressed in the Answer.
40. On 4 July 2024, the Respondents submitted their Answers, respectively.
41. On 5 July 2024, the CAS Court Office informed the Parties of the Sole Arbitrator's decision to hold a hearing via video-conference, and delivered a hearing schedule.
42. On the same day, the CAS Court Office, on behalf of the Sole Arbitrator, transmitted the Order of Procedure to the Parties which was duly signed and returned by the Parties.
43. On 8 July 2021, a hearing was held via video-conference. The Parties did not raise any objection as to the composition of the Panel.
44. In addition to the Sole Arbitrator and Mr Fabien Cagneux, Managing Counsel at the CAS, the following persons attended the video hearing:

For the Appellants:

Mr Christophe Bertrand, Counsel
Mr Laurent Vidal, Counsel
Mr Ronan Labar, Athlete
Mr Lucas Corvée, Athlete

For the First Respondent:

Mr Nicolas Zbinden, Counsel

Mr Michael Kottman, Counsel
Mr Thomas Haubro Lund, BWF
Mr Thomas Delaye-Fortin, BWF

For the Second Respondent:
Mr Nicolas Catterou, FFBaD
Mr Jérôme Careil, FFBaD
Mr Thierry Soler, FFBaD
Mr Nicolas Blanchard, Counsel

45. The hearing began at 8:00 am (CEST) and ended at 10:00 am (CEST) without any major technical interruption or difficulty.
46. The Parties were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Sole Arbitrator. Upon closing the hearing, the Parties stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The First Respondent maintained its objection to the jurisdiction of the CAS.
47. The Sole Arbitrator has carefully taken into account all the evidence and the arguments presented by the Parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. THE POSITION OF THE PARTIES

48. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Sole Arbitrator confirms, however, that she has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Appellants' Position and Request for Relief

49. The Appellants submits the following in substance:
 - The BWF made a serious administrative error in the points calculation for the Race to Paris Ranking List. The mistake was not corrected for 11 months, and when BWF finally corrected it shortly before the end of the Qualification Period, the Appellants had already played their last qualification tournament. The BWF is liable for the mistake. When federations draw up rules and selection criteria for competitions such as the Olympic Games, they must ensure that they are fully and correctly implemented.
 - BWF should have checked the accuracy of the Race to Paris Ranking List long before April 2024. Indeed, in December 2023, the BWF had been warned for the first time about a potential calculation error (with respect to a tournament that had taken place shortly before), where points had allegedly been awarded incorrectly to several players. The BWF eventually corrected this error a few weeks later (in February or March) without any public notification of either the error or its rectification. The occurrence of this error should necessarily have alerted the BWF's technical and sports teams, who should have immediately double-checked the accuracy of the Race to Paris Ranking List from the start of the qualification phase.
 - Article 3.2.8 of Section 5.3.9 of the BWF Statutes confirms that if a

mistake is identified in a ranking list, and a Player / pair is found eligible to compete on rectification of such mistake, BWF will include both Players / pairs (*i.e.* originally selected and the one found eligible due to rectification of error) in the draw of that event. Although Article 3.2.8 applies literally only to the World Ranking List, the ratio of such provision should apply in the present case, too.

- Based on the Race to Paris Ranking List drawn up and published by the BWF (and taken up by the FFBaD throughout the qualification period), the Appellants organized their qualification schedule for the Olympics. The Appellants' entire strategy regarding the choice and management of qualification competitions relied on the Race to Paris Ranking List. Had the Race to Paris Ranking List been correct from the beginning, the Appellants' would have re-organized their schedule, including by playing additional tournaments.
- In particular, the Athletes chose not to participate in three tournaments (in Indonesia, Azerbaijan and Uganda) which would have gained them more ranking points.
- The Athletes had legitimate expectations to be selected for the Olympic Games. The BWF's conduct, by not correcting the Race to Paris Ranking List immediately after the Sudirman Cup Finals 2023, induced legitimate expectations in the Appellants' mind that the ranking was correct under the BWF rules and that they would be selected through the

established qualification system. Throughout the qualification period and until their final competition at the European Championships, the Appellants held the unwavering belief that they had secured qualification for the Olympic Games.

- The doctrine of legitimate expectations, which is accepted in CAS case law, provides a procedural and, in some jurisdictions, a substantive right, where representations have been made to a person by someone in authority (*e.g.* CAS OG 16/005 & 16/007).
- Legitimate expectations were also fuelled by the FFBaD. According to Annex 1 of the FFBaD High Level Athletes Convention, titled "Selection modalities", the selection of French athletes for the badminton event refers directly and exclusively to the Race to Paris Ranking List. The FFBaD's conduct made the Appellants believe that they had been selected as the French pair to participate in the Doubles competition at the Olympic Games.
- The Appellants' non-selection would result in financial and moral prejudices.

50. The Appellants request the following relief:

- "i. **DECLARING** the appeal admissible;*
- ii. **ANNULLING** the decision of the Badminton World Federation dated May 20, 2024 in the form of failure to recommend Mr Ronan LABAR and Mr Lucas CORVÉE to the French Olympic Committee as a participant of Badminton*

discipline at the XXXIII Olympic Games in Paris;

iii. **DECLARING** that, in the pending procedure CAS 2024/A/10661, the Appellants are entitled to request the annulling of the decision of the International Olympic Committee dated June 7, 2024 in the form of failure to grant Mr. Ronan LABAR and Mr. Lucas CORVÉE quota places for participation in the XXXIII Olympic Games in Paris, Badminton discipline;

iv. **DECLARING** Mr. Ronan LABAR and Mr. Lucas CORVÉE selected to represent France in the XXXIII Olympic Games in Paris, Badminton discipline;

v. **ORDERING** the Badminton World Federation, the IOC and the French Badminton Federation to place Mr. Ronan LABAR and Mr. Lucas CORVÉE in the Olympic Team of France and to make all arrangements necessary to enable Mr. Ronan LABAR and Mr. Lucas CORVÉE to represent France in the Badminton discipline at the XXXIII Olympic Games in Paris, including obtaining the corresponding accreditation of the International Olympic Committee;

In any case:

vi. **ORDERING** the Respondents to pay all arbitration costs, including the Appellants' counsels' costs and expenses".

51. During the hearing, the Appellants clarified their requests for relief. In particular, they clarified that, as part of their Request No. (v.) ("to make all arrangements necessary to enable Mr. Ronan LABAR and Mr. Lucas CORVÉE to represent France in the Badminton discipline at the XXXIII Olympic Games in Paris") they request – as the very minimum – that the

BWF be ordered to recommend to the IOC an additional quota place for a second French pair.

B. The First Respondent's Position and Request for Relief

52. The First Respondent submits the following in substance:

- The CAS has no jurisdiction over the Appeal. The Appealed Decision is final and binding and cannot be appealed, absent an arbitration clause in favour of CAS. More specifically, the CAS's jurisdiction cannot be derived from Article 30.1 of the BWF Constitution.
- Decisions taken by the Chair of the Events Committee shall be final and not subject to appeal under BWF's Complaint Procedures. The Appealed Decision was the outcome of a "Complaint" under these Procedures.
- The Appeal is also inadmissible. As per CAS jurisprudence, it is the Appellants' obligation to identify all relevant respondents. CAS Panels have refused to render an award in circumstances where such award would have an effect on the legal interests of a non-party. In the present case, the Appellants can only be selected in replacement for the Popov/Popov Pair. However, the Popov/Popov Pair is not a party to the Appeal. The award of an additional quota place can only be made by the IOC. The IOC is also not a party to the Appeal. In addition, matters of selection are

solely within the discretion of the National Olympic Committees, here the CNSOF. The BWF has no right to force a NOC to prioritize certain athletes. Equally, the BWF has no right to force a NOC to select a specific athlete, which is always a matter within their discretion. In conclusion, the Athlete failed to identify “the proper respondents” in the present proceedings because they did not include the Popov/Popov Pair, the IOC, and/or the CNSOF as respondents.

- The Appeal fails to succeed also on the merits. The final Race to Paris Ranking List was the only ranking decisive to determine who would qualify for the Olympic Games. The (incorrect) ranking lists published on the BWF’s website during the Qualification Period were interim in nature, and the BWF clearly indicated that these rankings in no way guaranteed the allocation of a quota for the Paris 2024 Olympic Games through a special note. The Appellants cannot obtain any right from the interim rankings.
- Obviously, the Appellants have no right (*per se*) to participate in the Paris 2024 Olympic Games. At best, the Athletes can expect that the BWF applies its own qualification rules correctly when deciding on the final ranking, which was the case here: the final version of the ‘Race to Paris Ranking Lists’ was the one published on 30 April 2024, and it is uncontroversial that this

ranking was correct (and placed the Appellants behind the Popov/Popov Pair). The BWF has not changed the rules, but simply applied them.

- The reference to Article 3.2.8 of Section 5.3.9 of the BWF Statutes is unhelpful. The provision does not apply to the qualification for the Paris 2024 Olympic Games but to BWF World Championships. In fact, in the context of the Paris 2024 Olympic Games the IOC is the competent regulator and therefore, only the rules and regulations enacted or approved by the IOC are relevant for the allocation of quota places.
- The clerical mistake in previous, informative versions of the Race to Paris Ranking Lists did not create any “legitimate hopes or expectations”. The Appellants’ claim that they relied on the interim Race to Paris Ranking List is opportunistic and artificial. Ranking points are not attributed based on the number of competitions (*i.e.* the more competition you do, the more points you get), but based on the 10 best results (which give rise to the most points). It is therefore wrong and pure speculation to assert that the Appellants “*could have had the opportunity to earn more points by competing in more tournaments*”, as this would have depended on the results and the level of the competition in question. In any event, the difference in points between the two pairs was extremely small, such the Appellants cannot

seriously claim that the erroneous rankings with the points differences applicable in this case (484 points) had any impact on their strategic choices.

53. The First Respondent requests the following relief:

- “1. *The appeal filed by Mr Ronan Labar and Lucas Corvée is inadmissible, or in the alternative is dismissed.*
2. *The arbitration costs shall be borne by Mr Ronan Labar and Mr Lucas Corvée jointly and severally.*
3. *BWF is granted a significant contribution to its legal and other costs”.*

C. The Second Respondent’s Position and Request for Relief

54. The Second Respondent submits the following in substance:

- The FFBaD had no choice but to confirm the selection of the Popov/Popov Pair, because – according to the corrected Race to Paris Ranking List – the Popov/Popov Pair was the highest-ranked French Pair. Under no circumstances can the Appellants replace the Popov/Popov Pair. Its selection was made in full compliance with French and international selection rules, which was validated by the CNOSF on 14 May 2024.
- To compensate for the prejudices suffered by the Appellants, which are the direct consequence of an error made by the BWF, the FFBaD supports the request for the exceptional qualification of the

Appellants for the 2024 Olympic Games in the Men’s Doubles competition through an additional quota place. Such additional quota place can, however, only be granted through the BWF and the IOC. There are no practical difficulties in allocating an additional quota place, as the singles draw for the 2024 Olympic Games will also have an odd number of players in each group, so this can also be applied to the Men’s Doubles draw.

55. Beyond its expression of support to exceptionally admit the Appellants as the second French pair for the Men’s Doubles draw, the FFBaF has not introduced any specific request for relief.

V. JURISDICTION

56. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

57. The Appellants rely on Article 30.1 e) and g) of the BWF Constitution, which provide as follows:

“30. Authority

30.1. Members or persons dealing with the Federation or sharing in its activities, including a person who:

- *Participates as a player in an event*

under the authority of the Federation; [...] shall recognise and accept the following, subject to sub-paragraph g):

- a) the Statutes of the Federation;*
- b) the Federation's authority on all matters concerning international Badminton;*
- c) the mandatory nature of the Statutes;*
- d) the Federation's jurisdiction and the right to make any decision or impose any sanction based on the Statutes of the Federation;*
- e) **that the Federation appeals, complaints and dispute resolution processes must be fully exhausted before taking any case to the Court of Arbitration for Sport (CAS);***
- f) that any appeal against decisions of the Federation and its judicial bodies must be lodged in accordance with the Judicial Procedures;*
- g) **the Court of Arbitration for Sport (CAS) as the only competent judicial authority external to the Federation, to the exclusion of any ordinary court of law in respect of the Federation and its Constitution and its rules, any civil judicial authority of any country and any other arbitration body;***
- h) the decision of the CAS resolving any appeal may not be challenged in any forum or on any ground except as set*

out in Chapter 12 of the Swiss Federal Code on Private International Law; and

- i) the requirement to abide by the decisions of the Federation and/or CAS without attempting to hinder their application".*

[emphasis added]

58. BWF argues that the CAS does not have jurisdiction in the present case, because – in its view – Article 30.1 of the BWF Constitution does not include an arbitration clause, but merely provide for a generic “political commitment” by the “BWF community” to CAS being the ultimate judicial authority in respect of the BWF Statutes. Furthermore, BWF maintains that paragraph f) highlights that appeals must be lodged in accordance with the Judicial Procedures, and that Article 38 of such Judicial Procedures limits appeals to the CAS to decisions rendered by the BWF Independent Hearing Panel. No right of appeal exists in respect of the Appealed Decision, which was rendered by the Chair of the Event Committee under the BWF Complaint Procedures, the BWF argues.

59. Indeed, the Complaint Procedure, under which the BWF Chair of the Events Committee reviews decisions responding to a Complaint (*see* Section 3 A.4. of the Complaint Procedure) provides as follows (Section 3 A.5.):

*“The Chair of the Event Committee shall make a decision in relation to the complaint. **Such decision shall be final and not subject to appeal**”.*

60. The BWF, by relying on this provision, seems to suggest that its decisions on Complaints are not subject to any external judicial review outside the federation at all.
 61. The Sole Arbitrator disagrees with this interpretation. It is clearly contradicted by BWF's own Constitution – its supreme legal framework, which supersedes its other internal regulations, including the Complaint Procedures. Read in conjunction, Article 30.1 e) and g) of the BWF Constitution (cited above) highlight that the CAS shall be the ultimate external judicial forum for any appeal against decisions taken by the BWF. While Article 30.1 e) of the BWF Constitution clarifies that the internal (appeal) remedies have to be exhausted before the CAS can be seized, Article 30.1 g) designates the CAS as the only and exclusive external court to decide over an appeal. What the BWF Constitution does not say is that CAS jurisdiction is limited to certain (appeal) decisions, and excluded for others.
 62. In fact, access to an independent judicial authority (including state courts and independent arbitral tribunals such as the CAS) is a fundamental legal right of any person, enshrined, *e.g.*, in Article 29a of the Swiss Constitution, or Article 6 of the European Human Rights Convention (ECHR). Irrespective of the (non-)applicability of these legal regimes to BWF, which is seated in Malaysia, the fundamental right of an athlete to have access to an independent court also belongs to a good governance mandatory for all international sports federations that are signatories to the Olympic Charter.
 63. Therefore, in view of the fundamental importance of an athlete's right to obtain an external and independent judicial review of decisions and measures taken by sports federations, Section 3 A.5. of the Complaint Procedures must be interpreted restrictively. That means that the finality and non-appealability of the mentioned decisions only prohibits *internal* appeals before the Independent Hearing Panel (or any other internal appeal body within BWF), but does not restrict *external* appeals, which are primarily and exhaustively addressed by Article 30.1 e) and g) of the BWF Constitution. Article 30.1 e) and g) is more than a mere "political commitment". It is an umbrella clause providing persons bound by the BWF Constitution with access to CAS against any BWF decision for which the internal remedies (if any) have been exhausted. The BWF does also not contest that the Appellants are bound by the BWF Constitution.
 64. As a result, the CAS has jurisdiction to decide the present matter.
- VI. ADMISSIBILITY**
65. Article R49 of the CAS Code provides – in its pertinent parts – as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document".
 66. The Appealed Decision was notified to the FFBaD (and the Appellants) on 20

May 2024. The Appeal was filed on 9 June 2024, *i.e.* within the time limit of 21 days prescribed in Article R49 of the CAS Code, which is authoritative in the present case in the absence of any other time limit in the BWF Statutes.

67. The questions (i) whether the Appellants are entitled to pursue this Appeal despite the fact that they are not the addressees of the Appealed Decision (standing to sue), and (ii) whether they have named the correct Respondents (standing to be sued) will be addressed in the merits section below.

68. Therefore, the Appeal is admissible.

VII. APPLICABLE LAW

69. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

70. The Appellants requested that the Respondents agree for the dispute to be decided *ex aequo et bono* because the dispute is “exceptional” and requires “a very special treatment”. The Respondents did agree to such proposition.
71. Hence, the Sole Arbitrator has to identify the “*applicable regulations*” for the purposes of Article R58 of the Code. The “*applicable regulations*” are those contained in the rules and regulations of

the BWF because the appeal is directed against a decision issued by the BWF Chair of the Event Committee, which was passed applying the BWF rules and regulations.

72. As a result, BWF’s rules and regulations shall apply primarily. Malaysian law, being the law of the country in which BWF is domiciled, applies subsidiarily.

VIII. MERITS

73. Turning to the merits of the case, the Sole Arbitrator finds as follows:

A. Preliminary Issue: The Appellants’ Standing to Appeal

74. The first question to be addressed in relation to the Appeal is whether the Appellants have standing to appeal the Appealed Decision. The Appealed Decision was rendered by the BWF upon a Complaint filed by the FFbAD. Accordingly, the addressee of the Appealed Decision is only the FFbAD, not the Appellants.

75. Because of the substantive nature of the issue of standing, the law applicable to this question is defined by Article R58 of the CAS Code, under which the Sole Arbitrator has to apply, primarily, BWF’s rules and regulations, and, subsidiarily, Malaysian law. The BWF rules are silent on the issue. While the Sole Arbitrator is not familiar with Malaysian law (and none of the Parties has pleaded Malaysian law in this proceeding), she notes that neither of the Respondents has contested the Appellants’ standing to sue a decision which directly affects their legal rights and interests. In fact, the result of the Appealed Decision could not concern the Appellants more directly, because it deprives them of the

desired quota place for the Olympic Games. Therefore, under the sufficient legal interest-test accepted in CAS jurisprudence on the issue of standing (*see, e.g., CAS 2020/A/6713; CAS 2008/A/1674; CAS 2014/A/3744 & 3766*), there is no doubt that the Appellants have standing to appeal the Appealed Decision.

B. The Undisputed Facts

76. The factual background underlying the Appeal is largely undisputed. In particular, it is undisputed:

- That one French pair was to qualify for the Olympic Games based – principally – on the number of ranking points obtained during the 12-months Qualification Period;
- That at the very beginning of the Qualification Period (in May 2023), a calculation error occurred in awarding the Labar/Corvée Pair for participation in one tournament too many ranking points, based on the application of outdated rules;
- That the error was entirely BWF’s fault and entirely within BWF’s sphere;
- That the error remained unnoticed for approximately 11 months, and was not corrected until after the Appellants had played their last qualification tournament;
- That the mistake was corrected in mid-April 2024, still (and shortly) before the release of the final and binding Race to Paris Ranking List

on 30 April 2024, depriving the Appellants of any chance to take further sporting influence on the ranking;

- That the correction of the mistake had the immediate result that the Appellants fell behind the Popov/Popov Pair in the Race to Paris Ranking List, which means that they were no longer the highest-ranked French pair (as they had been before the correction of the mistake during the entire Qualification Period);
- That, on the basis of the final Race to Paris Ranking List released on 30 April 2024, the FFBaD recommended the Popov/Popov Pair to the CNSOF for nomination to the Olympic Games, as the highest-ranked French pair;
- That the FFBaD, at the same time, recommended and supported that the Appellants be included in the Olympic Games in addition to the Popov/Popov Pair, due to exceptional circumstances, and that the FFBaD filed a respective Complaint to the BWF;
- That the CNSOF applied with the IOC for an additional quota place on behalf of the Appellants;
- That the IOC replied that it “*must respect the role of ... the Badminton World Federation (BWF) in implementing the Olympic qualification system and determining the eligibility of the athletes*”.
- That the BWF declined to apply

with the IOC for an additional quota place on behalf of the Appellants because it did not see any unfairness.

C. The Disputed Facts

77. What remained contested throughout these proceedings is the impact of the ranking mistake on the Appellants' qualification strategy and tournament planning. In this respect, the Labar/Corvée Pair argued:

- That they would have adopted a different strategy for their planning of qualification tournaments, in particular, that they would have played three more tournaments in January/February 2024, in which they would have had a very realistic chance to obtain more points so that they would have qualified as the best French pair for the Olympic Games;
- That they relied on the Race to Paris Ranking List and adopted their qualification strategy in reliance on the Race to Paris Ranking List (which was updated every week).

78. The BWF argued:

- That the points difference was so narrow that it is inconceivable that the Appellants would have changed their strategy had the Race to Paris Ranking List been correct from the beginning, or had it been corrected earlier.

D. The Decision

79. The particular difficulty for the Appellants in lodging their Appeal and requests for relief is that numerous stakeholders are involved on the road for athletes to be admitted for participation at the Olympic Games:

80. (1) Initially, it is only for the IOC to determine, for each Olympic sport and competition, the number of available quota places. Similarly, the IOC is the only competent body to create additional quota places within its sole discretion. For the Men's Doubles competition in badminton, 32 quota places (for 16 pairs) were initially established. France had one of these quota places. (2) The BWF is responsible for implementing a qualification system applicable to all international athletes striving for an available quota place. In accordance with the BWF Qualification System released in May 2023, and more specifically the final Race to Paris Ranking Lists announced at the end of the Qualification Period, it is then (3) for each national federation, here the FFBaD, to propose, based on the final Race to Paris Ranking Lists, the best-ranked athletes to (4) the CNSOF, which – as the French National Olympic Committee ("NOC") – is the only instance competent to officially nominate athletes for the Olympic Games. Only athletes who were nominated by their respective NOC may (5) be admitted by the IOC to participate in the Olympic competition(s).

81. This (complex) multi-step qualification system is characterized by a clear distinction of competences and responsibilities of each involved federation or committee. The Sole Arbitrator must respect the limits of these competences, and cannot act *ultra*

vires by obliging a respondent party to do something outside its respective competence. This would amount to an award that is (legally) impossible to be complied with. Similarly, the Sole Arbitrator cannot render an award against a non-party whose interests would be directly affected by the award (constant CAS jurisprudence, *see, e.g.*, CAS 2011/A/2654).

82. It follows directly from these principles:

- That the Appellants’ request no. ii. (*see* above at para. 50), must be dismissed, because it is directed against the BWF, which – albeit a proper respondent in the present proceeding – has no authority to recommend athletes to the CNSOF as participants of the Olympic Games. The recommendation of athletes to the CNSOF is within the exclusive competence of the FFBaD, and the BWF cannot override such competence owned exclusively by the national federation. Consequently, the Sole Arbitrator cannot override such competence either. Furthermore, the Sole Arbitrator notes that the FFBaD’s recommendation of the Popov/Popov Pair to the CSNOF was based on the (correct) final Race to Paris Ranking List. Evidently, when comparing the interests of the highest-ranked pair (Popov/Popov) with the interests of a *believed-to-be* highest ranked pair (Labar/Corvé), no matter how legitimate the belief is, it was not arbitrary or abusive by the FFBaD to find that the former must prevail. In any event, because the Popov/Popov Pair is not a

party in these proceedings, the Sole Arbitrator would be barred from rendering any award in which the Popov/Popov Pair is deprived of its selection by the FFBaD and eventual nomination by the CNSOF.

- That the Appellants’ request no. iii. (*see* above at para. 50), which is directed only against the IOC (and which was initially part of a separate CAS appeal lodged by the Appellants against the IOC under reference no. CAS 2024/A/10661), must also be dismissed. The IOC is not a party in these proceedings, which means that the Sole Arbitrator cannot render any decision against the IOC (*see* also CAS 2020/A/6713).
 - That the request no. iv. (*see* above at para. 50) must also be dismissed, because the Sole Arbitrator cannot declare the Appellants to be “*selected to represent France in the [...] Olympic Games in Paris*”, because such an award would directly affect the rights of the CSNOF, which has not been named as a respondent in these proceedings. In this context the Sole Arbitrator notes that she would be barred from such award also because France has only one quota place, and such quota place was lawfully provided to the highest ranked French pair (*see* above).
83. The focus of this Appeal is, therefore, on the Appellants’ request no. v., seeking that the BWF be ordered “*to make all arrangements necessary to enable Mr. Ronan LABAR and Mr. Lucas CORVÉE to represent France in the Badminton discipline at*

the XXXIII Olympic Games in Paris, including obtaining the corresponding accreditation of the International Olympic Committee". During the hearing, the Appellants clarified that this request included – as the very minimum – that the BWF be ordered to recommend to the IOC an additional quota place for a second French pair.

84. It is not disputed between the Parties that the BWF would have the right to make such recommendation to the IOC. However, in the Appealed Decision, the BWF explained that it would not recommend to the IOC an exemption to qualify a second French pair for the Olympic Games. The IOC, in turn, made it clear (in its letter dated 7 June 2024, quoted above at para. 23) that it *"must respect the role of the [...] World Badminton Federation (BWF)"* and that it would not create an additional quota place against the will of the BWF.
85. Therefore, the decisive question in these appeals proceedings is whether the Appellants have a right to demand from the BWF that it recommends to the IOC the creation of an additional quota place on behalf of a second French pair.
86. As a matter of principle, the Sole Arbitrator accepts that it is within each international federation's ("IF's") discretion whether, and if so, under which circumstances, it (exceptionally) recommends to the IOC the creation of additional quota places beyond those originally established. It can only be under exceptional circumstances that an athlete may have a direct right to request such a recommendation from the IF, because the imposition of an obligation on the IF to apply for an additional quota place would erode its discretion

and interfere with its legally protected autonomy of associations. Therefore, only when circumstances are present under which the IF's discretion is reduced to zero, *i.e.* in which the IF has no discretion *not* to apply for the additional quota, the concerned athlete has an immediate right that the IF takes the requested action.

87. A relevant scenario in which the required reduction of the IF's discretion to zero (with a corresponding right by an athlete) has been accepted is the doctrine of "legitimate expectations" described in CAS jurisprudence as follows (*see* CAS 16/005 & 16/007):

"The doctrine of legitimate expectations provides a procedural and, in some jurisdictions, a substantive right, where representations have been made to a person by someone in authority. It is designed to protect individuals from an abuse of process. A procedural legitimate expectation is based on the presumption that a person in authority will follow a certain process in making decision, while a substantive legitimate expectation arises where a person in authority makes a lawful representation that an individual will receive a substantive benefit".

88. The doctrine of legitimate expectations is a manifestation of the more general principle of good faith and the principle of trust, which apply to IFs when they establish and apply qualification systems for major events.
89. In the present case, the Qualification System established by the BWF is not challenged. To the extent relevant here, it provides the following (D.1 – Quota Places):

"The 'Race to Paris Ranking Lists' of 30 April 2024 will be used to allocate the quota

places in Men's and Women's Singles, and Men's, Women's and Mixed Doubles. Each list will be based on results achieved during the period 1 May 2023 and 28 April 2024. Participation in any of the following events will count towards the respective 'Race to Paris Ranking Lists' during the qualification period:

[List of events]”.

90. The Qualification System describes clearly and transparently that an athlete's ranking in the Race to Paris Ranking List will principally be decisive in terms of his or her right to be selected and nominated by the relevant national federation and the NOC. Therefore, based on the Qualification System, athletes can principally rely on the Race to Paris Ranking List, and build legitimate expectations that their individual ranking is sufficient – or not sufficient – to qualify for the Olympic Games. No other (soft) criteria are established enabling the national federation and/or NOC to disregard the highest-ranked athlete(s) in the Race to Paris Ranking List and choose someone else.
91. In the present case, the Appellants do not dispute that the final Race to Paris Ranking List published by the BWF on 30 April 2024 is correct. They also do not challenge that, based on this ranking, the Popov/Popov Pair had obtained a right to be recommended to the CNSOF for nomination to the Olympic Games, as the highest-ranked French pair. However, the Appellants argue that they have had legitimate expectations that they – and not the Popov/Popov Pair – would be the highest-ranked pair in the final Race to Paris Ranking List, because they were listed as the best French pair still after the last qualification tournament due to an administrative error made by the BWF that remained undetected for 11 months, *i.e.* for almost the entire Qualification Period.
92. The BWF admits that it made a clerical mistake, and that the correction of this mistake had the immediate result that the Appellants fell behind the Popov/Popov Pair in the final Race to Paris Ranking List. The BWF, while regretting the mistake, argues – however – that the Appellants are not entitled to rely on the doctrine of legitimate expectations, for essentially two reasons:
 - The clear disclaimer (quoted above at para. 11) published with each interim Race to Paris Ranking List, indicating to athletes that they cannot derive any right for qualification from these rankings; and
 - The failure to prove any influence of the mistake on the Appellants' sporting results.
93. The Sole Arbitrator rejects both arguments. Based on the record before her, including the testimony given by the Appellants during the oral hearing, she is sufficiently satisfied that the Appellants justifiably relied on the Race to Paris Ranking List, and that an earlier correction of the mistake could have led to a different points situation based on a different qualification strategy they may have adopted had they known about the true situation:
94. First, the note BWF published with each interim Race to Paris Ranking List (*see* above at para. 10) had the only purpose to inform athletes that this was not the “final” ranking, but a mere “*representation of who could qualify should the accumulation of*

world ranking points from tournaments within the Olympic Qualifying Period as of this week be used to determine the list of qualifiers". It cannot be interpreted in a sense that the BWF (tacitly) reserved its right to change the points accumulated up until each publication of the list. To the contrary, the publication of the weekly ranking has the very purpose to indicate to athletes where they are ranked after each week, where their direct opponents are ranked, and what the "live" difference in points is. This information is important precisely because athletes need to determine and manage their further qualification strategy, which involves a decision as to which further tournaments to play at what time. This decision involves major thinking and planning in terms of training, travelling, recovering, and – last but not least – financial budget. Therefore, athletes are principally entitled to rely on the correctness of the information published by the BWF weekly in the interim Race to Paris Ranking List. They simply have no other means to manage their qualification strategy.

95. Second, the BWF is fully responsible for having maintained a wrong ranking for almost the entire Qualification Period (11 months). The incorrect ranking was confirmed every week, when the Race to Paris Ranking List was updated, on the basis of the mistake made already in May 2023. Although BWF admits that athletes are "guided" by the ranking, it undertook no effort to examine the ranking, not even after it was notified, in December 2023, about other mistakes in the Race to Paris Ranking List, relating to the men's singles. It was only in April 2024, after the Appellants had completed their last qualification tournament, that the mistake was

rectified, to the Appellants' immediate detriment. No other athlete was affected in that he or she lost the right to participate in the Olympic Games. The mistake is the result of the BWF's own negligence, and there is no indication that the Appellants knew (or should have known) about the calculation error.

96. Third, the Sole Arbitrator relies on Mr. Labar's and Mr. Corvée's oral testimony given during the hearing, regarding their strategic decisions that relied on the interim Race to Paris Ranking Lists. Both players presented themselves as credible and honest athletes, who would potentially have adopted a different tournament planning had they been aware of the true ranking points situation. BWF's counterargument that there is also the possibility that the sporting results would have remained the same is irrelevant. There must only be a possibility of a different outcome, no certainty.
97. Forth, the Sole Arbitrator's decision is also guided by Article 3.2.8 of Section 5.3.9 of the BWF Statutes, which reads as follows:

"Rectification of Entry

*3.2.8. If a mistake is identified in the World Ranking list as on the Eligibility Date and a Player / pair is found eligible to compete on rectification of such mistake, **BWF will include both Players/pairs (i.e. originally selected and the one found eligible due to rectification of error) in the draw of that Event**".*

98. Albeit not directly applicable for Olympic Games (but only for World Championships) the *rationale* of this provision is fully transferrable to the present case: the injustice created by

non-qualification due to incorrect rankings can be undone most appropriately by entering both affected pairs to the competition. In this case, this means that BWF has to do everything under its control to achieve entry of the disadvantaged pair through a respective application for an additional quota place with the IOC.

99. As a result, BWF's argument that it has no legal duty to recommend an additional quota place on behalf of a second French pair to the IOC is rejected. In fact, a legal duty of the BWF to do so arises out of its own mistake and the detrimental situation it created for the Appellants. In view of the legitimate expectations the Appellants could derive from the interim Race to Paris Ranking Lists, the BWF has no discretion: it must do everything under its control to rectify the detrimental effects of its mistake. This includes a recommendation to the IOC that an additional quota place for France be created. The requested recommendation does also not prejudice the BWF, because the final word to add an additional pair to the Olympic competition rests, in any event, with the IOC (which could still decide not to follow the recommendation).
100. The Sole Arbitrator's decision is not going to set a dangerous precedent: as per the BWF's own submission, ranking mistakes almost never occur, and if they occur, they almost never have effects as drastic as in this case. The BWF's Secretary General confirmed during the hearing that this is not an everyday situation. To his knowledge, Article 3.2.8 of Section 5.3.9 of the BWF Statutes had never been applied.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has jurisdiction to entertain the appeal filed on 9 June 2024 by Ronan Labar and Lucas Corvée against the decision issued on 20 May 2024 by the Badminton World Federation.
2. The appeal filed on 9 June 2024 by Ronan Labar and Lucas Corvée against the decision issued on 20 May 2024 by the Badminton World Federation is partially upheld.
3. The decision issued on 20 May 2024 by the Badminton World Federation is set aside to the extent that it confirms that the Badminton World Federation would not recommend to the International Olympic Committee an exemption to qualify a second French pair for the Paris 2024 Olympic Games.

101. The Badminton World Federation is ordered to take the appropriate steps to recommend to the International Olympic Committee an exemption to qualify a second French pair for the Paris 2024 Olympic Games on the basis that:

- i. Ronan Labar and Lucas Corvée were immediately and detrimentally affected by a mistake in the "Race to Paris Ranking List" maintained by the Badminton World Federation, and
- ii. Badminton World Federation did not correct the mistake in the

“Race to Paris Ranking List”, which occurred in May 2023, before April 2024, *i.e.* less than three weeks before the end of the qualification period for the Paris 2024 Olympic Games.

5. (...).
6. (...).
7. All other and further motions or prayers for relief are dismissed.

Football; Transfer – Training compensation; FIFA's standing to be sued in appeal against FIFA decisions; FIFA standing to be sued alone in EPP disputes; Adding a respondent to an ongoing proceeding

Panel

Mr Manfred Nan (The Netherlands), Sole Arbitrator

1. In cases in which the appeal is directed against a FIFA decision, the presence of FIFA as a party in these proceedings cannot be rejected. While there are circumstances in which FIFA's presence is mandatory (vertical disputes), there are certainly other circumstances and situations in which FIFA's presence is optional (horizontal disputes), i.e., its absence from the arbitral proceedings cannot cause - *per se* - the dismissal of the appeal. However, even if optional, the presence of FIFA among the respondents cannot be rejected by FIFA, in view of the clear rule of Article 75 of the Swiss Civil Code.
2. Although there may potentially be cases where a respondent like FIFA is best suited to represent the interests of its members if such members are only indirectly affected, eliminating the need to call such members as respondents, in the context of an Electronic Players' Passport dispute, the training clubs directly involved in such dispute have

a direct interest in the outcome of the proceeding. By not calling them to the appeal proceeding, they are deprived of their right to be heard as they cannot defend themselves against the factual and legal allegations of the appellant.

3. As determined in Article R48 of the CAS Code, it is the responsibility of the appellant to name the respondent(s). After the passing of the 21-day deadline to appeal, there is in principle no possibility anymore for an appellant to add respondents to the proceedings.

I. PARTIES

1. K.A.A. Gent (the "Appellant", the "Club" or "Gent") is a professional football club with its registered office in Gent, Belgium. The Club is registered with the Royal Belgium Football Federation (*Union Royale Belge des Sociétés de Football-Association* - "URBSFA"), which in turn is affiliated to the *Fédération Internationale de Football Association*.
2. The *Fédération Internationale de Football Association* (the "Respondent" or "FIFA") is an association incorporated under Swiss law with its registered office in Zurich, Switzerland. FIFA is the governing body of international football. It exercises regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players worldwide.
3. Gent and FIFA are hereinafter jointly referred to as the "Parties".

II. INTRODUCTION

4. These proceedings revolve around training compensation payable with respect to the transfer of Mr Ceti Junior Taty Tchibinda, a football player of Congolese nationality (the “Player”), from the Congolese club *Club Sportif Multidisciplinaire Diables Noirs* (“Diables Noirs”) to Gent.
5. Following an Electronic Players’ Passport (“EPP”) review process and a decision of a Single Judge of the FIFA Dispute Resolution Chamber (the “FIFA DRC EPP Decision”), the FIFA General Secretariat issued the Player’s EPP (the “EPP Decision”) and an Allocation Statement (the “Allocation Statement”). The ultimate consequence of the EPP Decision and the Allocation Statement (hereinafter jointly referred to as the “Appealed Decisions”) is that Gent was thereby required to pay training compensation to four other previous Congolese clubs of the Player, as follows:
 - *Association Sportive V. Club Mokanda* (“Mokanda”): EUR 182,902.99;
 - *Ecole de Football TOTAL* (“TOTAL”): EUR 142,860.09;
 - *Club de Football Tout Puissant Caïman* (“Caïman”): EUR 76,986.30;
 - *Association Sportive Panthère* (“Panthère”): EUR 19,298.53.
1. In the present appeal arbitration proceedings before the Court of Arbitration for Sport (“CAS”), Gent is

challenging the Appealed Decisions, requesting, *inter alia*, a decision confirming that no training compensation is payable to any of the afore-mentioned clubs. FIFA requests the Appealed Decisions to be confirmed.

III. FACTUAL BACKGROUND

2. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the Parties and the evidence examined in the course of the proceedings. This background information is given for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Background Facts

3. On 1 August 2023, Gent and Diables Noirs signed a transfer agreement regarding the transfer of the Player to Gent (the “Transfer Agreement”). The Transfer Agreement, *inter alia*, provides that the Player was registered with Diables Noirs as a professional football player, that no transfer fee was payable to Diables Noirs by Gent, but entitling Diables Noirs to a signing-on fee of 10% in case of a potential future transfer of the Player to a third club. Diables Noirs further waived any possible right to receive training compensation from Gent, warranted

- that any club to which the Player was loaned during his registration with Diablos Noirs had assigned their claims for training compensation to it, and indemnified Gent for any claims of such clubs.
4. On 5 September 2023, the Player was registered as a professional football player with Gent via the Transfer Matching System (“TMS”), following which TMS generated a provisional EPP of the Player, following which a 10-day inspection period commenced.
 5. On 18 September 2023, the provisional EPP was released for review by the clubs and the national football federations involved, which were the following:
 - a) URBSFA;
 - b) The *Fédération Congolaise de Football* (“FECOFOOT”);
 - c) Diablos Noirs;
 - d) TOTAL;
 - e) Mokanda;
 - f) Caïman;
 - g) Panthère.
 6. URBSFA and FECOFOOT are hereinafter referred to as the “Federations”. Diablos Noirs, TOTAL, Mokanda, Caïman and Panthère are hereinafter referred to as the “Training Clubs”.
 7. On 19 September and 3 October 2023, Gent intervened in the EPP process and provided certain information and evidence to FIFA.
 8. On 27 September 2023, URBSFA intervened in the EPP process and provided certain information and evidence to FIFA.
 9. On 5 October 2023, the EPP entered the “validation process”.
 10. On 13 and 21 March 2024, FIFA invited FECOFOOT to complete the Player’s EPP.
 11. On 27 March 2024, FECOFOOT intervened in the EPP process and provided certain information and evidence to FIFA.
 12. On 28 March 2024, the Player’s EPP again entered the “validation process”.
- B. Proceedings before the FIFA DRC**
13. On 6 June 2024, by virtue of Article 10(3) of the FIFA Clearing House Regulations (the “FCHR”) (providing that in situations of legal of factual complexity the FIFA DRC will decide on the final EPP), the FIFA General Secretariat referred the matter to the FIFA DRC.
 14. On 12 June 2024, a Single Judge of the FIFA DRC rendered the FIFA DRC EPP Decision, providing, *inter alia*, as follows:

“15. The Single Judge recalled the basic principle of burden of proof, as stipulated in art. 13 par. 5 of the Procedural Rules, according to which a party claiming a right on the basis of an alleged fact shall carry the respective burden of proof. Likewise, the Single Judge stressed the wording of art. 13 par. 4 of the Procedural Rules, pursuant to which she may consider evidence not filed by the parties,

- including without limitation the evidence generated by or within the Transfer Matching System (TMS).*
16. *The registration history provided by FECOFOOT states the player was an amateur with [Diablos Noirs] and with all his previous training clubs.*
 17. *Art. 7 of the FIFA RSTP and the DRC jurisprudence determine that career history data provided by the member associations is key for the distribution of training rewards.*
 18. *The importance of accurate data concerning a player's career history when determining entitlements to training compensation is paramount. The player passport, and for training compensation matters governed by the FCHR, the EPP, is key to providing this data, especially when a player is registered as a professional for the first time.*
 19. *Member associations are responsible for providing accurate data and therefore FIFA must rely on this information in good faith unless a club can provide evidence that would contradict what a member association has provided.*
 20. *The Single Judge acknowledges the attempt of [Gent] in having FIFA consider the player's registration with [Diablos Noirs] as a professional one.*
 21. *[Gent], however, did not provide satisfactory evidence of such an allegation. In particular, the Single Judge noted that the only evidence provided by [Gent] to contest the information contained in the player's passport issued by the FECOFOOT*
is the aforementioned 'transfer agreement'.
 22. *The Single Judge understood that the mere mention in the agreement that the player had a professional contract with [Diablos Noirs] is per se not sufficient to overturn the information contained in the player passport issued by the FECOFOOT that he had been registered as an amateur with all its affiliated clubs, until his first professional registration with [Gent].*
 23. *In fact, the Single Judge noted that no further evidence of the player's alleged professional status with [Diablos Noirs], such as a written employment contract with the latter club or any evidence that he was being paid more for his footballing activity than the expenses he effectively incurred, was provided.*
 24. *Therefore, based on the documentation on file, there is no reason to overturn the information provided by the FECOFOOT.*
 25. *Bearing all the above in mind and in line with the principle of the burden of proof of art. 13 par. 5 of the Procedural Rules, as well as on the basis of the evidence on file and that within TMS, the Single Judge determined that the player was always registered as an amateur at FECOFOOT, including with [Diablos Noirs].*
 - [...]
 34. *Finally, the Single judge pointed out that, even though the agreement mentions that the player was born on 5 April 2005, the player's passport issued by the FECOFOOT and the information available in the TMS are*

aligned in the sense that the player's birthdate is 5 April 2002.

35. *The Single Judge concluded her deliberations by confirming that the above constitutes her decision in the sense of article 10 paragraph 3 and 5 of the FCHR in relation to this EPP, the conclusions of which are reflected in the EPP determination to which this decision is enclosed as annexe”.*

15. On the same date, 12 June 2024, and based on the FIFA DRC EPP Decision, the FIFA General Secretariat issued the EPP Decision, which provides, *inter alia*, as follows:

“The FIFA general secretariat hereby determines the registration history of the player from the start of the calendar year of the player’s 12th birthday until the aforementioned training rewards trigger. This registration history is considered true and accurate for the period in question, in accordance with the information provided by the member associations that participated in the generation and review of the EPP, in accordance with article 10 of the FCHR. The registration history as determined by the FIFA general secretariat is as follows:

Club and member association	Start of registration	End of registration	Status	Nature of registration
K.A.A. GENT BEL, Belgium FIFA ID: 109HQBI Status: Affiliated Training category: 1	05/09/2023	Currently registered	Professional	Permanent
Club Sportif Multidisciplinaire Diabes Noirs FECOFoot, Congo FIFA ID: 109EXFJ Status: Affiliated Training category: 4	30/10/2022	14/08/2023	Amateur	Permanent
Association Sportive V. Club Mokanda FECOFoot, Congo FIFA ID: 109EVKH Status: Affiliated Training category: 4	08/06/2021	29/10/2022	Amateur	Permanent
Association Sportive V. Club Mokanda FECOFoot, Congo FIFA ID: 109EVKH Status: Affiliated Training category: 4	10/10/2020	30/05/2021	Amateur	Permanent

Ecole de Football TOTAL FECOFOOT, Congo FIFA ID: 109EV2B Status: Affiliated Training category: 4	14/08/2019	15/08/2020	Amateur	Permanent
Ecole de Football TOTAL FECOFOOT, Congo FIFA ID: 109EV2B Status: Affiliated Training category: 4	24/11/2018	23/06/2019	Amateur	Permanent
Club de Football Tout Puissant Caïman FECOFOOT, Congo FIFA ID: 142VP7B Status: Affiliated Training category: 4	13/01/2017	30/09/2018	Amateur	Permanent
Association Sportive Panthère FECOFOOT, Congo FIFA ID: 142VQ0H Status: Affiliated Training category: 4	30/11/2016	12/01/2017	Amateur	Permanent
Association Sportive Panthère FECOFOOT, Congo FIFA ID: 142VQ0H Status: Affiliated Training category: 4	10/08/2015	07/07/2016	Amateur	Permanent
Association Sportive Panthère FECOFOOT, Congo FIFA ID: 142VQ0H Status: Affiliated Training category: 4	14/08/2014	07/07/2015	Amateur	Permanent

16. The EPP Decision further provides as follows:

“Conclusion

15. *In consideration of the above and in accordance with the FCHR and annexes 4 and 5 to the RSTP, the FIFA general secretariat has determined the entitlement of clubs to*

training rewards for the above trigger as follows.

16. *[Diabes Noirs] would in principle be entitled to training compensation for having registered the player at some point in time between the start of the calendar year of player’s 12th birthday and the end of the calendar year of player’s 21st birthday, but given that training compensation is deemed included in the transfer fee paid by the new club, no training compensation is due to this training club.*
17. *[Mokanda] is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player’s 12th birthday and the end of the calendar year of the player’s 21st birthday.*
18. *[TOTAL] is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player’s 12th birthday and the end of the calendar year of the player’s 21st birthday.*
19. *[Caïman] is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player’s 12th birthday and the end of the calendar year of the player’s 21st birthday.*
20. *[Panthère] is entitled to training compensation for having registered the player at some point in time between the start of the calendar year of the player’s 12th birthday and the end of the calendar year of the player’s 21st birthday.*

21. *No other club is entitled to training compensation.*
22. *[Diablos Noirs] would in principle be entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of player's 12th birthday and the end of the calendar year of player's 23rd birthday, but given that solidarity contribution is deemed included in the transfer fee payable by the new club, no solidarity contribution is due to this training club. [Mokanda] is entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.*
23. *[Mokanda] is entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.*
24. *[TOTAL] is entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.*
25. *[Caïman] is entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.*
26. *[Panthère] is entitled to solidarity contribution for having registered the player at some point in time between the start of the calendar year of the player's 12th birthday and the end of the calendar year of the player's 23rd birthday.*
27. *No other club is entitled to solidarity contribution.*
28. *All of the above determinations and decisions are reflected in the EPP in question and/or will be considered in the generation of any Allocation Statement from this EPP for the calculation and distribution of training rewards in accordance with article 13 of the FCHR.*
29. *More specifically, in case of an international transfer (cf. article 6 FCHR) with payments, this EPP will be considered in the generation of any future Allocation Statement for the calculation and distribution of any solidarity contribution that may become due at a later stage if and when the payments requirements are met.*
30. *Pursuant to article 57 paragraph 1 of the FIFA Statutes and in accordance with article 10 of the FCHR, this decision and the corresponding allocation statements(s) AS TC-8625 may be jointly appealed before the Court of Arbitration for Sport within 21 days of notification. The final EPP will remain available in TMS".*
17. *On the same date, 12 June 2024, and based on the EPP Decision, the FIFA General Secretariat issued the Allocation Statement, which provides, inter alia, as follows:*

"Conclusion

8. *The new club [Gent] (BEL) shall pay training compensation to the training club(s) of the player in the total amount of EUR 422,047.91.*
 9. *The following training club(s) shall receive the following payment(s).*
 - 9.1. *The training club [Mokanda] (FECOFOOT) shall receive training compensation payments from the new club of the player in the amount of EUR 182,902.99.*
 - 9.2. *The training club [TOTAL] (FECOFOOT) shall receive training compensation payments from the new club of the player in the amount of EUR 142,860.09.*
 - 9.3. *The training club [Caïman] (FECOFOOT) shall receive training compensation payments from the new club of the player in the amount of EUR 76,986.30.*
 - 9.4. *The training club [Panthère] (FECOFOOT) shall receive training compensation payments from the new club of the player in the amount of EUR 19,298.53.*
 10. *The payments defined in this Allocation Statement shall be made through the FIFA Clearing House entity (FCH), in accordance with articles 12, 13 and 14 of the FCHR. The FCH will contact the new club, the relevant training clubs and the relevant member associations to process these payments.*
 11. *According to the relevant provisions of RSTP and FCHR, it is the new club that will be required to pay training rewards due to the training clubs concerned, and the new club may not assign responsibility to pay the amount requested to any other party.*
 12. *Pursuant to article 57 paragraph 1 of the FIFA Statutes and in accordance with article 10 of the FCHR, this decision and its corresponding EPP may be jointly appealed before the Court of Arbitration for Sport within 21 days of notification. The final EPP will remain available in TMS”.*
- IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**
18. On 3 July 2024, Gent filed a Statement of Appeal with CAS, challenging the Appealed Decisions, in accordance with Articles R47 and R48 of the 2023 edition of the Code of Sports-related Arbitration (the “CAS Code”). In this submission, Gent named FIFA as only Respondent and requested that the case be submitted to a sole arbitrator.
 19. On 12 July 2024, Gent filed its Appeal Brief in accordance with Article R51 of the CAS Code.
 20. On 17 July 2024, FIFA informed the CAS Court Office that it agreed with the appointment of a sole arbitrator, provided that the sole arbitrator be selected from the football list.
 21. On 22 August 2024, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the arbitral tribunal

appointed to hear the appeal was constituted as follows:

Sole Arbitrator: Mr Manfred Nan, Attorney-at-Law, Amsterdam, The Netherlands

22. On 19 September 2024, FIFA filed its Answer in accordance with Article R55 of the CAS Code.
23. On 24 September 2024, the CAS Court Office invited the Parties to express their position regarding their preference for a hearing to be held or for the Sole Arbitrator to issue an Award based solely on the Parties' written submissions. Furthermore, the Parties were invited to inform the CAS Court Office whether they requested a case management conference to be held.
24. On 1 October and 11 October 2024 respectively, FIFA and Gent indicated that the dispute could be resolved based on the Parties' written submissions without a hearing and without a case management conference.
25. On 17 October 2024, the CAS Court Office informed the Parties that, pursuant to Article R57 of the CAS Code, the Sole Arbitrator deemed himself to be sufficiently well informed and decided to not hold a hearing. Furthermore, the Parties were informed that, in accordance with Article R59 of the CAS Code, the evidentiary proceedings were closed.
26. On 21 October and 31 October 2024 respectively, FIFA and Gent returned duly signed copies of the Order of Procedure provided to them by the CAS Court Office, on behalf of the Sole

Arbitrator, on 17 October 2024. By signing the Order of Procedure, the Parties, *inter alia*, confirmed that the Sole Arbitrator could decide this matter based on the Parties' written submissions and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

27. The Sole Arbitrator confirms that he carefully heard and considered in his decision all the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral Award.

C. The Appellant

28. Gent's submissions, in essence, may be summarised as follows:
 - The employment contract between Gent and the Player is not the first professional contract of the Player as he had already concluded an employment contract as a professional with Panthère on 2 September 2016.
 - Therefore, and in application of the relevant provisions of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") (Article 20 and Annex 4 FIFA RSTP), no training compensation is due if a player reacquires amateur status (Article 2.2.b Annex 4 FIFA RSTP). Training compensation is only due to the previous club (Diables Noirs), which club however had waived its right to training compensation.

Therefore, no training compensation is due.

- The EPP is based on a factual error (which remained unnoticed during the entire review process) as it mentions 5 April 2002 as the Player's date of birth instead of 5 April 2005, which date of birth is confirmed by the Player's official birth certificate and passport.
- Considering the correct date of birth (5 April 2005), 2017 should be taken as the starting point for calculating training compensation instead of 2014 as was done by FIFA, with the result that the amount of training compensation should be reduced to EUR 198,113.71 instead of EUR 422,047.91.

29. On this basis, Gent submits the following prayers for relief in its Appeal Brief:

"for these reasons,

the court of arbitration for sports is requested to consider and accept the remarks of kaa gent,

in first order, to declare that no training compensation is due

in subsidiary order, if the cas would still decide that training compensation is due, quod non, to reduce the training compensation to eur 198.11,71 eur, taking into account that the decision of the fifa secretariat general is based on wrong factual data".

B. The Respondent

30. FIFA's submissions, in essence, may be summarised as follows:

- FIFA clearly lacks standing to be sued (alone), as Gent failed to name as respondents the Training Clubs which, except for Diablos Noirs, were awarded the right to training compensation in the Appealed Decision. The present appeal must therefore be dismissed in the absence of these mandatory respondents, as any decision issued on the merits would violate their right to be heard. This is a clear-cut situation of lack of standing to be sued and, specifically, a lack of passive mandatory joinder or "*consortité passive nécessaire*".

- As consistently confirmed by CAS, in particular also in CAS 2013/A/3228, point 2 of the summary on the CAS website; also followed by CAS 2021/A/8140, para 51, "*[i]f the prayers for relief, whatever the decision of the CAS panel may be, will affect the rights of a third party that has not been named and included as respondent in the proceedings before the CAS, there is no scope of review for the CAS panel and the appeal must be dismissed*".

- Furthermore, Gent, attempting to demonstrate that the Player's date of birth is incorrect, implicitly questioning the Player's passport issued by FECOFOOT, also failed to call as respondents the URBSFA and FECOFOOT. Both the Player's ITC and the Player's player passport issued by FECOFOOT expressly indicate that the Player's date of birth was 5 April 2002, and none of the parties involved disputed this

information (despite having had the opportunity to do so in light of the provisions of Article 9 FCHR).

- Consequently, the present case cannot be analysed in the absence of all mandatory respondents as they all have a legitimate expectation that the Appealed Decision is final and binding.
- As far as the merits of the horizontal disputes are concerned, the system of training rewards is built upon, *inter alia*, FIFA's necessary reliance upon the information (now electronically) provided by the concerned national associations. Consequently, as both the ITC and the Player's player passport issued by FECOFOOT indicated that the Player was born on 5 April 2002, instead of 5 April 2005 as alleged by Gent in the current proceedings before CAS, the FIFA DRC duly rendered its decision based on the (undisputed) date entered by the Federations, whose information is cardinal in determining a club's entitlement to FIFA's training rewards.

31. On this basis, FIFA submits the following prayers for relief in its Answer:

“(a) Rejecting the requests for relief sought by the Appellant;

(b) Confirming the Appealed Decision; and

(c) Ordering the Appellant to bear the full costs of these arbitration proceedings”.

VI. JURISDICTION

32. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (May 2022 edition), as it determines that “[a]ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question”, and Article R47 of the CAS Code. The jurisdiction of CAS is not contested and is further confirmed by the Order of Procedure duly signed by the Parties.

33. Moreover, Article 10.5(b) FCHR provides as follows:

“The FIFA general secretariat will notify the final EPP and the Allocation Statement to all parties in the EPP review process.

[...]

b) This notification shall be considered a final decision by the FIFA general secretariat for the purposes of article 57 paragraph 1 of the FIFA Statutes and may be appealed to the Court of Arbitration for Sport (CAS)”.

34. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

35. The appeal was filed within the deadline of 21 days set by Article 57(1) FIFA Statutes. The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

36. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

37. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

38. Article 56(2) FIFA Statutes (2022 edition) provides the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

39. Gent did not submit any position with respect to the applicable law.
40. FIFA argues that, in accordance with Article R58 of the CAS Code and Article 56(2) FIFA Statutes, *“the FIFA Statutes and regulations – namely the FCHR and the FIFA Regulations on the Status and Transfer of Players (ed. May 2023), constitute the applicable law to the matter at hand, and Swiss law shall be applied subsidiarily should the need arise to fill a possible gap in the FIFA regulations”.*
41. The Sole Arbitrator finds that the present proceedings are primarily governed by the various regulations of FIFA, more specifically the FCHR (edition October 2022) and the FIFA RSTP (edition May 2023) and, additionally, Swiss law.

IX. MERITS

A. The Main Issues

42. The present dispute concerns, in essence, FIFA’s alleged lack of standing to be sued alone and, on the substance, whether the Player had been registered as a professional football player before his registration with Gent on 5 September 2023, and whether the Player was born in 2002 or 2005.
43. Considering the foregoing, the Sole Arbitrator will first determine whether FIFA lacks standing to be sued alone.
44. The first point of contention in these proceedings is whether FIFA has standing to be sued, in the absence of the Training Clubs and the Federations having been called as respondents.
45. FIFA is the entity that issued the Appealed Decisions, and the presence of FIFA as a party in these proceedings cannot be rejected. This is confirmed by CAS jurisprudence, holding, *inter alia*, as follows:

“Keeping in mind that the Appealed Decision is to be qualified as an association decision, this lacuna should be filled by Swiss law, and more precisely by Article 75 of the Swiss Civil Code, which reads as follows: ‘Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof.’ As per this provision, the challenge against an association decision must, in principle, be filed against the association that issued such a decision. This applies to decisions of FIFA as well. While there are circumstances in which FIFA’s presence is mandatory (those that contain a vertical element – vertical disputes), there are certainly other circumstances and

situations – such as those in the present case – in which FIFA’s presence is optional (those that contain a horizontal element – horizontal disputes), i.e., its absence from the arbitral proceedings cannot cause - per se - the dismissal of the appeal. However, even if optional, the presence of FIFA among the respondents cannot be rejected by FIFA, in view of the clear rule of Article 75 of the Swiss Civil Code”. (CAS 2022/A/8960, para 97 of the abstract as published on the CAS website)

46. In any event, it is not in contention that FIFA has standing to be sued as such. Rather, FIFA maintains that it cannot be sued in the absence of the Training Clubs and the Federations.
47. After being provided with FIFA’s Answer, Gent did not request for a hearing or a second round of submissions to rebut FIFA’s position in this respect, but instead informed the CAS Court Office that the dispute could be resolved based on the Parties’ written submissions.
48. The Sole Arbitrator observes that, by means of the Appealed Decisions, the Training Clubs, except for Diablos Noirs, were awarded training compensation as follows:
 - Mokanda: EUR 182,902.99;
 - TOTAL: EUR 142,860.09;
 - Caïman: EUR 76,986.30;
 - Panthère: EUR 19,298.53.
49. Gent, the Training Clubs and the Federations were all parties in the EPP review process and were all notified of the Appealed Decisions.

50. However, if Gent’s requests for relief would be granted, the Appealed Decisions would be annulled, or the amounts awarded therein would be reduced, directly and adversely affecting the rights of the other four afore-mentioned clubs. Indeed, if Gent’s appeal would be upheld, these clubs would lose their entitlement to the amounts of training compensation granted to them by means of the Appealed Decisions or these amounts would be reduced.
51. Accordingly, the Sole Arbitrator finds that the four afore-mentioned clubs have a clear and direct interest in the outcome of the present proceedings, more specifically that Gent’s appeal be dismissed.
52. However, because the Club did not call them as respondents, they have been deprived of their right to be heard. Had they been granted their right to be heard, they could have defended themselves against the factual and legal allegations of the Club. It cannot be excluded that the submissions of these clubs could have an impact on the outcome of the merits of the present proceedings.
53. Consequently, the Sole Arbitrator finds that FIFA in principle indeed lacks standing to be sued alone and/or that he is barred from adjudicating and deciding on the merits of the case without Mokanda, TOTAL, Caïman and Panthère having been called as respondents.
54. CAS jurisprudence suggests that there may be a possibility to repair the default of not having called all parties that may be adversely affected by the appeal as respondents:

“In accordance with the CAS jurisprudence, a party has standing to be sued if it is personally obliged by the ‘disputed right’ at stake, i.e. if said party has some stake in the dispute because something is sought against it (CAS 2008/A/1620, para. 4.1; CAS 2007/A/1367, para. 37; and, CAS 2012/A/3032 para. 42).

CAS Panels repeatedly held that, when assessing whether a party may have standing to be sued, it has to be analysed if it ‘stands to be sufficiently affected by the matter at hand in order to qualify as a proper respondent within the meaning of the law’ (CAS 2017/A/5227, para. 35). CAS Panels also accepted the principle that ‘no order for relief can be granted which affects the rights and legitimate interests of absent third parties’ (see CAS 2020/A/7061, para. 125; CAS 2019/A/6334, para. 57; CAS 2016/A/4642 para. 120; CAS 2004/A/594, para. 51).

In particular, CAS Panels decided on several occasions that ‘the question of standing to be sued [...] must be resolved on the basis of a weighting of the interests of the persons affected by the said decision. The question, thus, is who [...] is best suited to represent and defend the will expressed by the organ of the association’ (CAS 2016/A/4787 para. 109; CAS 2015/A/3910, para. 138, endorsed by CAS 2016/A/4602, paras. 81 ff.).

It follows that when deciding who is the proper party to defend an appealed decision, CAS panels proceed by an analysis of the interests involved and by taking into account the role assumed by the association in the specific case (CAS 2020/A/7356, para. 64).

The Sole Arbitrator agrees that, on a general point of view, a sports federation such as the Respondent is deemed to be best suited to represent and defend the interests of its members in cases where a request for relief

would have an indirect bearing on all its members (a similar reasoning was adopted in the case CAS 2016/A/4787).

However, this is not necessarily the case where a request for relief directly affects one or several specific members (CAS 2020/A/7061, para. 126). In this scenario, the appeal might also have to be directed against the potentially affected member(s) as co-respondent(s) alongside the sports federation from which the appealed decision emanates. This is essential for an arbitral tribunal to ensure that the right to be heard of the member(s) concerned is respected (CAS 2019/A/6351).

Consequently, while noting that he would be in principle prevented from granting any request for relief that would directly affect the rights of an absent third party, the Sole Arbitrator deems that he must deal with the Appellant’s requests for relief in accordance with the above-mentioned test, i.e. in a manner which takes into account all the interests involved, the role assumed by the federation as well as the rights of defence and in particular the right to be heard of the directly affected parties” (CAS 2021/A/8225, paras. 75-81 of the abstract published on the CAS website).

55. The Sole Arbitrator finds that, although there may potentially be cases where a respondent like FIFA is best suited to represent the interests of its members if such members are only indirectly affected, eliminating the need to call such members as respondents, this is different in the matter at hand. On the basis of the above citation, the Sole Arbitrator feels strengthened in his opinion that Gent should have called the Training Clubs as respondents, given that they could potentially be directly and adversely affected by the

outcome of the present appeal arbitration proceeding.

56. Furthermore, the Sole Arbitrator finds that FIFA is not “*best suited*” to defend the Appealed Decisions. FIFA has no direct knowledge of the Player’s contractual situation with the Training Clubs or the Player’s date of birth. Rather, the Appealed Decisions have been issued by the FIFA General Secretariat exclusively on the basis of the applications submitted by Gent, (some of) the Training Clubs and the Federations. In the matter at hand, FIFA merely acted as an independent court of first instance in a horizontal dispute between, ultimately, Gent and URBSFA on the one hand, and the Training Clubs and FECOFOOT on the other. FIFA does not have a personal and/or direct interest in the outcome of the present proceeding, besides general objectives such as maintaining a consistent line of jurisprudence and supporting decisions of its adjudicatory bodies.
57. In the present appeal arbitration proceedings before CAS, the Club advanced evidence that was not part of the record in the proceedings leading to the Appealed Decisions.
58. Considering these arguments, including the filing of new evidence by Gent, the Sole Arbitrator notes that the assessment of Gent’s (new) arguments with supporting documents require an analysis in which the explanations of the Training Clubs concerned (and of the Federations, particularly the FECOFOOT regarding the Player’s Player Passport), would be important to consider. FIFA is not in a position to

confirm whether the new evidence submitted by Gent is accurate or not.

59. Accordingly, the Sole Arbitrator finds that it is impossible for him to do justice without hearing the views of the Training Clubs, or at least affording them the possibility to do so. Deciding on Gent’s appeal without affording the Training Clubs a right to be heard would comprise an impermissible violation of the due process rights of the Training Clubs. FIFA cannot represent the interests of the Training Clubs and the Federations in this instance.
60. As determined in Article R48 of the CAS Code, it is the responsibility of the appellant to name the respondent(s). After the passing of the 21-day deadline to appeal, there is in principle no possibility anymore for an appellant to add respondents to the proceedings, nor has there been any request of Gent to do so in the matter at hand.
61. This is not a statement that the Appealed Decisions are correct or that Gent’s factual or legal contentions are incorrect, but because Gent did not call the Training Clubs and the Federations as respondents in the present proceedings, the Sole Arbitrator is barred from assessing the merits of Gent’s appeal.
62. Consequently, based on all the above-mentioned facts and circumstances, the Sole Arbitrator finds that the substantial issues raised by Gent (whether the Player had been registered as a professional football player before his registration with Gent on 5 September 2023, and whether the Player was born in 2002 or 2005) in the present arbitration proceedings would have

required at least the participation of Mokanda, TOTAL, Caïman and Panthère.

B. Conclusion

63. Based on the foregoing, the Sole Arbitrator holds that FIFA lacks standing to be sued alone in connection with the Appealed Decisions.
64. Consequently, Gent's appeal is dismissed, and the Appealed Decisions are confirmed.
65. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 3 July 2024 by K.A.A. Gent against the decisions issued on 12 June 2024 by the General Secretariat of the *Fédération Internationale de Football Association* is dismissed.
2. The decisions issued on 12 June 2024 by the General Secretariat of the *Fédération Internationale de Football Association* are confirmed.
3. (...).
4. (...).
5. All other and further motions or prayers for relief are dismissed.

Arbitration CAS 2024/A/10722¹

A. v. International Olympic Committee (IOC) & B.

22 April 2025 (operative part of 30 July 2024)

Olympic Games; Eligibility to participate as an Individual Neutral Athlete at the Olympic Games Paris 2024; Admissibility of new documents; Standing to be sued; Applicable legal framework for IOC eligibility decisions; Condition of application of the IOC eligibility criteria regarding an Individual Neutral Athlete

Panel

Prof. Ulrich Haas (Germany), President

Mr Jeffrey Benz (USA)

Prof. Luigi Fumagalli (Italy)

1. Under Article R56 of the CAS Code, there are exceptional circumstances that allow the appellant to supplement his appeal after the exchange of submissions if the matter in dispute is of great importance for him and any evidence that helps the CAS panel to come closer to the truth is particularly helpful.
2. The term standing to be sued, or *“légitimation passive”* in French, refers under the subsidiarily applicable Swiss law to the party against whom an appellant must direct its claim to be successful. A party has standing to be sued only if it is personally obliged by the claim brought by an appellant. When deciding who is the proper party to defend an appealed decision, CAS

panels sometimes also proceed by balancing the interests involved and considering the role assumed by the association in the specific circumstances. In determining the parties to be summoned and heard in the proceedings, CAS panels cannot issue an award which affects the rights of a third party if that party has not been correctly summoned by the appellant and fully heard in the proceedings.

3. The legal yardstick applicable to determine the legality of an IOC decision to declare an athlete ineligible to participate to the Olympic Games as an Individual Neutral Athlete is not the one applicable in disciplinary matters. Indeed, the athlete is not (at the relevant time) contractually bound to the IOC. Thus, absent any legal relationship, there is no room for a disciplinary measure, because there exists no obligation arising from a contract or membership that can or needs to be enforced. The power not to contract with a third party does not need a legal basis in the rules and regulations of an association. Moreover, Rule 44(3) of the Olympic Charter establishes the IOC's broad discretionary authority in determining Olympic participation. Instead, the limits to the autonomy of a sport organisation arising from statutory law to select its members or participants apply. It follows that the burden of proof rests on the athlete to show that – as a matter of exception – s/he has a claim

¹ The Award has been redacted at the request of the Appellant to ensure that the identity of the athlete is not revealed, to which the Respondents have agreed.

against the IOC to admit him/her to the Olympic Games.

4. Under the IOC *“Principles Relating to the Implementation of the Participation for Individual Neutral Athletes and their Support Personnel with a Russian or Belarusian Passport at the Olympic Games Paris 2024”* (the “AIN Principles”), the requirement not to *“act against the peace mission of the Olympic Movement by actively supporting the war in Ukraine”* is assessed objectively. The relevant test is whether, from the standpoint of a reasonable observer, the individual’s conduct amounts to active support of the war. If so, exclusion from the Olympic Games is justified, regardless of the athlete’s subjective intentions or personal stance. What matters are the actions and their public perception, as these may undermine the IOC’s reputation. Accordingly, a CAS panel needs not inquire into the athlete’s motives: it is sufficient that the conduct objectively demonstrates active support for the war.

I. THE PARTIES

1. A. (the “Appellant” or the “Athlete”) [...].
2. The International Olympic Committee (the “First Respondent” or the “IOC”) is the governing body of the Olympic Games and the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer

and winter Olympic Games, including the Summer Olympic Games in Paris in 2024 (“Olympic Games Paris 2024”) fulfilling the mission, role and responsibilities assigned by the Olympic Charter, which includes promoting peace through sport.

3. B. (the “Second Respondent” or the “B”) is the world governing body for the sport of [...], recognised as such by the IOC.
4. The Appellant and Respondents are jointly referred to as the “Parties”.

II. Factual Background

5. The present dispute is primarily based on a decision by the IOC to declare the Appellant ineligible to participate as an Individual Neutral Athlete at the Olympic Games Paris 2024, based on the IOC *“Principles Relating to the Implementation of the Participation for Individual Neutral Athletes and their Support Personnel with a Russian or Belarusian Passport at the Olympic Games Paris 2024”* (the “AIN Principles”). The decision to declare the Appellant as ineligible for the said Games was made by the IOC AIN Eligibility Review Panel (the “AINERP”) on 23 May 2024 (the “Decision”). The Appellant only became aware of the Decision:
 - i. When, on 15 June 2024, the IOC released the first list of athletes eligible to compete at the Olympic Games Paris 2024 as AIN, which did not include the Appellant’s name. The said list was updated on 3 July 2024, and the Appellant’s name was not included (the “First IOC Communication”).
 - ii. When, on 5 July 2024, the IOC

AIN Eligibility Review Panel (the “AINERP”) wrote to the Appellant stipulating that the Appellant does not satisfy the criteria in the AIN Principles – in relevant parts – as follows:

“Based on publicly available information, the AINERP understands that you have been, between March 2022 and June 2024, affiliated with one of the military or security clubs indicated on the official lists established by the Russian Ministry of Sport and Tourism. The AINERP shall only refer to the official documents publicly available.

On this basis, the AINERP considered that you are not fulfilling the conditions defined by the IOC Executive Board to be invited to take part in the Olympic Games Paris 2024”.

(the “Second IOC Communication”)

6. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, the CAS file and the content of the hearing that took place on 29 July 2024. References to additional facts and allegations found in the Parties’ written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it shall refer in this Award only to those submissions and evidence it deems necessary to explain its reasoning.

i) The Activities of the Appellant

7. Since the Appellant was young, he was training at the [...] club, [...] (the “[...] Club”), in [...], the capital city of [...],

Russia. The [...] Club is based outside another club, [...] Club (also referred to as [...] Club), which is a multi-sport club, a Russian public organisation with some parts still being closely linked to [...].

8. In [...], the Appellant won the [...] at the [...] event at the [...] in [...] (“[...]”). In the same year, the Appellant opened his own [...] school named [...] School, based in [...] (the “School”), and has since began to conduct his own personal training at the School, exclusively. Also in the same year, [...], [...] Club approached the Appellant to be an affiliate, wherein the Appellant entered into an agreement with [...] Club to take part in several sporting events [...] and provide training and services to the said Club. Since [...], the Appellant was regularly invited by Russian entities and [...] authorities to participate in related events based on his [...] prowess and accomplishments.
9. In [...], the Appellant won the [...] at the [...] at the [...] in [...] (“[...]”). After the said [...], the Appellant received additional funding from the Russian Ministry of Sport and other sponsors, wherein he invested those funds in the School.
10. On [...], the Appellant allegedly resigned and ended his collaboration with [...] Club. However, to date, the Appellant is still listed as a member of [...] Club on the Club’s website.
11. From [...], the Appellant became the manager of the School, which became increasingly (and eventually, completely) independent from the Russian Ministry of Sport and other sponsors.

ii) **The IOC Recommendations against Russia**

12 On 28 February 2022, the IOC issued a resolution following Russia's invasion of Ukraine, providing in relevant parts as follows:

"1. *In order to protect the integrity of global sports competitions and for the safety of all the participants, the IOC EB recommends that International Sports Federations and sports event organisers not invite or allow the participation of Russian and Belarusian athletes and officials in international competitions.*

2. *Wherever this is not possible on short notice for organisational or legal reasons, the IOC EB strongly urges International Sports Federations and organisers of sports events worldwide to do everything in their power to ensure that no athlete or sports official from Russia or Belarus be allowed to take part under the name of Russia or Belarus. Russian or Belarusian nationals, be it as individuals or teams, should be accepted only as neutral athletes or neutral teams. No national symbols, colours, flags or anthems should be displayed.*

Wherever, in very extreme circumstances, even this is not possible on short notice for organisational or legal reasons, the IOC EB leaves it to the relevant organisation to find its own way to effectively address the dilemma described above.

In this context, the IOC EB considered in particular the upcoming Paralympic Winter Games Beijing 2022 and reiterated its full support for the International Paralympic Committee (IPC) and the Games.

[...]" (the "2022 Recommendations").

13. The B. implemented the 2022 Recommendations and the Appellant was not authorised to compete in international competitions in 2022, which included the [...].

14 On 12 October 2022, the IOC Executive Board suspended the Russian Olympic Committee (the "ROC") with immediate effect until further notice due to the ROC's unilateral decision, on 5 October 2022, to include all regional sports organisations under the authority of the Ukraine National Olympic Committee as its member. The IOC Executive Board stated that the IOC would reserve the right to decide on the participation of AINs with a Russian passport for the Olympic Games Paris 2024.

15. On 28 March 2023, the IOC issued the "Recommended Conditions of Participation for Individual Neutral Athletes and Support Personnel with a Russian or Belarusian Passport in International Sports Competitions Organised by the International Federations and International Sports Event Organisers" (the "2023 Recommendations"), which included the following guidelines for athletes with a Russian or a Belarusian passport to compete as Individual Neutral Athletes, as follows:

"[...]"

Individual Neutral Athletes and their support personnel may return to international sports competitions only in an individual and neutral capacity, and not in any way as a representative of the Russian Federation or the Republic of Belarus, or any other organisation in their country, including their National Olympic Committee (NOC) or National Federation (NF).

Individual Neutral Athletes and support personnel who are contracted to the Russian or Belarusian military or national security agencies cannot participate in any international sports competition.

[...]

Only those Individual Neutral Athletes and support personnel who have not acted against the peace mission of the Olympic Movement by actively supporting the war in Ukraine may be invited to participate in international sports competitions.

Contracted members of the Russian and Belarusian military or national security agencies are considered to support the war.

With regard to other active supporting measures, all relevant circumstances, in particular public statements, including those made on social media; participation in pro-war demonstrations or events; and the displaying of any symbol supporting the war in Ukraine, for example, the “Z” symbol, have to be taken into consideration

[...]”.

16. On 4 April 2023, the B. announced that it would examine the eligibility of Russian and Belarusian athletes following the 2023 Recommendations. Thereafter, the Chairman of the B. Legal & Ethics Commission formed a

Panel of three members in order to review the eligibility criteria of athletes with Russian or Belarusian passports (the “B. Panel”).

17. On [...], the B. Panel declared the Appellant eligible for international competitions.
18. In [...], the Appellant took part in the [...] (the “[...] Championship”) as an AIN, wherein the Appellant [...]. The Appellant was the [...].
19. Following the 2022 and 2023 Recommendations, the Ukrainian government condemned the IOC’s decision and maintained a public blog and list of athletes who have allegedly supported the war in Ukraine, which included the name of the Appellant.

iii) **Circumstances Surrounding the Appellant’s Qualification and Eligibility for the Olympic Games Paris 2024**

20. On 6 December 2023, the IOC and the B. adopted the Qualification System for [...] for the Olympic Games Paris 2024 (the “[...] QS”).
21. On 8 December 2023, the IOC adopted the “Principles Relating to the Implementation of the Participation for Individual Neutral Athletes and their Support Personnel with a Russian or Belarusian Passport at the Olympic Games Paris 2024” (the “AIN Principles”), providing in relevant parts as follows:

“Individual Neutral Athletes (AINs) with a Russian or Belarusian passport and their support personnel may take part in the Olympic Games Paris 2024 only in an individual and neutral capacity, and not in

any way as representatives of the Russian Federation or the Republic of Belarus, or any other organisation in their country, including their National Olympic (NOC) or National Federation (NF).

Only Individual Neutral Athletes who have fulfilled the specific eligibility and sporting qualification criteria set by their IF can be considered by the IOC for entry into the Olympic Games Paris 2024.

Only those Individual Neutral Athletes and support personnel who have not acted against the peace mission of the Olympic Movement by actively supporting the war in Ukraine may be invited to participate in the Olympic Games Paris 2024. In line with this principle, Individual Neutral Athletes and support personnel who are contracted to the Russian or Belarusian military or national security agencies cannot participate in the Olympic Games Paris 2024.

[...]

Individual Neutral Athletes and their support personnel will be registered on an individual basis. The registration (accreditation and sport entries) of Individual Neutral Athletes and their support personnel will be coordinated jointly between the Paris 2024 Organising Committee, the relevant IF, and the IOC.

Only Individual Neutral Athletes who have fulfilled the specific eligibility and sporting qualification criteria set by their IF can be considered by the IOC for entry into the Olympic Games Paris 2024.

Like all athletes participating in the Olympic Games Paris 2024, the Individual Neutral Athletes must sign the Conditions of Participation form.

The IFs will be required to submit the list of qualified and eligible AIN athletes (together with the criteria and reasoning used to confirm eligibility) to the IOC upon completion of qualification in the relevant sport/discipline, and the IOC will then review these lists for a final decision on entry by sport.

In addition, Individual Neutral Athletes and their support personnel must refrain from any activity or communication associated with the national flag, anthem, emblem or any other symbol of the Russian Federation, the Republic of Belarus, their NFs or NOCs, or support for the war in Ukraine (including, without limitation, the “Z” symbol, Saint George colours, and any other military branding and slogans), at any official venue or in the media (including interviews, social media – retweets, reposting, etc.) prior to, during and following the Olympic Games Paris 2024. This includes any national events, related to their participation in the Olympic Games Paris 2024.

The IOC will seek an independent evaluation of the eligibility of each qualified AIN athlete proposed by the IF, and their support personnel. Once the independent evaluation has been completed, the IOC will confirm to Paris 2024 which athletes and support personnel can be entered in an individual neutral capacity.

The IOC, at its full discretion, will have final authority to determine the entry and accreditation for any individual, and may reconsider that determination at any time where it deems appropriate to do so. No individual neutral athlete or their support personnel with a Russian or Belarusian passport is entitled as a right to be entered in the Olympic Games Paris 2024”.

- 22 On [...], the B. Panel declared the Appellant eligible to participate at the [...].
23. On 19 March 2024, the IOC Executive Board established the AINERP to evaluate the eligibility of each athlete and support personnel with a Russian or Belarusian passport who obtained, or could obtain, a qualification place for the Olympic Games Paris 2024. The AINERP is composed of three members, *viz*, Ms. Nicole Hovertsz (IOC Vice President), Mr. Pau Sadol (IOC Ethics Commission), and Mr. Seung Min Ryu (IOC Athletes' Commission), with Ms Paquerette Girard Zappelli (IOC Chief Ethics and Compliance Officer) as secretary. The AINERP also appointed Sportradar Integrity Services ("Sportradar") as its independent external expert to conduct due diligence on each AIN.
24. On 2 April 2024, Sportradar prepared an individual report dated 15 March 2024 on the Appellant which indicated the Appellant's association with [...] Club, which was deemed to be an entity affiliated with the Russian [...] (the "Sportradar Report"). In the Sportradar Report, there was further evidence of the Appellant's expression of support for the war in Ukraine:
- a) On [...], on the day of Russia's invasion of Ukraine, the Russian [...] team was at a training camp in [...], Russia, wherein a video was posted on Instagram showing the team sitting under a banner of President Vladimir Putin which reads in Russian, but in translation, *"Russian [...]. For a strong Russia! For a strong President!"*
 - b) On [...], the Appellant participated in [...] in [...], Russia, [...], at which the Appellant was surrounded by athletes and members of the Russian military wearing the symbol "Z", which is used both as a Russian military insignia and as a public symbol of Russia's invasion of Ukraine. In addition, there was a banner reading in Russian, as translated, *"Peace without Nazism, For Russia"*, alluding to the purported "denazification" of Ukraine, which is part of the Kremlin's asserted basis for the invasion.
 - c) In [...], the Appellant attended [...] in [...], Russia, of a [...] dedicated to Russian law enforcement officers killed in Donetsk and Luhansk, Ukraine, during Russia's "special military operation", at which the Appellant was photographed alongside Russian officials under the banner bearing the symbol "Z" which reads, in Russian, in translation, *"[...] tournament dedicated to the memory of law enforcement officers killed during the special operation on the territory of the LPR, DRP and Ukraine"*.
 - d) In [...], the Appellant attended, as a guest, a [...] in [...], Russia, dedicated to the memory of [...] military personnel who were killed in the war against Ukraine.
 - e) According to a Twitter (now

X) post published by “Base of Ukraine Sports” in November 2023, the Appellant liked an Instagram post published on [...] with the symbol “Z” and supporting the war in Ukraine. The Appellant had since removed his like from the said post.

f) In [...], the Appellant was photographed with a Russian soldier wearing a military uniform, which soldier had allegedly taken part in the war in Ukraine.

25. Based on the Report, the B. Panel reviewed its decision on the eligibility of the Appellant and determined that the Appellant did not meet the criteria set out in the AIN Principles.

26. On [...], two days before the Appellant was due to compete in the [...], the Appellant received a letter from B. informing him that he was no longer eligible to compete. The letter reads – in relevant parts – as follows:

“Panel Decision

On the eligibility of [...] holding a Russian or Belarussian passport to participate in any international event on the official B. calendar:

[...]

The Chairman of the B. Legal & Ethics Commission has formed a Panel of three (3) members of this Commission to review the eligibility criteria of the following athlete/ athlete support personnel pursuant to the Conditions, and based on the individual reports submitted after due diligence conducted by Sportradar, a private integrity service provider, in relation to potential violations of the Conditions.

Considering that new information concerning potential declarations contrary to the Conditions were reported to the B. Administration, a review of the decision [...] was carried out.

In view of the above, the Panel render the following decision:

1) *The following athlete is declared **ineligible**.*

A.	[...]	[...]	Athlete	[...]	[...]

This decision enters in force on the date of the decision.

[...]” (emphasis in original) (the “Final B. Decision”).

27. Upon receipt of the Final B. Decision, the Appellant contacted the President of the [...] (the “[...] President”). The Appellant submits that the [...] President allegedly informed him that the IOC had found him ineligible as the Appellant was contracted to [...] Club. The Appellant requested the [...] President to provide him with the said communication from the IOC deeming him ineligible, but the Appellant never received the said letter.

28. At the [...], two AIN athletes from Russia, viz, [...], finished in the [...] positions and secured one quota place each.

29. Sometime between [...], the Appellant [...]. The [...] President informed the Appellant that the Appellant’s papers would be sent to the IOC, and his selection would be dependent entirely on the IOC.

30. On 6 May 2024, B. sent a list of athletes to the IOC on the eligibility and qualification status of B. athletes, which reflected the development of the Appellant's (in)eligibility status.
31. On 23 May 2024, the Appellant, together with [...], wrote a letter to the B. and IOC Presidents with a request to be authorised to participate at the Olympic Games Paris 2024 as AIN.
32. On the same day, the AINERP declared the Appellant as ineligible to take part in the Olympic Games Paris 2024 pursuant to the AIN Principles (the "Decision") but did not communicate the Decision to the Appellant or other relevant parties immediately.
33. The [...] (the "[...]") submitted [...] athletes in the [...] competition for the Olympic Games Paris 2024 as AIN, including the Appellant's name in the [...].
34. On [...] 2024, the IOC released the first list of athletes eligible to compete at the Olympic Games Paris 2024 as AIN, which did not include the Appellant's name (the "First IOC Communication"). The said list was updated on [...] 2024, and the Appellant's name was not included.
35. On 24 June 2024, the Appellant wrote to the IOC Chief Ethics and Compliance Officer, members of the AINERP, and the Chair of the IOC Athletes' Commission, requesting clarification on the eligibility process, which correspondence provides in relevant parts as follows:

"[...] More specifically, I would like to put forward the lack of transparency in connection

with the vetting process. I strongly believe that I do meet the vetting requirements. I have resigned from the [...] Sport Society in [...] on January 1st 2022, I have no military associations, nor do I receive any support or grants from the military.

[...]"

36. On 5 July 2024, the AINERP wrote to the Appellant stipulating that the Appellant does not satisfy the criteria in the AIN Principles, stating, in relevant parts as follows:

"Based on publicly available information, the AINERP understands that you have been, between [...], affiliated with one of the military or security clubs indicated on the official lists established by the Russian Ministry of Sport and Tourism. The AINERP shall only refer to the official documents publicly available.

On this basis, the AINERP considered that you are not fulfilling the conditions defined by the IOC Executive Board to be invited to take part in the Olympic Games Paris 2024"

(the "Second IOC Communication").

III. THE APPEAL PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

37. On 5 July 2024, the Appellant filed the Statement of Appeal against the Respondents with the CAS in accordance with Article R48 of the CAS Code of Sports-related Arbitration (2023 edition) (the "CAS Code"). In the Statement of Appeal, the Appellant, *inter alia*, requested for an expedited procedure.

38. On 8 July 2024, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal and invited the Appellant to submit his Appeal Brief. In the same letter, the CAS Court Office invited the Respondents to comment on the Appellant's request for an expedited procedure and nomination of an arbitrator.

arbitrator chosen by the Respondents;

 - 22 July 2024: Filing of the Respondent's Answer (with a direct copy to the Appellant); and
 - 29 July 2024: Hearing, to the extent necessary.
39. On 9 July 2024, the IOC informed the CAS Court Office that it agreed with the Appellant's request for an expedited procedure.
40. On the same day, the CAS Court Office acknowledged receipt of the IOC's letter of 9 July 2024 and invited B. to respond on the same and on the updated procedural calendar jointly proposed by the Appellant and the IOC.
41. Still on the same day, the Appellant filed his Appeal Brief in accordance with Article R51 of the CAS Code.
42. On 10 July 2024, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief and invited the Respondents to file their respective Answers.
43. On the same day, B. informed the CAS Court Office that it agreed with the Appellant's request for an expedited procedure, and the updated procedural calendar.
44. Still on the same day, the CAS Court Office acknowledged receipt of the letter from B. of even date, and confirmed the following procedural calendar:
 - 12 July 2024: Appointment of the
45. On 12 July 2024, the IOC informed the CAS Court Office that the Respondents jointly nominated Professor Luigi Fumagalli as arbitrator.
46. On 15 July 2025, the CAS Court Office acknowledged receipt of the IOC's letter dated 12 July 2024.
47. On 16 July 2024, the Appellant informed the CAS Court Office that the Appellant nominated Mr. Jeffrey Benz as arbitrator.
48. On the same day, the CAS Court Office acknowledged receipt of the Appellant's letter of even date.
49. On 22 July 2024, the IOC and B. filed their respective Answers pursuant to Article R55 of the CAS Code.
50. On 23 July 2024, the Appellant requested that the CAS provide "*the confirmation of the composition of the panel and an invitation to attend the hearing ... by tomorrow at noon CET*".
51. On 24 July 2024, the CAS Court Office acknowledged receipt of the Respondents' Answers. In the same Letter, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel to decide the present dispute was constituted as follows:

President:

Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany

Arbitrators:

Mr. Jeffrey G. Benz, Attorney-at-Law and Barrister in London, United Kingdom

Professor Luigi Fumagalli, Professor of Law and Attorney-at-Law in Milano, Italy

52. On the same day, the CAS Court Office invited the Parties to attend the hearing on 29 July 2024 via videoconference and enclosed an Order of Procedure (“OoP”) for the Parties’ signature. The Appellant and the First Respondent submitted their signed OoP on 26 July 2024, the Second Respondent on 25 July 2024.

53. On 26 July 2024, the Appellant submitted (together with an updated list of exhibits) an additional document to be included in the case file (Statement by the Russian Ministry of Sport, Exhibit A32) on the basis of the following exceptional circumstances (Article R56 of the CAS Code):

“In its Answer of 22 July 2024, the IOC reproached the Appellant his affiliation to the [...] club, relying on lists of athletes and officials issued by the Russian Ministry of Sport for the years 2022 to 2024 (Answer, §67, Exhibits R-18 to R-20). The Appellant was unaware of the existence of such documents before their filing by the IOC and could not have anticipated that they existed. Such lists have not been provided by

the IOC with its email to the Appellant of 5 July 2024 (Exhibit A17).

Exhibit A32 is a more recent statement issued by the Russian Ministry of Sport explaining why the content of the lists of the Ministry produced by the IOC is incorrect with respect to the Appellant’s alleged affiliation with [...]. This document confirms that there is no current link between the Appellant and the [...] Club. ...

The Appellant therefore stated in its Appeal Brief that he has no connection with the [...] Club since the end of [...]. Consequently, this written statement confirms the statements made by the Appellant in its Appeal Brief and rebuts the evidence filed by the IOC.

The Respondents are also not harmed by the production of Exhibit A32 as this exhibit only relates to allegations already previously made by the Appellant. Further, the Respondents will be able to comment on the content of this statement at the hearing of 29 July 2024”.

54. On the same day, the CAS Court Office acknowledged receipt of the Appellant’s letter and granted Respondents until the end of 26 July 2024 to file their comments to the Appellant’s request. The letter further advised the Parties that the Appellant’s request would then be dealt with at the outset of the hearing scheduled for 29 July 2024.

55. On the same day, the Appellant wrote to the CAS Court Office as follows:

“Reference is made to your correspondence earlier today and the new Exhibit filed by the Appellant. Due to an administrative oversight, I had not received the updated list for 2024 mentioned in such correspondence.

You will see it attached, together with an English translation of the relevant lane. ...”.

56. Still on the same day, the First Respondent in its letter to the CAS Court Office objected to the Appellant’s request on the grounds that there were no exceptional circumstances to admit the new document on file. More specifically, the First Respondent stated:

“According to the CAS case law, “exceptional circumstances” are recognised when the need to present rebuttal evidence only becomes apparent after the other party’s submission.¹ Such evidence must be genuine rebuttal evidence and not merely new additional evidence disguised as rebuttal evidence.

In the present case, the Appellant cannot reasonably claim that the IOC’s reference to the lists of athletes and officials issued by the Russian Ministry of Sport was unknown to him until the filing of the IOC’s Answer.

First, the Appellant’s claim that “such lists have not been provided by the IOC with its email to the Appellant of 5 July 2024” is irrelevant. As explained by the AINERP in this email, these lists are publicly available information. These lists could easily have been found by the Appellant on the website of the [...] or the website of the Russian Ministry of Sport and Tourism.

Second, the Appellant was perfectly aware of the existence of these lists on 5 July 2024 at the latest. Indeed, on 5 July 2024, the AINERP informed the Appellant that the decision of his ineligibility decision was based on ‘publicly available information’ according to which he has been ‘between [...], [...] affiliated with one of the military or security clubs indicated on the official lists established by the Russian Ministry of Sport and Tourism.’ The submission of such late evidence

at the eleventh hour on the (false) basis that he was ‘unaware of the existence’ of these lists does not constitute exceptional circumstances under Article R56(1) of the CAS Code that would allow the Appellant to supplement his appeal after the exchange of submissions”.

57. Always on the same date, also the Second Respondent objected to the belated filing of new documents by the Appellant.

58. On 27 July 2024, the CAS Court Office advised the Parties that the issue of the new documents filed by the Appellant would be decided by the Panel at the outset of the hearing. Furthermore, the letter enclosed – on behalf of the President of the Panel – a tentative hearing schedule for the Parties’ attention.

59. On the same day, the Appellant responded to the objections raised by the Respondents and submitted that he “could reasonably not provide such a statement, as he had not been heard before the Challenged Decision was issued, and as he only had access to the detailed reasons for the IOC decision, and the supporting evidence ... when he received the Answering brief by the IOC”.

60. In a letter dated 29 July 2024, the CAS Court Office reminded the Parties that the issue of the late filing of the documents would be dealt with at the outset of the hearing.

61. On 29 July 2024, a hearing took place by videoconference before the Panel. Besides Ms. Lia Yokomizo (Counsel of the CAS), the following persons attended the hearing:

For the Appellant

- The Appellant;
- Mr. Claude Ramoni (Counsel for the Appellant);
- Mr. Flavio Pirrello (Trainee Counsel for the Appellant);
- Ms. Margarita Larshina (Interpreter);

For the IOC

- Mr. Antonio Rigozzi (Counsel for the IOC);
- Mr. Patrick Pithon (Counsel for the IOC);

For B.

- Mr. Jean-Pierre Morand (Counsel for B.);
- Mr. Michael Kottmann (Counsel for B.); and
- [...].

62. At the outset of the hearing, the Parties confirmed that they had no objection to the jurisdiction of the CAS and the formation of the Panel. Furthermore, the Panel decided to admit the new documents filed by the Appellant on 26 July 2024 on file.

63. At the closing of the hearing, the Parties declared that their right to be heard had been respected and that they had no objection to the way the hearing had been conducted.

64. On 30 July 2024, the CAS Court Office communicated the operative part of the Arbitral Award issued by the Panel.

IV. SUBMISSIONS OF THE PARTIES

65. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the

Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

66. In its Appeal Brief, the Appellant requested as follows:

- I. The appeal is upheld.*
- II. The decision by the IOC not to allow the participation of the athlete A. as an Individual Neutral Athlete in the Olympic Games Paris 2024 is annulled.*
- III. The athlete A. is eligible to take part in the [...] competitions as an Individual Neutral Athlete at the Olympic Games Paris 2024.*
- IV. The IOC and B. shall be ordered to grant an accreditation to A. as Individual Neutral Athlete at the Olympic Games Paris 2024 and to allow his participation / enter him in the Olympic [...].*
- V. The procedure shall be free of charge as per Article R65 CAS Code. In the event that arbitration costs are to be paid to the CAS, the IOC and B. (in proportions to be decided by the Panel) shall be ordered to bear all arbitration costs (if any) and to reimburse to the athlete A. any advance on costs paid by the later, as well as the minimum CAS Court Office fee of CHF 1,000.*

VI. *the IOC and B. shall each be ordered to pay the athlete A. a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the Panel*".

i) Applicable Law and Review

67. The Appellant submits that, pursuant to Article R58 of the CAS Code, the applicable regulations would be the Olympic Charter and further regulations issued by the IOC, such as the AIN Principles. The Appellant further submits that given that the IOC's seat is in Lausanne, Switzerland, Swiss law ought to apply on the merits of the case.

68. The Appellant also contends that the CAS has full power to review the fact and the law in accordance with Article R57(1) of the CAS Code (CAS OG 10/001, CAS 2019/A/6557 & 6663).

ii) Jurisdiction and Admissibility

69. The Appellant maintains that the CAS has jurisdiction to deal with the present dispute pursuant to Rule 61 of the Olympic Charter, which specifies that any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS. In addition, as the present case pertains specifically to the Decision dated 24 May 2024, which was only communicated on 15 June 2024 (the First IOC Communication) and 5 July 2024 (the Second IOC Communication), the present appeal, filed on 5 July 2024, was filed in time and is therefore admissible.

iii) Merits

70. The Appellant contends that he has met the all the criteria provided for in the AIN Principles, and all eligibility decisions ought to comply with the Olympic Charter and general legal principles, as follows:

➤ The AIN Principles should be read as "conditions of participation" under the meaning of Rule 40.1 of the Olympic Charter; as such, when reading and interpreting the AIN Principles, general principles found in the Olympic Charter must be considered, in particular, the Fundamental Principles of Olympism.

➤ The Olympic Charter makes clear that the interests of athletes "*constitute a fundamental element of the Olympic Movement's action*", pursuant to Rule 1.3 of the Olympic Charter, which also applies to AINs. As such, if any AINs fulfil the criteria laid down by the IOC in the AIN Principles, they should be entitled to participate at the Olympic Games Paris 2024, and any reasoning to the contrary would result in an arbitrary, unfair, and discriminatory situation in violation of the Olympic Charter.

➤ The measure of not inviting the Appellant to participate in the Olympic Games Paris 2024 aims at sanctioning an alleged prior misbehaviour and qualifies as a "sanction", not a

“eligibility rule” (CAS 2007/O/1381; CAS 2011/O/2422).

- Sanctions imposed by sporting bodies must comply with legal principles, such as the principle of legality (CAS 2014/A/3621, paras. 115 and 116), the principle of non-retroactivity (CAS 2008/A/1584), the principle *nulla poena sine culpa* (TAS 2007/O/1381, para. 61; CAS 2008/A/1583 & 1584), the principle of proportionality (CAS 2016/O/4684; CAS 2020/O/6689, para. 721).
- As the Decision must be construed as a “sanction”, the IOC has the burden of proof to demonstrate that the Appellant acted “*against the peace mission of the Olympic Movement*” (CAS 2015/A/4355, para. 4.17; CAS 2011/A/2384 & 2386, paras. 102 to 104). This is supported by the Appellant’s non-involvement in the process that led to the Decision, which shows that the burden of proof lies with the IOC. If the Appellant has to bring evidence to show the same, it would be evidence of negative facts, that he has “*not acted against the peace mission of the Olympic Movement*”, which would be very difficult.

71. The Appellant maintains that he met the sporting criteria to be qualified for the Olympic Games Paris 2024 as the AIN team has secured [...] quota places for the [...] at the [...], and the Appellant is the [...] AIN athlete in the

said category ([...]). In any event, the [...] selected the Appellant as the AIN athlete and entered his name to compete at the Olympic Games Paris 2024.

72. The Appellant maintains that he is not contracted to the Russian military or national security agencies, and should not be made ineligible for the Olympic Games Paris 2024 on that basis:

- The Appellant has no military association and has received no money from the military since [...]. The Appellant is also not a member of the Russian army or Russian security agencies, or the Russian police.
- The Appellant’s past affiliation with a [...] Club does not mean that he is under contract with military or national security agencies within the meaning of the AIN Principles. [...] Club is a large organisation which is historically linked [...], but is not considered “national security agencies”. In any event, the Appellant is no longer a member of [...] Club since [...]. The Appellant became financially independent after [...] and was able to stop all affiliations with [...] Club.
- The Appellant does not have any other contract, affiliation or the like, with the Russian army, armed forces, the police, law enforcement authorities or other similar agencies or institutions.

73. The Appellant maintains that he does not “actively” support the war in Ukraine, and should not be made

ineligible for the Olympic Games Paris 2024 on that basis:

- The interpretation of the AIN Principles for the said criteria must *bona fide* mean that in order to be deemed ineligible, athletes need to be “active” or engage in a conduct showing their active support to the war in Ukraine. Athletes who remain “neutral” by not providing any opinion cannot be deemed to support the said war, especially since athletes based in Russia cannot freely express their opinion about the situation in Ukraine.
- The Appellant had confirmed in writing that he will “*refrain from making any form of political statement or demonstration*”.
- The Decision by AINERP did not mention any publications by the Appellant. In his personal social media accounts, the Appellant does not show or display any support to the war in Ukraine or even display any Russian flag. The Appellant has never made any public statement supporting the war in Ukraine and has always adopted a “neutral” position.
- The Appellant was made aware of the statements provided by the Ukraine NOC and Ukraine Ministry of Sport about him, but they are wrong and misleading, in particular:
 - With regard to the Appellant’s photograph with a soldier; the Appellant was approached

to take a photograph with the soldier as a famous athlete in the country, and did not know that the person was a soldier and thought that he was just from security. The Appellant did not know this photograph existed or reposted this photograph.

- With regard to the Appellant’s alleged liking of a post displaying a “Z”; the Appellant had no knowledge of this alleged conduct, and checked that it was not true.
- The Appellant never appeared in public wearing a uniform with a “Z” or publicly displaying any support to the war in Ukraine. The Appellant always dresses in neutral colours. When he was invited as an Olympian to take part in [...] held in [...] on [...], he did not know that it was an event in support of the war in Ukraine. In any event, he did not wear any attire with “Z” on it, contrary to the other participants there. The Appellant cannot be expected to refuse an invitation from public authorities and cannot be expected to be considered as “actively” demonstrating support for the war by boycotting the said event.

- The Appellant never participated in any tournament dedicated to the memory of soldiers or with any pro-war connotation. The Appellant was invited as a special guest to [...], and while it is true that there were displays on the war in Ukraine, the Appellant cannot be held responsible if he sometimes appears in photographs with the posts or signs on the war, and this does not mean that the Appellant endorses any of such messaging.
 - The Appellant cannot be reasonably asked to actively object to the war and adopting a “neutral” position can already be perceived in Russia as a sign of lack of support for the Russian military operation in Ukraine.
 - The Decision must respect the principle of proportionality and any ban of the Appellant must respect the same principle.
74. The Appellant’s neutrality regarding the war in Ukraine is highlighted by testimonies provided from his competitors from [...].
75. The Decision was based on incorrect information and the Appellant should not be faced with the situation of *fait accompli*. The IOC can accept an additional athlete and organise an additional fight, which is not complex to organise.
76. At the hearing, the Appellant further submitted that there was no feasible way for the Appellant to appeal the Final B. Decision, as there was no arbitration clause within the B.’s governing documents, and the only alternative was for the Appellant to go through the domestic court process requesting for provisional measures. In any event, the IOC has full discretion to make the final determination on the eligibility of the Appellant, and the present appeal is based on the Decision of the IOC.
77. With regard to B.’s objections to be included as a respondent to the present proceedings, the Appellant submits that B.’s position would be affected by the present appeal and any outcome of the present appeal would bind B. in their administration of the sport at the Olympic Games Paris 2024.
- B. The IOC’s Position**
78. In its Answer, the IOC requested the Panel to rule as follows:
- “(i) *The Appeal filed by A. and all of its prayers for relief are dismissed.*
 - (ii) *The decision of the AIN Eligibility Review Panel declaring A. ineligible is upheld.*
 - (iii) *A. shall bear all arbitration costs incurred with the present proceedings and pay a contribution towards the legal costs incurred by IOC in connection with these proceedings”.*
- i) Jurisdiction and Admissibility
79. The IOC accepts the jurisdiction of the CAS in the present arbitration and does not dispute that the Appellant’s Statement of Appeal and Appeal Brief

have been filed within the applicable time limits and are thus admissible.

ii) Applicable Law

80. The IOC agrees that the rules of law applicable to the merits of the present proceedings are governed by Article R58 of the CAS Code and agrees that the present dispute be decided primarily according to the Olympic Charter (in force from 15 October 2023) and the AIN Principles, and subsidiarily, Swiss law.

iii) Merits

81. The IOC submits that the Appellant's allegation concerning the application of the AIN Principles is misplaced and that such application does not amount to a "sanction":

- According to CAS jurisprudence, a rule that bars an individual from participating in an event due to prior undesirable behaviour qualifies as a sanction, but necessary elements must be satisfied, *viz.* (i) adverse consequences; (ii) that are designed to punish; (iii) misconduct by the addressee of the sanction (CAS 2020/O/6689, para. 677 et seq.). However, these conditions are not met in the case at hand.
- Qualification or eligibility rules that serve to ensure that athletes meet the performance ability requirement do not seek to sanction undesirable behaviour by athletes, but define certain attributes required of athletes and formalities to be met.

- The AIN Principles are clearly qualifying or eligibility rules under CAS jurisprudence and not a "sanction", wherein the IOC did not deprive the Appellant of any "right" he may have had to participate, as set out in Rule 40.1 of the Olympic Charter.

- Under Rule 44.3 of the Olympic Charter, the IOC had discretion to refuse entry to the Olympic Games. The IOC has suspended the ROC, despite individual athletes not having violated the Olympic Charter. The IOC therefore decided that Russian athletes could participate in the Olympic Games on an individual basis under certain conditions, in order to protect the rights of individual athletes and staff who do not support the Russian war against Ukraine, which was designed not to sanction the Appellant but offer him the opportunity to participate should he meet the conditions *i.e.*, the AIN Principles.

This interpretation is in line with consistent CAS case law (CAS 2016/O/4684; CAS OG 16/019, para. 7.11-7.12; CAS OG 18/03, para. 7.4; CAS OG 18/02, para. 7.4)

- The Appellant's submissions on the principles of legality, non-retroactivity, *nulla poena sine culpa* and proportionality, as well as burden and standard of proof are irrelevant to the present case.

82. The IOC maintains that the AINERP rightly considered that the Appellant is

ineligible for the Olympic Games Paris 2024, as he has not been declared eligible by B.:

- The IOC does not dispute that a quota place for the [...] was earned by the AIN team with a Russian passport, and that [...] entered the Appellant's name to compete in the Olympic Games Paris 2024.
- Pursuant to the AIN Principles, *"only AIN who have fulfilled the specific eligibility and sporting qualification criteria set by their IF can be considered by the IOC for entry into the Olympic Games Paris 2024"*. This is consistent with Rule 40.1 of the Olympic Charter.
- On 3 April 2024, B. declared the Appellant ineligible to participate in its events, wherein the Appellant has not challenged the Final B. Decision. This makes the Appellant directly ineligible under the AIN Principles. While the AINERP did not examine the basis for the Final B. Decision and made the Decision, the Final B. Decision is itself an independent basis to reject the Appellant's appeal.

83 The IOC maintains that the AINERP rightly considered that the Appellant is ineligible for the Olympic Games Paris 2024, as he is affiliated with the [...] Club:

- [...] Club was created [...] in the Soviet Union whose members were drawn from [...]. Today, [...] Club is affiliated to the Russian [...], wherein members and employees of the said Club

are also members of and paid by the Russian [...]. The Chairman of [...] Club is [...]. On the official website of [...] Club, the Club states that its mission is the "[...]"

- All athletes affiliated with [...] Club have been declared ineligible for the Olympic Games Paris 2024, as the said Club clearly has strong ties to the Russian government and military.
- While the Appellant claims that he has not been a member of the [...] Club since [...], the evidence on file contradicts this position. The Appellant is still listed on the website of [...] Club as one of its member athletes, as well as listed as a member of [...] Club in a list by the Russian Ministry of Sports [...], and still in same list for [...]. There is no written contemporaneous evidence that the Appellant had concluded his relationship with [...] Club [...].

84. The IOC maintains that the AINERP rightly considered that the Appellant is ineligible for the Olympic Games Paris 2024, as he has actively supported the war in Ukraine in numerous occasions:

- While the Appellant claims that he has never made any public statement in support of the war in Ukraine and has always maintained a "neutral" position, the Appellant's position is contradicted by contemporaneous evidence on file, in particular by the information provided by

Sportradar.

- The fact that the Decision did not raise the Appellant's public displays of active support for the war in Ukraine is irrelevant, as the *de novo* principle under Article R57 of the CAS Code grants this Panel the power to review the facts and law afresh.

85. At the hearing, the IOC submitted that the Final B. Decision did not prevent the AINERP or the IOC determining that the Appellant was not eligible for the Olympic Games Paris 2024 as the criteria for eligibility for the said Games are cumulative. As such, it is no mistake that the First and Second IOC Communications only refer to the criteria found in the AIN Principles.
86. The IOC also further submitted that, in order to be eligible to participate at the Olympic Games Paris 2024, athletes with Russian and Belarusian passports have to satisfy the AIN Principles as well as the criteria set by the International Federation ("IF"), in this case, B. As the Appellant has not satisfied the eligibility criteria set by B., he would, in any event, be ineligible to participate in the Olympic Games Paris 2024 on that basis. It is not in the practice of the IOC to use its discretion to "overrule" the ineligibility requirement of the IFs, but it is within the IOC's discretion to add additional eligibility criteria, such as the AIN Principles.

C. B.'s Position

87. In its Answer, B. requested the Panel to rule as follows:

- "1. The appeal filed by A. shall be declared inadmissible.
2. The appeal filed by A. shall be dismissed, or, subsidiarily, the appeal filed by A. as directed against B. shall be dismissed;
3. The arbitration costs shall be borne by A.
4. B. is granted a contribution to its legal and other costs".

i) Admissibility

88. B. submits that, to the extent that the Appellant only requests for the annulment of the Decision by the IOC and not of the Final B. Decision (which also affects his eligibility), as well as for the Athlete to be declared as eligible (and granted the spot) to compete at the Olympic Games Paris 2024, B. has no *légitimation passive* to be a respondent in the present case.
89. Further, B. submits that the Appellant's ineligibility to compete at the Olympic Games Paris 2024 is based on the Final B. Decision, and the Appellant's present appeal against the Decision by the IOC is not supported by any actual interest of the Appellant. Even if the Panel decides to annul the Decision by the IOC, B. maintains that the Appellant remains ineligible to compete at the Olympic Games Paris 2024 by virtue of the Final B. Decision, and any request by the Appellant now is a belated and abusive attempt to invalidate the Final B. Decision belatedly.

ii) Merits

90. B. maintains that the appeal must be

dismissed as the Final B. Decision – which remains unchallenged – ensures the Appellant’s ineligibility for the Olympic Games Paris 2024:

- Under the AIN Principles, it is set out that AINs must fulfil the “*specific eligibility and sporting qualification criteria set by their IF*” before they can be considered by the IOC for entry into the Olympic Games Paris 2024, and the IF (here, B.) makes the first selection for the said Games before being independently reviewed by the IOC.
- At the hearing, B. maintains that the Final B. Decision expressly indicate that the Appellant is rendered ineligible to participate in “*any international event on the official B. calendar*”, which includes the Olympic Games Paris 2024.
- As such, the Appellant was not selected by B. and his name was not proposed to the IOC for their independent review. At the hearing, it was further added that it is not within the IOC’s practice to overrule the non-selection of an athlete as proposed by B.
- The Appellant’s request ought to be dismissed as his non-selection is based on the non-inclusion in the list by B. to the IOC, regardless of the IOC’s decision on the Appellant. There was, in fact, no need for any decision by the IOC on the Appellant’s non-inclusion, which was made (arguably) as an oversight, to declare the Appellant not re-instated onto a list he could not

belong to in the first place.

- The Appellant could have challenged the Final B. Decision before Swiss courts but chose not to do so.
- The Final B. Decision was, in any event, only based on the evidence tendered from the Sportradar Report, and not on any of the contested basis raised at the hearing on the Appellant’s relationship with [...] Club.
- As such, there is no decision to be appealed against the IOC in the present case.

91. In any event, B. observes that the Appellant does not meet the AIN Principles for participation at the Olympic Games Paris 2024:

- B. implemented the First Recommendations and Second Recommendations from the IOC pertaining to AINs and applied them when issuing decisions on the eligibility of AINs. The same standards were applied by the AINERP.
- B. relied on additional information from the Sportradar Report and made the Final B. Decision on the ineligibility of the Appellant. The Final B. Decision was not challenged by the Appellant, which indicates that he understood and accepted the newly considered elements. In any event, the Final B. Decision is not on appeal in the present case.
- The same facts and standards

were referred to in both the Final B. Decision and the Decision by the IOC, wherein the same elements gave rise to the same decision, *viz*, that the Appellant is ineligible to compete at the Olympic Games Paris 2024.

- The existence of the Final B. Decision provides a strong indication that the Decision is correct, but it gives more significance to the importance of deferring not to the Decision but also the solution already implemented by B. on the same issues (in the Final B. Decision), for which the Appellant already accepted the decision.
- Deference ought to be afforded to decisions of sports governing bodies, and the Panel should only intervene and revise a decision if it is clearly not a correct one (CAS 2022/A/8865 & 8868, paras. 89 to 91). The Decision on appeal is not the result of an incorrect exercise of the power of appreciation, requiring a revision of the Decision.
- In the totality of the appeal, there is no doubt that the decision to declare the Appellant as ineligible is supported by a correct and reasonable appreciation of the facts on file.

V. JURISDICTION

92. According to Article R47 of the CAS Code, the Panel has jurisdiction to hear:

“[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

93. Given that the Respondents do not object to the jurisdiction of the CAS, that all Parties have signed the OoP without reservation, and that all Parties fully participated in these proceedings without reservation, the Panel finds that it has jurisdiction to hear the present dispute.

VI. ADMISSIBILITY

94. Article R49 of the CAS Code provides – in its pertinent parts – as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

95. The Appellant directed his Statement of Appeal against the “*decision of the IOC rejecting his request to be invited at the Olympic Games Paris 2024*”. He deemed the “decision by the IOC” to be the First IOC Communication dated 15 June 2024. From the evidence and submissions tendered by the IOC subsequently, it was revealed that there was a decision made by the AINERP on 23 May 2024 (the “Decision”), which was the reason for the IOC not to invite the Appellant to the Olympic

Games Paris 2024. The Decision was communicated to the Appellant on two occasions (the First IOC Communication on 15 June 2024 and the Second IOC Communication on 5 July 2024). As such, while the Panel considers the submission of the Appellant, it interprets the generic phrasing of “*the decision by the IOC not to allow the participation of the athlete A. as an individual Neutral Athlete in the Olympic Games Paris 2024*”, to refer to the Decision with the other two later occasions as communications.

96. The Statement of Appeal was timely filed and complied with the requirements set by Article R49 of the CAS Code. There are no issues raised by the Respondents on the admissibility of the appeal based on the timeliness of the document submissions.
97. B. has submitted that it has no *légitimation passive* to be respondent in the present case, as the Appellant only included in his request for relief for the annulment of the Decision by the IOC, which does neither involve nor concern B. B. contests that while the Appellant is already deemed ineligible to qualify for the Olympic Games Paris 2024 pursuant to the Final B. Decision, the Appellant made the decision to only appeal against the Decision by the IOC, thus rendering the Appellant’s present case against B. moot.
98. The Panel notes that according to settled jurisprudence before the Swiss Federal Tribunal, the question of standing to be sued (*légitimation passive*) relates to the merits and not the admissibility of the case (see SFT 128 III 50 of 16 October 2001, at 55; SFT

4A_424/2008 of 22 January 2009, para. 3.3.; CAS 2008/A/1639, para. 3). The principle is similar for the question of standing to sue (*légitimation active*) (see among many references: CAS 2015/A/3959, para. 81; CAS 2015/A/4289, para. 110; SFT 128 III 50, 55; SFT 108 II 216, cons. 1; see also MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials*, 2015, R27, no. 82).

99. As such, the Panel will proceed to address the issue of *légitimation passive* raised by the B. under the merits section of this Award below.
100. Given that no further issues of the admissibility of the appeal were raised, the Panel finds that the appeal filed by Appellant is admissible.

VII. OTHER PRELIMINARY ISSUES

101. On 26 July 2024, the Appellant submitted additional documents to be included in the case file, more particularly a statement by the Russian Ministry of Sport (the “Statement by Russian Ministry”). The latter reads as follows:

“We hereby confirm that in the list of candidates for the sports national [...] team of the Russian Federation ([...]) for [...], approved on [...], as well as in the list of candidates for the sports national [...] team of the Russian Federation ([...]) for [...], an error has been done in specifying the name of belonging to the physical and sports organization.

In accordance with the letter of the Public-State Association ‘[...] Physical Culture and Sports Society’ of the Republic of [...] dated [...], the list of candidates for the Russian

Federation national [...] team ([...]) for 2024 was adjusted and approved on [...]. The inaccuracy has been corrected”.

102. The Panel at the outset of the hearing has decided to admit the above Statement by the Russian Ministry on file. Article R56(1) of the CAS Code provides as follows:

“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer”.

103. The Panel accepts that there are exceptional circumstances in the case at hand. The matter in dispute is of great importance for the Appellant and any evidence that helps the Panel to come closer to the truth is particularly helpful. Finally, the Panel notes that the Appellant was only provided with the full evidence on which the First Respondent based its Decision once he received the IOC’s Answer. In view of the above, the Panel finds that the better arguments speak in favour of admitting the new evidence on file.

VIII. SCOPE OF REVIEW

104. Article R57 of the CAS Code provides – in its pertinent parts – as follows:

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.

105. According to Article R57 of the CAS

Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance. As a consequence of the *de novo* principle, the Panel is not limited to the facts and legal arguments available at the time of Decision and/or enshrined therein. Instead, the Panel can base its finding on all submissions and evidence submitted to it in the course of the CAS proceedings.

IX. THE APPLICABLE LAW

106. Article R58 of the CAS Code stipulates that,

“[t]he Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

107. The Appellant and the IOC are in agreement that Article R58 of the CAS Code applies, and that the present dispute be decided primarily according to the Olympic Charter (15 October 2023 Edition), the AIN Principles, and subsidiarily, Swiss law. B. does not make any submission on the applicable law nor does it object to the positions of the Appellant and the IOC.

108. The Panel is in agreement that the present dispute be decided primarily according to the Olympic Charter (15 October 2023 Edition), the AIN

Principles, and subsidiarily, Swiss law as the IOC (the body which issued the Decision) is seated in Lausanne, Switzerland.

X. MERITS

109. Based on the submissions of the Parties, the Panel is tasked – in particular – to determine the following issues:

- A. Whether B. has standing to be sued, given that the Decision on appeal only pertains to the IOC?
- B. Whether the Appellant met the eligibility criteria to be able to participate in the Olympic Games Paris 2024?

A. Standing to be Sued

110. The first issue to be considered in the merits is whether B. has standing to be sued, given that the Decision on appeal pertains to the IOC and not B.

111. As mentioned above, the issue of standing has been addressed as a matter of merits by CAS panels.

i) The principles applicable to the issue of standing to be sued

112. The term standing to be sued, or “*légitimation passive*” in French, refers under the subsidiarily applicable Swiss law to the party against whom an appellant must direct its claim in order to be successful. A party has standing to be sued only if it is personally obliged by the claim brought by an appellant, *i.e.*, if the party is the debtor of the claim. (CAS 2006/A/1206; HAAS U., *Standing to Appeal and Standing to be Sued, in International Sport*

Arbitration, Bern 2018, p. 53-88, para. 1 with reference to other CAS jurisprudence).

113. When deciding who is the proper party to defend an appealed decision, CAS panels sometimes also proceed by balancing the interests involved and taking into account the role assumed by the association in the specific circumstances. Consequently, one must ask whether a party “*stands to be sufficiently affected by the matter at hand in order to qualify as a proper respondent within the meaning of the law*” (cf. CAS 2017/A/5227, para. 35). Similarly, the CAS panel in 2015/A/3910 held as follows:

“[T]he Panel holds that in the absence of a clear statutory provision regulating the question of standing to be sued, the question must be resolved on basis of a weighing of the interests of the persons affected by said decision. The question, thus, is who [...] is best suited to represent and defend the will expressed by the organ of the association”. (para. 138)

114. In the case at hand, the Decision was issued by the IOC and communicated to the Appellant by the IOC. B. had no role in issuing the Decision, has not advised the IOC to issue the Decision and has no role in enforcing the Decision. It is, thus, not comprehensible – at least at first sight – why B. would be the proper party to defend the Decision issued by the IOC.

ii) The position of the Parties

115. The Appellant at the hearing appeared to agree with the above and stated that B.’s role in these proceedings was more that of an “interested party”. The

purpose of directing the dispute also against B. was – according to the Appellant – so that B. would be bound to the Award. If the Panel would set aside the Decision, this would – according to the Appellant – also impact the legal position of B., since by setting aside the Decision, the Final B. Decision would become “immaterial”. The latter follows – according to the Appellant – from the fact that the Decision declares the Appellant ineligible without referring to the Final B. Decision. Furthermore, it is the IOC that is the final authority deciding on the application of the AIN Principles and on the entry of athletes to the Olympic Games. Thus, if the Decision is overturned because the Appellant complies with the AIN Principles, there is no room to further uphold the Final B. Decision. Finally, the Appellant submits that the legal framework underlying the Decision and the Final B. Decision is identical. Thus, if the Panel is of the view that the Decision must be set aside, the same must apply with respect to the Final B. Decision.

116. B., on the contrary argues that there is no involvement or personal obligation of it in the present proceedings. According to B., for the Appellant to be eligible to participate at the Olympic Games Paris 2024, he must satisfy both the IOC and the B. eligibility criteria in full. B., however, declared the Appellant ineligible *prior* to the Decision, rendering the Decision by the IOC irrelevant to the eligibility status of the Appellant for the Olympic Games Paris 2024. B. maintains that the chronological order of the Final B. Decision on 3 April 2024 renders the Decision by the IOC moot vis-à-vis the

eligibility of the Appellant, and that the appeal against the Decision cannot be misused to also encompass an appeal against the Final B. Decision, which – absent an appeal filed within the prescribed deadline – has become final and binding.

iii) *The finding of the Panel*

117. In determining the parties to be summoned and heard in the proceedings, CAS panels are not in a position to issue an award which affects the rights of a third party if that party has not been correctly summoned by the Appellant and fully heard in the proceedings (CAS 2013/A/3228, para. 8.1 et seq.; CAS 2021/A/8140, para. 51).
118. In order for the Appellant to be eligible to participate at the Olympic Games Paris 2024, he has to fulfil both the [...] QS and the AIN Principles, by virtue of his Russian nationality. Notably, under the [...] QS, the “Additional IF eligibility criteria” mandates the following:

“To be eligible to participate in the qualifying events and in the Olympic Games Paris 2024, all athletes must hold a valid license issued by their National [...] Federation and be recorded in B.’s official database”.

119. Further, under the AIN Principles, there is an express indication that the IF’s eligibility criteria will be considered by the IOC, *viz*,

“Only Individual Neutral Athletes who have fulfilled the specific eligibility and sporting qualification criteria set by their IF can be considered by the IOC for entry into the Olympic Games Paris 2024”.

120. The Panel notes that while this chronological reading of B. may hold true for the general qualification of athletes, it may not necessarily hold true for the exceptional situation involving athletes with Russian passports. On 19 May 2024, when the IOC Executive Board established the AINERP, it was intended and targeted to evaluate the eligibility of *all* athletes and support personnel with Russian passports “*who obtained, or could obtain*” a qualification place for the Olympic Games Paris 2024. As such, the AINERP was envisioned to be a proactive set-up to evaluate the eligibility of athletes and support personnel with Russian passports, even prior to their qualification or selection. This means that with the establishment of the AINERP, there is an established parallel decision-making framework on the eligibility of athletes with Russian passports by the AINERP, on top of the IF’s eligibility framework. Furthermore, the Decision and the Final B. Decision are closely linked, since both apply the exact same criteria for granting the status of an AIN and, in addition, both rely on the exact same evidence, *i.e.*, the Sportradar Report which was commissioned by the AINERP.
121. Be it as it may, the Panel can leave the question of B.’s standing to be sued undecided, since the appeal of the Appellant against the Decision is to be dismissed and, therefore, even if one were to follow the Appellant’s line of reasoning, this Award cannot impact the legal position of B.

B. The Eligibility Criteria for Olympic Games Paris 2024

122. The second issue which the Panel is tasked to consider is whether the Appellant has satisfied the eligibility criteria for him to participate in the Olympic Games Paris 2024. As mentioned before, in order for the Appellant to be eligible to participate in the Olympic Games Paris 2024, he has to fulfil both the [...] QS *and* the AIN Principles, by virtue of his Russian nationality. In particular, the AIN Principles stipulate that:

“Only those Individual Neutral Athletes and support personnel who have not acted against the peace mission of the Olympic Movement by actively supporting the war in Ukraine may be invited to participate in the Olympic Games Paris 2024. In line with this principle, Individual Neutral Athletes and support personnel who are contracted to the Russian or Belarusian military or national security agencies cannot participate in the Olympic Games Paris 2024”.

i) The applicable legal yardstick

123. The Appellant submits that the Decision constitutes a (disciplinary) sanction and, therefore, must comply with the respective legal prerequisites, *i.e.*, the principles of legality, non-retroactivity, *nulla poena sine culpa* and proportionality. Furthermore, because the Decision is to be qualified as a sanction, the Appellant submits that the IOC has the burden of proof to show that the Appellant has acted against the peace mission of the IOC. The IOC, on the contrary submits that the Decision pertains to an eligibility matter and cannot be qualified as a sanction, because the Decision does not deprive the Appellant of any right that the latter rightfully holds.

124. The terminology used to qualify measures of a sports body is not unanimous. It is however clear and generally accepted that not all measures by a sports body that have adverse effects for the addressee are to be treated the same (HAAS/HESSERT, The legal regime applicable to disciplinary measures by sports organizations – one size does not fit all, Festschrift zu Ehren von Lukas Handschin, 2020, p. 279 *et seq.*). A determining feature of a disciplinary sanction or measure is that it is intended to enforce obligations (*e.g.* in the context of anti-doping, match-fixing, etc.) assumed by a particular addressee in the context of a legal relationship arising out of a contract or through membership (*see* BK-ZGB/RIEMER, 2nd ed. 2023, Art. 70 N. 207 *et seq.*). Thus, absent any legal relationship (at the relevant time), there is no room for a disciplinary measure, because there exists no obligation arising from a contract or membership that can or needs to be enforced.
125. In the case at hand, the Appellant is not contractually bound to the IOC and, also, he is not a member of the IOC. Thus, the Appellant is under no obligation vis-à-vis the IOC and does not hold a lawfully acquired contractual right under the Olympic Charter that may be adversely affected by the IOC's Decision. This clearly follows from the Olympic Charter that provides in Rule 44(3) as follows:
- “Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games”.*
126. The legal principles invoked by the Appellant apply first and foremost to disciplinary sanctions (BK-ZGB/RIEMER, 2nd ed. 2023, Art. 70 N. 212 *et seq.*). The matter in dispute here, however, is not of a disciplinary nature. The claim pursued by the Appellant is to oblige the IOC to enter into a contract with him and to declare him eligible to participate in the Olympic Games Paris 2024. Thus, what the Appellant claims in the present matter is that the IOC, in essence, is under an obligation to contract with him. The Appellant does not submit that a contractual or a membership right held by him has been infringed, but seeks to obtain a (participation) right in the Olympic Games Paris 2024 that he has not held at any point in time.
127. The principles invoked by the Appellant also cannot apply by analogy. Of course, for a disciplinary measure to be lawful, it must have a sufficient legal basis in the rules and regulations of a sports body. Evidently depriving someone of a rightfully earned (contractual or membership) right is only possible, if the legal provisions applicable to the legal relationship so allow. However, absent any contractual relationship or membership the situation is completely different.
128. The power not to contract with a third party does not need a legal basis in the rules and regulations of an association. Such power simply flows from the individual freedom of action guaranteed by most constitutions. The power to contractually engage or not to engage with other individuals is part of the contractual freedom of every (natural or legal) person and, therefore, does not depend on an additional basis

in the association's statutes. This is all the more true considering that any such legal basis would not serve any purpose. The purpose of a clear legal basis for disciplinary measures in the statutes of an association is to protect the association's members or the persons that have contractually submitted to the rules. They must be able to understand the contents of their legal relationship with the sports association by reading the relevant rules and regulations. By examining the latter, they will be able to understand the obligations they have submitted to and how these obligations will be enforced against them. Non-members do not need comparable protection, since they are not submitted to the rules of the sports association from the very outset. Thus, requiring a regulatory basis in such circumstances is devoid of any sense, since the legal relationship between the sports organisation and non-members is first and foremost regulated by statutory provisions, the basis and contents of which are sufficiently clear. Since no legal basis is needed when refusing to contract with another person, no issues of retroactivity or "fault" (*nulla poena sine culpa*) can arise in this context.

129. This is not to say that there are no legal limits in the case at hand. Obviously, there are limits to the autonomy of a sports organisation to select its members or participants, particularly in case – as the one at stake – where the association enjoys a monopoly position (*see* BSK ZGB I-SCHERRER/BRÄGGER, 7th ed. 2022, Art. 70 no. 38). In such circumstance, rejecting an application must comply with general considerations of statutory law, in particular with

competition law and/or the personality rights of the applicant (SFT 4A_21/2011 consid. 5.2.1.3; CR-CC/FOËX/BENOIT, 2nd ed. 2024, Art. 70 N. 9). The CAS – *e.g.* – has decided that these general principles are breached where a sports organization on the one hand commits to harmonization across all sports by accepting maximum disciplinary sanctions for anti-doping rule violations and then contradicts such self-commitment by not allowing athletes to compete who have fully purged their sanction (CAS 2011/O/2422, no. 33 *et seq.*).

130. However, the mere fact that an association has a monopoly position does not award an unconditional claim to the applicant to be admitted to the association. Instead, the Swiss Federal Tribunal only qualifies the rejection of the applicant as illicit, if the association did not act in conformity with its rules and if the interest of the individual who seeks to become a member outweighs the interests of the association not to admit the applicant (SFT 4A_21/2011 consid. 5.5).
131. To conclude, therefore, the Panel finds that the legal yardstick applicable to determine the legality of the Decision is not the one applicable in disciplinary matters. Instead, the limits to the autonomy of a sport organisation arising from statutory law to select its members or participants apply. It follows from the above that the burden of proof rests on the Appellant to show that – as a matter of exception – he has a claim against the IOC to admit him to the Olympic Games Paris 2024.

ii) Applying the above principles to the case at hand

132. The Appellant does not take issue with the contents of the AIN Principles. Thus, the Appellant does not contest that an athlete can be validly excluded under the applicable rules from the Olympic Games Paris 2024, if he or she is actively supporting the war in Ukraine. It is, thus, uncontested between the Parties that in such case, the interests of the IOC outweigh the interests of the individual to participate in the Olympic Games. The Appellant, however, takes issue with the way the AIN Principles were applied in his case and submits that he did not act *“against the peace mission of the Olympic Movement by actively supporting the war in Ukraine”*.

133. The Respondents, on the contrary, are of the view that the Appellant had six instances for which he could have been deemed to have *“acted against the peace mission of the Olympic Movement by actively supporting the war in Ukraine”*, viz:

- a) On [...], on the day of [...], the Russian [...] was at a training camp in [...], Russia, wherein a video was posted on Instagram showing the team sitting under a banner of President Vladimir Putin which reads *“[...] For a strong Russia! For a strong President!”*
- b) On [...], the Appellant participated in [...] in [...], Russia, [...], at which the Appellant was surrounded by athletes and members of the Russian military wearing the symbol “Z”, which is used both as a Russian military

insignia and as a public symbol of Russia’s invasion of Ukraine. In addition, there was a banner reading “[...]”, alluding to the purported “denazification” of Ukraine, which is part of the Kremlin’s propaganda for the invasion.

- c) In [...], the Appellant attended the opening ceremony in [...], Russia, of a [...] dedicated to Russian law enforcement officers killed in Donetsk and Luhansk, Ukraine, during Russia’s “special military operation”, at which the Appellant was photographed alongside Russian officials under the banner bearing the symbol “Z” which reads *“[...] dedicated to the memory of law enforcement officers killed during the special operation on the territory of the LPR, DRP and Ukraine”*.
- d) In [...], the Appellant attended, as a guest, a [...] held in [...], Russia, dedicated to the memory of [...] military personnel who was killed in the war against Ukraine.
- e) According to a Twitter (now X) post published by “Base of Ukraine Sports” in [...], the Appellant liked an Instagram post published on [...] with the symbol “Z” and supporting the war in Ukraine. The Appellant had since removed his like from the said post.
- f) In [...], the Appellant was photographed with a Russian soldier wearing a military uniform who had allegedly

taken part in the war in Ukraine.

134. The Panel recalls that the burden of proof lies with the Appellant to show that the AIN Principles were misapplied in his case. Furthermore, the Panel notes that any of one instance of “*act[ing] against the peace mission of the Olympic Movement by actively supporting the war in Ukraine*” would suffice to render the Appellant ineligible for Olympic Games Paris 2024.

135. In the view of the Panel, the requirement of not “*act[ing] against the peace mission of the Olympic Movement by actively supporting the war in Ukraine*” is an objective one. The relevant standard is whether the conduct – viewed by an objective and reasonable bystander – can be interpreted as an active support of the war in Ukraine. If this is the case, the individual may be excluded from participating at the Olympic Games irrespective of whether – subjectively – the athlete supports the war or not. Because it is these actions, and the interpretation of these actions by the public, that bring the IOC in disrepute should such a person participate in the Olympic Games. Mental reservations or the subjective view of the person concerned when engaging in these actions are, therefore, immaterial. Thus, if an athlete actively engages in conduct that supports the war in Ukraine, the Panel is not required to investigate the motive behind such behaviour, because the latter is of no avail. Accordingly, the Panel will not take into consideration the intentions and the political beliefs of the Appellant. It suffices, for the Appellant to be excluded from the participation

of the Olympic Games Paris 2024, that he has engaged in a conduct showing active support for the war in Ukraine, wherein his intentions are not part of the requirement under the AIN Principles.

136. While the Appellant has contested and provided explanation for the above six instances for which the Report had raised, the Appellant had not denied participating in [...] held in [...], Russia, in honour of [...] on [...] (the “[...] R”). The Appellant first submitted that he was unsure as to what the [...] R. was about. However as can be seen in the documents submitted on file, the Appellant was surrounded at the [...] R. by athletes and members of the Russian military wearing the symbol “Z” (even though he chose not to wear the uniform with the said symbol himself) which is widely used both as a Russian military insignia and as a public symbol of Russia’s invasion of Ukraine. At the [...] R. also the President of the Russian Federation Vladimir Putin [...]. In his speech, President Vladimir Putin – *inter alia* – stated that “[...]”. It is obvious from the above and all other evidence on file (in particular the video) that the [...] R. was [...] in support of the war in Ukraine. The Appellant participated in that event prominently on stage standing amidst military personnel wearing uniforms and other athletes displaying the “Z”:

[...].

137. In the course of the hearing, the Appellant admitted that upon participating in the [...] R., he understood that the [...] R. was not about “celebrating sports and the

athletes”, but that it was held for a “different purpose”. This corroborates the finding of the Panel that the [...] R. – from the standpoint of an objective bystander – clearly was an event in support of the war in Ukraine. The Appellant submitted that once he realized the true purpose of the [...] while being on stage, he could no longer leave and that he was forced to stay. Whether this is true appears rather doubtful. The Appellant must have seen – prior to stepping on stage – all the people attending the event wearing the “Z” sign. Furthermore, the [...] R. was held shortly after the Russian invasion of Ukraine. He must have realized that there was a link between the [...] R. and the war in Ukraine. Be it as it may, it suffices in the eyes of the Panel – for the AIN Principles to be breached – that the Appellant participated in an event glorifying the war in Ukraine. At what point in time he understood the purpose of the [...] R. is immaterial. What is decisive is that he participated (and engaged in the conduct of participating) in the said [...] and thereby “*actively*” participated in an event which “*support[s] the war in Ukraine*”.

138. Consequently, the Panel does not need to determine whether the Appellant would have been prevented from participating in the Olympic Games Paris 2024 for any other reason, *e.g.* because of the Final B. Decision that rendered him ineligible to participate in the Olympic Games Paris 2024 under both the [...] QS and the AIN Principles. Furthermore, the Panel does not need to analyse all the other incidents listed in the Sportradar Report.

139. To conclude, the Panel finds that the IOC acted lawfully, and consistent with its stated criteria, when not admitting the Appellant to the Olympic Games Paris 2024.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 5 July 2024 by A. against the decision by the IOC not to allow his participation as an Individual Neutral Athlete in the Olympic Games Paris 2024 is dismissed.
2. The decision by the IOC not to allow the participation of A. as an Individual Neutral Athlete in the Olympic Games Paris 2024 is confirmed.
3. A. is not eligible to take part in the [...] competitions as an Individual Neutral Athlete at the Olympic Games Paris 2024.
4. (...).
5. (...).
6. All other and further motions or prayers for relief are dismissed.

Arbitration CAS 2024/A/10740

Emil Bengtson *et al.* v. Swedish Olympic Committee (SOC)

26 February 2025 (operative part of 26 July 2024)

Olympic Games (athletics and sailing); Authority of a NOC to issue supplementary, national specific qualification criteria for the Olympic Games; CAS jurisdiction; Notion of decision; Standing of athletes to challenge the rules of a NOC; Principles applicable to the interpretation of the Olympic Charter; Degree of autonomy granted to the NOCs under the Olympic Charter; Proportionality of the rules of an NOC

Panel

Prof. Ulrich Haas (Germany), President

Mr James Carter (USA)

Mr Klaus Reichert (United Kingdom)

1. According to Section 31 of the Swedish Olympic Committee (SOC) Statutes, the scope of the arbitration clause is restricted: the CAS only has jurisdiction for appeals directed against “[d]ecisions by the SOC Board, or by a mediation body, arbitral tribunal or disciplinary tribunal appointed by the SOC, in a sport-related dispute”. Pursuant to the SOC Statutes, the selection of the athletes for the Olympic Games is a matter falling within the competence of the SOC Board. Consequently, the act (be it a decision or not e.g. a press release from the SOC) to select or not to select an athlete is attributable to the SOC Board. Thus, the CAS has jurisdiction.
2. The characteristic features of a decision can be summarized as follows: (i) the term “decision” must be construed in a large sense; (ii) the form of the communication in question is irrelevant for its qualification; (iii) in principle, for a communication to be qualified as a decision, it must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties; (iv) a decision is a unilateral act, sent to one or more determined recipients that is intended to produce or produces legal effect. In this respect, both a decision of non-selection and a press release on selection issued by a National Olympic Committee (NOC) can be considered “decisions” within the meaning of Article R47 of the CAS Code. Even if the press release concerns a communication to the wider public on the selection, it pertains to an underlying decision made by the NOC and thus has the potential of affecting the legal situation of all the athletes selected and not selected.
3. The SOC Rules are not intended to grant a right or alter the legal position of the individual athletes. Instead, the SOC Rules are purely intended as internal administrative instructions for the sports bodies involved in the national nomination process. Although the SOC Rules that have been issued by the SOC General Assembly as such cannot be directly challenged by the athletes, since they have no standing be it as an addressee of these provisions or as a member of the SOC, the athletes cannot be barred from requesting an

incidental review of these rules in the context of an appeal against a decision of the SOC not to nominate them based on the SOC Rules. The SOC Rules cannot enjoy immunity from judicial review *vis-à-vis* the athletes.

4. Whether the SOC Rules follow the Olympic Charter (OC) depends on the latter's contents, which must be determined through interpretation. The statutes of major sports associations should be interpreted in the same way as law. Accordingly, any interpretation begins with the letter of the law (literal interpretation), but this is not the decisive factor: it must also convey the true scope of the rule (systematic interpretation), from the aim pursued (teleological interpretation), and from the legislator's intention as it emerges from the preparatory work (historical interpretation). A clear legal text could be departed insofar as the other methods of interpretation show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results that the legislator could not have intended, that offend the sense of justice or the principle of equal treatment. In short, no method of interpretation is favored, and no hierarchy is established. Rather, a pragmatic pluralism is used to seek out the true meaning of the provision.
5. There is no rule in the OC limiting the autonomy of the NOCs to issue qualification criteria for the Olympic Games that are more stringent than the ones established by the International Federations (IFs)

within their sphere of authority. In this respect, Rule 27.2 of the OC refers to an "exclusive authority" and Rule 27.7 to a "right" of the NOC to select athletes for the Olympic Games. This view is further backed by Rule 44.5 of the OC. The only sensible construction of the OC is that the qualification criteria established by the International Federations (IFs) and approved by the IOC constitute minimum standards only and that the NOCs have the autonomy to issue separate national qualification criteria, if they are no less rigorous (and may be more stringent) than the international qualification criteria and do not otherwise contradict the OC.

6. If the main purpose of the rules of a NOC is to – in principle – only select athletes who have "*shown such form that he/she is deemed capable of competing for at least twelfth place at the Olympic Games*", it appears to be legitimate and proportionate. This is especially true if said rules also provide for substantial exception to this principle to consider the individual circumstances of a specific case.

I. THE PARTIES

1. The Appellants consist of the following Swedish athletes (also referred to hereinafter as the "Athletes" or the "Appellants"):
- Mr. Emil Bengtson, who competes in sailing (class ILCA7);

- Ms. Sara Lennman, who competes in athletics (shot put);
 - Ms. Rebecka Hallerth, who competes in athletics (hammer throw);
 - Mr. Simon Sundström, who competes in athletics (3000 metres steeplechase);
 - Ms. Yolanda Ngarambe, who competes in athletics (1500 metres); and
 - Mr. Leo Magnusson, who competes in athletics (3000 metres steeplechase).
2. The Swedish Olympic Committee (the “Respondent” or “SOC”) is the National Olympic Committee (“NOC”) for Sweden.
 3. The Appellants and Respondent are jointly referred to as the “Parties”.

II. FACTUAL BACKGROUND

4. The present dispute is primarily based on what the Appellants allege is a decision of the SOC. The decision follows – according to the Appellants – *inter alia* from a press release (the “Press Release”) published by the SOC on 5 July 2024, which reads in its pertinent parts as follows:
“International Olympic Committee (IOC) confirms that the Swedish Committee (SOC) and other national Olympic committees have full authority to select which athletes will participate in the Olympics.
On July 8, the Swedish Olympic team will be finalized, currently consisting of 117 active athletes from 19 different sports. In connection with the latest selections, questions have arisen regarding national selection rules and SOC’s

mandate in relation to the Olympic Charter. ...

The IOC confirms that the responsibility for Olympic selections lies clearly with SOC and that SOC is ultimately responsible for the selection of teams and athletes in accordance with the Olympic Charter. The IOC also states that national Olympic committees and national federations can establish selection criteria that are stricter compared to the minimum international qualification levels, says SOC’s team leader Peter Reinebo. ...

According to the IOC’s statutes 27.3 (page 61), national Olympic committees have the exclusive right to choose which athletes are sent to the Olympics. It is common worldwide for national Olympic committees to exercise this right. ...

The Swedish Olympic Committee is a member-driven and democratic organization consisting of the 38 Olympic special federations (OSF). Selection criteria for participation in the Olympics are determined jointly by the federations. At SOC’s annual meeting in April 2023, the federations decided to change the criteria for participating in the Olympics, changing the basic criterion from top-8 to top-12 for both teams and individuals. What corresponds to a top-12 result in the highest international competition in the relevant sport is determined and documented in collaboration with the respective sport/coach. The future criterion exists for young promising athletes who are close but have not yet reached the basic criterion”.

5. The Appellants were not among the “117 active athletes from 19 different sports” referred to in the above Press Release.
6. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, the CAS

file and the content of the hearing that took place on 25 July 2024. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it shall refer in this Award only to those submissions and evidence it deems necessary to explain its reasoning.

A. The Olympic Charter and Qualification Systems for the Games

7. The Olympic Charter¹, which governs the conduct and processes of the International Olympic Committee (the "IOC") and the Olympic Movement, includes the following relevant parts: **"27 Mission and role of the NOCs**

[...]

3 The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. In addition, each NOC is obliged to participate in the Games of the Olympiad by sending athletes.

[...]

7 NOCs have the right to:

7.2 send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter;

40 Participation in the Olympic Games*

[...]

Bye-law to Rule 40

1 Each IF establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.

[...]

44 Invitations and entries*

2 Only NOCs recognised by the IOC may submit entries for competitors in the Olympic Games.

3 Any entry is subject to acceptance by the IOC, which may at its discretion, at any time, refuse any entry, without indication of grounds. Nobody is entitled as of right to participate in the Olympic Games.

4 An NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination

¹ While there have been multiple editions of the Olympic Charter in force since the past Summer Olympic Games, there are no substantial amendments to the relevant parts quoted.

5 The NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition. Through its IF, a national federation may ask that the IOC Executive Board review a decision by an NOC in a matter of entries. The IOC Executive Board's decision shall be final".

8. On 7 December 2022, World Sailing, the world governing body for the sport of sailing, adopted the Sailing Qualification System (the "World Sailing QS") for the Summer Olympic Games Paris 2024 ("Games"). The World Sailing QS provides – *inter alia* – for quota places for the participation in the Games. These quota places are allocated, based on the individual performance records prior to the Games of the top-ranked athletes globally, to the respective NOCs of the athletes' nationality, but not to an individual athlete. This follows from Sec. E1 of the World Sailing QS, which reads as follows:

E. CONFIRMATION PROCESS FOR QUOTA PLACES

E.1 CONFIRMATION OF QUOTA PLACES

E.1.1 World Sailing will publish the results of the event within seven (7) working days after the last day of the qualification event on its website (paris2024.sailing.org).

E.1.2 World Sailing will confirm in writing to the NOCs within ten (10) working days after the last day of each qualification event, the quota places they have obtained.

E.1.3 The NOCs will then have until midnight London time on the date in the table below to confirm to World Sailing using the World Sailing confirmation form via the specified email if they wish to use these quota places, as detailed in section G. **Qualification Timeline**.

9. It follows from E1.3 that the NOCs may decline a quota place allocated to them. In such case the quota place is reallocated by World Sailing. The

relevant provision in the World Sailing QS reads as follows:

E.1.5 Quota places not confirmed by the deadline will be deemed declined and reallocated according to section F. **Reallocation of Unused Quota Places**.

10. Sometime in December 2022, World Athletics, the world governing body for the sport of athletics, adopted the Athletics Qualification System for the Games (the "World Athletics QS"). Similarly to the World Sailing QS, the World Athletics QS also provides for quota places. These can be earned as follows:

General

An athlete can qualify in one of two ways:

- By achieving the entry standard (see section I.) within the respective qualification period outlined below. The entry standards, approved by the World Athletics Council in November 2022, have been determined in order to target the qualification of approximately 50% of the athletes. For the avoidance of doubt, any athlete achieving the entry standard will be deemed qualified, regardless of them being within the 50% or not.
- The remaining qualification places will be allocated on the basis of the World Athletics World Rankings within the ranking period.

11. The purpose of the Entry Standard (first pathway) (that need to be achieved within a certain time frame) is to require an athlete to meet a qualifying standard, meaning a mark as good or better than this set mark, in order to be eligible to compete. The standard for the individual disciplines is set in the World Athletics QS as follows:

Men	Event	Women
10.00	100m	11.07
20.16	200m	22.57
45.00	400m	50.95
1:44.70	800m	1:59.30
3:33.50 (3:50.40)	1500m (Mile)	4:02.50 (4:20.90)
13:05.00	5000m	14:52.00
27:00.00	10,000m	30:40.00
13.27	110m Hurdles / 100m Hurdles	12.77
48.70	400m Hurdles	54.85
8:15.00	3000m Steeplechase	9:23.00
2.33	High Jump	1.97
5.82	Pole Vault	4.73
8.27	Long Jump	6.86
17.22	Triple Jump	14.55
21.50	Shot Put	18.80
67.20	Discus Throw	64.50
78.20	Hammer Throw	74.00
85.50	Javelin Throw	64.00
8,460	Decathlon / Heptathlon	6,480
1:20:10	20km Race Walk	1:29:20
2:08:10	Marathon	2:26:50

12. Again, the quota places earned based on the Entry Standard (first or second pathway) are allocated not to an individual athlete, but to the NOC of the state of the athlete's nationality. Similarly to the World Sailing QS, also within the scope of the World Athletics QS, the NOC can accept or decline the quota place allocated to it:

F.1. REALLOCATION OF UNUSED QUOTA PLACES

After publication of the qualified athletes on 2 July 2024, NOCs must inform World Athletics of their intention to decline a quota place, whether in individual or relay events, by the deadline of 4 July (midnight Monaco time). Notifications must be sent to teamservices@worldathletics.org by the NOC/Member Federation concerned, with a copy to its respective NOC. Quota places declined after the above deadline will not be reallocated.

During the period 4 – 6 July, World Athletics will reallocate the declined quota places to the next best ranked athlete in the same event according to the World Athletics World Rankings, respecting the maximum quota by NOC per event. In case of tie (same world ranking position and ranking score), this will be resolved in favour of the athlete with the next best performance score.

B. The SOC Supplementary Selection Rules

13. Sometime in April 2023, the SOC general assembly adopted the Supplementary Selection Rules (the “SOC Rules”) for the Games.

14. On 11 October 2023, the SOC released the SOC Rules for the Games, with the aim of choosing a team that could win medals for Sweden. The relevant parts of the SOC Rules are as follows:

“2. Criteria for the selection of athletes - individual Olympic competitor

2.1) Basic Criterion: The selected athlete must have achieved results and shown such form that he/she is deemed capable of competing for at least twelfth place at the Olympic Games. The basic criterion must be achieved at the highest level of international competition on an Olympic scale, i.e. taking into account the number of athletes per nation allowed by the rules for Olympic participation.

2.2) Future criterion: The SOC may select Olympic participants who do not meet the basic criterion, but who are jointly judged by the sports directors of the OSF and the SOC to be a promising participant for the next Olympics. The Olympic participation must be considered a good learning experience for the athlete and a good investment for the next Olympics with a view to medal level. However, the athlete must have the assessed ability to perform at a high level already at the current Olympics.

2.3) Exception criteria:

In specific cases, exceptions to the basic criterion may be made. A prerequisite for any exception is that the active person has met the international qualification or quota criteria. An application for exemption may be made by the sports officials of the relevant OSF together with the sports officials of the SOC, provided they consider it well justified for one of the following reasons

- If the current results for the basic criterion are missing but the assessment is that the current level of the active person can still be considered as corresponding to the basic criterion.

- If a sport does not have a participant in the Olympic squad and it is considered that the participation of an athlete would particularly benefit that sport. The definition of sports is made in the selection document for each Olympic Games.

Decisions on any exceptions are taken by the SOC Board or a group appointed by the Board.

[...]

Athletics

[...]

Application of selection criteria and quality requirements

The selection of athletes for the Paris Olympics, on both the basic and future criteria, is based on an overall assessment of results and performances in international competitions with high international competition.

The basic criterion for nomination is considered met if the athlete has placed in the top 12 at the 2023 World Championships or shows an equivalent result and level of performance at other competitions in the highest international competition. The championships that form the basis for the nomination limit are the 2016 Olympics, 2020 Olympics, 2022 World Championships and 2023 World Championships. The basis for the nomination limit is the average result of the season's best before the championship for those who have reached 10-14 places at each championship. An athlete may be considered for selection even if they do not meet the nomination limit if they can show several results within the level range.

In marathon and all-around, the nomination limit is counted on results made even up to 1 year before the championship.

These nomination limits and level ranges should be seen as guidelines for the national team captain to be able to nominate the active, but is not automatically a clear Olympic selection.

The SOC makes the final decision on selection.

Results achieved at low level competitions or at indoor competitions may be supportive but are not the sole basis for nomination or selection.

Active can be nominated on the future criterion without having reached the SOK nomination limit or having results in the level range.

If more than the maximum of three (3) athletes pass the nomination level in a sport, the President decides who to nominate.

Nomination of individual active:

CRITERIA for the national team captain to nominate an athlete for Olympic selection. To be eligible for selection, 1 or 2 below always apply:

- 1. Meeting WA's eligibility threshold.*
- 2. To be invited by WA as the best ranked athlete in addition to those who have passed WA's qualification limit up to the number of participants in the event. In addition, the athlete must have shown top-12 results and be deemed capable of repeating this at the 2024 Paris Olympics (Basic Criterion). The nomination limit and, secondarily, the range of levels for this are set out below. Nomination limits are set on the basis of four championships, Olympic Games 16, Olympic Games 21, World Championships 22 and World Championships 23. The nomination*

limit is based on the average result of the season's best before the championship for those who have achieved 10-14 places at each championship. An active athlete may be considered for selection even if he/she does not meet the nomination limit if he/she can show several results within the level range. Results in the range close to the qualification limit increase the possibility of selection. In case of large differences in results between the championships, the latter two will count more heavily.

3. Separate dialog should be held with athletes/coaches in sports where multiple results in the level range are not possible due to the number of competitions, such as marathons and all-around.

4. Placed in the top 12 at the 2023 World Cup in Budapest (basic criterion).

5. Top 12 after the end of the international qualification period (Road to Paris), (Basic criterion).

6. If criteria 1 or 2 are met, nomination can also be made on the Future criterion.

7. Exceptions to the nomination limits and level ranges may be made on a case by case basis in special circumstances. E.g. weather and wind at the time of the competition, few competitions due to injury/illness, previous championship merits. In these special cases, a dialog is held between the national team captain and SOC's sports director, and in a second step with the athlete/coach, before any nomination is made.

[...]".

15. Under the SOC Rules, there are three criteria to be considered for selection by the SOC:

- The basic criterion ("Basic Criterion"): Athlete must be deemed to be capable to compete for, at least, 12th place at the Games. To this end, the SOC Rules define certain sporting limits ("Nomination Limits") for each sport.
- The future criterion ("Future Criterion"): Athlete, who has not fulfilled the Basic Criterion, is jointly deemed by the SOC and the national federation to be a future talent and Olympic medal candidate, whose development may benefit from participating in the Games.
- The exemption criterion ("Exemption Criterion"): Athlete may be exempted from the Basic Criterion if, *inter alia*, the Athlete has fulfilled the international qualification criteria but not the SOC Basic Criterion.

16. Notably, there is a safeguard under the SOC Rules with respect to the Basic Criterion, wherein there is a set range slightly below the Nomination Limit (the "Potential Range"), for which, if an athlete has several results within this range, he or she may also be nominated to the SOC.

C. Circumstances Around the Appellants' Qualification

17. The Appellants are Swedish athletes who meet the requirements for the Games, pursuant to the qualification systems of their respective sports:
 - Mr. Eric Bengtson competes in

the sailing class ILCA7. It is undisputed that his performance earned a quota place for the SOC under the World Sailing QS. He achieved rankings from 17th to 26th in the relevant events during the qualification period of July 2023 to 24 April 2024. The SOC was informed by World Sailing of the quota place based on Mr. Eric Bengtson's results and, on 13 March 2024, the SOC accepted the quota place earned by Mr. Bengtson for the Games on a preliminary basis. However, the SOC did not confirm the quota place within the prescribed deadline because it considered that Mr. Eric Bengtson did not meet the SOC Rules, described above, for its selection of Sweden's team for the Games. World Sailing then reallocated the quota place to another NOC.

- Ms. Sara Lennman, born on 8 April 1996, competes in the shot-put event in athletics. The Entry Standard according to the World Athletics QS is 18.80m. Ms. Lennman is placed 34th based on World Athletics' World Rankings. The SOC Rules have set the qualification period from 1 June 2023 and 30 June 2024 and the Nomination Limit for shot put at 18.88m. The Range of Potential Exemption is set by the SOC Rules at 18.33m, to 18,87m. Ms. Lennman did not achieve the Entry Standard and did not meet the Nomination Limit during the qualification

period. However, she recorded one performance within the Potential Range (18.39m) on 19 May 2024. Ms. Lennman was not nominated by the SOC for the Games and consequently her quota place was reallocated to another NOC.

- Ms. Rebecca Hallerth, born on 4 January 1996, competes in the hammer throw event in athletics which has an Entry Standard according to the World Athletics QS of 74.00m. Ms. Rebecca Hallerth is ranked 33rd based on World Athletics' World Rankings. The SOC Rules have set the Nomination Limit at 73.45m. Ms. Hallerth did not achieve either the Entry Standard nor the Nomination Limit within the qualification period between 1 June 2023 and 30 June 2024. However, she recorded one performance within the Potential Range set at 71.02m to 73.44m for hammer throw (72.62m) on 25 May 2024.
- Mr. Simon Sundström, born on 4 February 1998, competes in the 3000m steeplechase event in athletics. The Entry Standard according to the World Athletics QS is 8:15.00. Mr. Sundström is ranked 24th based on World Athletics' World Rankings. The SOC Rules have set the Nomination Limit at 8:15.51. Mr. Sundström did not achieve either the Entry Standard or the Nomination Limit during

the qualification period between 1 June 2023 and 30 June 2024. However, he recorded two performances within the Potential Range set at 8:15.52 to 8:19.12 for 3000m steeplechase, *i.e.* 8:17.15 on 2 June 2024 and 8:18.09 on 10 September 2023.

Limit during the qualification period between 1 June 2023 and 30 June 2024. However, he recorded one performance within the Potential Range set at 8:15.52 to 8:19.12 for 3000m steeplechase (8:18.23) on 15 June 2024.

➤ Ms. Yolanda Ngarambe, born on 14 September 1991, competes in the 1500m event in athletics. The Entry Standard according to the World Athletics QS is 4:02.50. Ms. Ngarambe is ranked 40th based on World Athletics' World Rankings. The SOC Rules have set the Nomination Limit at 04:02.52. Ms. Ngarambe did not achieve either the Entry Standard nor the Nomination Limit during the qualification period between 1 June 2023 and 30 June 2024. In addition, she has not recorded any performances within the Potential Range set at 4:02.53 to 4:04.33 for 1500m.

➤ Mr. Leo Magnusson, born on 4 February 1998, competes in the 3000m steeplechase event in athletics. The Entry Standard according to the World Athletics QS is 8:15.00. Mr. Magnusson is ranked 38th based on World Athletics' World Rankings. The SOC Rules have set the Nomination Limit at 8:15.51. Mr. Magnusson did not achieve either the Entry Standard or the Nomination

18. On 13 May 2024, the Swedish Sailing Federation ("SSF") informed Mr. Bengtson that he was not nominated to the SOC for selection for the Games.

19. Mr. Bengtson made enquiries at the SSF and received no substantial answers, and he proceeded to appeal the SSF's decision to the SOC on 4 June 2024.

20. On 12 June 2024, Mr. Bengtson had a meeting with some officials from SSF and SOC, wherein Mr. Bengtson made queries about the compliance of the SOC Rules with the Olympic Charter. The officials present thereafter contacted the IOC.

21. On 3 July 2024, Ms. Sara Lennman, Ms. Rebecca Hallerth. Mr. Simon Sundström, Ms. Yolanda Ngarambe and Mr. Leo Magnusson (the "Track and Field Athletes") were informed by the Swedish National Athletics Federation ("SNAF") that they had not been selected to the Swedish Olympic team (the "3 July Decision").

22. On 4 July 2024, the IOC sent an email to the SOC to confirm the exclusive authority of the SOC, with relevant parts of the email as follows:

"Please find attached the various emails the IOC has received from individuals over the last several days, which seem to be connected to the SOK's non-selection of sailing athlete, Emil

Bengtson. We also received a press inquiry last week.

We have responded to some of these emails by deferring the individuals to the SOK as per Rule 27 of the Olympic Charter: 'The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental, or world multi-sports competitions patronized by the IOC'".

23. On 5 July 2024, the SOC issued the Press Release.
24. During the period between 4 and 6 July 2024, World Athletics reallocated the declined quota places of the Track and Field Athletes.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 12 July 2024, the Appellants filed the Statement of Appeal against the Respondent with the CAS in accordance with Articles R48 of the CAS Code of Sports-related Arbitration (2023 edition) (the "CAS Code") respectively. In the Statement of Appeal, the Appellants, *inter alia*, nominated Mr. James H. Carter as an arbitrator and requested an expedited procedure.
26. On 15 July 2024, the CAS Court Office communicated the Statement of Appeal to the Respondent and invited it to state, by 17 July 2024, whether it agreed with the Appellants' request for an expedited procedure. The letter also invited the Respondent to nominate an arbitrator within ten days of receipt of this letter.
27. On 17 July 2024, the Respondent submitted "initial comments" to the

CAS Court Office. Therein, the Respondent requested the CAS to reject the Appellants' appeal and reserved its right to amend, develop and/or supplement its position and its requests for relief in its subsequent Answer. In addition, the Respondent requested a panel of three arbitrators to decide the case. Finally, the Respondent in its letter stated that it was "*prepared to agree that the matter is determined without a hearing*" and also accepted the Appellants' request for an expedited procedure and proposed the following procedural calendar subject to the Appellants' consent:

- Appellants' Appeal Brief by 18 July 2024;
 - Respondent's Answer by 23 July 2024;
 - Summary decision on the merits as soon as possible, and in any event before 26 July 2024.
28. On the same day, the CAS Court Office acknowledged receipt of the Respondent's letter and invited the Appellants to comment on the Respondent's proposed procedural calendar by 17:45 CEST of the same day. The letter invited the Respondent to confirm whether it intended to pay its share of the advance of costs. Finally, the letter invited the Appellants to confirm by 18 July 2024 whether they requested a hearing to be held in this matter.
 29. Still on the same day, the Respondent nominated Mr. Klaus Reichert SC as an arbitrator. Furthermore, the Respondent confirmed that it intended to pay its share of the advance on costs.
 30. Later on the same day, the Appellants informed the CAS Court Office that

- they requested an expedited procedure, accepted a panel of three arbitrators, wished to amend the procedural calendar proposed by the Respondent, agreed to decide the matter on written submission only and stated that they would like *“to receive the fixed cost as soon as possible”*.
31. Still on 17 July 2024, the CAS Court Office informed the Parties that the Appellants’ deadline to file the Appeal Brief was 18 July 2024 and invited the Respondent to confirm whether it agreed with the Appellants’ proposal for the filing of the Answer by 19 July 2024.
 32. In a final letter of same day, the Respondent objected to the Appellants’ amended procedural calendar and requested more time to file its Answer.
 33. On 18 July 2024, the CAS Court Office informed the Parties that the matter of the procedural calendar would be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy.
 34. Still on 18 July 2024, the CAS Court Office communicated the decision of the Deputy President of the CAS Appeals Division. According thereto, the following procedural calendar was implemented:
 - 18 July 2024 Appellants’ Appeal Brief
 - 22 July 2024 Respondent’s Answer
 - 23 July 2024 Appellants’ Reply (if any)
 - 24 July 2024 Respondent’s Rejoinder (if any)
 - 25 July 2024 Potential Hearing (subject to the Panel’s decision in this regard)
 - 26 July 2024 Notification of the operative part of the CAS award.
 35. On 18 July 2024, the Appellants filed the Appeal Brief, in accordance with Article R51 of the CAS Code and the expedited procedural calendar.
 36. On 19 July 2024, the CAS Court Office acknowledged receipt of the Appellants’ Appeal Brief and invited the Respondent to submit its Answer by 22 July 2024.
 37. On the same day, the Respondent submitted to the CAS Court Office an additional power of attorney by email.
 38. On 22 July 2024, the Respondent filed its Answer, in accordance with Article R55 of the CAS Code.
 39. On the same day, the CAS Court Office acknowledged receipt of the Respondent’s email dated 19 July 2024 and informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel to decide the present dispute was constituted as follows:

President:
Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany

Arbitrators:
Mr. James H. Carter, Attorney-at-Law, New York, USA
Mr. Klaus Reichert SC, Barrister in London, United Kingdom
 40. On 23 July 2024, the CAS Court Office acknowledged receipt of the Respondent’s Answer and invited the

- Parties to confirm their availability for a hearing via videoconference.
41. On 24 July 2024, the CAS Court Office noted that in view of the Parties' availability and on behalf of the Panel, the Parties were invited to appear at the hearing to be held via videoconference on 25 July 2024, 12:30 (Swiss time).
 42. On the same day, the Appellants sent an email informing the CAS Court Office that they would be assisted by Mr. Karl Ole Möller, Attorney-at-law.
 43. Still on the same day, the CAS Court Office acknowledged receipt of the Appellant's email and enclosed an Order of Procedure ("OoP") for the Parties' signatures.
 44. On 25 July 2024, the CAS Court Office acknowledged receipt of the Parties' signed OoP and provided a tentative hearing schedule.
 45. On the same day, a hearing took place by videoconference before the Panel. Besides Ms. Amelia Moore (Counsel to the CAS), the following persons attended the hearing:

For the Appellants:

Mr. Emil Bengtson (Appellant);
 Ms. Sara Lennman (Appellant);
 Ms. Rebecka Hallerth (Appellant);
 Mr. Simon Sundström (Appellant);
 Ms. Yolanda Ngarambe (Appellant);
 Mr. Leo Magnusson (Appellant);
 Prof. Daniel Stattin (Expert Witness for the Appellants); and
 Mr. Karl Ole Möller (Counsel for the Appellants);

For the SOC:

Ms. Åsa Edlund Jönsson
 (Representative for the SOC);

Mr. Peter Reinebo (Representative for the SOC);
 Mr. Fredrik Joulamo (Representative for the SOC);
 Mr. James Hope (Counsel for the SOC);
 Mr. Nils Ivars (Counsel for the SOC);
 and
 Mr. Sebastian Saadieh (Counsel for the SOC).

46. At the beginning of the hearing, the Parties confirmed that they had no objection as to the formation of the Panel. At the end of the hearing, the Parties acknowledged that their right to be heard had been respected in these proceedings.
47. On 26 July 2024, the CAS Court Office communicated the operative part of the Arbitral Award issued by the Panel.

IV. SUBMISSIONS OF THE PARTIES

48. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellants' Position

49. In their Appeal Brief, the Appellants requested two main aspects of relief as follows:

“The Appellant’s request that the Court of Arbitration of Sports (CAS) orders that the Appellant’s are registered for participation in the Paris 2024 Olympic Games for Sweden; by the Swedish Olympic Committee requesting that the International Olympic Committee, either by withdrawing the spot allocated according to Rule 44 “Invitations and entries” 1-5 or by increasing the number of participants according to Bye-Law to Rule 44 of the Olympic Charter 2023”.

And

“(a) The selection criteria for participation in the Olympic Games decided by the IOC shall apply.

(b) The SOC or Swedish sports federations may not adopt their own selection criteria for the selection of participants in the Olympic Games or amend/modify/change the selection criteria of the IOC.

(c) If the SOC or Swedish sports federations are not allowed to decide on their own selection criteria, such Criteria constitutes a breach or non-compliance with the Charter according to Rule 1.4 of the Charter” (sic).

50. The Appellants submit that the SOC should not have denied the Appellants the opportunity to compete at the Games because the IOC had the exclusive right to decide on the organization of the Games and the sole right to determine the rules for the selection of participants in the Games:

- Rule 40 of the Olympic Charter stipulates the main rules on eligibility, and sets the rules which need to be complied with in order to participate at the Games, as set out in bye-law 40.1 of the

Olympic Charter:

“Each IF establishes its sport’s rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval”.

- As such, only the international sports federations (“IFs”), together with the IOC, if it approves, can determine the criteria to be used in selecting participants for the Games. The SOC is not permitted to alter the IOC’s rules and criteria.

- Further, Bye-law 40.2 of the Olympic Charter also stipulates that the national sports federations (“NFs”) and NOCs are responsible for applying the criteria decided by the IFs and the IOC, which does not give the SOC the right to issue supplementary rules:

“The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities”.

- The division of the competences in the Olympic Charter therefore are as follows: it is for the IFs to propose the qualification system for the Games, the IOC Executive Board to decide whether to apply the standards of that system, and for national bodies to apply only those qualification standards. There are no grounds for transferring

competences between the IFs, the IOC, and national bodies, or national bodies have no “residual competence”.

- Rules 27.2 and 27.7 of the Olympic Charter stipulate that NOCs have certain tasks and rights but no unregulated residual competence such as issuing supplementary selection criteria. As such, the criteria issued by the SOC are a violation of Rule 1.4 of the Olympic Charter.
 - While the SOC has exclusive authority to enter participants and select the athletes that will represent Sweden at the Games, the additional criteria set by SOC contradict the Olympic Charter. It is important to distinguish between the competence to make the selection based on the given criteria from the IOC / IFs and competence to decide on the criteria themselves. The SOC has done the latter despite having only competence to do the former according to Rule 27.3 of the Olympic Charter.
 - Just because the IOC did not address the incorrect practice of the SOC, this does not justify continued wrongdoing by the SOC.
51. The Appellants further submit that the NOC should be seen as the extended arm of the IOC in the nations in which they operate, pursuant to Rule 27 of the Olympic Charter, and the SOC

must therefore apply the qualification criteria approved by the IOC. The term “application” does not imply a right to issue supplementary rules, and any non-compliance by the NOC can incur risk that the NOC will be liable to pay damages under Swedish law to athletes who have been wrongly refused participation at the Olympic Games.

B. The SOC’s Position

52. In its Answer, the SOC requested the Panel to rule as follows:

“(1) The Respondent asks the Panel to issue an initial summary decision denying the relief requested by the Appellants, including a summary of the basis for its decision.

(2) The Respondent asks the Panel to issue a subsequent reasoned decision addressing the substantive and procedural defences raised.

(3) In accordance with Article R64.5, first sentence, of the CAS Code, the Respondent asks the Panel to determine that the Appellants shall bear the full amount of the arbitration costs. However, for the purposes of these specific proceedings only, and subject to the general reservation of rights set out below, the Respondent does not ask for a contribution towards its legal fees and other expenses as contemplated by Article R64.5, second sentence, of the CAS Code”.

53. The SOC claims that there are a series of procedural / jurisdictional problems with the Appellants’ claim. The SOC also stated in its Answer that “[i]n fairness to the Appellants, the SOC asks the Arbitral Panel to consider the substance of the Appellants’ claims. In addition, the SOC also asks the Arbitral Panel to note that there are several procedural problems with the Appellants’ claims”. The procedural/jurisdictional problems

raised by the Respondent are the following:

- Section 31 of the SOC Statutes provides that only “[d]ecisions by the SOC Board, or by a mediation body, arbitral tribunal or disciplinary tribunal appointed by the SOC” may be appealed to the CAS.
- The Press Release issued by the SOC on 5 July 2024 is not a “decision” under Section 31 of the SOC Statutes.
- In any event, Mr. Emil Bengtson failed to bring his claim in time, as the decision of the SSF not to nominate him to the SOC for selection was communicated to him in May 2024, and the present appeal was only filed in July 2024, which is more than “21 days after the receipt of the decision”, pursuant to Section 31 of the SOC Statutes.
- The Appellants’ present appeal is – in reality – an appeal against and to overturn or rewrite the SOC Rules which were adopted at the SOC general assembly in April 2023. However, there is no right to appeal to the CAS against a decision of the SOC general assembly, and the appeal would be out of time.
- The relief sought by the Appellants cannot be legally granted by the CAS. The CAS cannot order that the SOC must request that the IOC withdraw places that have been

reallocated to other NOCs, nor can the CAS order that the SOC must request that the IOC increase the number of participants according to the Bye-Laws to Rule 44 of the Olympic Charter.

54. The SOC contends that the appeal must fail on the merits. As the NOC of Sweden, it has exclusive authority to select athletes for the Swedish Olympic team, as follows:

- Under the Olympic Charter, the NFs submit nominations to the NOC for their athletes, and the NOC selects candidates from the athletes nominated by the NFs. The NOC then makes the final selection of athletes who will represent its country at the Olympic Games, but the NOC is not obliged to select every nominated athlete under Rule 44.4 of the Olympic Charter. In any event, the IOC has the right to deny an athlete entry to the Games at its own discretion under Rule 44.3 of the Olympic Charter.
- Rule 27.3 of the Olympic Charter empowers the NOCs with the “exclusive authority for the representation of their respective countries at the Olympic Games”, which allows for discretion, wherein NOCs are bound to make an independent assessment of each nominated candidate, with possible considerations set out in the Bye-laws of Rules 27 and 28, and Rule 44 of the Olympic

Charter.

- Rules 27 and 44 of the Olympic Charter sets out a regime for selection for the Games, wherein the NF nominates athletes to the NOC, and the NOC has exclusive authority to select athletes to represent its country, and the IOC, at its own discretion, can ultimately decide not to allow an athlete to compete.
- Rule 27.3 of the Olympic Charter, which stipulates that *“each NOC is obliged to participate in the Games of the Olympiad by sending athletes,”* does not mean that the SOC is obliged to name all athletes who have met IF/SOC qualification system standard to the Swedish Olympic team, but rather merely precludes possibilities of boycott or refusal to participate in the said Games. There is no obligation on the NOCs to select any particular athlete, nor is there any right for any individual athlete to compete at the Olympic Games.

55. The SOC submits that it has the right to apply supplementary selection criteria in addition to the qualification standards set by the IOC, as follows:

- Under the World Sailing QS, quota places are allocated to NOCs and not to individual athletes and it is expressly stipulated that NOCs can choose to *“not confirm”* the allocated quota place or

“decline” a quota place, as a result of which the unused quota place can be reallocated. Further, the World Sailing QS also specifies that *“[e]ach NOC, in coordination with their national sailing federation, determine their own criteria and timeline for selecting which athletes will represent them in the Events the NOC qualifies”*. As such, there is no obligation under the World Sailing QS for the SOC to accept a quota place.

- Under the World Athletics QS, NOCs also can choose to *“decline”* a quota place, following which the unused quota place can be reallocated to the NOC of the next ranked athlete among all the qualified athletes globally in the same event. As such, there is no obligation under the World Athletics QS for the SOC to accept a quota place.
- The SOC Rules were adopted democratically by the SOC general assembly in April 2023, which includes 38 NFs of Sweden.
- The IOC has confirmed that the SOC had exclusive authority for the representation of Sweden at the Games, through an email dated 4 July 2024.
- Several other countries have their own additional selection criteria for the Games, such as the United Kingdom, the Netherlands, and New

Zealand.

56. The SOC submits that CAS jurisprudence has confirmed that the NOCs have an exclusive right to select competitors for the Olympic Games, and that quota places are allocated to the NOCs and not to individual athletes (CAS OG 20/05 para. 7.7; OG 22/007 para. 98).

57. The SOC maintains that the Appellants did not fulfil the selection criteria in the SOC Rules.

i) Mr. Emil Bengtson (sailing class ILCA7)

➤ Mr. Bengtson did not obtained any top-12 results in competitions during the qualification period between July 2023 and 24 April 2024. During the qualification period, Mr. Bengtson only achieved results from 17th to 26th placing.

➤ The Swedish national sailing coach and the SOC sports director have each and together assessed that Mr. Bengtson does not meet the SOC Rules for selection for any of the Criteria set out in the SOC Rules.

➤ Given that the SSF did not nominate Mr. Bengtson to the SOC for selection, it was outside the authority of the SOC to select Mr. Bengtson for the Games. As such, the SOC declined the offered quota place to Sweden.

ii) Ms. Sara Lennman (shot-put)

➤ Ms. Lennman did not achieve the Entry Standard of 18.80m or the SOC Nomination Limit of 18.88m during the qualification period between 1 June 2023 and 30 June 2024, but only recorded one performance within the Potential Range set at 18.33m to 18.87m for shot put, at 18.39m on 19 May 2024. As such, the SOC declined the offered quota place.

iii) Ms. Rebecca Hallerth (hammer throw)

➤ Ms. Hallerth did not achieve the Entry Standard of 74.00m or the SOC Nomination Limit of 73.45m during the qualification period between 1 June 2023 and 30 June 2024, but only recorded one performance within the Potential Range set at 71.02m to 73.44m for hammer throw, at 72.62m on 25 May 2024. As such, the SOC declined the offered quota place.

iv) Mr. Simon Sundström (3000m steeplechase)

➤ Mr. Sundström did not achieve the Entry Standard of 8:15.00 or the SOC Nomination Limit of 8:15.51 during the qualification period between 1 June 2023 and 30 June 2024, but recorded two performances within the Potential Range set at 8:15.52 to 8:19.12 for 3000m steeplechase, at 8:17.15 on 2

June 2024 and 8:18.09 on 10 September 2023. As such, the SOC declined the offered quota place.

v) Ms. Yolanda Ngarambe (1500m)

- Ms. Ngarambe did not achieve the Entry Standard of 4:02.50 or the SOC Nomination Limit of 04:02.52. Ms. Ngarambe did not achieve either standard during the qualification period between 1 June 2023 and 30 June 2024, nor record any performances within the Potential Range set at 4:02.53 to 4:04.33 for 1500m. As such, the SOC declined the offered quota place.

vi) Mr. Leo Magnusson (3000m steeplechase)

- Mr. Magnusson did not achieve the Entry Standard of 8:15.00 or the SOC Nomination Limit of 8:15.51. Mr. Magnusson did not achieve either standard during the qualification period between 1 June 2023 and 30 June 2024, but recorded one performance within the Potential Range set at 8:15.52 to 8:19.12 for 3000m steeplechase, at 8:18.23 on 15 June 2024. As such, the SOC declined the offered quota place.

58. The SOC submits that the requests of the Appellants can no longer be carried out by the Respondent:

- The IOC already re-allocated

the declined quota places by the SOC to the NOCs of the next ranked athletes and cannot withdraw places already re-allocated.

- The Panel is also not able to order the SOC to make a request to the IOC to increase the number of participants for the respective events, as it is already confirmed in previous decisions that the CAS itself cannot grant additional quota places, re-write or amend a qualification system, or add additional places to athletes who have not been selected by an NOC (CAS OG 22-007, para. 103; CAS OG 22/03, paras. 8.15, 8.19, 8.20; CAS OG 20/05, para. 7.13 ff; CAS OG 22/05, para. 7.19)

V. JURISDICTION

A. The Applicable Provisions

59. According to Article R47 of the CAS Code, the Panel has jurisdiction to hear:

“[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

60. In the absence of a specific arbitration agreement, in order for the CAS to have jurisdiction to hear an appeal, the statutes or regulations of the sports-

related body from whose decision the appeal is being made must expressly recognise the CAS as an arbitral body of appeal.

61. Sections 30 and 31 of the SOC Statutes set out the procedure for appeals to the CAS as follows:

*“§ 30 Dispute resolution and arbitration
Disputes concerning Swedish olympic issues shall be determined by the SOC Board. The SOC Board shall decide to determine the issue, or it shall appoint a mediation body, arbitral tribunal or disciplinary tribunal with the task of determining the issue.*

§ 31 Appeals to the CAS

Decisions by the SOC Board, or by a mediation body, arbitral tribunal or disciplinary tribunal appointed by the SOC, in a sport-related dispute, may only be appealed to the Court of Arbitration for Sports (CAS) in Lausanne, which shall finally determine the dispute in accordance with the Code of Sports Related Arbitration. Appeals shall be filed with CAS within 21 days after receipt of the decision”.

B. The Position of the Parties

62. The SOC objects to the Panel hearing the present dispute on grounds that the Press Release by the SOC on 5 July 2024 is not a decision appealable to the CAS pursuant to Section 31 of the SOC Statutes.
63. The Appellants, at the hearing, clarified that they are relying on the 3 July Decision from the SOC on the non-selection of the Track and Field Athletes. Mr. Bengston also clarified that the Press Release was the first time he received an answer from the SOC on the compliance of the SOC Rules with the Olympic Charter, and bases

his appeal on the Press Release. The Appellants further maintain that, on that basis, Section 30 of the SOC Statutes, which stipulates that all disputes pertaining to the Swedish Olympics are to be “*determined by the SOC Board*”, are appealable to the CAS under Section 31 of the SOC Statutes.

C. The Legal Nature of the 3 July Decision / Press Release: Matter of Jurisdiction or Admissibility

64. It is unclear if the issue of whether the 3 July Decision or the Press Release qualifies as a “decision” within the meaning of Article R47 of the CAS Code is a matter of jurisdiction or admissibility. The CAS jurisprudence is not unanimous. In *CAS 2008/A/1633* and *CAS 2022/A/8865-8868*, the panels treated the question whether the appeal was directed against a “decision” as an admissibility issue. In *CAS 2007/A/1633* or *CAS 2015/A/4174*, on the contrary, the respective panels analysed the identical issue as a jurisdictional matter.

65. The Panel finds that the better arguments speak in favour of qualifying the issue as an admissibility matter (cf. also *CAS 2021/A/8034*, no. 74). The CAS Code provides different types of proceedings depending on the matter in dispute, *i.e.* whether the requests filed by the Appellant relate to the setting aside of a “decision” of a sports organisation. If the latter is the case, then the dispute will be adjudicated according to the provisions applicable to the Appeals Arbitration Procedure. In case the matter in dispute does not concern an appeal against a decision, the respective provisions of the Ordinary Appeals Procedure apply.

The question of what procedural rules apply are completely independent from the question of whether the CAS – based on an arbitration agreement – has jurisdiction. As such, the Panel will proceed to address these arguments arising from Article R47 of the CAS Code in the next part on admissibility.

D. The Scope *Ratione Materiae* of the Arbitration Clause

66. According to Section 31 of the SOC Statutes, the scope of the arbitration clause contained therein is restricted. According thereto, the CAS only has jurisdiction for appeals directed against “[d]ecisions by the SOC Board, or by a mediation body, arbitral tribunal or disciplinary tribunal appointed by the SOC, in a sport-related dispute” which are appealable to the CAS. The Panel understands that the Appellants are basing their respective appeals on the 3 July Decision (for the Track and Field Athletes) and on the Press Release dated 5 July 2024 (in the case of Mr. Bengston). The question, thus, is whether these acts stem from “the SOC Board” pursuant to Section 31 of the SOC Statutes. In its Answer the Respondent submitted that these acts have not been issued by the SOC Board and that, therefore, there is no CAS jurisdiction.

67. The Panel notes that the Respondent’s position is somewhat ambivalent. In its Answer, the Respondent submitted that in “*fairness to the Appellants, the SOC asks the Arbitral Tribunal to consider the substance of the Appellant’s claims*”. However, one cannot object to the jurisdiction of the CAS and, at the same time, request the Panel to decide “in fairness” on the substance of the

Appellants’ claim. The question, therefore, is, whether by submitting this somewhat contradictory position the Respondent has waived its right to object to CAS jurisdiction. The Panel is not prepared to accept this as a waiver. The Respondent has signed the OoP, which states that “*the Respondent appears to dispute CAS jurisdiction*” and has made it explicit at the hearing that it relies on its jurisdictional objections. Furthermore, the Answer states that the Respondent “*asks the Panel to issue a ... reasoned decision addressing the substantive and procedural defences*”.

68. Section 22 of the SOC Statutes provides a list of “Duties of the Board”, which read as follows:

“§ Section 22 Duties of the Board
It is the responsibility of the Board to:

- a) implement the decisions of the General Assembly
- b) be responsible for international Olympic cooperation
- c) organize Sweden's participation in the Olympics in close cooperation with the OSF
- d) decide on the selection of Olympic participants following proposals from and consultations with the OSF
- e) appoint the central management of the Swedish participation in the Olympic Games
- f) submit requests for appropriations for the next financial year
- g) take other measures to obtain funds for Olympic preparations and other Olympic purposes
- h) support the sporting Olympic preparations and also otherwise work for performance development in Swedish elite sport
- i) be responsible for the management and accounts of the SOC
- j) draw up a proposal for the direction of activities for the current and next financial year to be submitted to the annual meeting

- k) draw up the business plan and budget*
- l) draw up the annual report and the annual accounts for the last financial year to be submitted to the annual meeting*
- m) where necessary, appoint the Secretary-General and the necessary staff and issue rules for their work*
- n) deal with other routine matters*
- o) decide on guidelines for and delegation of day-to-day work*
- p) prepare the question of membership of the RSF*
- q) establish a code of conduct”.*

69. It follows from the above provision that the selection of the athletes for the Games is a matter falling within the competence of the SOC Board. Consequently, the act (be it a decision or not) to select or not to select an athlete is attributable to the SOC Board. Thus, in the Panel’s view, it has jurisdiction to adjudicate the appeal lodged by the Appellants against both the 3 July Decision and the Press Release of the SOC Statutes.

VI. ADMISSIBILITY

70. With regards to the admissibility of the present dispute, the Panel will assess the following:
- a. Whether the appeal has been filed in a timely manner;
 - b. Whether the Appellants have exhausted all means of internal recourse; and
 - c. Whether the 3 July Decision and the Press Release qualifies as a “decision” within the meaning of Article R47 of the CAS Code.

A. Timeliness of the Appeal

71. Article R49 of the CAS Code provides – in its pertinent parts – as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late”.

72. The Appellants filed the Statement of Appeal on 12 July 2024, which was nine (9) and seven (7) days, respectively, after receipt of the 3 July Decision and the Press Release dated 5 July 2024. The appeals based on the 3 July Decision and the Press Release would fall under the 21-day time-limit for the Statement of Appeal to be filed under Article R49 of the CAS Code. The Panel, therefore, finds that the appeal is timely filed.

B. Exhaustion of Legal Remedies

73. The Parties are not in dispute that the Appellants exhausted all means of internal recourse before lodging the appeal to the CAS.

C. Appeal Against a “Decision”

74. The Parties are in dispute regarding whether the Press Release qualifies as a “decision” within the meaning of Article R47 of the CAS Code. The SOC contends that a Press Release is not a “decision”.
75. Mr. Bengston clarified at the hearing that the Press Release was the first time he received an answer from the SOC on the compliance of the SOC Rules

with the Olympic Charter. Mr. Bengston maintains that, on that basis, Section 30 of the SOC Statutes, which stipulates that all disputes pertaining to the Swedish Olympics are to be “determined by the SOC Board”, are appealable to the CAS under Section 31 of the SOC Statutes.

76. There is abundant CAS jurisprudence on what constitutes a “decision” within the meaning of Article R47 of the CAS Code (CAS 2004/A/659; CAS 2004/A/748; CAS 2005/A/899; CAS 2008/A/1633; CAS 2013/A/3148; CAS 2014/A/3744 & 3766). According thereto the characteristic features of a decision may be described as follows:

- the term “decision” must be construed in a large sense;
- the form of the communication in question is irrelevant for its qualification;
- in principle, for a communication to be qualified as a decision, the communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties;
- a decision is a unilateral act, sent to one or more determined recipients that is intended to produce or produces legal effect.

77. Whether an act of a sports organisation qualifies as a decision is not a matter of form, but of substance. Consequently, the form and/or denomination of the

challenged act are not decisive, but – at the most – a rebuttable indication. Below are a few examples of this jurisprudence:

“With respect to the characterization of a decision, the Panel agrees with the criteria laid down in CAS 2005/A/899, referred to by the Respondent, insofar as CAS considered that ‘... the form of a communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal’ and that ‘In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility of a request, without addressing the merits of such request’” (CAS 2007A/1251, no. 4).

“Based on the above, the Panel believes that an appealable decision of a sport association or federation ‘is normally a communication of the association directed to a party and based on an animus decidendi, i.e. an intention of a body of the association to decide on a matter [...]. A simple information, which does not contain any ‘ruling’, cannot be considered a decision’. (BERNASCONI M., When is a ‘decision’ an appealable decision?, in: RIGOZZI/BERNASCONI (eds.), The Proceedings before the CAS, Bern 2007, p. 273)” (CAS 2008/A/1633, no. 11)” (CAS 2008/A/1633, no. 11).

78. In view of the above criteria, the Panel finds that both the 3 July Decision (which concerns the Track and Field Athletes) and the Press Release are “decisions” within the meaning of

Article R47 of the CAS Code. It is true that the Press Release concerns a communication to the wider public on the selection of the “117 athletes from 19 different sports”. However, this Press Release – in substance – pertains to an underlying decision made by the SOC on the selection of athletes for the Games, and *vice versa*, the non-selection of Mr. Emil Bengtson. Thus, the Press Release has the potential of affecting the legal situation of all the athletes selected and not selected.

VII. THE APPLICABLE LAW

79. Article R58 of the CAS Code stipulates that,

“[t]he Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

80. In the present case, it is not disputed that the applicable regulations to be applied are first and foremost the Olympic Charter, the SOC Statutes, and the SOC Rules. The Panel notes that the Parties did not make any submission on the subsidiarily applicable law. Furthermore, there is no evidence on file that the Parties have entered into any choice-of-law agreement regarding the dispute. Absent any rules of law chosen by the Parties, the Panel shall subsidiarily apply “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is

domiciled or ... to the rules of law that the Panel deems appropriate”. The Panel will address that question in the context of the merits.

VIII. SCOPE OF REVIEW

81. Article R57 of the CAS Code provides – in its pertinent parts – as follows:

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.

82. Pursuant to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

IX. MERITS

83. The Panel takes note of the Appellants’ requests for relief, which read – *inter alia* – as follows:

“The Appellant’s request that ...

(a) The selection criteria for participation in the Olympic Games decided by the IOC shall apply.

(b) The SOC or Swedish sports federations may not adopt their own selection criteria for the selection of participants in the Olympic Games or amend/modify/change the selection criteria of the IOC.

(c) If the SOC or Swedish sports federations are not allowed to decide on their own selection criteria, such Criteria constitutes a breach or

non-compliance with the Charter according to Rule 1.4 of the Charter” (sic).

84. The merits of the present dispute pivot around the question whether the SOC has authority to issue supplementary, national-specific rules (the SOC Rules) for the Games, or whether the SOC is bound to only apply the Qualification Systems set by the IFs for the respective sports (and approved by the IOC).
85. The Respondent submits that what the Appellants seek is *“to appeal against, and to overturn or rewrite, the SOC’s selection criteria that were adopted at the general assembly of the SOC in April 2023 ... However, there is no right to appeal to CAS against a decision of the general assembly of the SOC, In any event, such an appeal would be out of time”*.
86. The Panel notes that the SOC Rules are not addressed to the athletes, but only to the sport entities involved in the national selection process. To this end, the SOC Rules provide as follows:
- “These nomination limits and level ranges should be seen as guidelines for the national team captain to be able to nominate the active, but is not automatically a clear Olympic selection. The SOC makes the final decision on selection”*.
87. Like the World Sailing QS, the World Athletics QS or the Olympic Charter, the SOC Rules also are not intended to grant a right or alter the legal position of the individual athletes. Instead, the SOC Rules are purely intended as internal administrative instructions for the sports bodies involved in the national nomination process. Furthermore, the Panel notes that athletes are not members of the SOC.

Section 3.2 of the SOC Statutes provides as follows:

“The SOC is composed of the following members:

1.) Swedish sports federations that are directly or indirectly affiliated to international federations that organize sport(s) included in the Olympic programme. Such a sports federation is referred to as the Olympic Special Sports Federation (OSF)

2.) Swedish member of the IOC according to OC

3.) Swedish sports federations that are recognized by the IOC and are members of the RF and approved by the annual meeting of the SOC. Such a sports federation is called Recognized Special Sports Federation (RSF)

4.) two representatives of the Active Committee, appointed by the Active Committee, these representatives being active participants in the Olympic Games during the last 12 years”.

88. The Panel is mindful that the SOC Rules have been issued by the SOC General Assembly. Thus, the SOC Rules as such cannot be directly challenged by the athletes, since they have no standing be it as an addressee of these provisions or as a member of the SOC. If, however, the SOC Rules cannot be made the subject of an appeal directly by the Appellants, the latter cannot be barred from requesting an incidental review of these rules in the context of an appeal against a decision of the SOC not to nominate them based on the SOC Rules. It is self-evident that the SOC Rules cannot enjoy immunity from judicial review vis-à-vis the athletes.

A. The Parties' Positions

89. The main arguments raised by the Appellants are that the SOC has no authority under the Olympic Charter to create supplementary selection criteria through the SOC Rules:

- Bye-law 40.1 of the Olympic Charter sets out the main rules on eligibility, which stipulates only that the IFs establish qualification rules, not the NOCs.
- The NOCs are only empowered to “apply” the approved Qualification Systems under Bye-law 40.1 of the Olympic Charter.
- Rules 27.2 and 27.7 of the Olympic Charter stipulate that NOCs have certain tasks and rights but no unregulated residual competence such as issuing supplementary selection criteria. As such, the criteria issued by the SOC are a violation of Rule 1.4 of the Olympic Charter.

90. On the other hand, the SOC maintains that it has authority under the Olympic Charter to apply the SOC Rules as part of its criteria for the selection of athletes to represent Sweden at the Games:

- Under Rule 27.7.2 of the Olympic Charter, the SOC has the exclusive right to “*send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*”, when read together with Rule 44.2 of the

Olympic Charter.

- Rule 27.3 of the Olympic Charter which stipulates that “*each NOC is obliged to participate in the Games of the Olympiad by sending athletes*” does not mean that the SOC is obliged to name all athletes who have met the SOC qualification system standard to the Swedish Olympic team, but rather merely precludes possibilities of boycott or refusal to participate by NOCs in the said Games.
- Under Rule 44.5 of the Olympic Charter, the SOC can send to the Games only competitors who are “*adequately prepared for high level international competition*”.
- Under Rule 44.3 of the Olympic Charter, “[n]obody is entitled as of right to participate in the Olympic Games”.
- Other NOCs such as the New Zealand Olympic Committee, NOC Netherlands, and British Olympic Association, have similar supplementary rules for the selection of their athletes for the Games.

B. The Relationship Between the Olympic Charter and the SOC Rules and Regulations

91. Section 1 of the SOC Statutes reads – *inter alia* – as follows:

“*The Swedish Olympic Committee (SOC) is the Swedish sports movement's highest body in Olympic matters.*”

The SOC's task is to promote and protect the Olympic Movement in Sweden in accordance with the provisions of the Statutes of the International Olympic Committee (IOC), the Olympic Charter (OC) and in accordance with other decisions taken by the IOC. The SOC's task is also to promote Sweden's interests within the Olympic Movement internationally ...

The SOC shall promote the Olympic values of friendship, respect and the pursuit of excellence. The SOC shall ensure compliance with the ... [Olympic Charter] in Sweden”.

92. Furthermore, Section 27 of the SOC Statutes provides as follows:

“The SOC Statutes shall always be in conformity with the ... [Olympic Charter]. Should the SOC Statutes be inconsistent with the [Olympic Charter], the [Olympic Charter] shall prevail”.

93. It follows from the above provisions that there is a clear hierarchy of norms. The SOC has committed itself to follow the Olympic Charter, to ensure that its actions are in compliance with the Olympic Charter and that in case of conflict between the SOC rules and regulations and the Olympic Charter, the latter shall prevail.

C. The Contents of the Olympic Charter

94. Whether the SOC Rules are in compliance with the Olympic Charter depends on the latter's contents, which must be determined through interpretation. Since the IOC is an association according to Swiss law (Articles 60 *et seq.* of the Swiss Civil Code), the Panel finds that the law

applicable to the interpretation of the Olympic Charter shall be Swiss law (cf. also Articles 154, 155 lit. f of the Swiss Private International Law Act), being the law most appropriate to decide this question.

i) Principles applicable to the interpretation of the Olympic Charter

95. According to the jurisprudence of the Swiss Federal Tribunal (“SFT”) the principles applicable to the interpretation of statutes and regulations of a Swiss association are as follows (SFT 4A_406/2021, consid. 4.3.1 seq.):

“4.3.1. Le Tribunal fédéral a interprété à l'égal d'une loi les statuts d'associations sportives majeures, comme l'UEFA, la FIFA, en particulier leurs clauses relatives à des questions de compétence (arrêts 4A_564/2020 du 7 juin 2021 consid. 6.4; 4A_490/2017 du 2 février 2018 consid. 3.3.2, 4A_600/2016 du 29 juin 2017 consid. 3.3.4.1). Il en a fait de même pour découvrir le sens de règles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance (arrêt 4A_600/2016, précité, consid. 3.3.4.1). ... Aussi le recourant a-t-il raison de vouloir les interpréter conformément aux méthodes d'interprétation des lois.

4.3.2. Toute interprétation débute par la lettre de la loi (interprétation littérale), mais celle-ci n'est pas déterminante: encore faut-il qu'elle restitue la véritable portée de la norme, qui découle également de sa relation avec d'autres dispositions légales et de son contexte (interprétation systématique), du but poursuivi, singulièrement de l'intérêt protégé (interprétation téléologique), ainsi que de la volonté du législateur telle qu'elle résulte

notamment des travaux préparatoires (interprétation historique). Le juge s'écartera d'un texte légal clair dans la mesure où les autres méthodes d'interprétation précitées montrent que ce texte ne correspond pas en tous points au sens véritable de la disposition visée et conduit à des résultats que le législateur ne peut avoir voulus, qui heurtent le sentiment de la justice ou le principe de l'égalité de traitement. En bref, le Tribunal fédéral ne privilégie aucune méthode d'interprétation et n'institue pas de hiérarchie, s'inspirant d'un pluralisme pragmatique pour rechercher le sens véritable de la norme (BGE 142 III 402 consid. 2.5.1 et les références citées; arrêt 4A_600/2016, précité, consid. 3.3.4.2)''.

Free translation: 4.3.1. The Federal Court has interpreted the statutes of major sports associations, such as UEFA and FIFA, in the same way as a law, in particular their clauses relating to questions of jurisdiction (judgments 4A_564/2020 of 7 June 2021, recital 6.4; 4A_490/2017 of 2 February 2018, recital 3.3.2; 4A_600/2016 of 29 June 2017, recital 3.3.4.1). It did the same to discover the meaning of rules at a lower level than the statutes enacted by a sports association of this importance (judgment 4A_600/2016, cited above, recital 3.3.4.1). ... The appellant is therefore right to seek to interpret them in accordance with the methods of statutory interpretation.

4.3.2. Any interpretation begins with the letter of the law (literal interpretation), but this is not the decisive factor: it must also convey the true scope of the rule, which also derives from its relationship with other legal provisions and its context (systematic interpretation), from the aim pursued, in particular the interest protected (teleological interpretation),

and from the legislator's intention as it emerges in particular from the preparatory work (historical interpretation). The court will depart from a clear legal text insofar as the other methods of interpretation mentioned above show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results that the legislator could not have intended, that offend the sense of justice or the principle of equal treatment. In short, the Federal Court does not favour any particular method of interpretation and does not establish a hierarchy, drawing on a pragmatic pluralism to seek out the true meaning of the provision (BGE 142 III 402 rec. 2.5.1 and the references cited; judgment 4A_600/2016, cited above, rec. 3.3.4.2).

ii) Degree of autonomy granted to the NOCs under the Olympic Charter

96. The starting point to determine the degree of autonomy granted to the NOCs (under the Olympic Charter) to select athletes for the Games is Rule 27.3 of the Olympic Charter. The provision reads as follows:

“The NOCs have the exclusive authority for the representation of their respective countries at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. In addition, each NOC is obliged to participate in the Games of the Olympiad by sending athletes”.

97. The provision is broadly worded, granting the NOC “exclusive authority” when selecting the athletes to represent the respective country. This authority granted to the NOCs is

reiterated in Rule 27.7.2 of the Olympic Charter according to which the NOCs have the “*right to ... send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter*”. The wide mandate granted to the NOC (“right”, “exclusive authority”) is only limited in Rule 27.3 of the Olympic Charter by the NOC’s obligation to participate in the competitions patronised by the IOC, *i.e.* the NOC must select athletes and send them to the respective competitions. This restriction, however, cannot be interpreted in a manner to require NOCs to send all athletes who fulfil the international qualification criteria to the Games. Such an interpretation would be in conflict with the first sentence of Rule 27.3 of the Olympic Charter granting “exclusive authority” to the NOC to select the athletes to represent the respective country. Furthermore, such interpretation would be difficult to reconcile with Rule 44.2 of the Olympic Charter which reads as follows:

“Only NOCs recognised by the IOC may submit entries for competitors in the Olympic Games”.

98. The above provision grants the exclusive power to submit the names of any athlete to participate in the Games to the respective NOC. The provision indicates that the NOC “may submit entries”. There is no obligation of the NOC to do so (even if certain sporting requirements have been met).
99. In conclusion, the scope of the second sentence of Rule 27.3 of the Olympic Charter is limited. The sentence only addresses situations such as boycotts of the Olympic Games. The Panel’s

interpretation of Rule 27.3 of the Olympic Charter is also confirmed by CAS jurisprudence (CAS OG 20/005 para. 7.7; OG 22/007 para. 98):

CAS OG 20/005 para. 7.7: “*At the national level, a National Olympic Committee (NOC) has the exclusive right to “send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter” (Rule 27.7.2 of the OC). According to CAS jurisprudence, “[i]t is not in issue that it is for a NOC to select its competitors for the Olympics. No other body or person within a member country has that right” (CAS OG 08/003).*”

CAS OG 22/007 para. 98: “*Pursuant to the applicable rules of the Olympic Charter, the quota places for the Olympic Games are not allocated to specific athletes but to the NOCs. At national level, a national Olympic committee (NOC) has the exclusive right to “send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter” (Rule 27.7.2 of the OC). According to CAS jurisprudence, “[i]t is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right” (CAS OG 08/003).*”

100. The exclusive right granted to the NOC to select athletes for the Games is not limited by any rights of the athletes, since Rule 44.3 of the Olympic Charter provides that “[n]obody is entitled as of right to participate in the Olympic Games”.
101. The right granted to the NOC to select athletes for the Games is, however, limited with respect to certain eligibility criteria that apply mandatorily. The

latter are to be found – *inter alia* – in Rule 40.1 of the Olympic Charter. The provision reads as follows:

“To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter, the World Anti-Doping Code and the Olympic Movement Code on the Prevention of the Manipulation of Competitions, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC”.

102. Bye-Law 40.1. of the Olympic Charter clarifies that the “conditions of participation” include – amongst others – the “qualification criteria” established by the respective IF and approved by the IOC. The qualification criteria refer to sporting eligibility criteria established by the IFs and approved by the IOC. In the dispute at hand these “qualification criteria” are the World Sailing QS and the World Athletics QS.

103. Bye-Law 40.2 of the Olympic Charter further states that these qualification criteria must be mandatorily applied by the various stakeholders *“in the field of ... [their] respective responsibilities”*. Consequently, the NOCs must apply these qualification criteria (World Sailing QS and World Athletics QS) when selecting athletes for the Games according to Rules 27.2, 27.7.2 of the Olympic Charter. This means that, as a minimum, an NOC must assure that the athletes selected by the NOC meet the standards of these (international) qualification criteria.

104. The issue at stake here is whether these

sporting eligibility criteria established by the IFs (and approved by the IOC) are to be understood not only as minimum, but also as maximum requirements, preventing the NOCs from establishing more restrictive qualification limits within their sphere of responsibility. The Panel notes that there is no rule in the Olympic Charter limiting the autonomy of the NOCs to issue qualification criteria for the Games that are more stringent than the ones established by the IFs within their sphere of authority. Absent any such provision, the default position would be that the NOCs enjoy autonomy. This is all the more true considering that Rule 27.2 of the Olympic Charter refers to an “exclusive authority” and Rule 27.7 to a “right” of the NOC to select athletes for the Games. The view held by the Panel is further backed by Rule 44.5 of the Olympic Charter that reads as follows:

“The NOCs shall send to the Olympic Games only those competitors adequately prepared for high level international competition. Through its IF, a national federation may ask that the IOC Executive Board review a decision by an NOC in a matter of entries. The IOC Executive Board’s decision shall be final”.

105. The provision makes it clear that it is for the NOCs to assess whether an athlete is *“adequately prepared for high level competition”*, its authority not being limited to rubber stamp those athletes that fulfil the qualification criteria of the IFs (approved by the IOC).
106. The above understanding is also reflected in the Section 2.2 of the SOC Statutes and Section 1.4 of the SOC Rules. that provide as follows:

Section 2.2 SOC Statutes: *“The SOC shall decide on the registration of athletes for the Olympic Games on the basis of a proposal from the OSF (definition of OSF, see § 3). Such selection shall be based not only on the athlete's sporting performance but also on the athlete's ability to serve as a role model for Sweden's young athletes”.*

Section 1.4 SOC Rules: *“International qualification or quota rules established by the IOC must be met for an athlete or team to be selected by the SOC, but do not in themselves give the go-ahead for participation in the Olympics. The SOC may make a selection before international qualification has been completed on condition that this qualification is later passed”.*

107. Finally, the Panel notes that its construction of the Olympic Charter according to which the qualification criteria of the IFs (approved by the IOC) constitute only minimum and not maximum standards is also backed by the view held by other stakeholders of the Olympic Movement. Both World Sailing QS and World Athletics QS provide that NOCs may reject an earned quota place that had been awarded to that NOC based on the international qualification criteria. This, however, would not make any sense if the qualification criteria would have to be construed as a mandatory minimum and maximum standard.
108. Furthermore, the Panel notes that other NOCs also have enacted separate selection criteria for the Games that apply in addition to the qualification criteria of the IFs. They appear to construe the Olympic Charter to permit this. The Respondent has – *inter alia* – submitted the respective nomination rules for the

United Kingdom and the Netherlands. The Panel wishes to highlight the rules applicable to the nomination of athletes for the Olympic Games in the United Kingdom. The provision describes the purpose of these rules in section 3.1. as follows:

“Publicly funded British sport is now a multi-million pound business receiving unparalleled investment from Government and the National Lottery, with the attendant external pressure and expectation to deliver results: there is, therefore, the requirement to act with integrity and professionalism to maintain the confidence of both the public and external investors, and all members of the WCP. For athletes, and also coaches, increased funding and commercial opportunity means that selection or non-selection may have substantial financial consequences. It is reasonable for athletes to expect to be well informed, treated fairly, on merit and without discrimination”.

109. The provision describes why there cannot be any automatic rule that athletes who fulfil the international qualification criteria must be nominated for the Games. Instead, there are many more country-specific factors that may need to be assessed and taken into account by the national sporting body with the authority for sending athletes to the Games.
110. To conclude, therefore, the Panel finds that the only sensible construction of the Olympic Charter is that the qualification criteria established by the IFs and approved by the IOC constitute minimum standards only and that the NOCs have the autonomy to issue separate national qualification criteria, provided that they are no less rigorous (and may be more stringent) than the international qualification

criteria and do not otherwise contradict the Olympic Charter.

D. Do the SOC Rules exceed the Autonomy Granted by the Olympic Charter?

111. The Appellants have based the alleged unlawfulness of the SOC Rules only on the ground that the SOC has no authority to issue separate qualification / eligibility criteria for the Games. The Panel has rejected this argument and finds that – based on the facts and evidence before it – there is no reason to assume that the SOC exceeded the autonomy granted by the Olympic Charter in any other way. The main purpose of the SOC Rules to – in principle – only select athletes who have *“shown such form that he/she is deemed capable of competing for at least twelfth place at the Olympic Games”* appears to be legitimate and proportionate. This is all the more true considering that the SOC Rules also provide for substantial exception to this principle (“Future Criterion” and “Exception Criteria”) in order to take into account the individual circumstances of a specific case.

E. Did the SOC Apply the SOC Rules Correctly?

112. The Appellants have not submitted that the SOC has misapplied the SOC Rules to them or applied them in an arbitrary manner. Based on the facts and evidence before it, the Panel finds no reason to assume that the SOC misapplied the SOC Rules incorrectly to the Appellants or in an arbitrary manner.

F. Conclusion

113. To conclude, the Panel finds that the SOC has the authority to issue separate nomination criteria for the Games within its sphere of responsibility and that the SOC Rules comply with the Olympic Charter. Consequently, the appeal filed by the Appellants must be dismissed and the Panel does not need to address any of the other objections raised by the Respondent against the present appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 12 July 2024 by Emil Bengtson, Sara Lennman, Rebecka Hallerth, Simon Sundström, Yolanda Ngarambe, Leo Magnusson against the Swedish Olympic Committee to order the Swedish Olympic Committee:
 - to register the Appellants for participation in the Paris 2024 Olympic Games for Sweden and
 - to request the International Olympic Committee to either withdraw the spots allocated according to Rule 44 of the Olympic Charter or to increase the number of participants
- is dismissed.
2. (...).
 3. (...).
 4. All other and further motions or prayers for relief are dismissed.

**Fencing; Doping (ostarine);
Contamination scenario; Factual and
scientific evidence; Sanction**

Panel

Mr Jacques Radoux (Luxembourg), President
Prof. Luigi Fumagalli (Italy)
Mrs Janie Soublière (Canada)

1. The FIE anti-doping rules do not formally require an athlete who claims contamination by an unspecified substance to demonstrate how it entered their body. However, they do place the burden on the athlete to prove, on a balance of probability, that the scenario they present is a plausible explanation and is not fatally undermined by scientific evidence.
2. The factual evidence provided by the athlete and witnesses during the first instance proceedings does not need to be substantiated again before the CAS if it was relied upon in the appealed decision and undisputed by the relevant anti-doping authorities. Conversely, a study must be sufficiently controlled to have decisive scientific weight. Such is the case if it is peer-reviewed and convincingly refutes intentional doping through urine and hair analysis, despite minor shortcomings and translation errors.

3. No sanction shall be imposed in case of no fault or negligence.

I. PARTIES

1. The World Anti-Doping Agency ("WADA" or the "Appellant") is a Swiss private-law foundation. Its legal seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms in conformity with the World Anti-Doping Code ("WADC") and all applicable International Standards.
2. The Fédération Internationale d'Escrime ("FIE" or the "First Respondent") is the international Olympic federation governing the sport of fencing worldwide. It has its registered seat in Lausanne, Switzerland. As a signatory to the WADC, the FIE has adopted the International Fencing Federation Anti-Doping Rules (the "FIE ADR") and complies with the WADC and all International Standards.
3. Ms Ysaora Thibus (the "Athlete" or the "Second Respondent"), born on 22 August 1991, is an international level fencing athlete who practices foil. She participated in major international competitions and won, *inter alia*, the gold medal in individual foil at the 2022 World Championships and a silver medal in team foil at the 2020 Olympic Games.
4. The First Respondent and the Second Respondent are together referred to as the "Respondents". WADA and the

Respondents are collectively referred to as the “Parties”.

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced in this procedure. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
6. On 14 January 2024, the Athlete participated in the women’s team foil competition at the 2024 Challenge International de Paris and was subject to an in-competition doping control (urine test) conducted by the International Testing Agency (“ITA”).
7. The Athlete’s sample coded 7217033 (the “Sample”), collected at 21:42 p.m. (time that the Sample was sealed), was analysed by the Anti-Doping Laboratory of the Paris-Saclay University, France (the “Laboratory”). The analysis of the Athlete’s A Sample revealed the presence of ostarine (enobosarm). Ostarine is listed as a Prohibited Substance under Section S1.2 “*Other Anabolic Agents/SARMS*” (“SARMS” are “selective androgen receptor modulators”) of the WADA Prohibited List. Ostarine is classified as a non-Specified Substance for the purposes of the FIE ADR.
8. The Laboratory test report dated 6 February 2024 did not indicate the concentration of ostarine detected in the urine sample. In a letter to the ITA dated 8 February 2024, the Laboratory recalled that there is no requirement to quantify the concentration of a substance such as Ostarine when reporting an AAF and that a qualitative analysis method had been used. In the same letter, the Laboratory provided an “*indicative estimation*” of the concentration of “*approximately 13 ng/mL*”.
9. On the same day, the ITA, on behalf of the FIE, notified the Athlete of the adverse analytical finding (“AAF”). Because the substance involved is classified as non-Specified, she was also advised that she was subject to a mandatory provisional suspension pursuant to Article 7.4.1 of the FIE ADR. The AAF notice set out the Athlete’s various procedural rights, including the opportunity to request the laboratory document package (“LDP”) for the A sample and the right to exercise her right to the analysis of her B sample.
10. On 9 February 2024, the Athlete requested her A sample LDP.
11. On 12 February 2024, the Athlete, *inter alia*, contested the results of the analysis and exercised her right to the analysis of her B-sample, requesting that it be conducted as soon as possible given that the 2024 Olympic Games were imminent.
12. On 16 February 2024, the ITA sent the Athlete her A sample LDP as well as a form to complete to analyze her B-sample.

13. On 20 February 2024, the Athlete provided the ITA with her explanations regarding the AAF, *i.e.* that she had identified as the source of the prohibited substance an inadvertent contamination by her then partner, Mr Race Imboden, with whom she was living in a registered relationship. Having identified the source of the AAF, to expedite her case being decided before the selection of the French fencers for the 2024 Olympic Games, the Athlete also waived her right to the analysis of her B-sample and requested a hearing.
14. On 22 February 2024, the ITA sent the Athlete a notice of charge formally charging with an antidoping rule violation (“ADRV”), confirming that the case would be referred to the FIE for adjudication by its Doping Disciplinary Tribunal (“DDT”).
15. On 27 February 2024, the case was referred to the DDT and, on 13 May 2024, a virtual hearing took place before the DDT. During that hearing, the DDT heard witness and expert evidence, by the Athlete, Mr Race Imboden, Prof. Jean-Claude Alvarez and Prof. Pascal Kintz (all for Ms Thibus), as well as by Prof. Martial Saugy (for the FIE).
16. On 4 June 2024, the DDT notified its decision (the “Appealed Decision”). The operative part, which was rendered on 21 May 2024, of said Decision reads as follows:
 - “1. *Ms Thibus has committed an anti-doping rule violation pursuant to Article 2.1 of the [FIE ADR].*
 2. *Ms Thibus is found to bear no fault or negligence. Hence the otherwise applicable period of Ineligibility is eliminated.*
 3. *Ms Thibus is Disqualified from the 14 January 2024 Women’s Team Foil Competition at the 2024 ‘Challenge International de Paris’ with all the resulting Consequences including forfeiture of any medals, points and prizes for herself and for her team.*
 4. *All results earned by Ms Thibus from the date of her positive Sample, i.e. 14 January 2024, through the commencement of her Provisional Suspension, i.e. 8 February 2024, are Disqualified.*
 5. *Ms Thibus shall pay the amount of CHF 16.245,00 to the FIE and the FIE shall bear the remainder of the costs of the procedure.*
 6. *All other motions or prayers for relief are dismissed”.*
17. A reading of the Appealed Decision demonstrates that the DDT considered factual elements, an expert report of Prof. Alvarez dated 26 February 2024 (the “First Alvarez Report”), evidence provided by Prof. Kintz, an expert report of Prof. Saugy dated 7 April 2024 (the “Saugy Report”) and the evidence of Ms Thibus and Mr Imboden.
18. With respect to the factual elements, the Appealed Decision reads as follows:

“Both Ms Thibus and Mr Imboden confirmed that they are a couple for seven years.

They lived as a couple in the same apartment. This is confirmed by the ‘convention de pacte civil de solidarité’ (cohabitation agreement)

they entered into and that was registered on 12 April 2023 with the local authority (exhibit 10 of Ms Thibus), as well as by their statements at the hearing.

On 9 December 2023 Mr Imboden ordered MK-2866 or ostarine with Receptor Chem via the internet (exhibit 18 of Ms Thibus).

Payment was made on 11 December 2024 from Mr Race Imboden's personal bank account with his bank in the USA (exhibit 4 of Ms Thibus).

The order was delivered to Mr Race Imboden personally at the couple's address on 3 January 2024 at 2.03 pm (exhibit 19 of Ms Thibus).

At that time Ms Thibus was at a photo shoot with her main sponsor Lacoste (exhibit 20 Ms Thibus).

Mr Imboden stated at the hearing that he ingested a 1 ml dose of MK-2866 on a daily basis as from 5 January 2024.

This corresponds with the finding of Professor Alvarez that on 9 February 2024 16 ml of ostarine was left in the vial, which is consistent with a daily use of 1 ml during 34 days [First Alvarez Report] (page 9). Professor Alvarez also found that the testosterone levels of Mr Imboden on 4 January and 20 February show that he didn't use ostarine before 5 January 2024 (page 14).

The label on the vial indicates that a 1 ml dose corresponds with 25 mg of ostarine.

Mr Imboden stated at the hearing that on 14 January 2024 he ingested his daily dose of ostarine around noon and then left for the competition site where he arrived about 1.00 pm.

Both Ms Thibus and Mr Imboden, that were heard separately by the DDT, declared at the

bearing that they kissed each other several times that afternoon.

Ms Thibus stated that they kissed each other frequently on the lips and sometimes with tongue, for example, when both of them were in the locker room.

Mr Imboden stated that kissing with tongue was very common in their couple. On 14 July they kissed on the lips but also with tongue, as at moments the couple was alone that afternoon.

The presence of Mr Imboden and the kissing is confirmed in five written witness statements that were submitted by Ms Thibus (exhibit 17).

As confirmed at the hearing by Ms Thibus, Mr Imboden, Ms Monlouis and Professor Alvarez, after being notified of her adverse analytical finding in the evening of 8 February 2024, Ms Thibus immediately contacted her lawyer and her lawyer contacted Professor Alvarez. Afterwards, there was a direct contact between Ms Thibus and Professor Alvarez, who invited her to come to his laboratory the other day.

Ms Thibus and Mr Imboden confirmed at the hearing that Ms Thibus also called Mr Imboden immediately after she had called her lawyer. Upon learning that Ms Thibus had an adverse analytical finding for ostarine, Mr Imboden confessed to her that he had been using MK-2866 or ostarine".

19. The DDT also recalled parts of the First Alvarez Report and found further to his answers to questions from all counsels and the members of the DDT that Prof. Alvarez had substantiated his Report and its conclusions.
20. Further, the DDT noted that, at the hearing, Prof. Kintz supported Prof.

Alvarez' conclusions. With respect to the Prof. Saugy's Report and evidence, the DDT held, *inter alia* that:

- Prof. Saugy had stated that *"the source of the AAF could also be due to a voluntary intake of one or several doses of ostarine in the days or weeks before the test of 14 January 2024"* and that a concentration of 13 ng/ml of ostarine in the Athlete's Sample would require a considerable quantity of contaminated saliva to have been passed by Mr Imboden to the Athlete.
 - Prof. Saugy had noted that no data is available on the quantity of saliva that actually has been passed in the afternoon of 14 January 2024 in the contamination study conducted by Prof. Alvarez.
 - Prof. Saugy had accepted that the pharmacokinetics of excretion for both Ms Thibus and Mr Imboden, as found by Prof. Alvarez in his contamination study, are not significantly different of what has been shown in the study published by Walpurgis et al. (Elimination profiles of microdosed ostarine mimicking contaminated products ingestion, from 2020, the "Walpurgis Study").
21. Considering the above, the DDT held that Prof. Saugy's conclusion that a voluntary ingestion of ostarine by the Athlete could not be excluded *"does not tilt the balance of probability towards a voluntary ingestion"*.
22. As for the Athlete's evidence, the DDT found that she answered all questions spontaneously and that there were no

signs of her acting or being evasive or insincere in her answers.

23. With respect to Mr Imboden's evidence, after being interrogated at the hearing by the DDT and Counsel for both parties, the DDT noted the following:
- i. Mr Imboden is a former elite fencer.
 - ii. Mr Imboden confirmed that he purchased and used MK-2866 (as well as MK-677 or ibutamoren, see below) without the knowledge of Ms Thibus.
 - iii. He used these substances while Ms Thibus was out to regain shape after a longer period of inactivity in sports.
 - iv. He kept the substances away from Ms Thibus and hid them in their apartment, in a bag hidden behind his clothes that were in a separate wall cabinet that served as his personal wardrobe and was accessed by him only.
 - v. Mr Imboden stated that he knew that ostarine and ibutamoren were prohibited. He wanted to ensure that Ms Thibus remained unaware that he was using them as he knew that she was radically opposed to doping.
 - vi. Mr Imboden also stated that he was not aware of the risk that he could contaminate Ms Thibus or cause her to test her positive in a doping control, in particular through the exchange of bodily fluids such as saliva.

24. Other particular elements and facts that were considered by the DDT include that:

- i. Ms Thibus made efforts to find out how the ostarine entered her body by asking Prof. Alvarez to do the necessary tests, seemingly willing to accept any result that might come out of such tests;
- ii. The 14 June 2024 competition was a team competition. It is unlikely that Ms Thibus, whom the DDT assessed as being an intelligent woman, would have knowingly ingested ostarine for the purpose of enhancing her own performance at the expense of the team and the teammates whose efforts and awards would be annulled and whose reputation could be tainted if she tested positive;
- iii. It is unlikely that Ms Thibus would have put her chances at risk to qualify both individually and as a member of her team for the 2024 Olympic Games by knowingly ingesting a prohibited substance which could result in a long period of ineligibility;
- iv. Because of her current results as an elite fencer, the Athlete was already eligible for selection to the Olympic Games. Doping was of no use to her;
- v. According to the Athlete's physical trainer, it would have been counterproductive for her to seek to gain muscle mass as that would have been an obstacle to her speed; and

vi. It is unlikely that Ms Thibus would knowingly take the risk of losing her sponsorship with Lacoste should she be found to have committed an ADRV.

25. As regards the question of whether the Athlete had successfully established the requisite legal standard that she had acted with No Fault or Negligence (as required by Article 10.2.2 of the FEI Anti-Doping Rules), the DDT's reasoning reads as follows:

"The DDT has accepted, by a balance of probability that Ms Thibus was unaware of the presence of the substance in her apartment, of its use by Mr Imboden and of her contamination.

The DDT also accepts that in these circumstances Ms Thibus had not to suspect, even with the exercise of utmost caution, that she could be contaminated with a Prohibited Substance by her life partner through the exchange of bodily fluids.

In particular Ms Thibus had not to suspect such risk being created by her partner who is a former high level athlete and who she could trust not to be involved in prohibited substances, at least not without informing her in advance of his intentions in that respect.

Neither had Ms Thibus an obligation to search the appartement [sic] from time to time in order to check whether her life partner might have hidden prohibited substances or to abstain from intimate contacts with her life partner without making sure that they would pose no risk.

Therefore the DDT finds Ms Thibus without Fault or Negligence".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On 17 July 2024, the Appellant filed its Statement of Appeal in accordance with Article 13.2.1 of the FIE ADR and Article R47 of the Code of Sports-related Arbitration (the “CAS Code”) against the Appealed Decision. In its Statement of Appeal, the Appellant nominated Prof. Luigi Fumagalli, Professor and Attorney-at-law in Milan, Italy, as arbitrator.
27. On 22 July 2024, the CAS Court Office initiated the present appeals arbitration procedure, and, *inter alia*, invited the Respondents to jointly nominate an arbitrator and to state whether they objected to English being the language of the present procedure.
28. On 22 July 2024, the First Respondent informed the CAS Court Office that it had no objection for the proceedings to be conducted in English.
29. On 25 July 2024, the Second Respondent requested that the present proceedings be conducted in French.
30. On 29 July 2024, the First Respondent informed the CAS Court Office that it agreed with the Second Respondent’s request to have these proceedings conducted in French.
31. On 2 August 2024, the Appellant objected to the Second Respondent’s request to have French as language of the procedure, but accepted that exhibits could be filed in French without the need for translation into English.
32. On 12 September 2024, the President of the Appeals Arbitration Division rendered an Order on Language and decided that the language of this procedure was English and that, unless requested by the Panel, once constituted, the Parties did not have to file an English translation of the exhibits in French.
33. On 2 October 2024, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.
34. On 3 October 2024, the CAS Court Office invited the Respondents to submit their Answers within the deadline set out in Article R55 of the CAS Code, highlighting that if they failed to do so, the Panel could nevertheless proceed with the arbitration and deliver an award. It further invited the Respondents to jointly nominate an arbitrator on or before 10 October 2024.
35. On 10 October 2024, the Respondents nominated Ms Janie Soublière, Attorney-at-law in Beaconsfield, Québec, Canada, as arbitrator in the present proceedings.
36. On 25 November 2024, the CAS informed the Parties that the Panel appointed to resolve this dispute was constituted as follows: Mr Jacques Radoux, Legal Secretary in Luxembourg (President), Prof. Luigi Fumagalli, Professor and Attorney-at-law in Milan, Italy and Ms Janie Soublière, Attorney-at-law in Québec, Canada (arbitrators).
37. On the same day, the First Respondent filed its Answer.
38. On 5 December 2024, the Second Respondent filed her Answer.
39. On 9 December 2024, the CAS Court Office informed the Parties that unless

they agree or the President of the Panel orders otherwise on the basis of exceptional circumstances, Article R56 of the CAS Code, provides that the Parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the Appeal Brief and of the Answer. The Parties were also invited to state, by 16 December 2024, whether they preferred a hearing to be held in the present matter and whether they requested a case management conference (CMC) with the Panel.

40. On 19 December 2024, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present matter.
41. On 23 January 2025, the CAS Court Office informed the Parties that a hearing would take place on 6 March 2025.
42. On 29 January 2025, the CAS Court Office, the CAS Court Office notified the Order of Procedure to the Parties. On 4 February 2025, the First Respondent returned a signed copy of said Order of Procedure. The Appellant and the Second Respondent both returned a signed copy of the Order of Procedure on 5 February 2025.
43. On 6 March 2025, a hearing took place at the CAS headquarters in Lausanne. The Panel was assisted by Ms Delphine Deschenaux-Rochat, counsel to the CAS, and joined by the following participants:

For the Appellant:

- Mr Nicolas Zbinden, Mr Michael Kottmann and Mr Robert Kerslake, counsels
- Mr Ross Wenzel, WADA General Counsel;
- Mr Cyril Troussard, WADA Associate Director;
- Ms Frédérique Lacroix-Dion, WADA Legal Counsel, Results Management;
- Prof. Christiane Ayotte, expert;
- Prof. Martial Saugy, expert.

For the First Respondent:

- Mr Yvan Henzer, counsel.

For the Second Respondent:

- Ms Ysaora Thibus, party;
- Ms Joëlle Monlouis and Mr Thierry Chiron, counsels;
- Prof. Jean-Claude Alvarez, expert;
- Prof. Pascal Kintz, expert.

44. At the outset of the hearing, the Parties confirmed that they had no objection as to the constitution of the Panel.

45. During the hearing, the Panel heard evidence from the following experts:

For the Appellant:

- Prof. Christiane Ayotte;
- Prof. Martial Saugy.

For the Respondents:

- Prof. Jean-Claude Alvarez;
- Prof. Pascal Kintz.

46. Before taking their evidence the President of the Panel informed all the experts of their duty to tell the truth subject to sanctions of perjury under Swiss law. Each of them confirmed their written expert reports and the Parties and the Panel had the opportunity to examine and cross-examine them.

47. The Parties were given full opportunity to present their case, submit their arguments and answer the questions from the Panel. The Athlete was also given the opportunity to make a statement. At the end of the hearing, the Parties confirmed that their right to be heard and their right to a fair trial had been fully respected during the hearing and that they had no objections as to the manner in which the proceedings had been conducted.

IV. THE PARTIES' SUBMISSIONS

48. This section of the Award aims to provide a summary of the Parties' main arguments rather than a comprehensive list thereof. However, the Panel confirms that in making its decision it has carefully considered all the Parties submissions and evidence, even if not expressly mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Submissions and Requests for Relief

49. The Appellant submits that, according to Article 2.1.1 of the FIE ADR, it is each athlete's personal duty to ensure that no Prohibited Substance enters their bodies. Further, pursuant to Article 2.1.2 of the FIE ADR, an ADRV is established, *inter alia*, if an

athlete waives the analysis of the B-sample and the B-sample is not analysed. In the present case, the Athlete's A-sample revealed the presence of ostarine and the Athlete waived her right to the analysis of her B sample. The ADRV is thus established, as conceded by the Athlete.

50. The Appellant observes that pursuant to Article 10.2.1.1 of FIE ADR, in case of "Presence" of a Prohibited Substance, the period of Ineligibility "*subject to Article 10.2.4, shall be four (4) years where: The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Fencer or other Person can establish that the anti-doping rule violation was not intentional*". The present case relates to a non-Specified Substance and the applicable period of Ineligibility would thus be four years, unless the Athlete proves a lack of intent when committing the ADRV. CAS jurisprudence has consistently held that for an athlete to discharge the burden of proving that an ADRV was not intentional, that athlete must first establish how the substance entered his or her body, *i.e.* establish the source of the Prohibited Substance. In this regard, the Appellant submits that CAS panels have also consistently held that an athlete must provide actual evidence, not just mere unsubstantiated assertions (CAS 2014/A/3820; CAS 2010/A/2230, and CAS 2014/A/3615 and CAS 2006/A/1067), and must also demonstrate that the source identified could effectively have caused the AAF (CAS 2010/A/2277).

51. As regards the present matter, the Appellant considers (i) that the Athlete's explanations as to how the ADRV occurred are not convincing, and (ii) that the Appealed Decision is wrong, insofar as the DDT held that the Athlete had acted with No Fault or Negligence thereby resulting in no sanction being imposed.
52. The Appellant disputes and rejects the Athlete's explanations before the DDT, *i.e.* that the most probable cause for the ADRV was a contamination through her then partner, Mr Race Imboden, who, without the Athlete's knowledge, had been using the ostarine product MK-2866 for a period of 5 weeks until 9 February 2024 and that this contamination was the result of the Athlete and her partner repeatedly kissing in the afternoon of the day of the doping control (the "Kissing Scenario"). Further, to the Appellant, both the "First Alvarez Report" and the evidence of Prof. Pascal Kintz, exhibit manifest deficiencies and should have been rejected by the DDT.
53. In support of its position that the Kissing Scenario is "*totally implausible*", the Appellant maintains, *inter alia*, that:
 - This scenario does not work in terms of pharmacokinetics. In a recent study published by Prof. Kintz, the latter investigated the concentration of ostarine contained in saliva following an oral administration of 17,3 mg in 20 mL of tap water. According to the values found by Prof. Kintz and assuming prolonged kissing, Prof. Christiane Ayotte considers in her expert report that the total amount of ostarine which could have been transferred to the Athlete in the present case would have been of 1,3 µg, which would be "*far from the dose needed to cause the AAF*". According to Prof. Ayotte, and by reference to the Walpurgis Study, the dose of ostarine required to produce the urinary concentration found in the Athlete's Sample would have had to be many times higher than it could have been from kissing her partner.
 - The total dose of 1.3 µg of ostarine calculated by Prof. Ayotte is based on favourable assumptions for the Athlete (repeated and prolonged kissing throughout the day) whereas there is no evidence supporting such kissing, and it is rather implausible that the Athlete and Mr Imboden did so, given that the Athlete competed in four matches the day of the doping control. Further, the calculations would be based on the premise that the first kiss occurred after 30 minutes, which seems implausible given the timeline provided by Mr Imboden before the DDT for the events on 14 January 2024.
 - According to Prof. Ayotte, Prof. Alvarez's estimation that the dose ingested by the Athlete was 15 µg is many times higher than a reasonable kissing scenario could have produced. In any event, even this dose would still be highly unlikely to have caused the AAF as shown by other precedents referred to by Prof. Ayotte.

- The contamination study conducted by Prof. Alvarez is “*such bad science that it is worthless*”:

- first, as pointed out by Prof. Ayotte, only the first two out of ten samples provided by the Athlete and Mr Imboden were provided under the supervision of Prof. Alvarez, making the study entirely unreliable.
- second, the study was based on wholly inaccurate assumptions as the Athlete and Mr Imboden started kissing “*about 30 minutes*” after the intake of the dose of MK-2866 by Mr Imboden. However, the 30-minute delay is without basis and contradicted by Mr Imboden’s own evidence at first instance, where he stated that he arrived at the competition site about one hour after ingesting Ostarine.
- third, according to Prof. Kintz’s study (“Human hair testing for selective androgen receptor modulators (SARMs): Current knowledge and limitations”, 2021), there is a significant drop in the concentration of ostarine in the mouth between 15 and 30 minutes post administration and, as a result, the timing of the first kiss would be a significant matter, and a fundamental flaw in the study.
- fourth, there was no basis for Prof. Alvarez to assume that,

during the study, the Athlete and Mr Imboden kissed “*as they had done on January 14*”. In any event, given the complete lack of information regarding the frequency and duration of the Athlete’s and Mr Imboden’s physical contacts during either the contamination study or on the day of the sample collection, the Athlete certainly failed to provide any relevant proof to show that the two situations were comparable.

- The other elements relied upon by Prof. Alvarez in his First Report do not support the Kissing Scenario put forward by the Athlete:

- the fact that the testosterone blood analysis of Mr Imboden suggests that he was using ostarine does not exclude the possibility that the Athlete was also using it.
- as noted by Prof. Ayotte, it is very odd that ostarine is detected in so many different items of the couple’s day-to-day life, which makes the possibility of systemic contamination during the uncontrolled experiment a serious concern.
- it would be difficult to understand how the high concentration of ostarine detected in the Athlete’s toes and fingernails could be explained through “*environmental contamination*”

such as pillowcases and a hairbrush.

54. In view of the above, the Appellant considers that there is no basis upon which the Athlete can claim that the Kissing Scenario is compatible with the concentration of ostarine detected in her urine. Thus, the Athlete's ADRV remains unexplained and should be deemed intentional. Consequently, the standard four-year period of Ineligibility should be applied.

55. In its requests for relief, the Appellant asks the CAS to rule that:

"1. The appeal of WADA is admissible.

2. The decision rendered by the Doping Disciplinary Tribunal under the rules of the Fédération Internationale d'Escrime dated 4 June 2024 (with the operative part of the decision communicated on 21 May 2024) in the matter of Ms Ysaora Thibus is set aside.

3. Ms Ysaora Thibus is found to have committed an anti-doping rule violation under art. 2.1 and/or 2.2 of the FIE Anti-Doping Rules.

4. Ms Ysaora Thibus is sanctioned with a period of Ineligibility of four years, starting on the date on which the CAS award enters into force. Any period of provisional suspension effectively served by Ms Ysaora Thibus before the entry into force of the CAS award shall be credited against the total period of Ineligibility to be served.

5. All competitive results obtained by Ms Ysaora Thibus from and including 14 January 2024 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The arbitration costs (if any) shall be borne by the FEI or, in the alternative, by the Respondents jointly and severally.

7. WADA is granted a significant contribution to its legal and other costs".

56. At the hearing, the Appellant reiterated its position adopted in its written submissions and added, *inter alia* that:

- this is not one of the exceptional cases in which an athlete could be absolved from establishing the source of the prohibited substance found in his or her body;

- while there is evidence that Mr Imboden ordered the product (MK-2866), who he purchased it for, has not been established. As such that both he and the Athlete were taking the substance cannot be excluded;

- CAS hears this case *de novo*. It is up to the Athlete to adduce specific evidence before the Panel to establish the reality of the facts underlying the Kissing Scenario she brings forward to explain the AAF. She failed to do so at first instance, and still fails to do so on Appeal;

- as repeatedly stated in its written submissions, the Kissing Scenario is not plausible. The Athlete has failed to provide relevant proof that the 14 January 2024 events are comparable to the scenario analysed by Prof. Alvarez in his study;

- the Athlete should have called Mr. Imboden as a witness. It was not up to the Appellant to do so as the

burden to establish the source of the ostarine found in the Athlete's system rests on the Athlete. Article 13.2.1 of the FIE ADR clearly provides that no weight should be given to the DDT's findings;

- even if the Panel were willing to accept the facts taken as established by the DDT, the Kissing Scenario remains scientifically unsound. Neither Prof. Alvarez's reports nor Prof. Kintz's published article explain the AAF as they are based themselves on premises that would not match the timeline of the events described by the Athlete and her partner at first instance;
- the concentration of ostarine found in the Athlete's Sample does not exclude her intentional use of the substance;
- Prof. Alvarez's hair and nail analysis are irrelevant to the Kissing Scenario;
- the Kissing Scenario, although possible is not plausible and consequently the Athlete cannot be said to have established the source of the ostarine found in her Sample to the required legal standard;
- the presumption of intent has not been rebutted and therefore that the four-year period of ineligibility requested by the Appellant is the only possible sanction for this Panel to impose.

B. The First Respondent's Submissions

57. The First Respondent clarifies that its participation in the hearing is not to defend the Athlete, but the DDT's Appealed Decision, which it considers to be well-reasoned as rendered by three qualified and prominent experts.
58. It further observes that the DDT considered numerous evidence (expert reports and studies, as well as witness testimonies) before concluding that, on the balance of probability, it was more likely than not that the Athlete's AAF of ostarine was due to contamination through the Kissing Scenario rather than through intentional ingestion in view of enhancing her sport performances.
59. The First Respondent rejects the Appellant's argument that the fact that Mr Imboden's blood analysis suggests that he was using ostarine in "*no way excludes the possibility that the Athlete was using it too*". The First Respondent argues that this submission is flawed as the issue at stake is not to exclude a doping scenario – which in a doping matter can almost never be fully excluded – but to assess whether contamination is more likely than an intentional intake of ostarine. In the present matter, the DDT carefully reviewed all the evidence and concluded that the balance leaned in favour of the Athlete.
60. The First Respondent also underlines that the DDT explicitly considered that a doping scenario was not likely because:

- i. the Athlete made considerable efforts to find out how the ostarine had entered her body;
 - ii. the 14 January 2024 competition was not an individual competition but a team competition;
 - iii. it was unlikely that the Athlete would have put her chances to qualify, individually and as a member of her team for the 2024 Olympic Games at risk by knowingly ingesting a Prohibited Substance which could result in a long period of ineligibility;
 - iv. the Athlete, given her level, could expect to be selected for the 2024 Olympic Games and doping could only be seen as an enormous risk to be excluded from these Olympic Games, and
 - v. it would have been counterproductive for the Athlete – as a fencer – to seek to gain muscle mass.
61. The First Respondent further argues that Prof. Ayotte’s conclusions (the “Ayotte Report”) are contradicted by the contamination study performed by Prof. Alvarez and are not consistent with the case file, to which she did not have full access. Indeed, her report states that she merely got access to “*the documentation package from the Paris laboratory, and the expert-report of Prof. J.-C. Alvarez produced for the athlete*”. Consequently, Prof. Ayotte issued an opinion without assessing all the evidence supporting contamination.
62. Regarding the question as to the quantity of saliva liquid required to render such contamination plausible, the First Respondent notes that a debate between experts took place before the DDT further to which it was uncontested that, in a situation like the case at hand, contamination was possible.
63. Keeping in mind all the evidence, the DDT found that the Kissing Scenario was plausible and supported the science because the ostarine concentration detected in the Athlete’s system was considerably lower than that found in Mr Imboden’s system, showing that the latter directly ingested ostarine, while the Athlete was merely contaminated.
64. Finally, should CAS uphold the appeal, the First Respondent argues that no blame should be placed on the DDT and on the FIE “*in particular with regard to the imposition of costs*”.
65. In view of all the above considerations, the First Respondent submits the following prayers for relief:
- I. The Appeal filed by WADA is dismissed.*
- II. The Decision issued by the Doping Disciplinary Tribunal of the FIE in the matter of Ms Ysaora Thibus is confirmed.*
- III. The Fédération Internationale d’Escrime shall not bear any costs of arbitration and shall be granted a contribution towards its legal costs in these proceedings”.*
66. At the hearing, the First Respondent reiterated its position and added, *inter alia*, that:
- the Appellant was not acting in good faith as in its written submissions it had neither openly

challenged the general facts, nor the Kissing Scenario in particular, yet now chose to do so at the hearing;

- if the Appellant wished to examine and question Mr Imboden, it could have done so by calling him as a witness, as it did for Prof. Saugy;
- the Appellant had not challenged the factual findings of the DDT in its written submissions prior to the CAS hearing, the Panel should thus defer to the DDT's findings;
- there is no scientific evidence in the case file suggesting that the Athlete, unlike Mr Imboden, used the ostarine intentionally;
- the Appellant did not challenge the experts' statements that ostarine is very sticky when packaged in an oily solution like the MK-2866 product Mr. Imogen was using;
- the contamination scenario put forward by the Athlete does not limit itself to one kiss or several kisses during one sole afternoon, but stretches over 9 days;
- Prof. Alvarez's findings and calculations are consistent with those of the Walpurgis Study, which is a study accepted by the Appellant. Prof. Saugy also acknowledged that the calculations and findings of Prof. Alvarez's study and those in Walpurgis are aligned;
- it would be improbable that an athlete and his or her partner could manage to influence or manipulate a study in such a way as to

reproduce the same findings than scientists found in another study;

- the Alvarez study and its findings are correct, and it must be considered the most reliable piece of evidence in support of the Kissing Scenario. There is no other more reliable evidence on file. Given the expertise and reputation of Prof. Alvarez, the Panel must find that the Athlete has proven her innocence in the present matter.

C. The Second Respondent's Submissions

67. The Second Respondent considers the Appellant's claims and allegations are unfounded and that the present Appeal should be dismissed.
68. The Second Respondent argues both that the Ayotte Report is flawed as Prof. Ayotte did not have access to the full case file and that the Appellant's allegations are neither documented nor based on factual evidence or elements. Conversely, Prof. Alvarez's (the "Second Alvarez report") and Prof. Kintz's experts reports, both filed with her Answer, clearly establish that the Kissing Scenario presented before the DDT is supported by objective and proven factual elements.
69. Regarding the Kissing Scenario and the Appellant's statement according to which *"the dose of ostarine required to produce the Athlete's urinary concentration would have to have been many times higher than it could have been from kissing"*, the Second Respondent submits that the Appellant seems to *"have a massive misunderstanding on some pharmacology*

- concepts*". As described in the Second Alvarez Report, the *"quantity of a product eliminated in the urine or present in the blood is obtained in pharmacology by calculating the area under the concentration-time curve"* and not, as Prof. Ayotte calculates, *"by adding up the concentration"*. The Second Respondent thus rejects Prof. Ayotte's calculations, according to which, even based on favorable assumptions for the Athlete, the total dose of Ostarine should have been *"1,3 µg"*. According to Dr. Alvarez, who relies on accurate pharmacology concepts and the Walpurgis study also referred to and relied upon by the Appellant, the more accurate estimated concentration of ostarine detected would be 19,7 µg, which is even higher than the 15 µg assessed in the contamination study. Thus, the Appellant's claim that the Kissing Scenario *"does not work in terms of pharmacokinetics"* is both unsupported by any evidence and contradicted by science.
70. Concerning Prof. Alvarez's contamination study which has been discarded as uncontrolled by the Appellant, the Second Respondent notes, first, that that study has been peer reviewed, published and accepted by the scientific community as a *"controlled study"*. There is no evidence that Mr Imboden might have taken a second dose of Ostarine to alter the results. The analysis findings, based on the time and maximum concentration in both subjects, *i.e.* Mr Imboden and the Athlete, are in line with the results of a contamination survey done by Prof. Marion Thevis, head of the WADA laboratory in Cologne, Germany. Before the DDT, even Prof. Saugy acknowledged this fact. Hence, the Appellant's claim that the contamination study was *"uncontrolled"* is baseless.
 71. Second, everyone involved in Prof Alvarez's study understood the importance of re-enacting the time preceding the doping control exactly as it has occurred. The doubts the Appellant has raised as to whether, Mr. Imboden and the Athlete kissed *"as they had done on January 14"* or whether the 30-minute delay from the ingestion of ostarine until the Athlete and Mr Imboden started kissing was not established, lead to a false debate.
 72. Third, the Appellant's statement according to which *"the testosterone blood analysis of Mr Imboden, suggests that he was also using ostarine, which in no way excludes the possibility that the Athlete was using it too"* is a purely unsubstantiated and unsupported allegation.
 73. Fourth, the Appellant's remark regarding Prof. Ayotte's concern about the *"possibility of a systemic contamination during the contamination experiment"*, is without merit as Prof. Alvarez not only clearly stated that a *"systemic contamination has been investigated and can be totally ruled out"* but also explained why that would be so.
 74. Based on the above, the Second Respondent considers that the Appellant's arguments are irrelevant and that Appellant's requests for relief must be dismissed.
 75. The Second Respondent adds that the filing of the present Appeal on the last day of the deadline and just a few days before the opening of the 2024 Olympic Games and the beginning of her fencing competition at those Olympic Games *"seriously damaged her*

mental health” and caused her “*moral damage*”. By reference to “*Article R64.5*” of the CAS Code, the Second Respondent, therefore requests compensation for the “*moral harm that the proceedings before the CAS have caused her at the amount of CHF 10.000*”.

76. Finally, relying on the same provision, the Athlete requests compensation for her legal fees and the expenses of her legal team for a total amount of CHF 30’000.

77. In view of all the above elements, the Second Respondent submits the following prayers for relief:

“Prayer 1: The Appeals [sic] shall be dismissed.

Prayer 2: In any event, the Appellant shall be ordered to bear the costs of the arbitration and It [sic] shall be ordered to contribute to the legal fees incurred by the Second Respondent at an amount of CHF 30.000.

Prayer 3: The Appellant shall be ordered to contribute for the moral harm of the Athlete at an amount of CHF 10.000”.

78. During the hearing, the Second Respondent reiterated the general line of argumentation set out in her Answer and added, *inter alia*, that:

- only at the hearing did the Appellant challenge the chain of events and the facts considered by the DDT in relation to the Kissing Scenario and raised the argument that it wanted to hear or examine Mr Imboden. It was incumbent on the Appellant to call Mr Imboden as witness, as it did for Prof. Saugy, The Appellant decided not to do so.

- the Appellant is acting in bad faith and the Panel should dismiss its argument according to which the Athlete failed to establish the facts underlying the Kissing Scenario;
- the Athlete has provided a coherent and scientifically sound chain of events establishing both the source of the ostarine found in her system and that the ADRV was unintentional;
- the Appellant has not been able to present a more plausible scenario than the one put forward by the Athlete;
- the scientific hypothesis raised by the Appellant to show that the Kissing Scenario is implausible is flawed and unreliable;
- the Appellant’s experts do not share the same expertise as the Athlete’s experts when it comes to ostarine. In particular, Prof. Ayotte and Prof. Saugy are not pharmacologists; they have not published any articles or studies on ostarine and they are not experts in hair analysis;
- the Prof. Alvarez’s study has been peer reviewed and published (“Body fluid contamination in the context of an adverse analytical finding in doping: About a case involving ostarine”, 2024). It has not been challenged.

V. THE HEARING

79. At the hearing, the Panel heard the evidence of the following experts: Prof. Jean-Claude Alvarez and Prof. Pascal Kintz (retained by the Athlete)

as well as Prof. Christiane Ayotte and Prof. Martial Saugy (retained by the Appellant). Their expertise can be summarized respectively as follows:

- Prof. Jean-Claude Alvarez is a Professor of Pharmacology-Toxicology at the Faculty of Medicine of the University Paris-Saclay, the Head of department of Pharmacology-Toxicology at the University Hospital Centre (CHU) of Garches, the Medical Director of the University and Medical Biology and Genetics Department of the Paris-Saclay Hospital Group (since July 2023) and has acted as an expert to the Cour d'Appel (Court of Appeal) of Versailles for 23 years and for the French Cour de Cassation (Supreme Court) for 9 years.
- Prof. Pascal Kintz is a Professor of Legal Medicine at the University of Strasbourg and is an expert for Justice appointed by the French Cour de Cassation for Chemistry, Toxicology and blood alcohol determination.
- Prof. Christiane Ayotte has a PhD in Organic Chemistry and a post-doc. in mass-spectrometry. She was the Director of the WADA-accredited Montreal Laboratory from 1991 to 2024. She has not published any articles on ostarine but has given lectures on the substance. She co-authored a paper on clenbuterol on hair of calves in the 1990's. Over the years, she has been a member of various WADA committees and working groups.

- Prof. Martial Saugy holds a Master Degree in Biology and a PhD in Plant Biology and Phytochemistry (180 reviewed publications in the anti-doping field but no publication on hair analysis), he was the Director of the WADA-accredited Lausanne Laboratory from 2002 until 2016, and was the Director of the Center of research & expertise in Anti-Doping sciences (RED's) of the University of Lausanne from 2016 until 2020.

80. Each expert was heard, examined and cross-examined singularly. They were then given the opportunity to provide concurrent evidence in the form of a "hot-tub".
81. Prof. Alvarez explained that during the contamination study he conducted on the Athlete and her partner, he mimicked the timeline of the events of 14 January 2024. The urine concentrations of ostarine detected in the Athlete further to his study were more or less similar to the ones found in the Athlete's A Sample. The AAF is thus compatible with contamination. The analysis of the Athlete's hair and her partner's hair confirm the above as the concentrations found in the Athlete hair, *i.e.* 2,5 pg/mg were way below the concentrations found in the hair of person using ostarine for doping purposes, *i.e.* between 50 and 200 pg/mg. The analysis of the Athlete's partner's hair in comparison revealed however that he had been using ostarine repetitively (65 pg/mg) as he explained that he was at the time of the doping control which caused the AAF and as he still was at the time of the controlled study. All of these findings are compatible with an

intentional use of ostarine on the part of the partner and incompatible with an intentional doping scenario and use of ostarine by the Athlete.

82. Prof. Kintz explained that he was not involved in the initial study by Prof. Alvarez but that he was asked by the Athlete's legal team to review that study. He explained the strategy according to which, in his view, contamination can be successfully established. In the present matter, the results found by Prof. Alvarez indicate that the AAF was consistent with contamination of the Athlete by her partner. Further, the Athlete had no knowledge of the fact that her partner was taking ostarine or that contamination via body fluids was possible. He underlined that, in a case like this, it is important to take into account the fact that the contamination did not just occur on the date of the Sample collection, *i.e.* 14 January 2024, but already the days before, as the Athlete had been exposed to ostarine from 5 January 2024 onwards and it takes days or sometimes weeks to eliminate ostarine from the system.
83. In response to a question from the Appellant, Prof. Alvarez explained that the "Second Alvarez Report" has been written by himself and by Prof. Kintz. Prof. Kintz acknowledged that in the award CAS 2017/A/5296, to which the parties referred in their submissions, no hair analysis was done.
84. As regards the dose of ostarine that could be transferred in a situation like the Kissing Scenario and the question to what this dose might amount and whether this dose amounts to the sums of the trapeze below the

concentration-time curve and between two concentrations (as argued by Prof. Alvarez in the Second Alvarez Report) or to the concentrations found at the moment of each kiss (as Prof. Ayotte argues), Prof. Alvarez reiterated his position that the dose that has reached the systemic circulation (blood or urine) has to be calculated according to the trapezoidal method. He further added that the fact that the ostarine taken by Mr Imboden was diluted in an oily liquid (PEG), and not in an aqueous solution, has its importance because when ostarine is diluted in PEG it will stay longer in the mouth.

85. Regarding the same question and the results that can be drawn from his own study, Prof. Kintz, first, underlined that the ostarine used in his study was contained in an aqueous solution and not in an oily solution like the one used by the Athlete's partner. Second, he stated that he's not a specialist of pharmacology and that he relies on the expertise of Prof. Alvarez regarding the explanation of the trapezoidal method.
86. Prof. Saugy agreed that there is a difference between oily and water-soluble preparations when it comes to ostarine, but considers that in the case at hand, "*we're not speaking about an oily preparation for the partner of the Athlete*". According to Prof. Ayotte, the product used by Mr Imboden is not to be considered an oily preparation in the strict sense as it was a Polyethylene glycol (PEG) preparation. This might be "oily" in appearance, but it is highly soluble in water. However, such a solution will leave a less high concentration of ostarine in the mouth than the solution used by Prof. Kintz in his study, in which he crushed an

ostarine pill and put it into water. Prof. Kintz underlined that in the Walpurgis Study, to which all Parties refer, ostarine was dissolved in a solution of ethanol and water.

87. With respect to the hair analysis, Prof. Alvarez acknowledged that he did not analyse the hair samples after every bath and did not include pictures of all samples in the First Alvarez Report. However, he stated, and was supported by Prof. Kintz on this, that the findings could clearly rule out that the Athlete's hair (and/or her partner's) had been manipulated through cosmetic treatment (discoloration). Prof. Alvarez then stated that regarding the hair analysis, he only took the results of the third washing bath because it is the most important, whereas for the nails, he took the results after the first and the third washing bath. When asked to explain why he only analysed the hair after the third washing bath he stated that that's how it is usually done giving that these analyses are very time consuming (+/-1 hour per segment). The analysis of the hair after the third washing would give the best image on how important external contamination really was in a specific case. Prof. Kintz then underlined that hair testing is regulated by the scientific society of hair testing and that there is a consensus that hair can be kept for reanalysis. He submitted that there is no rule saying that hair must be analysed after every washing bath. Neither expert was contradicted on these points.

88. In response to the question on how he could explain that there was a gradient of contamination in the different segments of hair when all of the

segments were, in the scenario at stake in the present matter, exposed to a contamination for more or less the same period of time, Prof. Alvarez stated that the maximum concentration is always found on the tips of the hair.

89. When asked if there were studies showing whether substances that are ingested can produce "external contamination", Prof. Kintz stated that, indeed, there were such studies, notably involving Quetiapine, Propranolol, Promazine. According to Prof. Kintz, there are dozens of studies showing that external contamination can occur through a pillowcase. Moreover, if the hair of a person is slightly damaged or porous due to the hair products that the person is taking, that hair would be more prone to contamination. As regards the Athlete's hair, it would be obvious that she is using hair products to prevent the hair from curling and these products would render her hair more porous.

90. In response to a question from the Panel, Prof. Alvarez explained, *inter alia*, that the higher concentrations at the end of the hair could be explained not only by the fact that that segment of hair had been exposed longer to the contamination source but also by the fact that when people brush their hair, they "brush" the substance to the outside, *i.e.* to the end of the hair. He further stated that the concentrations found in the hair of the Athlete must be due to external contamination. Indeed, the length of the analysed hair would represent several years of her life (33 months) and if she had taken ostarine for that amount of time there

would be a chance that she would be dead. Prof. Alvarez was not contradicted on this last point.

91. As regards the first segment and the finding of 2,5 pg/mg, Prof. Alvarez excluded that such a finding could be compatible with an intake of ostarine for doping purposes. He further stated that he believes that he could detect a one-off intake of ostarine in a hair analysis as he has a limit of quantification of 0,05 pg/mg. When confronted with a study of Prof. Kintz in which the latter had found concentrations of 3 to 21 pg/mg of ostarine in the hair of a person that had used ostarine, Prof. Alvarez argued that that person had probably not used ostarine for doping purposes.

92. In response to the question how he could explain that an amount as high as 250 µg of ostarine was found on the Athlete's hair brush, Prof. Alvarez, although having specified in his First Report that the analysed hair brush was "exclusively used by Mrs. Ysaora Thibus", stated that the Athlete's partner had used that hairbrush as well and that ostarine is a very sticky substance that, when used in a household, would be found everywhere.

93. In relation to an article he co-authored and which reads *inter alia*, that:

"it was difficult to determine the toxicological significance of the measured concentration of SARMS in the hair because there was no controlled study about SARMS incorporation into hair and because single dose detection tests have produced controversial results and that it was accepted that some parameters that must be evaluated during the validation process have not yet been assessed (like the dose necessary to

give a positive finding, influence of gender, variable incorporation into hair according to hair colour, external factors that may have an impact, cosmetic treatment(s) etc.)".

Prof. Kintz acknowledged that these elements have an incidence on the concentration and underlined that it's important to publish studies in order to get a better understanding of these elements. He then explained that his reading of the results found by Prof. Alvarez was that the whole strand of the Athlete's hair was contaminated by ostarine. As regards the results found in relation to the Athlete's partner's hair, he recalled that the concentrations found were far higher and that, in light of the literature on ostarine findings in doped athletes and ostarine testing from non-exposed athletes, it would be clear that the concentrations found in the Athlete's hair were caused solely by external contamination. Prof. Kintz expressed that he had no doubt about this because the concentrations of Ostarine found in the Athlete's hair "are very low and absolutely linear". He says such a finding would be accepted by French courts based on big number of cases published around the world. This last point has not been contested by the other experts. He further stated that there is no literature on doping with ostarine by micro-dosing and that, accordingly, such a scenario should be excluded.

94. Prof. Alvarez, in response to a question from the Appellant about his study, underlined that notwithstanding the fact that the Athlete and her partner were only mimicking the way they kissed on 14 January 2024, the ostarine concentrations found in the urine of the Athlete were very similar to the

ones found in the Sample collected on that day. Further, he stressed that the concentration curve he found in his study is very similar to the one found in the Walpurgis Study.

95. Prof. Alvarez, in his answer to a question from the Panel, stated that the concentrations found in the Athlete's Sample were the result of the contamination she suffered over nine (9) days with a kind of cumulative effect, because ostarine is not excreted within one day but over 6 to 9 days. What he examined in his study was the effect of only one day of contamination, as both the Athlete and her partner had no ostarine in their system when starting the study. In this regard, Prof. Kintz added that it has been established that ostarine can be transferred via sweat and that it is likely that it could be transferred via seminal liquid, as is the case for cardarine.
96. Prof. Saugy stated, in relation to his report, that he was not asked to assess whether a Kissing Scenario as the one described by the Athlete was plausible during a competition, but to look at the results found by Prof. Alvarez in his study, which he considers to be "uncontrolled", and assess whether they could be compatible with the AAF. He acknowledged that he had no indication that the study was "wrong or biased" but that he was skeptical because the study was not conducted under "full control". In this regard, Prof. Alvarez argued that he had left the Athlete and her Partner after they had provided the second sample, that he took the bottle of ostarine with him, that if the Athlete and/or her partner had ingested more ostarine after his departure, it would have shown as a

second peak in the following samples, that one of his assistants remained with the Athlete and her partner until the end of the study, *i.e.* collecting of the last sample. Prof. Saugy, confronted with the fact that he had stated that "*the findings did not exclude a voluntary intake of ostarine by the Athlete*" and asked whether he had ever seen an ostarine case in which a "voluntary ingestion" could be 100% excluded, stated that he was not aware of any such case. He further stated that, in his view, a concentration in pg/mL is more likely to be due to a contamination than a concentration of ng/mL and that a concentration of 13ng/mL is not a "low" concentration that could be attached to a contamination.

97. In response to a question from the First Respondent, Prof. Saugy confirmed, in relation to the ostarine found in the Athlete's Sample, the concentration of 13ng/mL is a rough estimate. As regards the uncertainty of that concentration, he stated that there could be a variation of around 20 to 30% up or down.
98. When asked, Prof. Ayotte reconfirmed that, in her view, 13ng/mL is not a low concentration. In many ostarine cases, the concentrations found were a lot lower, for example 0,03 ng/mL. Out of the 50 ostarine cases she has seen in connection with in-competition testing at the Montreal Laboratory, only 4 had a higher concentration than 1 ng/mL. She also stated that, if one was to rely on Prof. Kintz's study, the maximum amount of ostarine that could have been transferred solely by kissing in a scenario like the one described by the Athlete would have been 1,3 µg. She opines therefore that kissing alone

would certainly not be enough to explain the finding of 13 ng/mL in the Athlete's Sample. This finding would have required a transfer of 50 µg of ostarine via kissing which she says is implausible. Prof. Ayotte emphasized, however, that her calculation only considered a possible contamination by kissing.

99. As regards the trapezoidal calculation method referred to by Prof. Alvarez, Prof. Ayotte explained that this method could only work if the Athlete and her partner had been kissing without interruption for several hours in a row, *quod non*. Also, in her opinion, Prof. Alvarez's study could not be considered "controlled". First, in the lead up to the examination of the external contamination, the Athlete and her partner were alone in their apartment. Second, during the study, Prof. Alvarez left the Athlete and her partner alone after he had collected the second sample. Thus, interference by the Athlete or her partner could not be excluded. Prof. Ayotte then explained how a possible interference by the Athlete and/or her partner during the study or the days preceding the hair and nail collection could have occurred. According to Prof. Ayotte, in any event, external contamination leading to a concentration of 13 ng/mL in the urine of an athlete has never been seen or, at least, been published before. Prof. Saugy agreed with Prof. Ayotte that the study led by Prof. Alvarez could not be considered as being a "controlled study" as, for example, the Athlete and her partner were left alone after the second hour of the study. He also agreed with Prof. Ayotte on the point that based on the findings in Prof. Kintz's study, the

kissing that could have reasonably occurred between the Athlete and her partner on 14 January 2024 could not have caused the concentration of 13 ng/mL found in the Athlete's Sample.

100. To Prof. Ayotte, there is no reason to rule out the Athlete's intentional use of ostarine because even very low doses (1 mg to 3 mg) could have a performance enhancing effect. Female athletes could use ostarine in low doses of 3 to 5 mg, which would not amount to micro-dosing. Given that most AAF's found showed concentrations of ostarine below 1 ng/mL, she has been given no reason to believe that the Athlete's AAF was due to an unintentional use of ostarine.
101. Prof. Ayotte further reiterated that a concentration of 13 ng/mL does not seem likely to be the result of contamination even if, *per se*, this concentration does not exclude the possibility of ostarine contamination. She explained that not all SARMS have the same impact on each individual. Different SARMS have different precise actions. However, even though other SARMS than ostarine may have other physiological impacts, the global action of SARMS would be about the same. For some, for example ligandrol, the dosage and excretion time would be about the same as for ostarine. Hence one could compare the two. Other SARMS, like probenecid, could not be compared with ostarine or ligandrol. Prof. Ayotte disagreed with Prof. Kintz's statement that "*ostarine and ligandrol do not share the same pharmacokinetic parameters*" because the "*catching time would be similar*" (the doses would be proposed in the same

preparation, *i.e.* PEG, the excretion time is about the same as they are taken orally). Prof. Ayotte stated that she was not aware of an ostarine “contamination case” in which the alleged contamination occurred through intimate kissing. With reference to existing literature and comparing this case to all the other ostarine cases she has seen, Prof. Ayotte submitted that she could safely deduce that the Athlete’s AAF was not likely to be due to an involuntary ingestion. Regarding the explanations brought forward by Prof. Alvarez that the findings of his study point to the AAF being the result of systemic contamination, Prof. Ayotte stated that there is no proof in the case file that the hair or the exhibits were not contaminated by Prof. Alvarez himself. As to the fact that the reagent blank and the G0 have shown no signs of ostarine, this fact would not rule out that the hair had been contaminated during the study. Prof. Ayotte reiterated that she considered the study to be “uncontrolled”, but did not suggest that Prof. Alvarez intentionally interfered with his results. To her, the extent of contamination raises suspicions as to the context under which the study was done.

102. In response to a question from the Panel on the possible variation of the estimated level of concentration detected in the Sample, Prof. Alvarez, who had stated in his Second Report that the urinary concentrations found for the Athlete were “*of 5 to 15 ng/mL*” (page 4 and 5/9 of the Second Report; and points 7 to 10 page 13/55 of the first report), argued that when taking into account the Internal Standard (IS), the result obtained for the Athlete has

to be divided by 2,5 [*i.e.*, 707018 – which corresponds to the average of the three IS values – divided by 275252] leading to an actual concentration of ostarine of 5 to 6 ng/mL and not 13 ng/mL. According to him, the quantification of estimated concentration of Ostarine in the Athlete’s Sample was incorrect and should have been much lower. Prof. Ayotte, for her part, referred to Prof. Alvarez’s published study in which he mentioned only a concentration of 13 ng/mL (and not one of 5 or 6 ng/mL) and noted that even a concentration of 5 or 6 ng/mL would very unlikely be caused by contamination. Prof. Saugy also disagreed with Prof. Alvarez and explained that the role of the Internal Standard is to moderate the concentration laboratories detect in the samples they analyse and which, most commonly, are collected in competition, meaning that the samples are thicker. To Dr. Saugy, the actual concentration of the Sample at hand would be 13 ng/mL, with a possible variation of 30% up or down to account for different calibration corrections. When the question was put to him a second time, he revised his answer to a calibration of 20% up or down.

103. Relying on the Walpurgis Study, Prof. Alvarez noted that in Walpurgis, the ingestion of 10 µg of ostarine led to a urinary concentration of almost 6 ng/mL. He opined that such a finding would be akin to contamination because 10 µg would be 100 times less than the minimum effective dose of ostarine. Prof. Ayotte agreed with him on this point.

104. Prof. Alvarez then asked Prof. Ayotte, in relation to the possible systemic contamination, whether she believed he could have contaminated everything except for the first curve point, which did not contain ostarine, and the two first samples of the Athlete and Mr Imboden. She did not want to answer that question.
105. Prof Alvarez disagreed with Prof. Ayotte that ligandrol and ostarine could be compared considering the doses they are supposed to be taken at. According to him, to be beneficial, ostarine products should be taken in doses of 30 to 50 mg/day, whereas ligandrol could be taken at a dose of between 8 and 22 mg/day. He thus considers that one cannot compare the findings of these substances in urine samples. Moreover, much unlike ostarine, a laboratory would detect only ligandrol metabolites in urine and not ligandrol itself. Prof. Ayotte retorted that her reference to the ligandrol cases was solely due to the fact that in his published study, Prof. Alvarez had made a reference to two cases involving ligandrol contamination (athletes A and B). Her point was that the concentrations of ligandrol found in those contamination cases were much lower than the concentrations of ostarine detected in the Athlete's sample here.
106. At the end of the hearing, the Athlete offered a sincere and compelling statement in which she highlighted that she has always trained and competed with integrity and that winning at any cost has never been an option for her. She explained that the months following the AAF were particularly challenging for her, and that the

Appellant's appeal filed three days before the opening ceremony of the 2024 Olympic Games and shortly before the start of her competitions at these Games, has had a devastating effect on her. She emphasized that her teammates stood by her throughout the ordeal and believed in her innocence. She stressed how difficult it is for innocent athletes to go through a procedure like the ordeal she has lived. She frankly stated that she did not cheat and will do everything in her power to qualify for the 2028 Olympic Games.

VI. JURISDICTION

107. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

108. Pursuant to Article 13.2 of the FIE ADR:

“A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed [...] may be appealed exclusively as provided in this Article 13.2”.

109. Article 13.2.1 of the FIE ADR provides as follows:

“In cases arising from participation in an International Event or in cases involving

International-Level Fencers, the decision may be appealed exclusively to CAS”.

110. According to Article 13.2.3 of the FIE ADR, in cases stipulated in Article 13.2.1 parties entitled to appeal to the CAS are, *inter alia*, “(c) the FIE; (d) the National Anti-Doping Organisation of the Person’s country of residence or countries where the Person is a national or license holder; (e) the International Olympic Committee [...]; and (f) WADA”.

111. It is uncontested that the Athlete is an International-Level Fencer within the meaning of the FIE ADR. None of the Parties objected to the CAS jurisdiction and all Parties confirmed such jurisdiction by signing the Order of Procedure.

112. In view of the above, the Panel confirms that the CAS has jurisdiction to decide on the present appeal.

VII. ADMISSIBILITY

113. Article R49 of the CAS Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after

considering any submission made by the other parties”.

114. Pursuant to Article 13.6.1 of the FIE ADR, the “*time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed:*

(a) Within fifteen (15) days from the notice of the decision, such party/ies shall have the right to request a copy of the full case file pertaining to the decision from the Anti-Doping Organisation that had Results Management authority;

(b) If such a request is made within the fifteen (15) day period, then the party making such request shall have twenty-one (21) days from receipt of the file to file an appeal to CAS.

The above notwithstanding, the filing deadline for an appeal filed by WADA shall be the later of:

(a) Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed, or

(b) Twenty-one (21) days after WADA’s receipt of the complete file relating to the decision”.

115. In the present matter, it is uncontested that the Appealed Decision has been notified to the Athlete’s National Anti-Doping Organisation, the *Agence Française de Lutte contre le Dopage* (AFLD), on 5 June 2024. The AFLD’s time limit to file an appeal against the Appealed Decision thus expired on 26 June 2024 and, in accordance with

Article 13.6.1 of the FIE ADR, the Appellant had another twenty-one (21) days after that day to file its appeal with the CAS, bringing that time limit to 17 July 2024. By filing its Statement of Appeal exactly on the 17 July 2024, the Appellant respected the twenty-one (21) day deadline set out in the FIE ADR. Thus, the present appeal was filed within the prescribed deadline and is admissible.

VIII. APPLICABLE LAW

116. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

117. The Appealed Decision was rendered under the FIE ADR and there is no dispute as to the applicability of the FIE ADR in the present matter. According to Article 24.4 of the FIE ADR, the latter have been adopted pursuant to the applicable provisions, *inter alia*, of the WADC and shall be interpreted in a manner that is consistent with applicable provisions of the WADC, knowing that in case of conflict between the FIE ADR and the WADC, the WADC shall prevail. Further, pursuant to Article 24.6 of the FIE ADR the comments annotating various provisions of the WADC shall be used to interpret the FIE ADR.

118. As to procedural issues, the procedural rules of the CAS Code, supplemented by Swiss procedural law and principles enshrined in chapter 12 of the Swiss Private International Law Act (“PILA”) are applicable as the CAS has its seat in Switzerland, pursuant to Article R28 of the CAS Code, and at least one of the Parties has its domicile outside Switzerland.

IX. MERITS

119. In the present matter, the Athlete does not dispute that she committed an ADRV in breach of Article 2.1 of the FIE ADR for the presence of a prohibited substance. The Parties are also in agreement that because ostarine is a non-Specified Substance, pursuant to Article 10.2.1.1 of the FIE ADR, the presumptive period of ineligibility applicable as a result of this ADRV is four (4) years, unless the Athlete can establish that the ADRV was “not intentional”.
120. According to the comment to Article 10.2.1.1 of the FIE ADR, “[w]hile it is theoretically possible for a Fencer or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one’s system, it is highly unlikely that in a doping case under Article 2.1 a Fencer will be successful in proving that the Fencer acted unintentionally without establishing the source of the Prohibited Substance”.
121. Article 3.1 of the FIE ADR, entitled “Burdens and Standards of Proof”, provides, in its relevant parts, that “[w]here these Anti-Doping Rules place the burden of proof upon the Fencer or other Person alleged to have committed an anti-doping rule violation to rebut a presumption

or establish specified facts or circumstances, except as provided in Articles 3.2.2 and 3.2.3, the standard of proof shall be by a balance of probability”.

122. In the present matter, the mandate of the Panel is, in principle, limited to the questions of whether the Athlete has discharged her burden of establishing on a balance of probability that the ADRV was not intentional. In the affirmative, pursuant to Article 10.2.2 of the FIE ADR, the Panel must then determine if the period of ineligibility may be eliminated under Article 10.5 of the FIE ADR (No Fault or Negligence) or reduced pursuant to Article 10.6 of the FIE ADR (No Significant Fault or Negligence).
123. As a preliminary point, the Panel notes however that, in response to a question from the Panel, the Appellant clarified that if the Panel were to accept that the Kissing Scenario put forward by the Athlete is more likely than not to have caused the ADRV, the Appellant would concede that this case would result in a finding of No Fault or Negligence. Accordingly, if the Panel finds that the Athlete establishes to the required legal standard that the Kissing Scenario explains the source of the ostarine found in her system, the Athlete will benefit from the lenience of Article 10.5 of the FIE ADR and see the otherwise applicable period of ineligibility eliminated.
124. The Panel emphasizes that in order for it to be satisfied on the balance of probability that the Kissing Scenario did cause the Athlete's ADRV, the Athlete must, according to constant CAS jurisprudence, establish that said Scenario constitutes a plausible

explanation for the ostarine detected in her system or, in other words, that the Kissing Scenario – and the concentration of ostarine that could result therefrom – is not fatally undermined by scientific, *i.e.* pharmacokinetic, evidence (CAS 2017/A/5296, para. 53 and 54; CAS 2023/A/10025 & 10227, para. 166 and 167).

125. In this regard, the Panel observes that in its Appeal Brief, the Appellant argued that (i) the Kissing Scenario “*put forward by the Athlete simply cannot be the explanation of the [AAF]*”, the Athlete’s explanation, and Prof. Alvarez’s report upon which the Athlete relies are “*scientifically unsound*” (para. 4); (ii) the “*scenario put forward and supported by Prof. Alvarez and Dr. Kintz is plainly implausible*” (para. 40); (iii) the Kissing Scenario “*simply does not work in terms of pharmacokinetics*” [para. 40 sub i)]; (iv) the calculations done by the Athlete’s experts are based on a premise which “*seems wholly implausible on the facts*” in light of “*Mr Imboden’s own evidence at first instance*” [para. 40 sub iii) and v)ii)]. Further, in one of its footnotes to para. 40 sub v) ii) of its Appeal brief, the Appellant made a reference to the statement of Mr Imboden regarding the time of ingestion of his dose of ostarine and his time of arrival at the competition site on 14 January 2024 as mentioned in the Appealed Decision (page 11, para. 2). Finally, in the second last paragraph of its written submissions on the merits of the case, the Appellant stated that “*there is no basis for the Athlete to claim that her explanation is compatible with the concentration of ostarine detected in her urine. She relies almost exclusively on Prof. Alvarez’s ‘contamination study, which is*

deeply flawed from a scientific perspective. [...] Further, the study conducted by Dr. Kintz measuring the amount of ostarine in the saliva after ingestion of the drug shows that the dose that could have been transferred by Mr. Imboden was simply not in the right ballpark to cause the [AAF] (even taking favorable, and rather implausible, assumptions). In WADA's submission, the Athlete's explanation must therefore fail".

126. While it is true that the Appellant also claimed (i) that “*general experience of life would suggest that one does not kiss as one usually does whilst competing at an international fencing competition*”; (ii) that “*given the complete lack of information regarding the frequency and duration of the Athlete's and Mr Imboden's physical contacts during either the contamination study or the 14 January 2024 competition, the Athlete certainly failed to provide any relevant proof to show that the two situations were comparable*” [para. 40. sub v) ii)], and (iii) that “*other elements relied upon by Prof. Alvarez in his report do not provide any support to the scenario put forward by the Athlete*” [para. 40 sub vi)], the fact remains that, in the Panel's view, the Appellant did not, through these claims, actually question the factual evidence provided by the Athlete and the witnesses before the DDT and relied on by the latter in the Appealed Decision as regards the general course of the events leading up to 14 January 2024 and on this date. Indeed, read together with the Appellant's arguments recalled in the previous paragraph of the present award, the Panel understood these claims to be solely aimed at undermining the scientific, in particular the pharmacokinetic plausibility of the Kissing Scenario put forward by the Athlete and accepted by the DDT.

127. In such a situation, and notwithstanding the fact that, according to Article 13.1.2 of the FIE ADR, the Panel shall, in making its decision, not defer to the discretion exercised by the DDT, in the particular circumstances described above, the Panel considers that it would be contrary to the legal principles of procedural fairness and good faith for the Appellant to demand that the Second Respondent establish before the CAS the course the events underlying the Kissing Scenario when she has already successfully done so before the DDT without being challenged. Indeed, on the basis of the Appeal Brief, the Second Respondent was entitled to reasonably assume that the Appellant had accepted these underlying facts and that she did not have to establish anything else but the scientific soundness of this Scenario to satisfy her burden of establishing the source of the AAF. Further, given that the Appellant had filed along with its Appeal Brief both the Athlete's written submissions before the DDT and the exhibits accompanying these written submissions, it is understandable that the Second Respondent limited herself, in her Answer Brief before this Panel, to state that said Brief “*incorporates by reference the facts and the arguments developed in the Athlete's previous submissions*”.

128. Finally, as argued by the First Respondent, if the Appellant had, from the beginning of the procedure, actually intended to question the reality of the factual events underlying the Kissing Scenario and to examine (or rather cross-examine) Mr Imboden, who appeared as witness in the first instance hearing, the Appellant could easily have done so by proceedings as

it did for Prof. Martial Saugy, *i.e.* by reserving its right to call Mr Imboden to provide evidence and answer questions in the event that the Second Respondent would not call him as a witness.

129. In view of the above-mentioned elements, the Panel finds here that it may validly consider that the Athlete has established the factual elements underlying the Kissing Scenario, *i.e.* the events leading up to the 14 January 2024 and during that day, as brought forward by the Athlete during the first instance proceedings and as accepted by the DDT. In particular, the Panel considers that the invoices and email exchange on file prove that Mr Imboden ordered ostarine (MK-2866), and that his blood and urine samples prove that he had ingested ostarine. Further, the Panel accepts that Mr Imboden admitted to ordering and ingesting ostarine without the Athlete's knowledge.
130. However, given that the Appellant argues that the intake of ostarine by Mr Imboden does not exclude that the Athlete was also intentionally taking ostarine, the Panel will not only examine whether the concentration of ostarine found in the Athlete's Sample can, on the balance of probability, be explained by a contamination through the Kissing Scenario alone but also whether there are elements on file that indicate that she might have intentionally ingested ostarine.
131. Firstly, the Panel notes that according to Prof. Kintz's published and peer reviewed article ("Evidence of ostarine excretion in oral fluid after a single controlled oral administration", 2024),

it appears to be scientifically established that the intake of a dose of ostarine similar to the dose ingested by the Athlete's partner (*i.e.* 1 ml) would have left sufficient amounts of ostarine in the saliva of the partner to contaminate a person, here the Athlete, through kissing. In the present matter, there are several witness statements in the case file confirming that on the day of the Sample collection, *i.e.* 14 January 2024, the Athlete and her partner exchanged intimate kisses (French kisses). Some of these witness statements also highlight that the Athlete and her partner had the habit of frequently exchanging French kisses. Accordingly, it is reasonable to assume that, in the days prior to the 14 January 2024, the couple also engaged in intimate kissing which could have led to a transfer of that substance to the Athlete given that Mr Imboden started taking ostarine from the 5th of January 2024 onwards.

132. Secondly, the Panel notes that the ostarine concentration levels found in the urines in the study led by Prof. Alvarez submitted as the "Alvarez Report" before the DDT, and published in an article entitled "Body fluid contamination in the context of an adverse analytical finding in doping: About a case involving ostarine" (2024), appear to corroborate the concentrations found in the Athlete's Sample. This leads the Panel to the conclusion that it is unlikely that there was a second source of ostarine in addition to the ostarine transferred to the Athlete by her partner via, *inter alia*, the kissing. Indeed, on basis of the evidence before the Panel, it appears likely that in such a case the concentrations of ostarine found in the

Athlete's Sample could even have been higher than the 13 ng/mL detected. Moreover, the curve found by Prof. Alvarez in his study is, as all experts agreed during the hearing, very similar to the one found in the Walpurgis Study, which all the Parties considered to be controlled and reliable.

133. Regarding the study led by Prof. Alvarez, while agreeing with the Appellant that the conditions under which this study was conducted could have been stricter and that the reporting of the different steps undertaken could have been better documented, the Panel finds that said study can be considered as sufficiently controlled to be attributed, in the present matter, some decisive scientific weight. Indeed, on the one hand, the results of the study have been published in an article that has been peer reviewed and, so far, these results have not been scientifically contested. On the other hand, as became clear in the discussion during the hearing, before starting the study, Prof. Alvarez had tested the Athlete and her partner several times to make sure that there was no ostarine remaining in their system. Further, even if it is stated in the published article that, after the second urine sample was taken, Prof. Alvarez *"left, leaving [the Athlete and her partner] both with the first two vials of urine and taking back the vial of MK-2866"*, it is clear from the "First Alvarez Report", in which it is stated that Prof. Alvarez *"left [the Athlete and her partner] until the following day, leaving with the first two vials of urine and taking back the vial of MK-2866"*, that, after the Athlete and her partner had each provided their second sample, Prof. Alvarez left with all the vials of urine he had collected so far

and also took the vial of MK-2866 with him. The Panel considers that the misleading wording of the sentence in Prof. Alvarez's published article is due to an unfortunate but understandable translation error. More importantly, Prof. Alvarez convincingly testified before the Panel that when he left the Athlete and her partner, he took the vials of urine that he had collected and the bottle of ostarine with him. An interference of the Athlete or her partner with the first two urine samples collected by Prof. Alvarez in his study can thus be excluded. In this regard, it must also be mentioned that there is no element pointing into the direction of the existence of a second bottle of ostarine in the household of the Athlete and her partner. In any event, if the partner had ingested another dose of ostarine, that ingestion would have resulted in a second spike of ostarine in his urine samples. Finally, as regards the allegation that the results found by Prof. Alvarez, in particular, the hair and nails analysis could possibly be due to systemic contamination, the Panel finds this allegation not to be substantiated by any concrete elements and does not consider the contradictory evidence given in relation to the Athlete's hairbrush to be determinative or relevant. In any event, the Panel considers that the most relevant part of the Alvarez study is the analysis of the Athlete's and her partner's urine and Prof. Alvarez has, in the Panel's view, convincingly contested the allegation of a possible systemic contamination of those urine samples.

134. Further, still in connection with the question whether a second source of ostarine might have caused the AAF,

although being well aware of the CAS jurisprudence according to which a hair analysis is not sufficient to rebut the presumption that an ADRV was intentional (CAS 2021/O/7977) and adopting a cautious approach to the conclusions that might be drawn from such analysis when it comes to the use of Prohibited Substances, the Panel notes that while all experts but Prof. Alvarez agreed that, for the reasons exposed by Prof. Kintz in his article entitled “Human hair testing for selective androgen receptor modulators (SARMs): Current knowledge and limitations” (2021), the intake of ostarine in very small doses might not be detectable in hair analysis, it is uncontested that the concentrations of ostarine found in the Athlete’s hair are linear, which constitutes a strong indication that they are the result of an external contamination and not of an intentional ingestion. Indeed, according to Prof. Kintz and Prof. Alvarez, who are specialists in the field, first, the concentrations found are not indicative of an intake of pharmacological doses of ostarine for performance enhancing purposes and, second, it can be excluded that the Athlete could have been consuming ostarine over the whole length of the period represented by the analysed strand of hair (*i.e.* 33 months).

135. Finally, as already mentioned above, with reference to the findings of Prof. Alvarez and Prof. Kintz in their respective studies, the Panel considers that if there had been a second source of ostarine, *i.e.* direct intentional intake by the Athlete, the concentrations found in the Athlete’s Sample ought very likely to have been higher than

what they were (13 ng/mL) as these concentrations were, more or less, reproduced in the study of Prof. Alvarez on the basis of just one indirect source by way of contamination. Moreover, the Panel takes into consideration that both experts called by the Appellant acknowledged that a concentration of ostarine of 13 ng/mL does not, *per se*, exclude the possibility of contamination.

136. Thus, on the balance of probability, the Panel excludes that besides the Athlete’s partner, there was a second direct source of Ostarine. In other words, the Panel excludes that, here, the Athlete intentionally ingested the ostarine in addition to being contaminated by her partner’s saliva.
137. It must be added that although most of the Appellant’s arguments aiming at undermining the plausibility of the Kissing Scenario brought forward by the Athlete focus on the fact that it is unlikely that, on the 14 January 2024, the Athlete and her partner could have been kissing in such a way as to transfer enough ostarine to cause the AAF (13 ng/mL), the Panel notes that it accepts that Mr Imboden was taking ostarine from 5 January 2024 onwards. Therefore, there has been contamination over 9 days with a cumulative effect because it has also been established that the excretion time for ostarine is 6 to 9 days. The Panel does not view it of critical importance whether, on 14 January 2024, the Athlete and her partner started kissing half an hour, one hour or one and a half hours after the ingestion of 1 ml of ostarine by Mr Imboden. In this regard, it may be added that, in relation to the

Appellant's argument according to which, on the 14 January 2024, the Athlete and her partner could not have started kissing immediately after the partner's arrival at the competition site due to the fact the Athlete's team had a match against China at 13h00, the First Respondent clarified at the hearing, without being contradicted, that the planned schedule of that match had been delayed and that the match started later.

138. In view of the above, and having taken all the available evidence into account, the Panel finds that the Athlete has provided a plausible explanation as to how the ostarine found in her Sample had entered her system and that this explanation has not been "fatally undermined" by the scientific evidence and arguments raised by the Appellant.
139. Hence, the Panel finds that the Athlete has discharged her burden of establishing on the balance of probability that her AAF came from contamination by intimate kissing (contact) with her partner on the day of the Sample collection and the (9) days prior to that. It follows that the Athlete's ADRV for the presence of ostarine was not intentional. Further, in the light of these findings, it is manifest and uncontested that the Athlete bears No Fault or Negligence for her ADRV. As Article 10.5 of the FIE ADR provides that "*if a Fencer or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated*", no period of suspension shall be imposed on the Athlete. Furthermore, WADA's request to amend the duration of the Athlete's retroactive disqualification is

rejected and the DDT decision is confirmed also on this point.

140. The DDT decision is upheld and the Appeal dismissed.
141. Any other and further claims or requests for relief on the merits are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the World Anti-Doping Agency (WADA) against the Fédération Internationale d'Escrime (FIE) and Ms Ysaora Thibus with respect to the decision rendered by the Doping Disciplinary Tribunal of the Fédération Internationale d'Escrime on 4 June 2024 is dismissed.
2. The decision rendered by the Doping Disciplinary Tribunal of the Fédération Internationale d'Escrime is confirmed.
3. (...).
4. (...).
5. All other and further motions or prayers for relief are dismissed.

Athletics (hammer throw); Participation in the Olympic Games; Valid arbitration agreement in favour of CAS; Rule 61(2) of the Olympic Charter

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

1. A substantively valid arbitration agreement in favour of CAS requires a mutual intent between the Parties to refer their dispute to the CAS to the exclusion of state courts. Such mutual intent may be expressed in an agreement or by submitting to the rules and regulations of a sports organisation that contain an arbitration clause. Furthermore, Article 178(4) of the Federal Act on Private International Law provides that the arbitration clause can also be contained in a unilateral transaction or in articles of association.
2. Rule 61(2) of the Olympic Charter (OC): (i) sets out an arbitration clause for *“any dispute[s] arising on the occasion of, or in connection with, the Olympic Games”* to be submitted exclusively to the CAS. The provision covers – *ratione personae* – all stakeholders that are bound to the OC either by membership or by submitting contractually to the rules of the IOC; (ii) cannot be construed as a contract “offer” by the Olympic Charter to any third party that wishes to litigate with the IOC in relation to

the Olympic Games. Absent any clear indications to the contrary, statutes of a Swiss association cannot be construed as awarding rights to non-members akin to Article 112(1) of the Swiss Code of Obligations; and (iii) applies only to those instances, where the parties mutually and unequivocally have expressed their willingness to be bound *vis-à-vis* each other either by entering into a membership relationship or by contractually subordinating their legal relationship in full or in part to the OC.

I. THE PARTIES

1. Ms. Nayoka Clunis (the “Appellant” or the “Athlete”) is an elite Jamaican athlete, specialising in the hammer throw event.
2. World Athletics (the “First Respondent” or “WA”) is the world governing body for the sport of athletics, recognised as such by the International Olympic Committee (the “IOC”). WA has its seat and headquarters in Monaco, Principality of Monaco.
3. The IOC (or the “Second Respondent”) is the governing body of the Olympic Games and the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, including the Summer Olympic Games in Paris in 2024 (“Olympic Games Paris 2024”) fulfilling the mission, role

and responsibilities assigned by the Olympic Charter (“OC”), which includes promoting peace through sport.

4. WA and the IOC are collectively referred to as the “Respondents”.
5. The Appellant and Respondents are jointly referred to as the “Parties”.

II FACTUAL BACKGROUND

A. Introduction

6. The present dispute is primarily based on a decision by the Director of Competitions and Events Department of WA dated 8 July 2024 not to allow the Appellant to participate in the Olympic Games Paris 2024, because the Jamaica Athletic Administrative Association (“JAAA”) had failed to include the Appellant’s name in the list of confirmed athletes within the prescribed deadline (the “Appealed Decision”). The Appealed Decision reads as follows:

“Dear Mr. President, Dear Garth,

Thank you for your letter below and I do hope that Hurricane Beryl passed without major destruction and damage to your facilities and most importantly the Jamaican athletics family.

About the situation concerning Ms. Nayoka Clunis, I am sorry to have to confirm to you that as the target numbers for each event at the Paris Olympics have been reached by reallocation over the past few days, we can no longer guarantee her participation in the upcoming games. I personally discussed the unfortunate situation at length internally even with President Coe to seek a solution, but the best I can do at this point in time is to give you

my word, that should there be any cancellation or withdrawal in the women’s hammer throw before the games begin, Ms. Clunis will be first in line to be offered the position.

While I do understand this is not the solution you were hoping for, please do accept that we have to follow the rules and regulations, furthermore in another situation you would expect World Athletics to do just that.

Thank you for your understanding and hope to be in touch about possible withdrawals over the coming weeks”.

7. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, the CAS file and the content of the remote hearing that took place on 29 July 2024. References to additional facts and allegations found in the Parties’ written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he shall refer in this Award only to those submissions and evidence he deems necessary to explain his reasoning.

B. Background Facts

8. On 20 December 2022, WA published its qualifying system for the sport of athletics for the Olympic Games Paris 2024 (the “WA QS”), according to which field events like hammer throw has 32 entries each for men’s and women’s categories who can qualify for the 32 spots by Entry Standard or World Ranking.
9. On 19 June 2024, WA held an

information session for its Member Federations regarding the WA QS, relevant deadlines, and reallocation procedure. Following the information session the Member Federations were advised by WA via email – *inter alia* – as follows:

“As mentioned, your proposed entries must include qualified athletes (whether by standard or world rankings) as well as any next best athlete available to take a reallocated quota place. Athletes that are not included in your EES entries, will NOT be considered for Paris 2024

By submitting these entries, you will allow World Athletics to know which qualified athletes are going to participate in each event and, therefore, reallocate any unused quota places to the next best available athletes by world rankings.

Deadline to populate the EES is 4 July midnight Monaco time”.

10. On 1 July 2024, JAAA made eighty-nine pre-entries in the Event Entry System (“EEA”).
11. On 2 July 2024, WA confirmed the list of athletes who qualified by Entry Standard and World Ranking for the Olympic Games Paris 2024, wherein the Appellant was identified to JAAA and Jamaica Olympic Association (“JOA”) as eligible for nomination through her World Ranking position then (23rd in the world) (the “Communication”). The Communication contained the following:

“This is to inform you that, following the end of the qualification period on 30 June, we have processed all the results from the registered competitions and many National

Championships. We have done that to the best of our ability and accuracy and have updated the Road to Paris accordingly, which is now published on our website [...] Any omissions or corrections must be immediately reported to us for eventual review.

Please remember to submit your pre-entries through the Event Entry System (EES) [...]

*As mentioned, these must include qualified athletes (whether by standard or world rankings) as well as any next best athlete available to take a reallocated quota place. Athletes who are not included in your EES entries, will **NOT** be considered for Paris 2024.*

By submitting these entries, you will allow World Athletics to know which qualified athletes are going to participate in each event and, therefore, reallocate any unused quota places to the next best available athletes by world rankings.

Deadline to populate the EES is 4 July midnight Monaco time.

Any problem using EES, please email the list of athletes to enter to [...] by the deadline of 4 July”.

12. On 3 July 2024, JAAA informed the Appellant that, based on her World Ranking, she had been selected to compete at the Olympic Games Paris 2024.
13. On the same date, Hurricane Beryl, a category-five Atlantic hurricane, hit Jamaica.
14. On 4 July 2024, JAAA submitted the pre-entries on the EES before the midnight deadline stipulated by WA, which did not include the name of the

- Appellant.
15. On 5 July 2024, WA reallocated places to the next best ranked athletes by their Member Federations for those quota places which were not used. The next best ranked athlete for hammer throw was Ms. Iryna Klymets from Ukraine, and the unused quota place was offered to and accepted by her.
 16. On the same date, WA informed Member Federations and the IOC of the athletes qualified and eligible for entry to the Olympic Games Paris 2024, which did not include the name of the Appellant.
 17. On 6 July 2024, the president of JAAA (the “JAAA President”) wrote an email to WA that reads as follows:

“Dear Marton

I am seeking your assistance in adding hammer thrower Nayoka Clunis as a Quota Athlete who is ranked 23rd. Due to the inputs being done on the day of the approaching hurricane which adversely affected our ability to act we were unable to correct and complete the entries on the final day due to the passage of the hurricane which affected our electricity and internet islandwide. We still have limited capabilities and I am requesting that she be added to the list of quota athletes in the hammer ...”.
 18. On 7 July 2024, JAAA released a press release containing the names of track and field athletes selected to represent Jamaica at the Olympic Games Paris 2024.
 19. On the same date, WA published the final list of athletes who will compete at the Olympic Games Paris 2024.
 20. Still on the same date, the Appellant’s coach informed the Appellant that her name was not included in the list of athletes who will compete at the Olympic Games Paris 2024. The Appellant proceeded to contact the Secretary General of JAAA, who informed the Appellant of the situation.
 21. On 8 July 2024, WA submitted the list of participating athletes to the IOC, which did not include the Appellant. JOA also submitted a list of Jamaican athletes to compete at the Olympic Games Paris 2024, which also did not include the Appellant.
 22. On the same date, WA informed JAAA of the Appealed Decision.
 23. In response to the Appealed Decision, the JAAA wrote to the WA as follows:

“Dear Marton

Thank you for all the assistance offered and we do remain hopeful that eventually she will be able to be added if there is a withdrawal”.
 24. On 12 July 2024, the Appellant was informed by the President of JAAA that he had been speaking with the IOC and WA, and they should be meeting soon for her matter.
 25. On 15 July 2024, the JAAA President wrote to WA as follows:

“Dear Mr. Gyulai:

Further to your letter of July 8, 2024 with regard to Miss Nayoka Clunis’ not being declared as an entrant in the Women’s Hammer Throw event at the 2024 Paris Olympics, we write to inform you that this

situation has been creating severe emotional stress on the athlete.

We also write to remind you that this unfortunate situation was due to the devastation caused by hurricane Beryl in which Jamaica suffered severe damage in telecommunications and other infrastructure throughout our country.

Based on the foregoing, we are respectfully asking that even if there is no withdrawal or cancellation (suggested in your letter), Miss Clunis be included in the list of athletes to compete in the event”.

26. On 16 July 2024, the President of JAAA informed the Appellant that there were no updates, and JAAA made another request to WA.

III. THE PROCEEDINGS BEFORE THE AD HOC PANEL OF THE COURT OF ARBITRATION FOR SPORT

27. On 18 July 2024, the Appellant filed an application with the Court of Arbitration for Sport (“CAS”) Ad Hoc Division Games of the XXXIII Olympiad in Paris (“CAS Ad Hoc Division”) against JAAA as respondent. The case was docketed under CAS OG 24/01. In these proceedings the Appellant filed the following requests for relief:

- “- *direct that her name be included on the appropriate list (and anything incidental thereto);*
- *direct the JAAA to implement remedial measures to ensure this does not happen again, for the athlete’s sake and the wide sporting community; and/or*
- *any other relief or remedy the Panel may*

deem just in the circumstances”

28. In the proceedings CAS OG 24/01, the IOC, as one of the interested parties, contested the jurisdiction of the CAS Ad Hoc Division on – *inter alia* – the following grounds:

- The Appellant based the jurisdiction of the CAS Ad Hoc Division on the “*arbitration clause inserted in the official entry form of the O.G.*”, but does not produce a duly-executed entry form, and the IOC understood that the Appellant was not provided with such a form.
- The Appellant’s own Application Form confirms that the dispute on her non-selection arose before 16 July 2024, as it indicates that “*this is a dispute arising on the occasion of, or in connection with the Olympic Games (and one which has continued into the 10 days preceding the Opening Ceremony [...])*”. By stating that the dispute “*has continued into the 10 days preceding the Opening Ceremony*”, the Appellant acknowledged that the dispute came into existence earlier than that.

29. In the same proceedings, WA, as one of the interested parties, objected to the Appellant’s application on the following grounds:

- WA had, in accordance with the WA QS, communicated eligible and qualified athletes for entry to the Member Federations and to the IOC on 5 July 2024.

- In accordance with the WA QS, WA had reallocated the place to the next qualified athlete and opposed to another athlete and Member Federation being penalised as a result of the omission of the JAAA.
30. On 22 July 2024, the CAS Ad Hoc Panel decided that the *“CAS ad Hoc Division does not have jurisdiction to hear the application filed by Nayoka Clunis on 18 July 2024”*.
 31. In the merits of the award, the CAS Ad Hoc Panel held, its pertinent parts, as follows:

*“28. This Panel has been formed under the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games (‘the Rules’). Article 1 of the Rules provides that the relevant dispute must **arise** during the Olympic Games or **during a period of ten days preceding the Opening Ceremony of the Olympic Games** (emphasis added).*

29. The Opening Ceremony for the Paris Olympic Games is 26 July 2024.

30. The IOC has specifically raised the question of jurisdiction, submitting that the dispute is not covered by Article 61 of the Olympic Charter and that the dispute did not arise during the relevant 10-day period.

31. To determine whether the Panel has jurisdiction, it is necessary to consider the chronology of relevant events concerning the Athlete, as ascertained from the evidence provided by the Athlete in her Application, together with some additional evidence provided during the hearing. [...]

49. In the Application, the Athlete has not nominated a decision from which she appeals; the section of the Application asking for the details of the decision challenged, if any, is left blank. It is to be recalled that the Respondent is the JAAA and that the relief sought, while seeking ‘any other relief or remedy that the Panel may deem just in the circumstances’ can only be sought against the respondent to the application.

50. From the chronology set out above, it is apparent that the dispute as between the Athlete and the JAAA could be said to have arisen on 4 July 2024 - when the Athlete’s name was omitted from the list sent to WA, on 7 July 2024 – when the Athlete was informed by the JAAA that her name was not on the list sent to WA by the JAAA, or on 8 July 2024 – when WA informed the JAAA that the Athlete’s name could not be added to the list of competitors.

51. It is clear that all of these dates are beyond the time limit required for the Panel of the ad hoc Division for the Paris Olympic Games to have jurisdiction. [...]

The relevant date is when the dispute between the Athlete and the JAAA arose, not when it could be said to have ‘crystallised’ by the receipt of submissions from WA as an interested party. A dispute does not arise when all steps to resolve the dispute have failed. The dispute either arose when the Athlete became aware that her name had not been included on the list submitted by the JAAA to WA, or when she first became aware that the mistake would not, or could not, be rectified by WA. The Panel does not need to decide which of these dates apply as both are beyond the 10

days prior to the Opening Ceremony of the Paris Olympic Games. [...]

56. The Panel concludes that it has no jurisdiction in this case as the dispute arose prior to a period of ten days preceding the Opening Ceremony of the Paris Olympic Games. Having determined that the Panel does not have jurisdiction for this reason, it is unnecessary to consider whether there is jurisdiction under Rule 61 of the Olympic Charter”.

IV. THE APPEAL PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 25 July 2024, the Appellant filed a Statement of Appeal (serving also as Appeal Brief) with the CAS against the Respondents with respect to the Appealed Decision, in accordance with Articles R48 and R51 of the CAS Code of Sports-related Arbitration (2023 edition) (the “CAS Code”). In her Statement of Appeal, the Appellant brought the appeal against the Respondents, as well as against Ms. Iryna Klymets and the Ukrainian Athletic Association (“UAA”) as third and fourth respondents, and JAAA and JOA as interested parties. The Appellant, inter alia, requested for the matter to be expedited in accordance with Article R52 (4) of the CAS Code. The procedure was docketed as CAS 2024/A/10760 *Nayoka Clunis v. World Athletics & International Olympic Committee & Iryna Klymets & Ukrainian Athletic Association*.
33. On 26 July 2024, the CAS Court Office acknowledged receipt of the Statement of Appeal, and proposed an expedited procedural calendar for the Parties’

agreement.

34. On the same date, the JAAA filed a separate Request for Arbitration and Statement of Claim against WA, the IOC, JOA, Ms Iryna Klymets and the UAA. This procedure was docketed as CAS 2024/O/10764 *Jamaica Athletics Administrative Association v. World Athletics & International Olympic Committee & Jamaica Olympic Association & Irina Klymets & Ukrainian Athletics Association*.
35. Still on 26 July 2024, WA informed the CAS Court Office as follows:
- “Further to the JAAA’s filing of a request for arbitration ... today, rising from the same facts. And the need for World Athletics to consider the matter, World Athletics would respectfully request an extension of until tomorrow morning ... to provide the information requested by the CAS ... namely our position on the request for an expedited procedure, proposed timetable and request for a sole arbitrator”.*
36. On 27 July 2024, the Appellant, First Respondent, and Second Respondent submitted that they agree to an expedited procedure and the proposed calendar, while Ms. Klymets and UAA objected to an expedited procedure. In the same communications, the Appellant requested for the Hon. Dr Annabelle Bennett to be appointed as sole arbitrator while the First and Second Respondents proposed for the dispute to be submitted to the same three-member panel as CAS OG 24/01.
37. On the same date, the CAS Court Office informed the Parties that in the absence of an agreement among all Parties, no expedited procedure shall

- be implemented.
38. On the same date, the Appellant informed the CAS Court Office that “should the procedure follow the regular time limits ... the appeal would become entirely moot. ... Should the Third and Fourth Respondent ... refuse the expedited procedure, the Appellant sees no other option but to withdraw the appeal against the First and Fourth Respondent ...”.
 39. Still on 27 July 2024, the CAS Court Office invited Ms. Klymets and UAA whether they maintained their objection against an expedited procedure.
 40. As no response was received by the Third and the Fourth Respondents, the CAS Court Office determined that the Appellant’s appeal against Ms. Klymets and UAA was withdrawn and proposed the following amended expedited procedural calendar to the remaining Parties:
 - *Filing of the Respondents’ Answers by 28 July 2024 (with direct copy to the Appellant);*
 - *Hearing on 29 July 2024 at 15:00 CEST;*
 - *Issuance of the operative part of the Arbitral Award by 30 July 2024, if possible.*
 41. The letter of the CAS Court Office invited the Parties to comment on the procedural calendar by 28 July 2024. In addition, the CAS Court Office informed the Parties that, due to the Appellant’s withdrawal of her appeals against Ms. Klymets and UAA, the new reference of the present procedure was
- CAS 2024/A/10760 Nayoka Clunis v. World Athletics & International Olympic Committee.*
42. On 28 July 2024, the Appellant and the JAAA requested the following:
 - For the JAAA’s Request for Arbitration dated 26 July 2024 to be admitted as *amicus curiae* brief; and
 - For the JAAA to be permitted to attend the hearing in the present matter on 29 July 2024 and to make *amicus curiae* submissions in support of the Appellant’s position.
 43. On the same date, the First and Second Respondent objected to the Appellant’s and the JAAA’s requests of even date, and maintained their request to submit the present matter to the same three-member panel as CAS OG 24/01.
 44. On the same date, the CAS Court Office informed the Parties that the Parties’ positions on JAAA’s requests will be referred to the Panel once constituted. In a separate letter of the same day, the CAS Court Office also informed the Parties that the issue of the constitution of the Panel will now be referred to the President of the CAS Appeals Arbitration Division, or her Deputy.
 45. On the same date, the Respondents submitted their respective Answers in accordance with Article R55 of the CAS Code.
 46. Still on the same date, the Parties provided the names of the persons that will be attending the hearing on their

respective behalf.

47. On 29 July 2024, the CAS Court Office acknowledged receipt of the Respondents' respective Answers.

48. On the same date, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the Panel to decide the present dispute was constituted as follows:

Sole Arbitrator: Prof. Dr Ulrich Haas, Professor of Law in Zurich, Switzerland, and Attorney-at-Law in

49. On the same date, the CAS Court Office informed the Parties that the hearing was postponed to 29 July 2024 at 16:30 CEST.

50. On the same date, the CAS Court Office provided the Parties with an Order of Procedure ("OoP") for the Parties' signature. The Appellant, the First Respondent, and Second Respondent submitted their signed OoP on 29 July 2024, 30 July 2024, and 29 July 2024, respectively.

51. Still on the same date, the First Respondent produced the document M/35/23 dated 14 August 2023 upon request of the Sole Arbitrator and following the document production request contained in the Appellant's Statement of Appeal / Appeal Brief.

52. Still on 29 July 2024, a hearing took place by videoconference before the Sole Arbitrator. Besides Dr Björn Hessert (Counsel to the CAS), the following persons attended the hearing:

For the Appellant

- Ms. Nayoka Clunis (the Appellant);
- Mr. Saverio Spera (Counsel for the Appellant);
- Mr. Jacques Blondin (Counsel for the Appellant);

For WA

- Ms. Catherine Pitre (Representative for WA);
- Mr. Nicholas Zbinden (Counsel for WA);

For the IOC

- Dr Antonio Rigozzi (Counsel for the IOC); and
- Mr. Eolos Rigopoulos (Counsel for the IOC).

53. At the outset of the hearing, the Parties confirmed that they had no objection as to the constitution of the Panel. However, the Parties reiterated their divergent positions as to the jurisdiction of the CAS.

54. Furthermore, the Sole Arbitrator at the hearing rejected the Appellant's and JAAA request to admit the latter's submission dated 26 July 2024 as *amicus curiae* brief and JAAA's attendance at the hearing. The Sole Arbitrator advised the Parties that the reasons for such decision would be provided in the final Award.

55. At the end of the hearing the Parties acknowledged that their right to be heard had been fully respected.

V. SUBMISSIONS OF THE PARTIES

56. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the

Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

57. In her Appeal Brief, the Appellant requested as follows:

“(a) Upholding the present Appeal.

(b) Setting aside the Appealed Decision.

(c) Replacing the Appealed Decision with an award ordering that the Appellant will participate in the Olympic Games by:

i. Either allocating an additional slot to the Athletics competition;

ii. Or replacing Ms Klymets' participation with the Athlete's”.

i) Jurisdiction and Admissibility

58. The Appellant submits that the CAS has jurisdiction to hear the present dispute on the following grounds:

➤ The Appellant has an interest to participate at the Olympic Games Paris 2024 and has been adversely affected by the Appealed Decision. As a consequence of the Appealed Decision, the Appellant was denied the opportunity to enter into a legal relationship with the IOC (with the Games Participation Agreement, and

ergo, the clause for arbitration before the CAS). Failing which, the Appellant would have consented to arbitration pursuant to Rule 61(2) of the OC, and grounded the jurisdiction of the CAS upon that provision.

➤ The Appellant was unable to rely on the jurisdiction of the CAS Ad Hoc Division, as the Appealed Decision was rendered on 8 July 2024, more than ten days prior to the opening ceremony of the Olympic Games Paris 2024.

➤ The CAS has jurisdiction under Rule 3.1 of the World Athletics Disputes and Disciplinary Proceedings Rules (2019 Edition) (the “2019 Disputes Rules”), which provides for a catch-all provision conferring exclusive jurisdiction of the CAS to entertain appeals filed by a range of affected parties, which would include the Appellant (cf. CAS 2021/A/8167, para. 44).

➤ However, while the 2019 Disputes Rules were revised in 2023 and now constitute two distinct documents, *viz.* the Dispute and Disciplinary Proceedings Rules (the “2023 Disputes Rules”) and the Disciplinary and Appeal Tribunal Rules (the “2023 Tribunal Rules”), the latter still confers the CAS exclusive jurisdiction in Rule 16 contained herein. The 2023 Disputes Rules are not

applicable to the present case.

- The World Athletics Constitution (the “WA Constitution”) provides for Member Federations and Area Associations the possibility to refer to the CAS any matter against WA “*within 5 days of the date in which the dispute arose*”, but JAAA failed to submit a claim to the CAS regarding the dispute arising out of the email dated 8 July 2024 within the applicable time limit. However, the Decision has adversely affected the Appellant’s position in a way that is akin to a disciplinary measure, and it would be a denial of justice to confer jurisdiction of the CAS only to JAAA, since the party directly affected in this case is the Appellant (with JAAA’s rights only indirectly affected).
- Pursuant to Rule 16 of the 2023 Tribunal Rules, the CAS has exclusive jurisdiction to hear the present matter. Determining otherwise would deprive the Appellant of a means of appeal which is guaranteed to athletes in such situations, and put the Appellant in a position of juridical limbo (in violation of the legal principle of legal certainty) as she has no effective means of access to justice. The CAS is the only forum to which such disputes can be effectively brought and determined (cf. CAS 2020/A/6912, para. 119).

ii) *Admissibility of the appeal*

59. The Appellant further contends that the requirements under Article R49 of the CAS Code are fulfilled, wherein the present appeal is filed within the time limit, and there is no effective internal remedy which the Appellant could have used for the present appeal (cf. CAS 2021/A/8034, para. 90).
60. The Appellant maintains that the Appealed Decision is an appealable decision under the unambiguous CAS jurisprudence on the same matter.

iii) *Standing*

61. The Appellant also submits that she has standing to appeal as she is greatly affected by the Appealed Decision (cf. CAS OG 22/007, paras. 90 to 92), and she has self-evident and enormous sporting interest in the present matter.
62. The Appellant further submits that the Respondents in the present matter (including the initial claim against Ms. Klymets and UAA) have standing to be sued, as follows:
- They have some stake in the dispute by being personally obliged by the disputed right at stake or something is sought against the said party(s) (cf. CAS 2022/A/8886, para. 52; CAS 2018/A/5888, paras. 4 to 5). In particular, WA as the party who made the Appealed Decision, which is under appeal, the IOC as the Appellant is requesting admission to the Olympic Games Paris 2024, Ms. Klymets and UAA as parties who are affected by the present

appeal.

- Neither the WA Constitution nor the regulations of WA limit which parties may be named as respondents in an appeal.

iv) *Applicable Law*

63. The Appellant submits that under Article R58 of the CAS Code, the applicable regulation is Article 84(5) of the WA Constitution which refers to the application of the rules of WA and the subsidiary application of Monegasque law. The Appellant further submits that since the IOC is involved and based in Switzerland, Swiss law can also apply.

v) *Merits*

64. The Appellant submits that the Appealed Decision is the outcome of excessive formalism on the part of WA:

- Under Swiss jurisprudence, excessive formalism is a particular aspect of the denial of justice prohibited by Article 29(1) of the Swiss Constitution (SFT 142 I 10). Formalism is considered to be excessive when the strict application of the rules is not justified by an interest worthy of protection and unsustainably complicates the realisation of substantive law or restricts access to courts (SFT 130 V 177, consid. 5.4.1; SFT 128 II 139, consid. 2 a; SFT 127 I 31).
- Under CAS case law, the strict application of rules should be avoided when it becomes an end in itself (cf. CAS

2019/A/6636, para. 87).

- The circumstances around the Appellant's eligibility to participate at the Olympic Games Paris 2024 is uncontested, including the liberty on the part of WA to rectify the error made by JAAA between 6 July 2024 and 8 July 2024, before JOA could submit the final list to the IOC.
- The decision of WA to allocate the Appellant's slot to Ms. Klymets constituted an application of the rules resolving in an end in itself.

65. The Appellant contends that the administrative oversight by JAAA was not her fault and arose out of a *force majeure* situation:

- i) Upon realisation that the Appellant had not been included in the list unintentionally, JAAA had immediately informed WA that it was their clerical mistake due to the approaching of Hurricane Beryl.
- ii) JAAA had clarified that the approaching of Hurricane Beryl prevented it from correcting the pre-entries since the said Hurricane caused a general power shortage that affected the whole country.
- iii) The concept of *force majeure* is defined by CAS case law, with elements present in this case (cf. CAS 2021/A/8277):
 - Neither JAAA nor the

Appellant could foresee that Hurricane Beryl would have affected Jamaica on the last available day to submit the pre-entries.

the effects of the external interference, considering that JAAA could not foresee the power shortages caused by Hurricane Beryl.

- Hurricane Beryl is an event that occurred beyond the activities of JAAA or the Appellant.
- Hurricane Beryl caused an objective impediment to JAAA, which was not able to correct the pre-entries due to power shortages.
- Neither JAAA nor the Appellant could do anything to avoid Hurricane Beryl or prevent the damage it caused to the whole island, including power shortages.
- Both JAAA and the Appellant were diligent throughout the entire process, and JAAA was still within its rights when it tried to correct the pre-entries, but it was prevented from doing so by Hurricane Beryl.
- By not submitting the pre-entries at the last second before the expiry of the deadline for pre-entries, JAAA took all reasonable steps to prevent or limit

- iv) The above circumstances justify departing from a strict and unreasonable application of the rules around the pre-entries.
- v) The *force majeure* situation also excludes the possibility of creating a dangerous precedent for future circumstances, wherein there is no chance for the same chain of events to occur again, on the last day available for the submission of pre-entry for the Olympic Games.
- vi) There is nothing preventing WA or the IOC from accepting the Appellant's participation at the Olympic Games Paris 2024.

66. The Appellant also seeks the production of “*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*”, pursuant to Article R44.3(1) of the CAS Code.

B. WA's Position

67. In its Answer, WA requested the Panel to rule as follows:

“*I. The CAS does not have jurisdiction over the present appeal, or alternatively the appeal filed by Nayoka Clunis is inadmissible or dismissed;*

II. *The arbitration costs (if any) shall be borne by the CAS legal aid fund*".

i) Jurisdiction and Admissibility

68. WA maintains that the Appellant's reliance on Rule 16(4) of the 2023 Tribunal Rules to claim CAS jurisdiction is wrongly placed:

- Rule 16(4) of the 2023 Tribunal Rules is not an arbitration clause, but rather a provision setting out the relevant deadline and other formalities for an appeal to the CAS.
- Rule 16 of the 2023 Tribunal Rules has nothing to do with the present subject matter, wherein it refers only to "*a decision of the Disciplinary Panel under the Rules*", and the said Rules only pertain to "*any alleged Non-Doping Violations over which jurisdiction is conferred on [the Disciplinary and Appeals Tribunal] by the Integrity Code of Conduct and the Integrity Unit Rules and any Preliminary Proceeding under the Reporting, Investigation and Prosecution Rules – Non-Doping*".
- The Appellant has not identified any basis for her appeal to the CAS, and the CAS has no jurisdiction to hear the present matter.
- The Athlete's allegations of denial of justice are denied, which cannot, in any event, be a basis to create CAS jurisdiction.

69. WA contends that the Appealed

Decision is not a "decision" within the meaning of Article R47 of the CAS Code:

- A decision requires an *animus decidendi*, or any intention of a body of the association to decide on a matter. Said Appealed Decision (or email communication) was only meant to provide information and not to decide on any matters (cf. CAS 2008/A/1633, para. 11). Further, there was no request from JAAA in the first place on which WA had to decide. Instead, JAAA only contacted WA to place a call for help.
- The Appealed Decision (or email) had no impact on the Appellant's legal situation, as by the time of JAAA's email dated 6 July 2024, the quota place of the Appellant was already reallocated, and the Appellant could no longer be entered at the Olympic Games Paris 2024.
- As such, the present appeal is also not admissible.

70. Finally, WA also submits that the Appellant did not fulfil her responsibility of including the correct respondents, since she withdrew her appeal against Ms. Klymets and UAA. As such, the Appellant's present request to "replace" Ms. Klymets at the Olympic Games Paris 2024 cannot be granted by the Panel, as it would be impacting the rights of a third party that is no longer party to these proceedings (cf. CAS 2011/A/2654,

paras. 16 to 17).

ii) Merits

71. WA – on a subsidiary basis – admits that the matter is unfortunate but maintains that the rules for entry are clear and must be strictly enforced:

- It is unchallenged that the Appellant was not included in the EES, the quota earned by the Appellant was rightly considered unused, and therefore properly reallocated. As a result, JOA did not include the Appellant on its list of entries on 8 July 2024.
- The communications on 19 June 2024 and on 2 July 2024 made it absolutely clear that only the list of athletes submitted by 4 July 2024 would be considered for participation at the Olympic Games Paris 2024.
- It was solely due to the mistake of JAAA (and not the WA) that the Appellant's name was not on that list.
- Unfortunate events pertaining to pre-entry name inclusion are not unprecedented, wherein the CAS has determined previously that a late admission of an athlete could detrimentally affect other athletes who have been properly admitted following the required procedures (cf. CAS OG 20/05, para. 7.14).
- The allegations by JAAA about Hurricane Beryl is wholly

unsubstantiated and is contradicted by the evidence on file. The logs of JAAA's activities on the EES show that all entries were made on 1 July 2024 (prior to Hurricane Beryl hitting Jamaica on 3 July 2024), and JAAA was able to log into the system on 3 July and 4 July 2024 (as well as 5, 6, and 7 July 2024). JAAA did, in fact, log into the system and accessed both the "Entries Summary" and "Check Final Entries" on 3 July 2024, and accessed the "Entries Summary" on 4 July 2024. Notwithstanding JAAA's access to the system on 3 and 4 July 2024, it failed to include the Appellant's name. The allegation that Hurricane Beryl prevented JAAA from rectifying the list and including the Appellant is a red herring.

- WA cannot be accused of excessive formalism when the same strict framework is expected and imposed on all its Member Federations. The deadlines are applied strictly in order for equal treatment, in order that the limited quotas are used and reallocated. The qualification systems cannot be disregarded just because a Member Federation made a mistake.

- The non-inclusion of the Appellant in the present case is a matter which the Appellant should take with JAAA, rather than with WA, as JAAA made the mistake which resulted in the reallocation of her quota to

the next deserving athlete.

72. WA also maintains that the document production request of the Appellant pertaining to the 2023 Tribunal Rules should not be granted, as the Appellant has not explained the relevance of the said documents, or established that such documents exist.

A. The IOC's Position

73. In its Answer, the IOC requested the Panel to rule as follows:

i. Declare that it does not have jurisdiction over the Appellant's appeal;

ii. In the alternative to prayer for relief i, dismiss the appeal filed by the Appellant;

iii. Order that the arbitration costs incurred with the present proceedings be borne by the CAS legal aid fund".

74. The IOC notes that given the withdrawal of the Appellant's appeal against Ms. Klymets and UAA on 27 July 2024, the scope of the present proceedings are limited to point (c).i of the Appellant's prayers for relief, *viz*, that she be allowed to participate in the Olympic Games Paris 2024 by "[...] allocating an additional slot to the Athletics competition". The other request filed by the Appellant, i.e. "*replacing Ms Klymets' participation with the Athlete's*" can no longer be granted after the partial withdrawal of the Appellant's appeal.

i) Jurisdiction and Admissibility

75. The IOC challenges the jurisdiction of the CAS on the following grounds:

➤ The Appellant has not identified a proper legal basis to

establish the jurisdiction of the CAS in the present matter. She has conceded in any event that the CAS does not have jurisdiction on the basis of Rule 61(2) OC.

➤ The 2019 Disputes Rules do not apply as they were replaced by the 2023 version of the Disputes Rules, as well as the 2023 Tribunal Rules.

➤ The Appellant's request for the documents related to the amendment of the 2023 version of the 2023 Disputes Rules proves that her arguments on jurisdiction are weak.

➤ In any event, Rule 1.2.4 of the 2019 Disputes Rules expressly excludes from its scope "*any protests made prior to a competition concerning the status of an athlete to participate in the competition*". Such disputes must be submitted to a different body within WA, which the Appellant failed to consult.

➤ The 2023 Tribunal Rules are also not applicable in the present case as they apply only to "Appeals from Decisions of the Disciplinary Panel" and the Appellant does not allege that there was any decision by such organ, or that the present dispute pertains to a disciplinary matter.

➤ The Appellant already conceded that the jurisdiction of the CAS cannot be established under Article 84 of

the WA Constitution, which only allows JAAA or JOA to file a claim with the CAS Ordinary Division within five days of the dispute arising.

ii) Applicable Law

76. The IOC – on a subsidiary basis – agrees that the rules of law applicable to the merits of the present proceedings are governed by Article R58 of the CAS Code. Consequently, the IOC submits that the present dispute must be decided primarily according to the WA Constitution, rules and regulations of WA, and on a subsidiary basis, Monegasque law – pursuant to Rule 84(5) of the WA Constitution.

77. The IOC objects to the Appellant’s position that Swiss law can apply subsidiarily on the basis of the involvement of the IOC, as the involvement of a Swiss respondent cannot affect the applicable rules of law, given the clear choice of law in the WA Constitution in favour of Monegasque law.

iii) Merits

78. The IOC – on a subsidiary basis – contends that the Appealed Decision does not “constitute excessive formalism” as argued by the Appellant:

- The Appellant based her arguments on excessive formalism under Swiss law, which is inapplicable, when the applicable law in the present case is Monegasque law.
- The fact that WA decided to allocate the quota spot to Ms.

Klymets before the issue involved the IOC cannot reasonably “constitute an application of the rules resolving in an end in itself”.

➤ Further, the fact that WA applied the WA QS within the applicable deadlines faster than the Appellant would have preferred has nothing to do with excessive formalism, especially since the Appellant does not allege that WA would have misapplied any of the applicable rules. The Appellant merely contends that WA acted before JAAA realised its mistake. The Appellant has failed to address the fact that once her spot had been reallocated, there was nothing that WA could have done to change the situation.

➤ There is ample CAS case law confirming the unfortunate reality that athletes sometimes have to suffer the consequences of the mistakes made by their national federations, and there is nothing wrong for international federations (in this context) to rely on national federations and their submissions. WA cannot be held responsible for the mistakes of the national federations (cf. CAS OG 20/05, para. 7.14; CAS 2015/A/4319, para. 73).

79. The IOC submits that JAAA’s mistake was due to its negligence and not to a case of *force majeure*.

- CAS case law has consistently held that a mistake of a national federation in the context of the registration of its athletes for the Olympic Games does not justify making exceptions to the qualification rules, irrespective of how genuine or how significantly the mistake has impacted on the athlete's situation.
- It is clear from the circumstances that JAAA's mistake was a result of its negligence. JAAA had the ability to correct or recheck the pre-entry list for the EES and was not precluded from doing so by Hurricane Beryl. JAAA – for whatever reason – had not included the Appellant's name in list in the first place (which the Appellant does not allege was caused by *force majeure*). Further, JAAA confirmed that it only forgot to include one name in the list of pre-entries on the EES. This can hardly be a consequence of Hurricane Beryl. Instead, the hurricane had nothing to do with the submission of the pre-entries.
- There is, in any event, no evidence on the record to show the effect of Hurricane Beryl on the communication lines that allegedly prevented JAAA from "rechecking" the list for pre-entries on EES prior to the expiry of the deadline on 4 July 2024.

VI. PRELIMINARY ISSUES

80. There are two preliminary issues raised, namely:
- i. A request from JAAA to be included as Interested Party, and for JAAA's request for arbitration filed in procedure *CAS 2024/O/10764* to be included as *amicus curiae* brief in the present procedure; and
 - ii. A request for document production by the Appellant for "*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*", pursuant to Article R44.3(1) of the CAS Code.

A. Requests Pertaining to JAAA

81. On 26 July 2024, a Request for Arbitration was filed by JAAA in *CAS 2024/O/10764*. Since the CAS Code does not provide for the status as "interested party", JAAA and the Appellant requested that JAAA's submissions filed on 26 July 2024 be included as an *amicus curiae*. Both WA and the IOC object to such request. The Respondents contend that an *amicus curiae* is typically envisaged for organisations which are not directly affected by the prayers for relief but should be allowed to assist the arbitrators by offering expertise or insight that has a bearing on the issues at stake. As JAAA is the party who made the mistake of not including the Appellant in the pre-entry list, which forms the core of the present dispute, the Respondents do not see the relevance of JAAA's inclusion in these

proceedings as an *amicus curiae*. The Respondents further submit that the purpose of an *amicus curiae* is not to allow a third party to circumvent the fact that they have failed to meet the deadline for appeal and/or lack standing to appeal or to intervene in the proceedings. Finally, the Respondents are of the view that under no circumstances the JAAA should be allowed to participate in the hearing.

82. According to Article R41.4(6) of the CAS Code, the Panel “*may allow the filing of amicus curiae briefs, on such terms and conditions as it may fix*”. It is, thus, within the Sole Arbitrator’s discretion to grant the status of an *amicus curiae* to a third person. Literally translated “*amicus curiae*” means “*friend of the court*”. The term *amicus curiae* or *amicus* brief describes an instrument allowing someone who is not a party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, usually in the form of a written (*amicus curiae*) brief or submission, in order to assist the court in the matter before it. The Sole Arbitrator finds that in order to assist a Panel by providing an additional perspective or expertise it is not necessary for this third person to be covered by the same arbitration agreement. However, admitting a third person as an *amicus* only makes sense where it serves the purpose of the arbitration proceedings in question. This is, however, not the case here.

83. In JAAA’s submissions there is nothing to assist the Panel beyond of what has already been submitted by the Parties. The latter have presented all relevant facts. Any further relevant evidence that JAAA wishes to submit can be included in these proceedings

via the Appellant. The Sole Arbitrator also sees no reason to include JAAA in these proceedings for any alleged specific expertise. Finally, the Sole Arbitrator notes that the possibility of filing an *amicus curiae* brief shall not be to allow a third party to circumvent the deadlines for either filing an appeal or requesting its intervention in these proceedings. Thus, the Sole Arbitrator dismisses JAAA’s request to participate in these proceedings as a “friend of the court”.

B. Request for Document Production

84. The Appellant seeks the production of “*any documents, preparatory and/or explicatory notes, circulars concerning the amendment of the World Athletics Disputes and Disciplinary Proceedings Rules of August 2023*”, as there were no such explanatory notes or circulars found online in order to explain the amendments from the 2019 Disputes Rules to the 2023 Disputes Rules. In particular, there is a specific circular titled, “M35/2” (the “Circular”), concerning the above-stipulated amendments which is not publicly available. The Appellant alleges that the Circular is relevant to the present proceedings as it concerns the revision of the 2019 Disputes Rules to the 2023 Disputes Rules, upon which the Appellant seeks to ground CAS jurisdiction on the present matter, *viz*, the removal of Rule 3.1 in the 2019 Disputes Rules.

85. WA, on the other hand, maintains that the document production request of the Appellant pertaining to the 2023 Tribunal Rules should not be granted, as the Appellant has not explained the relevance of the said documents, or

established that such documents exist, and is just mounting on a “fishing expedition”. At the hearing, WA confirmed that the requested Circular is only available to Member Federations and would otherwise remain confidential and maintains that – with the revocation of the 2019 Disputes Rules – the request for the Circular on the amendment remains irrelevant.

86. The Sole Arbitrator, at the hearing, found that the request for the Circular remains relevant and sought the Parties cooperation to produce the same during the hearing.
87. During the hearing, WA produced the Circular and all Parties were granted the opportunity to consider and make submissions on its content.

VII. JURISDICTION

88. According to Article R47(1) of the CAS Code, the Panel has jurisdiction to hear:

“[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

89. Based on this provision, the Sole Arbitrator has jurisdiction only “if the statutes or regulations of the said body so provide” or “if the parties have concluded a specific arbitration agreement”.
90. Accordingly, the Sole Arbitrator will first have to assess whether CAS has jurisdiction to hear the present dispute by the Appellant against both WA and

the IOC. As the seat of the present arbitration is – indisputably – Switzerland pursuant to Article R28 of the CAS Code, the applicable *lex arbitri* or law of the arbitration is Swiss law. More specifically, the Swiss Private International Law Act (“PILA”), since at the time that the alleged arbitration agreement was concluded, at least one of the Parties thereto did not have its domicile, its habitual residence or its seat in Switzerland (Art. 176(1) of the PILA).

91. Based on Article 186(1) PILA and Article R55(4) of the CAS Code, the Sole Arbitrator has the competence to decide on his own jurisdiction (so-called *Kompetenz-Kompetenz*).

A. Arbitration Agreement between the Appellant and WA

i) Parties’ submissions on the arbitration agreement in casu

92. In relation to WA, the Appellant bases the CAS jurisdiction on the 2019 Disputes Rules (which are amended to 2023 Disputes Rules), the 2023 Tribunal Rules, and the WA Constitution. WA, in turn, has objected to the jurisdiction of the CAS. According to WA the 2019 Disputes Rules, the 2023 Disputes Rules, the 2023 Tribunal Rules, and Article 84 of the WA Constitution are not applicable to the present proceedings. More particularly, WA submits that the 2019 Disputes Rules are no longer in force (while its 2023 Tribunal Rules have no arbitration clause in favour of CAS), and the 2023 Tribunal Rules and the WA Constitution do not provide an arbitration clause in favour of CAS applicable to the dispute at stake or the

Appellant.

ii) Decision of the Sole Arbitrator

93. Article 84 of the WA Constitution reads – in its pertinent parts – as follows:

“84.2 In the event there is a dispute or difference between:

a. a Member Federation or Member Federations and World Athletics; or

b. an Area Association or Area Associations and World Athletics;

that cannot be resolved as set out in Article 84.1, the matter will be submitted to arbitration before the CAS (Ordinary Arbitration Division), to the exclusion of any other court or forum, in accordance with Article 84.3, below. The CAS will resolve the dispute definitively in accordance with the CAS Code of Sports-related Arbitration.

84.3 Any dispute submitted to the CAS under Article 84.2 must be filed either within five (5) days of the date of the dispute first arising or within five (5) days of any failure to resolve the dispute in accordance with Article 84.1 (whichever the case may be).”

94. It follows from the above provision that there is an arbitration clause in favor of the CAS enshrined in Article 84.2 of the WA Constitution. Article 84.3 of the WA Constitution – on the contrary – is not a self-standing arbitration clause. Instead, the provision only deals with the time limits within which an appeal according to Article 84.2 of the WA Constitution must be filed. The scope *ratione personae* of the arbitration clause in Article 84.2 of the WA Constitution is limited to disputes between Member Federations

or Area Associations, on the one hand, and WA, on the other hand. At the hearing, the Appellant somewhat conceded to the inapplicability of Article 84 of the WA Constitution in the present case. While the Appellant claims that she is a member of WA, the WA Constitution does not mandate arbitration before the CAS for its indirect members, such as athletes. As such, Article 84 of the WA Constitution does not confer jurisdiction upon the CAS to hear the present dispute between the Appellant and WA. Thus, the present dispute involving the Appellant is not covered by that clause.

95. Article 3.1 of the 2019 Disputes Rules read as follows:

“This Rule 3 relates to any legal dispute of any kind whatsoever arising between World Athletics on the one hand and any Member, Area Association, athlete, athlete support personnel or other person who is subject to the Constitution and/or any of the Rules or Regulations on the other hand, in relation to the Constitution and/or any Rule or Regulation and/or any World Athletics decision or act or omission, howsoever arising, that is not covered by the dispute resolution provisions of the Constitution or any Rules or Regulations (each, a "Dispute"). Subject to, and in accordance with Article 84 of the Constitution, a Dispute shall be submitted to arbitration before the CAS (Ordinary Arbitration Division or Appeal Arbitration Division, depending on the circumstances of the case), to the exclusion of any other court or forum. The CAS will hear and determine the Dispute definitively in accordance with relevant provisions of the CAS Code of Sports-Related Arbitration. The law governing the Dispute will be the Constitution and Rules and Regulations, with the laws of Monaco applying

subsidiarily. Unless the parties agree otherwise, the arbitration proceedings before the CAS will be conducted in the English language before a Panel consisting of three arbitrators. Pending determination of the Dispute by the CAS, any provision of the Constitution or Rule or Regulation or decision or act or omission under challenge will remain in full force and effect unless the CAS orders otherwise. The ultimate decision of the CAS on the merits of the Dispute will be final and binding on all parties, and all parties waive irrevocably any rights they might otherwise have to any form of appeal, review or other challenge in respect of that decision, except as set out in Chapter 12 of Switzerland's Federal Code on Private International Law".

96. The above arbitration clause in favor of the CAS covers “[d]isputes between World Athletics and any Member, Area Association, athlete, athlete support personnel or other person(s)” – save for disputes which are excluded therein under Rule 1.2 of the said Rules. However, the 2019 Disputes Rules have been revised to the 2023 Disputes Rules effective as of 14 August 2023, and thus are no longer in force. Since the present dispute arose subsequent of the change of the rules, the 2019 Dispute Rules can no longer be applied to the present matter *ratione temporis*. The 2023 Dispute Rules, however, no longer contain any arbitration clause in favour of the CAS.
97. The 2023 Tribunal Rules contain an arbitration clause in favour of the CAS, but only for appeals against a decision of the WA Disciplinary Panel (cf. Article 16.2). According to the 2023 Tribunal Rules, the WA Disciplinary Panel is competent to hear the following types of disputes:

“The ... Disciplinary Panel shall have jurisdiction to hear and decide any alleged Non-Doping Violations over which jurisdiction is conferred on it by the Integrity Code of Conduct and the Integrity Unit Rules and any Preliminary Proceeding under the Reporting, Investigation and Prosecution Rules – Non-Doping”.

98. It follows from the above that the arbitration cause contained in the 2023 Dispute Rules does not cover the case at hand. The clause is limited – *ratione materiae* – to appeals from decisions of the Disciplinary Panel pertaining to disciplinary matters of a non-doping nature. This is clearly not the case here. Neither has the Disciplinary Panel decided in the present case as a first instance nor is the present eligibility matter of a disciplinary nature. Without going into details on whether and why the Appellant was required to refer the dispute to the Disciplinary Panel, the Sole Arbitrator notes that Rule 16 of the 2023 Tribunal Rules does not permit the Appellant to bring her present dispute – which did not arise from the Disciplinary Panel – to the CAS. The Appealed Decision is a decision by the Director of Competitions and Event Departments of WA, and does not pertain to any disciplinary matter arising out of the 2023 Tribunal Rules. As such, the Sole Arbitrator finds that there is no basis for the Appellant to raise the 2023 Tribunal Rules as grounds for CAS jurisdiction. The above result is not contradicted by the documents produced by WA in these proceedings following the Appellant’s request and the Sole Arbitrator’s order of document production. The Circular is in line with the above interpretation of

the new rules coming into force in 2023.

99. The Sole Arbitrator acknowledges, on a side note, that Rule 61(2) OC does stipulate that all disputes “*on the occasion of, or in connection with, the Olympic Games*” are to be referred exclusively to the CAS, providing – arguably – for jurisdiction *ratione materiae* for all “Olympic Games”-related dispute to be referred to the CAS. However, Rule 61(2) of the Olympic Charter is found in the governing document of the IOC, providing no agreement – still – between the Appellant and WA and, thereby, not conferring jurisdiction to the CAS to hear a dispute between the Appellant and WA.

B. Arbitration Agreement between the Appellant and the IOC

i) Parties’ submissions on the arbitration agreement in casu

100. With regards to whether the Appellant and the IOC have an arbitration agreement in favour of the CAS, the Appellant raises the preliminary point that the IOC was brought in as Respondent in the proceedings only because the IOC has a stake in the outcome of the said dispute, *viz*, the inclusion of the Appellant at the Olympic Games Paris 2024.
101. In her submissions, the Appellant raised that – due to JAAA’s fault – she has not reached the stage of selection where she would have been invited to sign the Games Participation Agreement for the Olympic Games Paris 2024, which would have included an arbitration clause in favour of CAS as follows:

“7. ARBITRATION

The Court of Arbitration for Sport is exclusively competent to finally settle all disputes arising in connection with my participation in the Games

Unless otherwise agreed in writing by the IOC, any dispute or claim arising in connection with my participation at the Games, not resolved after exhaustion of the legal remedies established by my NOC, the International Federation governing my sport, Paris 2024 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport (“CAS”) for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration.

The seat of arbitration shall be in Lausanne, Switzerland and the language of the proceedings English. The decisions of the CAS shall be final, binding and non-appealable, subject to the action to set aside to the Swiss Federal Tribunal.

I hereby waive my right to bring any claim, arbitration or litigation, or seek any other form of relief, including request for provisional measures, in any other court or tribunal, unless otherwise agreed in writing by the IOC”.

102. The Appellant, nevertheless, submitted that save for the inadvertent non-inclusion of her name in the pre-entries and admission into the Olympic Games Paris 2024, she would have signed the Games Participation Agreement which would have established the jurisdiction of the CAS, on the basis of Rule 61(2) of the OC. As such, the Appellant had been denied the opportunity to submit to CAS jurisdiction by the Games Participation Agreement.

103. The IOC, in turn, maintains that there is no CAS jurisdiction, and the denial of access to justice is, in itself, insufficient as a basis to “create” CAS jurisdiction. Further, the IOC submits that under Swiss law the standard to assert jurisdiction is high, and is only established once there is an arbitration agreement that fulfils both the substantive and formal validity requirements.

ii) Decision of the Sole Arbitrator

104. The Sole Arbitrator agrees with the IOC that under Swiss law an arbitration agreement shall not be accepted lightly. The Sole Arbitrator is minded by the jurisprudence of the Swiss Federal Tribunal (“SFT”) according to which a rather strict standard applies when it comes to the consent to arbitrate. According thereto, the parties’ intention to resort to arbitration must be clear and unequivocal as such consent is a waiver of the right to involve otherwise competent state courts. The SFT has expressed this principle as follows¹:

“Unter einer Schiedsvereinbarung ist eine Übereinkunft zu verstehen, mit der sich zwei oder mehrere bestimmte oder bestimmbare Parteien einigen, eine oder mehrere, bestehende oder künftige Streitigkeiten verbindlich unter Ausschluss der ursprünglichen staatlichen Gerichtsbarkeit einem Schiedsgericht nach Massgabe einer unmittelbar oder mittelbar bestimmten rechtlichen Ordnung zu unterstellen [...] Entscheidend ist, dass der Wille der Parteien zum Ausdruck kommt, über bestimmte Streitigkeiten ein Schiedsgericht, d.h. ein nichtstaatliches Gericht, entscheiden zu lassen [...]

Die Auslegung einer Schiedsvereinbarung folgt den für die Auslegung privater Willenserklärungen allgemein geltenden Grundsätzen. Massgebend ist danach in erster Linie der übereinstimmende tatsächliche Wille der Parteien ... Diese subjektive Auslegung beruht auf Beweiswürdigung, die der bundesgerichtlichen Überprüfung grundsätzlich entzogen ist ... Steht bezüglich der Schiedsvereinbarung kein tatsächlich übereinstimmender Wille der Parteien fest, so ist diese nach dem Vertrauensprinzip auszulegen, d.h. der mutmassliche Wille ist so zu ermitteln, wie er vom jeweiligen Erklärungsempfänger nach Treu und Glauben verstanden werden durfte und musste.. Bei der Auslegung einer Schiedsvereinbarung ist deren Rechtsnatur zu berücksichtigen; insbesondere ist zu beachten, dass mit dem Verzicht auf ein staatliches Gericht die Rechtsmittelwege stark eingeschränkt werden. Ein solcher Verzichtswille kann nach bundesgerichtlicher Rechtsprechung nicht leichthin angenommen werden, weshalb im Zweifelsfall eine restriktive Auslegung geboten ist ...”.

Free translation: An arbitration agreement is to be understood as an agreement by which two or more specific or specifiable parties agree to submit one or more existing or future disputes to an arbitration tribunal in accordance with a directly or indirectly specified legal system, to the exclusion of the original state jurisdiction. What is crucial is that the will of the parties is expressed to have a court of arbitration, i.e. a non-state court, decide on certain disputes.

The interpretation of an arbitration agreement follows the principles generally applicable to the

¹ SFT 4A_124/2020, consid. 3.1.2.

interpretation of private declarations of intent. Accordingly, the decisive factor is primarily the parties' actual concordant will [...]. This subjective interpretation is based on the consideration of evidence, which is generally not subject to review by the Federal Supreme Court [...]. If the parties' actual concordant will regarding the arbitration agreement is not established, then it must be interpreted according to the principle of good faith, i.e. the presumed will must be determined as it could and should have been understood in good faith by the respective recipient of the declaration [...]. When interpreting an arbitration agreement, its legal nature must be taken into account; in particular, it must be noted that the avenues for appeal are severely restricted by the waiver of a state court. According to the case law of the Federal Supreme Court, such a waiver cannot be assumed lightly, which is why a restrictive interpretation is required in case of doubt [...].

105. Thus, a substantively valid arbitration agreement in favour of CAS requires a mutual intent between the Parties to refer their dispute to the CAS to the exclusion of state courts. Such mutual intent may be expressed in an agreement or by submitting to the rules and regulations of a sports organisation that contain an arbitration clause. Furthermore, Article 178(4) PILA provides that the arbitration clause can also be contained in a unilateral transaction or in articles of association.
106. Rule 61(2) of the OC sets out an arbitration clause for "*any dispute[s] arising on the occasion of, or in connection with, the Olympic Games*" to be submitted

exclusively to the CAS. The provision covers – *ratione personae* – all stakeholders that are bound to the OC either by membership or by submitting contractually to the rules of the IOC. In the present case, the Appellant is neither a member of the IOC nor has she submitted contractually to the rules of the IOC. It is true that the Appellant was deprived from doing so (with no fault of her own), because JAAA failed to enter her in the EAA. However, this cannot substitute for a valid arbitration agreement.

107. The Sole Arbitrator also finds that Rule 61(2) of the OC cannot be construed as a contract "offer" by the OC to any third party that wishes to litigate with the IOC in relation to the Olympic Games. First of all – absent any clear indications to the contrary – statutes of a Swiss association cannot be construed as awarding rights to non-members akin to Article 112(1) of the Swiss Code of Obligations ("SCO"). In principle, the rights and duties arising from the internal relationship between the association and its members do not extend to third parties (BK-ZGB/RIEMER, 2n ed. 2023, Art. 70 no. 134). Nothing in the OC points to the IOC's willingness to be bound with respect to its dispute resolution mechanism in Rule 61(2) of the OC to any third party. Furthermore, the Sole Arbitrator notes that the rules and regulations of an association are to be interpreted – according to the jurisprudence of the SFT – applying the same methodology as for laws. In a decision dated 14 February 2022, the SFT stated as follows (4A_406/2021, consid. 4.3.1 seq.):

“Le Tribunal fédéral a interprété à l'égal d'une loi les statuts d'associations sportives majeures, comme l'UEFA, la FIFA, en particulier leurs clauses relatives à des questions de compétence ... Il en a fait de même pour découvrir le sens de règles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance [...]

Toute interprétation débute par la lettre de la loi (interprétation littérale), mais celle-ci n'est pas déterminante: encore faut-il qu'elle restitue la véritable portée de la norme, qui découle également de sa relation avec d'autres dispositions légales et de son contexte (interprétation systématique), du but poursuivi, singulièrement de l'intérêt protégé (interprétation téléologique), ainsi que de la volonté du législateur telle qu'elle résulte notamment des travaux préparatoires (interprétation historique)”.

Free translation: The Swiss Federal Supreme Court has interpreted the statutes of major sports associations such as UEFA and FIFA in the same way as it would a statute, in particular their clauses relating to questions of jurisdiction [...] It has done the same to discover the meaning of rules enacted by a major sports association at a lower level than the statutes [...]

All interpretations begin with the letter of the law (literal interpretation), but this is not the decisive factor: it is still necessary to restore the true scope of the rule, which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, in particular the interest protected (teleological interpretation), as well as the will of the legislator as it results in particular from the preparatory work (historical interpretation).

108. Nothing has been submitted by the Parties in the case at hand concerning the will of the legislator. Similar to the literal interpretation also a systematic interpretation points against interpreting Rule 61(2) of the OC as awarding third parties the right to litigate against the IOC before the CAS. If one were to follow this approach, all persons, including sports bodies and individuals at the national level, would have access to bring a claim against the IOC before the CAS. It is not, however, in the objective interest of the IOC to extend the scope of application of its statutes to an unknown multitude of third parties around the world and in this way to enter into innumerable legal relationships with an unmanageable number of persons. Thus, the better arguments speak in favour of applying Rule 61(2) of the OC only to those instances, where the parties mutually and unequivocally have expressed their willingness to be bound *vis-à-vis* each other either by entering into a membership relationship or by contractually subordinating their legal relationship in full or in part to the OC. Only this reading fosters legal certainty by ensuring that an agreement exists between the parties (jurisdiction *ratione personae*) covering the dispute at stake (jurisdiction *ratione materiae*).

C. Conclusion

109. This is a very unfortunate case. A great injustice has been committed *vis-à-vis* the Appellant, a world-class, Olympic-level athlete who had qualified for the Olympic Games Paris 2024. Due to JAAA's mistake the Appellant was deprived of a life-time experience, i.e. to participate in the pinnacle of competitions in her sport to which she

was eligible, i.e. the Olympic Games Paris 2024. This wrongdoing was difficult to remedy, because she was caught in an unfortunate legal position wherein she has no legal proximity to both WA and the IOC for her to appeal the case to the CAS and where she was not yet invited to sign the Games Participation Agreement (containing the CAS arbitration clause). The entity having caused these problems, the JAAA, only took belated and inefficient steps to remedy the damage caused to the Appellant. Be it as it may, there is no provision comparable to Article 3 of the PILA providing for default jurisdiction to the CAS. Article 3 of the PILA reads as follows:

“Where this Act does not provide for jurisdiction in Switzerland and proceedings abroad are impossible or cannot reasonably be required, the Swiss judicial or administrative authorities at the place with which the case has a sufficient connection have jurisdiction”.

110. Thus, the hands of the Sole Arbitrator are bound and he cannot do otherwise than to not entertain the appeal of the Appellant, because CAS has no jurisdiction to hear the present dispute between the Appellant and WA, or between the Appellant and the IOC. As such, the Sole Arbitrator is precluded from making any further determinations on the admissibility or the merits of the case.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has no jurisdiction to entertain the appeal filed on 25 July 2024 by Nayoka Clunis

against the decision rendered on 8 July 2024 by World Athletics.

2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.

Football; Validity of an offer and existence of a binding employment contract; Essentialia negotii; Wording of an invitation letter; Qualification of official communication; Conditional contract; Withdrawal of an offer

Panel

Mr Jacopo Tognon (Italy), Sole Arbitrator

1. If an employment contract includes, *inter alia*, (i) a date, (ii) the names of the parties, (iii) the duration of the agreement, (iv) the position of the employee, (v) the remuneration components to be paid, and (vi) the signatures of the parties, it contains all *essentialia negotii* to be considered a valid and binding agreement. The *essentialia negotii* are also instrumental in determining whether an official communication or interest shown by a club qualifies as a valid offer capable of forming a contract upon agreement.
2. A communication should make it clear that it does not constitute a contractual offer, i.e. by referring to a “*proposal*”, and that any further contract negotiations will occur only once certain conditions are met.
3. A contract – or an offer – is deemed to be made “in writing”, when it is signed with the original signature of the party, as to an offer, or the parties, as to a contract, that are contractually bound by the document. As to the

exact mode of communication for offers or contracts, the only tangible expectation is that the communication be made through clear and verifiable means to prove its existence in case of disputes. Although an offer lacks an active authorisation, it may still be regarded as a valid offer on the basis of a passive or tacit authorisation.

4. Pursuant to Article 151(1) of the Swiss Code of Obligations, parties are permitted to make the validity of a contract subject to the fulfilment of one or more conditions.
5. A withdrawal of an offer can be justified if its author has expressly reserved the right to do so within the terms of its letter.

I. PARTIES

1. Bogdan Ilie Vătăjelu (the “Appellant” or the “Player”) is a professional football player, born on 24 April 1993 in Romania.
2. Abha FC (the “Respondent” or the “Club”) is a professional football club based in Abha, Saudi Arabia. It is a member of the Saudi Arabian Football Federation (“SAFF”) which in turn is affiliated with the *Fédération Internationale de Football Association* (“FIFA”).
3. The Appellant and the Respondent shall hereinafter be jointly referred to as the “Parties”, where applicable.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the

Parties' written submissions, pleadings and evidence adduced at the hearing on 25 February 2025. Additional facts and allegations found in the Parties' pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Background Facts

5. The Appellant is a professional football player from Romania who played for Universitatea Craiova (the "Former Club") between 2019 and 2024. While, the Respondent is a professional football club based in Saudi Arabia.
6. On 15 June 2023, the Player and the former club mutually terminated their employment relationship, as per Exhibit 4 of the Appeal Brief (the "Release Letter").
7. On the same date, the Respondent received a WhatsApp message from Mr Mohamed Ali Bouraoui, acting as a legal representative (the "Agent's Lawyer") on behalf of the Player's agent, Mr Cornel Teodorescu (the "Player's Agent").

The message included the Player's CV from Transfermarkt, a copy of the Player's passport and a mandate granting exclusive authorisation to Mr Teodorescu to negotiate on behalf of the Player.

8. On 16 June 2023, Mr Abu Hathra, the Sporting Director of the Club sent Mr Akram, the "alleged agent of the Player, *via* WhatsApp, an offer for an employment contract ("Offer").

9. The Offer read as follows:

"Dear M. Bodgan,

We hope this letter finds you well. We are delighted to inform you that our club, Abha FC, is highly interested in securing your services as a free agent. We would like to present you with the following proposal:

1. Proposal details:

Term: one (1) year plus an option of one more option season at the discretion of the club.

Annual salary: USD 500,000

2. Additional Benefits:

Transportation and accommodation provided by the club.

Aircraft tickets: two (2) economic flight tickets per season for you and the same for your spouse pre-season.

Match-Win-Bonus as per our internal rules.

Compensation for breach: 2 monthly salary.

Please note that this proposal is subject to the following cumulative conditions:

- *Providing a release letter or proof of the end of your contract with your former club (free agent).*
- *Passing a medical examination conducted by our club's medical staff in Saudi Arabia, and*

- *Signing an employment contract with Abha FC.*

We would like to emphasize that this proposal is not a binding employment offer, Abha FC reserves the right to withdraw from the deal without legal consequences if any of the aforementioned conditions are not met.

We kindly request that you respond to this proposal within 48 hours of receiving this letter, indicating your acceptance or rejection. If you choose to accept our proposal, we will proceed with the necessary arrangements to finalize the transfer and employment process”.

10. Also on 16 June 2023, Mr Akram reverted *via* WhatsApp a signed copy of the Offer to the Club.
11. On 18 June 2023, the Club sent an email to the Player’s Agent, in which, the Club withdrew the Offer based on the following reasons:

“We hope this message finds you well. We regret to inform you that we must withdraw our non-binding employment offer that was extended to you for the position with Abha FC. This notification comes after the expiration of the deadline, which occurred yesterday.

As per the conditions outlined in our initial offer, we required the receipt of proof regarding the end of your last contract with your former club within the specified deadline. Unfortunately, we did not receive the necessary documentation through the official means before the expiration of the deadline.

Due to the expiration of the deadline without receipt of the required proof, we are unable to proceed with the employment offer at this time.

(...) Should there be any change in circumstances or if you are able to provide the required proof through the official means at a later date, we would be open to reconsidering our offer”.

12. On 19 June 2023, Mr Bouraoui, the lawyer of the Player’s Agent, replied to the above email, as follows:

“I inform you that I had not received the offer referred to in your attached letter, by official means...”

We have received the offer from Akram by WhatsApp. As I am sure you are that I am authorised by the official agent of the player.

If you are still interested by the above mentioned player we are ready to provide you all needed information upon receipt of an offer by official means”.

13. On 20 June 2023, Mr Bouraoui sent another email to the Club stating, *inter alia*, the following:

“I apologize for the delay in responding to your offer regarding the player, Mr Bodgan Ilie Vatajelu. Please accept my apologies for not meeting the deadline”.

Firstly, want to clarify that Mr Akram is not the official agent of the player. The official representative of the player exclusively in Saudi Arabia is [Mr Teodorescu]. Please direct any future communications or inquiries regarding the player through [Mr Teodorescu].

Furthermore, I have attached the proof of the player’s release letter, which confirms his status as a free player. The letter, signed by his former club on June 16, 2023, serves as evidence of his availability for transfer.

If your club is interested in pursuing the opportunity of his transfer, I assure you that we are open to discussing a new offer. Please let us know your intentions and any updated proposals you may have”.

14. On 23 June 2023, the Sporting Director of the Club replied *via* WhatsApp to a previous message sent by the Player and informed him about the following:

“Hello you are welcome Mr. Vatajelu. Sorry to answer late. Yes bro the committee decided to stop to sign you because we have 2 seats for only for the foreign players and we need striker and central defender now for that we decided to stop negotiation with your agent. And we wish all the best for you in the future”.

15. On the same date, the Player replied *“Thank you for your answer Mr. Mohamed. Wish you all the best”.*
16. Also on 23 June 2023, the Player and another Romanian club Universitatea Cluj concluded a second employment contract valid as from 26 June 2023 until 31 May 2025. According to Clause 4 of said contract, the Player would receive a monthly salary of EUR 12,500 net as from 26 June 2023 to 31 May 2024, and a monthly remuneration of EUR 13,000 net as from 1 June 2024 until 31 May 2025.
17. On 20 October 2023, the Player put the Respondent in default (the “Default Notice”) informing, *inter alia*, that:

“Despite reaching an agreement between the Parties, your Club did not fulfil its obligations, which resulted in the Player incurring a

500.000 USD prejudice that your club will have to cover”.

Further, the Player granted a deadline of three days to the Club to proceed with the payment of the above-mentioned amount.

18. On 22 October 2023, the Club replied to the Player, denying his allegations and informing him essentially that (i) the Offer did not constitute an employment contract; (ii) no acceptance of the Offer was received through official channels within the deadline provided; (iii) on 19 June 2023 the Club informed about the withdrawal of the Offer; (iv) the conditions provided in the Offer were not met, and (v) the Player’s immediate signing with Universitatea Cluj reinforces the Club’s stance that the Offer was never intended as a binding employment contract.
19. On 23 February 2024, the Player and Universitatea Cluj mutually terminated their employment contract.
20. On 24 February 2024, the Player and the Kazakhstani club Aktobe concluded an employment contract valid until 31 December 2025. According to Clause 3 of said contract, the Player is entitled to receive a monthly remuneration of KZT 8,035,000 net¹⁹ through its entire duration.

B. Proceedings before the FIFA Dispute Resolution Chamber

21. On 27 March 2024, the Player lodged a claim before the FIFA Dispute Resolution Chamber (the “Chamber” or

¹⁹ Equivalent to USD 16,450 as stated in the Appeal Brief.

“FIFA DRC”), concerning the alleged validity of the Offer and the consequences deriving from its alleged termination without just cause by the Club.

22. Subsequently, the Respondent submitted that due to the non-fulfilment of precedent conditions specified in the non-binding Offer, the Parties did not conclude an employment contract, therefore, the Player’s claim should be rejected.

23. Consequently, the Dispute Resolution Chamber came to the following considerations:

- On the authenticity of the Player’s signature, the Chamber concluded that there was no substantial evidence proving that the signature was forged. Rather, the Player explained that he signed *via* iPhone, resulting in the difference, if any, between the other signatures. Hence, the Chamber rejected the Club’s allegation in this regard.
- The Chamber observed that the Offer included the parties and their role, the duration of the employment relationship, and the remuneration payable to the Player by the Club. Finally, the WhatsApp screenshots provided by the Player clearly demonstrated that he accepted the Offer and that it was duly signed by the Club’s Professionalism Director.
- Based on this, the Chamber unanimously concluded that the Offer was, in principle, a valid and binding employment contract.

- However, the Chamber noted that the Offer was conditioned not only to the Player accepting the Offer, but also to the proof of his free agent status and to the passing of a medical examination. The Chamber recalled that pursuant to art. 18 par. 3 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), *“The validity of a contract may not be subject to a successful medical examination”*. On that criterion, the Chamber disregarded this particular condition.

- Consequently, the Chamber, by majority, concluded that the Offer was only validly subjected or conditioned to the Player providing proof of his free agent status. Subsequently, the Chamber observed that from the WhatsApp conversation provided by the Player, it was visible that he indeed sent a signed copy of the Offer to the Club. However, there was no evidence as to the delivery of the termination agreement with his former club.

- Based on the above, the Chamber considered that, due to the absence of the relevant documentary evidence, the Player failed to demonstrate that he indeed shared the proof of his free agent status within the deadline stipulated in the Offer, which in turn rendered the Offer invalid.

- As such, in the Chamber’s opinion, the Player did not prove to their satisfaction his allegations that a valid and binding

employment contract was concluded between the parties on 16 June 2023.

- In the Chamber's view, the Player himself acknowledged that he did not comply with the deadline set in the Offer, and suggested to initiate further negotiations to "*discussing a new offer*" and/or "*updated proposals*". Moreover, when the Player was informed that the Club would finally not sign him, he accepted the Club's decision and signed a new employment contract with another club on the very same day. In other words, for the majority of the Chamber, the Player's own conduct showed that the Offer was never materialised.
 - Thus, the Chamber concluded that on the basis of the documentation on file, it could not be established that the Player and the Club had validly entered into an employment relationship, which would have been subsequently terminated by the Club. Consequently, the Chamber, by majority, decided to reject the claim of the Player due to its lack of contractual basis
24. The Decision of the Chamber (the "Appealed Decision") is as follows:
- "1. *The claim of the Claimant, Bodgan Ilie Vătăjelu, is rejected.*
 - 2. *This decision is rendered without costs*".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

25. On 2 September 2024, the Appellant lodged the Statement of Appeal before the Court of Arbitration for Sport (the "CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (the "CAS Code") against the Respondent with respect to the decision rendered by the FIFA DRC on 25 July 2024. The Appellant requested the proceedings to be conducted in English and for the appointment of a Sole Arbitrator.
26. On 12 September 2024, the Appellant filed his Appeal Brief in accordance with Article R51 of the CAS Code.
27. On 17 September 2024, the Respondent informed the CAS Court Office that it agreed to the appointment of a Sole Arbitrator.
28. On 3 January 2025, the Respondent filed its Answer to the Appeal Brief within the previously extended time limit.
29. On 6 January 2025, the CAS Court Office informed the Parties that the Arbitral Tribunal appointed by the Deputy President of the CAS Appeals Arbitration Division in the procedure was constituted as follows:
- Sole Arbitrator: Mr Jacopo Tognon, Attorney-at-Law in Padua, Italy.
30. On 13 January 2025, the Respondent informed the CAS Court Office that it preferred the Sole Arbitrator to issue an award based solely on the written submissions.
31. On 15 January 2025, the Appellant informed the CAS Court Office that he preferred a hearing to be conducted in person. Further, the Appellant requested

- an opportunity to respond to certain factual issues raised by the Respondent in its Answer.
32. On 16 January 2025, the CAS Court Office invited the Appellant to clarify whether his request should be understood as a request for a second round of written submissions or if he intended to address these issues during the hearing.
 33. On 24 January 2025, in the absence of the Appellant's clarification, the CAS Court Office informed the Parties that if the Appellant's intention was to request a second round of written submissions, this request was rejected and the Appellant would have the opportunity to address any relevant issues during the hearing. Furthermore, the Sole Arbitrator had decided to hold a hearing *via* videoconference on 25 or 26 February 2025 and the Parties were requested to confirm their availability for the proposed dates.
 34. On 27 January 2025, in view of the Parties' availabilities and on behalf of the Sole Arbitrator, the CAS Court Office informed the Parties that a hearing will be held by videoconference on 25 February 2025 at 10:00 CET.
 35. On 10 February 2025, the CAS Court Office acknowledged receipt of the Order of Procedure signed by the Parties.
 36. On 25 February 2025, the hearing took place *via* videoconference. In addition to the Sole Arbitrator and Mr Giovanni Maria Fares, Counsel to the CAS, the following persons attended the hearing:
 - On behalf of the Appellant: Mr Bogdan Ilie Vătăjelu (Appellant); Mr Sabin Liviu Gherdan (Counsel); Ms Călina Oana Tejan (Counsel).
 - On behalf of the Respondent: Mr Boughrara Khaled Ben Mohamed (Counsel).
 37. At the outset of the hearing, the Parties confirmed that they had no procedural objections as to the conduct of the proceedings and the appointment of the Sole Arbitrator. During the hearing, the Parties made submissions in support of their respective arguments. Furthermore, there were no witnesses called from either side.
 38. During the hearing, the Appellant gave an oral statement, which may be summarised as follows:
 - The Appellant asserts that the Club was aware that he was a free agent when the Offer was sent. He confirms that the signature on the Offer is indeed his.
 - He was eager to play for the Club and waited for them to send the flight tickets after receiving the Offer. However, after signing, he received no further communication and thus, reached out to the Club directly to clarify the situation.
 - At the time of receiving the Offer, he was in good shape and also received offers from few other clubs.
 - He confirms that Mr Teodorescu and Mr Akram collaborated to

negotiate his contract with the Club. Further, the Appellant states that he had no contact with Mr Mohamed Ali Bouraoui and thus he had no influence over Mr Bouraoui's communications with the Club.

- He claims that he had every intention to play for the Club and media reports about him cannot be relied upon, as he never provided any statements to the media and had no control over what was written.

39. At the closing of the hearing, the Parties confirmed that they had no objections on their right to be heard and that they had been given the opportunity to fully present their cases.

IV. SUBMISSIONS OF THE PARTIES

40. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every argument advanced by the Parties. The Sole Arbitrator has nonetheless carefully considered all claims made by the Parties, whether or not there is a specific reference to them in the following summary.

A. The Appellant's submissions

41. The Appellant's submissions, in essence, may be summarised as follows:

- The FIFA DRC rightly concluded that the Club's Offer constituted, in principle, a valid and binding employment contract, as it contained all the *essentialia negotii* required for a valid contract.

- Hence, the Respondent's claim stating that "*the Offer was not officially received by the Player*" should be rejected, given that the Player had sent a signed copy of the Offer to the Club – as acknowledged by the FIFA DRC.

- The FIFA DRC wrongly stated that the Offer was conditional not only on the Player accepting it but also on him providing proof of his free agent status and passing a medical examination.

- After having disregarded the condition of a successful medical examination in accordance with Article 18 para. 3 of the FIFA RSTP, the FIFA DRC concluded that the Player did not provide evidence of his free agent status.

- In this regard, the Appellant argues that his claim before the FIFA DRC was rejected without any reference to the message from Mr Hathra, who stated that the Club's management had decided to "*withdraw the offer*" as they preferred to sign a striker and a central defender for the only two available spots for foreign players, rather than a left-back defender (being the Appellant).

- The Appellant contends that the Player had a 48-hour deadline to merely inform the Club whether he was interested - which he fulfilled. There was no requirement for him to provide a release letter or proof of the termination of his contract with Universitatea Craiova in a 48-hour window.

- The Club recognised that the Player was a free agent when the Offer was sent, as highlighted *“Abba FC is highly interested in securing your services as a free agent”*. This is further corroborated by a release letter signed between Universitatea Craiova and the Appellant, which confirmed that the Player became a free agent as of 15 June 2023. The following day, on 16 June 2023, the Club sent the Offer, which the Player accepted and signed the same day, well within the stipulated deadline.
- During the first instance proceedings, the Appellant submitted video evidence on his signature, to which the FIFA DRC concluded no forgery. Thus, the Appellant claims that the Club’s arguments on forgery are submitted without evidence.
- Based on the above, the Appellant submits that he fulfilled the condition of presenting a release letter in a timely manner and requests the Sole Arbitrator to conclude that a valid and binding employment contract was established between the Parties at the moment the Player returned the signed offer, without the need for any additional requirements to be fulfilled within the 48-hour window.
- Moreover, the alleged failure of the Player to prove his free agent status cannot lead to the invalidity of the contract, due to the fact that, if a player is under contract with another club while signing a new contract, they would be subject to sanctions in accordance with Article 17 of the FIFA RSTP.
- The Appellant acknowledges Mr Akram as his agent. The Player was aware of Mr Akram’s role and authorized him to negotiate his contract with the Club. Further, there was no mandate/agreement signed between the Player and Mr Mohamed Ali Bouraoui. The Agent’s lawyer did not represent the Player and likewise the Appellant was not responsible for any communication exchanged between Mr Bouraoui and the Club.
- The Appellant had to contact the Club directly, as he never received any follow-up after sending the Offer. Moreover, the only reason he didn’t pursue the matter when the Club withdrew the Offer was because he was in good form at that time and had other offers at his disposal.
- The Appellant submits that the Respondent terminated the contract without just cause. This is corroborated by the evidence submitted by the Appellant in which the Club’s representative Mr Hathra informed the Player that the Club will not respect the agreement due to change of team’s needs and perspective.
- Nevertheless, the Respondent asserted that it withdrew the offer due to not receiving a timely response. However, this claim is contradicted by the above-

mentioned evidence containing Mr Hathra's message.

- The Club changed its position by initially claiming that the Letter was an Offer and later arguing that it was a Pre-Contract. In reality, the Club failed to uphold its contractual obligations and is therefore liable for breach of contract. In any case, both arguments constitute a breach of contract, as the Appellant promptly informed the Club of his acceptance and fulfilled all the stipulated conditions. As a result, the Appellant is entitled to the whole amount of the contract based on the Club's fault for non-execution.
- The Appellant contends that all the requirements for a valid and binding contract were met in the agreement signed between the Parties on 16 June 2023. Specifically, the contractual relations between the Parties began when the Player accepted the Offer unconditionally. Followed by the Club's subsequent unjustified breach.
- In accordance with Article 17 of the FIFA RSTP, the Appellant mitigated his damages in the amount of USD 175,741.06, corresponding to his salaries from the Club Universitatea Cluj-Napoca.
- Lastly, the reason for the Club's withdrawal was based on strategical reasons, due to which, the Appellant incurred financial losses, as the offer from the

Appellant's current club, Aktobe was three times lower in value compared to the Club's Offer.

- The Appellant submits that the Respondent's actions caused the Player damages in the amount of USD 324,258.94 (USD 500,000 minus USD 175,741.06) which must be paid as compensation by the Respondent.
- Thus, in the alternative, if the Sole Arbitrator does not accept the Appellant's principal requests, the Appellant submits that he should be awarded, at a minimum, the compensation for breach outlined in the offer, consisting of two monthly salaries. Since one salary is equivalent to USD 50,000 the total amount in this case should be USD 100,000.

42. The Appellant's request for relief is the following:

To order the Respondent to pay the Appellant, compensation for breach of contract in the amount of USD 324,258.94;

In the alternative, to order the Respondent to pay compensation for breach outlined in the Offer, in the amount of USD 100,000;

To order the Respondent to bear the costs of the present proceedings and to pay the Appellant a contribution towards legal and other costs, in an amount to be determined at the Sole Arbitrator's discretion, but no less than EUR 20,000.

B. The Respondent's submissions

43. The Respondent's submissions, in essence, may be summarised as follows:

- The Respondent argues that the wording of the Letter clearly indicates that it is a proposal, not a binding offer. The phrasing and explicit disclaimers within it, establish that the proposal was intended to facilitate negotiations rather than create immediate enforceable obligations.
- Additionally, by reserving the right to withdraw, the Club demonstrated its intent to retain flexibility, which is incompatible with the definitive nature of an offer.
- The Respondent argues that there has been a confusion between the concepts "binding" and "non-binding" and that the Swiss Code of Obligations clearly defines each term. The Respondent submits that the Club's Offer was "non-binding" and the Player's proof of free agent status was a cumulative condition. On that note, the Parties never signed a contract as the Player failed to demonstrate his free agent status.
- The proposal explicitly states that its enforceability was contingent upon the fulfilment of specific cumulative conditions precedent. The Respondent argues that these conditions reinforce the document's nature as a proposal whereas a binding offer would not defer enforceability to the satisfaction of future conditions. Therefore, the inclusion of such conditions confirms that the

proposal lacks the immediacy and finality required for an offer.

- Moreover, the language used throughout the Offer reflects a clear intent to negotiate rather than commit to an agreement. For instance, the letter requests a response within 48 hours to indicate acceptance or rejection. However, even acceptance of the proposal does not create binding obligations, as the fulfilment of conditions precedent remains necessary.
- The proposal lacks the characteristics of a binding offer, as it reserves the Club's right to withdraw. These provisions align with FIFA's Commentary on the RSTP 2023, which allows clubs to issue non-binding proposals to facilitate negotiations without creating binding obligations.
- According to said commentary, the existence of such disclaimers aligns the document with the characteristics of a pre-contract, as it lacks the finality and immediacy required of an employment agreement.
- The Respondent contends that the proposal letter is unequivocally non-binding, even though it contains several essential elements of a valid contract. The document's language, structure, and explicit disclaimers confirm its intent as a pre-contractual proposal rather than a definitive employment agreement. The inclusion of cumulative pre-conditions further emphasises that

no binding obligations could arise until these conditions were fulfilled.

- Moreover, the FIFA DRC ruled that no proof of free agent was delivered to the Respondent within a 48-hour deadline or before the Club's withdrawal from the non-binding proposal.
- The Respondent argues that the Appellant made no attempts to provide proof of free-agent status, schedule a medical examination, or finalize a definitive employment contract. This lack of action strongly supports the conclusion that the Player did not view the proposal as a valid agreement requiring his compliance.
- The Player did not object to Abha FC's decision to withdraw. Despite contacting the Club, the player did not protest or attempt to enforce the alleged agreement.
- Finally, the lack of acceptance has significant legal and procedural implications under the FIFA RSTP and the Swiss Code of Obligations (SCO), according to which, a binding contract requires clear intent, fulfilment of conditions precedent, and mutual agreement on essential terms. The Player's failure to fulfil the proposal's conditions and his behaviour during the relevant period demonstrates that no such agreement existed.
- The Respondent points out that the alleged acceptance was orchestrated by Mr Akram, who lacked proper authorization to act

on the Player's behalf. Mr Akram's actions, including fabricating the Player's signature, are void without a valid power of attorney or subsequent ratification by the Player.

- Contrary to the Appellant's submissions, Mr Akram was not authorised by the Player. The Respondent clarifies that the release letter was not sent by Mr Akram, but rather by Mr Bouraoui. Furthermore, the Player's CV and Transfermarkt link were sent by Mr Cornel.
- The Respondent argues that the Player had formally appointed Mr Teodorescu, a licensed FIFA agent, as his exclusive representative for all negotiations related to his transfer. This mandate was consistent with FIFA regulations, further reinforcing that Mr Akram's involvement lacked legal standing. Similarly, the Club never recognized Mr Akram as an intermediary in any capacity, ensuring his actions were entirely unauthorized.
- The Respondent demonstrated good faith by clearly outlining the conditions of the proposal and transparently communicating the withdrawal when those conditions were unmet. While, the Appellant failed to disclose the ongoing negotiations with Universitatea Craiova, delaying the submission of proof of free agency, which highlights bad faith on his part.

- Moreover, at the time of the Offer, the Player did not disclose his serious injury to the Club. Additionally, the media reports concerning the Player's other offers indicate that he was not fully committed to the Club's Offer.
 - The release letter with Universitatea Craiova dated 15 June 2023, was executed only on 19 June 2023, meaning the Appellant was still contractually bound to his former club as on 16 June 2023. This impacted the fulfilment of the Club's condition requiring proof of the Player's free agency, rendering the alleged acceptance invalid.
 - The Club was aware of the release letter only on 19 June 2023, as confirmed by the Club's official website and media reports – which is the actual date of when the Player became a free agent. Thus, they received the proof of free agent status only after expiry of the deadline
 - The Respondent contends that the sequence of events clearly demonstrates that the Player suffered no loss or damage as a result of the Club's withdrawal. Instead, the Player's financial trajectory shows consistent growth, with each successive contract offering improved terms.
44. The Respondent request for relief is the following:

"In light of the foregoing arguments, factual evidence, and legal principles, the Respondent respectfully requests the following relief:

1. *That the present appeal lodged by Mr Bodgan Ilie Vătăjelu be rejected in its entirety.*
2. *That the FIFA Dispute Resolution Chamber's decision, which is being challenged, be confirmed in full.*
3. *That all costs associated with these proceedings, including but not limited to the procedural costs and legal expenses incurred by the Respondent, be born entirely by the Appellant, Mr Bodgan Ilie Vătăjelu.*
4. *That Mr Bodgan Ilie Vătăjelu be ordered to contribute to the Respondent's legal fees and other related expenses in an amount to be determined by the Sole Arbitrator".*

V. JURISDICTION

45. Article R47 para. 1 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

46. Article 57 para. 1 of the FIFA Statutes (2023 edition) provides as follows:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or

leagues shall be lodged with CAS within 21 days of receipt of the decision in question”.

47. Similarly, the Appealed Decision provides for an appeal to CAS.
48. In light of the above, the jurisdiction of the CAS derives from Article R47 para. 1 of the CAS Code, Article 57 para. 1 of the FIFA Statutes, and is confirmed in the Appealed Decision itself. Furthermore, the jurisdiction of the CAS is not contested by the Parties and it is confirmed by the Order of Procedure duly signed by the Parties.
49. Therefore, the Sole Arbitrator finds that the CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

50. Article R49 of the CAS Code provides in its relevant part as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document”.

51. Article 57 para. 1 of the FIFA Statutes quoted above provides for a time limit to lodge an appeal against a decision of the FIFA DRC. It states that an appeal must be filed within 21 days of receipt of the notification of the decision in question.
52. The grounds of the Appealed Decision were notified to the Parties on 12 August 2024. The Appellant filed his Statement of Appeal on 2 September 2024.

53. The Sole Arbitrator notes that the admissibility of the appeal is not, in principle, contested by the Parties.
54. The Sole Arbitrator concludes that the present appeal was filed within the 21-day time limit and is thus admissible.

VII. APPLICABLE LAW

55. The Sole Arbitrator firstly takes note that the Letter in dispute does not mention any provision related to the *rules of law* chosen by the Parties.
56. Secondly, the Appellant does not particularly refer to any applicable law, nevertheless, he makes abundant reference to the FIFA Regulations. While the Respondent refers to the FIFA Regulations, as well as the Swiss Code of Obligations.
57. In accordance with Article R58 of the CAS Code, which reads as follows:
- “The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
58. By submitting their dispute to CAS, by signing the Order of Procedure and not filing any objections in this regard, the Parties have implicitly and indirectly chosen for the application of the conflict-of-law rule in Article R58 CAS Code, leading to the primary application

of the regulations of FIFA (CAS 2020/A/7499).

59. Furthermore, FIFA's rules and regulations shall apply in football-related disputes. Specifically, the Appeal in the present case is directed against a decision issued by FIFA, which was passed in accordance with FIFA's rules and regulations (CAS 2014/A/3626).

60. Article 56 para. 2 of the FIFA Statutes provides as follows:

"The provisions of the CAS Code of Sports related Arbitration shall apply to the proceedings. CAS shall apply the various regulations of FIFA and, additionally, Swiss law".

61. In case of appeals against decisions issued by FIFA, there is a tacit and indirect choice of law. In accordance with Article R58 of the CAS Code and Article 56 para. 2 of the FIFA Statutes, the dispute has to be decided according to the laws and regulations of the FIFA and, complementarily, Swiss law as the law of the country where FIFA is domiciled.

62. Therefore, the Sole Arbitrator shall decide the present case according to the relevant FIFA regulations, specifically the FIFA RSTP 2023 edition. Additionally, Swiss law shall also be applicable, as a subsidiarily, in order to fill any existing *lacunae* in the FIFA regulations.

VIII. MERITS

63. Prior to assessing the main issues at stake, the Sole Arbitrator deems it necessary to first establish the standard of proof applicable to the present case.

64. The Sole Arbitrator observes that the Appellant did not make any submission with respect to the above-mentioned criteria, whereas, the Respondent submitted that in accordance with the FIFA regulations and the Swiss Code of Obligations, the standard of proof applicable is comfortable satisfaction, as consistently applied in CAS proceedings concerning contractual disputes.

65. The Appealed Decision does not address this particular criterion. Nevertheless, CAS panels have consistently applied the standard of "comfortable satisfaction" which, on the standard of proof spectrum, sits in between the standard of "beyond any reasonable doubt" and the standard of "balance of probabilities" (CAS 2020/A/7180).

66. Further, the "comfortable satisfaction" standard has been regularly upheld in cases before CAS, when considering the FIFA RSTP (for instance in CAS 2012/A/2908, CAS 2019/A/6187 and CAS 2020/A/7605).

67. Thus, the Sole Arbitrator considers that the applicable standard of proof in this case is that of "comfortable satisfaction", given that the case at hand concerns essentially matters of contractual nature.

A. The legal issues to be decided

68. This appeal is based on the challenge brought by the Player against the Club concerning the Appealed Decision, in which the FIFA DRC determined that there was no valid and binding employment contract concluded between the Parties.

69. The Appellant principally contests that the FIFA DRC did not fairly consider the consequences leading up to the alleged unilateral termination by the Club. While the Respondent argues that the “Offer” was a proposal with a disclaimer emphasising that it was not a binding employment offer. Further, the Club submits that the Appellant failed to fulfil the conditions precedent which led to its subsequent withdrawal.
70. Bearing in mind the above, the main issues to be addressed by the Sole Arbitrator in deciding this dispute are the following:
 1. Is the Offer considered valid?
 2. If yes, does the Offer constitute a binding employment contract?
71. The Sole Arbitrator will address these issues in detail below.
 1. ***Is the Offer considered valid?***
72. In order to assess the validity of the Offer, the Sole Arbitrator shall firstly examine the prerequisites or *essentialia negotii* required for a valid and binding contract.
73. The Sole Arbitrator notes that the FIFA RSTP does not explicitly define the terms “offer” or “*essentialia negotii*” under a specific article. However, the well-established jurisprudence of the FIFA DRC and subsequently CAS jurisprudence often rely on certain essential elements required for a valid and binding employment contract, such as – the date, clear description of the parties involved, the duration of the contract, remuneration payable by the employer and signatures of the parties.
74. In reference to CAS 2021/A/8292, para. 110 reads as “*the Sole Arbitrator notes also that according to Article 1(1) and Article 2(1) of the Swiss Code of Obligations (SCO), an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points. If an employment contract includes, inter alia, (i) a date, (ii) the names of the parties, (iii) the duration of the agreement, (iv) the position of the employee, (v) the remuneration components to be paid, and (vi) the signatures of the parties, it contains all essentialia negotii to be considered a valid and binding agreement between the parties (see, for example, CAS 2017/A/5164, paras 128 – 130)*”.
75. In consideration of the above criteria, the Sole Arbitrator observes that, the letter in dispute contains the following: the date as on 16 June 2023; the names of the Parties with their description; the duration of the contract for one year; the remuneration with an annual salary of USD 500,000; and finally, the signatures of the Parties. However, none of these elements are disputed by the Parties.
76. On the contrary, what is disputed by the Parties, are that (i) the Offer was sent through unofficial means *i.e.* not authorised by the Club; and (ii) the Player’s signature was forged.
77. In this regard, the Respondent extensively argues on the role of Mr Akram, the alleged agent of the Player. The Club insists that Mr Akram, who acted as an agent to the Club’s former head coach, unilaterally sent a non-binding proposal directly to the Player, without obtaining official authorisation from the Club. This unauthorised communication sent by Mr Akram bypassed the legal protocols of the Club,

who intended to communicate with Mr Teodorescu alone, as the Player's Agent.

78. Additionally, the Club challenges the legitimacy of the Player's signature on the acceptance of the Offer by claiming that it was fabricated by Mr Akram. The Respondent points out to the WhatsApp chats submitted by the Player before the FIFA DRC and argues that there was a difference in the timing of when the signed offer was sent to the Club.
79. In order to assess the above-mentioned issues, the Sole Arbitrator shall examine the role of Mr Akram in the present case, in particular, focussing on whether the Offer he forwarded to the Player is valid and accurate.
80. The Player maintains that Mr Akram was his agent, from whom he received the Club's Offer. Consequently, the signed offer was sent back to the Club *via* Mr Akram. Additionally, the Player argues that Mr Akram's lack of authority did not impact the validity of his consent to join the Club.
81. The Respondent, on the other hand, argues on the lack of authority granted to Mr Akram, in particular that he is not a licensed FIFA agent. Furthermore, Mr Teodorescu was the sole agent authorised by the Player, as per the Exclusive Authorization Mandate, giving him exclusive authorisation.
82. Furthermore, the Respondent submitted evidence showing that Mr Akram was convicted in 2013 of crimes related to organised crime and bribery. According to the press release from the National Anti-Corruption Division of Romania, Mr Akram was charged with *inter alia*

incitement to forgery in documents under private signature.

83. This matter was dealt in the Appealed Decision, wherein the Chamber found that the press release itself clarifies that "*By criminal decision no. 177 of 15.07.2019, the High Court of Cassation and Justice ordered the acquittal of the defendants (...) Akram Naser Abdel Rahman Bani Mustafa (...), for the offenses charged against them, since the deed does not exist, the deed is not provided for by the criminal law, or there is no evidence that a person committed the crime*".
84. In any event, the Sole Arbitrator does not consider it necessary to examine Mr Akram's alleged past criminal conduct, as such matters fall outside the jurisdiction of this tribunal. Moreover, given that neither Party called him as a witness in this matter, the Sole Arbitrator shall limit the assessment strictly to Mr Akram's role in the present proceedings.
85. The Sole Arbitrator finds that regardless of an exclusive authorisation between the Player and Mr Akram, his involvement in negotiating the Player's Offer letter cannot be ignored, as demonstrated by the communication exchanged between the Player, Mr Akram and Mr Teodorescu. Further, during the hearing, the Player confirmed that both agents collaborated in the negotiations with the Club.
86. On the question of whether the Offer constituted an official communication, in CAS 2010/A/2316, the panel notes that "*according to articles 13, 14 and 16 of the Swiss Code of Obligations (SCO), which apply not only to contracts but as well to offers (ATF 101 III 65), a contract – or an offer – is deemed to be made "in writing", when it is signed with the original signature of the party, as to an offer,*

or the parties, as to a contract, that are contractually bound by the document”.

87. Therefore, the Sole Arbitrator concurs with the findings of the FIFA DRC, particularly that the Offer was signed by the Club’s Professionalism Director, dated, and was expressly addressed to the Player. Furthermore, the content of the Offer clearly demonstrates the Club’s interest in engaging the Player.
88. Moreover, the FIFA RSTP do not strictly stipulate the exact mode of communication for offers or contracts. The only tangible expectation is that the communication be made through clear and verifiable means to prove its existence in case of disputes. In the same CAS 2010/A/2316 the Panel states the following: *“the Panel was of the opinion that the requirement of a transmission by registered mail (or electronic mail) has been foreseen by FIFA as a way to provide evidence and not as a condition of validity”.*
89. In the present case, although the Offer lacked an active authorisation, it may still be regarded as a valid offer on the basis of a passive or tacit authorisation. Thus, the Sole Arbitrator is satisfied that the Offer originated from the Club, irrespective of whether it was transmitted by official means or otherwise.
90. Regarding the Player’s signature, the Sole Arbitrator upholds the conclusion reached by the FIFA DRC, which found no substantial evidence indicating that the Player’s consent had been forged.
91. Further, the Club did not submit any forensic report to support its claim of forgery. It follows that the Sole Arbitrator seconds the authenticity of

the Player’s signature which led to his acceptance of the Offer back.

92. For the sake of clarification, the *essentialia negotii* are not only relevant for assessing the existence of a binding contract but are also instrumental in determining whether an official communication or interest shown by a Club qualifies as a valid offer capable of forming a contract upon agreement. In other words, *essentialia negotii* are not only used to assess the validity of a contract, but also to determine whether a valid offer exists in the first place.
 93. In light of the above, the Sole Arbitrator finds that the letter in dispute contains all the *essentialia negotii* required for a genuine Offer. Therefore, the Offer sent by the Club to the Player is considered valid.
- 2. *If yes, does the Offer constitute a binding employment contract?***
94. Having determined that the Offer is indeed valid, the Sole Arbitrator nonetheless cannot overlook the conditions precedent and disclaimers set out in the Offer in order to further evaluate its binding nature and the alleged unilateral termination by the Club.
 95. The conditions precedent mentioned in the Offer are as follows: (i) providing a release letter on the closure of the employment relationship with the Player’s former club *i.e.* proof of the Player’s free agent status; (ii) passing a medical examination conducted by the Club’s medical staff in Saudi Arabia, and (iii) signing an employment contract with the Club.

96. Additionally, the Offer includes a disclaimer stating that the *“proposal is not a binding employment offer. Abha FC reserves the right to withdraw from the deal without legal consequences if any of the aforementioned conditions are not met”*. Along with a 48-hour deadline for the Player to indicate his acceptance or rejection.
97. The Parties strongly dispute the first condition concerning the Player’s free agent status. The Appellant argues that the Club had already recognised the Player’s free agent status as written in the Offer, which stated that the Club was *“highly interested in securing”* the Player’s services *“as a free agent”*. This was also corroborated by the Release Letter, which confirmed that the Player became a free agent as of 15 June 2023.
98. The Respondent *inter alia* argued that the Appellant failed to submit the release letter *i.e.* proof of free agent status within the stipulated 48-hour deadline. The Respondent insists that this was a fundamental requirement for proceeding with the proposal and verifying the Player’s eligibility for employment.
99. Similarly, the FIFA DRC concluded that the Player failed to provide proof of his free agent status within the agreed deadline and thus, rendered the Offer invalid.
100. After assessing the evidence submitted by the Parties, the Sole Arbitrator observes that the release letter submitted by the Appellant was signed on 15 June 2023. While the numerous media reports submitted by the Respondent suggests that the mutual termination of the contract between the Player and his former club was made official only on 19 June 2023.
101. The Sole Arbitrator notes that the release letter submitted by the Player is merely an English translation of the original Romanian document and lacks both the official stamp of the Club and the Player’s signature. Likewise, the Player failed to provide the original document, thereby making it difficult to verify whether his employment with the former club had, in fact, concluded at the time of signing the Offer.
102. In any case, the Sole Arbitrator notes that the Player failed to provide evidence of fulfilling the first condition, namely, proof of his free agent status. The WhatsApp messages show that the Player returned only the signed Offer to Mr Akram and there is no indication in the case file that the Release Letter was also sent on the same day.
103. Nonetheless, the Sole Arbitrator is of the view that, although the Offer contains certain conditions, it did not require the Player to fulfil them within the prescribed 48-hour deadline. The Offer expressly states that the Player was only required to indicate his acceptance or rejection of the Club’s proposal within that timeframe.
104. In this regard, the Sole Arbitrator finds that providing proof of the Player’s free agent status was not a condition that had to be satisfied within the stipulated deadline. Thus, based on the literal interpretation of the disputed Offer, the Player duly complied with his obligation by returning the signed document, thereby confirming his acceptance.
105. Then, the Sole Arbitrator must examine whether the Player’s mere acceptance of

the Offer was sufficient to establish a binding contract between the Parties.

106. The Appellant argues that a valid and binding employment contract was established between the Parties at the moment the Player returned the signed Offer, without the need for any additional requirements to be fulfilled within the 48-hour window.

107. The Respondent argues that the Offer was not intended to be binding and the Club explicitly stated that it reserves the right to withdraw without any legal consequences.

108. On many occasions, FIFA and CAS jurisprudence shed light on the prerequisites required for an offer to be viewed as a binding contract. Some of these requirements are discussed in CAS 2018/A/5628, paras. 82-84, in which the Panel held that:

“82. (...) First the panel notes that the offer fails to specify the “duration of the contract”, in that it does not define the starting date. Indeed, according to Hellas Verona’s interpretation, the alleged contract could have started either during the 2014 summer transfer window or sometime during the 2015 winter transfer window. On the other hand, the panel recognizes that in case of a contract which is subject to a suspensive condition, the uncertainty of the starting date is a built-in consequence of such condition.

83. *Moreover, the Panel’s hesitation is reinforced when looking at the well-known and publicly available FIFA’s circular number 1171 dated 24 November 2008. The circular sets guidelines establishing minimum requirements for a professional football*

player contract “with the aim to cover the most important and essential rights and duties of both contractual partners (professional clubs and players)”. Based on this circular, a contract should include, inter alia, a clear starting date:

“1.5 The agreement defines a clear starting date (day/month/year) as well as the ending date (day/month/year)”.

84. *Furthermore, the contract should include the club’s obligation towards the player as well as the player’s obligations vis-à-vis the club”.*

109. Based on the above, the Sole Arbitrator notes that the Offer includes a proposed duration of the employment, which is merely indicated without a precise clarification of either a start or end date, as would be required for a binding employment contract. Moreover, the Offer does not include the Parties’ obligations arising from the employment relationship. Both of these elements constitute essential components of an employment contract, which are absent in the Offer.

110. Furthermore, the FIFA Commentary on the RSTP 2023 edition highlights the importance of the wording of any invitation letter or similar correspondence sent to a player by an interested club. Wherein a relevant communication should make it clear that it does not constitute a contractual offer, and that any further contract negotiations will occur only once certain conditions are met.

111. Indeed, the Offer in dispute explicitly states that it is not a binding employment offer. It is referred to as a “proposal”

rather than a contract or an offer. Even after sending the letter, there is no supporting evidence to indicate that the Parties had a genuine intention to engage in further negotiations with a view to concluding a contractual agreement.

112. For the sake of clarification, the Sole Arbitrator shall address the remaining two conditions outlined in the Offer, in particular the second condition of passing a medical examination. Article 18 para. 4 of the FIFA RSTP clearly stipulates that the validity of an employment contract cannot be made conditional upon the completion of a medical examination.
113. Accordingly, the Sole Arbitrator confirms the FIFA DRC's conclusion in the above-mentioned matter to disregard this provision when assessing the validity and enforcement of an employment contract.
114. Moreover, a club wishing to employ a player has to exercise due diligence and carry out all relevant medical examinations prior to entering into an employment contract with that player. Therefore, without conducting a medical examination, it is clear that the Club had no intention of entering into a binding employment contract with the Player at the time of sending the Offer.
115. While on the third condition of signing an employment contract with the Club – the Sole Arbitrator is of the opinion that such a condition becomes relevant only upon the actual conclusion of the employment contract itself. Consequently, it would have been impossible for the Player to cumulatively fulfil this requirement within the 48-hour deadline, further confirming that the

Offer was not intended to be a binding contract.

116. As such, the fulfilment of the conditions precedent outlined in the Letter were prerequisites for the Parties to enter into a binding contract. Under Swiss law, parties are permitted to make the validity of a contract subject to the fulfilment of one or more conditions. Pursuant to Article 151(1) of the Swiss Code of Obligations, *“a contract is conditional if its binding nature is made dependent on the occurrence of an event that is not certain to happen”*.
117. Thus, the Sole Arbitrators finds that even though the first condition is an achievable obligation from the part of the Player, the last two conditions precedent are subject to the conclusion of the employment contract and not to the enforceability of the Offer itself. Nevertheless, the letter explicitly states that the 48-hour timeline requires for the Player to only indicate whether he accepted or rejected the Club's proposal and nothing else.
118. Ultimately, the Club's subsequent withdrawal of the Offer is justified, as the Club had expressly reserved the right to do so within the terms of the letter. Accordingly, the Player's arguments regarding the Club's intention behind the withdrawal are irrelevant, given that the Club did not exercise this right in bad faith.
119. In light of the above, the Sole Arbitrator is sufficiently satisfied that based on the clear wording of the Offer and evidence submitted before this Arbitral Tribunal, no binding employment contract was concluded between the Parties. The letter was only intended to be an

offer/proposal for a potential employment relationship, contingent upon the fulfilment of the conditions set forth therein.

4. All other and further motions or prayers for relief are dismissed.

B. Conclusion

120. Based on the above, and after having taken into due consideration the applicable rules, the evidence produced and the arguments submitted, the Sole Arbitrator concludes that:

- i. The Offer contains all the *essentialia negotii* and therefore qualifies as a valid offer;
- ii. Nevertheless, the Offer does not constitute a binding employment contract;
- iii. Consequently, the Club did not commit any breach by withdrawing the Offer.

121. Finally, all other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 2 September 2024 by Bogdan Ilie Vătăjelu against the decision rendered on 25 July 2024 by the FIFA Dispute Resolution Chamber is dismissed.
2. The Appealed Decision issued by the FIFA Dispute Resolution Chamber on 25 July 2024 is confirmed.
3. (...).

Arbitration CAS 2024/A/10918

Jonathan Dominic Finbar Beckett v.
Fédération Internationale de Football
Association (FIFA)

15 May 2025

Football; Disciplinary sanction for providing services without the proper licence; Referral of a matter relating to the FFAR to the FIFA Disciplinary Committee; Suspension of Article 21 of the FFAR; Automatic provisional suspension; Imposition of a sanction against an agent

Panel

Mr Manfred Nan (The Netherlands), President

Mr Anthony Lo Surdo SC (Australia)

Mr Wouter Lambrecht (Belgium)

1. According to Articles 5, 17 and 21 of the FIFA Football Agent Regulations (FFAR), the procedure to refer a matter to the FIFA Disciplinary Committee is as follows: (i) if the FIFA General Secretariat forms a belief upon investigation that there are grounds to consider that a Football Agent does not meet the eligibility requirements, in that case; (ii) the FIFA General Secretariat is required to inform the Football Agent of that belief; (iii) the FIFA General Secretariat is required to implement an automatic provisional suspension on the Football Agent; and (iv) the FIFA General Secretariat is required to refer the matter to the FIFA Disciplinary Committee for a decision.
2. Article 21 of the FFAR, which sets out the competence of the FIFA Disciplinary Committee to impose

sanctions on agents who breach the FFAR, is currently suspended.

3. An automatic provisional suspension cannot be a definite or final suspension. A competent body must be able to lift the provisional suspension if it deems that the ongoing eligibility requirements are satisfied.
4. The implementation of a *de facto* definite or final suspension by a different body than the body afforded the jurisdiction to decide on the definite or final consequences, due to the suspension of the relevant provision of the regulations, lacks a legal basis.

I. PARTIES

1. Mr Jonathan Dominic Finbar Beckett (the “Appellant” or “Agent”) is a British football agent and co-owner of the football agency Areté Management Ltd. (also referred to as “Areté” or “Areté Ltd”).
2. The *Fédération Internationale de Football Association* (the “Respondent” or “FIFA”) is an association under Swiss Law, with its registered headquarters in Zurich, Switzerland. FIFA is the governing body of football worldwide; The Agent and FIFA are hereinafter jointly referred to as the “Parties”.

II. INTRODUCTION

3. This matter concerns an appeal filed by the Agent against the decision rendered by the FIFA General Secretariat on 16 September 2024 (the “Appealed Decision”) to provisionally suspend the

Agent's licence and prevent him from submitting a new licence application until 17 January 2026 for having provided Football Agent Services before being granted a license.

4. The Agent is challenging the Appealed Decision before the Court of Arbitration for Sport ("CAS"), *inter alia*, requesting that it be set aside, whereas FIFA seeks a confirmation of the Appealed Decision.

III. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts and allegations based on the Parties' written and oral submissions. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this arbitral award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background Facts

6. On 30 March 2021, the Agent and A. (the "Player") signed a representation agreement.
7. On 7 March 2022, the Agent represented the Player in relation to his first professional employment contract concluded with the English football club Aston Villa FC ("Aston Villa").
8. On 1 February 2023, Areté Management Ltd. and the Player signed a new representation agreement, signed by Mr Simon Bayliff, player agent and

CEO of Areté Management Ltd., on behalf of the latter.

9. On 21 December 2023, the English Football Association ("The FA") announced that the FA Football Agent Regulations (the "FAFAR") would enter into force on 1 January 2024, superseding The FA's Working with Intermediaries Regulations, and giving effect in England to the FIFA Football Agent Regulations (the "FFAR").
10. According to the Agent, in late 2023, he engaged in discussions with Aston Villa and the Player about a potential new employment contract for the Player.
11. On 30 December 2023, FIFA issued Circular 1873, confirming that certain provisions of the FFAR (including Article 21 FFAR) were to be temporarily suspended on a worldwide basis.
12. On 31 December 2023, The FA released an updated version of the FAFAR to reflect the contents of Circular 1873.
13. At all times up to 1 January 2024, the Agent remained a registered intermediary with the FA, entitling him to act for the Player in discussions with Aston Villa.
14. On 1 January 2024, the FFAR and the FAFAR came into effect. At that point in time, the Agent had not yet applied for or obtained a license from FIFA, as a consequence of which he was not a Football Agent in the context of the FFAR.
15. Between 8 and 19 January 2024, the Agent sent and received various emails with Aston Villa's Academy Manager

- and Club Secretary about the possibility of extending the Player's employment contract. It derives from these emails that various meetings took place. Almost all emails sent by the Agent contained the following text at the bottom: "*sent on behalf of Simon Bayliff cc'd*".
16. On 12 January 2024, Mr Bayliff informed the Player, *inter alia*, as follows by email, with The FA in copy:

"I'm writing because FIFA / The FA have now introduced new regulations governing the activities of football agents. Amongst the new regulations is an obligation on each Intermediary (now known as a Football Agent) to be both licensed by FIFA (which I am, with FIFA license no. [...]), and registered with The FA as an FA Registered Football Agent (which I am, with FA Agent no. [...]).

A further requirement is that I write to you with reference to the ongoing representation contract between you and Areté Management Ltd dated 1st February 2023 (the 'Representation Contract'). Whilst the new regulations have now been implemented, the Representation Contract remains in full force and effect. The agency is, however, required to write to you by way of this email, which I am copying to The FA, to inform you that I am, and will until further notice continue to be, the nominated FA Registered Football Agent who will provide the Football Agent Services (previously described in the old regulations as 'Intermediary Activity') under the Representation Contract".
 17. On the same date, 12 January 2024, the Player replied as follows to the email of Mr Bayliff:

"Thanks mate 🤝".
 18. On 13 January 2024, Mr Bayliff and the Player concluded a tripartite representation agreement between Mr Bayliff in person, Areté Management Ltd. and the Player.
 19. According to the Agent, Mr Bayliff proceeded to provide the relevant Football Agent Services to the Player in January 2024. According to the Agent, his role was limited "*at this time to working for and providing assistance to Mr Bayliff, which role he undertook given that [the Agent] had the long-standing relationship with the Player and had already been in discussions with [Aston Villa] in relation to the Player*" and "*whilst Mr Bayliff was providing Football Agent Services on the proposed Transaction, [the Agent] continued to send and receive correspondence in relation to the Player on Mr Bayliff's behalf [...]*".
 20. According to FIFA, "[the Agent] attempted to circumvent the FFAR by replacing himself, on paper and purely formalistically, with Mr Bayliff in a ceremonial role as the official signatory while arguing that his own role in the transaction was purely administrative", while "[the Agent] was, always, the main point of contact and correspondent of [Aston Villa] (and the Player) throughout the negotiations that he personally conducted".
 21. On 19 January 2024, the Player concluded an extended employment contract with Aston Villa. The Agent attended the signing ceremony on behalf of Areté Management Ltd.
 22. On 7 February 2024, The FA informed Aston Villa, *inter alia*, as follows:

"We write to you in relation to the [FAFAR]. In particular, this relates to the contract extension of [the Player] at [Aston Villa] dated 19th January 2024 ('the Transaction').

The AF1 submitted in respect of the Transaction details Simon Bayliff (FARA0178) of Arete Ltd (“the Football Agent”) as having acted for the Player and the Club. The FA has been made aware that Joe Musker and [the Agent], both of Arete Ltd, but neither an FA Registered Football Agent, may have provided Football Agent Services in respect of the Transaction.

Based on this information, The FA is seeking the Clubs detailed observations in respect of the Regulations, including, but not limited to 6.1 [...].”

23. On 14 February 2024, Aston Villa provided its comments with respect to The FA’s enquiry.

24. On 27 March 2024, the Agent submitted a license application on the FIFA Agent Platform and confirmed that he complied with the eligibility requirements, which include, *inter alia*, the following requirement as per Article 5(1)(b) FFAR:

“[I]n the twenty-four months before the submission of a licence application, never have been found performing Football Agent Services without the required licence”.

25. On 2 April 2024, The FA informed Mr Bayliff, *inter alia*, as follows:

“We write to you in relation to potential breaches of the [FAFAR]. In particular, this relates to the following two Transactions (referred to as ‘the Transactions’):

- *The contract extension of [the Player] at [Aston Villa] dated 19th January 2024 (“the A. Transaction”).*

[...]

The FA has been made aware that [the Agent] of Arete Ltd, who is not registered as an FA Registered Football Agent, may have provided Football Agent Services in respect of the Transactions.

Based on this information, The FA is seeking your detailed observations in respect of the Regulations, including, but not limited to 3.5 and 6.1 [...].”

26. On 19 April 2024, Mr Bayliff provided his comments with respect to The FA’s enquiry.

27. On 30 May 2024, FIFA issued a license to the Agent, by means of which he became a Football Agent in the context of the FFAR.

28. On 14 August 2024, The FA informed Aston Villa as well as Mr Bayliff as follows:

“Having considered the particular facts and circumstances of this matter, The FA are of the view that [the Agent] performed Football Agent Services on the Transaction on behalf of Arete Ltd at a time where he was not permitted to do so. [...]

*However, given the particular facts and circumstances at the time of the Transaction, including, but not limited to, the uncertainty caused by the change in regulations, The FA have decided not to bring a disciplinary charge against [Aston Villa / Mr Bayliff] and instead issue [Aston Villa / Mr Bayliff] with a **Formal Warning**. [...].”* (emphasis in original).

29. On 2 September 2024, The FA provided FIFA with a report following its investigation regarding a potential breach of the FAFAR by the Agent in relation to the extension of the employment contract between the

Player and Aston Villa on 19 January 2024 (the “Employment” or the “Transaction”). The FA informed FIFA, *inter alia*, as follows:

“Please note that The FA has completed its investigation into a potential breach of the [FAFAR], in particular this related to the [Employment] of [the Player] at [Aston Villa].

It was alleged that an individual who was not a FIFA Licensed Football Agent (and therefore not an FA Registered Football Agent) performed football agent services on the Transaction.

The FAs investigation concluded that the [Agent] did perform football agent services on the Transaction.

The FA subsequently issued a formal warning to [Aston Villa] and Simon Bayliff of Arete Ltd [...] on 14th August 2024.

The [Agent] who performed football agent services was [the Agent] of Arete Ltd. He was not FIFA Licensed at the time but has subsequently obtained his license [...].

[...]

We therefore, are reporting the matter to you in accordance with 5.1.b of the FFAR which states:

- 1. An applicant must:*
- b) in the twenty-four months before the submission of a license application, never have been found performing Football Agent Services without the required licence;”.*

B. The Proceedings before the FIFA General Secretariat

30. On 3 September 2024, FIFA, *inter alia*, informed the Agent as follows:

“As you know, all Football Agents must comply with the eligibility requirements at all times, as established by articles 5 and 17 [FFAR] and that failure to do so shall result in the automatic and provisional suspension of their licence in accordance with art. 17 para. 1 lit. a) of the FFAR.

In order to confirm that you comply with licence eligibility requirements pursuant to article 5 of the FFAR, please provide FIFA with the requested information below.

It appears that you provided Football Agent Services to the [Player], and/or the [Aston Villa] with respect to his employment contract extension with the referred club (‘Employment’).

Consequently, we kindly request that you provide us with the following information/documentation:

- 1. A brief summary of your position on the above-mentioned matter, in particular with respect to your role in this Employment.*
- 2. Any offer you provided with respect to this Employment.*
- 3. Any communications (e.g., emails, texts or WhatsApp messages) with respect to this Employment.*
- 4. Copy of any payments in connection with this Employment”.*

31. Also on 3 September 2024, FIFA informed Aston Villa as follows:

“We are reaching out to you concerning a potential breach of article 5 paragraph 1 b) of the [FFAR].

It appears that [the Agent] provided Football Agent Services to Aston Villa and/or the [Player], with respect to his employment contract extension with your club ('Employment').

Consequently, we kindly request that you provide us with the following information/documentation:

- 1) A brief summary of your position on the above-mentioned matter, in particular with respect to [the Agent] role in this Employment.*
- 2) Any offer provided to Aston Villa FC by any individual with respect to the Employment.*
- 3) Any communication (e.g., emails, texts or Whatsapp messages) with respect to the Employment.*
- 4) Copy of any payments made by your club in connection with this Employment”.*

32. On 10 September 2024, the Agent responded to FIFA’s request, *inter alia*, indicating the following:

“I firmly believe that I meet (and have always met) the eligibility requirements set out in article 5 of the FFAR. In particular, and with reference to the Transaction you have identified, I believe that from 1 January 2024 I did not in fact carry out any Football Agent Services (whether on behalf of [the Player] and/or the Club)”.

33. On 12 September 2024, Aston Villa responded to FIFA’s request, *inter alia*, indicating the following:

“It was, and is, our belief that [the Agent] assisted Mr Bayliff but the decision-making

and negotiation on behalf of the Player was undertaken by Mr. Bayliff.

It is our understanding that [the Agent] acted as Mr. Bayliff’s secretary in the transaction”.

34. On 16 September 2024, the FIFA General Secretariat issued the Appealed Decision, including the grounds. The operative part provides as follows:

“30.1. the licence number 202405-6183 is provisionally suspended, as per article 17 par. 3 lit. a) of the FFAR.

30.2. the Agent is prevented to submit a new licence application in the agent platform until 17 January 2026.

30.3. this is a final decision of the FIFA general secretariat for the purposes of article 50 paragraph 1 of the FIFA Statutes”.

35. The grounds of the Appealed Decision provide as follows:

➤ *“Although the Agent denied the allegations, from the information available to the FIFA general secretariat, it shows that in January 2024, the Agent, at the time as an unlicensed individual, provided Football Agent Services to the Player, with respect to his employment contract extension with the Club, without the required licence, which makes him ineligible for the Football Agent licence, as per article 5 paragraph 1. b) of the FFAR.*

➤ *More specifically, it is clear from the case file that [the Agent] provided Football Agent Services to the Player as per the evidence below:*

- *There is communication on record between the Agent and the Academy Manager of the Club (Annex 3.2). Mark Harrison, and the Club Secretary, Sharon Barnburst (Annex 3.5) which clearly reflects the purpose, objective and/or intention of concluding a transaction (i.e., a football player's employment contract extension), such as:*
 - *Following a catch-up meeting with Mr. Harrison, on 9 January 2024 (late in the evening), [the Agent] answers to his email, about the Club's contract proposal to the Player, as follows: [...]*
 - *Again, the Agent answered to another email from Mr. Harrison on 10 January 2024 about the new contract proposals, after having spoken with the Player and attending a call with the Club: [...]*
 - *On 17 January 2024, the Agent answered, this time to the Club secretary about the agency fees and the Player employment contract as follows (Annex 3.5):*
- *The Agent states in his position that he 'was acting at all times under Simon's control and upon Simon's instruction' or that he 'was communicating his [Simon] views (...), as a PA would often do in a larger organization'. However, this seems unplausible considering that:*
- *The first communication from the Club regarding the Transaction was sent to the Agent, who appears to have previously discussed with the academy manager about the Player with no reference whatsoever to Simon Bayliff or any other licensed football agent at Areté (hereinafter 'Agency').*
- *The Agent presents himself, in email communication, as 'Director' and 'Head of Talent Representation' of the Agency, and not as a personal assistant.*
- *Never in any communication with the Club, did the Agent present himself as personal assistant of Simon Bayliff, nor did he ever refer to himself as such.*
- *Further, the Agent is a minority shareholder of the Agency ('I also hold 20% of the shares (equity) of Areté'), which shows again the degree of responsibility and ownership of the Agency (and again, it clearly undermines the plausibility of the allegation that the Agent would simply be a personal assistant of Simon Bayliff).*
- *Finally, it cannot be overlooked that the Agent was the main contact of the Club with respect to the Player.*
- *The fact that the Agent sent all his communications to Aston Villa FC 'on behalf of Simon Bayliff cc'd' does not change the fact that he, individually and directly provided Football Agent Services. First, there are e-mails on record with the Club, in which the Agent did not indicate that he was – supposedly – communicating on behalf*

of Simon Bayliff (annex 3.5). Second, it is clear from the emails [sic] correspondence that the Agent participated in calls negotiating the Player's employment contract with the Club. Third, even considering that the bottom line of some emails indicate 'sent on behalf of Simon Bayliff cc'd' this does not change the fact that the Agent himself was also, individually and actively, involved in the Transaction and that he, individually and directly, provided Football Agent Services, in particular by his communication as per the email dated 17 January 2024.

- Finally, one must remain mindful of avoiding possible circumventions of the FFAR and of its requirement that only licensed Football Agents may provide Football Agent Services. It cannot be enough to simply indicate in an email that the email is – allegedly – sent on behalf of someone else (i.e., on behalf of a licensed Football Agent), to avoid that the person sending such email would also require a licence under the FFAR. A licence is issued to a natural person, is strictly personal and non-transferable, and simply copying a licensed Football Agent to an email within a Transaction does not meet the relevant requirements under the FFAR, in particular, the principle that only licensed Football Agents may provide Football Agent Services (article 11 para. 1 of the FFAR).
- There is, accordingly, no doubt that both the Agent and Simon Bayliff were indeed providing Football Agent Services to the Player in the Transaction by:

- providing advice on, and assistance with, the negotiation and conclusion of an employment contract.
- performing any communication relating to an employment of the Player
- representing clients at meetings; and
- discussing the terms of possible deals with clients²⁰.

- Finally, it is worth mentioning also that the definition of Football Agent Services and examples of the same were already provided by FIFA in March 2023²¹, which seems sufficient time to grasp what said services encompass, in particular to an individual that have [sic] been working in the Agency and in this market for close to a decade.
- The Agent has thus been found providing Football Agent Services without a licence. Accordingly, he breached article 5 par. 1 b) of the FFAR.
- Art. 17 para. 1 of the FFAR states that if a Football Agent fails to meet the eligibility requirements at any time, their licence shall automatically be suspended.
- In view of the above, performing Football Agent Services without a licence shall lead to the automatic provisional suspension of the Agent's licence.

Conclusion

- In view of the above, the FIFA general secretariat is convinced that the Agent

²⁰ "Please see page 13 of FAQ".

²¹ "Please see FAQ".

has been found performing Football Agent Services without the required licence. This renders him ineligible to continue being a Football Agent by virtue of art. 5 par. 1 b) FFAR.

- *Consequently, based on art. 17 para. 1 FFAR, the licence of the Agent must be provisionally suspended.*
- *Since the Agent was found performing Football Agent Services without the required licence and said services were performed on 17 January 2024 at the latest, as per the Agent's last communication with a Club official, this decision prevents the Agent from submitting a new licence application in the agent platform until 17 January 2026.*
- *In this context, it must be noted that art. 21 FFAR is currently temporarily suspended, as provided in the FIFA Circular no. 1873. Accordingly, it is not possible for the FIFA general secretariat to refer this matter to the FIFA Disciplinary Committee, as would otherwise be provided in art. 17 para. 3 b) FFAR.*
- *However, in order to ensure the possibility for the Agent to obtain an effective and impartial judicial review of the provisional suspension of his licence, the FIFA general secretariat hereby clarifies that this decision is a final decision in the meaning of art. 50 of the FIFA Statutes. Accordingly, it can be appealed before the Court of Arbitration for Sport (CAS) with seat in Lausanne, Switzerland".*

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

36. On 6 October 2024, the Agent filed a Statement of Appeal with CAS in accordance with Articles R47 and R48 of the 2023 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"), challenging the Appealed Decision. In his Statement of Appeal, the Agent applied for the proceedings to be expedited and nominated Mr Anthony Lo Surdo SC, Barrister in Sydney, Australia, as arbitrator.

37. On 10 October 2024, the CAS Court Office acknowledged receipt of the Statement of Appeal and indicated, *inter alia*, that "as the costs of this arbitration procedure must be paid by the Parties, the CAS Director General or the CAS Finance Director will shortly write to the Parties inviting them to pay an advance on such arbitration costs, in accordance with Article R64.2 of the Code".

38. On the same date, 10 October 2024, the Agent filed a reasoned objection to the application of Article R64 CAS Code, requesting the following relief:

- "1. *The Appeal will be governed by Article R65 (as an appeal against a decision issued by an international federation in a disciplinary matter); and*
2. *As a consequence of the above (and without prejudice to the Panel's discretion at R65.3 of), the proceedings shall be free beyond the non-refundable Court Office Fee already paid by the Appellant".*

39. On 11 October 2024, the CAS Court Office informed the Parties as follows:

"The CAS Court Office considers that the issue at stake is whether the Appellant is eligible to continue being a Football Agent by

- virtue of art. 5 par.1 b) FEAR. Therefore, the CAS Court Office confirms that the case concerns an eligibility issue and Article R64 of the Code shall apply to this procedure”.*
40. On 14 October 2024, FIFA indicated that it did not agree with the Agent’s request for this matter to be expedited, following which the CAS Court Office confirmed that, pursuant to Article R52 CAS Code, no expedited procedure was implemented.
 41. On 15 October 2024, the Agent filed his Appeal Brief in accordance with Article R51 CAS Code.
 42. On 17 October 2024, following a confirmation of the CAS Court Office that, upon FIFA’s request, the time limit for the filing of FIFA’s Answer was set aside and would be fixed after the Appellant’s payment of his share of the advance of costs, the Agent objected to such decision and requested to be informed about the advance of costs to be paid.
 43. On 18 October 2024, the CAS Court Office, with reference to Article R55 CAS Code, denied the Agent’s objection and informed the Parties that the advance of costs had been communicated to the Parties.
 44. On the same date, 18 October 2024, the Agent, *inter alia*, objected to the statement from the CAS Court Office that “*as a general rule, FIFA does not pay any arbitration costs in advance when it acts as a Respondent in a procedure before CAS, which is admissible to CAS pursuant to Article R64.2 of the Code*” and indicated that it had nevertheless paid the full advance of costs, “*whilst expressly reserving his rights, including in relation to the unreasonableness of FIFA’s ‘general approach’ in the present case, and in relation to his request that the Panel determines whether the Appeal proceeds under Article R65 as the Appellant contends*”.
 45. On the same date, 18 October 2024, a new time limit for the filing of FIFA’s Answer was fixed.
 46. On 21 October 2024, FIFA nominated an arbitrator.
 47. On 28 October 2024, following a disclosure made by the FIFA-nominated arbitrator, the Agent challenged the appointment.
 48. On 4 November 2024, following additional information being provided by the FIFA-nominated arbitrator in response to the challenge and a request for reconsideration of the challenge, the Agent informed the CAS Court Office that he maintained his challenge, following which the FIFA-nominated arbitrator recused himself.
 49. On 5 November 2024, following a request of FIFA, the CAS Court Office extended FIFA’s time limit to file its Answer with 10 days.
 50. On 11 November 2024, FIFA nominated Mr Wouter Lambrecht, Attorney-at-Law in Geneva, Switzerland, as arbitrator.
 51. On 18 November 2024, FIFA filed its Answer in accordance with Article R55 CAS Code.
 52. On 19 November 2024, the Agent, *inter alia*, informed the CAS Court Office as follows:

“we inform the CAS that the parties have agreed in writing that a hearing should take place in this matter. The parties have specifically agreed that the hearing should: (a) take place on any date(s) between 10 December and 16 December 2024; (b) have an estimated length of one full day; (c) be held over video conference; and (d) commence, on any setting date(s), no earlier than [sic] 14.00 CET, in view of FIFA’s location in Miami”.

53. On 25 November 2024, FIFA, *inter alia*, informed the CAS Court Office as follows:

“it was never FIFA’s agreement that such hearing should ‘have an estimated length of one full day’ as stated by the Appellant. In our view, such hearing should not extend beyond a duration of three to an absolute maximum of four hours”.

54. On 26 November 2024, the Agent made a proposal for a hearing schedule. FIFA did not file any objection thereto and it was ultimately approved by the Panel on 2 December 2024.

55. On 28 November 2024, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division, pursuant to Article R54 CAS Code, had decided that the Panel appointed to decide the case was constituted as follows:

President:

Mr Manfred Nan, Attorney-at-Law in Amsterdam, the Netherlands;

Arbitrators:

Mr Anthony Lo Surdo SC, Barrister in Sydney, Australia; and

Mr Wouter Lambrecht, Attorney-at-Law in Geneva, Switzerland.

56. On 29 November 2024, the CAS Court Office informed the Parties that a hearing would be held by videoconference on 16 December 2024 at 17.00 CET.

57. On 2 December 2024, the CAS Court Office informed the Parties that Mr Dennis Koolaard, Attorney-at-Law in Amsterdam, The Netherlands, had been appointed as *Ad hoc* Clerk.

58. On 9 and 11 December 2024 respectively, FIFA and the Agent returned duly signed copies of the Order of Procedure to the CAS Court Office that was provided to them by the CAS Court Office on 9 December 2024. The Agent added the following comment:

“Please be advised that our client has signed this document expressly reserving his rights as to paragraph 11.1 of the Order of Procedure, which states that ‘Article R64 of the Code shall apply’ (in respect of costs). Our client does not agree that Article R64 of the Code applies.

As the CAS, the Panel and the Respondent will all be aware, it is the Appellant’s position that Article R65 of the Code applies (as is set out, for example, in paragraphs 101 to 106 of the Appeal Brief). The Appellant has requested that the Panel determines the issue, as is his right in accordance with Article R65.2 of the Code” (emphasis omitted).

59. On 16 December 2024, prior to the hearing, the Agent filed three publicly available documents with the CAS Court Office, requesting them to be admitted on file for ease of reference.

60. On the same date, a hearing was held by videoconference. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel. In addition to the members of the Panel, and Mr Antonio de Quesada, CAS Head of Arbitration, the following persons attended the hearing:

a) For the Appellant:

- Mr Jonathan Dominic Finbar Beckett, the Appellant;
- Ms Kendrah Potts, Counsel;
- Mr Daniel Lowen, Counsel;
- Mr Jonathan Hyman, Counsel.

b) For the Respondent:

- Mr Miguel Liétard Fernández-Palacios, FIFA Director of Litigation;
- Mr Alexander Jacobs, FIFA Senior Legal Counsel;
- Mr Luis Villas-Boas Pires, FIFA Head of Agents.

61. The Panel heard evidence from the Agent and Mr Simon Bayliff, player agent and CEO of Areté Management Ltd., witness called by the Agent. Mr Bayliff was invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties had full opportunity to examine and cross-examine the Agent and Mr Bayliff.

62. The Parties were given full opportunity to present their cases, submit their

arguments and answer the questions posed by the members of the Panel.

63. Before the hearing was concluded, both Parties expressly stated that they had no objection to the procedure adopted by the Panel and that their right to be heard had been respected.

V. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

64. The Panel confirms that it carefully heard and considered in its decision all the submissions, evidence and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

A. The Appellant

65. The Agent summarises his submissions as follows in his Appeal Brief:

- *“The FIFA general secretariat did not have jurisdiction or authority to determine whether [the Agent] provided Football Agent Services without a licence or to impose sanctions (or determine consequences) because: (i) the FFAR does not confer power on the FIFA general secretariat to make such determinations; and (ii) the conduct giving rise to the alleged infringement of the FFAR does not fall within the scope of the FFAR as it does not have an international dimension or concern an international transfer or transaction (rather the conduct is of a domestic nature and therefore falls within the scope of the national football association – in this case, The FA).*”

➤ *As to liability, [the Agent] has not infringed Article 5(1)(b) FFAR because:*

- i. He was not 'found' by a body with jurisdiction to make the finding and/or after any proper due process to have provided Football Agent Services without a licence;*
- ii. He was not found in the 24 months prior to applying for his FIFA licence to have provided Football Agent Services without a licence;*
- iii. Further and alternatively, [the Agent] did not in fact provide Football Agent Services to the Player in January 2024 (which were in fact provided by Mr Bayliff);*

➤ *As to sanction: in the event [the Agent] is found to have infringed the FFAR, the sanction imposed by FIFA of a 16 month ban on [the Agent] being able to hold an active FIFA licence was unlawful and/or misconceived and/or disproportionate”.*

66. On this basis, the Agent submits the following prayers for relief in his Appeal Brief:

- “a. The appeal is admissible.*
- b. The Decision dated 16 September 2024 be set aside.*
- c. A declaration that the FIFA general secretariat did (and/ or does) not have jurisdiction or authority to (i) determine whether Mr Beckett provided Football Agent Services*

without a licence, and/or (ii) to impose consequences following any finding that Mr Beckett provided Football Agent Services without a licence (other than the provisional suspension of Mr Beckett’s licence pending determination of the consequences by a body with jurisdiction to do so).

d. An order that Mr Beckett’s FIFA licence be immediately reactivated or otherwise reinstated.

e. If the Panel considers it appropriate to determine the following issues:

i. A declaration that Mr Beckett has not infringed or otherwise acted contrary to any requirements of the FIFA Football Agent Regulations.

ii. In the event the Panel were to find that Mr Beckett infringed the FIFA Football Agent Regulations, that the Panel (i) impose a proportionate sanction in the form of a warning as to future conduct or a reprimand; alternatively (ii) impose a proportionate sanction by reducing the sanction/ consequences imposed by the Decision to the extent the Panel considers appropriate (including if considered appropriate in the form of a suspended sanction), and (iii) order that Mr Beckett’s FIFA licence be reactivated or otherwise reinstated once the sanction (if any) is served or as the Panel considers appropriate.

- f. *Any costs of the arbitration be paid by FIFA.*
- g. *Mr Beckett be granted a significant contribution to his legal costs”.*

B. The Respondent

67. FIFA summarises its submissions as follows in its Answer:

- *“The essence of the matter at stake is simple: The General Secretariat applied the FFAR and in accordance with Articles 5 and 17, it (1) investigated the eligibility requirements, (2) notified the findings of its investigation and (3) applied the consequences in the form of the ‘automatic provisional suspension’. Not more, not less.*
- *The Appellant attempted to circumvent the FFAR by replacing himself, on paper and purely formalistically, with Mr Bayliff in a ceremonial role as the official signatory while arguing that his own role in the transaction was purely administrative (while being a shareholder of the agency and holding the title of Director – Head of Talent Representation). The Appellant was, always, the main point of contact and correspondent of the Club (and the Player) throughout the negotiations that he personally conducted. This manifestly qualifies as rendering Football Agent Services.*
- *This case is a matter of (in)eligibility and not of sanction, despite the Appellant’s assertions and mischaracterizations that this case would be one of disciplinary nature”.*

68. On this basis, FIFA submits the following prayers for relief in its Answer:

- “(a) reject the Appellant’s relief;*
- (b) confirm the Appealed Decision in its entirety;*
- (c) order the Appellant to bear the full costs of these arbitration proceedings; and*
- (d) order the Appellant to make a contribution to FIFA’s legal costs and expenses”.*

VI. JURISDICTION

69. Article R47 CAS Code provides the following:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

70. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) FIFA Statutes (May 2024 edition) which provides as follows:

“Appeals against final decisions passed by FIFA and its bodies shall be lodged with CAS within 21 days of receipt of the decision in question”.

71. Furthermore, the operative part of the Appealed Decision provides, *inter alia*, as follows:

“[T]his is a final decision of the FIFA general secretariat for the purposes of article 50 paragraph 1 of the FIFA Statutes”.

72. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by the Parties.

73. It follows that CAS has jurisdiction to adjudicate and decide on the present dispute.

VII. ADMISSIBILITY

74. The Appealed Decision was communicated to the Agent on 16 September 2024. The Agent filed his Statement of Appeal with CAS on 6 October 2024, i.e., within the time limit of 21 days set by Article 50(1) FIFA Statutes. The Statement of Appeal further complied with the other conditions set forth in Article R48 CAS Code, including the payment of the CAS Court Office fee.

75. It follows that the appeal is admissible.

XIII. APPLICABLE LAW

76. The Parties submit that according to Article 49(2) FIFA Statutes and Article R58 CAS Code, the Panel shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

77. Article R58 CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision

is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

78. Article 49(2) FIFA Statutes provides the following:

“The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”.

79. The Panel finds that, pursuant to Articles R58 CAS Code and 49(2) FIFA Statutes, the regulations of FIFA are primarily applicable, in particular, the FFAR (2022 edition). Additionally, should the need arise to fill a possible gap in the various rules of FIFA, Swiss law is applicable.

IX. MERITS

A. The Main Issues

80. The applicable regulatory framework is mainly comprised of Articles 5, 17 and 21 FFAR and the definitions of “Football Agent Services” and “Transaction” as set out in the FFAR. Article 21 FFAR is currently suspended.

81. The afore-mentioned articles and definitions are set forth below for ease of reference:

“Football Agent Services: football-related services performed for or on behalf of a Client, including any negotiation, communication relating or preparatory to the same, or other related activity, with the purpose, objective and/or intention of concluding a Transaction”.

“Transaction: (i) the employment, registration or deregistration of a player with a club or a Single-Entity League; (ii) the employment of a coach with a club, Single-Entity League or a member association; (iii) the transfer of the registration of a player from one club to another; (iv) the creation, termination or variation of an Individual’s terms of employment”.

“Article 5: Eligibility requirements

1. *An applicant must:*

a) *upon submitting their licence application (and subsequently thereafter, including after being granted a licence):*

i. *have made no false or misleading or incomplete statements in their application;*

ii. *never have been convicted of a criminal charge, including any related settlements, regarding matters related to: organised crime, drug trafficking, corruption, bribery, money laundering, tax evasion, fraud, match manipulation, misappropriation of funds, conversion, breach of fiduciary duty, forgery, legal malpractice, sexual abuse, violent crimes, harassment, exploitation or child or vulnerable young adult trafficking;*

iii. *never have been the subject of a suspension of two years or more, disqualification or striking off by any regulatory authority or*

sports governing body for failure to comply with rules relating to ethics and professional conduct;

iv. *not be an official or employee of FIFA, a confederation, a member association, a league, a club, a body that represents the interests of clubs or leagues or any organisation connected directly or indirectly with such organisations and entities; the only exception is where an applicant has been appointed or elected to a body of FIFA, a confederation or a member association, representing the interests of Football Agents;*

v. *not hold, either personally or through their Agency, any interest in a club, academy, league or Single-Entity League.*

b. *in the twenty-four months before the submission of a licence application, never have been found performing Football Agent Services without the required licence;*

c) *in the five years before the submission of a licence application (and subsequently thereafter, including after being granted a licence):*

i. *never have declared or been declared personally bankrupt or been a majority shareholder, director or key office holder of a business that has declared*

- bankruptcy, entered administration and/or undergone liquidation;*
- d) *in the 12 months before the submission of a licence application (and subsequently thereafter, including after being granted a licence):*
- i. *not have held any interest in any entity, company or organisation that brokers, arranges or conducts sports betting activities whereby a wager is placed on the outcome of a sporting event in order to win money.*
2. *An applicant must satisfy the eligibility requirements:*
- a) *at the time of their application, in order to take the exam; and*
- b) *at all times after obtaining a licence, in accordance with article 17.*
3. *The FIFA general secretariat is responsible for investigating compliance with the eligibility requirements”.*
- “Article 17: Compliance with ongoing licensing requirements**
1. *If a Football Agent fails to:*
- a) *meet the eligibility requirements at any time;*
- b) *pay the annual licence fee to FIFA within the deadline stipulated on the Platform;*
- c) *comply with the CPD requirements in a calendar year; or*
- d) *comply with their reporting obligations;*
- their licence shall automatically be provisionally suspended.*
2. *The FIFA general secretariat is responsible for investigating compliance with the requirements in paragraph 1 of this article.*
3. *If paragraph 1 a) of this article applies:*
- a) *the FIFA general secretariat will notify the Football Agent that it believes there are grounds to consider that they do not meet the eligibility requirements, and of the automatic provisional suspension; and*
- b) *the matter will be referred to the FIFA Disciplinary Committee for its decision.*
4. *If one or more of the circumstances described in paragraphs 1 (b), (c) or (d) of this article apply:*
- a) *the FIFA general secretariat will notify the Football Agent of their non compliance and of the automatic provisional suspension; and*
- b) *if the Football Agent fails to rectify their non-compliance within sixty days of their licence being automatically provisionally suspended, their licence shall be withdrawn”.*

“Article 21: Competence and enforcement

1. *The FIFA Disciplinary Committee and, where relevant, the independent Ethics Committee are competent to impose sanctions on any Football Agent or Client that violates these Regulations, the FIFA Statutes or any other FIFA regulations, in accordance with these Regulations, the FIFA Disciplinary Code and the FIFA Code of Ethics. FIFA has jurisdiction regarding:*

- a) any conduct connected to a Representation Agreement with an international dimension (cf. article 2 par. 2); or*
- b) any conduct connected to an international transfer or international Transaction.*

2. *The relevant member association is responsible for imposing sanctions on any Football Agent or Client that violates their national football agent regulations. The relevant member association has jurisdiction regarding:*

- a) any conduct connected to a Representation Agreement without an international dimension (cf. article 2 par. 3); or*
- b) any conduct connected to a national transfer or national Transaction.*

3. *The FIFA general secretariat shall monitor compliance with these Regulations. In particular:*

- a) Any party that receives a notice requesting information shall*

cooperate in full by complying, upon reasonable notice, with requests for any documents, information or any other material of any nature held by it, as well as with requests to procure and provide any documents, information or any other material of any nature not held by the party but which the party is entitled to obtain. Failure to comply with these requests from the FIFA general secretariat may lead to sanctions being imposed by the FIFA Disciplinary Committee. If requested by the FIFA general secretariat, a document (or an excerpt) shall be provided in English, French or Spanish.

b) Electronic notifications through the Platform or TMS or sent by email to the address provided on the Platform or TMS by the parties are considered valid means of communication and will be deemed sufficient to establish time limits.

c) Following an investigation, the FIFA general secretariat may refer cases of non-compliance with these Regulations to the FIFA Disciplinary Committee in accordance with the FIFA Disciplinary Code.

d) Following an investigation, the FIFA general secretariat may refer cases of ethical misconduct in relation to these Regulations to the independent Ethics Committee in accordance with the FIFA Code of Ethics”.

82. To uphold the Appealed Decision several issues would have to be addressed by the Panel. However, this is all subject to the fundamental question of whether the FIFA General Secretariat was competent to issue the Appealed Decision. The Panel will therefore address this issue first.

a. The positions of the Parties

i. The Agent's position

83. With respect to the jurisdiction of the FIFA General Secretariat, the Agent submits as follows in his Appeal Brief:

- *'In the [Appealed Decision] the FIFA general secretariat fails to identify clearly the jurisdictional basis or authority for its decision. The [Appealed Decision] refers to Article 17 FFAR; however, neither Article 17, nor any other provision in the FFAR, confers jurisdiction or authority on the FIFA general secretariat to make the Determinations.*
- *Article 17(2) provides that the FIFA general secretariat is responsible only for 'investigating compliance with the requirement in paragraph 1 of article 17'. Article 17(1) lists various ongoing requirements for agents to retain their license, including paying the annual fee, compliance with CPD and meeting the eligibility requirements. The effect of this is that the FIFA general secretariat should investigate whether fees have been paid and CPD requirements met and whether there has been a breach of the eligibility conditions in Article 5, including whether there has been a finding within the meaning in Article 5(1)(b).*

However, it does not confer authority on the FIFA general secretariat itself to make a finding as to whether an agent engaged in Football Agent Services without a licence.

- *Further support for this position can be found in Article 21. Whilst currently suspended, it sets out the powers that it was envisaged that the FIFA general secretariat would have. None of the sub-paragraphs of Article 21(3) provide for the general secretariat to determine either whether an agent has infringed the FFAR or the consequences of any such infringement.*

- *On the contrary, Article 17(3) (which is in force) expressly provides that cases of potential non-compliance with Article 17(1)(a) (which includes an infringement of Article 5(1)(b)) are to be referred to the FIFA Disciplinary Committee [...] for its decision. If a matter of non-compliance with the FFAR had been brought before the [FIFA Disciplinary Committee], there would have been a proper process in accordance with the FIFA Disciplinary Code [...] and the [FIFA Disciplinary Committee] could (if it found there was an infringement) have imposed a sanction from the range of sanctions in Article 6 of the Disciplinary Code, which includes a warning and reprimand.*

- *The FIFA general secretariat did not have the right to usurp the functions of the FDC. Further, the fact the FIFA general secretariat sought incorrectly to deal with the matter is part of the reason it did not impose a proportionate sanction: instead of considering the range of sanctions available to the [FIFA Disciplinary Committee],*

the general secretariat was instead forced to contrive an outcome by reference to eligibility criteria which has resulted in a disproportionate ban (addressed further below).

- *In the circumstances, the FIFA general secretariat did not have authority to make the Determinations and the [Appealed Decision] must be set aside”.*

ii. *FIFA’s position*

84. With respect to the jurisdiction of the FIFA General Secretariat, FIFA submits as follows in its Answer:

- *‘Firstly, and despite the Appellant’s artificial creation of the notion ‘Determinations’ and his questioning of the General Secretariat’s ‘authority’, the content of Article 5(1) juncto Article 17 FFAR is self-explanatory: [...]*
- *At this stage, it is worth recalling the relevant definition of Football Agent Services and Transaction in the FFAR: [...]*
- *When applying the above sequence of different articles of the FFAR to the matter at stake, the following conclusion can be drawn:*
 - *The Appellant was found to have performed Football Agent Services from at least 8 January 2024 until and including 17 January 2024 and therefore within the twenty-four months before the Appellant’s submission of the license application on 27 March 2024 (i.e. the period between 27 March 2022 and 27 March 2024).*

This finding was not only made by the General Secretariat but also independently by The FA, when it informed FIFA that ‘The FAs investigation concluded that the individual [the Appellant] did perform agent services on the Transaction.’ The decision issuing a formal warning to Mr Bayliff and [Aston Villa] stated that: ‘Having considered the particular facts and circumstances of this matter, The FA are of the view that [the Agent] performed Football Agent Services on the Transaction on behalf of Arete Ltd at a time where he was not permitted to do so. [...]’.

- *Within the scope of its ‘responsibility’, the General Secretariat investigated the Appellant’s compliance with the obligations to ‘meet the eligibility requirements at any time’ by submitting a request for information to the Appellant and [Aston Villa] on 3 September 2024.*
- *On 16 September 2024, and after investigating the Appellant’s compliance with the eligibility requirements, the General Secretariat notified the Appellant that there are grounds to consider that he does not meet the eligibility requirements since ‘the general secretariat is convinced that the Agent has been found performing Football Agent Services without the required licence’ and of the consequence that ‘the licence of the Agent must be provisionally suspended’.*

- *In view of the above, it is abundantly clear that it is the General Secretariat’s*

'responsibility' to make the relevant 'Determination'. In the FFAR, there is simply no mention whatsoever of any other 'body' that is entitled to investigate compliance and arrive to the conclusion that 'it believes there are grounds to consider that they [the Football Agents] do not meet the eligibility requirements' and to notify the relevant ineligible agent 'of the automatic provisional suspension'.

- *It is therefore entirely unclear how the Appellant considers that it would be possible for the General Secretariat to (1) comply with its responsibility to investigate compliance, (2) to notify the relevant Football Agent of its belief that there are grounds to consider that he does not meet the eligibility requirements and (3) entitling it on that basis to notify an automatic provisional suspension, while arguing that the combination of Article 5 and 17 FFAR 'does not confer authority on the FIFA General Secretariat itself to make a finding as to whether an agent engaged in Football Agent Services without a licence'. This is plainly nonsensical.*
- *The General Secretariat applied the three phases of the FFAR that are currently in force: (1) investigate the eligibility requirements, (2) notify its findings or assessment ('believes there are grounds to consider') of such investigation, and (3) process the 'automatic provisional suspension' based on its investigation and its belief on the grounds of such investigation. The three mentioned phases are the scope and limit of this proceeding, considering that the fourth and separate step is currently suspended: the referral to the FIFA Disciplinary Committee*

[...] for its decision on the disciplinary consequences.

- *The Appellant seeks to capitalize on the referral to the Disciplinary Committee being suspended by relying on Article 21 FFAR and arguing that 'whilst currently suspended, it sets out the powers that it was envisaged that the FIFA general secretariat would have' and the fact that Article 21(3) FFAR allegedly does not allow the General Secretariat to determine an infringement or the consequences thereof. It is ironic that the Appellant seeks to rely on an Article of the FFAR that is currently suspended, especially since the Appellant benefits from its inapplicability and the avoidance of effective disciplinary sanctions (e.g. a fine, a ban from any football related activities or the withdrawal of a football agent license in accordance with the disciplinary measures mentioned in Article 6 of the FIFA Disciplinary Code [...]).*
- *In general, the Disciplinary Committee's role would have been to decide on the imposition of sanctions (or not) on any Football Agent or Client that violated the FFAR. In terms of the failure to comply with the eligibility requirements, the Disciplinary Committee would have assessed and decided if the investigation conducted by the General Secretariat justified the imposition of a sanction as per Article 6 FDC or if the matter should be closed and the provisional suspension lifted.*
- *The General Secretariat did not 'usurp the functions of the FDC' or 'impose a disproportionate ban' as misleadingly held by the Appellant. At the risk of repetition, the General Secretariat*

exclusively operated within the scope of its obligations pursuant to the FFAR: (1) investigate the eligibility requirements, (2) notify its findings or assessment of the investigation, and (3) apply the “automatic provisional suspension” based on that investigation” (emphasis in original).

b. The findings of the Panel

i. Introductory remarks

85. The Panel finds that Articles 5, 17 and 21 FFAR, considered in unison, contemplate the following steps:

- i) If the FIFA General Secretariat forms a **belief** upon investigation that there are grounds to consider that a Football Agent does not meet the eligibility requirements, in that case;
- ii) the FIFA General Secretariat is required to inform the Football Agent of that **belief**;
- iii) the FIFA General Secretariat is required to implement an automatic **provisional suspension** on the Football Agent; and
- iv) the FIFA General Secretariat is required to refer the matter to the FIFA Disciplinary Committee for a **decision**.

86. The Panel finds that the formation of a “belief” is not tantamount to a “finding”, a “decision” or a “determination”. The distinction between such terms is not an artificial creation of the Agent, as argued by FIFA. The Panel finds that the

formation of a belief is merely a *prima facie* assessment that, according to the FIFA General Secretariat, “there are grounds to consider that they do not meet the eligibility requirements”, which is a trigger required for i) the opening of disciplinary proceedings by the FIFA Disciplinary Committee; and ii) for the automatic imposition of a provisional suspension pending such proceedings.

87. Conversely, a decision of the FIFA Disciplinary Committee can extend to both a determination as to whether the eligibility requirements are satisfied, as well as the consequences in case it is determined that they are not satisfied. Moreover, if the FIFA Disciplinary Committee were to determine that the eligibility requirements are satisfied, it can lift the provisional suspension of the license imposed by the FIFA General Secretariat.

88. However, what is problematic here is that, whereas the FIFA General Secretariat, in principle, legitimately took the first three steps in the process, that is: i) it formed a belief that there were grounds to consider that the Agent did not meet the eligibility requirements; ii) it informed the Agent of that belief; and iii) it implemented an automatic provisional suspension on the Agent, it was unable due to the suspension of Article 21 FFAR from taking the fourth step, that is, the matter could not be referred to the FIFA Disciplinary Committee for a decision.

ii. The suspension of Article 21 FFAR

89. Indeed, as also confirmed in the Appealed Decision, because of the suspension of Article 21 FFAR, the

- FIFA General Secretariat was barred from referring matters that fall under the scope of the FFAR to the FIFA Disciplinary Committee. In this respect, it is to be noted that FIFA, when asked by the Panel, itself argued at the hearing that the jurisdiction of the FIFA Disciplinary Committee could not be based on Article 17.3(b) FFAR alone, because this might be seen as a circumvention of the suspended Article 21 FFAR, a submission the Panel has to adhere to in this case.
90. Moreover, when asked at the hearing, FIFA indicated that there is no clarity on when the suspension of Article 21 FFAR may be lifted.
- iii. *The nature of the automatic provisional suspension of the Agent's license*
91. Turning to the nature of the automatic provisional suspension of the Agent's license, the Panel notes that FIFA, on the one hand, argued during the hearing that it is not an **indefinite** suspension of the Agent's license, because the suspension is limited to 24 months. On the other hand, FIFA also argued that the automatic provisional suspension is not **definite** since the suspension of Article 21 FFAR may be lifted, as a consequence of which the FIFA Disciplinary Committee may still decide on the matter before the provisional suspension expires, giving it a provisional character.
92. The Panel finds that FIFA's argument that the automatic provisional suspension of the license is not **indefinite** is correct in the sense that the Agent's license is only temporarily suspended until 17 January 2026, or at least he can reapply for a license after such date according to the Appealed Decision.
93. However, the Panel notes that if there is currently no FIFA body competent to **decide** whether the ongoing eligibility requirements are satisfied, this means that there is also no FIFA body competent to lift the provisional suspension. The Panel finds that this changes the nature of the provisional suspension imposed by the FIFA General Secretariat in the Appealed Decision. In reality, it is not a **provisional** suspension, but it is *de facto* a **definite or final** suspension of the Agent's license until 17 January 2026.
94. In other words, the FIFA General Secretariat has conflated its investigative powers with the power which would ordinarily reside in the FIFA Disciplinary Committee (if Article 21 FFAR had not been suspended) to decide, following a full-fledged disciplinary procedure, whether the Agent has, as a matter of fact (rather than a belief), failed to meet the eligibility requirements and what the ultimate consequences (as opposed to the provisional consequences) thereof should be, be it a definite suspension of the license, the ineligibility of the Agent to act as a Football Agent in the context of the FFAR, or otherwise.
95. To the extent FIFA argues that the finding that Football Agent Services were provided by the Agent without a license "*was not only made by the General Secretariat but also independently by The FA*", this does not impact on the Panel's findings, as there is no legal basis in the FFAR that allows the competence of the FIFA Disciplinary

Committee to decide to be substituted by a decision of a member association like The FA. In any event, The FA considered the matter from the perspective of the FAFAR, not from the perspective of the FFAR and it only pronounced disciplinary decisions concerning Mr Bayliff and Aston Villa, not concerning the Agent.

96. The Panel finds that the implementation of a *de facto* definite or final suspension of the Agent's license by a different body (the FIFA General Secretariat instead of the FIFA Disciplinary Committee) than the body afforded the jurisdiction to decide on the definite or final consequences (as opposed to the provisional consequences) lacks a legal basis and must be set aside.

97. The Panel is appreciative of the complicated situation faced by FIFA in its obligation to ensure compliance with the FFAR given the suspension of several provisions of the FFAR. However, in the absence of a body being conferred with the competence to decide on potential infringements of the FFAR and on the ultimate consequences thereof pending the suspension of, *inter alia*, Article 21 FFAR, such authority cannot simply be usurped by the FIFA General Secretariat without at least a temporary regulatory regime granting it the authority to do so.

B. Conclusion

98. Consequently, the Panel finds that the Appealed Decision is to be set aside as the FIFA General Secretariat was not competent to i) decide whether the Agent provided Football Agent

Services without a license; and ii) implement a *de facto* definite suspension on the Agent.

99. Since the Appealed Decision is set aside, there is no need to issue the declaratory relief sought in para. (c) of the Agent's prayers for relief. There is also no need to specifically state in the operative part of the Award that the Agent's license is reinstated (prayer for relief (d)), because without the Appealed Decision, the Agent's license remains in force. The Panel lacks the competence to rule on prayer for relief (e)(i), because this is the prerogative of the FIFA Disciplinary Committee. Prayer for relief (e)(ii) is raised only as an entirely subsidiary request, which in the circumstances does not arise for consideration.

100. All other and further motions or prayers for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on 6 October 2024 by Mr Jonathan Dominic Finbar Beckett against the decision issued on 16 September 2024 by the General Secretariat of the Fédération Internationale de Football Association is upheld.
2. The decision issued on 16 September 2024 by the General Secretariat of the Fédération Internationale de Football Association is set aside.
3. (...).
4. (...).

5. All other and further motions or prayers for relief are dismissed.

Football; Termination of the employment contract with a coach by the club without just cause; Forum shopping; Ordre public; Ordre public and res judicata; Distinction between res judicata and the internal binding effect of decisions; Assessment of res judicata; Horizontal and vertical disputes; Potestative clause

Panel

Prof. Ulrich Haas (Germany), Sole Arbitrator

1. In order for an individual to be engaged in forum shopping, this being a manifestation of procedural bad faith from the party bringing the claim, an intent to “game the system” must be established.
2. An arbitral tribunal sitting in Switzerland is bound to the Swiss ordre public. The Swiss Federal Tribunal (SFT) differentiates between procedural and substantive public policy. In particular two concepts form part of the procedural ordre public, i.e. *res judicata* and the intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) of decisions. Both concepts must be complied with *ex officio* by an arbitration panel sitting in Switzerland. A procedural violation of public policy occurs when fundamental and generally recognised procedural principles are violated, the non-observance of which is an intolerable contradiction of the sense of justice, so that the

decision appears to be irreconcilable with the legal and value system applicable in a state under the rule of law.

3. The arbitral tribunal violates the procedural ordre public if it disregards the *res judicata* effect of an earlier decision when making its decision or if it deviates in its final decision from the view it expressed in a preliminary decision regarding a substantive preliminary issue.
4. The purpose of *res judicata* is to ensure that the content of a formally final decision is upheld in further separate proceedings. To this end, *res judicata* differentiates between two situations: in case both proceedings are identical, the second seized adjudicatory body is barred from reviewing the first decision. In case the matter decided by the court seized first is prejudicial for the outcome of the court seized second, the latter is bound to the findings of the first court. *Res judicata* protects the decision issued in one proceeding from being challenged in a new proceeding. Consequently, *res judicata* only comes into play, if the two proceedings are two distinct and separate proceedings. Differently from *res judicata*, the internal binding effect of decisions deals with the effects of a decision in the context of the proceedings, in which the decision has been issued. According to this concept, a court cannot deviate from a decision (e.g. a preliminary decision) that it has previously rendered. The court is, thus, bound by its decision. Furthermore, the court is also bound by the legal assessment of the appeal

instance, in case the dispute is referred back to it, because here, too, the appeal decision was rendered in the same proceedings. In addition, also the appeal instance itself is bound to its decision should the first instance – after the referral back to it – issue a new decision that is being again appealed.

5. The starting point for determining the scope of *res judicata* is the operative part of the award and not the grounds of the respective decision. Albeit, the grounds of the decision may be complimentary assessed in order to derive the meaning and/or the scope of the operative part. Courts and authorities are authorised to assess preliminary questions from another area of responsibility provided that the competent authorities and courts have not yet issued a judgment with *res judicata* effect in the specific case. The answer to the preliminary question is merely a consideration of the judgement and does not participate in the *res judicata* effect of the judgement.
6. Article 75 of the Swiss Civil Code (SCC) is not determinative for every kind of disputes that may arise within the context of an association but rather deals with “vertical disputes” only. CAS jurisprudence differentiates between disputes arising from decisions issued by organs of an associations, namely vertical and horizontal disputes. Vertical disputes are characterized by the fact that the association issuing the decision thereby shapes, alters, or terminates the membership relation between itself and the member

concerned, often manifesting in decisions such as sporting sanctions or purely disciplinary issues, along with eligibility or registration issues. A horizontal dispute pertains to disputes between association members and does not involve the association as a party. In horizontal disputes the association merely acts as an adjudicator and does not have a direct interest in the outcome of the dispute other than applying the applicable provisions in a proper and just way.

7. A potestative condition is a condition whose fulfilment is completely within the power of the obligated party. A potestative clause is often used in reference to a contractual term that allows one party to unilaterally terminate a contract without providing a justification and often at a reduced amount of compensation, if any. FIFA regulations are silent on the limits of contractual autonomy and the need for reciprocal clauses. The validity of such clauses must be assessed first and foremost in light of the subsidiarily applicable law.

I. PARTIES

1. DVSC Futball Szervezo ZRT (the “Appellant” or the “Club”) is a Hungarian professional football club headquartered in Debrecen, Hungary. The Club is affiliated to the Hungarian Football Federation, which in turn is an affiliated member of the *Fédération Internationale de Football Association* (“FIFA”).

2. Juan Carillo Milan (the “Respondent” or the “Coach”) is a professional football coach of Spanish nationality.
3. The Appellant and the Respondent shall, where appropriate, be jointly referred to as the Parties (the “Parties”).

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties’ submissions and evidence examined during the course of the present proceedings. Additional facts and allegations found in the Parties’ submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award (the “Award”) only to the submissions and evidence it considers necessary to explain his reasoning.

A. Background facts

5. On 7 November 2021, the Parties entered into an employment contract (the “Contract”), valid between 8 November 2021 and 30 June 2023, by which, *inter alia*, the following was agreed:

“IV. Benefits

8.1 The [Club] pays the [Coach] a basic personal salary, the amount of which is HUF 3.850.000 net per month for the duration of the contract, i.e., HUF 3 million to eight hundred and fifty thousand, gross HUF 4.577.076.

[...]

9. In addition to the basic salary specified in point 8.1, the [Club] undertakes to pay the following benefits to the [Coach] in addition to the salary, taking into account the position achieved according to the announced final result of the given NB Season I championship:

9.1 Benefits based on the ranking achieved in the 2021/2022 league season

<i>NB Championship Rank</i>	<i>Amount of benefit (HUF)</i>
<i>1st place</i>	<i>18.000.000</i>
<i>2nd place</i>	<i>16.500.000</i>
<i>3rd place</i>	<i>15.000.000</i>
<i>4th place</i>	<i>12.750.000</i>
<i>5th place</i>	<i>12.000.000</i>
<i>6th place</i>	<i>11.250.000</i>
<i>7th place</i>	<i>9.000.000</i>
<i>8th place</i>	<i>8.250.000</i>
<i>9th place</i>	<i>7.500.000</i>
<i>10th place</i>	<i>6.750.000</i>
<i>11th place</i>	<i>-</i>
<i>12th place</i>	<i>-</i>

9.2. Benefits based on the ranking achieved in the 2021/2022 league season.

NB I Championship Rank	Amount of benefit (HUF)
1 st place	24.000.000
2 nd place	22.000.000
3 rd place	20.000.000
4 th place	17.000.000
5 th place	16.000.000
6 th place	15.000.000
7 th place	12.000.000
8 th place	11.000.000
9 th place	10.000.000
10 th place	9.000.000
11 th place	-
12 th place	-

[...]

IX TERMINATION, IMMEDIATE TERMINATION

17. With regard to the status of the [Coach] as a senior employee, the [Club] may terminate this contract with a unilateral legal declaration (termination), without any obligation to state reasons, in spite of the specified period of time, as follows:

- before the 30th of June 2022, by paying to the [Coach] the amount of the basic salary until the 30th of June 2022 and the end-of-season bonus corresponding to the placement at the time of termination.
- If the [Club] nevertheless justifies the termination, the Parties shall consider the following in particular as a ground based on the Employee's ability to justify the employer's lawful termination:
 - if the first team is eliminated from NB I, based on the announced final result of the 2021/2022 league season;
 - if the first team is relegated in three consecutive rounds at any time after the 5th round in the NB I championship season 2022/2023 and it is four or more points behind the 10th placed team.

[...]

X. MISCELLANEOUS PROVISIONS

[...]

22. The parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement procedure of the FIFA Dispute Resolution Chamber.

23. The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not regulated in this contract, the Hungarian Civil Code, The Sports

Act, the LC and other relevant law and regulation shall prevail”.

6. On 27 June 2022, the Appellant unilaterally terminated the Contract pursuant to Article 17 and Article 210.1(b) of the Hungarian Labour Code (the “Hungarian Labour Code”). To that end, the Appellant furnished the Respondent with the following termination letter (the “Termination Letter”):

“In view of the fact that the [Coach] qualifies as a senior employee, pursuant to point b) of Article 210 (1) of the Hungarian Labour Code and the first sentence of point 17 of Chapter IX of the Employment Contract, the [Club] is entitled to terminate the employment relationship of the [Coach] with a unilateral legal declaration (termination), without the obligation to state reasons, on the basis of which the [Club] has decided as described above.

The [Coach] may submit a claim in 3 copies against the present termination notice to the Debrecen Regional Court (1. Perényi utca, Debrecen, H-4026) within 30 days of its receipt. There is no suspensory effect of bringing an action”.

7. On 1 July 2022, the Respondent replied to the Appellant’s termination, stating that his dismissal was not in accordance with Hungarian labour laws and offering an amicable settlement to the dispute, alongside payment of nine months’ worth of his salary and the end-of-season bonus.

B. The Respondent’s claims before FIFA and Hungarian courts

8. On 24 July 2022, the Respondent filed a claim against the Appellant with FIFA on the grounds of termination without just cause.

9. On 26 July 2022, the Respondent filed another claim against the Appellant pertaining to his termination, this time before the Tribunal of Székesfehérvár. In his claim, the Respondent argued that the dismissal was invalid, given that it had not been signed and improperly listed possible legal remedies, and unlawful, as it allegedly had no legal basis. Consequently, the Respondent contended, the Appellant was liable to pay HUF 72,924,912 in compensation.
10. On 22 November 2022, FIFA’s Player’s Status Chamber (“PSC”) rendered its decision (“First PSC Decision”) on the Respondent’s claim, finding that it was inadmissible due to the Respondent’s purported forum shopping.
11. On 24 November 2022, the Tribunal of Székesfehérvár determined it lacked jurisdiction to hear the Respondent’s claim. Thus, the Tribunal referred the case to the Debrecen Regional Court.
12. On 1 February 2023, the Respondent signed an employment contract with the Spanish club CD Lugo (the “Lugo Contract”), agreeing on a five-month term in exchange for a gross monthly salary of EUR 9,000 (*i.e.*, EUR 45,000 for the total compensation under the Lugo Contract).
13. On 24 February 2023, the Respondent withdrew his claim before the Debrecen Regional Court.
14. On 6 March 2023, the Lugo Contract was terminated by CD Lugo and the Respondent. On account of the early termination, the Respondent was paid EUR 36,000 gross (EUR 34,200 as compensation and EUR 1,800 as outstanding salaries corresponding to February).

15. On 20 March 2023, the Debrecen Regional Court decided to terminate the procedure and order the Respondent to pay the costs of the proceedings and legal fees.
16. On 4 April 2023, the aforementioned decision was notified to the Parties.

C. CAS Appeal

17. On 7 March 2023, the Respondent filed an appeal against the First PSC Decision before the Court of Arbitration for Sport (“CAS”). The proceedings were docketed as CAS 2023/A/9477.
18. On 14 February 2024, the CAS issued its decision (the “First CAS Award”), ordering the following:

- “1. *The appeal filed on 7 March 2023 by Joan Carrillo Milan against the decision rendered on 22 November 2022 by the FIFA Players’ Status Chamber is upheld.*
2. *The decision issued on 22 November 2022 by the FIFA Players’ Status Chamber is annulled.*
3. *The case is referred back to the FIFA Players’ Status Chamber to decide on the merits of the dispute.*
4. *The costs of the arbitration, to be determined and served separately to the parties by the CAS Court Office, shall be borne by FIFA.*
5. *FIFA is ordered to pay CHF 3’000 to Joan Carrillo Milan as a contribution to his legal fees and other expenses incurred in connection with this procedure.*
6. *All other and further motions or prayers for relief are dismissed”.*

19. In reaching its determination, the sole arbitrator reasoned, *inter alia*, the following:

- The law applicable to the merits consisted of, primarily, FIFA Regulations. In the event that the need arose to interpret or fill a gap within the regulation, Swiss law would apply. Finally, for questions not covered by FIFA Regulations, then Hungarian law would apply as the law chosen by the parties; and
- In order for a Coach to be engaged in forum shopping, this being a manifestation of procedural bad faith from the party bringing the claim, an intent to “*game the system*” must be established. In the sole arbitrator’s opinion, there was no bad faith from the part of the Coach as he believed that the “*prudent and careful act was to file his claim*” before Hungarian courts considering the Termination Letter and, importantly, the comparatively short prescription period to bring such claims before Hungarian courts (*i.e.*, 30 days as opposed to two years in the case of claims brought before the FIFA Football Tribunal).

D. The Appealed Decision

20. On 16 February 2024, FIFA acknowledged the First CAS Award and, given that the dispute had been referred back, registered the Parties’ dispute under a new reference number.
21. On 5 March 2024, the Coach filed its claim before the PSC, requesting the following:

“Please oblige the Respondent Club of

5.1. (i) payment of the gross amount HUF 50.805.544,- (in words fifty million eight hundred five thousand and five hundred and forty-four [sic] Hungarian forints as the remuneration until the 30th June 2023, and

5.2. (ii) HUF 24.000.000,- (in words twenty-four million Hungarian forint) as a general calculated compensation for the bonus payment (according to the ‘loss of a chance’ cases scheme), alternatively HUF 20.000.000,- (in words twenty million Hungarian forints) as a compensation for the bonus payment (regarding the result of the Respondent in fact)

5.3. (iii) mitigate the claim with amount of the remuneration received from CD Lugo was 12.778.318,- Ft

[41] Altogether [sic] ((i) + (ii) - (iii)) HUF 62.027.226,- (in words sixty-two million and twenty seven thousand and two hundred and twentysix [sic]) and 12% p.a. Interest rate from the date of 27th June 2022 until the effective payment date of the claim above.

Alternatively - with regard to the amount of the compensation of the bonus for the season 2022/23 - HUF 58.027.226,- (in words fifty-eight million and twenty seven thousand and two hundred and twentysix [sic]) and 12% p.a. Interest rate from the date of 27th June 2022 until the effective payment date of the claim above”.

22. The Coach argued, in substantiating his requests, that the Club had unilaterally terminated the Contract without just cause, failing to (i) make full payment of the compensation due under the Contract, (ii) execute the termination by the designated person under the Contract, and (iii) correctly identify the proper forum to file an appeal.

23. On 2 April 2024, the Club filed its answer to the Coach’s claims, requesting the PSC to:

“Based on the above, the respondent primarily asks the Honourable FIFA to establish the lack of jurisdiction/competence in the matter and to reject the claimant’s claim without a substantive investigation and to terminate the proceedings.

If the Honourable FIFA does not reject the claimant’s claim despite its lack of jurisdiction/competence without a substantive investigation, or does not terminate the proceedings, then the respondent asks, as an alternative, to reject the claimant’s claim request, owing to the fact that the claimant’s claim is unfounded both in its legal basis and in its amount.

The respondent asks the Honourable FIFA to oblige the claimant to pay the respondent’s costs arising from the procedure”.

24. In the proceedings before the PSC, the Club challenged FIFA’s jurisdiction, contending that the Hungarian labour courts were competent to resolve the dispute. Furthermore, the Club argued that the Coach was estopped from continuing its claim before FIFA as the Hungarian courts had already heard the Parties’ case on the merits, with the Coach subsequently withdrawing its claim as it anticipated to lose on the merits.

25. On the merits, the Club refuted the Coach’s claims, stating that (i) the Contract did not stipulate any payment of additional benefits by the date of the termination; (ii) the Termination Letter was executed on behalf of the employer and by someone entitled to exercise such rights on its behalf; (iii) the Appellant correctly identified the appeal forum;

and (iv) no reasons for the termination had to be given per Hungarian labour laws.

26. On 29 August 2024, the PSC issued its decision on the Respondent's claim ("Appealed Decision"), ordering *inter alia* the following:

- "1. *The Football Tribunal has jurisdiction to hear the claim of the claimant, Juan Antonio Carrillo Milan.*
2. *The claim of the Claimant, Juan Antonio Carrillo Milan, is partially accepted.*
3. *The Respondent, DVSC Futball Szervező ZRT, must pay to the Claimant the following amount(s):*
 - *HUF 27,998,835 as compensation for breach of contract without just cause plus 5% interest p.a. as from 27 June 2022 until the date of effective payment.*
4. *Any further claims of the Claimant are rejected".*

27. On 27 September 2024, FIFA notified the Parties of the grounds of the Appealed Decision, which is summarised as follows:

- FIFA has jurisdiction over the dispute since the case has been referred to it by the First CAS Award;
- The Appellant has terminated the Contract without just cause. Despite recognizing that the Contract included a termination clause (*i.e.*, Article 17 of the Contract), the PSC found that the

clause was abusive as it could only be triggered by the employer;

- As a consequence of the PSC's dismissal of Article 17 of the Contract, the Contract did not regulate compensation in the event of termination. As such, the PSC applied Article 6(2) of Annex 2 of the Regulations for the Status and Transfer of Players (the "RSTP"), deciding to award the remaining value of the Contract, minus the mitigated amounts related to payments received by the Respondent on account of the Lugo Contract.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 18 October 2024, the Appellant filed a Statement of Appeal pursuant to Article R48 of the Code of Sports-related Arbitration (the "CAS Code") against the Appealed Decision, passed on 29 August 2024. Thereby, the Appellant requested that the dispute be heard by a sole arbitrator and named both the Coach and FIFA as respondents.
29. On 22 October 2024, FIFA requested to be excluded from these proceedings, arguing *inter alia* that the dispute between the Parties did not concern FIFA and that the PSC had merely acted as the competent decision-making body in the first instance.
30. On 25 October 2024, the Appellant informed the CAS Court Office that it withdrew its appeal against FIFA.
31. On 28 October 2024, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code.

32. On 31 October 2024, the Respondent consented to having the dispute heard by a sole arbitrator.
 33. On 15 December 2024, the Respondent filed his Answer to the Appellant's Appeal Brief pursuant to R55 of the CAS Code.
 34. On 17 December 2024, the Parties informed the CAS Court Office that neither of them considered it necessary for a hearing to be held in the present proceedings.
 35. On 6 January 2025, the CAS Court Office, pursuant to Article R54 of the CAS Code and in the absence of any challenge under Article R34 of the CAS Code, notified the Parties that the President of the CAS Appeals Arbitration Division had decided to constitute the Panel hearing the present matter as follows:

Sole Arbitrator:

Mr Ulrich Haas, Professor in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany
 36. On 13 January 2025, the CAS Court Office informed the Parties of the Sole Arbitrator's decision to order a second round of submission, which were limited to the following issues:

“- *standing to be sued (addressed in the Respondent's Answer at paras 29 et seq. particularly the reference to the award issued in CAS 2016/A/4836). Parties are invited to also include the award CAS 2021/A/7775 Nyíregyháza Spartacus Football Club Kft. v. Vukašin Poleksić in their discussions.*
- *if and to what extent the reasoning on the applicable law in the award CAS 2023/A/9477 is binding in this procedure.*
 - *if and to what extent the issue of forum shopping / competence of the FIFA Football Tribunal is binding in this procedure.*
 - *whether and to what extent the FIFA Interim Regulatory Framework related to the RSTP has any bearing on this case”.*
37. Additionally, on the same date, the CAS Court Office notified the Parties that Mr Adrian Hernandez, CAS Clerk, had been appointed as Clerk in this matter.
 38. On 22 January 2025, the Appellant filed its Secondary Submission in accordance with the Sole Arbitrator's instructions.
 39. On 31 January 2025, the Respondent filed his Secondary Submission in accordance with the Sole Arbitrator's instructions.
 40. On 14 February 2025, the CAS Court Office (i) confirmed that the Sole Arbitrator deemed himself sufficiently informed to issue this Award solely on the basis of the Parties' written submissions, (ii) informed the Parties that the evidentiary phase of the proceedings was closed, and (iii) furnished the Order of Procedure to be signed by the Parties.
 41. On 15 February 2025, the Respondent duly signed the Order of Procedure.
 42. On 18 February 2025, the Appellant duly signed the Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

43. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has accounted for and carefully considered all the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Arguments

44. The Appellant's submissions, in essence, may be summarised as follows:

- Preliminarily, the Appealed Decision did not sufficiently substantiate its ruling, instead merely making a determination without explaining the reasoning behind it or adduce legal provisions to support it;
- The Appealed Decision incorrectly applied FIFA Regulations. Given that the Parties executed an employment relationship in Hungary, the Contract was governed by Hungarian labour laws. As such, FIFA breached its own regulations (*i.e.*, Article 3 of the Procedural Rules Governing the Football Tribunal), as it did not sufficiently account for "*all relevant arguments, laws, and/or collective bargaining agreements that exist at national level*";
- The Appellant lawfully terminated the Contract, even without justifications, based on the

Articles 64(1)(b), 65(1) and 210(1)(b) of Act I of 2012 of the Hungarian Labour Code. As such, the termination on 27 June 2022 complied with the 30-day-notice requirement. Furthermore, such unilateral terminations are available to employers when the employee qualifies as a "*managerial employee*". The Coach meets these requirements on account of his position and salary as per Article 208 of the Hungarian Labour Code and acknowledged this fact in Article 2.3 of the Contract;

- On account of the above, FIFA wrongly argued that Article 17 of the Contract created an imbalance of power, since the Coach enjoyed a significant degree of prominence within the Club. Furthermore, he received a significant remuneration for his services compared to the standard salary paid on the Hungarian market; and
- Despite the finding in the First CAS Award, the Respondent has clearly committed acts of procedural bad faith by engaging in forum shopping.

45. Additionally, the Appellant submitted the following answers to the Sole Arbitrators questions dated 13 January 2025:

- Considering the issues of the case, in particular their contractual nature, the present dispute is purely horizontal and, therefore, FIFA's participation in these proceedings is not necessary to render the Award;

- The reasoning found in the First CAS Award as to the applicable law is not binding in these proceedings;
 - Likewise, nothing in the CAS Code or CAS jurisprudence points to any binding nature of the findings by the PSC; and
 - The FIFA Interim Regulatory Framework related to the RSTP is not applicable to the present case as it came into effect on 1 January 2025, while the Appealed Decision was issued on 27 September 2024.
46. On this basis, the Appellant submits the following requests for relief:
- “- to set aside the decision passed by the FIFA Players’ Status Chamber on 29 August 2024 the grounds thereof sent on 27th of September 2024 or change it in a way according to which the claim Juan Carillo Milan, be fully rejected;*
- to oblige the Frist Respondent, Juan Carillo Milan, to pay all the costs arising in accordance with the procedure”.*
- B. The Respondent’s Arguments**
47. The Respondent’s submissions, in essence, may be summarised as follows:
- The appeal must be declared inadmissible as the Claimant withdrew its claim against FIFA. It is true that FIFA stated that this dispute was of a purely horizontal nature. However, this is not correct. The Appellant has objected to FIFA’s jurisdiction, based on the forum shopping argument. Such objection – according to the Appellant – changes the nature of the dispute and transforms the latter into a vertical dispute, which requires that the appeal must (also) be directed against FIFA. This finding is further backed by the fact that the Appellant repeatedly questioned the validity of the Appealed Decision, criticising the lack of sufficient;
 - The Appellant’s arguments are without substance insofar as they rely on Hungarian law. As it has been repeatedly concluded, in particular in the First CAS Award, the applicable law in the matter at hand are the FIFA Regulations and, subsidiarily, Swiss law. Moreover, even if Hungarian law were to apply, it would only come into play subsidiarily, i.e. in case the FIFA Regulations are silent in relation to the issue in question (see, CAS 2021/A/7794, ¶¶ 94-96);
 - The lack of reasoning when terminating the Contract is in clear contravention of the well-established notion that early termination is an *ultima ratio* remedy (see, CAS 2021/A/7794, ¶¶ 157-159). Thus, when applying Article 14 (1) of the RSTP, it is clear that the Appellant did not terminate the Contract with just cause, as rightly found in the Appealed Decision (see, CAS 2022/A/8963, ¶ 72);
 - Article 17 (1) of the Contract shall be abusive, rendering it null and void, by its potestative nature (see, CAS 2021/A/7794, ¶¶ 161-163). Even if such a potestative clause is agreed upon by the Parties, it is

nonetheless null and void per application of the FIFA Regulations;

- The Appellant terminated the Contract without just cause, even by the operation of Article 17 of the Contract, since the Appellant failed to make full payment of the Respondent's salary on or before 30 June 2022; and
- The issue of forum shopping cannot be relitigated in these proceedings, nor decided upon by the Sole Arbitrator, as it is covered by *res judicata* with binding effect. As such, the issue of FIFA jurisdiction was already ruled upon in the First CAS Award. The binding nature of the First CAS Award follows from the triple-identity test (*i.e.*, same object, same parties, and the same cause of actions) (see, CAS 2013/A/3061), the requirements of which are met in the present matter. Notably, the Appellant did not challenge the First CAS Award before the Swiss Federal Tribunal ("SFT").

48. Additionally, the Respondent submitted the following answers to the Sole Arbitrator's questions dated 13 January 2025:

- On account of the scope of the appeal filed by the Appellant, including issues pertaining to FIFA's jurisdiction, "FIFA *shall not simply be considered as an adjudicatory body to the current dispute which only provides a platform for their members but should defend their interests for the sake of legal certainty*". Hence,

FIFA should have participated in these proceedings;

- The Appellant conflates the concept of precedent and *res judicata*. When a previous award meets the triple-identity test, it becomes binding in light of the principle of *res judicata*. As such, given the reasoning of the Sole Arbitrator in the First CAS Award, the applicable law to the case has already been decided with binding effect;
- In line with the above, the forum shopping issue is *res judicata* as it was decided upon in the First CAS Award; and
- The Respondent agrees with the Appellants on the inapplicability of the FIFA Interim Regulatory Framework related to the RSTP due it not being in force at the issuance of the Appealed Decision. Notably, in replying to this question, the Appellant did not challenge the applicability of the FIFA Interim Regulatory Framework related to the RSTP on the basis of Hungarian law being solely applicable, tacitly accepting the applicability of FIFA Regulations.

49. On this basis, the Respondent submits the following prayers for relief in its Answer:

"Please find the Appellant's Appeal inadmissible and dismiss it entirely.

Alternatively, if the Honourable Arbitrator would find the Appeal (partially) admissible, please dismiss the Appellant's Request for Arbitration and Appeal Brief entirely.

Please order the Appellant to pay the whole CAS administration cost and the Arbitrators fees.

Please fix a sum of CHF 12,500 (Twelve Thousand and Five Hundred Swiss Francs) to be paid by the Appellant to the Coach to assist the payment of his legal fees covering the costs of his representation in front of the Court of Arbitration for Sport”.

V. JURISDICTION

50. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

51. Furthermore, Article 50 (1) of the 2024 edition of the FIFA Statutes (the “FIFA Statutes”) provides that “[a]ppeals against final decisions passed by FIFA and its bodies shall be lodged with CAS within 21 days of receipt of the decision in question”.

52. Additionally, Article 22 of the Contract states that:

“The parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement procedure of the FIFA Dispute Resolution Chamber”.

53. The Appellant filed its appeal on the basis of Article 50 (1) of the FIFA Statutes, citing Article 57 (1) of the 2022 edition of the FIFA Statutes. On a similar line, the Respondent does not contest the CAS’s jurisdiction, making reference to Article 22 of the Contract. Finally, the Parties signed the Order of Procedure which, *inter alia*, reaffirmed the jurisdiction of the CAS.

54. Consequently, the Sole Arbitrator has jurisdiction to hear and resolve the present dispute.

VI. ADMISSIBILITY

55. The Appellant submitted its Statement of Appeal within 21 days of being notified of the ground for the Appealed Decision in compliance with Article 50 (1) of the FIFA Statutes. The Respondent does not dispute the admissibility of the Appeal on these grounds.

56. Nonetheless, the Respondent argued against the admissibility of the appeal on the basis of FIFA’s standing to be sued. While the Sole Arbitrator takes note of the Appellant’s contention on this point, for reasons to be given below, FIFA’s purported standing to be sued will be analysed on the merits.

57. Thus, the Sole Arbitrator finds the appeal admissible.

VII. APPLICABLE LAW

A. The relevant Provisions

58. Article R58 of the CAS Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to

the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

59. Moreover, Article 23 of the Contract states that:

“The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not regulated in this contract, the Hungarian Civil Code, The Sports Act, the LC and other relevant law and regulation shall prevail”.

B. The Submissions of the Parties

60. The Appellant contends that both the First CAS Award and the Appealed Decision incorrectly applied FIFA Regulations, in particular the RSTP, instead of Hungarian law. Primarily, the Appellant argues that the contractual relationship between the Parties must be governed by Hungarian law, specifically the Hungarian Labour Code, as the latter is “binding on all persons working in Hungary” since it is one of the “highest level legislation enacted by the Hungarian parliament after Hungary’s Constitution”. Moreover, not only was the application of the RSTP a violation of Hungarian law, but the Appellant further argues that it represented a breach of FIFA’s own rules, in particular Article 3 of the Procedural Rules Governing the Football Tribunal since it did not take “into account all relevant [...] laws”. Finally, in the Appellant’s view, there is no legal provision that would bind the Sole Arbitrator to the decision on the

applicable law reached in the First CAS Award.

61. The Respondent rebuts the Appellant contentions and, instead, argues that FIFA Regulations are primarily applicable, with Swiss law applying subsidiarily. To that end, the Appellant argues that the First CAS Award binds the Sole Arbitrator to its determination on the law applicable to the Contract. Notably, the First CAS Award, in applying Article 187 (1) of the Swiss Private International Law Act (“PILA”), Article R58 of the CAS Code and Article 56 (2) of the FIFA Statutes, as well as interpreting Article 23 of the Contract, found the following:

“In view of the above, the Sole Arbitrator finds that the dispute in question must be resolved primarily according to the ‘applicable regulations’, i.e. the rules and regulations of FIFA, in particular the FIFA RSTP (edition July 2022). In addition, Swiss law shall be applied subsidiarily, should the need arise to interpret or fill a possible gap in the various regulations of FIFA. For all questions not covered by the FIFA regulations, the Sole Arbitrator will resort to the ‘rules of law’ chosen by the parties, i.e. the Hungarian law” (CAS 2023/A/9477, ¶ 54).

62. The Respondent argues that this finding has *res judicata* effect, as opposed to serving a decision on a preliminary question, since it was determinative to the finding on the merits of the First CAS Award. Additionally, the Respondent highlighted CAS jurisprudence with similar fact patterns (*i.e.*, where the applicability of the Hungarian Labour Code was in dispute), finding that FIFA Regulations prevailed over the parties’ choice of law (see, CAS 2021/A/7794, ¶¶ 94-96,

citing CAS 2014/A/3527 and CAS 2017/A/5375). In addition, the Respondent emphasizes the restriction on the parties' freedom to choose the applicable law of the contract in favour of the "applicable regulations" (see, CAS 2020/A/7605, ¶ 177; CAS 2023/A/9636, ¶ 130).

63. Finally, the Respondent does not believe the PSC improperly applied the Procedural Rules Governing the Football Tribunal as "*the FIFA Football Tribunal has the primary obligation to apply first and foremost the FIFA Statutes and the FIFA regulations whereas it is only optional to take into account the provisions of the national law*".

C. The Findings of the Sole Arbitrator

Ordre public

64. It is beyond dispute that an arbitral tribunal sitting in Switzerland is bound to the Swiss *ordre public*. The SFT differentiates between procedural and substantive public policy. In particular two concepts form part of the procedural *ordre public*, i.e. *res judicata* and the intra-procedural binding effect ("*innerprozessuale Bindungswirkung*") of decisions. Both concepts must be complied with *ex officio* by an arbitration panel sitting in Switzerland. In SFT 136 III 345 ¶ 2.1 the court held as follows:

"Der Ordre public (Art. 190 Abs. 2 lit. e IPRG) hat sowohl einen materiellen als auch einen verfahrensrechtlichen Gehalt. Ein Verstoß gegen den verfahrensrechtlichen Ordre public liegt vor bei einer Verletzung von fundamentalen und allgemein anerkannten Verfahrensgrundsätzen, deren Nichtbeachtung zum Rechtsempfinden in einem unerträglichen Widerspruch steht, so dass die Entscheidung als mit der in einem Rechtsstaat geltenden Rechts-

*und Wertordnung schlechterdings unvereinbar erscheint ... Das Schiedsgericht verletzt den verfahrensrechtlichen Ordre public, wenn es bei seinem Entscheid die **materielle Rechtskraft** eines früheren Entscheids unbeachtet lässt oder wenn es **in seinem Endentscheid von der Auffassung abweicht, die es in einem Vorentscheid hinsichtlich einer materiellen Vorfrage geäußert hat**"* (emphasis added).

Free translation: Public policy (Art. 190 para. 2 let. e PILA) has both a substantive and a procedural content. A procedural violation of public policy occurs when fundamental and generally recognised procedural principles are violated, the non-observance of which is an intolerable contradiction of the sense of justice, so that the decision appears to be irreconcilable with the legal and value system applicable in a state under the rule of law... The arbitral tribunal violates the procedural *ordre public* if it disregards **the *res judicata* effect** of an earlier decision when making its decision or **if it deviates in its final decision from the view it expressed in a preliminary decision regarding a substantive preliminary issue.**

(See also, CAS 2016/A/4408, ¶ 80, CAS 2006/A/1029, ¶ 14; CAS 2008/A/1677, ¶ 15; CAS 2013/A/3380, ¶¶ 139-141; CAS 2019/A/6483, ¶¶ 117, 119, citing SFT 4A_633/2014; CAS 2020/A/6884, ¶¶ 88, 112).

The distinction between *res judicata* and the internal binding effect of decisions

65. The purpose of *res judicata* is to ensure that the content of a formally final decision is upheld in further separate

proceedings. To this end, *res judicata* differentiates between two situations: in case both proceedings are identical, the second seized adjudicatory body is barred from reviewing the first decision. In case the matter decided by the court seized first is prejudicial for the outcome of the court seized second, the latter is bound to the findings of the first court. The effects of *res judicata* are best summarized in KuKo-ZPO/OBERHAMMER/WEBER, 3rd ed. 2021, Art. 236 N. 39 et seq as follows:

“The purpose of res judicata is to ensure that the legal peace established by a decision is not called into question again; it is about the binding nature of the judgement. This can be called into question in various constellations. Res judicata initially prevents the same subject matter from being raised again as the subject of an action. [Furthermore,] the binding effect of substantive res judicata becomes apparent when the main issue of the previous proceedings becomes the key issue of the subsequent proceedings”.

66. *Res judicata*, thus, protects the decision issued in one proceeding from being challenged in a new proceeding (cf. SFT 5A_866/2012, ¶ 4.2). Consequently, *res judicata* only comes into play, if the proceedings CAS 2023/A/9477 and CAS 2024/A/10946 are two distinct and separate proceedings.
67. Differently from *res judicata*, the internal binding effect of decisions (“*innerprozessuale Bindungswirkung*”) deals with the effects of a decision in the context of the proceedings, in which the decision has been issued. According to this concept, a court cannot deviate from a decision (e.g. a preliminary decision) that it has previously rendered. The court is, thus, bound by its decision. Furthermore, the court is also bound by

the legal assessment of the appeal instance, in case the dispute is referred back to it, because here, too, the appeal decision was rendered in the same proceedings. In addition, also the appeal instance itself is bound to its decision should the first instance – after the referral back to it – issue a new decision that is being again appealed. Thus, if CAS 2023/A/9477 and these current proceedings (CAS 2024/A/10946) were one single procedure, the binding effect of the First CAS Award on the pending proceedings before the Sole Arbitrator would have to be determined according to the principles applicable to the internal binding effect of decisions (“*innerprozessuale Bindungswirkung*”).

68. According to the SFT the consequences are different, depending what procedural concept applies. The SFT has stated this repeatedly. In SFT 5A_866/2012, ¶ 4.2, the court provided as follows:

“4.2 La force de chose jugée formelle (formelle Rechtskraft) ne doit pas être confondue avec l'autorité de la chose jugée (matérielle Rechtskraft), dont sont revêtues les décisions sur le fond (ATF 123 III 16 consid. 2a) et qui permet de s'opposer à ce que cette décision soit remise en discussion devant un tribunal par les mêmes parties et sur le même objet (art. 59 let. e CPC; ATF 121 III 474 consid. 2), ni avec l'autorité attachée à l'arrêt de renvoi, qui oblige l'autorité cantonale à laquelle l'affaire est renvoyée de se fonder sur les considérants de droit de l'arrêt (ATF 135 III 334 consid. 2) et qui lie même le Tribunal fédéral saisi d'un recours contre la nouvelle décision rendue par l'autorité cantonale”

Free translation : 4.2 Formal *res judicata* (formelle Rechtskraft) should not be confused with *res judicata* (materielle Rechtskraft), which is vested in decisions

on the merits (ATF 123 III 16 consid. 2a) and which prevents this decision from being reopened before a court by the same parties and on the same subject matter (art. 59 let. e CPC; ATF 121 III 474 consid. 2), nor with the authority attached to the referral decision, which obliges the cantonal authority to which the case is referred to base its decision on the legal grounds of the decision (ATF 135 III 334 consid. 2) and which is even binding on the Federal Court hearing an appeal against the new decision handed down by the cantonal authority.

69. Similarly, the SFT stated in 4A_696/2015, ¶ 3.5.2.2 stated as follows:

“Das Bundesgericht setzt allgemein die formelle Rechtskraft, die materielle Rechtskraft und die innerprozessuale Bindungswirkung nicht gleich ... Die Bindung der unteren Instanz an die Rechtsauffassung des Rechtsmittelgerichts wird nicht als Folge der Rechtskraftwirkung verstanden, sondern als eine Bindung sui generis, die sich aus der Hierarchie der Instanzen im gleichen Prozess ergibt ... Auch die Bindung der urteilenden Instanz selber wird nicht aus der Rechtskraft abgeleitet, sondern aus einem allgemeinen Prinzip der Unabänderlichkeit und Einmaligkeit des Rechtsschutzes”.

Free translation: The Federal Court does not equate formal legal force, *res judicata* and the internal binding effect within a single legal process. The internal binding effect of the lower court on the court of appeal is not understood as a consequence of *res judicata*, but as a *sui generis* binding effect that arises from the hierarchy of instances in the same legal process. The binding effect of the court itself is not derived from legal force, but from a general principle of irrevocability and the uniqueness of legal protection.

70. Whether the principles of *res judicata* or the principles of the intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) are applied, therefore, may make a difference, because the two concepts are not identical. In the opinion of the SFT, the intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) goes further than *res judicata*. In its decision 5A_591/2015, the SFT states in this regard as follows (¶ 2.2.2):

“Diese innerprozessuale Bindungswirkung tritt ein, soweit eine Frage im Zwischenentscheid entschieden worden ist ... Inwieweit dies der Fall ist, ergibt die Auslegung des Zwischenentscheides, zu welcher dessen ganzer Inhalt heranzuziehen ist. Zwar kann der unangefochtene Zwischenentscheid nur in jener Form Bindungswirkung entfalten, wie er im Urteilsdispositiv zum Ausdruck kommt, denn nur dieses kann angefochten werden. Doch ergibt sich die Tragweite des Dispositivs vielfach erst aus einem Beizug der Urteilserwägungen (BGE 128 III 191E. 4a S. 195). Zu beachten ist zudem, dass den Erwägungen eines Entscheides innerhalb eines Verfahrens eine Bindungswirkung zukommen kann, die ihnen ausserhalb des Verfahrens abgeht ... Die bundesgerichtliche Rechtsprechung zur Rechtskraft eines Urteils (vgl. BGE 123 III 16 E. 2a S. 18 f.; Urteil des Bundesgerichts 4C.233/2000 vom 15. November 2000, E. 3a) kann daher nicht für die Tragweite der Bindungswirkung des Zwischenentscheides ... herangezogen werden. ... Der guten Ordnung und einem beförderlichen Prozessverlauf liefe es zuwider, wenn die Parteien und das Gericht die vorangegangenen Etappen desselben Prozesses immer wieder in Frage stellen könnten ... Insoweit ist eine Analogie zur Bindungswirkung eines Rückweisungsentscheides (vgl. hierzu BGE 135 III 334 E. 2 und 2.1 S. 335 mit Hinweisen) zu ziehen....” (emphasis added).

Free translation: This intra-procedural binding effect occurs insofar as a question has been decided in a preliminary decision... The extent to which this is the case is determined by the interpretation of the preliminary decision, for which its entire content is to be consulted. It is true that the uncontested preliminary decision can only have a binding effect in the form in which it is expressed in the operative part of the judgment, because only this can be challenged. However, the scope of the operative part often only becomes clear when the considerations are also taken into account (BGE 128 III 191, E. 4a, p. 195). It should also be noted that the considerations of a decision within a procedure can have a binding effect, which they lack outside the procedure ... The SFT's case law on *res judicata* (see BGE 123 III 16 E. 2a p. 18 f.; judgment of the Federal Court 4C.233/2000 of 15 November 2000, E. 3a) cannot therefore be used to determine the scope of the binding effect of the preliminary decision ... It would be contrary to the good order and expeditious conduct of proceedings if the parties and the court could repeatedly call into question the previous stages of the same process... In this respect, an analogy should be drawn with the binding effect of a rejection decision (cf. BGE 135 III 334 E. 2 and 2.1 p. 335 with references).

The relationship between CAS 2023/A/9477 and CAS 2024/A/10946

71. Which of the two procedural concepts applies in the case at hand depends on whether CAS 2023/A/9477 and CAS 2024/A/10946 constitute a single procedure or two distinct proceedings.

72. At first glance, both proceedings (CAS 2023/A/9477 and CAS 2024/A/10946) appear to be distinct and separate, because they were docketed under different file numbers with the CAS, were referred to different sole arbitrators and because both proceedings deal with appeals against different PSC decisions. However, it is questionable whether such a formalistic view is appropriate.

73. The Sole Arbitrator notes that both CAS proceedings have a common starting point, namely the filing of the claim by the Coach against the Club on 24 July 2022 with FIFA. The matter in dispute has remained unchanged since throughout the various adjudicatory instances. Furthermore, when the sole arbitrator in CAS 2023/A/9477 issued her award, she did not finally dispose of the Coach's claim against the Club, but only referred the matter back to the "first instance", i.e. to the PSC. It is true that by doing so, she put an end to the procedure CAS 2023/A/9477. However, from a substantive point of view, the Coach's claim against the Club remained pending, since the arbitrator in CAS 2023/A/9477 did not decide (either in part or in total) on the Coach's claim. Instead, she referred the case back to the PSC for a final resolution of the matter. Consequently, from a substantive point of view both arbitral proceedings are not distinct, but constitute a single (ongoing) procedure (stretching over several instances).

74. The Sole Arbitrator further notes that in case one of the Parties would have appealed the First CAS Award to the SFT, the latter would not have undertaken a full review of the grounds listed in Article 190 (2) PILA, but would have qualified the First CAS Award as a

preliminary award within the meaning of Article 190 (3) PILA and thus the proceedings before the various instances as a single procedure. This follows from the decision in SFT 140 III 520, ¶ 2.2.1, where the court held as follows:

“En effet, statuant alors comme juridiction d'appel, la Formation du TAS rendra certes une sentence finale au sens de la définition rappelée plus haut, c'est-à-dire une sentence qui mettra un terme à l'instance arbitrale pendante devant elle. Cependant, la procédure au fond opposant les parties ne sera pas nécessairement close par cette sentence. Elle se poursuivra dans l'hypothèse où la Formation annulerait la décision attaquée et renverrait le dossier à la fédération sportive concernée en l'invitant à reprendre l'instruction de la cause et à rendre une nouvelle décision. Considérée sous cet angle, la procédure initiée devant la fédération sportive, puis poursuivie en appel devant le TAS, s'apparente à une procédure étatique ordinaire, soumise à l'exigence de la double instance (cf. art. 75 al. 2, 80 al. 2 et 86 al. 2 LTF). Or, comme le souligne un passage du Message du 28 février 2001 concernant la révision totale de l'organisation judiciaire fédérale (FF 2001 4129 s. ch. 4.1.4.1), repris par BERNARD CORBOZ (in Commentaire de la LTF, 2^e éd. 2014, n° 9 ad art. 90 LTF), le critère de la fin de la procédure dépend non seulement de la procédure conduite devant l'autorité qui précède le Tribunal fédéral, mais aussi de la procédure qui s'est déroulée devant l'autorité dont la décision a été déférée à cette instance de recours; il faut donc examiner si la décision attaquée a pour effet de clore la procédure entamée en première instance. En application de ce principe, la décision par laquelle l'autorité de recours annule la décision attaquée et renvoie la cause à l'autorité de première instance pour instruction et nouvelle décision sur le fond est qualifiée de décision incidente par la jurisprudence fédérale, quand bien même elle met un terme à l'instance de recours ...

Il se justifie d'appliquer par analogie le même principe à la procédure d'appel menée devant le TAS, l'idée étant, ici aussi, de faire en sorte que le Tribunal fédéral ne doive s'occuper qu'une seule fois d'une affaire, sous réserve des exceptions admises par la jurisprudence en la matière (ATF 130 III 755 consid. 1.2). ... La présente espèce concerne le même cas de figure. Le TAS a annulé la décision qui lui était soumise après avoir mis en évidence un vice majeur affectant la procédure y relative; puis, usant de la faculté que lui accorde l'art. R57 al. 1 du Code, il a renvoyé la cause à la CRL pour qu'elle statue à nouveau. Ce faisant, il a sans doute clos la procédure d'appel pendante devant lui; il n'a cependant pas rendu une sentence finale, dans l'acception particulière de cette notion retenue ici, mais une décision incidente ayant trait à une question de procédure, à savoir le respect du droit d'être entendu de l'intimé”.

Free translation : Indeed, ruling as a court of appeal, the CAS Panel will certainly issue a final award as defined above, i.e. an award that will bring the arbitration proceedings pending before it to an end. However, the proceedings on the merits between the parties will not necessarily be closed by this award. They will continue in the event that the Panel annuls the contested decision and refers the case back to the sports federation concerned, inviting it to resume the investigation of the case and render a new decision. Seen in this light, the procedure initiated before the sports federation, then pursued on appeal before the CAS, is similar to an ordinary state procedure, subject to the requirement of double instance (cf. art. 75 para. 2, 80 para. 2 and 86 para. 2 LTF). However, as emphasised in a passage of the Message of 28 February 2001 concerning the total revision of the federal judicial organisation (FF 2001 4129 s. ch. 4.1.4.1), taken up by

BERNARD CORBOZ (in Commentaire de la LTF, 2nd ed. 2014, no. 9 ad art. 90 LTF), the criterion of the end of the proceedings depends not only on the proceedings conducted before the authority that precedes the Federal Court, but also on the proceedings that took place before the authority whose decision was referred to this appeal body; it is therefore necessary to examine whether the contested decision has the effect of closing the proceedings initiated at first instance. In accordance with this principle, the decision by which the appeal authority annuls the contested decision and refers the case back to the first instance authority for investigation and a new decision on the merits is classified as an incidental decision by federal case law, even if it brings the appeal proceedings to an end.

It is justified to apply the same principle by analogy to the appeal procedure before the CAS, the idea being, here too, to ensure that the Federal Tribunal only has to deal with a case once, subject to the exceptions allowed by the case law in this area (ATF 130 III 755 consid. 1.2). ... The present case concerns the same scenario. The CAS annulled the decision submitted to it after having highlighted a major flaw affecting the related procedure; then, using the power granted to it by art. R57 para. 1 of the Code, it referred the case back to the CRL for a new decision. In doing so, it undoubtedly closed the appeal proceedings pending before it; however, it did not hand down a final award, in the particular sense of this concept used here, but an interlocutory decision relating to a procedural issue, namely respect for the respondent's right to be heard

75. Thus, according to the SFT, the sports-judicial appeal process is similar to the ordinary instances before state courts (“... *la procédure initiée devant la fédération sportive, puis poursuivie en appel devant le CAS, s'apparente à une procédure étatique ordinaire, soumise à l'exigence de la double instance*”). The SFT, therefore, applies the principles applicable to state court instances by analogy to the dispute resolution mechanism in sport. According thereto a decision by the appeal instance (CAS) is only deemed final, if it not only puts an end to the proceedings before the appeal instance, but also before the first instance. Consequently, a decision by the second instance to refer the case back to the first instance does not qualify as a final decision. Rather, such remittal decision is to be qualified as preliminary decisions, because – substantively – the dispute between the parties is still ongoing and pending.

The Consequences of the above for the case at hand

76. It is not necessary to decide whether the present case involves two separate proceedings or a single proceeding, since the application of the principles of *res judicata* or intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) will lead to the same outcome.
 - a. *Application of the res judicata principles*
77. It is undisputed that the parties in these pending proceedings are also the parties in CAS 2023/A/9477. It is true that in the proceedings CAS 2023/A/9477 also FIFA was involved. However, this does not undermine the fact that all parties in the current proceedings were already parties in the previous CAS proceedings.

It is also undisputed that the claim forming the basis of the proceeding in CAS 2023/A/9477 is the same as in 2024/A/10946.

78. The starting point for determining the scope of *res judicata* is – according to Swiss law – the operative part of the award and not the grounds of the respective decision (see, CAS 2018/A/5898, ¶ 54; CAS 2020/A/7183, ¶ 102; CAS 2020/A/7551, ¶ 74, citing 4A_536/2018, 16 March 2020, consid. 3.1.1). Albeit, the grounds of the decision may be complimentary assessed in order to derive the meaning and/or the scope of the operative part (see, CAS 2018/A/5898, ¶ 54, citing NOTH/HAAS, Article R46 CAS Code, in: ARROYO M., Arbitration in Switzerland – The Practitioner’s Guide, 2018, p. 1567; CAS 2020/A/7183, ¶ 102; CAS 2020/A/7551, ¶ 74, citing 4A_536/2018, 16 March 2020, consid. 3.1.1). This view is also backed by the jurisprudence of the SFT. The latter held in SFT 144 I 11, ¶ 4.2 as follows:

“Die materielle Rechtskraft eines früheren Entscheids bedeutet grundsätzlich nur eine Bindung an das Dispositiv. Allerdings können zur Feststellung der Tragweite des Dispositivs weitere Umstände, namentlich die Begründung des Entscheids herangezogen werden”.

Free translation: The *res judicata* effect of an earlier decision basically only means that the operative part of the decision is binding. However, further circumstances, namely the reasons for the decision, can be used to determine the scope of the ruling of the operative part.

79. Similarly, the SFT held in SFT 136 III 345, ¶ 2.1 as follows:

“Die Rechtskraftwirkung beschränkt sich auf das Urteilsdispositiv. Die Urteilsbegründung wird davon nicht erfasst. Die Urteilsabwägungen haben in einer anderen Streitsache keine bindende Wirkung, sind aber gegebenenfalls zur Klärung der Tragweite des Urteilsdispositivs beizuziehen”.

Free translation: The binding effect is limited to the operative part of the judgment. It does not extend to the grounds for the judgment. The considerations set out in the judgment are not binding in another dispute, but may be consulted to clarify the scope of the operative part of the judgment.

80. Additionally, when it comes to the binding nature of preliminary questions, the SFT has found that (BGE 137 III 8, ¶ 3.3.1):

““Nach schweizerischer Rechtsauffassung sind Gerichte und Behörden befugt, Vorfragen aus einem anderen Zuständigkeitsbereich zu beurteilen, solange darüber die hierfür zuständigen Behörden und Gerichte im konkreten Fall noch keinen rechtskräftigen Entscheid getroffen haben. Die Antwort auf die Vorfrage ist dabei lediglich Urteilsabwägung und nimmt an der Rechtskraft des Urteils nicht teil (vgl. BGE 90 II 158 E. 3 S. 161; BGE 131 III 546 E. 2.3 S. 551)”.

Free translation: According to Swiss interpretation of the law, courts and authorities are authorised to assess preliminary questions from another area of responsibility provided that the competent authorities and courts have not yet issued a judgment with *res judicata* effect in the specific case. The answer to the preliminary question is merely a consideration of the judgement and does not participate in the *res judicata* effect of the judgement (see BGE 90 II 158 E. 3 S. 161; BGE 131 III 546 E. 2.3 S. 551)

81. Thus, the Sole Arbitrator in the context of *res judicata* is not bound by preliminary considerations in the First CAS Award that are not reflected in the conclusions of said award. Since the findings on the applicable law in the First CAS Award are preliminary considerations only, they do not enjoy *res judicata* effects. Consequently, if one were to apply the principles of *res judicata*, the Sole Arbitrator would be free to make his own assessment on the issue of the applicable law.

82. In doing so, the Sole Arbitrator – in any event – concurs with the First CAS Award, namely: (i) by operation of Article R58 of the CAS Code, the applicable regulations are primarily applicable to the merits of the dispute, *in casu*, being FIFA Regulations (*i.e.*, the RSTP); (ii) Swiss law shall apply subsidiarily to FIFA Regulations, to be used in the event that the latter needs to be interpreted; and (iii) in view of Article 23 of the Contract, Hungarian law shall apply to any issue on the merits not addressed by FIFA Regulations seeing the none-hierarchical nature of the laws listed in the provision (*i.e.*, “*regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law*”).

b. *Application of the principles related to intra-procedural binding effects (“innerprozessuale Bindungswirkung”)*

83. If one were to apply the principles applicable to intra-procedural binding effects (“*innerprozessuale Bindungswirkung*”) the Sole Arbitrator would be bound to the findings related to the applicable law in the First CAS Award. The extent of such binding effects are best described in the following decision of the SFT (131 III 91, ¶ 5.2):

“Le juge auquel la cause est renvoyée voit donc sa cognition limitée par les motifs de l’arrêt de renvoi, en ce sens qu’il est lié par ce qui a été déjà tranché définitivement par le Tribunal fédéral (ATF 104 IV 276 consid. 3b p. 277; ATF 103 IV 73 consid. 1 p. 74) et par les constatations de fait qui n’ont pas été attaquées devant lui (ATF 104 IV 276 consid. 3d p. 278). ... Il en découle aussi que le recourant qui a obtenu gain de cause en instance de réforme ne peut, dans la nouvelle procédure cantonale, subir une aggravation de sa position juridique; dans l’éventualité la plus désavantageuse pour lui, il devra s’accommoder du résultat que la partie adverse n’a pas attaqué”.

Free translation : The judge to whom the case is referred therefore has his jurisdiction limited by the grounds of the referral decision, in the sense that he is bound by what has already been definitively decided by the Federal Court (ATF 104 IV 276 consid. 3b p. 277; ATF 103 IV 73 consid. 1 p. 74) and by the findings of fact that have been challenged before it (ATF 104 IV 276 consid. 3d p. 278). ... It also follows that the appellant who has won his case in the proceedings for review cannot, in the new cantonal proceedings, suffer a worsening of his legal position; in the most disadvantageous eventuality for him, he will have to accept the result that the opposing party has not challenged

84. The extent to which the courts and parties are bound by the First CAS Award follows from the grounds for the referral, which provided both the framework for the new findings of fact and that for the new legal grounds. When reading the section on the applicable law in the First CAS Award it becomes clear that the sole arbitrator definitely resolved the issue of the applicable law in the matter at hand and

that, therefore, neither the PSC nor the Sole Arbitrator can deviate from these findings.

VIII. MERITS

85. Having addressed the preliminary issues relevant to this case, and after taking due consideration of the arguments presented by the Parties and the facts relevant to the case, the Sole Arbitrator will consider the following points when resolving the Parties' dispute:

- A. To what extent, if any, is the Appellant's claim frustrated by its decision to release FIFA as a respondent in the present case?
- B. If the Appellant's claim proceeds, to what extent, if any, is the Sole Arbitrator bound by the First CAS Award's ruling on the issue of FIFA jurisdiction by virtue of the *res judicata* doctrine?
- C. Finally, did the Appellant validly terminate the Contract?

A. FIFA's Standing to be sued

1. Issue on the merits

86. The issue of FIFA's standing to be sued in the present case was raised by the Respondent as an admissibility issue, arguing that the Appellant's claim should be dismissed on account of an improperly constituted *litis consortium* (see supra, ¶ 56). As it is well-established in CAS jurisprudence, the issue of standing to be sued is a merits issue, as opposed to a question of admissibility (see, CAS 2020/A/7356; CAS 2016/A/4602; CAS 2013/A/3047; CAS 2008/A/1639). The Sole Arbitrator notes that, while Article 50 (1) of the

FIFA Statutes provides that appeals against FIFA decisions must be filed with the CAS, the remainder of FIFA Regulations are silent on the issue of standing to be sued. Thus, the Sole Arbitrator must resort to Swiss law for guidance to resolve this matter arising from Article 50 (1) of the FIFA Statutes.

2. The law applicable to standing to be sued

87. Turning to the Swiss Civil Code ("SCC"), the Sole Arbitrator takes note of Article 75, which provides that "[a]ny member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof". At first glance, this Article seems to support the Respondent's contention: FIFA should have remained a respondent in this case. However, as already analysed by CAS jurisprudence, Article 75 SCC is not determinative for every kind of disputes that may arise within the context of an association but rather deals with "vertical disputes" only (see, CAS 2021/A/7775, ¶ 118, citing CAS 2014/A/3289-3490, ¶ 119).

88. CAS jurisprudence differentiates between disputes arising from decisions issued by organs of an associations, namely vertical and horizontal disputes. As referenced above, Article 75 SCC prescribes that for vertical dispute the appeal must be directed against the association. Vertical disputes are "characterized by the fact that the association issuing the decision thereby shapes, alters, or terminates the membership relation between itself and the member concerned", often manifesting in decisions "such as sporting sanctions or purely disciplinary issues, along with eligibility or registration issues" (CAS

2022/A/8758, ¶ 103, citing CAS 2013/A/3140, ¶ 8.12; CAS 2017/A/4836, ¶ 123. See also, CAS 2021/A/7775, ¶ 119; CAS 2022/A/8758, ¶ 103).

89. A horizontal dispute pertains to disputes between association members and does not involve the association as a party. In horizontal disputes the association merely acts as an adjudicator and does not have a direct interest in the outcome of the dispute other than applying the applicable provisions in a proper and just way (see, TAS 2016/A/4443 & TAS 2016/A/4444, ¶ 83; CAS 2019/A/6233, ¶ 121; CAS 2020/A/7144, ¶¶ 91-94). The panel in CAS 2014/A/3489-3490 defined a horizontal dispute rightly as follows:

“[I]f a party to an horizontal dispute adjudicated by a FIFA body – i.e., a dispute between two or more direct or indirect members of FIFA (such as clubs, players, agents or coaches) which does not involve FIFA’s disciplinary powers and where FIFA has nothing directly at stake – appeals to the CAS without summoning FIFA, the appointed CAS panel may still proceed to examine the matter and adjudicate the dispute. This is so because a decision adopted by a FIFA body on a dispute between its direct or indirect members, being a decision of an association, is not an award but it has a contractual value for the members of the association” (CAS 2014/A/3489-3490, ¶ 136).

3. The nature of the dispute follows from the matter in dispute

90. Importantly, in order to determine the nature of the dispute in relation to the parties, one must look at the matter in dispute and the interests at stake that follow from such dispute. Put simply, it

is “*the matter in dispute that defines the nature of the dispute and not the reasons based on which an adjudicatory body dismisses or accepts a claim. The matter in dispute is defined by the requests of the parties and the facts underlying the respective requests*” (CAS 2021/A/7775, ¶ 122).

a. The position of the Parties

91. The Respondent’s contends that FIFA should have remained a party to this arbitration on the grounds that (i) FIFA’s jurisdiction has been challenged by the Appellant, putting in questions FIFA’s interest, in particular legal certainty, (ii) the Respondent cannot protect FIFA’s interest as an indirect member of the association, and (iii) additionally, the Appellant has impugned the validity of the Appealed Decision by “*by criticising the lack of (satisfying) reasoning FIFA has provided*”. The Respondent refers to CAS jurisprudence (CAS 2016/A/4836) to back its position. The award reads in its pertinent parts as follows:

“Disputes adjudicated by FIFA bodies can be qualified of ‘horizontal’ disputes where they involve two or more direct or indirect members of FIFA (such as clubs, players, or coaches) and did not involve FIFA’s particular prerogatives or disciplinary powers and where FIFA has nothing directly at stake. In such context, and provided the relevant other conditions are met, a CAS panel will proceed to examine the appeal and adjudicate the dispute although FIFA was not summoned as respondent. Other decisions involving the application of sporting sanctions, purely disciplinary issues, jurisdiction, eligibility or registration matters fall within the ‘vertical’ criteria” (CAS 2016/A/4836, Preliminary Summary; emphasis added).

92. The Appellant, who had initially named FIFA as a respondent in its Statement of Appeal, submits that the dispute in this matter is of a horizontal nature, since “FIFA has nothing directly at stake”.

b. The findings of the Sole Arbitrator

93. The Sole Arbitrator agrees with the Appellant that FIFA, when acting as a mere adjudicatory body in a dispute between indirect members, has “nothing at stake” and that in such circumstances FIFA’s interest are not directly affected.

94. In case FIFA decides on a jurisdictional challenge within the context of a contractual dispute between indirect members, this does not put in play any issue that affects FIFA’s relationship with its members. Moreover, FIFA’s interest in legal certainty and in its rules being applied properly cannot override the basic principle that the resolution of contractual disputes between indirect members first and foremost serves the private interest of the parties. If it were, otherwise, the differentiation between horizontal and vertical disputes would become completely obsolete. FIFA’s interest in enforcing its rules and regulation and, thus, the rule of law is not in itself sufficient to confer to it standing to be sued.

95. In any event, the Sole Arbitrator finds that FIFA’s interests, being general in nature, are sufficiently protected on account of (i) the shared interest of the Respondent and FIFA, (ii) FIFA’s desire to be severed from the case, and (iii) FIFA’s participation in case CAS 2023/A/9477.

96. Additionally, if FIFA were of the view that its “general interests” would not be

sufficiently taken care of by the Respondent, it could have simply continued to be a party in this arbitration and not requested to be removed from these proceedings. FIFA’s procedural behaviour, thus, shows that its interest in this arbitration is such that the claim can be adjudicated without FIFA to be heard.

97. In view of all of the above the Sole Arbitrator is comfortably satisfied that the Respondent has standing to be sued alone.

B. The Findings of the First CAS Award in relation to FIFA jurisdiction

98. The Parties are in disagreement if and to what extent the Sole Arbitrator is bound to the findings on FIFA jurisdiction in the First CAS Award.

1. The applicable yardstick

99. It is also questionable here which principles should be applied to assess a possible binding effect of the First CAS Award on the pending proceedings. Again, the applicable yardstick could either be the principles applicable to *res judicata* or the principles governing intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”), depending on whether CAS 2023/A/9477 and CAS 2024/A/10946 constitute a single procedure or two distinct proceedings.

100. Since the intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) – as shown above – extends further than the *res judicata* effect, the Sole Arbitrator will in the following start the examination of the binding effect based on the principles applicable to *res judicata*. If such examination concludes that the

Sole Arbitrator is bound to the findings on jurisdiction in the First CAS Award, then an examination applying the principles of intra-procedural binding effect (“*innerprozessuale Bindungswirkung*”) becomes obsolete, because the latter will then – in any event – come to the identical result.

2. *The scope of no. 3 of the operative part of the First CAS Award*

101. The Sole Arbitrator has already referred to the doctrine of *res judicata* above. As highlighted in the Applicable Law Section of this Award (see *supra*, ¶¶ 77-82), the starting point for determining the scope of the binding effect of a previous decision is its operative part. The operative part of the First CAS Award reads – *inter alia* – as follows:

- “1. *The appeal filed on 7 March 2023 by Joan Carrillo Milan against the decision rendered on 22 November 2022 by the FIFA Players’ Status Chamber is upheld.*
2. *The decision issued on 22 November 2022 by the FIFA Players’ Status Chamber is annulled.*
3. *The case is referred back to the FIFA Players’ Status Chamber to decide on the merits of the dispute. ...”.*

102. The Appellant argues that the above conclusion in the First CAS Award is not binding in these proceedings. The Respondent, on the contrary, submits that the First CAS Award ruled on the issue of FIFA jurisdiction in a binding manner and that the Appellant failed to challenge such award before the SFT.

103. No. 3 of the operative part states that the case is referred back to the PSC with respect to the merits of the case only. That finding may – at first sight – appear a bit ambiguous, since the question whether FIFA has jurisdiction to decide the dispute is – from the perspective of a CAS arbitration – a matter of the merits. However, when interpreting the conclusion in the operative part of the award in light of the grounds of the First CAS Award it becomes clear that the sole arbitrator in CAS 2023/A/9477 finally and bindingly disposed of the question whether or not FIFA has jurisdiction to decide the matter. This clearly follows from the grounds in the First CAS Award that read in their pertinent parts as follows:

“81. In view of the above, the Sole Arbitrator considers that the FIFA PSC erred in finding that the Appellant’s claim filed before FIFA was inadmissible because the Appellant was engaged in “forum shopping”.

82. In light of the above, the Sole Arbitrator considers that the appeal shall be upheld and, consequently, the Appealed Decision is set aside.

83. Furthermore, considering that the Appellant’s principal prayer for relief was to send the case back to FIFA and his arguments were focused on the jurisdiction of FIFA to hear this case, the Sole Arbitrator decides to refer the case back to FIFA to allow the latter to decide on the merits of the case”.

104. In summary, the sole arbitrator in case CAS 2023/A/9477 found that the Respondent had not engaged in forum shopping because (i) he had no intent to game the system and (ii) by taking recourse before Hungarian Courts did not act in bad faith, but rather in an attempt to preserve his rights in light of the Termination Letter and its purported

forum for challenges (*i.e.* the Debrecen Regional Court). In doing so, the First CAS Award (i) upheld the Respondent's appeal against the First PSC Decision, which declared the Respondent's claim inadmissible on the basis of forum shopping; and (ii) remanded the case back to the PSC to rule on (all other matters related to) the merits of the case. Put simply, the First CAS Award did rule on the issue of jurisdiction with *res judicata* effect, while leaving the merits of the case (*i.e.*, the legality of the termination of the Contract, etc.) to be decided upon by the PSC.

105. It follows from the above that by referring the case back to the PSC *"to decide on the merits of the case"*, the sole arbitrator in no. 3 of the operative part of the First CAS Award withdrew the mandate from the PSC to rule on the question of FIFA jurisdiction, because she herself had finally and bindingly ruled on this matter. Thus, no. 3 of the operative part of the First CAS Award establishes that FIFA has jurisdiction in the present matter. This is true irrespective of whether one applies the principles of *res judicata* or of intra-procedural binding effect (*"innerprozessuale Bindungswirkung"*).

C. The termination of the Contract

106. The Sole Arbitrator now turns to the validity of the termination of the Contract by the Appellant.

1. The Parties' positions

107. The Appellant contends that the termination of the Contract, by way of the Termination Letter, was compliant with the Hungarian Labour Code and the terms of the Contract. The Appellant

submits that the Parties freely agreed to the terms under Article 17 of the Contract, namely:

"17. With regard to the status of the [Coach] as a senior employee, the [Club] may terminate this contract with a unilateral legal declaration (termination), without any obligation to state reasons, in spite of the specified period of time, as follows:

- before the 30th of June 2022, by paying to the [Coach] the amount of the basic salary until the 30th of June 2022 and the end-of-season bonus corresponding to the placement at the time of termination" (emphasis added).

108. Conversely, the Respondent challenges the validity of Article 17 of the Contract. He is of the view that it is a potestative clause, abusive in nature, which contravenes the principles enshrined in the RSTP. Additionally, the Respondent argues that, in the event that Article 17 of the Contract is considered valid, the Appellant nonetheless failed to meet the requirements, namely full payment by 30 June 2022, to execute the unilateral termination.

2. The findings of the Appealed Decision

109. The Appealed Decision found that Article 17 of the Contract is null and void:

"The Single Judge then deemed it appropriate to remind the parties that only a breach or misconduct which is of a certain severity justifies the termination of a contract. In other words, only when there are objective criteria which do not reasonably permit to expect the continuation of the employment relationship between the parties, a contract may be terminated prematurely. Hence, if there are more lenient measures which

can be taken in order to ensure the fulfilment of the contractual duties by the counterparty, such measures must be taken before terminating an employment contract. A premature termination of an employment contract can only ever be an ultima ratio measure.

Bearing in the foregoing the Single Judge observed that the Respondent argued that it terminated the contract on the basis of [Article 17] of the Contract. However, the Single Judge observed that according to such clause, the Coach was at the mercy of the Club, as the clause can only be triggered by the Club (i.e., a potestative clause). Moreover, the Single Judge acknowledged the usual imbalance in the bargaining power of the employer and of the employee and, therefore, decided that such clause has a clearly abusive nature and shall not be applicable.

Therefore, and considering that no reason was provided as to the termination, the Single Judge concluded that the Club terminated the contract without just cause” (Appealed Decision, ¶¶ 51-53; emphasis added).

3. The Findings of the Sole Arbitrator

110. A potestative condition is “a condition whose fulfillment is completely within the power of the obligated party”. A potestative clause is often used in reference to a contractual term that allows one party to unilaterally terminate a contract without providing a justification and often at a reduced amount of compensation, if any (see, CAS 2021/A/8471, ¶ 126).
111. CAS jurisprudence on the validity of such clauses is not unanimous. Some panels take a very formalistic approach according to which unilateral clauses are invalid by the mere fact that they are unilateral. In CAS 2021/A/7794, e.g., the panel ruled that a clause allowing a

club to unilaterally terminate an employment contract early without providing reasons or compensation was null and void. The panel found as follows:

“Article 9 paragraph 4 of the Contract, which was invoked by the Appellant as the main reason to terminate the Contract, provides as follows:

‘The club has the right to unilaterally terminate the contract, in which case the coach is not entitled to any compensation.’

After examining the content of the aforementioned clause, the Panel considers that this clause is clearly of a potestative nature, it is not bilateral whilst it limits the rights of the First Respondent in an excessive manner and leads to an unjustified disadvantage towards the Appellant. This finding is in line with the established CAS jurisprudence (for example, awards CAS 2016/A/4852, CAS 2014/A/3675 and CAS 2008/A/1517).

In CAS 2016/A/4852 the Panel concludes:

‘A contractual clause contained in a footballer’s employment contract under which only the club, but not the player may unilaterally terminate the employment contract is unilateral and potestative and therefore contrary to the regulations of FIFA. Consequently it is null and void...’

The same considerations are expressed in CAS award CAS 2014/A/3675:

‘A clause in an employment contract which — contrary to the FIFA regulations — is of unilateral and potestative nature and to the benefit to the employer (club) only in that it grants the employer the unilateral right to terminate the employment contract while at the same time excluding the player’s right to compensation for the otherwise remaining period of the contract cannot be validly invoked as a

legal basis for unilateral termination of an employment contract...'

In the present case, the Appellant was the only party that could decide to unilaterally terminate the Contract, without any explanation while the First Respondent was not at liberty to do the same and further, it left the Coach in a position that he could not seek compensation for this unilateral act of the Club. Therefore, the Panel fully shares the conclusion of the Single Judge of the FIFA PSC in that Article 9 paragraph 4 of the Contract must be considered null and void. Consequently, this clause cannot be validly invoked as a legal basis for the unilateral termination of the Contract" (CAS 2021/A/7794, ¶¶ 160-164, citing CAS 2016/A/4582, ¶ 4 of the introductory summary; CAS 2014/A/3675, ¶ 1 of the introductory summary. See also, CAS 2021/A/8471, ¶ 126).

112. It appears that FIFA in its Commentary to the RSTP follows this formalistic approach:

"In other words, there are limits to the validity of such clauses. These limits are reached when the stipulation becomes authoritative – that is, the conditions under which a contract is terminated are unilaterally influenced by the party that wishes to put an end to the contract. If the definition of 'just cause' agreed by the parties to the contract is deemed to be either void or unjustified, then the general principles for determining just cause will be applied. In this respect, CAS recently found that a contractual clause under which only the club can terminate the agreement is potestative even if agreed upon mutually, and is therefore null and void" (Commentary on the RSTP (FIFA, 2023 edition), p. 131, Chapter IV: Article 14 – Terminating a contract with just cause, citing CAS 2021/A/7794).

113. Other CAS panels have taken a more liberal approach when evaluating so-called "potestative clauses" and advocate a case-by-case assessment whether the boundaries of contractual freedom have been trespassed. In CAS 2019/A/6368 – 6372, e.g., the panel was of the view "*that there is nothing in FIFA regulations or jurisprudence (or in CAS jurisprudence) which invalidates [one-sided termination clauses]*". Instead the panel in that case gave weight to (i) an in-depth analysis of the proportionality of the contractual relationship as a whole and (ii) the parties' freedom "*to decide whether or not they want to enter into the contract with whatever balance of rights and obligations they have been able to negotiate*" (CAS 2019/A/6368 – 6372, ¶¶ 196-198, citing *inter alia* CAS 2018/A/6029, ¶ 104).

114. A similar approach was taken by the panel in CAS 2013/A/3375 & 3376 when assessing the validity of a unilateral extension clause in favour of a club. The panel found as follows:

"The Panel observes that notwithstanding the well-established jurisprudence of the FIFA DRC that: 'Unilateral options are, in general, problematic, since they limit the freedom of the party that cannot make use of the option in an excessive manner. Furthermore such options are not based on reciprocity, since the right to extend a contract is left exclusively at the discretion of one party' (DRC, 22/07/2004) and the CAS that: '(...) a system that allows, for the benefit of the club alone, the contract of a player to be extended with limited salary adjustments, (...) is not, in principle, compatible with the time frame that the FIFA Regulations provide. (...)' (CAS 2005/A/983 & 984) unilateral options to extend contracts of employment in favour of football clubs are not per se invalid and incompatible with the RSTP and the principle of global labour law. The jurisprudence does not

absolutely preclude the valid operation of such a clause and that each specific clause and the circumstances of its purported exercise must be examined on a case by case basis” (CAS 2013/A/3375 & 3376, ¶ 86(4)i.-xi; emphasis added).

115. In the above case, the panel upheld the unilateral extension clause, finding that “*the particular factual circumstances herein indicate that the option to extend the Employment Contract was valid and exercised with the full knowledge and agreement of the Player*”.

116. In CAS 2015/A/4042 the sole arbitrator held as follows:

“Furthermore, the Sole Arbitrator considers this provision to be a deviation from the general principles enshrined in the FIFA Regulations. The Sole Arbitrator finds that, in principle, nothing prevents parties from defining when and under which circumstances a party may terminate the Employment Contract with just cause. For if the parties are free to arrange in the employment contract the method of compensation for breach of contract, then, in principle, the same must apply to specifying when there is ‘just cause’ (CAS 2006/A/1180). Such deviation may in principle not be potestative, i.e. the conditions for termination may not be unilaterally influenced by the party wishing to terminate the contract (an example of a potestative clause would be the situation where a contract provides that it can be unilaterally terminated by the club if the player does not play in a certain percentage of matches, for the decision to field the player may be influenced by the club). As maintained by a legal scholar, ‘[i]n relation to the substance of the unilateral option clause, parity of termination rights is no longer to be taken as a benchmark for public policy, since (as shown) a disparity of termination rights has to be accepted as such; instead the question to be answered here is how great the disparity may be. The limit of

contractual freedom in this respect is formed by the prohibition of excessive self-commitment, as laid down in Swiss law, for example, at Art. 27(2) of the Swiss Civil Code”, adding in a footnote that “[n]o person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law and morality’ (PORTMANN, Unilateral option clauses in Footballer’s contracts of employment: An assessment from the perspective of International Sports Arbitration, ISLR 2007, p. 6-16)” (CAS 2015/A/4042, ¶¶ 68-70; emphasis added. See also, CAS 2017/A/5056 & 5069, ¶¶ 68-71).

117. In the above case, the sole arbitrator found that based on the circumstances of the case the limits to the contractual freedom of the parties have not been exceeded and upheld the termination clause. The sole arbitrator found that the clause did not create an unreasonable obligation that led to an unjustified disparity between the parties nor that it was the result of unequal bargaining power between the parties (see, CAS 2015/A/4042, ¶ 69).

118. Considering the foregoing, the Sole Arbitrator is not convinced that Article 17 of the Contract is null and void in light of the RSTP. Firstly, while some of the awards referenced above refer to general principles of the RSTP restricting the parties’ contractual freedom, the Sole Arbitrator concurs with the panel in CAS 2019/A/6368 – 6372 in finding that FIFA regulations are silent on the limits of contractual autonomy and the need for reciprocal clauses. The Sole Arbitrator finds that, therefore, the validity of such clauses – in the absence of specific provisions in the RSTP – must be assessed first and foremost in light of the subsidiarily applicable law.

119. In the case at hand, the subsidiarily applicable law is not Swiss law, since the latter only applies to interpret the rules of the industry, i.e. the RSTP. In view of the regulatory silence of the RSTP, the limits of contractual autonomy must, therefore, be determined applying the law chosen by the Parties, i.e. Hungarian law.

120. *In casu*, the Sole Arbitrator is not persuaded that Article 17 of the Contract violates Hungarian law. Be it as it may, the Sole Arbitrator can leave this question unanswered, since even if Article 17 of the Contract was valid, the Sole Arbitrator is sufficiently satisfied that the Appellant failed to meet the preconditions to properly terminate the Contract pursuant to this article. Thus, further analysis on the Hungarian law would become superfluous.

121. Article 17 of the Contract is drafted in such a way to condition the Appellant's termination rights. The Sole Arbitrator finds that the conditions agreed to reflect the "*common intention of the parties*" from a plain reading of the clause, as well as in the absence of any evidence external to the Contract that would indicate the contrary (see, Article 18 of Swiss Code of Obligations, as well as Decision of the SFT, 4A_155/2017, 12 October 2017, ¶ 2.3; ATF 132 III 268, ¶ 2.3.2; ATF 132 III 626, ¶ 3.1; ATF 131 III 606, ¶ 4.1). These conditions, as understood by the Sole Arbitrator, are the following:

- The termination option must have been exercised "*before the 30th of June 2022*"; and
- The termination option shall be exercised "*by paying to the [Respondent] the amount of the basic*

salary until the 30th of June 2022 and the end-of-season bonus corresponding to the placement at the time of the termination" (emphasis added).

122. Hence, the termination hinged on both a temporal condition (*i.e.*, must be executed before 30 June 2022) and two conditions precedent to the termination (*i.e.*, paying salaries until 30 June 2022 and the end-of-season bonus). It is uncontested that the Appellant made only partial payment of the Respondent's remaining wages, six days after the deadline, as well as the end-of season bonus. Indeed, by not making full payment of the Respondent's wage and making payment after the deadline to trigger the termination, the Appellant effectively failed to properly exercise the termination option within the prescribed period, despite furnishing the termination letter of 27 June 2022, since the triggers for termination were only partially fulfilled and only after 30 June 2022.

123. Consequently, the Appellant's appeal is dismissed since the unilateral termination of the Contract, while potentially valid under the framework of the Contract and the law applicable on this issue, was improperly executed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by DVSC Football Szervezo ZRT against the Decision of the FIFA Players Status Chamber passed on 29 August 2024 is dismissed.

2. The Decision of the FIFA Players Status Chamber passed on 29 August 2024 is confirmed.
3. (...).
4. (...).
5. All other and further motions or request for relief are dismissed.

Aquatics (waterpolo); Disciplinary sanction against an athlete; Interest of bifurcating the proceedings - award on jurisdiction; CAS jurisdiction – arbitration agreement; CAS jurisdiction in the absence of a specific arbitration agreement; Interpretation of statutory arbitration clause; Possibility to have a mandatory right of appeal; Arbitration clause by reference; Right to a fair trial under article 6 (1) of the ECHR

Panel

Mrs Despina Mavromati (Greece), Sole Arbitrator

1. In a case in which the jurisdiction of CAS appears to be doubtful, on a *prima facie* basis, for reasons of procedural economy, an award on jurisdiction can save substantive time and financial resources. Especially considering that the jurisdiction of the CAS is a threshold matter and only if CAS panels confirm that the CAS has jurisdiction to hear a case can it subsequently review the legality of the relevant disciplinary system and its decision-making process altogether. The CAS does not have an “*omnibus* jurisdiction” to review possible malfunctions or bad administration of justice unless its jurisdiction is granted under the conditions enshrined in Article R47 of the CAS Code.
2. According to Article 178 para. 1 of the Federal Act on Private International Law (PILA), the arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text. Pursuant to Article 178 para. 2 of the PILA, the arbitration agreement is then valid as to its substance if it conforms either with the law chosen by the parties, or with the law governing the subject-matter of the dispute, or with Swiss law. Article R47 of the CAS Code therefore provides for the possibility of bringing an appeal to the CAS either through a specific arbitration agreement or through a statutory basis (i.e. an arbitration agreement enshrined in the rules of the federation of the body that issued the appealed decision). Generally, the arbitration agreement enshrined in Article R47 of the CAS Code is an agreement pursuant to which the parties agree to have existing and / or future disputes decided by an arbitral tribunal according with the relevant procedural provisions, excluding the competence of state courts.
3. In the absence of a specific arbitration agreement concluded between the parties, and in line with Article 178 para. 4 of the PILA and Article R47 para. 1 of the CAS Code, it is also possible to confer jurisdiction to an arbitral tribunal through an arbitration clause included in the rules of an association.
4. The interpretation of the statutory arbitration clause inserted in the rules of a (major) sports federation is

made according to the rules of statutory interpretation. Generally, the principles of statutory interpretation are the literal interpretation, the systematic interpretation, the teleological interpretation and the historical interpretation. However, it is possible to depart from the clear text if the other methods of interpretation show that this does not correspond to the true meaning of the provision in question. There is no method of interpretation favoured and no hierarchy established; it is rather pragmatic pluralism that prevails by seeking the true meaning of the norm.

5. In the case of an appealed decision from a continental association, CAS jurisdiction can only be derived from the rules of the body that issued the appealed decision, and therefore the only pertinent rules should be those of the continental association and not those of the relevant international sports federation. Especially if the regulations of the international federation do not provide for a mandatory provision obliging a continental association to introduce a right of appeal to the CAS against its decisions, and the international federation regulations do not provide such mandatory right for appeal. Even though the rules of an international federation may compel a national federation to provide for a right of appeal from its decisions, no right of appeal to the CAS can exist until the national federation has actually inserted such clause in its own regulations.
6. Even though it is indeed possible to

recognize the validity of arbitration clauses integrated by reference in the rules of sports federations, such reference must be specific in its personal and material scope in order to bind the respective parties and cover the scope of the dispute. Such “general reference” in favour of the CAS has been interpreted as a reference (in the rules of the body which issued the appealed decision) that does not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause.

7. CAS applies principles of procedural public policy, including the right to a fair trial. However, CAS, as a private arbitral tribunal with its seat in Switzerland, can only review and apply said principles insofar as it has jurisdiction to hear a present matter.

I. PARTIES

1. Vladan Spaić (“the Athlete”) is a professional water-polo player of Montenegrin nationality and is currently playing for the Cercle des Nageurs de Marseille (“the Club”), a water-polo club based in Marseille, France (jointly referred to as “the Appellants”).
2. European Aquatics (“EA” or the “Respondent”) is the governing body of water-polo in the continent of Europe and the organizer of the Water Polo Champions League. It is one of the regional Confederations of World Aquatics and it is based in Nyon, Switzerland. Together with the Appellants they will be referred to as “the Parties”.

3. The appeal is directed against a decision rendered by the EU Disciplinary Panel Commission on 10 November 2024 (“the Appealed Decision”).

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, she refers in her Award on Jurisdiction only to the submissions and evidence she considers necessary to explain her reasoning.
5. On 9 October 2024, the first water polo Champions League group match took place between Cercle des Nageurs de Marseille and PVK Jarden HN, in Marseille.
6. At 3:41 in the second half of the match, the Athlete struck an opponent, Mr Vuk Milojevic (the “Incident”). Prior to the Incident, the Athlete had been pushed underwater by an opponent on two occasions and a fault was whistled by the referee, with the opponent player temporarily sent off and the Club getting the ball back.
7. In a subsequent action, the Athlete gave Vuk Milojevic a blow underwater and caused him an injury. Only two minutes later, the referee noted that Mr Vuk Milojevic had sustained a mouth injury

and sanctioned the Athlete with a red card for violent conduct.

8. After the match, the Athlete publicly apologized through his Instagram account.
9. Furthermore, the day after the match, the Athlete spoke to Mr Vuk Milojevic and offered his apologies, that were accepted.

B. Proceedings before the previous instance

10. On 11 October 2024, namely two days after the match, the Club was notified of the decision of the EA TWPC Commission (the “First Decision”), rendered by the President of European Aquatics, its Vice-President, and its Secretary, which read as follows:

“After analysing all the actions and the facts that led to the violent action committed by Vldan Spajic and seriousness of the injury to the opponent player, TWPC Commission made decision regarding sanction to be imposed as follows:

Due to gravity of violent action committed by intentional punch which as consequence has serious injury of opponent player and according to the EA WP Code of Discipline, as per rule 2.2, player Vldan Spajic has been sanctioned with ten (10) games suspension.

Sanction imposed will be served at next ten (10) games of CN Marseille under EA jurisdiction. Regardless of the sanction imposed, according to the “Regulations for the European Cups for Club Teams” point CLUB 10.3.5, CN MARSEILLE may substitute the suspended player and have thirteen (13) players listed on the Players list on those games.

The additional fine sanction of 500€ will be processed by the European Aquatics Office after the end of the competition. According to the Rule E 21.3 a) an appeal against decision of TWPC Commission may be submitted to the European Aquatics Panel within twenty-one (21) days after notification (Rule C 15.2.1.4)”.

11. The First Decision was issued without previously consulting with the parties concerned.
12. On 14 October 2024, the Club sent an email to EA informing it of its wish to appeal the First Decision and requested clarification as to the procedure to be followed.
13. On 17 October 2024, EA informed the Club that it needed to submit a written appeal with evidence or facts justifying the appeal and stated that the appeal would be forwarded to “the appropriate body in accordance with the regulations”.
14. On the same day, the Club indicated that it wished to file an appeal by email and asked whether evidence should be filed at the same time or upon the initiation of the appeal procedure.
15. This email remained without a response and the Club sent again an email on 22 October 2024, requesting confirmation of receipt of the appeal and information on the progress of the proceedings. On the same day, the Club sent EA various attestations, exchanges between the players and the Player’s apology on Instagram.
16. On 24 October 2024, EA informed the Club that the appeal had to be filed in writing (and therefore not by email) and should set out the facts and evidence justifying the appeal.
17. On 25 October 2024, the Club sent a written appeal by email, along with the exhibits that had already been sent before.
18. On 10 November 2024, the EA Disciplinary Panel Commission issued the Appealed Decision and decided as follows:

“The EA Disciplinary Panel commission fully supports the decision of the EA TWPC, confirming Mr. Vladan Spaić’s suspension for a total of 10 matches.

Given that the player has already served two matches, the imposed sanction will be served in the next eight (8) matches of CN Marseille under the jurisdiction of the EA.

This sanction imposed on the player Vladan SPAIC is an indication to all other players that European Aquatics will not tolerate violent behavior of any kind”.
19. The Club told EA that it was astonished by the “*the manner in which this case has been handled, as the current procedure undermines all principles of the right to defense (...)*”. It also said that the Club and the Player were both deprived of their right to present their version of events and to consult the case file, but also that EA considered that this was “*an intentional punch*” and “*a serious injury*”. As such, the Club requested EA to provide “*the official documents detailing such a procedure, as well as the complete disciplinary file concerning Mr. Spaić (...)*”.
20. This email remained without a response from EA.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 29 November 2024, the Appellants filed a Statement of Appeal and a Request for Provisional Measures to the CAS against the Appealed Decision, indicating that the Statement of Appeal should be considered as an Appeal Brief, in accordance with the letter of 23 December 2024 and Article R51, para. 1 of the CAS Code. The Statement of Appeal was filed in French and the Appellants requested that a Sole Arbitrator be appointed.
22. On 29 November 2024, the CAS Court Office acknowledged receipt of the Statement of Appeal against the Appealed Decision of 10 November 2024 and invited the Appellant to file its Appeal Brief, unless it intended to use its Statement of Appeal as an Appeal Brief and invited the Respondent to express itself on the request for provisional measures until 3 December 2024.
23. On 2 December 2024, the CAS Court Office acknowledged receipt of the Appellants' email requesting confirmation of receipt and information on the next steps, informing the Appellants that an Order on Provisional Measures would soon be issued. On the same day, the CAS Court Office acknowledged receipt of the Appellants' email that they had not received the CAS letter dated 29 November and forwarded it to them anew.
24. On 3 December 2024, the CAS Court Office noted that the Respondent had not filed any submissions with respect to the Appellants' Request for Provisional Measures and informed the Parties that the President of the Appeals Division or her Deputy would issue an Order on Provisional Measures shortly.
25. On 3 December 2024, the Respondent informed the CAS Court Office that it had not been able to respond on the Request for Provisional Measures within the given deadline and that, in accordance with Article R29 of the CAS Code, the present proceedings should be conducted in English. In the same letter, the Respondent informed the CAS that it did not recognize the jurisdiction of the CAS in the given matter and reserved its right to make further submissions in fact and in law, including on the issue of provisional measures.
26. On 4 December 2024, the CAS Court Office acknowledged receipt of the Respondent's email and granted three days to the Appellants to express themselves on the language issue raised by the Respondent.
27. On the same day, the CAS Court Office acknowledged receipt of the Respondent's new email whereby it requested the procedural correspondence of the case and informed the CAS that the next pertinent match of the Appellants was scheduled on 4 February 2025, therefore there was no urgency to decide on the Request for Provisional Measures submitted by the Appellants, requesting a new time limit to rebut the Appellants' allegations on provisional measures. In its letter, the CAS Court Office noted that the time limit to file the observations on the Request for Provisional Measures had already expired and any request for extension should have been filed prior to the expiry of such time limit. The CAS Court Office invited the Appellants to file their observations on the Respondent's request to reinstate the time limit to file observations on their Request for

Provisional Measures by 6 December 2025.

28. On 5 December 2025, the Appellants sent a letter to the CAS objecting to the request for reinstatement of the time limit filed by the Respondent, indicating that the Player had already been suspended for five matches out of a total of ten matches. On the language of the proceedings, the Appellants noted that the Respondent had equally missed the time limit to object to French being the language of the proceedings. In any event, English was imposed on the Appellants during the internal disciplinary proceedings and therefore the Respondent's arguments could not be pertinent in the sense of Article R29 of the CAS Code. According to the latter provision, French was one official language of the CAS and an official language of EA, and the decisions could be easily translated into French. Moreover, the Club is based in France and the Player of Montenegrin nationality based in France since 2020.
29. On 6 December 2024, the CAS Court Office acknowledged receipt of the Appellants' letter dated 5 December 2024 and informed the Parties that the Respondent will not benefit from a reinstatement of the time limit to file observations on the Request for Provisional Measures and that an Order would shortly be issued in this respect. With respect to the language of the proceedings, the CAS Court Office noted that the time limit to file objections on the language would expire on 9 December 2024 only, therefore the Respondent's objections were filed on time, but in view of the Appellants' objections it invited the Respondent to indicate to the CAS whether it intended to maintain or withdraw its objection to the language by 10 December 2024, during which time the time limit to file an Appeal Brief would be suspended.
30. On 10 December 2024, the Respondent reiterated its objection to French being the language of the proceedings and noted that, as per Articles C8.1 and C8.2 of the EA Constitution, "*in cases of doubt, the English language shall prevail*" and "*that the working language shall be English*". Finally, Article C.20.2 of the same rules provided that "*(...) The arbitration proceedings shall be conducted in English unless the parties agree otherwise*".
31. On 10 December 2024, the CAS Court Office acknowledged receipt of the Respondent's letter of the same day and informed the parties that the President of the Appeals Division or her Deputy would issue an order on this matter shortly.
32. On 20 December 2024, the Deputy President of the Appeals Arbitration Division issued an Order on Language, deciding that English should be the language of the proceedings and requesting the Appellants to file their Appeal Brief in English within ten (10) days from notification of the Order.
33. On the same day, the CAS Court Office responded to an email sent by the Appellants clarifying that they should indicate whether they intended to use their Statement of Appeal as an Appeal Brief and that they could file a request for extension of the time limit if necessary pursuant to Article R32 of the CAS Code.
34. On 23 December 2024, the CAS Court Office acknowledged receipt of the Appellants' letter informing the CAS

- that their Statement of Appeal should be considered as their Appeal Brief and granted the requested extension of 10 days in order to file the translated submissions in line with Article R32 para. 2 of the CAS Code.
35. On 9 January 2025, the CAS Court Office acknowledged receipt of the Appellants' email dated 8 January 2025 with the English translation of their Appeal / Appeal Brief and its exhibits and granted the Respondent twenty days to file its Answer.
 36. On 27 January 2025, the Respondent requested an extension to file its Answer until 18 February 2025.
 37. On 28 January 2025, the CAS Court Office acknowledged receipt of the Respondent's letter dated 27 January 2025 whereby it requested an extension of 20 days and granted a 10-day extension based on Article R32 para. 2 of the CAS Code, while it invited the Appellants to comment on the additional 10-day extension requested by 29 January 2025.
 38. On 30 January 2025, the CAS Court Office acknowledged receipt of the Appellants' objection to the extension of the time limit that was requested by the Respondent, considering that this a dilatory measure, and informed the Parties that the CAS Appeals Arbitration Division President would issue a decision in due course.
 39. On 4 February 2025, the CAS Court Office notified the Parties of the Order on Request for Provisional Measures rendered by the Deputy President of the Appeals Arbitration Division whereby she granted the request filed by the Appellants. By the same letter, it informed the Parties that the Deputy Division President had decided to grant ten (10) additional days to the Respondent to submit its Answer.
 40. On 7 February 2025, the CAS Court Office informed the Parties that the Panel appointed to decide this matter was constituted as follows:

Sole Arbitrator: Dr Despina Mavromati, Attorney-at-law in Lausanne, Switzerland.
 41. On 6 February 2025, the Respondent filed a request for bifurcation to the CAS, supporting that the CAS should deal with the jurisdictional issue prior to deciding on the merits. In the same letter, the Respondent requested that the Order on Provisional Measures "shall be set aside immediately".
 42. On 12 February 2025, the CAS Court Office acknowledged receipt of the Appellant's two letters, objecting to the request for bifurcation filed by the Respondent and invited the Parties to refrain from filing unsolicited submissions. In these letters, the Appellants indicated, as a precautionary measure, that they were firmly opposed to the lifting of the provisional measures granted by the Division President on 4 February 2025; in the second letter, the Appellants objected to the request for bifurcation filed by the Respondent, considering that the criteria for bifurcation were not granted in the given case and considering, in essence, that the jurisdictional issue could not be separated from the purely disciplinary question of the case.
 43. On 14 February 2025, the CAS Court Office informed the Parties that, after considering the Parties' respective

submissions, the Sole Arbitrator had decided to bifurcate these proceedings and to analyse the jurisdiction of the CAS as a preliminary issue and granted ten (10) days to the Respondent to file its submissions on the jurisdiction of the CAS.

44. On 25 February 2025, the CAS Court Office acknowledged receipt of the Respondent's submissions on jurisdiction and granted ten (10) days to the Appellants to file their submissions on the jurisdiction of the CAS. On the same day, the CAS Court Office acknowledged receipt of the Appellants' request for a ten-day extension of their time limit to file their submissions on the jurisdiction of the CAS and invited the Respondent to comment on such request.
45. On 3 March 2025, the CAS Court Office acknowledged receipt of the Respondent's letter dated 28 February 2025 whereby it did not object to the granting of an extension to the Appellants to file their observations on the jurisdictional issue and granted such request.
46. On 18 March 2025, the CAS Court Office acknowledged receipt of the Appellants' Brief on jurisdiction filed on 17 March 2025.

IV. SUBMISSIONS OF THE PARTIES

47. While the Sole Arbitrators has read and considered the Parties' entire submissions, she only reproduces below a summary of the Appellants' submissions as exposed in their Statement of Appeal / Appeal Brief and the Parties' subsequent respective submissions on the issue of jurisdiction.

A. The Appellants' Submissions in their Statement of Appeal / Appeal Brief with respect to the jurisdiction of the CAS

48. Since these proceedings have been bifurcated to focus on the jurisdiction of the CAS, the Sole Arbitrator shall only refer to the Appellants' submissions on such issue, which can be summarized as follows:
 - The Appellants were faced with a conflict of norms among several regulations, on the one hand among the 2022 Constitution and the 2023 Constitution regarding the internal appeal procedure and on the other hand among the EA and the World Aquatics By-laws. The First Decision stated that an appeal would be possible "*to the European Aquatics Panel within twenty-one (21) days after notification (Rule C 15.2.1.4)*". However, said provision only existed in the 2022 Constitution. Article C 15 of the 2022 Constitution was replaced in the 2023 Constitution by article C 16 entitled "*European Aquatics Integrity Unit (EAIU)*", with different prerogatives from the former LEN Panel.
 - The notification of the First Decision of October 11, 2024 does not mention an appeal to the EA Integrity Unit but only to the EA Disciplinary Panel without further details or operational guidelines. This is the reason that the 2022 version of the EA Constitution should apply in the present case.

- Article C 15.4 of the 2022 Constitution provides that the Appellants must be entitled to the right to a fair trial, the right to respond to the violation and resulting consequences, the right to present evidence, and the right to a written, reasoned decision.
- Article 15.2.3 of the 2022 Constitution provides that “*A decision taken by the LEN Panel according to C 15.2.1.4 and C 15.2.1.5 shall be final*”. At first glance, therefore, it would appear that a decision by the LEN Panel is not subject to external appeal.
- However, the Respondent is a Continental Organization of World Athletics, Article 11 of the World Aquatics Constitution provides that “*The constitution and rules of a Continental Organisation must comply with this Constitution and the World Aquatics Rules. [...] In case of any inconsistency between this Constitution and the World Aquatics Rules and the constitution and rules of a Continental Organisation, this Constitution and the World Aquatics Rules shall prevail*”. Moreover, Article 4.2.5 of the By-laws of World Aquatics provides for all aquatic athletes’ rights, including their right to an independent and impartial panel, with a right to appeal to the CAS. This provision providing for an appeal to the CAS must therefore prevail over Article 15.2.3 of the 2022 Constitution.

49. The Appellants filed the following requests for relief:

“In view of the urgency of the matter:

The granting of provisional measures to allow the Player to participate without delay in the Water Polo Champions League and to provisionally lift the suspension imposed on the Player by the Respondent with immediate effect;

The suspensive effect of this Appeal; Primarily:

The reduction of the sanction imposed on Mr. SPAIĆ to a fine of €500 and a suspension of less than five matches under the jurisdiction of European Aquatics;

In the alternative :

Refer the case back to the EA Disciplinary Panel Commission for a fresh decision;

In such a case, the Panel of Arbitrators will enjoin the EA Disciplinary Panel Commission to comply with its regulations and in particular with the rights of the defense provided for in article C 15.4 of its Constitutional Rules 2022;

In any case:

Order European Aquatics to pay all the costs of the arbitration proceedings and to pay Mr. Vladan SPAIĆ and the Cercle des Nageurs de Marseille a contribution towards their legal fees, as well as compensation for other costs incurred in the context of the present proceedings, in an amount to be set at the discretion of the CAS Arbitration Panel”.

B. The Respondent’s Submissions on Jurisdiction

50. The Respondent’s submissions on jurisdiction can be summarized as follows.

- The Appealed Decision is final as per the rules and regulations of EA and therefore cannot be appealed to the CAS.

- First, there is no jurisdiction that can be derived by the EA Rules. In accordance with Article R47 of the CAS Code, jurisdiction is granted if *“the statutes or regulations of the said body so provide (...)”*. As such, it is the statutes or regulations of EA that should foresee an arbitration clause to that effect, as the *“body issuing the decision”* according to CAS case law. Even though the Appellants acknowledge the absence of an arbitration clause within the rules of EA, they nevertheless attempt to establish such jurisdiction by combining outdated provisions of EA and those of World Aquatics, which is not a party to the present proceedings and has no relevance for the Appealed Decision, to the extent that said decision was rendered by EA in a competition organized and governed exclusively by EA.
- The Appellants’ reference to the EA Constitution is for its 2022 and 2023 edition, however at the time of the incident, the EA Constitution of 2024 (the “2024 Constitution”) was already fully in force. While older versions of the EA Constitution can be used for interpretational purposes, older versions of the Constitution cannot apply when the current edition is already in force. However, neither version of the EA Constitution foresees the possibility to appeal a decision of the EA Disciplinary Panel to the CAS.
- Article C20.1 of the 2024 Constitution provides that only final decisions made by the Congress or Bureau that violate the Constitution or mandatory legal provisions may be submitted to the CAS, which *e contrario* means that decisions of the EA Disciplinary Panel cannot be appealed to the CAS.
- According to Article 15.2.1.4 of the 2022 Constitution, the respective EA Disciplinary Panel (i.e. the LEN Panel under the older versions) had jurisdiction to decide on appeals by a party involved in regard *“to sanctions imposed by either a LEN Delegate or a LEN Committee (...)”*, and Article 15.2.3 provided that *“decision[s] taken by the LEN Panel according to C 15.2.1.4 and C 15.2.1.5 shall be final”*.
- When a decision is final according to the federation’s regulations, no appeal can be lodged to the CAS, as the latter requires a valid arbitration agreement and even acknowledged by the Appellants who state that *“[a]t first glance, therefore, it would appear that a decision by the LEN Panel, on appeal from a decision of the EA TWPC Commission, is not subject to external appeal”*.
- Second, the Respondent submits that there is no jurisdiction that can be derived from the Rules of World Aquatics. Article 4.2.5 of World Aquatics By-Laws provides for the athletes’ right to due process, *“including the right to a fair hearing within a reasonable time by the Disciplinary Chamber of the Aquatics Integrity Unit, the CAS Anti-Doping*

Division or other applicable independent and impartial panel, with a right to appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland”.

- To the extent that CAS jurisdiction can only be derived from the rules of the body that issued the appealed decision, the only pertinent rules should be those of the EA and not of World Aquatics. There is further no contradiction between the EA rules and Article 4.2.5 of World Aquatics By-Laws and the latter should not prevail over the former based on Article 11.2 of the World Aquatics Constitution.
- In this case, there is no inconsistency between the various rules but only a lack of jurisdiction in favour of the CAS. Article 4.2.5 does not impose an obligation to EA to foresee an appeal to the CAS in its own rules, and it is common for other associations to limit the appeal to CAS to specific cases. In the case of EA, this is only possible for decisions made by the Congress and the Bureau. Moreover, the EA rules have been approved by World Aquatics pursuant to Article C21.1.3 of the 2024 Constitution.
- Even if there were such an obligation imposed by World Aquatics, it would not be possible to directly invoke said obligation directly by the Appellants in order to establish a jurisdiction of the CAS in the present case.

- In summary, the Respondent submits that in the present case there is neither a parties’ agreement to bring this case to the CAS nor an arbitration clause in the rules of EA for decisions of the EA Disciplinary Panel, and it is not possible to derive a jurisdiction from the rules and regulations of World Aquatics.

51. The Respondent submitted the following requests for relief:

(i) Declare that it has no jurisdiction to hear the appeal in the proceedings TAS 2024/A/11043 Vladan Spaić & Cercle des Nageurs de Marseille v. European Aquatics;

(ii) In any event, to order Appellant to pay a contribution to the legal costs and expenses of European Aquatics of at least CHF 20'000.

52. The Respondent reserved the right to submit further requests for relief on any aspects of this case, including a request for a higher contribution to the legal costs and expenses in case that the CAS rule that it has jurisdiction in the present case.

C. The Appellants’ Subsequent Submissions on Jurisdiction

53. The Appellants’ subsequent submissions on jurisdiction can be summarized as follows:

- The 2024 Constitution, even though likely to have been approved in 2024, was not published on the European Aquatics website on the date of the Appellants’ filing of the Statement of Appeal.

- Furthermore, the notification of the First Decision of the EA TWPC Commission, stated that *“According to Rule E 21.3 a) an appeal against decision of TWPC Commission may be submitted to the European Aquatics Panel within twenty-one (21) days after notification (Rule C 15.2.1.4)” Exhibit A.1 - EA TWPC Commission decision of October 11, 2024”*.
- Rule E corresponds to the General Events Rules, and Rule E 21.3 a) states as follows:
“All actions of misconduct and disciplinary matters which do not require an immediate decision at the European Aquatics Event shall be decided: a) by the Chairman, the Vice-Chairman and the Secretary of the respective Technical Committee, if sanctions are provided for in one of the Codes of Conduct; An appeal against such a decision may be submitted to the European Aquatics Panel within twenty-one (21) days after notification (Rule C 15.2.1.4)”.
- Regarding the appeal procedure, Article E 21.3 a) refers to Article C 15.2.1.4, which, in the document in force since September 2023 and in the 2024 Constitution, Article C 15.2.1.4 does not exist. This provision however existed in an earlier document, namely the 2022 Constitution, which provided that *“The LEN Panel shall deal with cases which are under the jurisdiction of LEN and: [...] 15.2.1.4 decide on appeals put forward to the LEN Panel by a party involved in regard to sanctions imposed by either a LEN Delegate or a LEN Committee, subject to the payment of a fee of five hundred (500) EUR to LEN;”*.
- The 2023 Constitution has ratified the change of name of the former “Ligue Européenne de Natation (LEN)” to its current name “European Aquatics”. In the 2023 and the 2024 Constitution, Article C 15 entitled “LEN Panel for Disciplinary Matters and Disputes” does no longer exist and has been replaced by Article C 16 entitled “European Aquatics Integrity Unit (EAIU)”, which does not confer the same prerogatives as the former LEN Panel. What is more, the notification of the First Decision does not mention the EA Integrity Unit but rather the “European Aquatics Panel”, the competence of this body and its functioning not being detailed anywhere. This is why the Appellants submit that the 2022 Constitution should determine the rights of those subject to disciplinary proceedings by the EA Disciplinary Panel.
- Accordingly, Article C 15.4 specifies that all the rights relating to a fair trial that the appellant is entitled to, namely *“5.4 Relevant Principles of due Process, 15.4.1 The hearings of the LEN Panel shall respect the following principles taking into account the urgency of the matter, if applicable; 15.4.1.1 a timely hearing either personally or by written submissions; 15.4.1.2 a fair and impartial hearing body; 15.4.1.3 the right to be represented by counsel at the hearing, with no expense to LEN; 15.4.1.4 the right to be fairly and timely informed of the relevant violation;*

15.4.1.5 the right to respond to the violation and resulting consequences; 15.4.1.6 the right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission); 15.4.1.7 the right to an interpreter at the hearing, at no expense to LEN; and 15.4.1.8 the right to a timely, written, reasoned decision; specifically, including an explanation of the reason(s) for any period of suspension. 15.4.2 The LEN Panel may conduct a hearing or decide a matter based upon written submissions of the parties, however in any case the principles expressed in C 15.4.1 must be respected”.

- Notwithstanding Article 15.2.3 of the 2022 Constitution providing that “[a] decision taken by the LEN Panel according to C 15.2.1.4 and C 15.2.1.5 shall be final”, the Appellants submit that the Respondent’s position is based on an erroneous interpretation of all the rules applicable to water-polo players and clubs and that the CAS should have jurisdiction based on the case law of the CAS and the Swiss Federal Tribunal.
- More specifically, the CAS has jurisdiction based on a general reference in the respective rules of the federation. Citing federal case law, a general reference in the national rules whereby said federation must observe the rules of the international federation is sufficient to establish the jurisdiction of the CAS in the light of R47 of the CAS Code. According to the Appellants, as

members of a national or continental federation whose regulations make general reference to the regulations of the international federation of which it is a member, and that these regulations include an arbitration clause in favour of the CAS, athletes and clubs can benefit from such arbitration clause.

- Furthermore, the Appellants consider that a restriction on the jurisdiction of CAS cannot be provided for by a norm that is less important in the hierarchy of norms than the one giving CAS this jurisdiction. There is a conflict of standards between the rules of EA and the By-laws of World Aquatics. A finality of the Appealed Decision, however, would conflict with World Aquatics, to which EA is accountable as a Continental Organization.
- Moreover, the EA Constitution provides for a general reference to the World Aquatics regulations insofar as it states that the rules for the competitions authorized by European Aquatics are “the established EA Regulations and the World Aquatics rules”. Inversely, the World Aquatics rules require Continental Organizations to comply with the World Aquatics Constitution and the World Aquatics Rules and provide that, in case of inconsistency between the various rules, the ones of World Aquatics shall prevail.
- The Appellants submit that Article 4.2.5 of World Aquatics

Constitution granting athletes the right to due process cannot be restricted by Continental Organizations. As such, any provision in the EA Constitution providing for finality of the Appealed Decision is contrary to the World Aquatics rules. The “compliance” certificate granted to the Respondent is only a certificate of expediency but cannot be used to deviate from the regulatory provisions in force.

- Most importantly, the Appellants consider that the general reference to the World Aquatics regulations in the EA Constitution allows athletes to benefit from all procedural guarantees included therein, and in particular to the right to appeal to the CAS as per Article 4.2.5 of the By-laws of World Aquatics.
- In summary, the Appellants submit that a general reference is sufficient to establish CAS jurisdiction pursuant to Article 47 of the CAS Code; the reference in the EA rules specifying that the competitions organized by EA are subject to the rules of World Aquatics and the fact that World Aquatics rules have precedence over EA rules in case of inconsistency should allow for an appeal to the CAS. *In casu*, there is such inconsistency since the EA rules do not provide for an appeal to the CAS, while the World Aquatics rules do provide for an appeal to the CAS. Therefore, all aquatic athletes have the right to appeal to the CAS in disciplinary matters under the World Aquatics

regulations and the fact that the European Aquatics rules do not provide for such an appeal does not prevent the CAS from having jurisdiction, but on the contrary guarantees it. As such, the Appellants – and at least the Athlete, as an aquatic athlete, should have a right to appeal to the CAS based on Article 4.2.5 of the World Aquatics By-laws, to the extent that these rules take precedence over Article C 15.2.3 of the EA Constitution.

- The Appellants further submit that the jurisdiction of CAS is necessary to guarantee them the right to a fair trial under Article 6 paragraph 1 of the European Convention on Human Rights. In the present case, the Appellants were deprived of knowing their rights regarding the disciplinary proceedings due to an absence of provision in the EA rules. However, only the 2022 Constitution included due process provisions, safeguarding the parties’ rights. The Appellants were however deprived of all their procedural rights during the EA proceedings, as they could not attend a hearing, produce written observations or be represented by a lawyer.
- Therefore, Article 15.2.3 of the 2022 Constitution is without effect and the CAS should accept its jurisdiction, to the extent that the EA Commissions did not respect the regulations and violated the Appellants’ right to a fair trial.

54. The Appellants submitted the following request:

“i. That the CAS has jurisdiction to hear the appeal filed on November 29, 2024 in French and January 8, 2025 in English against the decision of the EA Disciplinary Panel of European Aquatics of November 10, 2024, by virtue of the jurisdiction clause provided for by the regulations of World Aquatics, to which the regulations of European Aquatics refer;

ii. That the CAS has jurisdiction to hear the appeal filed on November 29, 2024 in French and January 8, 2025 in English against the decision of the EA Disciplinary Panel of European Aquatics of November 10, 2024, in that it is the only available recourse to allow the Appellants to preserve their right to a fair trial;

And in the alternative, that in the event of a decision of inadmissibility, the Appellants request the Sole Arbitrator to rule:

i. That each party shall bear the burden of its legal costs;

ii. In the extremely unlikely event that they are ordered to bear the Respondent's costs, that these costs be reduced to a fairer level”.

V. APPLICABLE LAW

55. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

56. In line with the aforementioned provision, the Sole Arbitrator considers that the EA Constitution and relevant rules should be applied in the present matter.

57. Regarding the applicable version of the EA Constitution, and even though all Parties refer to the EA Constitution, the Appellants refer to the 2022 Constitution, while the Respondent supports that only the 2024 Constitution is applicable. The Sole Arbitrator agrees that previous editions of the EA Constitution may be used for interpretational purposes if needed; however, and in accordance with the principle of *tempus regit actum*, only the 2024 Constitution shall apply for the determination of the existence or validity of an arbitration agreement in favour of the CAS, to the extent that this version was approved and fully and formally in force at the time of the filing of the claim (cf. CAS 2018/O/5822, § 63). In this respect, it is immaterial that the applicable version was not yet published in the EA website or that the notification of the First Decision gave a reference to a provision that does no longer exist in the 2023 or the 2024 Constitution.

58. Moreover, Article 20.2 of the 2024 Constitution, i.e. the only provision that refers to applicable law in the 2024 Constitution provides that “[t]he time limit for filing an appeal shall be 21 days after receipt of the decision against which the appeal is directed. The governing law of the appeal shall be the Constitution and the Rules and Regulations of European Aquatics and complementarily, Swiss law. The arbitration proceedings shall be conducted in English unless the parties agree otherwise”.

59. It follows that the applicable law in the present proceedings will be 2024 Constitution and, complementarily, Swiss law.

VI. PRELIMINARY ISSUE: BIFURCATION OF THE PROCEEDINGS

60. Disputing the CAS jurisdiction in this matter from the beginning, the Respondent requested a bifurcation of the present proceedings to deal with the issue of jurisdiction as a preliminary matter.
61. In its letter dated 6 February 2025, the Respondent submitted that the requested bifurcation would contribute towards procedural efficiency and save valuable resources for both Parties as well as the CAS, even more as there was no urgency to obtain a decision on the merits due to the granted provisional measures. Moreover, the Order on the Request for Provisional measures dated 4 February 2025 did not preclude the bifurcation of the proceedings as it only examined the CAS jurisdiction on a “*prima facie*” basis and in the absence of any submissions filed by the Respondent.
62. The Appellants objected to the Respondent’s request to bifurcate these proceedings referring to CAS case law, stating that the criteria for bifurcation should include the efficiency of the proceedings, the interest of justice and safeguard of the parties’ interests.
63. The Appellants considered that a bifurcation would only lengthen the procedure before the issuance of a final award and force them to endure additional costs; furthermore, there is no issue of urgency as the request for bifurcation was made more than two

months after the starting of the proceedings. What is more, the granting of provisional measures would not allow for a bifurcation only for this reason. In the Order on Provisional Measures, the Deputy President of the Appeals Arbitration Division held that “*the jurisdiction of the CAS is not entirely crystal clear*”, but also considered that “*on a prima facie basis, she is not in a position to consider that CAS lacks jurisdiction to entertain this appeal*”, and that if this had been the case, she would have “*terminate the arbitration procedure if she considered that the CAS clearly had no jurisdiction*”.

64. Finally, the Appellants submit the question of the jurisdiction of CAS cannot be separated from the merits of the case, as the entire disciplinary system of European Aquatics is being challenged by the Appellants. This disciplinary procedure, which does not respect the rights of the defence and goes against the World Aquatics regulations, which should nevertheless prevail, “*does not allow the athletes to benefit from an appeal before CAS, which is precisely strongly criticized and contradicted by the Appellants in their declaration of appeal*”. According to the Appellants, this is a global issue that should not be separated from the purely disciplinary question of the case, i.e. the reduction of the sanction.
65. Having heard the Parties’ submissions on this matter and having consulted the case file, the Sole Arbitrator decided to bifurcate the present proceedings for the reasons that follow.
66. First, the jurisdiction in the present case appears to be doubtful. In such a case, and for reasons of procedural economy, an Award on jurisdiction can save

substantive time and financial resources if the Sole Arbitrator finds that the CAS does not have jurisdiction to hear the appeal. In any event, the bifurcation of the proceedings does not prejudice the procedural rights of the Appellants to the extent that the latter have already been granted a suspension of the sanction through the Order on Provisional Measures of 4 February 2025.

67. Finally, the Sole Arbitrator is not convinced by the Appellants' argument that the jurisdiction of the CAS in the present case cannot be separated from the merits, as they challenge the entire disciplinary system of the Respondent. In fact, the jurisdiction of the CAS is a threshold matter and only if the Sole Arbitrator confirms that the CAS has jurisdiction to hear the case can she subsequently review the legality of the EA disciplinary system and its decision-making process altogether. The CAS does not have an "omnibus jurisdiction" to review possible malfunctions or bad administration of justice unless its jurisdiction is granted under the conditions enshrined in Article R47 of the CAS Code.

VII. JURISDICTION

68. First, it must be noted that these arbitration proceedings are international insofar as the CAS has its seat in Lausanne and the Appellants were not domiciled in Switzerland at the relevant time. Therefore, the proceedings are governed, alongside the CAS Code, by the underlying legal framework of the 12th Chapter of the Federal Act on Private International Law of December 18, 1987 (PILA; RS 291).

69. According to Article 178 para. 1 of the PILA, the arbitration agreement must be made in writing or any other means of communication allowing it to be evidenced by text. Pursuant to Article 178 para. 2 of the PILA, the arbitration agreement is then valid as to its substance if it conforms either with the law chosen by the parties, or with the law governing the subject-matter of the dispute, or with Swiss law. The EA is based in Nyon, Switzerland, and the Parties have provided submissions with references to CAS case law and the jurisprudence of the Swiss Federal Tribunal (SFT). As a result, the substantive validity of the arbitration agreement will be determined in accordance with Swiss law and, more specifically, the principles developed by the SFT (cf. 4A_388/2012, at 3.4.1.).

70. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

71. Article R47 of the Code therefore provides for the possibility of bringing an appeal to the CAS either through a specific arbitration agreement or through a statutory basis (i.e. an arbitration agreement enshrined in the rules of the federation of the body that issued the appealed decision).
72. Generally, the arbitration agreement enshrined in Article R47 of the Code is

an agreement pursuant to which the parties agree to have existing and / or future disputes decided by an arbitral tribunal according with the relevant procedural provisions, excluding the competence of state courts (4A_430/2023 of 23 February 2024, at 5.2).

73. In the case at hand, it is uncontested among the Parties that the latter have not concluded a specific arbitration agreement as per Article R47 of the CAS Code. However, in line with Article 178 para. 4 of the PILA and Article R47 para. 1 of the CAS Code, it is also possible to confer jurisdiction to an arbitral tribunal through an arbitration clause included in the rules of an association. Therefore, the Sole Arbitrator will need to determine, according to Article R47 para. 1 of the Code, whether the 2024 Constitution provides for a valid arbitration clause and an appeal to the CAS against the Appealed Decision.
74. In their Statement of Appeal, the Appellants refer among others to Article C 15.2.1.4 of the 2022 Constitution, which states as follows: *“A decision taken by the LEN Panel according to C 15.2.1.4 and C 15.2.1.5 shall be final”*.
75. Even though the Appellants acknowledge that *“[a]t first glance, (...) it would appear that a decision (...) is not subject to external appeal”*, they subsequently refer to a series of other rules, including the ones of World Aquatics, in order to establish the CAS jurisdiction in the present appeal proceedings. In their submissions on jurisdiction, the Appellants request *“[t]hat the CAS has jurisdiction to hear the appeal filed on November 29, 2024 in French and January 8, 2025 in English against the decision of the EA*

Disciplinary Panel of European Aquatics of November 10, 2024, by virtue of the jurisdiction clause provided for by the regulations of World Aquatics, to which the regulations of European Aquatics refer”.

76. In view of the above, the Sole Arbitrator must proceed to a detailed examination of the applicable rules and interpret the arbitration clause, in order to determine its validity and its scope.
77. Having established that only the 2024 Constitution is applicable for the determination of the jurisdiction of CAS in the present matter, the Sole Arbitrator considers that the Appellants’ references to the 2022 Constitution do not offer any help in this regard, all the more since Article 15.2.3 of the 2022 Constitution did not provide for an appeal to the CAS for decisions of the LEN Panel (i.e. the current EA Disciplinary Panel) in that *“[a] decision taken by the LEN Panel according to C 15.2.1.4 and C 15.2.1.5 shall be final”*. In turn, Article 15.2.1.4 of the 2022 Constitution covers decisions *“in regard to sanctions imposed by either a LEN Delegate or a LEN Committee (...)”*.
78. The Sole Arbitrator emphasizes that the key question is whether, based on the 2024 Constitution and the various regulations, the CAS has jurisdiction to hear the appeal against a decision rendered in second instance by the EA Disciplinary Panel. From the first sight, it seems evident that the possibility to bring the Appealed Decision to the CAS is nowhere to find in the 2024 Constitution, which is the only regulatory framework applicable for the determination of the CAS jurisdiction between the Parties.
79. In this respect, the only provision in the 2024 Constitution that foresees an

appeal to the CAS is in Article C 20.1 of the 2024 Constitution for *“final decisions made by the Congress or Bureau that violate the Constitution or mandatory legal provisions”*. It is however clear that the scope of such arbitration clause is limited to decisions made by the Congress or Bureau violating the Constitution or mandatory legal provisions, i.e. not related to the dispute that led to the Appealed Decision.

80. The Appellants’ efforts to derive an arbitration clause from a combined reading of the (non-applicable) 2022 Constitution together with references to the World Aquatics rules are misplaced. They even acknowledge that *“[a]t first glance, therefore, it would appear that a decision by the LEN Panel, on appeal from a decision of the EA TWPC Commission, is not subject to external appeal”*. From the above it follows that there is no arbitration clause that can be derived directly from the EA Constitution. It is however in the applicable version of the EA rules (i.e. the 2024 Constitution) that one should seek the arbitration clause in favour of the CAS, as the body that issued the Appealed Decision.
81. The Sole Arbitrator now turns to the Appellants’ arguments to establish jurisdiction through the regulatory provisions of other federations, such as the rules of World Aquatics, or rather the existence of a valid reference in the relevant EA rules to the rules of World Aquatics that would allow for an appeal to the CAS against the Appealed Decision.
82. In accordance with the jurisprudence of the SFT, the interpretation of the statutory arbitration clause inserted in the rules of a (major) sports federation is

made according to the rules of statutory interpretation (4A_314/2017, at 2.3.1; 4A_490/2017, at 3.3.2; 4A_600/2016, at 3.3.4.1). Generally, the principles of statutory interpretation are the literal interpretation, the systematic interpretation, the teleological interpretation and the historical interpretation. However, it is possible to depart from the clear text if the other methods of interpretation show that this does not correspond to the true meaning of the provision in question. The SFT does not favour any method of interpretation and does not establish a hierarchy but draws rather on pragmatic pluralism by seeking the true meaning of the norm (ATF 142 III 402, at 2.5.1).

83. In the case at hand, as shown above, the 2024 Constitution is clear in that there is no arbitration clause against the Appealed Decision in favour of the CAS. In terms of systematic and teleological interpretation, the Sole Arbitrator cannot find any provision in the 2024 Constitution or the other EA regulations that would establish the drafter’s will to allow for an appeal against the EA Disciplinary Panel decisions. As seen above, the historical interpretation by looking at the previous versions of the EA Constitution is equally not helpful, to the extent that it foresaw the finality of the decisions rendered by the LEN Panel.
84. The Sole Arbitrator now turns to the Appellants’ further argument based on Article 4.2.5 of World Aquatics By-Laws, which provides for the athletes’ right to due process, *“including the right to a fair hearing within a reasonable time by the Disciplinary Chamber of the Aquatics Integrity Unit, the CAS Anti-Doping Division or other applicable independent and impartial panel,*

with a right to appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland”.

85. However, and as stated above, the Sole Arbitrator agrees with the Respondent that CAS jurisdiction can only be derived from the rules of the body that issued the appealed decision, and therefore the only pertinent rules should be those of the Respondent and not of World Aquatics. What is more, Article 4.2.5 explicitly refers to proceedings of the Disciplinary Chamber of the Aquatics Integrity Unit, the CAS Anti-Doping Division or other applicable independent and impartial panel within the ambit of its own jurisdiction, i.e. World Aquatics. As such, there is nothing in Article 4.2.5 that seems to oblige EA to provide for an appeal to the CAS for decisions of the EA Disciplinary Panel, either in its own rules or by reference to Article 4.2.5.
86. Moreover, and even if there were such an obligation imposed by World Aquatics (*quod non*), it would not have been possible for the Appellants to invoke said obligation directly in order to establish a jurisdiction of the CAS in the present case, all the more since the EA Rules have been officially approved by World Aquatics as per Article C 21.1.3 of the 2024 Constitution. In other words, and according to CAS case law, the World Aquatics rules do not contain any mandatory provision obliging a Continental Association like EA to introduce a right of appeal to the CAS against its decisions, and the World Aquatics rules do not provide such mandatory right for appeal (cf. CAS 2021/A/8403, § 85). Also, in line with CAS 2005/A/952, even though the rules of an international federation may compel a national federation to provide for a right of appeal from its decisions, no right of appeal to the CAS can exist until the national federation has actually inserted such clause in its own regulations (cf. CAS 2021/A/8403, § 85).
87. For the same reason, the Sole Arbitrator must discard the Appellants’ argument that the CAS has jurisdiction to review the decision of the EA Disciplinary Panel in that “*it is the only available recourse to allow the Appellants to preserve their right to a fair trial*”: the CAS being an arbitral institution, the Sole Arbitrator cannot rewrite or interpret an association’s rules in such a way as to establish jurisdiction from a non-existent arbitration clause; this would amount to overstepping her jurisdictional limits as exposed above. That said, the Respondent is an association under Articles 60 ff. of the Swiss Civil Code (CC), and its members have all the rights enshrined therein, including but not limited to the right to challenge its decisions in accordance with Article 75 CC.
88. Furthermore, the Sole Arbitrator cannot accept the Appellant’s argument that the CAS has jurisdiction based on a general reference to World Aquatics in the EA rules. The judgment relied upon by the Appellants in order to corroborate their argument, i.e. 4A_460/2008, does not seem to be relevant in the case at hand. Specifically, that case involved an appeal to the CAS filed by FIFA and WADA against a decision rendered by a Brazilian football tribunal against a Brazilian football player; however, the jurisdiction of the CAS in that case was enshrined in the FIFA’s Statutes, which granted FIFA and WADA the right to appeal directly to the CAS against a decision rendered by one of FIFA’s members. In the

present proceedings, World Aquatics is not a party to these proceedings.

89. As a result, and even though it is indeed possible to recognize the validity of arbitration clauses integrated by reference in the rules of sports federations, such reference must be specific in its personal and material scope in order to bind the respective parties and cover the scope of the dispute. It is on the contrary not possible to derive CAS jurisdiction from a few scattered provisions and possible combinations of older, non-applicable versions of the EA Constitution and the rules of World Aquatics (that was not even a party in these proceedings) against decisions for which even the 2022 EA Constitution explicitly provides that are “final” (cf. also 4A_564/2020, at 6.5).
90. For the same reason, the Appellants’ arguments based on references to CAS 2009/A/1817 & CAS 2009/A/1844 and CAS 2009/A/1881 should also be dismissed. In CAS 2009/A/1817 & CAS 2009/A/1844, like in the 4A_460/2008 mentioned above, the case related to appeals filed by WADA and FIFA against decisions rendered by a national football association, the rules of which mandated conformity with FIFA regulations. Again, in that case it was FIFA and WADA that filed an appeal to the CAS, that right being explicitly provided in the FIFA statutes for the specific category of doping-related matters, clearly distinguishing that case from the present dispute.
91. Similarly, in CAS 2009/A/1881, the CAS interpreted the meaning of the “general reference” in favour of the CAS as a reference (in the rules of the body

which issued the appealed decision) that does not “*explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause*”. Such clause is however nowhere to find in the 2024 Constitution and the general obligation of each Continental Organization (including EA) to comply with the World Aquatics Rules enshrined in Article 11 of the World Aquatics is clearly not a sufficient basis to establish CAS jurisdiction in the present matter. There is therefore no reference, either general or specific, in the 2024 Constitution that would otherwise allow for an appeal to the CAS.

92. Furthermore, the Appellants’ reference to CAS 2016/A/4654 and the hierarchy of norms is equally irrelevant, to the extent that the CAS award referred to the hierarchy of norms within the same association (FIFA) and not among different associations, given the principle of autonomy of the association anchored in Swiss law (cf., among others, CAS 2019/A/6278, § 46). For the same reason, based on the principle of autonomy of associations and their freedom to include an arbitration clause in favour of the CAS in their own rules, the Sole Arbitrator does not consider that the present case presents a conflict of standards between the EA Constitution and the By-laws of World Aquatics. In any event, a World Aquatics rule providing that, in case of inconsistency between the various rules, the ones of World Aquatics shall prevail, cannot be employed in order to artificially create an arbitration clause in the 2024 Constitution.
93. In the absence of a valid arbitration agreement, either direct or by reference, in the rules of EA, i.e. the body that

issued the Appealed Decision, there is no general vested “right of stakeholders” to appeal to the CAS. For the same reason, the Sole Arbitrator does not consider that the Athlete – as an “aquatic athlete” under the Article 4.2.5 of the World Aquatics By-laws, can rely on said provision in order to challenge a decision rendered by another association and whose regulations do not provide for a right to appeal.

94. The Sole Arbitrator thus concludes that, for all the reasons explained above and refuting the Appellants’ arguments, the CAS lacks jurisdiction to hear an appeal against the Appealed Decision in the present matter.

95. In a second line of arguments, the Appellants endeavour to establish CAS jurisdiction based on their right to a fair trial as it is guaranteed by Article 6 (1) of the European Convention of Human Rights (“the Convention”), which provides 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

96. The Sole Arbitrator agrees with the Appellants that the CAS applies said principles of procedural public policy, including the right to a fair trial (cf. CAS

2009/A/1995). The CAS, however, as a private arbitral tribunal with its seat in Switzerland, can only review and apply said principles *insofar as* it has jurisdiction to hear a present matter.

97. Again, the Sole Arbitrator reiterates that the issue of jurisdiction and the existence of a valid arbitration clause in favour of the CAS should be distinguished from the Appellants’ fundamental rights in line with mandatory Swiss law (in particular with respect to Article 75 CC that allows members of an association the right to challenge unlawful decisions of associations before ordinary courts). As such, the dispute at hand must be differentiated from CAS 2017A/5042, which related to the lack of exhaustion of legal remedies and not the lack of personal or material jurisdiction of the CAS, and CAS 2018/A/5994, whose factual matrix is entirely irrelevant to the present matter. As such, and to the extent that it was established that the only applicable set of rules is the 2024 Constitution, all arguments related to the previous versions of the EA Constitution – including the insinuated lack of independence and impartiality of the deciding bodies that issued the Appealed Decision - must be discarded.

98. Overall, the Sole Arbitrator considers that the Appellants’ effort to establish CAS jurisdiction through an overly expansive interpretation of the various regulatory provisions and reliance to rules of other associations such as World Aquatics must be dismissed as they contradict the clear wording and structure of the applicable 2024 Constitution. It follows that the CAS lacks jurisdiction to entertain the appeal filed by the Appellants.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS does not have jurisdiction to entertain the appeal filed by Vladan Spaic and Cercle des Nageurs de Marseille on 29 November 2024 against the decision issued by the European Aquatics Disciplinary Panel on 10 November 2024.
2. The stay of the execution of the decision issued by the European Aquatics Disciplinary Panel on 10 November 2024, granted by the President of the Appeals Arbitration Division on 4 February 2025, is revoked with immediate effect.
3. (...).
4. (...).

Football; Indemnités de formation;
Mécanisme de consorité passive
nécessaire en droit suisse; Qualité d'intimé
(appelée encore qualité pour défendre ou
légitimation passive); Conséquences selon
le droit suisse de l'absence à une procédure
d'un intimé ayant légitimation passive;
Renonciation au droit d'être entendu

Formation

Me Giulio Palermo (Italie), Arbitre unique

1. En droit suisse, la consorité passive nécessaire existe lorsqu'il faut lier toutes les parties dans une relation substantielle afin de rendre les effets d'une décision opposables à celle-ci.
2. La qualité pour être intimé dans une procédure existe lorsque les intérêts essentiels d'une partie sont directement et fondamentalement concernés par ladite procédure. Dans ces cas, cette partie doit participer à la procédure afin d'être en mesure d'exercer ses droits procéduraux fondamentaux.
3. Si, en principe, les questions litigieuses peuvent être dissociées et seules jugées les demandes à l'encontre de l'intimé qui a été attrait au litige, il ne saurait être procédé ainsi lorsque seule la FIFA a été attrait au litige et que l'objet de l'appel porte sur (i) la reconnaissance de l'éligibilité à une indemnité de

formation et (ii) son paiement. Ces deux questions ne peuvent être dissociées l'une de l'autre car une éventuelle reconnaissance de l'éligibilité à une indemnité de formation entraînerait l'obligation de paiement de l'indemnité par un club tiers à la procédure. En l'absence de toutes les parties ayant qualité pour être intimées, l'appel doit être rejeté.

4. Le seul silence d'un club dans une procédure de détermination du Passeport électronique d'un joueur ne peut être interprété comme une renonciation à son droit d'être entendu dans une procédure d'appel contre la décision ayant porté validation du contenu dudit Passeport. La renonciation au droit d'être entendu doit être établie de manière non équivoque et s'entourer d'un minimum de garanties correspondant à sa gravité.

I. LES PARTIES

1. Lyon La Duchère est un club français de football amateur dont le siège est à Lyon, France ("le Club" ou "l'Appelant"). Le Club est affilié à la Fédération Française de Football (FFF).
2. La Fédération Internationale de Football Association est une association à but non lucratif de droit suisse et l'instance dirigeante du football au niveau mondial ("la FIFA" ou "l'Intimée"). Son siège est situé à Zurich, Suisse.
3. Le Club et la FIFA sont conjointement désignés ci-après "les Parties".

II. FAITS

4. Les principaux faits, tels qu'ils résultent des écritures et preuves soumises par les Parties sont exposés ci-dessous. Ce résumé n'a pas vocation à être exhaustif. Bien que l'Arbitre unique ait revu et analysé l'ensemble des allégations et preuves avancées par les Parties, il ne se réfère dans la sentence qu'aux éléments qu'il estime nécessaires à l'explication de son raisonnement.
5. Le 8 juillet 2024, le joueur de football de dix-huit ans Rayan Djahl ("le Joueur") a rejoint le club italien Juventus F.C. Spa ("Juventus"), affilié à la *Federazione Italiana Giuoco Calcio* ("FIGC"), association membre de la FIFA. Il s'agissait de son premier enregistrement en tant que professionnel.
6. Préalablement à cette date, le Joueur a évolué cinq saisons au sein du Club en qualité d'amateur, soit durant la période du 8 juillet 2019 au 1^{er} juillet 2024. Le Joueur a également évolué au sein du club de football Olympique Lyonnais durant la période du 1^{er} janvier 2018 au 30 juin 2018, ainsi que du club C.S. Lyon 8 durant la saison du 2 juillet 2018 au 30 juin 2019.
7. Dans la mesure où l'enregistrement auprès de Juventus était susceptible de donner droit au paiement d'une indemnité de formation, cet enregistrement a déclenché, conformément à l'article 8.1 du Règlement de la Chambre de Compensation de la FIFA ("RCC"), un Passeport électronique de joueur (EPP) provisoire. Cet EPP a été généré le 8 juillet 2024.
8. A l'issue d'une période d'inspection de l'EPP provisoire, une procédure d'examen de l'EPP a été ouverte. Il ressort de la détermination du Secrétariat général de la FIFA du 12 novembre 2024 que les parties suivantes ont participé à la procédure d'examen de l'EPP:
 - La FIGC;
 - La FFF;
 - Lyon La Duchère;
 - Juventus;
 - Olympique Lyonnais;
 - C.S. Lyon 8.
9. Le 31 octobre 2024, selon la FIFA, l'Appelant a été contacté par la FIFA afin de *"soumettre toute documentation relative au droit aux rétributions de la formation de tout club concerné dans l'EPP, y compris, mais sans s'y limiter, les renonciations des clubs formateurs obtenues par le nouveau club ou bien l'offre de contrat produite par l'ancien club (cf. article 6 paragraphe 3 de l'Annexe 4 du Règlement du Statut et du Transfert des Joueurs), au plus tard à la date à laquelle le statut de "finalisation" prend fin comme actuellement affiché dans TMS"*. Selon l'Intimée, l'Appelant n'a pas répondu.
10. Le 8 novembre 2024, l'EPP est passé à l'état de "validation".
11. Le 11 novembre 2024, l'EPP a été approuvé. Le 12 novembre 2024, la détermination sur l'EPP, soit la décision du Secrétariat général de la FIFA attaquée en appel ("la Décision"), a été notifiée aux participants de la procédure d'examen. Selon cette Décision, Lyon La Duchère n'était pas éligible aux indemnités de formation à la suite du transfert du Joueur; seuls les clubs Olympique Lyonnais et CS Lyon 8 étaient éligibles.
12. Le 15 novembre 2024, l'Appelant a adressé une lettre à la FIFA contestant la Décision.

III. RÉSUMÉ DE LA PROCÉDURE DEVANT LE TAS

13. Par courriel du 3 décembre 2024 et lettre recommandée avec accusé de réception du même jour, l'Appelant a déposé sa déclaration d'appel ("la Déclaration d'appel") à l'encontre de la Décision devant le TAS, en désignant la FIFA en qualité d'intimée.

14. Par ailleurs, dans sa Déclaration d'appel, l'Appelant a désigné Me Nicolas Cottier en tant qu'arbitre et a sollicité du TAS qu'il:

"enjoigne la FIFA à revoir sa position, calculer les indemnités à percevoir en tenant compte de la durée passée au sein dudit club et à inviter in fine le club du FC Juventus à les verser dans les délais lui étant impartis par les Règlements du Statut et du Transfert du Joueur (R.S.T.J.)".

15. La Déclaration d'appel était accompagnée des Pièces No. 1 à 3.

16. Le 10 décembre 2024, le Greffe du TAS a accusé réception de la Déclaration d'appel et a, notamment:

- i. invité l'Appelant à déposer son mémoire d'appel dans un délai de dix jours suivant l'expiration du délai d'appel;
- ii. invité l'Intimée à désigner un arbitre sur la liste du TAS dans un délai de dix jours suivant la réception de la correspondance. Nonobstant ce qui précède, et compte tenu de la valeur litigieuse relativement basse, le Greffe du TAS a invité les Parties à lui indiquer dans un délai de cinq

jours de la réception de la correspondance si elles acceptent qu'un arbitre unique soit désigné par la Présidente de la Chambre arbitrale d'appel du TAS, ou sa suppléante;

iii. informé les Parties que dans la mesure où l'Appelant a déposé sa Déclaration d'appel en français, sauf objection dans un délai de trois jours suivant la réception de la correspondance, la langue de l'arbitrage sera le français et toutes écritures et pièces des Parties devront être accompagnées d'une traduction en français;

iv. attiré l'attention des Parties sur la possibilité de soumettre leur différend aux règles du TAS sur la médiation et de désigner un médiateur pour régler leur litige.

17. Le 10 décembre 2024, l'Appelant a indiqué au Greffe du TAS qu'il était disposé à soumettre le litige à la médiation selon les règles du TAS. En cas de refus de la FIFA, l'Appelant a consenti à la désignation d'un arbitre unique par la Présidente de la Chambre arbitrale d'appel du TAS ou sa suppléante.

18. Le 11 décembre 2024, le Greffe du TAS a invité l'Intimée à se déterminer sur la suggestion de l'Appelant le 13 décembre 2024 au plus tard, précisant qu'en cas de refus ou absence de réponse de la part d'Intimée, aucune médiation ne sera mise en œuvre.

19. Le 12 décembre 2024, l'Appelant a déposé son mémoire d'appel ("Mémoire d'appel"). Le Mémoire d'appel était accompagné des Pièces No. 1 à 7 bis.

20. Le 12 décembre 2024, l'Intimée a accusé réception des correspondances du Greffe du TAS des 10 et 11 décembre 2024 et, a, notamment:
- i. accepté à ce que la présente procédure se tienne en français à condition que les Parties soient également autorisées à produire des écritures et pièces en anglais, sans traduction en français;
 - ii. refusé la possibilité de recourir à la médiation;
 - iii. accepté que le litige soit soumis à un arbitre unique à condition qu'il/elle soit choisi(e) parmi les arbitres figurant sur la Liste du Football, conformément à l'article R54(4) du Code de l'arbitrage en matière de sport ("le Code du TAS").
21. Le 13 décembre 2024, le Greffe du TAS a invité l'Appelant à faire ses commentaires sur les suggestions de l'Intimée à propos de la langue de l'arbitrage le 18 décembre 2024 au plus tard. Le Greffe a également invité l'Intimée à déposer au Greffe du TAS, dans un délai de vingt jours de la réception de la correspondance, son mémoire de réponse.
22. Le même jour, soit le 13 décembre 2024, l'Appelant a consenti à ce que des documents en anglais puissent être déposés par les Parties, sans traduction. Le même jour, compte tenu de l'accord des Parties, le Greffe du TAS a confirmé que la langue de la procédure était le français et les Parties étaient autorisées à déposer des documents en anglais, sans traduction.
23. Le 17 décembre 2024, l'Intimée a sollicité du Greffe du TAS un nouveau délai afin de soumettre son mémoire de réponse après le paiement par l'Appelant de sa part de l'avance de frais, conformément à l'article R55 al. 3 du Code du TAS.
24. Le 18 décembre 2024, le Greffe du TAS a indiqué aux Parties que le délai imparti à l'Intimée pour son mémoire de réponse était annulé et qu'un nouveau délai serait fixé dès réception du paiement de la part de l'avance de frais par l'Appelant.
25. Le 14 janvier 2025, le Greffe du TAS a accusé réception du paiement de l'Appelant et invité l'Intimée à déposer son mémoire de réponse dans un délai de vingt jours suivant la réception de la correspondance par courriel.
26. Le 17 janvier 2025, le Greffe du TAS a adressé aux Parties la "Déclaration d'acceptation et d'indépendance" complétée et signée par Me Giulio Palermo, qui avait été désigné arbitre unique ("l'Arbitre unique") par la Présidente de la Chambre arbitrale d'appel du TAS. Le Greffe du TAS a, par ailleurs, attiré l'attention des Parties sur la remarque faite par l'Arbitre unique dans sa Déclaration d'acceptation et d'indépendance, et rappelé le délai de sept jours durant lequel une éventuelle demande de récusation doit être déposée selon l'article R34 du Code du TAS.
27. Le 22 janvier 2025, en raison d'une charge de travail élevée du département des litiges de la FIFA et l'absence du directeur de ce département durant une semaine, l'Intimée a sollicité une prolongation de vingt jours du délai pour

- le dépôt de son mémoire de réponse, conformément à l'article R32 du Code du TAS.
28. Le 22 janvier 2025, conformément à l'article R32 du Code du TAS, le Greffe du TAS a, au nom du directeur du TAS, octroyé un délai automatique de dix jours pour le dépôt du mémoire de réponse. Le Greffe a également invité l'Appelant à se déterminer, le 24 janvier 2025 au plus tard, sur l'extension de dix jours supplémentaires sollicité par l'Intimée, précisant que le silence de l'Appelant vaudra acceptation.
29. Le même jour, l'Appelant s'est opposé à ce qu'un délai supplémentaire soit accordé à l'Intimé considérant que la FIFA avait déjà bénéficié de larges délais dans l'attente de paiement par l'Appelant de sa part de l'avance de frais.
30. Le même jour, compte tenu de l'objection de l'Appelant, le Greffe du TAS a rappelé aux Parties qu'il reviendra à la Présidente de la Chambre arbitrale d'appel du TAS, ou sa suppléante, de décider sur le délai supplémentaire sollicité par l'Intimée.
31. Le 27 janvier 2025, le Greffe du TAS a informé les Parties qu'aucune demande de récusation de l'Arbitre unique n'a été déposée dans le délai imparti par l'article R34 du Code du TAS.
32. Le 6 février 2025, l'Appelant a demandé au Greffe du TAS si une décision avait été prise par la Présidente de la Chambre arbitrale d'appel du TAS sur la demande d'extension formulée par l'Intimée.
33. Le même jour, le Greffe du TAS a répondu qu'aucune décision n'avait été encore prise.
34. Le même jour, soit le 6 février 2025, l'Intimée a déposé sa réponse au Mémoire d'appel ("Mémoire de réponse"), ainsi que l'Annexe No. 1 produite à l'appui du Mémoire de réponse.
35. Le 7 février 2025, le Greffe du TAS a invité les Parties à indiquer, le 14 février 2025 au plus tard, si elles souhaitent que le TAS tienne une audience ou préfèrent y renoncer. Le Greffe du TAS a également confirmé aux Parties que le Tribunal arbitral était constitué de la manière suivante:
- Arbitre unique: Me Giulio Palermo, avocat à Genève, Suisse.
36. Le 7 février 2025, considérant que l'Intimée aurait dû déposer son Mémoire de réponse dans un délai de vingt jours à compter du 14 janvier 2025, soit avant le 3 février 2025, l'Appelant a sollicité le rejet de ce Mémoire pour non-respect du calendrier procédural.
37. Le même jour, par courriel séparé, l'Appelant a également sollicité, sur le fondement de l'article R56 du Code du TAS, la possibilité de compléter et/ou modifier ses conclusions et produire de nouvelles pièces dans l'hypothèse où le Mémoire de réponse de l'Intimée ne serait pas écarté des débats. L'Appelant a également précisé qu'il se prononcerait sur l'opportunité de tenir une audience avant le 14 février 2025.
38. Le même jour, l'Intimé a rappelé que:
- i. Le 22 janvier 2025, elle avait sollicité un délai de vingt jours pour le dépôt de son Mémoire de réponse et obtenu un délai

automatique de dix jours, soit jusqu'au 13 février 2025.

- ii. L'Appelant était invité à se déterminer sur le délai supplémentaire de dix jours puisque l'Intimée demandait une extension de vingt jours au total.
- iii. Aucune décision n'a été prise sur cette demande de dix jours supplémentaires, qui, en tout état de cause, est devenue sans objet.

39. Le 10 février 2025, le Greffe du TAS a indiqué aux Parties que la question de la recevabilité du Mémoire de réponse sera transmise à l'Arbitre unique pour sa considération.

40. Par courrier du 12 février 2025, le Greffe du TAS a informé les Parties que l'Arbitre unique a déclaré le Mémoire de réponse recevable dans la mesure où:

- i. Le 14 janvier 2025, le Greffe avait octroyé à la FIFA un délai de 20 jours pour son Mémoire de réponse, soit jusqu'au 3 février 2025.
- ii. Le 22 janvier 2025, soit dans le délai initial de l'article R32 al. 2 du Code du TAS, la FIFA avait sollicité une prolongation de vingt jours supplémentaires pour déposer son Mémoire de réponse. Le même jour, un délai de dix jours (selon l'article R32 al. 2 du Code du TAS) avait été octroyé à la FIFA, soit jusqu'au 13 février 2025.
- iii. La FIFA a déposé son Mémoire de réponse le 6 février 2025, soit dans le délai imparti, et toute objection

quant au délai de dix jours supplémentaires est devenue sans objet.

41. Par ailleurs, dans le même courrier, l'Arbitre unique a invité l'Appelant à déposer une réplique, strictement limitée à la question de la consorité passive nécessaire, dans un délai de dix jours dès réception du courrier, précisant que tout nouvel argument outrepassant cette question ne serait pas pris en compte.

42. Le 14 février 2025, l'Intimée a considéré que la tenue d'une audience ou d'une conférence de gestion de la procédure n'était pas nécessaire. Quant à l'Appelant, il n'a pas fait part de sa position sur cette question.

43. Le 21 février 2025, l'Appelant a déposé son mémoire en réplique ("Mémoire en réplique"), limité à la question de la consorité passive.

44. Le 27 février 2025, au nom de l'Arbitre unique, le Greffe du TAS a indiqué que la tenue d'une audience n'ayant pas été requise par les Parties, l'Arbitre unique rendrait sa sentence sur la base de leurs écritures. La phase d'instruction a été, par conséquent, clôturée. L'Arbitre unique s'est toutefois réservé la possibilité de rouvrir l'instruction et d'interroger les Parties sur des points spécifiques s'il l'estimait nécessaire.

45. Le 6 mars 2025, le Greffe du TAS a adressé aux Parties une Ordonnance de procédure, les invitant à contresigner et retourner l'Ordonnance au TAS le 13 mars 2025 au plus tard. L'Appelant et l'Intimée ont respectivement signé l'Ordonnance le 11 et le 7 mars 2025.

III. LA POSITION DES PARTIES

A. La position de l'Appelant

46. Les principaux arguments de l'Appelant peuvent être résumés comme suit:

1. Concernant la consorité passive nécessaire

- Les décisions produites par l'Intimée dans les affaires TAS 2008/O/1808 et TAS 2013/A/3228 ne sont pas pertinentes pour l'appréciation de l'existence de la consorité passive nécessaire car elles ne concernent pas la détermination par la FIFA des bénéficiaires des indemnités de formation, comme c'est le cas en l'espèce.
- Le club Juventus n'a nullement été privé de son droit d'être entendu dans la mesure où il a été convié à la procédure EPP en qualité de débiteur des indemnités de formation, mais s'est abstenu de faire valoir une quelconque position sur cette question. Dès lors, son silence équivaut *de facto* à l'acceptation pure et simple de la Décision de la FIFA.
- Le club Juventus n'a pas la qualité pour être attrait dans cette procédure en tant qu'intimé car aucune demande n'est dirigée à son encontre. L'Appelant entend obtenir une réévaluation de la décision de l'EPP par la FIFA. Or, seule la FIFA est habilitée, conformément aux articles 1 et 2 du RCC, à instruire une procédure EPP, le club Juventus étant totalement étranger à cette procédure. La demande

subsidaire formulée par la FIFA et tendant à obtenir le renvoi de l'affaire devant la FIFA confirme ce point.

- Conformément à la jurisprudence du TAS (TAS 2013/A/3437), un éventuel manquement à l'obligation d'identifier correctement tous les intimés n'a pas en soi pour conséquence de rendre l'appel irrecevable. Cela signifie seulement que l'Arbitre unique peut refuser de rendre des décisions à l'encontre d'une partie qui est en fait un intimé approprié mais qui n'a pas été jointe, ou qu'il peut limiter la portée de son examen à toute requête demandée à l'encontre d'une partie qui a été correctement jointe en tant qu'intimée. Il s'agit d'une faculté et non d'une obligation. Il en résulte que même en présence de consorité passive, l'appel ne serait pas entaché d'irrégularité et l'Arbitre disposerait d'une grande latitude pour apprécier la portée de sa décision quant aux demandes de l'Appelant.

2. Concernant l'éligibilité du Club à l'indemnité de formation

- En vertu de l'article 6.4 de l'annexe 4 du Règlement du Statut et du Transfert des Joueurs (RSTJ), "*Si le club précédent ne propose pas de contrat au joueur, aucune indemnité de formation n'est due, à moins que ledit club puisse justifier le droit à une telle indemnité*", c'est-à-dire, selon la jurisprudence du TAS, si le club formateur démontre un intérêt sincère et de bonne foi à conserver le joueur (TAS 2014/A/3652).

- En raison des contraintes financières, les clubs amateurs français qui évoluent dans les divisions nationales françaises (1, 2 et 3) ne sont pas en mesure d’offrir des contrats aux joueurs mineurs et préfèrent recruter des joueurs expérimentés, issus des divisions supérieures. Les joueurs mineurs choisissent dès lors des clubs qui offrent, outre un projet sportif, un projet éducatif ou professionnel.
- Les clubs français sont rigoureusement encadrés par la Direction Nationale du Contrôle de Gestion (D.N.C.G.), placée sous l’égide de la FFF, qui a un pouvoir de contrôle et d’encadrement à l’égard des clubs, y compris de leur masse salariale. A l’issue de la saison 2020-2021, sur décision de la D.N.C.G., le Club a fait l’objet d’une rétrogradation sportive en National 2, puis administrative en National 3 en raison de sa situation financière dégradée. Le Club étant placé sous l’encadrement de la masse salariale par la D.N.C.G., il lui était difficile, voire impossible d’offrir un contrat de travail au Joueur, qui plus est était inconcevable avec le projet éducatif visant à éviter le décrochage scolaire.
- Lors de la fin de saison 2023/2024, le Club a démontré sa volonté d’accompagner le Joueur en lui permettant d’intégrer l’équipe senior évoluant en Championnat National 3 lors des cinq dernières rencontres dont les

deux derniers matchs étaient effectués en tant que titulaire. Le Club envisageait donc d’intégrer définitivement le Joueur dans l’équipe senior évoluant en Championnat National 3 dès la saison suivante, soit celle de son enregistrement auprès de Juventus.

47. Aux termes de son Mémoire d’appel, l’Appelant a demandé au TAS de:

*“**Réformer** en toutes ses dispositions la décision rendue le 12 novembre 2024 par le Secrétariat général de la F.I.F.A*

Statuant à nouveau,

À TITRE LIMINAIRE,

Dire et juger recevable la déclaration d’appel du club Lyon la Duchère,

EN CONSEQUENCE,

Dire et juger que le club Lyon la Duchère est éligible aux indemnités de formation du fait du transfert du joueur Rayan DJHAL au club FC Juventus

Dire et juger que la F.I.F.A devra calculer le montant dû au club Lyon la Duchère au titre des indemnités de formation

Dire et juger que la F.I.F.A devra enjoindre au club FC Juventus de payer les indemnités de formation dues au club Lyon la Duchère

Condamner la F.I.F.A à supporter et à payer la totalité des frais de l’arbitrage

Condamner la F.I.F.A à contribuer aux frais d’avocats engagés par le club Lyon la Duchère à concurrence de 10.000 €”.

48. Par ailleurs, aux termes de son Mémoire en réplique, l'Appelant a demandé au TAS de:

*“**REJETER** les demandes de la FIFA qui tendent à rejeter l'appel du club LYON LA DUCHERE, sans avoir à analyser les questions de fond, seront purement et simplement écartées ainsi que l'ensemble de ses demandes, faits et prétentions sur le fond*

***DECLARER** recevable et bien fondé l'appel formé par le club Lyon la Duchère à l'encontre de la détermination de l'EPP 43202 et de la déclaration d'affectation SC-13937 rendues le 12 novembre 2024 par la FIFA relatives au joueur Rayan DJAHL”.*

B. La position de l'Intimée

49. Les principaux arguments de l'Intimée peuvent être résumés comme suit:

1. Concernant la consorité passive nécessaire

- L'appel doit être rejeté, sans analyse des questions de fond soulevées par l'Appelant, en raison de la consorité passive nécessaire, fondement qui a été appliqué à plusieurs reprises dans la jurisprudence du TAS, y compris dans le cadre de la procédure spécifique de révision de l'EPP ou d'un appel dirigé contre l'EPP (par exemple, TAS 2024/A/10514; TAS 2023/A/10002).
- Il y a consorité passive nécessaire lorsqu'il faut lier toutes les parties à un rapport substantiel pour que les effets d'une décision soient étendus et opposables à celles-ci (TAS 2022/A/9238). Autrement dit, une partie doit être entendue dans une procédure dans laquelle

l'un de ses intérêts essentiels est directement et fondamentalement concerné afin d'être en mesure d'exercer ses droits procéduraux fondamentaux, tels que se défendre (par exemple, TAS 2022/A/9238; TAS 2008/O/1808; TAS 2020/A/6922; TAS 2022/A/9238).

- Selon un principe général de droit suisse, seul le débiteur des droits litigieux a qualité pour agir; “la qualité pour défendre appartient à celui qui obligé du droit litigieux”. A défaut de qualité pour agir, le recours doit être rejeté (TAS 2018/A/6044).

- En l'espèce, les demandes de l'Appelant, dirigées à l'encontre de la Décision, affectent directement les droits du club Juventus et constituent une violation évidente de son droit d'être entendu. En effet, l'appel tend à ce que le club Juventus soit enjoint de payer les indemnités de formation à l'Appelant. Or, le TAS ne peut juger une question qui entraînerait l'obligation pour Juventus de payer une indemnité de formation, sans que celui-ci ait été entendu en qualité d'intimé. L'appel doit être par conséquent rejeté.

2. Concernant l'éligibilité du Club à l'indemnité de formation

- En vertu de l'article 9.6 du RCC et l'article 8 du Code civil suisse, il appartient à l'Appelant de prouver le bien-fondé de son droit à l'indemnité de formation. Or, l'Appelant n'a apporté aucun élément permettant d'établir qu'il a

été empêché d'offrir un contrat professionnel au Joueur, que ce soit en raison de prétendus "usages des clubs français" ou de l'encadrement de la D.N.C.G.

- L'Appelant n'a pas démontré son intérêt réel de retenir les services du Joueur non plus. La déclaration écrite du père du Joueur, ainsi que le compte-rendu d'une réunion, qui n'est ni daté, ni signé, sont insuffisants pour conclure que le Club avait l'intention d'intégrer définitivement le Joueur dans l'équipe senior évoluant en Championnat National 3 dès la saison 2024/2025. A supposer même que le directeur du Club l'ait envisagé au mois de janvier 2024, soit plus de cinq mois avant la fin de la saison, ceci ne démontre pas que telle aurait été l'intention du Club deux mois avant la fin de saison. Il s'agissait d'une simple hypothèse et non d'un intérêt réel.

50. Aux termes de son Mémoire de réponse, l'Intimée a demandé au TAS de rendre une sentence arbitrale:

- a) *"Rejetant l'appel de l'Appelant sur le fond;*
- b) *En tous cas, confirmant la Décision Attaquée;*

Subsidiairement, et uniquement si l'Arbitre unique conclue que la Décision Attaquée peut et doit être modifiée,

- c) *Ordonnant le renvoi de l'affaire à la FIFA pour que tout modification de la Décision Attaquée soit effectuée administrativement selon les instructions de l'Arbitre unique.*

Dans tous les cas,

- d) *Ordonnant que les frais de procédure soient mis à la charge de l'Appelant".*

IV. COMPÉTENCE DU TAS ET RECEVABILITÉ DE L'APPEL

51. La compétence du TAS résulte de l'article R47 du Code du TAS, ainsi que l'article 50 al. 1 des Statuts de la FIFA (édition 2024) qui prévoient ce qui suit:

Article R47 du Code du TAS:

"Un appel contre une décision d'une fédération, association ou autre organisme sportif peut être déposé au TAS si les statuts ou règlements dudit organisme sportif le prévoient ou si les parties ont conclu une convention d'arbitrage particulière et dans la mesure aussi où la partie appelante a épuisé les voies de droit préalables à l'appel dont elle dispose en vertu des statuts ou règlements dudit organisme sportif".

Article 50 al. 1 des Statuts de la FIFA:

"Tout recours contre des décisions prises en dernière instance par la FIFA et ses organes doit être déposé auprès du TAS dans un délai de vingt-et-un jours suivant la réception de la décision".

52. Les Parties ont confirmé la compétence du TAS aux termes de l'Ordonnance de procédure du 6 mars 2025.

53. Par ailleurs, par cette même Ordonnance, les Parties ont confirmé que les écritures des Parties ont été déposées dans les délais spécifiques prescrits par le Code du TAS. L'ensemble des conditions pour la recevabilité de l'appel sont réunies. La

recevabilité de l'appel n'est d'ailleurs pas contestée.

V. DROIT APPLICABLE

54. Aux termes de l'Ordonnance de procédure du 6 mars 2025, les Parties ont confirmé, qu'en application de l'article R58 du Code du TAS:

“La Formation statue selon les règlements applicables et, subsidiairement, selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit que la Formation estime appropriées. Dans ce dernier cas, la décision de la Formation doit être motivée”.

55. Par ailleurs, selon l'article 49 al. 2 des Statuts de la FIFA:

“La procédure arbitrale est régie par les dispositions du Code de l'arbitrage en matière de sport du TAS. Le TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif”.

56. Il résulte dès lors des dispositions précitées que l'Arbitre unique statue selon les règlements et les Statuts de la FIFA et, à titre subsidiaire, selon le droit suisse.

VI. SUR LE FOND

57. Compte tenu des demandes et allégations des Parties, les deux questions litigieuses à résoudre sont (A) la question de la consorité passive nécessaire et ses éventuelles conséquences, et, dans l'hypothèse où le bien-fondé de l'appel devrait être

analysé, (B) la question de l'éligibilité du Club à l'indemnité de formation.

58. Si la consorité passive nécessaire est établie et entraîne le rejet de l'appel, comme demandé par l'Intimée, la question de l'éligibilité du Club à l'indemnité de formation n'aura plus lieu d'être examinée. Par souci d'économie judiciaire, l'Arbitre unique analysera donc la question de la consorité passive nécessaire en premier lieu.

A. La question relative à la consorité passive nécessaire

59. L'Intimée soutient que l'annulation de la Décision, demandée par l'Appelant, est susceptible d'affecter directement les droits du club Juventus puisque l'Arbitre unique créerait une obligation de payer les indemnités de formation à la charge de Juventus. Il y a donc consorité passive nécessaire qui oblige l'Appelant à diriger son appel également à l'encontre de Juventus afin que celui-ci puisse être entendu. L'Appelant, quant à lui, considère qu'aucune demande n'est formée à l'encontre de Juventus et qu'en tout état de cause, ce dernier a accepté les termes de la Décision en s'abstenant de faire part de sa position dans la procédure de détermination de l'EPP devant la FIFA, de sorte qu'il n'y a aucune violation de son droit d'être entendu.

60. L'Arbitre unique constate tout d'abord que le Code du TAS, tout comme les règlements et Statuts de la FIFA, qui régissent le litige, sont silencieux sur la question de savoir qui doit être nommé en qualité d'intimé dans la procédure d'appel contre la Décision. Cette question doit par conséquent être analysée en droit suisse (TAS

2018/A/6044, para. 70; TAS 2017/A/5352, para. 44; TAS 2022/A/8960, paras. 96, 97).

61. En droit suisse, la consorité passive nécessaire existe lorsqu'il faut lier toutes les parties dans une relation substantielle afin de rendre les effets d'une décision opposables à celle-ci. Elle est fondée sur l'article 8a, al. 1 de la loi fédérale suisse sur le droit international privé selon lequel *"lorsque l'action est intentée contre des consorts pouvant être poursuivis en Suisse en vertu de la présente loi, le tribunal suisse compétent à l'égard d'un défendeur l'est à l'égard des autres"*. L'article 70, al. 1 du Code de procédure civile précise également que *"Les parties à un rapport de droit qui n'est susceptible que d'une décision unique doivent agir ou être actionnées conjointement"* (TAS, 2022/A/9238, para. 76; voir également TAS 2008/O/1808, para. 68).
62. La FIFA ne conteste pas sa qualité d'être intimée et, en tout état de cause, a volontairement participé dans la procédure et formulé des prétentions au fond. Dès lors, l'Arbitre unique analysera seulement la question de savoir si Juventus dispose de la qualité pour être intimé (appelée encore qualité pour défendre ou la légitimation passive).

1. La qualité d'intimé du club Juventus

63. En vertu d'un principe général de droit suisse, seul le débiteur des droits litigieux a la qualité pour défendre (TAS 2015/A/3999, para. 73; TAS 2018/A/6044, para. 72); il ne s'agit pas d'un principe spécifique à la procédure de détermination des indemnités de formation.
64. Selon la jurisprudence constante du TAS, une partie dispose de la qualité

pour être intimée si elle a un intérêt dans le litige, c'est-à-dire, une demande est formulée à son encontre et elle est personnellement obligée par le droit litigieux en jeu (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Art. R48, para. 65; TAS 2008/A/1518, para. 22; TAS 2013/A/3437, para. 280; TAS, 2015/A/3999, para. 73; TAS 2017/A/5352, para. 45; TAS 2018/A/6044, para. 72; TAS 2020/A/6922, para. 96). Les formations du TAS ont également jugé, à plusieurs reprises, que la légitimation passive existe lorsqu'une partie est suffisamment affectée par l'affaire en cause pour être qualifiée d'intimée (TAS 2021/A/8225, para. 76; TAS 2020/A/7061, para. 35) ou plus spécifiquement, lorsque l'un de ses intérêts essentiels est directement et fondamentalement concerné (TAS 2008/O/1808, para. 69; voir également, TAS 2013/A/3228, para. 8.10; TAS 2024/A/10718, para. 56).

65. Dans ces cas, la partie qui a la qualité pour être intimée doit participer à la procédure afin d'être en mesure d'exercer ses droits procéduraux fondamentaux, tels que le droit d'être entendu (TAS 2022/A/9238, para. 76; voir également, TAS 2020/A/6922, para. 100; TAS, 2024/A/10718, paras. 63, 64). En droit suisse, le droit d'être entendu est un droit fondamental, garanti par la Constitution, qui selon le Tribunal fédéral, comprend: *"le droit pour l'intéressé de s'exprimer sur les éléments pertinents avant qu'une décision ne soit prise touchant sa situation juridique, le droit de produire des preuves pertinentes, de prendre connaissance du dossier, d'obtenir qu'il soit donné suite à ses offres de preuves pertinentes, de participer à l'administration des preuves"*

essentielles ou à tout le moins de s'exprimer sur leur résultat, lorsque cela est de nature à influencer sur la décision rendue" (ATF, 137 IV 33, consid. 9.2).

66. Compte tenu de ce qui précède, l'Arbitre unique considère que Juventus aurait dû être attrait dans cette procédure pour les raisons suivantes:

67. Premièrement, l'Arbitre unique constate qu'aux termes de son Mémoire d'appel, l'Appelant a demandé au TAS, entre autres, de:

"Dire et juger que la F.I.F.A. devra enjoindre au club FC Juventus de payer les indemnités de formation dues au club Lyon la Duchère".

68. L'Arbitre unique n'est pas convaincu par l'allégation de l'Appelant qu'aucune demande n'est fondée à l'encontre de Juventus et que ce dernier serait totalement étranger à la procédure de réévaluation de la décision de l'EPP par la FIFA.

69. Si la FIFA est en effet la seule habilitée à instruire une procédure de l'EPP, l'objet de l'appel porte sur l'annulation de la Décision rendue par la FIFA et donc, la reconnaissance de l'éligibilité du Club à l'indemnité de formation afin d'en obtenir le paiement. La demande de l'Appelant reproduite ci-dessus confirme que le but premier de l'appel est le paiement de l'indemnité de formation. Le fait que cette demande soit formulée indirectement, soit à l'encontre de la FIFA pour qu'elle enjoigne Juventus de payer, ne change pas le résultat. Si l'Arbitre unique accueillait les demandes de l'Appelant, Juventus aurait *in fine* l'obligation de payer l'indemnité de formation, comme en cas d'une

demande formulée à son encontre directement. Juventus serait donc personnellement obligé par le droit litigieux en question. Par conséquent, Juventus a clairement un intérêt dans le litige, au sens de la jurisprudence précitée du TAS.

70. Deuxièmement, si l'annulation de la Décision était prononcée, elle affecterait directement et fondamentalement les intérêts de Juventus. En vertu de la Décision, seuls les clubs Olympique Lyonnais et CS Lyon 8 ont été considérés éligibles aux indemnités de formation. Tel n'était pas le cas du Club et c'est précisément la raison pour laquelle la présente procédure a été initiée. A supposer même que le club Juventus ait accepté les termes de la Décision, comme allégué par l'Appelant, l'appel tend au contraire à réformer cette Décision et créer une obligation de paiement de l'indemnité de formation au profit du Club, alors qu'une telle obligation n'existait pas aux termes de la Décision. Ceci affecte directement et fondamentalement les intérêts de Juventus et plus précisément, son intérêt financier de payer une somme moindre à titre d'indemnité de formation.

71. Troisièmement, l'Arbitre unique considère que le seul silence de Juventus dans la procédure de détermination de l'EPP ne peut être interprété comme une renonciation à son droit d'être entendu dans la présente procédure. Selon le Tribunal fédéral, la renonciation au droit d'être entendu doit être établie de manière non équivoque et s'entourer d'un minimum de garanties correspondant à sa gravité (ATF 137 IV 33, consid. 9.2). Or, il n'y a aucun élément, et *a fortiori* aucun élément non équivoque, laissant penser que Juventus

aurait renoncé à son droit d'être entendu dans la procédure d'appel à l'encontre de la Décision.

72. Enfin, l'Arbitre unique observe que la sentence citée par l'Appelant dans une procédure d'annulation de sanctions et amendes infligées par la Commission du Statut du Joueur de la FIFA (TAS 2014/A/3831) n'est pas pertinente en l'espèce. Dans cette affaire, comme souligné par la formation du TAS, seule la FIFA a été considérée comme ayant un intérêt dans le litige dans la mesure où la FIFA ouvre une procédure disciplinaire d'office ou à la demande du créancier de la sanction afin de *“protéger un intérêt essentiel de la FIFA, à savoir le respect total de ces décisions rendues par ses organes”*, alors que le rôle du créancier se limite à la collaboration afin d'établir les faits (TAS 2014/A/3831, paras. 6.12 et 6.13).
73. Contrairement à la procédure disciplinaire, dans la procédure de détermination de l'EPP, la FIFA agit seulement en tant que juridiction indépendante de première instance et n'a aucun intérêt personnel et/ou direct à l'issue du litige, mis à part l'objectif général d'assurer la cohérence de la jurisprudence et soutenir les décisions de ses organes juridictionnels (TAS, 2024/A/10718, para. 61). Pour cette même raison, ses intérêts ne se confondent pas avec ceux du club Juventus; il n'appartient donc pas à la FIFA de les défendre.
74. Par conséquent, l'Arbitre unique conclut que la consorité passive nécessaire est caractérisée. Il convient dès lors d'examiner les conséquences qui découlent du fait que Juventus n'a pas été identifié comme intimé.

2. Les conséquences de l'absence du club Juventus dans cette procédure

75. Les Parties divergent sur les conséquences de l'absence de Juventus dans la procédure. Selon l'Appelant, ce manquement n'entraîne pas nécessairement le rejet de l'appel et l'Arbitre dispose d'une grande latitude à cet égard. L'Intimé considère en revanche que l'appel doit être rejeté afin de ne pas porter atteinte au droit d'être entendu de Juventus.
76. En droit suisse, la qualité pour défendre appartient aux conditions matérielles de la prétention litigieuse et se détermine selon le droit du fond. Le défaut de la qualité pour défendre conduit au rejet de l'action au fond (ATF 126 III 59, consid.1a; ATF 114 II 345, consid. 3a; TAS 2018/A/6044, para. 72; TAS 2019/A/6639, para. 57; TAS 2021/A/8214, para. 78; MAVROMATI/REEB, précité, para. 65), même si une ancienne jurisprudence a pu considérer que la sanction était l'irrecevabilité (CAS 2013/A/3437, para. 285; TAS 2015/A/3999, para. 63).
77. Conformément à l'article R48 du Code du TAS, il appartient à l'Appelant d'identifier l'intimé approprié dans sa déclaration d'appel.
78. L'Appelant soutient toutefois que le manquement à l'obligation d'identifier correctement tous les intimés ne devrait pas entraîner nécessairement le rejet de l'appel et cite la sentence du TAS selon laquelle:
- “En règle générale, l'appelante est tenue d'identifier le(s) défendeur(s) approprié(s) pour le présent litige. Cependant, un éventuel*

manquement à l'obligation d'identifier correctement tous les intimés n'a pas en soi pour conséquence que l'appel est totalement irrecevable, mais seulement que l'Arbitre unique peut refuser de rendre des ordonnances ou des décisions à l'encontre d'une partie qui est en fait un intimé approprié mais qui n'a pas été jointe, ou qu'il peut limiter la portée de son examen à toute requête demandée à l'encontre d'une partie qui a été correctement jointe en tant qu'intimée" (TAS 2013/A/3437, traduction libre, para. 66).

79. Si en principe, les questions litigieuses peuvent être dissociées et seules les demandes à l'encontre de l'intimé qui a été attrait au litige jugées, l'Arbitre unique n'est pas en mesure de procéder ainsi en l'espèce. Comme déjà expliqué, il résulte des demandes de l'Appelant que l'objet de l'appel porte sur (i) la reconnaissance de l'éligibilité du Club à l'indemnité de formation et (ii) son paiement. Or, ces deux questions ne peuvent être dissociées l'une de l'autre car une éventuelle reconnaissance de l'éligibilité du Club à l'indemnité de formation entraînerait l'obligation de paiement de l'indemnité par Juventus. Il n'y a donc aucune demande que l'Arbitre unique puisse juger à l'égard de la FIFA uniquement, en l'absence de Juventus dans la présente procédure.

80. Par ailleurs, l'Appelant soutient, s'appuyant à nouveau sur la jurisprudence précitée du TAS, que le rejet de l'appel en cas de manquement à l'obligation d'identifier l'intimé approprié, serait seulement facultatif. Autrement dit, l'Arbitre unique aurait un pouvoir discrétionnaire à cet égard.

81. L'Arbitre unique ne peut adhérer à cette interprétation. L'emploi du verbe "peut" dans la sentence citée ne signifie pas que

le rejet de l'appel est facultatif, mais que dans certains cas, il peut exister une alternative au rejet total de l'appel: *"l'Arbitre unique peut refuser de rendre des ordonnances ou des décisions à l'encontre d'une partie qui est en fait un intimé approprié mais qui n'a pas été jointe, ou qu'il peut limiter la portée de son examen à toute requête demandée à l'encontre d'une partie qui a été correctement jointe en tant qu'intimée"* (TAS 2013/A/3437, traduction libre, para. 66). Comme expliqué ci-dessus, une telle alternative n'existe pas en l'espèce (voir para. 79).

82. Par ailleurs, l'interprétation proposée par l'Appelant conduirait à rendre le respect du droit d'être entendu simplement facultatif et ce même, à l'égard d'une partie qui a la qualité d'être intimée, c'est-à-dire qui a un intérêt au litige ou dont les droits sont affectés. Eu égard à l'importance du droit d'être entendu et l'ampleur de sa protection, cette interprétation ne peut prospérer. C'est également en ce sens que la jurisprudence du TAS s'est prononcée, considérant qu'en l'absence de toutes les parties qui ont la qualité pour être intimées, l'appel doit être rejeté (TAS 2015/A/3880, para. 64; TAS 2018/A/6044, para. 72; TAS 2022/A/9238, paras. 71 et 81).

83. Il en résulte qu'en l'absence de Juventus en qualité d'intimé, l'appel est rejeté.

B. L'éligibilité du Club à l'indemnité de formation

84. Dans la mesure où l'absence de Juventus conduit au rejet de l'appel, cette question n'a plus lieu d'être examinée.

PAR CES MOTIFS

**Le Tribunal Arbitral du Sport, statuant
contradictoirement:**

1. Rejette l'appel déposé par Lyon La Duchère à l'encontre de la décision rendue par le Secrétariat général de la FIFA le 12 novembre 2024.
2. Confirme la décision rendue par le Secrétariat général de la FIFA le 12 novembre 2024.
3. (...).
4. (...).
5. Rejette toutes autres ou plus amples conclusions des Parties.

Equestrian; Provisional suspension pending investigation for horse abuse; Temporal scope of application of a provision; “Civil law” nature of disputes involving disciplinary matters; Interpretation of rules and regulations of large sports federations; Admissibility of the extension of a period of limitation; No applicability of legitimate expectation; Admissibility of an unlimited period of limitation

Panel

Prof. Luigi Fumagalli (Italy), President
Mr Patrick Grandjean (Switzerland)
Mr Lars Hilliger (Denmark)

1. The indication that modifications to a preceding version of the regulations introduced by the new version of the regulations became effective on a specific date, merely means that the provisions of the new edition of the regulations could be applied only after their entry in force, and not that a specific provision of the regulations was applicable to govern only the prosecution of violations committed after the date of entry into force of the regulations and could not be applied, once entered into force, to govern the prosecution of violations irrespective of when they occurred.
2. Disputes involving disciplinary matters are of a “civil law” nature, even though subject to some fundamental principles, common to

criminal law proceedings (such as the principle of legality and of predictability, the prohibition of double jeopardy, etc.). Consequently, any legal issue concerning the application of rules on statute of limitations should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled. In other words, the possibility to have an application of a new provision on the statute of limitations to the prosecution of violations committed before its entry into force is to be evaluated against a “civil law”, not a “criminal law”, benchmark.

3. Rules and regulations of international large sports federations are subject to the methods of interpretation applicable to statutory provisions rather than contracts. Therefore, the interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rules, which falls to be interpreted. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule.
4. Article 49 of the Final Title of the Swiss Civil Code explicitly allows the application of a new law specifying a longer period of prescription than the previous law, but only if prescription has not yet taken effect under the previous law. The

principle of legality, then, prohibits the “punishment without law” (according to the principle “*nullum crimen, nulla poena sine lege*”), ensuring that no one can be held guilty of an offence on account of any act or omission which did not constitute a violation under the applicable law at the time when it was committed, or that a penalty is imposed heavier than the one that was applicable at the time the offence was committed. In other words, by ensuring that the legality of an action must be evaluated on the basis of the rules in force at the time it was committed, the principle of legality corresponds to the principle “*tempus regit actum*”, which excludes the retroactive application of new laws, “creating” *ex post factum* a responsibility that did not exist or had ceased to exist under the law in force at the time of the action or increasing *ex post* the sanction provided under that law.

5. No party allegedly committing a violation, and chiefly a violation of a rule expressing a fundamental principle, can have a “legitimate” expectation not to be punished, at least as long as prosecution remains possible.
6. Limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and

incomplete because of the passage of time. Limitation periods are a common feature as regards criminal, disciplinary and other offences, as an open-ended approach to disciplinary cases poses a serious threat to the principle of legal certainty. A balancing is necessary between competing interests and a broad margin of discretion is to be left in this respect for the setting of the appropriate period of limitation.

I. THE PARTIES

1. Ms Evi Strasser (the “First Appellant”) is a Canadian coach and horse trainer, born on 13 February 1964, and a former professional dressage rider. She coaches her daughter, Ms Tanya Strasser.
2. Ms Tanya Strasser (the “Second Appellant”) is a Canadian professional dressage rider and coach, born on 12 July 1995.
3. The Fédération Equestre Internationale (“FEI” or the “Respondent”) is the internationally recognized governing body for the equestrian sport disciplines of dressage and para-equestrian dressage, jumping, eventing, driving and para-driving, endurance and vaulting. FEI has its registered office in Lausanne, Switzerland.
4. The First Appellant and the Second Appellant (jointly the “Strassers” or the “Appellants”) are registered FEI dressage athletes. Dressage is an equestrian sport in which the horse and rider perform a set of specific movements in an arena, judged on their precision and accuracy. The discipline emphasizes a seamless connection

between rider and horse, focusing on improving suppleness, flexibility, obedience, and athleticism. To score well, both horse and rider must execute the required movements without mistakes, as even small issues like the horse raising its head or losing concentration, can result in lower scores. The Strassers are based in Saint-Adèle, Quebec, Canada, where the First Appellant owns and operates Good Tyme Stables (the “Stables”).

5. The Appellants and the Respondent together are referred to as the “Parties”.

II. BACKGROUND FACTS

6. Below is a summary of the main relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
7. On 15 February 2024, a complaint was submitted to Equestrian Canada (“EC”), the national equestrian association of Canada and a member of FEI, alleging abuse of horses at the Stables.
8. On 17 February 2024, as a result, EC provisionally suspended the Strassers and informed FEI of such suspension.
9. On 18 February 2024, FEI extended at international level the provisional

suspension imposed by EC.

10. Around the same time, FEI separately received allegation of abusive training techniques employed by the Strassers.
11. On 22 April 2024, the FEI sent a notice (the “Notice”) to the Strassers, informing them of the opening of its own investigation into the allegations reported to EC and to FEI, and imposing on them a provisional suspension with immediate effect pending the investigation (the “Provisional Suspension”), in accordance with Article 164.6 of the FEI General Regulations (the “GR”), *“given the gravity of the horse abuse which appears to have occurred on several instances involving a number of horses”*.
12. On 23 April 2024, a request for disclosure was submitted on behalf of the Strassers to FEI, seeking clarification on whether the *“separately received allegations”* received by the FEI, mentioned in the Notice, were distinct or the same as the allegations set out in the complaint to EC on 17 February 2024, and disclosure of these separately received allegations, in order to be able to prepare an application to the FEI Tribunal requesting the immediate lifting of the Provisional Suspension.
13. On 25 April 2024 FEI indicated to the Strassers that that its investigation was separate and independent from the one conducted by EC and that the allegations, which had been brought forward to the FEI by several individuals and had prompted the FEI’s imposition of the Provisional Suspension, were the following: [...].
14. On 26 April 2024, the Strassers denied the allegations made against them and

- requested to be provided with additional details together with the documents and evidence supporting them.
15. On 1 May 2024, FEI replied that it was unable to provide additional information pending the investigation.
 16. On 2 May 2024, the Independent Third-Party Complaints Manager of EC (the “TTPCM”) issued a decision staying the process started by the complaints it had received, in light of the Provisional Suspension imposed by FEI on the basis of the same allegations, and in order to avoid duplications.
 17. On 3 May 2024, the Strassers insisted in their request for disclosure.
 18. On 7 May 2024, FEI confirmed its position.
 19. On 8 May 2024, the Strassers filed an application with the FEI Tribunal, requesting that the Provisional Suspension be lifted.
 20. On 13 May 2024, the FEI Tribunal issued the operative part of a decision (the “First FEI Decision”), dismissing the Appellants’ application, as follows:
 - “1) *The 8 May 2024 Applications to lift the Provisional Suspensions imposed on Ms. Evi Strasser and Ms. Tanya Strasser are denied.*
 - 2) *The FEI Tribunal (the “Panel”) finds that the FEI has broad discretionary authority to impose provisional measures under the GRs in order to safeguard the interest and integrity of the sport and its athletes (both equine and human); provided the FEI has acted reasonably in imposing such provisional measures. The Panel finds that, under the current set of facts and circumstances, the FEI has acted within its discretionary powers in imposing the Provisional Suspensions against the Athletes.*
 - 3) *Each party shall bear their own costs incurred relating to these proceedings. No fines are hereby levied.*
 - 4) *This Decision shall be notified to the Athletes, to their, Legal Representatives, their NF and to the FEI”.*
 21. On 15 May 2024, the Appellants lodged with the Court of Arbitration for Sport (“CAS”) an application (the “First CAS Proceedings”), seeking the adoption of urgent provisional measures lifting the Provisional Suspension confirmed by the First FEI Decision, pending the final determination of the appeal against it. The First CAS Proceedings were registered as CAS 2024/A/10576.
 22. On the same day, the Deputy President of the CAS Appeals Arbitration, after receiving a response by FEI, issued an order lifting the Provisional Suspension on an *interim* basis pending the outcome of the Appellants’ appeal (the “First CAS Order”), and ordering further briefing.
 23. As a result, in the framework of the First CAS Proceedings:
 - i. on 17 May 2024, the FEI submitted a supplemental response, requesting that the Appellants’ application for provisional measures be rejected and that the Provisional Suspension be reinstated;

- ii. on the same 17 May 2024, the Appellants commented on the FEI's submissions;
 - iii. on 30 May 2024, FEI lodged two witness statements from A., dated 15 May 2024, and from B., unsigned and undated;
 - iv. on 10 June 2024, the Appellants' counsel sent a letter to the CAS Court Office with respect to the witness statements filed by FEI;
 - v. on 18 June 2024, the FEI submitted its response to the request for provisional measures, insisting in *"its request that the CAS dismiss the Applicants' application for provisional measures in its entirety"*;
 - vi. on 1 July 2024, the Deputy President of the CAS Appeals Arbitration ruled that the First CAS Order would remain in force, pending the conclusion of the appeal against the First FEI Decision.
- 24. On 19 May 2024, in the meantime, the ITPCM clarified the meaning and effects of its decision of 2 May 2024, confirming that the entire complaint hearing process, including the suspension, had been stayed.
 - 25. On 22 July 2024, the FEI Tribunal issued the full written reasons of the First FEI Decision.
 - 26. On 12 August 2024, the Appellants filed their statement of appeal against the First FEI Decision. A series of deadline extensions for submission of the appeal brief were subsequently requested and granted, with the final deadline expiring on 26 September 2024.
 - 27. On 27 September 2024, the Appellants requested a further extension of the deadline to lodge their appeal brief.
 - 28. On the same day, the CAS Court Office, writing with respect to the First CAS Proceedings, noted that the Appellants' request had been submitted past the expiry of the deadline to submit the appeal brief and invited the FEI to inform the CAS Court Office whether it agreed to the granting of a new time limit.
 - 29. On 30 September FEI expressed its disagreement with a further extension.
 - 30. On 4 October 2024, the Parties were informed that the Panel appointed in the First CAS Proceedings would decide whether the appeal against the First FEI Decision was deemed withdrawn pursuant to Article R51 of the Code of Sports-related Arbitration (the "CAS Code").
 - 31. On 12 November 2024, the Panel in the First CAS Proceedings issued an Award on Costs, finding that the Appellants' request for the reinstatement of the time limit for the appeal brief could not be granted and therefore that the appeal had to be deemed withdrawn pursuant to Article R51 of the CAS Code. As a result, the First CAS Proceedings were terminated, the First CAS Order automatically annulled and the Provisional Suspension imposed on the Appellants reinstated.
 - 32. On 22 November 2024, the Chair of the FEI Tribunal issued directions with respect to the continuation of the disciplinary proceedings against the Strassers.

33. On 22 November 2024, the Appellants filed a second application before the FEI Tribunal, requesting it to lift the Provisional Suspension imposed on them on 22 April 2024 and confirmed by the First FEI Decision.

34. On 29 November 2024, the FEI submitted its “*Response to the appellants’ second application to lift their provisional suspensions*”, asking the FEI Tribunal to “*uphold the Applicants’ Provisional Suspensions*”.

35. On 12 December 2024 the FEI Tribunal issued the operative part of a decision (the “Second FEI Decision” or the “Appealed Decision”) on the Strassers’ second application to lift the Provisional Suspension, as follows:

“1) *The 22 November 2024 Applications to lift the Provisional Suspensions reinstated on Ms. Evi Strasser and Ms. Tanya Strasser are denied.*

2) *The FEI Tribunal (the “Panel”) finds that the FEI has broad discretionary authority to impose provisional measures under the GRs in order to safeguard the interest and integrity of the sport and its athletes (both equine and human): provided the FEI has acted reasonably in imposing such provisional measures. The Panel finds that, under the current set of facts and circumstances, the Provisional Suspensions reinstated against the Athletes on 12 November 2024 must be maintained.*

3) *Each party shall bear their own costs incurred relating to these proceedings. No fines are hereby levied.*

4) *This Decision shall be notified to the Athletes, to their, Legal*

Representatives, their NF and to the FEI.

IV Legal Action [...]

3) *According to Articles 162.1(b) and 162.7 of the FEI General Regulations, this Decision, in its reasoned form, may be appealed before the Court of Arbitration for Sport (CAS) by the persons and within the terms set forth in the applicable rules”.*

36. On 21 January 2025, the Strassers started the present arbitration (§ 41 below).

37. On 6 February 2025, FEI formally charged the Appellants, pursuant to Article 28 of the Internal Regulations of the FEI Tribunal (the “Internal Regulations”), with the following offences: (i) abuse of horse (Article 142 of the GR), (ii) breach of the FEI Code of Conduct on the Welfare of the Horse (the “Code of Conduct”) and (iii) conduct that brings the FEI and/or equestrian sport into disrepute (Article 164.11 of the GR). FEI indicated that the charges, if not accepted, would be determined in proceedings before the FEI Tribunal. Attached to the notifications to the Strassers, FEI transmitted the witness statements of A. and C.

38. On 7 February 2025, the Appellants’ counsel requested an extension of the deadline to provide FEI with a reply to the charges until 20 days after CAS issued a decision in the present appeal proceedings.

39. On 8 February 2025, the FEI agreed to such request.

40. On 27 March 2025, the FEI Tribunal issued the full written reasons of the Appealed Decisions, stating *inter alia* the following:

i. as to the question “*Is the FE’s (sic) investigation/ and or prosecution of this matter time barred?*”, it noted that:

- under Swiss law, which governs the FEI rules, the amended (unlimited) statute of limitations applies retroactively, since the alleged events had not yet become time-barred in 2022. Had the acts occurred earlier, the outcome might have been different;
- the Appellants’ claim that they had a legitimate expectation that the misconduct could no longer be prosecuted after five years is to be rejected: in addition, such argument implicitly acknowledges the commission of the acts. Moreover, it is important to uphold strict animal welfare standards within the FEI, and the elimination of time limits to prosecute horse abuse allegations reflects a justified zero-tolerance policy;
- lastly, the Appellants’ legal arguments concerning legal certainty and Article 6(1) of the ECHR is to be dismissed, since the application of an open-ended limitation period within a private association

like the FEI is reasonable and supported by CAS jurisprudence. The approach is also consistent with the practice of other sports federations with respect to serious misconduct;

ii. as to the question “*Is the FEI’s failure to progress its investigation/prosecution since the Athletes were first provisionally suspended renders the Provisional Suspensions procedurally unfair?*”, the Appellants’ claim is to be denied, since:

- the Provisional Suspension had only lasted 33 days in total and the investigation was still active, especially as new witnesses continued to come forward with serious allegations: while timely proceedings are important for fairness, the gravity and complexity of the case justified a longer investigation;
- this case of the Appellants is more serious than the other CAS cases cited by them, making a comparison impossible;
- lastly, the procedural fairness arguments cannot be accepted, since the FEI’s approach was reasonable under the circumstances, and the Provisional Suspension is necessary to protect horse welfare during the ongoing

investigation.

III. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

41. On 21 January 2025, the Appellants filed with CAS a “*Statement of Appeal, Appeal Brief and Request for Provisional Measures*”, pursuant to Articles R37 and R47 of the CAS Code, to challenge the Appealed Decision (the “Appeal”) and to request that the President of the CAS Appeals Arbitration Division issue an order, by 29 January 2025, staying the Provisional Suspension pending the outcome of the Appeal. In addition, the Appellants, *inter alia*, appointed Mr Pierre Muller, Former Judge in Lausanne, Switzerland, as an arbitrator. Together with their Appeal, the Appellants filed a bundle of documents which included also the statements of a number of witnesses.
42. On 23 January 2025, the CAS Court Office acknowledged receipt of the Appeal, initiated the present arbitration procedure and *inter alia* invited the Respondent to file its position on the request for provisional measures.
43. On 27 January 2025, the Respondent filed its answer to the Appellants’ request for provisional measures, asking that such request be dismissed. Additionally, it requested a suspension of the time limit to file its answer to the Appeal until the reasons in support of the Appealed Decision were issued.
44. On 28 January 2025, as a result, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division, or her Deputy, would issue shortly an Order on the request for provisional measures. At the same time, the Respondent was invited to clarify, by 31 January 2025, when the FEI Tribunal was expected to issue the reasons of the Appealed Decision.
45. On 28 January 2025, the Respondent informed the CAS Court Office that it was not able to provide the requested information, as the FEI Tribunal is an independent judiciary body. Therefore, the CAS Court Office invited the Appellants to comment, by 31 January 2025, on the Respondent’s request for suspension of the time limit to file an answer to the Appeal.
46. On 29 January 2025, the President of the CAS Appeals Arbitration Division issued the operative part of an Order on Application for Provisional Measures, stating as follows:
 - “1. *The application for provisional measures filed by Ms Evi Strasser and Ms Tanya Strasser on 21 January 2025 in the matter CAS 2025/A/11145 Evi Strasser & Tanya Strasser v. Fédération Equestre Internationale (FEI) is denied.*
 2. *The costs of the present Order shall be determined in the final award or any final disposition of this arbitration*”.
47. On 30 January 2025, the Appellants objected to the FEI’s request to stay the proceedings pending the issuance of the reasons for the Appealed Decision.
48. On 4 February 2025, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided to deny the Respondent’s request for the suspension of the present procedure. Consequently, the suspension of the Respondent’s time limit to file its

answer was lifted with immediate effect.

49. On 6 February 2025, the CAS Court Office noted that the Respondent had failed to nominate an arbitrator within the granted deadline. Consequently, it informed the Parties that, in accordance with Article R53 of the CAS Code, the President of the CAS Appeals Arbitration Division would appoint an arbitrator on the Respondent's behalf.

50. On 6 February 2025, the Respondent nominated Prof. Ulrich Haas, Professor of law in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany, as an arbitrator in this matter. As a result, the CAS Court Office on the same day invited the Appellants to confirm whether they agreed with the Respondent's nomination, given that the deadline for the Respondent had expired.

51. On 6 February 2025, the Respondent in a message to the CAS Court Office wrote that:

"... The FEI ... did not request only for a stay in the deadline to file its Answer but in the Appeal Proceedings in their entirety including the deadline to nominate an arbitrator.

It would be unreasonable to only suspend part of the Appeal Proceedings, especially as the FEI's choice of the arbitrator may depend on the availability of the reasoned decision, which was the main reason behind the FEI's request for a stay in the Appeal Proceedings in the first place.

Taking both aspects as above into account, the FEI therefore rightfully so assumed that the suspension referred to the entire Appeal Proceedings and requests that the FEI's nomination of an arbitrator is accepted. ...".

52. On 11 February 2025, the Appellants informed the CAS Court Office that they *"object[ed] to the FEI's nomination of Prof. Haas, and consider[ed] that, pursuant to Article R53 of the CAS Code, it [was] for the President of the CAS Appeals Arbitration Division, or her Deputy, to nominate an alternative arbitrator in lieu of the FEI".*

53. On 12 February 2025, the CAS Court Office advised the Parties that the issue of the validity of the Respondent's nomination of Prof. Dr Haas had been submitted to the President of the CAS Appeals Arbitration Division.

54. On 19 February 2025 the Respondent filed with the CAS Court Office its answer to the Appeal (the "Answer"), pursuant to Article R55 of the CAS Code, seeking its dismissal. The Answer contained also the request that the Appellants disclose copies of all non-disclosure agreements ("NDAs") that they had entered into with employees at the Stables.

55. On 20 February 2025, the CAS Court Office invited the Parties to express a preference as to the holding of a hearing or whether they wished the Panel to decide on the basis of their written submission.

56. On 25 February 2025, the Respondent informed the CAS Court Office that:

"... it does not request for a hearing to be held in the above stated Appeal and deems that the Panel will be sufficiently informed on the matter to issue an award based on the Parties' written submission solely, in particular as the majority of the submitted arguments pertain to the Statute of Limitations, which is a purely procedural question. In consequence, the FEI also does not request a case management conference".

57. On 26 February 2025, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division, pursuant to Article R53 of the CAS Code, had ruled that the Respondent's nomination of Prof. Dr Haas was late, and that, consequently, the Deputy President would appoint an arbitrator on the Respondent's behalf.

58. On 27 February 2025, the CAS Court Office informed the Parties that Mr Pierre Muller had not accepted his nomination as arbitrator in the present procedure, and therefore requested the Appellants to nominate another arbitrator. Additionally, it noted that the Deputy President of the CAS Appeals Arbitration Division had appointed Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark, as arbitrator in the matter in lieu of the Respondent.

59. On 27 February 2025, the Appellants sent a letter to the CAS Court Office as follows:

"The Appellants request that a hearing is held, in order to, inter alia, allow the Appellants to:

- a. address the FEI's arguments (as presented in its Answer) and evidence. In particular, the FEI has filed with its Answer new witness evidence which was not submitted during the first instance proceedings. The Appellants thus were not able to address that witness evidence in their Appeal Brief. It is therefore essential that a hearing is held so that the Appellants can address this new evidence; and*
- b. set out their position orally and answer any questions which the Panel may have.*

The Appellants do not consider a case management conference to be necessary at this stage".

60. On 28 February 2028, the Appellants in a letter to the CAS Court Office nominated Mr Patrick Grandjean, Attorney-at-Law in Belmont, Switzerland, as an arbitrator.

61. On 20 March 2025, the CAS Court Office noted that, pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Panel appointed to hear the Appeal had been formed as follows:

President:

Prof. Luigi Fumagalli, Professor and Attorney-at-Law in Milan, Italy;

Arbitrators:

Mr Patrick Grandjean, Attorney-at-Law in Belmont, Switzerland; and

Mr Lars Hilliger, Attorney-at-Law in Copenhagen, Denmark.

62. On 1 April 2025, the Appellants wrote a message to the CAS Court Office requesting that a hearing be scheduled, at the Panel's earliest convenience.

63. On 1 April 2025, the CAS Court Office noted that the Panel had decided to hold a hearing in this matter on 21 May 2025. The Parties were invited to inform whether they would be available on this date by 4 April 2025.

64. On 2 April 2025, the Appellants confirmed their availability on such date.

65. On 4 April 2025, the Respondent

informed the CAS Court Office of a change in its representation and confirmed its availability on the date proposed for the hearing. Enclosed to its letter, the Respondent submitted also a copy of the full written reasons for the Appealed Decision issued by the FEI Tribunal on 27 March 2025 (§ 40 above). At the same time, the Respondent noted that the Appellants had not provided the NDAs requested by FEI in its Answer: it therefore reiterated the request, demanding that the Panel order such production in the event of failure of the Appellants to provide them voluntarily.

66. On 7 April 2025, the Parties were informed that the hearing would be held by videoconference on 21 May 2025. In the same letter, the Appellants were invited by the CAS Court Office to file by 14 April 2025 their comments on the grounds of the Appealed Decision, as transmitted by the Respondent on 4 April 2025, with the possibility of subsequent rebuttal by the Respondent.
67. On 8 April 2025, the Appellants wrote a letter to the CAS Court Office stating as follow:

"We write further to your letter of 7 April 2025, in relation to the grounds of the appealed decision (the "Reasoned Decision"), which invited the Appellants to 'file their comments on this document, if any'.

The Appellants are content to address the Reasoned Decision, to the extent that it could be relevant (given that the appeal is de novo), at the hearing, rather than by way of any additional written submissions, in the interests of saving costs.

Accordingly, the Appellants do not wish to file any comments on the Reasoned Decision.

We note that your letter stated that the Respondent will be granted an opportunity to file a 'rebuttal' to any comments filed by the Appellants regarding the Reasoned Decision. Given that the Appellants have not filed any such comments, we understand that the Respondent will not now be entitled to file any submissions of its own. However, the Appellants respectfully reserve the right to reconsider their decision not to file comments on the Reasoned Decision, to the extent that this understanding is not correct".

68. On 10 April 2025, the Appellants, in a letter to the CAS Court Office, referred to the grounds of the Appeal and noted that one of them related to the unfairness of the Provisional Suspension, owing to the delays in the FEI's investigation of the allegation, because, at the time the Appeal was filed, FEI had not yet charged the Appellants with any misconduct. However, since the Appeal Brief was filed, the FEI concluded its investigation and formally charged the Appellants (§ 37 above). As a result, *"in light of this development and with a view to narrowing the issues in dispute"*, they notified the FEI and the CAS Panel that they no longer intended to pursue that ground of Appeal.
69. On 15 April 2025, the Appellants provided their comments on the Respondent's request for the production of documents, stating *inter alia* what follows:
- i. the documents sought were neither in the possession of the Appellants, nor under their control. Accordingly, the Appellants were not in a position to produce or provide copies of them;

- ii. the use of NDAs between employers and employees constitutes a standard across all industries and a lawful practice. As a result, it cannot be construed as an attempt to conceal instances of horse abuse;
 - iii. the assertion in the Appeal Brief, that the complainants in this matter had entered into NDAs with the Appellants, was made in error and was factually incorrect, as it should have read that the Appellants “*may*” have entered into NDAs with the complainants;
 - iv. the correct position as to the Appellants use of NDAs was the following:
 - “(a) *The Appellants do not routinely use, and have never routinely used, NDAs at Good Tyme Stables. However, in the past, they have, on occasion, entered into termination / settlement agreements with (former) employees, which agreements have included certain non-disclosure obligations.*
 - (b) *The Appellants have not used any such settlement agreements in recent years and have been unable to locate copies of any historic settlement agreements. However, the Appellants have obtained from their former lawyer a copy of a draft settlement agreement that was prepared (but not ultimately concluded) for a former employee, who left Good Tyme Stables in January 2018 after suffering an injury at work (the “Draft Settlement Agreement”, enclosed). The Draft Settlement Agreement includes obligations relating (inter alia) to confidentiality, non-disparagement, and non-use of confidential business information, in addition to obligations regarding the mutual release of claims. The Draft Settlement Agreement is thus typical of settlement agreements arising from the termination of an employment relationship.*
- (c) *Given that seven years have passed since [A.] left their employment, the Appellants cannot specifically recall entering into an NDA with [A.]. However, [A.] suffered a riding accident whilst working at Good Tyme Stables and the Appellants may therefore have asked her to sign a settlement agreement prior to leaving their employment (in order to avoid any future liability or litigation). If they did so, [A.]’s settlement agreement would likely have taken the same form as the Draft Settlement Agreement, which had been prepared a matter of months before [A.] left their employment, for another injured employee. It would thus likely have included the same clauses regarding confidentiality, non-disparagement, and non-use of confidential business information.*
 - (d) *However, having searched their electronic and physical records (which ... were destroyed by a flood in May 2023), the*

Appellants do not have a copy of any such settlement agreement (or any NDA) with [A.]. The Appellants' former lawyer (who provided them with a copy of the Draft Settlement Agreement) also does not have any such document. Notably, [A.] does not appear to have a copy of any such document, either, as no such document has been filed by the FEI.

(e) *The Appellants are confident that they did not enter into any NDA or settlement agreement with [B.] or [C.]. Notably, the witness statements of [B.] and [C.] ... do not suggest otherwise”.*

70. On 30 April 2025, the Appellants informed the CAS Court Office *inter alia* of a change in their representation.
71. On 7 May 2025, the Respondent sent a letter to the CAS Court Office requesting the CAS Panel that some new documents, consisting in (a) a copy of a NDA between A. and the Stables dated 31 January 2018 (but allegedly signed in June 2018), (b) a “*Settlement Agreement and Release*” dated 20 June 2018 between the same parties, (c) a “*Cease and Desist Demand*” sent to A. by a law firm representing the Stables on 3 December 2023, and (d) a Facebook post of the Appellants, be added to the case file in accordance with Article R56 of the CAS Code, as such new evidence:
 - i. was materially relevant to the Respondent’s case that the Appellants could not rely on any limitation defence, due to their alleged concealment of the abuse, including the use of the NDAs, particularly with A.;
 - ii. arose as a result of the FEI’s further investigations with A. following the Appellants’ inability to produce the relevant agreements and their failure to disclose their attempts to enforce on December 2023 those agreements, notably some seven months after the Appellants’ copies of those documents were allegedly destroyed.
72. On 9 May 2025, the Appellants, commenting on the Respondent’s letter dated 7 May 2025:
 - i. opposed the FEI’s request that the additional evidence be added to the case file, arguing it did not meet the “exceptional circumstances” standard under Article R56 of the CAS Code, because the documents at stake existed well before the FEI’s Answer and could have been filed earlier, considering that they were allegedly under A.’s control;
 - ii. denied the FEI’s claim that the Appellants’ failure to produce the documents justified the late submission, as the burden of proof remained with the FEI. Therefore, admitting the evidence would unfairly prejudice the Appellants.
73. On 13 May 2025, the Parties were informed by the CAS Court Office that the CAS Panel had decided to admit to the case file the new evidence filed by the Appellant.
74. On 16 May 2025, the Respondent sent a letter to the CAS Court Office with

respect to the structure and schedule of the hearing.

75. On 18 May 2025, the Appellants sent a letter to the CAS Court Office addressing the issue of the hearing structure and schedule and requesting the admission of an unredacted version of a draft “*Settlement Agreement and Release*” entered into with a former employee, [...], previously submitted in redacted form in order to protect her identity. In that regard, the Appellants indicated (i) that, since the Panel had admitted two agreements between the Stables and A., both closely based on the draft “*Settlement Agreement and Release*” with [...] and even mistakenly naming her, there was no longer a need for redaction, and (ii) that the unredacted version would help clarify the origin of the agreements entered into with A. At the same time, the Appellants submitted additional legal authorities they intend to rely on at the hearing.

76. On 21 May 2025, a hearing was held by videoconference. In addition to the Panel and Ms Delphine Deschenaux-Rochat, CAS Counsel, the following persons attended the hearing:

for the Appellants:

the Appellants in person, assisted by Mr Tom Seamer, Mr Ben Cisneros, and Mr Claude Ramoni, counsel;

for the Respondent:

Ms Anna Thorstenson and Ms Ana Kricej, FEI Legal Counsel, assisted by Ms Lauren Pagé, Mr Alasdair Muller, and Mr Riccardo Coppa, counsel.

77. At the beginning of the hearing, the

Parties confirmed that they had no objection to the composition of the Panel. The Panel then, after opening statements by counsel, heard the declarations of Ms Evi Strasser and A. In that context, and *inter alia*:

- i. Ms Evi Strasser denied the veracity of the accusations of horse abuse brought against the Appellants: they always treated A. well, taking care of her and paying her salary even in the period she was injured and could not work. Ms Evi Strasser explained that the NDA with A. was signed when she left, on the basis of a previous text, prepared for another employee, and modified. The texts of the NDA and of the settlement agreement were prepared by lawyers and were signed without any pressure having been put on A., who was never threatened. Only later a cease and desist letter was sent because she had started to attack the Strassers. The only explanation for A.’s behaviour is that she was irritated because she could not obtain another employment she was later seeking and imputed her failure to the Strassers;

- ii. A. confirmed the signing of the NDA and of the settlement agreement when she was only 19, and unexperienced: they were the first legal documents she signed. They were put before her by Ms Evi Strasser in a very aggressive way at the end of the period of employment and it was clear that they had been drafted to threaten her. A. explained that she was

really scared at the time and only later was told that any confidentiality obligation she had undertaken would not cover horse abuse. When she denounced the abuses in a post (in 2020, correcting a previous indication of 2019), she received the cease and desist letter.

78. The Parties were finally invited to submit their pleadings. In that context, the Parties answered questions asked by the Panel and insisted for the granting of the relief respectively sought.
79. At the conclusion of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings.
80. On 2 June 2025, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the “Order of Procedure”), which was signed by the Appellants on 9 June 2025, in a slightly amended version, and by the Respondent on 5 June 2025.

IV. THE POSITION OF THE PARTIES

81. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the Appellants

82. In their Appeal, the Appellants requested the CAS to issue an award to:

- “(a) *set aside the Appealed Decision;*
- (b) *declare that the FEI’s investigation and/or prosecution of this matter is time-barred owing to the expiry of the applicable statute of limitations;*
- (c) *declare that the Provisional Suspensions are procedurally unfair and/or disproportionate;*
- (d) *lift the Provisional Suspensions with immediate effect; and*
- (e) *order the FEI to reimburse their legal costs and expenses related to this appeal”.*

83. In essence, the Appellants request this CAS Panel to overturn the Appealed Decision, arguing that the Respondent’s investigation and prosecution are time-barred. They initially contended also that the Provisional Suspension was to be set aside on the basis of reasons of “*procedural fairness and proportionality*”. Such ground was however withdrawn on 10 April 2025 (§ 68 above).

84. In their submissions, the Appellants describe the facts they indicate to be relevant, with respect to the FEI’s evidence and allegations. In such regard, the Appellants underline *inter alia* that:

- the accusations come from disgruntled former employees. Doubts exist on their credibility, due to inconsistencies and inaccuracies in their witness statements. Notably, B.’s statement implicates only Ms Evi Strasser, while the allegations against Ms Tanya Strasser rely solely on A.’s testimony, which lacks specific dates and details;

- the alleged incidents date back to 2018, making it difficult to gather exculpatory evidence. Similar accusations were previously investigated by *Ministère de l'Agriculture, des Pêcheries et de l'Alimentation Québec* (MAPAQ), which cleared them of any wrongdoing in 2020;
 - Dr Sylvie Surprenant, a respected veterinarian with extensive experience in equestrian sports, attests that she has never observed any signs of abuse in over a decade of working with them. Additional statements from clients, colleagues, and staff further confirm their professionalism and refute any claims of misconduct.
85. The position of the Appellants is that the allegations of the misconduct are time-barred due to the expiration of the applicable five-year statute of limitations. As a result, the Respondent lacks the authority to prosecute the case or impose the Provisional Suspension, which must be lifted immediately.
86. The Appellants, first, contend that they are not precluded from raising in this arbitration the statute of limitations defence despite the Respondent's claim that the same issue was raised in the First CAS Proceedings. In fact, the Appellants submit that:
- i. the Respondent withheld the fact that the alleged misconduct occurred in 2018 and refused to specify the allegations;
 - ii. when the Respondent eventually disclosed the evidence during the First CAS Appeal, the Appellants immediately raised the statute of limitations issue, but only in brief submissions, without a right of reply;
 - iii. these submissions were made only at an interim stage, and the issue was never fully determined by CAS, as the First CAS Proceedings were terminated because the appeal was deemed withdrawn;
 - iv. the statute of limitations issue is not covered by *res indicata*, because the matter was never discussed or made the object of substantive determination by CAS, and the Appellants are free to raise it again in this Appeal;
 - v. the First CAS Proceedings were terminated due to the negligence of the Appellants' former *pro bono* counsel, not of the Appellants themselves. Denying them the possibility to invoke now the defence would be unfair.
87. The Appellants then submit that the allegations of the misconduct are time-barred for the following reasons:
- i. the alleged misconduct, on which the Provisional Suspension is based, took place in 2018. According to Article 163.12 of the GR in force at that time, such offenses, constituting horse abuse (not committed on the field of play or in its immediate vicinity), fall under the category of "*other offences*" and are subject to a five-year statute of limitations. Since the FEI only initiated its investigation in 2024, the case became time-barred in 2023,

- rendering the Provisional Suspension unlawful and requiring its immediate removal;
- ii. the GR were amended in 2022 to remove the statute of limitations for horse abuse as from 1 January 2022. However, the new rule (Article 157(i)(d) of the GR) cannot be applied retroactively. The principle of non-retroactivity, recognized in both Swiss law and sports law, prevents new substantive rules from affecting past conduct, unless explicitly stated, which is not the case here. Since the current regulations do not include a retroactive provision, the 2018 rules should apply, also on the basis of the *contra proferentem* rule of interpretation, confirming that the prosecution is time-barred. Additionally, the Appellants had a legitimate expectation that any charges against them would be brought within the five-year limit. The FEI's decision to impose a Provisional Suspension beyond this period is therefore unfair and breaches the principle of legal certainty. Furthermore, an unlimited statute of limitations contradicts legal principles, including Article 6(1) of the European Convention on Human Rights (the "ECHR"), as established by the European Court of Human Rights (the "ECtHR") in its jurisprudence (*Volkov v. Ukraine*). Consequently, the FEI's attempt to extend the limitation period indefinitely is unlawful and invalid;
 - iii. the Respondent's position expressed in the Answer is untenable. Contrary to the allegations of the Respondent, the Panel should find that:
 - i. the new (unlimited) statute of limitations in Article 157(1)(d) of the GR cannot be applied retroactively: it is a substantive rule, not merely procedural, as it explicitly extinguishes liability and limits the FEI's jurisdiction. The Respondent's reliance on Article 49 of the Final Title [*"Commencement and Implementing Provisions"*] of the Swiss Civil Code (the "SCC Final Title") is misplaced because that provision applies only to amendments to the Swiss Civil Code (the "SCC"), not to private regulatory frameworks like the GR. Furthermore, Article 49 of the SCC Final Title provides a clear exception to the general principle of non-retroactivity, whereas the FEI regulations lack any such transitional provision;
 - ii. in the absence of explicit language stating otherwise, the Appellants were reasonably entitled to expect that the five-year limitation period from 2018 would apply. Expecting them to preserve potentially exculpatory evidence beyond five years is unreasonable. Additionally, none of the

- authorities cited by the FEI supports the fairness or validity of an indefinite statute of limitations, which they argue is clearly unlawful;
- iii. the Respondent's attempt to distinguish *Volkov v. Ukraine* from their case is devoid of merit, since both cases involve serious historical misconduct allegations with significant disciplinary consequences. Therefore, the principles established by the ECHR in *Volkov* are directly relevant. Moreover, if the new unlimited statute of limitations is incompatible with Article 6(1) ECHR, it is invalid, and the original five-year limitation period must apply;
 - iv. the present case does not concern a contractual dispute, but a disciplinary matter, making the Swiss limitation period for breach of contract inapplicable;
 - v. animal mistreatment constitutes a criminal offence and therefore falls within the scope of criminal law. As a result, fundamental principles of criminal law must apply, including the prohibition of retroactive application of more severe legal provisions, as provided by Article 389 of the Swiss Criminal Code with respect to the statute of limitations;
 - vi. the accusation of having required A. and B. to sign NDAs in order to deliberately conceal misconduct is denied. In fact, NDAs between employers and employees are standard practice across industries to protect sensitive information and client privacy. There is no concrete evidence, but only speculation from the complainants, to support the claim that the NDAs were used to hide wrongdoing. Furthermore, the FEI Tribunal previously rejected a similar argument in its confidential decision of 30 August 2024.
- B. The Position of the Respondent**
88. On 19 February 2025 in its Answer, the Respondent requested the CAS:
- “10.1. declare the Second CAS Appeal inadmissible;*
 - 10.1.2 in the alternative, declare that:*
 - 10.1.2.1 the FEI is not time-barred from adducing the FEI Evidence, nor from bringing charges against the Appellants in relation to the acts described therein; and*
 - 10.1.2.2 maintaining the Provisional Suspensions pending determination of those charges is not procedurally unfair on the Appellants;*

- 10.1.3 *dismiss the Second CAS Appeal and uphold the Appellants' Provisional Suspensions;*
- 10.1.4 *order the Appellants to reimburse the FEI with its legal costs and other expenses pertaining to the Second CAS Appeal*".
89. In support of its requests, the Respondent submits that the Appellants are precluded from raising in the present arbitration a time bar exception, and that in any case FEI is not time-barred from investigating and/or prosecuting instances of horse abuse alleged to have occurred in 2018/2019.
90. The Respondent in fact first contends that the present second CAS arbitration is an abuse of process. The Appeal is therefore inadmissible:
- i. the case before this Panel largely mirrors the issues which were the object of the First CAS Proceedings. Those issues would have been determined by the CAS Panel appointed in the First CAS Proceedings, if the Appellants had not missed the deadline for the appeal brief. As a result, the present Appeal is merely an attempt to rectify the Appellants' own procedural error:
 - ii. the behaviour of the Appellants constitutes an abuse of process and a violation of procedural good faith under Swiss law and any statute of limitations issues should be addressed in the main proceedings regarding the charges, which can be expedited if necessary;
 - iii. the limitation issue was raised in the First CAS Proceedings, and the Panel appointed in that case could hear the matter in the exercise of its *de novo* power of review. If the CAS Panel could not reach that stage of evaluation and consider the issue, it was only because of the Appellants' procedural mistakes, and the Appellants should not be allowed to evade the consequences of the withdrawal due to their own fault.
91. The Respondent then submits that no time-bar precludes it from investigating and prosecution the case of the Appellants, since:
- i. "GR Art. 157.1(d) *can and does apply retroactively*":
 - a. the Appellants incorrectly argue that all statutes of limitations under Swiss law are substantive. In reality, Swiss law distinguishes between procedural and substantive limitations, with both types being capable of retroactive application. According to Article 49 of the SCC Final Title, "*where the new law specifies a longer period than the previous law, the new law applies, provided prescription has not yet taken effect under the previous law*". This principle has been confirmed by the CAS and the FEI Tribunal, which found that the new extended limitation period for horse abuse cases under Article 157.1(d) of the GR applies to allegations not

- yet time-barred. The Appellants' claim that Article 49 of the SCC Final Title only applies to limitations under the SCC is incorrect, as the provision applies more broadly to all statutes of limitation under Swiss private law;
- b. given that the FEI's regulations lack provisions for intertemporal issues, it is appropriate to apply Swiss law. The Appellants themselves acknowledge that Swiss law applies subsidiarily in the absence of specific FEI provisions. Therefore, the prosecution of the Appellants' alleged horse abuse is not time-barred;
 - c. moreover, even if Article 157.1(d) of the GR is considered procedural, CAS case law (CAS 2000/A/274; and CAS 2001/A/340) affirms that procedural regulations apply immediately when enacted, without the need of explicit retroactive effect. Therefore, the Respondent can pursue disciplinary action against the Appellants for alleged violations under the new extended limitation period;
- ii. *"Applying GR Art. 157.1(d) retroactively is not contrary to the Appellants' legitimate expectations":*
 - a. the allegations against the Appellants involve deliberate, severe and repeated horse abuse, along with efforts to conceal this behaviour that fundamentally opposed to the values of equestrian sport. No participant in equestrian sport should ever expect that such abuse is tolerated or exempt from sanction, regardless of when it occurred;
 - iii. *"Applying GR Art. 157.1(d) retroactively is not unfair to the Appellants":*
 - a. a strict zero-tolerance policy on horse abuse is maintained, which is why the current GR include no limitation period for such cases. Consequently, the Appellants cannot reasonably claim that Article 157.1(d) should not apply retroactively, and any other approach would undermine the integrity of the sport;
 - a. the unlimited limitation period for horse abuse came into effect on 1 January 2022, before the previous five-year period for the Appellants' alleged conduct had expired. Therefore, its application is not retroactive in a way that forbids past permitted behaviour or removes acquired rights; it merely extends the timeframe during which already illegal acts can be prosecuted;

- b. the Appellants' argument that this extension is unfair, is rejected noting that CAS case law consistently upholds long limitation periods, even if they make it harder to gather exculpatory evidence. Moreover, the Appellants fail to specify what exculpatory evidence they lost and why. Consequently, the Respondent maintains that it is fully entitled to use its evidence and pursue disciplinary action for the alleged horse abuse;
- iv. "GR Art. 157.1(d) does not violate Article 6(1) ECHR":
 - a. the Appellants' argument that the lack of a limitation period for horse abuse under Article 157.1(d) of the GR violates the principle of legal certainty and Article 6(1) of the ECHR is denied;
 - b. the decision of the ECtHR in *Volkov v Ukraine* case dealt with judicial misconduct and procedural issues, vastly different in nature from the current case, which concerns serious and repeated acts of physical horse abuse, potentially amounting to criminal behaviour. Unlike *Volkov*, this case also involves allegations of deliberate concealment by the accused;
- c. due to the gravity of horse abuse, it is justified to have no limitation period for such violations, without infringing Article 6(1) ECHR. However, if the CAS Panel were to find that an indefinite limitation violates the ECHR, the longest applicable limitation under Swiss law of ten years for contractual breaches, should apply instead, rather than the five-year limit proposed by the Appellants;
- v. *"the Appellants have concealed their alleged acts of horse abuse and so cannot rely on any limitation defence in any event"*:
 - a. A., in her witness statement, confirms she was required to sign a non-disclosure agreement while working for the Appellants and was threatened with legal action by Ms Evi Strasser if she disclosed information about their alleged horse abuse. Although the Appellants argue that NDAs are standard in many industries, the Respondent disputes the idea that broad NDAs are common in equestrian sport, especially those preventing discussion of stable practices not inherently confidential. Furthermore, in this case NDAs were used not for standard confidentiality, but to actively conceal

misconduct. This is supported by additional allegations of intimidation by Ms Evi Strasser against other witnesses, including C., who delayed giving testimony until January 2025 due to feeling threatened;

- b. the Appellants deliberately hid their abusive actions to later rely on a statute of limitations defence. Therefore, the limitation period should begin only when the Respondent became aware of the misconduct around February 2024, not when the acts occurred in 2018 and 2019. Furthermore, under Article 2 of the SCC, invoking a limitation defence after deliberately concealing wrongdoing constitutes an abuse of rights and should be barred;
- c. while a previous FEI Tribunal decision rejected similar concealment arguments in another case, the current matter can be distinguished due to the gravity of the allegations and the use of NDAs as tools of concealment. Horse abuse cases, due to the centrality of horse welfare in equestrian sport, deserve special treatment and should not allow abusers to escape accountability through concealment tactics.

V. JURISDICTION

- 92. The jurisdiction of the CAS is not disputed by the Parties.
- 93. According to Article R47, first paragraph of the CAS Code:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.

- 94. The jurisdiction of CAS is contemplated by Article 39 of the FEI Statutes as follows:

“39.1 The Court of Arbitration for Sport (CAS) shall judge all Appeals properly submitted to it against Decisions of the FEI Tribunal, as provided in the Statutes and General Regulations.

39.2 Any dispute between National Federations or between any National Federation and the FEI, which falls outside the jurisdiction of the FEI Tribunal shall be settled definitively by the CAS in accordance with the CAS Code of Sports-related Arbitration.

[...]

39.4. The parties concerned acknowledge and agree that the seat of the CAS is in Lausanne, Switzerland, and that proceedings before the CAS are governed by Swiss Law.

39.5. Notwithstanding anything to the contrary in the CAS Code of Sports-related Arbitration, no evidence

discoverable by due diligence during proceedings before the FEI Tribunal may be brought before the CAS on Appeal. If any such evidence is produced after a Decision is issued by the FEI Tribunal, it must first be produced to the FEI Secretary General before all legal remedies are exhausted within the meaning of the CAS Code of Sports-related Arbitration. Any such additional evidence produced post-Decision may be the subject of additional proceedings and penalties. [...]”.

95. In addition, Article 162 of the GR states that:

“162.1 An Appeal may be lodged by any person or body with a legitimate interest against any Decision made by any person or body authorized under the Statutes, GRs or Sport Rules, provided it is admissible [...]:

(b) With the CAS against Decisions by the FEI Tribunal. The person or body lodging such Appeal shall inform the FEI Legal Department. [...].

162.7 Appeals to the CAS together with supporting documents must be dispatched to the CAS Secretariat pursuant to the Procedural Rules of the CAS Code of Sports-related Arbitration so as to reach the CAS within twenty-one (21) days of the date on which the notification of the FEI Tribunal Decision was sent to the National Federation of the Person Responsible.

162.8. Cross appeals and other subsequent appeals by any respondent named in

cases brought to CAS under the FEI Rules and Regulations are specifically permitted. Any party with a right to appeal to CAS must file a cross appeal or subsequent appeal at the latest with its answer”.

96. Finally, the jurisdiction of CAS has been confirmed by the Parties by signing the Order of Procedure.

97. The Panel, consequently, has jurisdiction to decide on the Appeal filed by the Appellants against the Appealed Decision.

VI. ADMISSIBILITY

98. The Statement of Appeal was filed by the Appellants within the deadline set in Articles 162(7) of the GR and R49 of the CAS Code and complied with the requirements of Article R48 of the CAS Code.

99. The Panel notes that the admissibility of the Appeal is however challenged by the Respondent, which in fact requested it to be dismissed on that basis, without any further consideration in its merits.

100. At the same time, however, the Panel remarks that the Respondent’s objection relates specifically to one of the grounds on which the Appeal was originally based. As a result, the Panel will examine it in the framework of the discussion of that specific ground.

101. Subject to the further discussion of the admissibility of a specific claim, the Appeal is therefore admissible.

VII. SCOPE OF THE PANEL’S REVIEW

102. According to Article R57, first paragraph of the CAS Code,

“The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. ...”.

VIII. APPLICABLE LAW

103. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the CAS Code.

104. Article R58 of the CAS Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

105. In light of the foregoing, the “applicable regulations” in the present case for the purposes of Article R58 of the CAS Code are those adopted by FEI. Swiss law applies subsidiarily.

IX. PRELIMINARY PROCEDURAL MATTERS

106. In the course of the arbitration, on 13 May 2025 (§ 73 above), the Panel admitted to the case file the new evidence filed by the Appellant on 7 May 2025 (§ 71 above), with reasons to be given in the final award.

107. The Panel confirms here such decision and finds that “*exceptional circumstances*” pursuant to Article R56 of the CAS Code justified it. In fact, the Panel notes

that the necessity to produce those documents, which were originally not in the possession of the Respondent, but of one of its witnesses, arose only after the Appellants’ indication (on 15 April 2025: § 69 above) that the documents sought by the Respondent in its Answer were not in their possession or control. As a result, it appeared fair to the Panel to allow these new documents to be admitted to the file, putting the Appellants in a condition to examine them ahead of the hearing.

108. In that regard, the Panel remarks that, on 18 May 2025 (§ 75 above), the Appellant filed with the permission of the Panel new documents directly relating to those admitted to the file upon the Respondent’s request, and that no further issue arose or objection raised at the hearing.

X. MERITS

A. The issues

109. The object of this arbitration is the Appealed Decision, which denied the Appellants’ second application to lift the Provisional Suspension. In fact, the Provisional Suspension had been reinstated following the termination of the First CAS Proceedings.

110. In essence, the Appellants submit that the investigation into the facts which allegedly occurred in 2018, and their prosecution as disciplinary violations, is time-barred. Therefore, the Provisional Suspension imposed on them pending the investigation should be set aside. The Respondent denies the Appeal, maintaining that the Appellants are precluded from raising the time-bar argument and that in any case the investigation is not time-barred.

111. The present case presents some peculiarities. The case, in fact, is about a Provisional Suspension, and not about a final determination of a violation. However, the disputed matter is not about the satisfaction or not of the conditions which are normally required in order to justify a provisional measure (the suspension) pending the final outcome of an investigation, or whether an *interim* measure is to be granted to stay the execution of the Provisional Suspension. The dispute regards a time-bar issue for the investigation and prosecution of an alleged offence. As a result, the decision required of this Panel appears to go beyond the matter directly discussed (the justification of a Provisional Suspension pending the investigation), but the possibility in itself to conduct an investigation. The determination of this Panel, however, will be strictly limited to the relief requested. In other words, any finding regarding the Provisional Suspension would not imply any conclusion regarding the commission by the Appellants of any action amounting or not to a disciplinary violation.
112. In light of the foregoing, there are two main issues to be examined by the Panel. They are the following:
 - i. are the Appellants precluded from raising in this arbitration procedure the time-bar argument?
 - ii. is the investigation into facts which allegedly occurred at the Stables in 2018 time-barred?
113. The CAS Panel will examine those issues in sequence.
 - i. *Are the Appellants precluded from raising in this arbitration procedure the time-bar argument?*
114. The Respondent requested the Appeal to be dismissed, claiming that the ground on which it is based is inadmissible. According to the Respondent, in fact, the Appeal is precluded because it constitutes an abuse of rights. More specifically, the Appellants would be precluded from invoking a time-bar to the investigation and prosecution into the alleged horse abuse at the Stables, because that issue was before CAS in the First CAS Proceedings and because the matter should be more properly discussed in the framework of a determination on the merits of the violation.
115. The Panel does not agree with the Respondent's contention and finds that the Appellants are not precluded from raising the limitation defence in the present procedure. In fact, in the Panel's opinion:
 - i. the Appeal is not precluded by any *res indicata* effect that could be produced by the First CAS Award. Such prior decision, rendered in the First CAS Proceedings, in fact, dealt with a different issue, *i.e.* whether the Appellants' request to be allowed to file their appeal brief past an expired deadline had to be granted or not. And on that basis the Panel in the First CAS Proceedings only decided that the First CAS Appeal had to be considered as withdrawn. In other words, the Panel in the First CAS Proceedings did not decide in any way on the issue of time-bar,

irrespective of whether that issue was, or could have been, before it;

- ii. no bad faith can be imputed to the Appellants. There is no indication and no reason to find that the Appellants, by bringing the present Appeal and raising in this arbitration a matter that was never decided at CAS level, acted in bad faith or abused any procedural right they might have. Well to the contrary, this CAS Panel notes that the Appealed Decision contained a final note confirming that it could be appealed before the CAS within 21 days of receipt. It would be odd to find an abuse in the exercise by the Appellants of a right explicitly mentioned in the Appealed Decision, which expressly dealt with the limitation issue.
116. As a result, this CAS Panel finds that the Appellants are not precluded from raising the issue of time-bar in this arbitration.
- ii. *Is the investigation into facts which allegedly occurred in 2018 at the Stables time-barred?*
117. The main issue before this Panel concerns the Appellants' claim that the Respondent was precluded from starting on 22 April 2024 an investigation (§ 11 above), and therefore to impose the Provisional Suspension, because, at the time the alleged events of horse abuse occurred (in 2018), the statute of limitations then in force, as defined by Article 163.12(ii) of the GR (the "GR 2018"), provided for a 5-year time-bar, and had therefore expired. The Respondent's submission on the

other hand is that no time-bar can be invoked by the Appellants, since Article 157.1 of the GR, as entered in force as from 1 January 2022 (the "GR 2022"), legitimately removed all limits to the prosecution of issues of horse abuse if not already time-barred.

118. With regard to the disputed issue, and for the purposes of the identification of the applicable rule, several aspects have been discussed by the Parties. They include questions regarding the interpretation of sporting regulations, the nature of the rules on time-bar, Swiss law, the principle of legality and the limits to retroactivity, and the impact of the rules on the protection of human rights. In the end, however, the question remains whether Article 163.12 of the GR 2018 or Article 157.1 of the GR 2022 applies in the case of the Appellants with respect to the investigation into events which allegedly occurred in 2018: if Article 163.12 of the GR 2018 applies, then, the prosecution of the Athletes would be time barred; if Article 157.1 of the GR 2022 applies, the prosecution of the Athletes would not be time barred. In fact, it is common ground between the Parties (and cannot be disputed) that on 1 January 2022, when the GR 2022 entered into force, the period of limitation for the prosecution of the alleged violation that had occurred at the Stables in 2018 had not elapsed yet.
119. The rules invoked by the Parties are the following:
- i. Article 163.12 of the GR 2018, which reads as follows:

"There is a statute of limitation on prosecution by the FEI, which is time-barred after:

- (i) *one (1) year for offences committed on the field of play or in its immediate vicinity;*
 - (ii) *five (5) years for all other offences;*
 - (iii) *ten (10) years for doping offences;*
 - (iv) *Match-fixing, bribery and corruption shall not be subject to a statute of limitations”.*
 - ii. Article 157.1 of the GR 2022, which provides the following:
 - “*There is a statute of limitation on prosecution by the FEI, which is time-barred after:*
 - (a) *one (1) year for offences committed on the field of play or in its immediate vicinity;*
 - (b) *five (5) years for all other offences;*
 - (c) *ten (10) years for doping offences;*
 - (d) *Horse Abuse, Match-fixing, bribery and corruption and offences falling under the FEI Safeguarding Policy against Harassment and Abuse are not subject to a statute of limitations”.*
120. In the context of such discussions, the Parties made reference also to, and discussed the relevance of, some Swiss law provisions. More specifically of:
- i. Article 49 of the SCC Final Title:
 - “1 *Where the new law specifies a longer period than the previous law, the new law applies,*
 - provided prescription has not yet taken effect under the previous law.*
 - 2 *Where the new law specifies a shorter period, the previous law applies”.*
 - ii. Article 389 of the Swiss Criminal Code:
 - “1 *Unless the law provides otherwise, the provisions of the new statute of limitations for prosecution and the execution of sentences and measures, if they are less strict, also apply to offenders who have committed offences or been convicted before this Code comes into force.*
 - 2 *The periods of time that have elapsed before the new law comes into force are taken into account”.*
121. The Panel finds, in application of Article 157.1(d) of the GR 2022, that the investigation into the events which allegedly occurred at the Stables in 2018 was not time barred when on 22 April 2024 the Notice was sent. In the Panel’s opinion, the rule set by the GR 2022, allowing the prosecution of horse abuse without being constrained by prescription periods, was correctly applied by the Appealed Decision to the case of the Appellants: the investigation into the Appellants was not time barred under the GR 2018 when the GR 2022 entered into force; and the GR 2022 as from 1 January 2022 did not retroactively make it punishable a behaviour that was legal (or became unpunishable) under the previous edition of the GR: they simply extended the possibility to investigate into a

alleged behaviour uninterruptedly considered illegal and liable for punishment.

122. The Panel is led to this conclusion by a number of reasons, relating to the identification of the scope of application of Article 157.1(d) of the GR 2022, *i.e.* of the provision in force at the time the investigation was opened.
123. The Panel starts its observations by noting that the GR 2022 do not contain any provision describing the “temporal” scope of application of Article 157.1. In fact, Article 157.1(d) of the GR 2022 simply indicates that no time-bar period applies to the prosecution by FEI of instances of horse abuse, but does not clarify whether the FEI can prosecute at any time also instances of horse abuse allegedly occurred prior to the entry into force of the GR 2022.
124. At the same time, the Panel remarks that no indication can be found in the GR 2022, suggesting that Article 157.1 does not apply to violations committed when the GR 2018 was in force. In fact the indication that the modifications to the preceding version of the GR introduced by the GR 2022 became effective on 1 January 2022, as explicitly mentioned in the text of the GR 2022, in the Panel’s view, means only that the new provisions of the 2022 edition of the GR could be applied only after their entry in force, and not that Article 157.1 was applicable to govern only the prosecution of violations committed after 1 January 2022 and could not be applied, once entered into force, to govern the prosecution of instances of horse abuse irrespective of when they occurred.
125. The absence of a provision describing

the “temporal” scope of application of Article 157.1 of the GR 2022 is, in other words, the starting point of a required analysis, as an element thereof, and does not offer in itself the solution to the issue before this Panel.

126. At the same time, the Panel remarks that the absence of a specific rule making the new provision on the statute of limitations applicable the prosecution of violations committed before its entry into force marks an important distinction with respect to a precedent invoked by the Respondent. In the decision of 16 June 2022, rendered in CAS 2021/ADD/42, the Single Judge of the CAS Anti-Doping Division (the “ADD”) in fact noted that a specific provision in the sporting regulation at stake so provided and found that such provision was not inconsistent with Swiss law. The point therefore remains (as it was not addressed by the ADD decision) whether, in the absence of a specific indication, a rule providing for a longer period of limitation can be applied with respect to the prosecution of violations committed before its entry into force, when the relevant rules provided for a shorter limitation period.
127. The mentioned ADD decision is however meaningful at another, more general, level. As noted, in fact, the Single Judge in that case evaluated the consistency of the rule explicitly providing for the application of the new period of limitation to violations predating its entry into force with Article 49 of the SCC Final Title, *i.e.* with a provision governing the entry into force and the applicability of new rules on prescription of rights in civil law matters (see the *Basler Kommentar Zivilgesetzbuch II* (BSK ZGB II), ad Art.

49 SchlT ZGB (2023), 3-5, where reference is made to the applicability of Article 49 of the SCC Final Title, in the absence of specific rules, to “federal civil law” and to “provisions of civil law”, not limited to the limitation periods set out in the SCC).

128. The meaning of the indication of the ADD goes in that regard beyond the direct applicability of Article 49 of the SCC Final Title to that (and the present) case. In general terms, in fact, it can be seen as a further confirmation of a consistent line of CAS precedents, underlining the “civil law” nature of disputes involving disciplinary matters, even though subject to some fundamental principles, common to criminal law proceedings (such as the principle of legality and of predictability, the prohibition of double jeopardy, etc.). With respect specifically to the nature of the rules on statute of limitations, a CAS Panel, in the opinion rendered in CAS 2005/C/841, § 78, noted the following:

“[...] it must be noted that doping rules enacted by sports authorities are private law rules (and not penal law rules). Consequently, in the Panel’s view, any legal issue concerning the application of such eight-year rule should be dealt with in the context of the principles of private law of the country where the interested sports authority is domiciled. For instance, with respect to the doping rules issued by international federations domiciled in Switzerland, the rules of Swiss civil law concerning the statute of limitations – in French ‘prescription’ – should be applied complementarily to the sports rules themselves. By the same token, Italian sports authorities, when applying their own rules setting forth a statute of limitations – in particular, the eight-year rule implemented by CONI and by Italian

federations after Article 17 of the WADC –, should interpret such rules in the context of the Italian civil code and the related civil law jurisprudence on ‘prescrizione’ in order to evaluate whether they are actually time-barred from opening a disciplinary proceeding for facts occurred years before”.

129. In other words, this Panel finds it meaningful that the possibility to have an application of a new provision on the statute of limitations to the prosecution of violations committed before its entry into force is to be evaluated against a “civil law”, not a “criminal law”, benchmark. As a result, this Panel finds that the provision of the Swiss Criminal Code on the temporal scope of application of the rules on prescription (Article 389, mentioned above) is not relevant to the interpretation of Article 157.1 of the GR 2022, and this irrespective of the fact that horse abuse might be considered also as a criminal offence in several jurisdictions, including Switzerland (see Article 25 of the Swiss Animal Welfare Act cited by the Appellants for the first time during the hearing).
130. The issue whether, in the absence of a specific indication, Article 157.1 of the GR 2022 providing for a longer period of limitation can be applied to the prosecution of violations committed before its entry into force, at a time when the relevant rules provided for a shorter limitation period, is therefore a question of interpretation.
131. It is generally admitted that rules and regulations of international large sports federations are subject to the methods of interpretation applicable to statutory provisions rather than contracts (see SFT 4A_564/2020 E.6.4 of 7 June

2021; SFT 114 II 193, E.5a; SFT 4A_600/2016, E.3.3.4.1; CAS 2010/A/2071, para. 20; CAS 2016/A/4602, para. 101). Given that the Respondent encompasses 136 affiliated national federations, oversees more than 4,200 events globally, and maintains a database comprising 478,000 horses, 178,000 competitors, and 11,500 officials, the Panel is satisfied that its rules require interpretation consistent with the principles applied to legal norms. In this regard, the CAS panel in CAS 2010/A/2071 rightly found that:

“The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rules, which falls to be interpreted. The adjudicating body – in this instance the Panel – will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule [...]”.

132. The Panel notes that:

- i. as already remarked, the text of the rule is silent as to the definition of its temporal scope of application, *i.e.* it does not explicitly adopt a solution in favour or against its applicability to events that had occurred prior to the entry into force of the GR 2022. However, the wording adopted (“Horse abuse ... *[is]* not subject to a statute of limitations”) is suitable to extend to any instances of “horse abuse” irrespective of the time such “abuse” is committed;
- ii. the subtraction of “horse abuse”

from the application of any statute of limitations, making such violation prosecutable without any time limit, corresponds to a fundamental interest of the Respondent, in the pursuit of one of its objectives (“*To preserve and protect the welfare of the Horse*”: Article 1.4 of the FEI Statutes). As a result, it advocates for an application to “horse abuse” irrespective of the time such “abuse” is committed, since, from the FEI’s point of view, “horse abuse” cannot be tolerated, whenever it occurred;

- iii. the *contra proferentem* rule of interpretation does not lead to a different conclusion: there is no ambiguity in the text of the rule, in that, as noted, it is suitable to extend to any instances of “horse abuse” irrespective of the time such “abuse” is committed.

133. Such provision, however, as objectively construed to be applicable to the prosecution of violations committed before 1 January 2022, must be interpreted in conformity with Swiss law and the general principle of “legality”. As a result, the application of Article 157.1 of the GR 2022 to the prosecution of violations committed before its entry into force is to be limited to the instances in which on 1 January 2022 the disciplinary action with respect “horse abuse” had not become time-barred under the preceding rules.

134. Article 49 of the SCC Final Title, in fact, explicitly allows the application of a new law specifying a longer period of prescription than the previous law, but only if prescription has not yet taken

effect under the previous law.

135. The principle of legality, then, prohibits the “punishment without law” (according to the principle “*nullum crimen, nulla poena sine lege*”), ensuring that no one can be held guilty of an offence on account of any act or omission which did not constitute a violation under the applicable law at the time when it was committed, or that a penalty is imposed heavier than the one that was applicable at the time the offence was committed.
136. In other words, by ensuring that the legality of an action must be evaluated on the basis of the rules in force at the time it was committed, the principle of legality corresponds to the principle “*tempus regit actum*”, which excludes the retroactive application of new laws, “creating” *ex post facto* a responsibility that did not exist or had ceased to exist under the law in force at the time of the action or increasing *ex post* the sanction provided under that law.
137. As a result, the application of Article 157.1 of the GR 2022 to the prosecution of violations committed before 1 January 2022, extending the limitation period previously in force, would not lead to a conviction of the accused for an act or omission which did not constitute a disciplinary offence at the time when it was committed, when the disciplinary action had not been time barred under the preceding rules. In such situation, in fact, the acts which the accused are alleged to have committed constituted, at the time when they were committed, the same offence and were punishable by the same penalties as those applicable after the entry into force of the GR 2022.
138. This conclusion is confirmed by the

case-law of the ECtHR in relation to Article 7 of the ECHR, which expresses the principle of legality (“*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed*”). According to that case-law, the extension of the limitation period and its immediate application do not entail an infringement of the rights guaranteed by Article 7 of the ECHR, since that provision cannot be interpreted as prohibiting an extension of limitation periods where the relevant offences have never become subject to limitation (see, to that effect, *Coëme and Others v. Belgium*, Nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 149; *Scoppola v. Italy (no. 2)* [GC], No 10249/03, § 110; and *OAO Neftyanaya Kompaniya Yukos v. Russia*, No 14902/04, §§ 563, 564, 570). The point was restated by the ECtHR as recently as on 26 April 2024, in the advisory opinion rendered upon request of the Armenian Court of Cassation (P16-2021-001), where it was held that if a criminal offence was subject to a statute of limitation pursuant to the domestic law and the applicable limitation period had already expired, Article 7 of the ECHR precluded the revival of a prosecution in respect of such an offence: only in that case, to hold otherwise would be tantamount to accepting the retrospective application of the criminal law to an accused’s disadvantage.

139. In that context, the characterization of the rules on prescription as having substantive or procedural nature ceases to be relevant. In the Panel opinion, the

issue concerns the identification of the scope of application of the rules in question, and even considering the time-bar as an institute of substantive law no prohibition could be found preventing the application of new (substantive) rules to govern (within the limits described above) the prescription of violations committed before their entry into force.

140. In the same way, in the Panel's opinion, no legitimate expectation can be opposed to the application of the new rules. No party allegedly committing a violation, and chiefly a violation of a rule expressing a fundamental principle (such as the protection of horses against abuse), can have a "legitimate" expectation not to be punished, at least as long as prosecution remains possible. In the case of the Appellants, the investigation into their alleged actions (still to be determined in their merits) has always been and remained possible: the time for its opening was extended before it expired, but never expired. Therefore, no "legitimate" expectation can be invoked by them.
141. The possibility to prosecute horse abuse without time limits is challenged by the Appellants under an additional point of view. According to the Appellants an unlimited statute of limitations contradicts legal principles, including Article 6(1) of the ECHR, as established by the ECtHR in its jurisprudence (*Volkov v. Ukraine*). Consequently, the FEI's attempt to extend the limitation period indefinitely would be unlawful and invalid.
142. The Panel notes that the ECtHR in *Volkov v. Ukraine*, No. 21722/11, decision of 9 January 2013 (§§137-140),

found a violation of Article 6(1) of the ECHR in an "*an open-ended approach to disciplinary cases involving the judiciary*" on account of a breach of the principle of legal certainty caused by the lack of a limitation period, underlining that:

"... The Court has held that limitation periods serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent any injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time (see Stubbings and Others v. the United Kingdom, 22 October 1996, § 51, Reports 1996-IV). Limitation periods are a common feature of the domestic legal systems of the Contracting States as regards criminal, disciplinary and other offences.

... As to the applicant's case, the facts examined by the HCJ in 2010 dated back to 2003 and 2006 [...]. The applicant was therefore placed in a difficult position, as he had to mount his defence with respect to events, some of which had occurred in the distant past.

... It appears [...] submissions that domestic law does not provide for any time bars on proceedings for dismissal of a judge for "breach of oath". While the Court does not find it appropriate to indicate how long the limitation period should be, it considers that such an open-ended approach to disciplinary cases involving the judiciary poses a serious threat to the principle of legal certainty".

143. At the same time, the Panel remarks that the findings in *Volkov* were considered by the ECtHR in the case of *Sanofi Pasteur v. France* (No 25137/16, decision of 13 February 2020, §§ 54-57), where it was underlined, by reference to

additional precedents (*Howald Moor and Others v. Switzerland*, Nos 52067/10 and 41072/11, decision of 11 March 2014) that a balancing was necessary between competing interests and that a broad margin of discretion is to be left in this respect for the setting of the appropriate period of limitation.

144. In the present case, the Panel notes that an unlimited period of limitation has been set in order to strengthen the pursuit of a fundamental policy, i.e. the adoption of a zero tolerance approach to any cruelty against or abuse of horses. The Panel does not express any final view as to the compatibility *in abstracto* of an unlimited period of limitation. The Panel is in fact content to remark that in the case at stake it cannot be found to be a violation of the Appellants' rights not to be prosecuted, on the basis of the new rules extending the time-limit previously applicable before its expiration, around 6 years after the alleged facts occurred.

145. In light of the foregoing, the Panel concludes that the investigation started on 22 April 2024 into facts which allegedly occurred at the Stables in 2018 is not time-barred in accordance with Article 157.1 of the GR 2022. As a result, any issue regarding the concealment of evidence, put forward by the Respondent for the case the Panel would find that Article 163.12 of the GR 2018 remained applicable, is moot.

B. Conclusion

146. In summary, according to the Panel the Appeal is admissible, but must be dismissed. The Appealed Decision is confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Evi Strasser and Ms Tanya Strasser on 21 January 2025 against the decision rendered on 12 December 2024 by the FEI Tribunal is dismissed.
2. The decision rendered on 12 December 2024 by the FEI Tribunal is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.

Sélection de publications récentes relatives au TAS / Selection of recent publications relating to the CAS / Selección de publicaciones recientes relacionadas con el CAS

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