

CAS 2023/O/10000 Lia Thomas v. World Aquatics

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Ms Carmen Núñez-Lagos, Attorney-at-Law in Paris, France
Arbitrators: Mr Richard H. McLaren, Professor and Barrister in London, Ontario, Canada
Mr Ulrich Haas, Professor in Zurich, Switzerland, and Attorney-at-Law in Hamburg, Germany
Clerk: Ms Stéphanie De Dycker, CAS Clerk, Lausanne, Switzerland

in the arbitration between

Ms Lia Thomas, United States of America

Represented by Mr Carlos Sayao, Mr James Bunting, Ms Anna White, Ms Alexandria Matic and Mr Carlos Lopez, Attorneys-at-Law, Tyr LLP, Toronto, Ontario, Canada

Claimant

and

World Aquatics, Switzerland

Represented by Mr Jonathan Taylor KC, Mr Chris Lavey and Ms Brianna Quinn, Attorneys-at-Law, Bird and Bird LLP, London, United Kingdom, by Mr Pascal Hachem, Attorney-at-Law, Bär & Karrer, Zurich, Switzerland, and by Ms Caroline Cusinato, World Aquatics

Respondent

I. PARTIES

1. Ms Lia Thomas is a 24-years old female swimmer from the United States of America (the “Athlete”).
2. World Aquatics (“WA”) is the world governing body for all aquatic sports. It is an association under the Swiss Civil Code (“SCC”), with its headquarters in Lausanne, Switzerland.
3. The Athlete and WA are jointly referred to as the “Parties”.

II. INTRODUCTION

4. The present ordinary proceedings were initiated in respect of a challenge to Section F.2 and Section F.4 (b) of WA’s Policy on the Eligibility for the Men’s and Women’s Competition Categories (the “Policy”) as well as to Sections B.4, C, D, and E of the implementing operational requirements (the “Operational Requirements”) (altogether the “Challenged Provisions”).
5. The Athlete submits that the Challenged Provisions are invalid and unlawful as they (i) discriminate against her contrary to the Olympic Charter, the WA Constitution, and Swiss law including the European Convention on Human Rights (the “Convention”) and the Convention on the Elimination of all forms of Discrimination against Women (the “CEDAW”), and (ii) such discrimination cannot be justified as necessary, reasonable or proportionate to achieve legitimate sporting objective.
6. Below is a summary of certain key facts and allegations drawn from the Parties’ written submissions as well as the oral pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in later sections of this award (the “Award”). The Panel has considered all of the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings. It nonetheless refers in this Award only to those submissions and evidence that it considers necessary to explain its reasoning and conclusions.

III. FACTUAL BACKGROUND

A. The World Aquatics’ Policy on the Eligibility for the Men’s and Women’s Competition Categories and the Operational Requirements in relation to World Aquatics’ Policy on the Eligibility for the Men’s and Women’s Competition Categories

7. In November 2021, the International Olympic Committee (the “IOC”) issued its Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations (the “IOC Framework”), which provides a 10-principle approach designed to collectively guide international federations in the development of eligibility criteria that reflect the specificities of their particular sports and at the same time aim at including to the maximum extent possible athletes whose gender identity

and/or expression differs from the gender socially attributed to the sex observed at birth (“Transgender Athletes”) as well as athletes with sex variations.

8. Following the IOC Framework, WA entrusted a working group with the task of establishing eligibility criteria for, and more generally regulate the participation of Transgender Athletes as well as [...] athletes with differences of sexual development whose legal gender and/or gender identity is female (“46XY DSD Athletes”), in the men’s and women’s categories in Aquatic sports.
9. On 18 June 2022, the WA Bureau approved the result of the work of WA’s working group, namely the Policy. On 19 June 2022, the WA Congress ratified the Policy. The current version of the Policy came into effect on 24 March 2023.
10. The Challenged Provisions of the Policy apply to transgender women [...] athletes (“Transgender Women Athletes”) and 46XY DSD Athletes who (i) wish to compete in women’s category in WA competitions and (ii) wish to set World Records in the women’s category at WA competitions and in other events recognised by WA. The Challenged Provisions provide that such athletes are eligible to compete in the women’s category if they can establish to WA’s comfortable satisfaction that:
 - They have complete androgen insensitivity and therefore could not experience male puberty; or
 - They are androgen sensitive but had male puberty suppressed beginning at Tanner Stage 2 or before age twelve, whichever is later; and have since continuously maintained their testosterone levels below 2,5nmol/L. (the “Eligibility Conditions”).
11. The Challenged Provisions of the Policy further provide that unintentional deviations from testosterone levels requirement may result in retroactive disqualification of results. Intentional deviation from testosterone levels requirement may result in prospective period of ineligibility being imposed on the concerned athlete in addition to retroactive disqualification of results.
12. The Challenged Provisions of the Policy also provide for a certification process requiring athletes to certify their chromosomal sex with their member federation and allowing WA to include a chromosomal sex screen in its anti-doping protocol to confirm such certification.
13. The Operational Requirements was adopted together with the Policy in order to implement the Policy. Their current version came into effect on 24 March 2023.
14. The Challenged Provisions of the Operational Requirements concern in essence the identification and registration with WA of athletes based on chromosomal sex records, the assessment by independent scientific and/or medical experts of the Eligibility

Conditions, the compliance with the Eligibility Conditions as well as the disciplinary proceedings and sanctioning regime in case of breach of the Policy and/or the Operational Requirements.

B. The Athlete

15. The Athlete was born in 1999. She is a transgender woman.
16. [...].
17. [...].
18. [...].
19. In November 2021, she began competing in NCAA swimming competitions in the female category, with great success. She graduated in summer 2022.
20. [...].
21. On 5 January 2024, USA Swimming granted the Athlete’s request for Self-Identity Verification, as provided under USA Swimming Athlete Inclusion, Competitive Equity, and Eligibility Policy (“USA Swimming Policy”) and confirmed that the Athlete was registered in the female competition category.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 6 September 2023, the Athlete filed a Request for Arbitration before the Court of Arbitration for Sport (the “CAS”) against WA pursuant to Article R38 of the Code of Sports-related Arbitration (2023 edition) (the “CAS Code”). In her Request for Arbitration, the Athlete considered that the appointment of a three-person panel would be appropriate.
23. On 26 September 2023, the CAS Court Office informed the Parties that the present arbitration proceedings had been assigned to the Ordinary Arbitration Division of the CAS and invited WA to file its Answer within the prescribed time limit as well as to comment on the Athlete’s request to have the present dispute decided upon by a three-person panel.

24. On 23 October 2023, WA informed the CAS Court Office that the Parties both agreed that a three-arbitrator panel was appropriate in the present proceedings.
25. On 27 October 2023, WA filed its Answer with the CAS Court Office.
26. On 30 October 2023, the CAS Court Office informed the Parties that the President of the Ordinary Arbitration Division had decided to refer the present procedure to a panel of three arbitrators and requested the Athlete to nominate an arbitrator.
27. On the same day, the Athlete informed the CAS Court Office that she had decided to nominate Mr Richard McLaren, Professor and Barrister in London, Ontario, Canada, as arbitrator.
28. On 31 October 2023, the CAS Court Office invited WA to nominate an arbitrator in the present proceedings.
29. On 31 October 2023, WA informed the CAS Court Office that it had decided to nominate Mr Ulrich Haas, Attorney-at-Law in Hamburg, Germany and Professor in Zurich, Switzerland, as arbitrator.
30. On 7 November 2023, the Athlete filed a petition challenging WA's nominated arbitrator pursuant to Article R34 of the CAS Code.
31. On 9 November 2023, the CAS Court Office invited WA to file its response to the Athlete's petition challenging WA's nominated arbitrator.
32. On 15 November 2023, WA filed its response to the Athlete's petition challenging WA's nominated arbitrator.
33. On 16 November 2023, the Athlete filed with the CAS Court Office an unsolicited reply to WA's response on the petition challenging WA's nominated arbitrator.
34. On 17 November 2023, the CAS Court Office invited the Athlete to indicate whether, in light of the comments on the challenge provided by WA as well as by the concerned arbitrator and his co-panellist, the challenge was maintained or withdrawn.
35. On 20 November 2023, the Athlete informed the CAS Court Office that she had decided to withdraw her challenge of WA's nominated arbitrator.
36. On 12 December 2023, WA informed the CAS Court Office that it requested the Panel, once constituted, to decide as a preliminary issue whether the Athlete had standing to challenge WA's Policy and Operational Requirements in the present proceedings (the "Request for Bifurcation").
37. On 11 January 2024, the CAS Court Office informed the Parties that the Panel appointed to decide the present procedure was constituted as follows:

President: Ms Carmen Núñez-Lagos, Attorney-at-Law in Paris, France

Arbitrators: Mr Richard H. McLaren, Professor and Barrister in London, Ontario,
Canada

Mr Ulrich Haas, Professor in Zurich and Attorney-at-Law in Hamburg,
Germany.

38. On 12 January 2024, the CAS Court Office invited the Athlete to comment on the Request for Bifurcation.
39. On 18 January 2024, the Athlete filed her comments to the Request for Bifurcation.
40. On 22 January 2024, the CAS Court Office informed the Parties that Ms Stéphanie De Dycker, Clerk with the CAS, would assist the Panel in the present proceedings.
41. On 29 January 2024, the CAS Court Office informed the Parties that the Panel had decided to accept the Request for Bifurcation and thereby to bifurcate the proceedings. The CAS Court Office on behalf of the Panel invited WA to file within a prescribed time limit a Reply strictly limited on the issue of standing of the Athlete (the “Bifurcated Issue”), informing the Parties that the Athlete would have a similar deadline thereafter to file a Rejoinder on the Bifurcated Issue and that the Panel would hold a hearing by videoconference strictly limited on the Bifurcated Issue.
42. On 14 February 2024, after having consulted the Parties on possible hearing dates, the CAS Court Office confirmed to the Parties that they were called to appear at the hearing strictly limited on the Bifurcated Issue in the present proceedings, which would be held by videoconference on 11 March 2024 and invited the Parties to communicate the list of the persons attending the hearing as well as their contact details.
43. On 16 February 2024, within the agreed time limit, WA filed a Reply on the Bifurcated Issue with the CAS Court Office.
44. On 6 March 2024, within the agreed time limit, the Athlete filed a Rejoinder on the Bifurcated Issue with the CAS Court Office.
45. On 7 March 2024, WA sent the list of its hearing attendees as well as their contact details.
46. On 11 March 2024, a hearing strictly limited to the Bifurcated Issue was held in the present matter by videoconference. In addition to the members of the Panel, Ms Stéphanie De Dycker, CAS Clerk and Mr Giovanni Maria Fares, CAS Counsel, the following persons attended the hearing:

For the Athlete: Mr Carlos Sayao, counsel
Ms Anna White, counsel
Ms Lia Thomas, Athlete

For WA: Mr Jonathan Taylor, counsel
Mr Chris Lavey, counsel
Mr Pascal Hachem, counsel
Mr Brent Nowicki, World Aquatics Executive Director
Mr Mike Unger, World Aquatics Senior Advisor
Ms Caroline Cusinato, World Aquatics Legal counsel

47. At the hearing, the Parties were given full opportunity to present their case, submit their arguments and answer the questions from the Panel.
48. At the end of the hearing, the Parties confirmed that they were satisfied with the procedure so far and throughout the hearing regarding the Bifurcated Issue, and that their right to be heard had been fully respected.

V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

49. As a result of the Panel's decision to bifurcate the present proceedings, the present section shall be limited to the Bifurcated Issue. The aim of this section of the Award is therefore to provide a summary of the Parties' main arguments regarding the Bifurcated Issue rather than a comprehensive list thereof. Additional elements of the Parties' claims may be discussed in subsequent sections of the Award. As stated above, the Panel reiterates that in deciding upon the Parties' claims it has carefully considered all of the submissions made and all of evidence adduced by the Parties on the Bifurcated Issue, whether or not expressly referred to in this section of the Award or in the discussion that follows.

A. The Athlete

50. In her Rejoinder, the Athlete requested the following relief:

“

- a. Declare that Ms. Thomas has standing to bring this Arbitration;*
b. Order that a schedule be set leading to a full merits hearing on Ms. Thomas' claim; and
c. Order World Aquatics to pay the costs of these proceedings pursuant to CAS Code R64.4 and to pay an appropriate contribution towards the legal costs and other expenses that Ms. Thomas has incurred in responding to World Aquatics argument on standing, further to CAS Code R64.5.”

51. The Athlete’s submissions on the Bifurcated Issue are summarized hereafter. The Athlete contends that she has standing to sue WA in relation to the Challenged Provisions:

- The Athlete is a female member of USA Swimming and eligible to compete in the Female competition category under Paragraph 4 (a) of the USA Swimming Policy. Being a member of USA Swimming, who in turn is a member federation of WA, the Athlete is subject to the jurisdiction of WA and is thereby bound by the rules and regulations of WA, in particular the Challenged Provisions. The fact that she was not a member of USA Swimming at the moment of the initiation of the present proceedings is not relevant.
- The Athlete is directly affected by the Challenged Provisions because these rules make it impossible for her to qualify for and therefore also to register for a WA Competition:
 - Paragraph 7 of the USA Swimming Policy precludes the Athlete from participating in an ‘International Team Selection Event’ (defined as “*team selection events for USA Swimming teams sent to each World Aquatics Competition*”) without the Athlete’s compliance with the Eligibility Conditions being previously approved by WA. The Challenged Provisions therefore directly preclude the Athlete from having a chance to qualify for any WA women’s competition. It is therefore wrong to state that in order to have standing to challenge the Challenged Provisions, it is required to achieve a qualifying time for and subsequently registering in a WA Competition.
 - Paragraph 4 of the USA Swimming Policy provides that compliance with the Eligibility Conditions is an alternative to compliance with Paragraph 6 of the USA Swimming Policy. Hence, US transgender swimmers who seek to compete in “Elite Events” are directly confronted with the Challenged Provisions. It is therefore wrong to state that the Challenged Provisions do not affect such athletes unless and until they are registered to compete in a WA Competition.
- WA’s attempt to restrict the scope of the individuals who have standing to challenge the Challenged Provisions conflicts with the text of the Policy and the Operational Requirements:
 - Section A.1 of the Operational Requirements provides that the Operational Requirements bind all individuals “*subject to World Aquatics’ jurisdiction*”.
 - Section B.2 of the Operational Requirements expressly provides that the

Operational Requirements bind any transgender athlete “*who wishes to be eligible to participate in a World Aquatics Competition*”.

- Section B.5 of the Operational Requirements provides that the Challenged Provisions apply to any transgender athlete who sets a world record in an event recognised by WA, regardless of whether that athlete is registered with WA.
- Section D.2 (a) of the Operational Requirements provides that WA has the power to “*investigate, at any time (...) whether an athlete who has not filed a declaration under these Operational Requirements is a transgender athlete*”, which means that the Challenged Provisions can affect a much broader group of athletes than those who have already qualified and been registered for a WA Competition within the meaning of Section A of the Operational Requirements.

B. World Aquatics

52. In its Reply, WA requested the following relief:

“(1) to dismiss these proceedings on the merits on the ground that the Claimant lacks the requisite legal standing to challenge the validity of the WA Policy and Operational Requirements; (2) to order the Claimant to pay the costs of the proceedings within the meaning of CAS Code R64.4, including reimbursing World Aquatics for such of those costs as it has been required to advance; and (3) to order the Claimant to pay an appropriate contribution towards the legal costs and other expenses that World Aquatics has incurred in responding to this claim, further to CAS Code R64.5.”

53. WA’s submissions on the Bifurcated Issue may be summarized as follows:

54. The Athlete has no standing to sue WA with respect to the Challenged Provisions of the Policy and the Operational Requirements as she was not a member of USA Swimming at the time of the initiation of the present proceedings; in any event, the Athlete lacks any interest worthy of protection in the matter being appealed:

- The Policy and the Operational Requirements apply only to athletes who:
 - become members of one of WA’s national member federations, and are therefore subject to WA’s jurisdiction (Section A.1 of the Operational Requirements); and
 - establish their eligibility under that national member federation’s rules to compete in the female category in domestic competitions organised or recognised by that national member federation; and
 - while competing in the female category in those domestic

competitions, meet the qualifying standards specified by the member federation and WA respectively for participation in a WA Competition; and

- are duly registered by that member federation with WA for a WA competition.
- Unless and until the Athlete satisfies each of the above requirements, the Policy and the Operational Requirements do not apply to the Athlete and the latter is therefore not affected by the Challenged Provisions. In particular, the Athlete:
- was not a member of USA Swimming at the time of the initiation of the present proceedings;
 - does not satisfy the eligibility requirements for the “Elite Events” in the female category set out in Paragraph 6 of the USA Swimming Policy: she did not even submit any application in view of demonstrating to a panel of three independent medical experts appointed by USA Swimming that *“[f]rom a medical perspective, the prior physical development of the athlete as a Male, as mitigated by any medical intervention, does not give [her] a competitive advantage over [her] cisgender Female competitors”*; it is in any event highly questionable that she would meet the burden of proof given WA’s expert research indicating that post-puberty testosterone suppression does not remove all the physiological benefits conferred by male puberty;
 - did not perform in a USA Swimming domestic “Elite Event” in the female category for the purpose of qualification or selection for WA Competitions (in the hypothesis that the Athlete was registered for such competitions);
 - did not perform in a USA Swimming “Elite Event” in the female category to such a standard that she either (i) would have qualified to participate in the female category in an International Team Selection Event and then would have performed at such International Team Selection Event to a standard that meets the criteria for selection for a WA Competition; or (ii) would have met the selection criterion (qualifying time) specified by the USA Swimming for selection for a WA Competition without having to participate in an International Team Selection Event;

- she did not seek to be registered to compete in the female category in a WA Competition.
- The Athlete cannot rely on Paragraph 4 of the USA Swimming Policy to conclude that US transgender swimmers like the Athlete who seek to compete in “Elite Events” are directly confronted with meeting WA’s Challenged Provisions and thereby directly affected. This provision was designed to allow transgender women athlete who meet the WA more stringent eligibility requirements and perform to the international standard to satisfy both sets of requirements by demonstrating that she meets the more stringent set. The Athlete cannot do that because (i) she has not been registered for a WA Competition and therefore the Policy and the Operational Requirements have not been triggered, and (ii) the Athlete could never satisfy the Eligibility Conditions because she went through male puberty. The Policy and the Operational Requirements and the approval process thereunder cannot be triggered by the USA Swimming Policy.
- Paragraph 7 of the USA Swimming Policy requires a transgender women athlete to have her eligibility for the female category approved by WA before she may participate in an International Team Selection Event and before being selected for WA Competitions based on times achieved in another event. This however only applies when USA Swimming registers an athlete to compete in a WA Competition, which it will only do if the transgender women athlete performs well in the female category in “Elite events” so as to qualify for an International Team Selection Event or be selected for a WA Competition. The Athlete is not in this situation. Also, in order to participate in “Elite events”, the Athlete would need to demonstrate that she satisfies the eligibility requirements set out in the USA Swimming Policy.

VI. JURISDICTION

55. Article R27 of the CAS Code provides as follows:

“These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) [...]”

56. Section F.1 of the Operational Requirements provides as follows:

“The validity of the Policy and/or these Operational Requirements may only be challenged by way of ordinary proceedings filed before the Court of Arbitration for Sport in Lausanne, Switzerland (CAS) or as part of an appeal to the CAS

made pursuant to Section F.2.”

57. The Panel notes that pursuant to Section F.1 of the Operational Requirements, the CAS holds jurisdiction to decide on the challenge brought against the Policy and/or the Operational Requirements that is brought by way of ordinary proceedings. The Panel further notes that the Athlete’s challenge regarding the Challenged Provisions was made by way of a Request for Arbitration pursuant to Article R38 of the CAS Code. As a result, the Panel finds that the CAS holds jurisdiction to decide on the present matter. The Panel notes that the Parties did not object to the jurisdiction of the CAS.

VII. APPLICABLE LAW

58. Article R45 of the CAS Code provides as follows:

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

59. Section F.3 of the Operational Requirements provide as follows:

“Any such challenge or appeal will be conducted in the English language and will be governed by the World Aquatics Constitution and other World Aquatics Rules (in particular, the Policy and these Operational Requirements), with the laws of Switzerland applying subsidiarily. In the case of any conflict between any of the above instruments and the CAS Code of Sports-Related Arbitration in force at the relevant time, the above-instruments will take precedence.”

60. The Panel notes that the issues relating to the merits of the present dispute shall be resolved in accordance with the regulations of WA, in particular the Policy and the Operational Requirements, and that Swiss law shall apply subsidiarily.
61. The Panel shall clarify the law applicable to specific issues of a procedural nature in the following sections upon examining such issues.

VIII. PROCEDURAL ISSUE

62. In the present section, the Panel wishes to come back to its decision to bifurcate the present proceedings and explain its reasoning.
63. On 12 December 2023, WA indeed filed a Request for Bifurcation of the procedure requesting that the Panel render a Preliminary Award on the issue of the Claimant’s standing to bring a claim against WA before the CAS. WA, in essence, submitted that the Athlete’s standing to sue was a dispositive threshold issue in the present matter, which deserved to be resolved without delay as a preliminary matter. WA also submitted

that bifurcating the present proceedings would save costs and would in any event not prevent having a decision on the full merits before the US Olympic Trials in June 2024.

64. On 18 January 2024, the Athlete objected to WA’s Request for Bifurcation. The Athlete, in essence, contended that bifurcating the procedure would cause more costs and that it would not be appropriate in this case since the issue of the Athlete’s standing to sue was so closely connected to the other issues on the merits of the dispute.
65. As a starting point, the Panel notes that the question whether or not to bifurcate proceedings in order to decide on a preliminary question is a procedural issue that is, in principle, governed in international arbitrations by Article 182 of the Swiss Private International Law Act (“PILA”). The CAS Code, to which both Parties submitted, only deals with the question whether or not a Panel can bifurcate the proceedings in order to decide the preliminary question of its jurisdiction (Article R39, par. 5 of the CAS Code).
66. However, the CAS Code does not contain any provision on whether or not a Panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits). In the absence of any specific provisions in the CAS Code, the Panel is entitled – according to Article 182 (2) PILA – to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. The Panel is inspired by Article 125 lit. a of the Swiss Code of Civil Procedure (“CCP”). According thereto a court may “[i]n order to simplify the proceedings...limit the proceedings to individual issues or prayers for relief”. This power of the court is directly connected to Article 237 CCP according to which a court “*may issue an interim decision*” (KuKo-ZPO/WEBER, 3rd ed. 2021, Article 125 no. 3; see CAS 2019/A/6294, paras 63 et seq. and the references mentioned). When exercising its discretion according to Article 125 lit. a CCP, a court will consider whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs (CPC-HALDY, 2nd ed., 2019, Article 125 no. 5). The view held here that an arbitral tribunal is entitled to issue decisions on preliminary questions is also backed by the legal literature according to which in the absence of an agreement by the parties a panel is vested with the power to issue interim or final awards. Such power is a particular aspect of the mandate of an arbitral tribunal to organize the arbitral proceedings (POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, no. 725).
67. In light of the dispositive nature of the issue of the Athlete’s standing in the present matter and in accordance with the principle of procedural efficiency, the Panel is of the view that the Bifurcated Issue in the present matter, namely the issue of standing of the Athlete to challenge the Policy and the Operational Requirements before the CAS, should be clarified at the outset of the present proceedings. The Panel therefore decided on 29 January 2024 that it should issue a preliminary decision on the Bifurcated Issue, which is explained in the following section.

IX. MERITS

68. In the present section, the Panel shall examine the question of standing of the Athlete to challenge WA's Policy and Operational Requirements before the CAS.

a) Position of the Parties

69. WA submits that the Athlete lacks standing to challenge the Policy and the Operational Requirements because she was not member of USA Swimming at the time of the initiation of the present arbitration proceedings. In any event, even if she is a member of USA Swimming, WA contends that she is not affected by the Policy and the Operational Requirements because these rules do not currently apply directly to her. WA contends that the Policy and Operational Requirements would only apply to the Athlete if she was registered to participate in the female category of USA Swimming "Elite Events" and she did compete in such "Elite Events" and she did perform in such "Elite Events" to such a standard that she (i) would have qualified to participate in the female category in an International Team Selection Event and then would have performed at such International Team Selection Event to a standard that meets the criteria for selection for a WA Competition; or (ii) would have met the selection criterion (qualifying time) specified by the USA Swimming for selection for a WA Competition without having to participate in an International Team Selection Event, and that as a result USA Swimming would have attempted to register the Athlete for a WA Competition. In the present case however, the Athlete did not even apply for registration in the female category of "Elite Events" of USA Swimming. For the rest, WA argued that it is not for USA Swimming to modify the scope of application of the conditions set forth in the Policy and the Operational Requirements.
70. The Athlete in turn contends that the text of the Policy and the Operational Requirements do not specify that they only bind athletes who are registered to participate in a WA Competition. The text of the Operational Requirements rather indicates that the Challenged Provisions apply to a much broader group of athletes : (i) the Operational Requirements bind all individuals "*subject to World Aquatics' jurisdiction*" (Section A.1 of the Operational Requirements); (ii) the Operational Requirements bind any transgender athlete "*who wishes to be eligible to participate in a [WA] Competition or set a [WA] World Record*" and that such athlete must "*follow the procedures set out in Section F to challenge the Policy and/or these Operational Requirements*" (Section B.2 of the Operational Requirements); (iii) the Eligibility Conditions apply to any transgender athlete who sets a world record in an event recognised by WA, regardless of whether that athlete is registered with WA (Section B.5 of the Operational Requirements); (iv) WA's investigative powers apply to "*athlete[s] who ha[ve] not filed a declaration under these Operational Requirements*" (Section D.2 of the Operational Requirements).
71. The Athlete also submitted that, according to Paragraph 4 (b) of the USA Swimming

Policy, compliance with WA's Eligibility Conditions is an alternative to compliance with the eligibility conditions provided for under Paragraph 6 (c) of the USA Swimming Policy, i.e. satisfy the Elite Athlete/Event Fairness Panel that "*from a medical perspective, the prior physical development of the athlete as a Male, as mitigated by any medical intervention, does not give the athlete a competitive advantage over the athlete's cisgender Female competitors*". However, according to Paragraph 7 of the USA Swimming Policy, the Athlete is barred from achieving a qualifying time for and being subsequently registered in a WA competition by USA Swimming as long as her eligibility to participate in WA competitions is barred by the Policy and Operational Requirements.

b.) Position of the Panel

(i) In General

72. The notion of standing to sue refers to the question of whether the Claimant has a claim on the merits according to the applicable law. According to settled jurisprudence of the CAS and the Swiss Federal Tribunal, the question of standing to sue relates to the merits and not the admissibility of the case (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).
73. Since the issue of standing is an issue pertaining to the merits, the matter shall therefore be decided on the basis of the law applicable to the merits, as described above. The Panel shall therefore primarily apply the rules and regulations of WA, namely the Policy, the Operational Requirements and the Constitution of WA; Swiss law shall apply subsidiarily. The Parties did not dispute the law applicable to the issue of standing in the present proceedings.
74. The Policy and the Operational Requirements do not specify who has a substantive right to challenge their rules. The Panel shall therefore refer to Swiss law.
75. In Swiss civil procedural law, the basic principle is that a claimant has standing to sue providing the person is invoking a substantive right of its own, i.e. a right deriving from contract, tort or another source. The conditions for standing to sue coincide with the conditions of the substantive right invoked and they shall exist at the latest at the moment of the decision (F. HOHL, *Procédure civile*, Tome I, 2e éd., Berne 2016, p. 135-136, N° 759-761). The SFT expressed this basic principle in the following terms:

"Selon la jurisprudence, la qualité pour agir et la qualité pour défendre appartiennent aux conditions matérielles de la prétention litigieuse. Elles se déterminent selon le droit au fond et leur défaut conduit au rejet de l'action, qui intervient indépendamment de la réalisation des éléments objectifs de la prétention litigieuse. De même que la reconnaissance de la qualité pour

défendre signifie seulement que le demandeur peut faire valoir sa prétention contre le défendeur, revêtir la qualité pour agir veut dire que le demandeur est en droit de faire valoir cette prétention. Autrement dit, la question de la qualité pour agir revient à savoir qui peut faire valoir une prétention en qualité de titulaire d'un droit, en son propre nom. En conséquence, la reconnaissance de la qualité pour agir ou pour défendre n'emporte pas décision sur l'existence de la prétention du demandeur, que ce soit quant au principe ou à la mesure dans laquelle il la fait valoir.” (SFT 125 III 82, para. 1a; see also ATF 114 II 345 para. 3a and cited legal authorities.)

[Free Translation: “According to case law, standing to sue and standing to be sued belong to the material conditions of the litigious claim. They are determined according to the substantive law, and their absence leads to the dismissal of the action, which occurs independently of the realization of the objective elements of the litigious claim. Just as the recognition of standing to be sued only means that the plaintiff can assert his claim against the defendant, the granting of standing means that the plaintiff is entitled to assert this claim. In other words, the question of standing comes down to who can assert a claim as the holder of a right, in his or her own name. Consequently, recognition of standing to sue or to be sued does not determine the existence of the plaintiff’s claim, either in principle or in terms of the extent to which it is asserted.”]

76. Therefore, in order for a claimant to have standing to sue under Swiss law, it shall demonstrate that he/she has a substantive right of its own in the matter at stake.
77. CAS panels refer to Article 75 of the SCC in order to determine whether a party has standing to appeal a decision of an association under Swiss law. This provision states 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.” [emphasis by the author]*
78. According to the jurisprudence of the Swiss Federal Tribunal, Article 75 of the SCC grants the right to challenge an association’s resolution to “any member” of that association, a notion that includes direct members as well as indirect members affected by a decision of the umbrella association to which the association of which they are a member is affiliated, as well as third parties who are subject to a sanction and who have submitted to the regulations of the association that has imposed the sanction, to the exclusion of non-members such as former members, creditors or interested third parties (4A_314/2017 para. 2.3.2.2., with references to ATF 119 II 271, para. 3b and legal authorities).
79. Moreover, according to CAS settled jurisprudence, a member who was not entitled to take part in the decision-making process of the decision being challenged is only entitled

to challenge such decision according to Article 75 of the SCC if he/she is affected by it in its membership rights, which will occur if the decision in question is addressed to said member and personally affects its membership rights as to their substance (CAS 2016/A/4602, para. 66 and cited references; see also U. HAAS, Standing to appeal and standing to be sued, International Sport Arbitration, 6th conference CAS & SAV/FSA Lausanne 2016, no. 16). In doing so, CAS settled jurisprudence has held that an appellant has to demonstrate that “*he or she is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature, at stake*” (CAS 2018/A/5658, para. 58; CAS 2013/A/3140, para. 8.3; CAS 2008/A/1583-1584, para. 9.5.5.1).

80. When applying the above principles to the case at hand, the Panel shall however consider the fact that the present proceedings is not an appeal proceeding but an ordinary one, and therefore that the Athlete challenges WA’s Policy and Operational Requirements rather than a specific WA decision addressed to her.

(ii) The Athlete’s Case under the Policy and the Operational Requirements

81. The Panel shall thus examine whether the Athlete holds a substantive claim deriving from the Policy and the Operational Requirements. The Panel first notes that Section A.1 of the Operational Requirements provides that:

“These Operational Requirements implement the Policy on Eligibility for the Men’s and Women’s Competition Categories that the World Aquatics Bureau adopted on 18 June 2022 and that the World Aquatics Congress ratified on 19 June 2022 (the Policy). They will come into effect on 20 June 2022, and from that date forward they will bind all Member Federations, athletes, and other natural and legal persons who are subject to World Aquatics’ jurisdiction, and will govern eligibility: (a) to compete in the World Aquatics World Championships, World Cups, Grand Prix, World Leagues, and World Series events and tournaments, and other international events (World Aquatics Competitions), and (b) to set World Aquatics World Records in World Aquatics Competitions and/or in other events recognised by World Aquatics, wherever they are held.” [emphasis by the author]

82. The Panel shall first verify whether the Athlete is a member of WA. In this context, the Panel first notes that, although the Athlete was not a member of USA Swimming at the time of the initiation of the present proceedings, she was registered in the female category of USA Swimming as from 5 January 2024, i.e. at a time the present proceedings were ongoing. The Panel therefore concludes that, at the time of this Panel’s decision, the Athlete is an indirect member of WA. In the Panel’s view, and in accordance with the above cited Swiss doctrine, the fact that the Athlete was not a member of USA Swimming at the time of the initiation of the present proceedings is not decisive.

83. Being an indirect member of WA is, as such, not sufficient to demonstrate standing in the present matter because in the present matter there is no decision personally affecting the Athlete's membership rights. As stated above, the Athlete shall demonstrate that she has a substantive right to claim deriving from the Policy and the Operational Requirements so as to be sufficiently affected by those rules.
84. The Panel notes that the Policy and the Operational Requirements govern the eligibility conditions of athletes for competing in WA Competitions and for setting a WA World Record in WA Competitions and in other events recognised by WA. This stems from by Section A.1 of the Operational Requirements, which provides that:
- “[t]hese Operational Requirements [...] will govern eligibility: (a) to compete in the World Aquatics World Championships, World Cups, Grand Prix, World Leagues, and World Series events and tournaments, and other international events (World Aquatics Competitions), and (b) to set World Aquatics World Records in World Aquatics Competitions and/or in other events recognised by World Aquatics, wherever they are held”* [emphasis by the author].
85. It also is confirmed by Section B.1 of the Operational Requirements, which similarly provides that:
- “[t]he eligibility conditions for competing in the men's and women's categories in World Aquatics competitions and for setting a World Aquatics World Records in the men's and women's categories in World Aquatics Competitions and in other events recognised by World Aquatics are set out in the Policy”* [emphasis by the author].
86. The fact that the Policy does not govern eligibility to compete in events that are not WA Competitions or events recognized by WA is further confirmed by Sections G.8 and G.9 of the Policy, which state that “*World Aquatics recommends that each Member Federation adopts its own sex and gender policy to determine eligibility to compete in events taking place under its jurisdiction*” and that “*any policy adopted and enforced by a Member Federation remains within the jurisdiction of the Member Federation*”.
87. It stems from the above provisions that the Policy and the Operational Requirements only concern eligibility for participation in WA Competitions or for setting a WA World Record.
88. Furthermore, the Panel notes that pursuant to the Operational Requirements, the athletes who are planned to participate in a WA Competition are registered by their member federation with WA prior to competition in view of approval by WA of their eligibility. Pursuant to Section B.4 of the Operational Requirements:

“Prior to competition, each Member Federation must register its athletes with the World Aquatics General Management System (GMS). At registration, each

Member Federation will be required to identify each athlete's chromosomal sex in accordance with Policy Section F.2 and either confirm compliance with the Policy and these Operational Requirements or identify that the matter requires further consideration under the Policy and these Operational Requirements. [...]" [emphasis by the author].

89. In the Panel's view, unless and until an athlete is registered for a WA Competition by a member federation, the Policy and Operational Requirements of WA have no impact on that athlete, and they are simply not triggered.
90. The solution is similar in case of world record by an athlete who has not been registered with WA in an event recognised by WA. Pursuant to Section B.5 of the Operational Requirements, the athlete who wishes to have a performance registered as a WA World Record shall demonstrate that "*the athlete met all of the relevant Eligibility Conditions of the Policy at the time of the event*". Until that stage, the Policy and Operational Requirements of WA are thus not triggered with respect to such athlete.
91. Based on the above considerations, the Panel also finds that the wording of Section B.2 (a) and (d) of the Operational Requirements, which state that "*[a]ny athlete (including any transgender or 46 XY DSD athlete) who wishes to be eligible to participate in a World Aquatics Competition, or to set a World Aquatics World Record in a World Aquatics Competition or in another event recognised by World Aquatics, agrees, as a condition to such eligibility, [...] [t]o fully comply with the Policy and these Operational Requirements; [...] [t]o follow the procedures set out in Section F to challenge the Policy and/or these Operational Requirements*", does not contradict its understanding of the scope of application of the Policy and the Operational Requirements. In the Panel's view, an athlete "*who wishes to be eligible to participate in a [WA Competition] or to set a [WA World Record]*" is an athlete who is somehow entitled to participate in such WA Competition or to set a world record.
92. The Panel therefore concludes that the Policy and the Operational Requirements can only be triggered whenever an athlete is entitled to compete in a WA Competition, which occurs upon registration with WA prior to a competition, or sets a performance which leads to a request for registration as WA World Record.
93. The Panel however notes that, for the time being, the Athlete is not entitled to participate in WA Competitions; nor is there any indication she set a world record.
94. In fact, the Panel notes that the Athlete did not apply for – let alone was granted – the right to participate in "Elite Events" within the meaning of the USA Swimming Policy. She is currently only entitled to compete in USA Swimming-events that do not qualify as "Elite Events".
95. According to Paragraph 4 (c) of the USA Swimming Policy, the notion of "Elite Events"

covers many different domestic and international events, including all WA Competitions:

“[...] any United States Olympic and Paralympic Committee (“USOPC”) Delegation Event and/or Protected Competition as defined in the USOPC Bylaws; World Aquatics Events; Pan Pacific Championships; World University Games; USA Swimming Nationals, Junior Nationals, U.S. Open, International Team Trials, U.S. Olympic Team Trials - Swimming; and/or any other competition designated by USA Swimming as an “Elite Event” and any other event which conditions entry on meeting the USA Swimming Junior National Time Standard or faster. For purposes of this Policy, Elite Events shall also include any other competition in which a qualifying time standard is achieved for entry into the other Elite Events described above or to be eligible to set an American or National Age-Group Record at the 13-14 level or above.” [emphasis by the author]

96. The Panel therefore concludes that since the Athlete is not entitled to participate in “Elite Events” within the meaning of USA Swimming Policy, let alone to compete in a WA Competition, which occurs upon registration with WA prior to a competition or upon setting a performance which leads to a request for registration as WA World Record, she is simply not entitled to engage with eligibility to compete in WA Competitions. The Policy and the Operational Requirements are simply not triggered by her current status.
97. The Athlete contends that she could not apply for “Elite Events” because compliance with the Challenged Provisions is a prerequisite for becoming an “Elite” athlete, and that, as a result, in order for her to be registered for “Elite Events”, she is confronted with the Challenged Provisions. The Athlete’s argument is based on Paragraph 4 (b) of the USA Swimming Policy, which provides as follows:

“Athletes who have transitioned, or are transitioning, from a Male biological gender assignment at birth to a Female gender assignment must, before being declared eligible to compete in the Female competition category:

- a. Satisfy the Self-Identity Verification set forth in Paragraph 5 below.*
- b. Satisfy the conditions set forth in Paragraph 6 below, “Elite Event Fairness Conditions” if the athlete:*
 - i. Has achieved “Elite Athlete” status as defined in Paragraph 4(c) below;*
 - ii. Desires to compete in an “Elite Event” as defined in Paragraph 4(c) below; and/or*
 - iii. Desires to have a competitive time recognized by USA Swimming as an American Record.*

An athlete may also satisfy the conditions in Paragraph 6 below (and thus satisfy Paragraph 4(b)) if the athlete instead has obtained approval from World Aquatics to compete in the Female competition category.” [emphasis by the

author]

98. Based on the above provision, the Athlete considers that in order to be granted registration for “Elite Events” she has the choice to either (i) seek USA Swimming panel’s approval on the issue of whether she fulfills the Elite Event Fairness Conditions as referred to in the above-cited provision or (ii) obtain approval to compete in the female category from WA directly. The Elite Event Fairness Conditions are detailed under Paragraph 6 of the USA Swimming Policy. According to this provision, the athlete must demonstrate to the USA Swimming panel that “[f]rom a medical perspective, the prior physical development of the athlete as a Male, as mitigated by any medical intervention, does not give the athlete a competitive advantage over the athlete’s cisgender Female competitors”.
99. In the Panel’s view, the above provision means that if an athlete already obtained approval from WA that she complies with the Eligibility Conditions, such approval may serve to demonstrate that she also fulfills the Elite Event Fairness Conditions before the USA Swimming panel. However, it is wrong to consider that this provision grants an athlete who wishes to be registered for female “Elite Events” with USA Swimming Policy - and is thus not yet eligible to participate in WA Competitions or set a WA World Record -, the right to engage with the Eligibility Conditions under the Policy and the Operational Requirements. Based on the pyramidal structure of sports federations, a national federation has no authority to modify the scope of the rules and regulations of the international federation it is affiliated to. In the context of the present matter, only WA is competent to define the scope of application of its own Policy and Operational Requirements and the USA Swimming Policy or its governing body has no authority to modify such scope of application. This is also the meaning of Section 9 of the Policy which clearly states that “*any policy applied at a national level will not determine the eligibility of athletes to compete in World Aquatics competitions or to set World Aquatics World Records. Instead, that will be determined exclusively by reference to this Policy.*”
100. Similarly, the Panel cannot follow the Athlete when she states that because, under Paragraph 7 of the USA Swimming Policy, she is required to have her eligibility for the female category approved by WA *before* she may participate in an International Team Selection Event and *before* she can be selected for a WA Competition based on times achieved in another event, she necessarily has a right to challenge the Policy and the Operational Requirements.
101. The Panel further notes that Paragraph 7 of the USA Swimming Policy, in its relevant section, provides as follows:

“It is important that all participants in International Team Selection Events be eligible to compete in the subsequent World Aquatics Competition if, based on their performance, they have qualified for a place on the USA Swimming team.

Accordingly, all athletes who would be subject to the World Aquatics eligibility conditions set forth above must, before participating in an International Team Selection Event, have their eligibility to participate in that gender category in the subsequent World Aquatics Competition approved by World Aquatics as set forth in the application and approval process in the World Aquatics Policy.

In those circumstances where selection to a team to compete in a World Aquatics Competition is based on time rankings rather than finish order in an International Team Selection Event, athletes who would be subject to the World Aquatics eligibility conditions set forth above must, before being selected to the team by USA Swimming, have their eligibility to participate in that gender category in the World Aquatics Competition approved by World Aquatics as set forth in the application and approval process in the World Aquatics Policy.”
[emphasis by the author]

102. Based on the above provision, the Athlete argues that since she is required to have her eligibility for the female category approved by WA *before* she may participate in an International Team Selection Event or *before* she can be selected for a WA Competition based on times achieved in another event, she necessarily has a right to challenge the Policy and the Operational Requirements at that time already.
103. The Panel again recalls that it is not for the USA Swimming Policy to determine when and under what conditions the Policy and the Operational Requirements are triggered. Section B.4 of the Operational Requirements provides for an approval process which is initiated “prior to the competition” upon the athlete’s registration for the WA Competition by the member federation. It is thus only upon registration for a WA Competition by a member federation that the Policy and Operational Requirements are triggered; unless and until then, the Athlete is not sufficiently affected by the Challenged Provisions.
104. Finally, the Panel finds that Section D.2 (a) of the Operational Requirements, which provides that “*World Aquatics may investigate, at any time[...] whether an athlete who has not filed a declaration under these Operational Requirements is a transgender athlete or 46 XY DSD athlete who needs to establish their eligibility to compete in a particular competition category in accordance with the Policy and these Operational Requirements*”, only concerns athletes who are registered to participate in a WA Competition. Indeed, only those athletes that are registered to participate in a WA Competition are those who need to establish that they fulfil the Eligibility Conditions.
105. In light of the above considerations, the Panel concludes that the Athlete lacks standing to challenge the Policy and the Operational Requirements in the framework of the present proceedings. The Panel therefore finds that the case shall be dismissed.

X. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed on 6 September 2023 by Ms Lia Thomas against World Aquatics is dismissed.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 10 June 2024

THE COURT OF ARBITRATION FOR SPORT

Carmen Núñez-Lagos
President of the Panel

Richard H. McLaren
Arbitrator

Ulrich Haas
Arbitrator

Stéphanie De Dycker
Clerk