



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2017/A/4949 Ms. Tatyana Chernova v. International Association of Athletics Federations (IAAF)**

## **ARBITRAL AWARD**

**delivered by the**

## **COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

President: Prof. Jan Paulsson, Attorney-at-Law, Washington, D.C.  
Arbitrators: Mr. Mika Palmgren, Attorney-at-Law, Turku, Finland  
Prof. Massimo Coccia, Attorney-at-Law, Rome, Italy  
*Ad hoc* Clerk: Mr. Philipp Kotlaba, Attorney-at-Law, Washington, D.C.

**in the arbitration between**

**Ms. TATYANA CHERNOVA**, Russian Federation  
Represented by Mr. Hannu Kalkas, Teperi & Co., Ltd., Helsinki, Finland

as Appellant

and

**INTERNATIONAL ASSOCIATION OF INTERNATIONAL FEDERATIONS**, Monaco  
Represented by Mr. Ross Wenzel, Kellerhalls Carrard, Lausanne, Switzerland

as Respondent

\*\*\*\*\*

## CONTENTS

I.	THE PARTIES .....	2
II.	BACKGROUND FACTS .....	2
III.	THE ARBITRAL PROCEEDINGS.....	4
	A. PROCEEDINGS BEFORE THE CAS SOLE ARBITRATOR .....	5
	B. THE APPEAL .....	5
IV.	POSITIONS OF THE PARTIES .....	6
	A. THE APPELLANT’S POSITION .....	6
	B. THE RESPONDENT’S POSITION.....	10
V.	LEGAL ANALYSIS .....	13
	A. JURISDICTION (IN THIS APPEAL) .....	13
	B. ADMISSIBILITY .....	14
	C. APPEAL ARBITRATION PROCEDURE .....	15
	D. APPLICABLE LAW.....	15
	E. ANALYSIS (JURISDICTION OF THE SOLE ARBITRATOR).....	16
	a. Applicable requirements of the CAS Code .....	17
	b. Adequacy of the IAAF Rules as an “arbitration agreement” .....	18
	c. The Parties’ correspondence as an “arbitration agreement” .....	21
VI.	COSTS .....	23
VII.	DISPOSITIF .....	25

## I. THE PARTIES

1. Ms. Tatyana Chernova (“*Athlete*” or “*Appellant*”) is an international-level Russian athlete specializing in heptathlon. She is affiliated with the national governing body for track and field in Russia, the All Russian Athletics Federation (“*ARAF*”).
2. The International Association of Athletics Federations (“*IAAF*” or “*Respondent*”) is the world governing body for athletics and is responsible for the regulation of international track and field. The IAAF has its registered seat in Monaco.

## II. BACKGROUND FACTS

3. The present section sets out a summary of relevant facts as advanced by the Parties in their written submissions and accompanying exhibits. It serves the purpose of synopsis only. Additional facts are set out further below to the extent the Panel considers them necessary or relevant, but the present Award refers only to such evidence and arguments where its reasoning so requires. The Panel has nonetheless considered all facts and legal arguments placed before it.
4. The present case concerns the appeal of the Athlete against a first-instance award dated 29 November 2016 (CAS 2016/O/4469) (the “*Appealed Award*”), in which CAS Sole Arbitrator Michael Geistlinger deemed the Athlete in violation of Rule 32.2(b) of the IAAF Rules based on an analysis of Ms. Chernova’s Athlete Biological Passport (“*ABP*”). As a result of that finding, the Athlete was suspended from competition for a period of three years and eight months starting from 5 February 2016. In addition, the Appellant’s results as from 15 August 2011 were nullified to 22 July 2013, including forfeiture of all titles, awards, medals, points, and prize and appearance money obtained during this period. On appeal, the Athlete alleges that the IAAF improperly referred the dispute to CAS rather than conducting its own first-instance hearing in the place of ARAF (which has been suspended by the IAAF since November 2015 and, but for its current suspension, would have adjudicated the dispute). Accordingly, this appeal purely focuses on a jurisdictional issue and therefore does not require review of the Sole Arbitrator’s finding that “the Athlete engaged in blood doping practices throughout the period between August 2009 to at least July 2013.”
5. From 14 August 2009 to 13 November 2014, the Athlete provided nineteen blood samples to the Respondent for inclusion in her ABP Profile, which functions as a longitudinal logbook of an athlete’s biological indicators designed to assess whether there is an anomalous deviation from that athlete’s baseline values indicative of doping.
6. The Athlete has faced two separate and parallel investigations against her. The first of these concern a 2009 sample, re-tested in 2013, which tested positive for “oral turinabol,” a prohibited anabolic steroid. The Athlete was consequently tried and sanctioned by the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Authority on 20 January 2015. The IAAF deemed the sanction to be too lenient and

filed an appeal against it; that appeal is currently pending before CAS but has been suspended pending resolution of this case.

7. The present proceedings concern the Appellant's haematological ABP; they are therefore based on longitudinal profiling and indirect analyses of the Athlete's blood values as resulting from the collection of many samples, not on direct analytical detection of a prohibited substance in a single, discrete sample.
8. The case has its genesis in a letter dated 24 April 2015 from the IAAF to ARAF, in which the IAAF stated that it was considering bringing charges against the Athlete. Before disciplinary proceedings were commenced, ARAF was suspended from IAAF membership during the IAAF Council convention in Monaco on 26 November 2015.
9. On 5 February 2016, the IAAF notified ARAF that: (i) in its view an additional anti-doping rule violation had occurred; (ii) the Athlete was provisionally suspended with immediate effect; and (iii) the IAAF would assume responsibility for disciplinary proceedings, in light of ARAF's own suspension.
10. The letter – whose contents the IAAF requested to be notified to the Athlete and which it forwarded to her by e-mail on 9 February 2016 – informed the Athlete that, in the event she requested a hearing, such hearing would proceed under either IAAF Rule 38.3 ("Sole Arbitrator with a right of appeal to a CAS Panel") or Rule 38.19 ("Single CAS Hearing"). That text is excerpted below:

#### **E. CAS Hearing**

*Pursuant to IAAF Rule 38.2, the Athlete has a right to request a hearing within fourteen (14) days of this notice. [...]*

*As you will be aware, ARAF is currently suspended from membership of the IAAF. As a consequence of such suspension, the IAAF has taken over the responsibility for coordinating disciplinary proceedings in inter alia the case of the Athlete [...].*

*If the Athlete requests a hearing [...] her case will be referred to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) for a hearing to be conducted, at her election, in accordance with one of the following two procedures:*

*Before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42; or*

*Before a CAS Panel sitting as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with*

*IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal). [...]*

*In the event that the Athlete elects to proceed with the ABP case within the context of a single CAS hearing (on the basis of IAAF Rule 38.19) to be conducted in accordance with the rules applicable to CAS appeal arbitration procedures, the IAAF intends to request that either (i) the two cases be formally consolidated or (ii) they both be referred to the same Panel.*

*For the avoidance of doubt, the comments in this [section] are made without any prejudice to the Athlete's freedom to choose to proceed under either IAAF Rule 38.3 or IAAF Rule 38.19. However, as that choice will inform the manner in which the IAAF seeks to pursue both sets of proceedings, the IAAF wished to give the Athlete fair warning of the possible procedural consequences of her choice.*

11. The Athlete, through her representative, responded by e-mail on 19 February 2016. The relevant part of the response reads:

*Regarding you[r] letter dated February 05, 2016 (received by Tatyana Chernova and her representative on February 09, 2016), which concerns Tatyana Chernova (the Athlete) violating anti-doping provisions, in particular IAAF Rule 32.2 (b), and suspending the Athlete from all competition until the court passes a final disposition under her case[.]*

*We hereby inform you that Athlete requests a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-Related Arbitration (CAS) because the Athlete denies the accusation presented in terms of the Athlete's Biological Passport.*

*According to your letter dated 05.02.2016, Athlete's case shall be transferred to the Court of Arbitration for Sport in Lausanne (Switzerland), should the Athlete request a hearing within the period specified in paragraph 10 of the letter.*

### **III. THE ARBITRAL PROCEEDINGS**

12. The following section summarizes the proceedings before the CAS Sole Arbitrator and in the present appeal.

**A. PROCEEDINGS BEFORE THE CAS SOLE ARBITRATOR**

13. On 23 February 2016, the IAAF filed its Request for Arbitration with CAS and requested that the matter be referred to a Sole Arbitrator. Two days later, on 25 February 2016, the CAS Court Office confirmed that the case had been transferred to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division Rules.
14. The Athlete filed her Answer on 1 April 2016. Ms. Chernova requested, *inter alia*, that the “Appeal of IAAF [...] be rejected as inadmissible because of lack of jurisdiction.”
15. On 11 April 2016, the IAAF informed the CAS Court Office that CAS was “effectively acting as a substitute for the ARAF because of the ARAF’s inability to conduct disciplinary proceedings in Russia in due time.” In the Respondent’s view, therefore, the IAAF Rules called for the costs of proceedings to be borne by ARAF.
16. On 19 April 2016, the IAAF filed a Submission on Jurisdiction, requesting that the Athlete’s objections to the jurisdiction of CAS and to the admissibility of the claim be dismissed.
17. Following his appointment, the CAS Sole Arbitrator rendered the Appealed Award on 29 November 2016, upholding jurisdiction and partially granting the relief sought by the IAAF. As to jurisdiction, which is the only matter of relevance at present, he concluded the following:
  - (a) Article R47 of the Code of Sports-related Arbitration (“**CAS Code**”) permits the submission of a “case” to CAS either “by application of a statutory rule providing for jurisdiction” or “by an arbitration agreement.” CAS had jurisdiction by virtue of the “statutory rule” found in IAAF Rule 38.3.
  - (b) The Parties’ correspondence made clear that the IAAF “would refer the matter to CAS.” The response of the Athlete’s legal counsel, of 19 February 2016, “can only be understood as requesting” a hearing before CAS, “and not as requesting [...] a hearing before the IAAF as alleged.” This correspondence, moreover, rendered the Athlete’s arguments as to the interpretation of IAAF Rule 38.3 “not consistent and not convincing.”

Accordingly, the Sole Arbitrator dismissed the Athlete’s objections to jurisdiction.

**B. THE APPEAL**

18. On 12 January 2017, the Appellant filed her Statement of Appeal in accordance with Article R47 et seq. of the CAS Code, challenging the jurisdiction of the Sole Arbitrator and nominating Mr. Mika Palmgren, Attorney-at-Law in Turku, Finland, as arbitrator.
19. The Appellant submitted her Appeal Brief, including various legal and factual exhibits enclosed thereto, on 20 January 2017, in accordance with Article R51 of the CAS Code.

20. On 30 January 2017, the Respondent nominated Professor Massimo Coccia, Attorney-at-Law in Rome, Italy, as arbitrator.
21. On 23 February 2017, the IAAF submitted its Answer in accordance with Article R55 of the CAS Code.
22. On 9 March 2017, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, constituted the Panel as follows:  
President: Professor Jan Paulsson, Attorney-at-Law in Washington, D.C., USA  
Arbitrators: Mr. Mika Palmgren, Attorney-at-Law in Turku, Finland  
Professor Massimo Coccia, Attorney-at-Law in Rome, Italy
23. On 26 April 2017, the Parties were informed that Mr. Philipp Kotlaba, Attorney-at-Law in Washington, D.C., USA had been appointed as *ad hoc* clerk.
24. On 4 May 2017, the CAS Court Office informed the Parties that the Panel, having considered the Parties' positions concerning the need for a hearing and upon review of the Parties' submissions in this procedure, deemed itself sufficiently well informed to render a decision in the proceedings without a hearing and on the basis of the Parties' written submissions only.
25. An Order of Procedure was circulated on 11 May 2017. The Appellant and the Respondent returned signed copies to the CAS Court Office on 12 and 16 May 2017, respectively.

#### IV. POSITIONS OF THE PARTIES

26. This section serves only as a summary of the Parties' positions. It does not necessarily include every submission advanced in pleadings and other correspondence. The Panel has, however, considered all arguments presented to it in rendering the present Award.

##### A. THE APPELLANT'S POSITION

27. The Appellant asserts that the Respondent erred in failing to hold its own first-instance hearing, substituting for the suspended ARAF, prior to referring the dispute to CAS. Absent first-instance adjudication *by the IAAF*, Ms. Chernova submits, there was no agreement to arbitrate the matter before CAS, either as a matter of the IAAF Rules or by virtue of the Parties' correspondence.
  - (i) *Article R47 of the CAS Code imposes threshold requirements which the IAAF did not meet.*
28. In the view of the Appellant, Article R47 of the CAS Code applies and imposes threshold procedural requirements that were unsatisfied when the IAAF referred the dispute to a CAS Sole Arbitrator.
29. Article R47 is titled "Appeal" and appears directly below the heading, "Special Provisions Applicable to the Appeal Arbitration Procedure." It reads:

*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.*

30. The requirements of Article R47, in the Appellant's view, include the existence of a first-instance decision against which an appeal is sought, exhaustion of legal remedies, and, finally, either "statutes or regulations" or a "specific arbitration agreement" vesting CAS with jurisdiction. She submits that the IAAF failed all of these:
- (a) **No Appeal** – The Appellant considers that, by definition, no appeal can exist where there is no prior, first-instance decision issued by ARAF or the IAAF (in light of Russia's suspension and as analyzed in detail below).
  - (b) **No Exhaustion** – Similarly, the IAAF failed to exhaust legal remedies by failing to conduct its own first-instance hearing. The Appellant argues that CAS jurisprudence places great weight on the exhaustion requirement (*see, e.g.*, CAS 2007/A/1373, providing that Article R47 contemplates that CAS "cannot hear an appeal if all internal legal remedies have not been exhausted without effectively depriving the Athlete of his/her right to [a] first-instance hearing from which she would have the right to appeal") and draws attention to the IAAF's letter of 5 February 2016, in which the Respondent indicated it had "taken over responsibility for coordinating the disciplinary proceedings" from Russia. One such "responsibility" which the IAAF must be understood as taking over, the Appellant submits, is the responsibility for conducting a hearing. Since the IAAF immediately referred the matter to CAS upon suspending Russia's membership, it failed, in essence, to exhaust a remedy expressly contemplated under its own rules.
  - (c) **No Agreement** – Third, Article R47 only permits the referral of an appeal to CAS "if the statutes or regulations of said body so provide or if the parties have concluded a specific arbitration agreement." There is no jurisdictional basis capable of satisfying this requirement, in the Appellant's view, either by statute or separate arbitration agreement. Specifically, she alleges that Rule 38.3 of the IAAF Rules fails this purpose and that the Parties did not otherwise agree to refer the matter to CAS through their correspondence.
    - (ii) *IAAF Rule 38.3 did not confer jurisdiction to CAS over a first-instance hearing.*
31. As a preliminary matter, the Appellant argues that any arbitration agreement must be specific and unequivocal, with ambiguities to be construed against the drafting party.
32. The Appellant submits in particular that Rule 38.3 of the IAAF Rules did not vest CAS with jurisdiction. That rule operates hand in hand with Rule 38.2, which guarantees athletes the right to request a hearing in respect of anti-doping rule



violation allegations against them. Rule 38.3, in turn, specifies that, where an athlete so requests, a hearing is to be held and completed by a national member federation within two months. Should the member federation fail to hold a hearing, or where it “fail[s] to complete” one within two months, the IAAF “may elect” to refer the matter to a CAS Sole Arbitrator operating under the rules applicable to appeal arbitrations (Article R47 et seq. of the CAS Code).

33. In the Appellant’s view, Rule 38.3 fails to serve as a valid “arbitration agreement” providing for CAS jurisdiction in the first instance. She draws attention to the following language (emphasis in pleadings):

*If the Member [ARAF] fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect [...] to have the case referred directly to a single arbitrator appointed by CAS.*

34. The Appellant considers that ARAF’s suspension has effectively deprived ARAF of the opportunity to comply with its obligation under the IAAF Rules to conduct a hearing. Absent such an opportunity, she submits, it is impossible for the express precondition to a CAS referral, as provided under Rule 38.3, to have been satisfied:

*As ARAF has been suspended by IAAF it has not been able to fulfill its obligations stated in the article 38.3 of IAAF Rules. [...] As ARAF has not even been given a possibility to fulfill its responsibilities according to the Rule 38.3 and IAAF can only have the case referred to a single arbitrator appointed by CAS when a Member has failed to complete a hearing or render a decision in time, IAAF has no right to refer the case to CAS.*

35. The Appellant further considers the IAAF’s own correspondence to strengthen her interpretation of Rule 38.3. On 5 February 2016, the IAAF informed the Athlete, through ARAF, of the charges against her and observed that it had “taken over responsibility for coordinating the disciplinary proceedings” in light of ARAF’s suspension. This wording suggests that IAAF would “take over” the core responsibility of adjudication of her case, as would ordinarily be required of ARAF under Rule 38.3: “It is a fact that IAAF cannot ‘take over’ any other responsibilities than those of ARAF.”
36. The Appellant’s position is therefore grounded both on a textual reading of the applicable law and on the IAAF’s conduct. To the extent the text of Rule 38.3 is ambiguous, however, the Athlete submits that Rule 38.3 should be construed in her favor and against the IAAF (the party that proffered it), in accordance with the principle of *contra proferentem*. The Appellant recalls, in this regard, that she “has had no possibility to influence the content of the arbitration clause.” As a prudential matter, moreover, the Appellant takes issue with the implications of permitting the

IAAF to proceed to CAS directly where, were ARAF not suspended, it would have lacked the ability to do so:

*ARAF was suspended by IAAF. By suspending a Member by its own actions IAAF cannot expand its own rights as a contractual party and get the right to appeal to CAS as a first instance. IAAF's interpretation leads exactly to that.*

37. Finally, the Appellant denies that her arguments with respect to Rule 38.3 lack credibility or are estopped – as the Sole Arbitrator appeared to conclude – by virtue of her representative's correspondence with the IAAF. (As Ms. Chernova's arguments in relation to the import of her counsel's letter of 19 February 2016 are primarily relevant to whether a separate arbitration agreement was formed between the Parties, they are treated below.)

(iii) *The Parties' correspondence did not otherwise create an arbitration agreement.*

38. Having sought to establish that Rule 38.3 of the IAAF Rules cannot serve as an arbitration agreement endowing CAS with jurisdiction over a first-instance hearing, the Appellant additionally argues that the Parties have not otherwise agreed to submit the matter to CAS, including by their correspondence of February 2016.

39. The Athlete responded via e-mail sent by her counsel on 19 February 2016, responding to the IAAF's letter concerning referral of the matter to CAS. The message reads, in relevant part:

*We hereby inform you that Athlete requests a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-Related Arbitration (CAS) because the Athlete denies the accusation presented in terms of the Athlete's Biological Passport.*

*According to your letter dated 05.02.2016, Athlete's case shall be transferred to the Court of Arbitration for Sport in Lausanne (Switzerland), should the Athlete request a hearing within the period specified in paragraph 10 of the letter.*

40. The Appellant denies that this response evinces acquiescence to CAS jurisdiction. First, she notes the response's explicit, and exclusive, reference to Rule 38.2 of the IAAF Rules. That rule provides athletes with the general "right to request a hearing"; it does not mention CAS (as does Rule 38.3).
41. The Appellant concedes that the IAAF's letter, to which her representative was responding, also outlined procedural options for handling the case, both of which involved CAS in some capacity: either a CAS Sole Arbitrator sitting in the first instance but governed by the appeals arbitration rules (as was to be the case) or before a CAS Panel sitting as a single hearing, with narrower options for subsequent appeal.

Rule 38.3 was cited by the IAAF in connection with the first option; Rule 38.19 was cited in connection with the second. Nevertheless, the Athlete notes that her response was limited to Rule 38.2 only, and considers the IAAF's interpretation of and reference to Rules 38.3 or 38.19, in any event, to be "false."

42. Second, the Appellant denies that the e-mail's reference to the IAAF's statement that the case would be "transferred to the Court of Arbitration for Sport" constitutes an agreement to do so. Terming the IAAF's letter "misleading to say the least," the Athlete considers that her representative "was not able to give a *bona fide* answer to the alternatives that were based on [a] false interpretation of Rule 38.3."
43. Accordingly, the Appellant submits that the CAS Sole Arbitrator lacked jurisdiction. She seeks the Panel to find as follows:

- (i) *The Appeal of Ms Chernova is admissible.*
- (ii) *The decision rendered by the CAS sole arbitrator 2016/O/4469 is set aside.*
- (iii) *Ms Chernova is granted an award for costs in this case and also in the case 2016/O/4469.*

#### **B. THE RESPONDENT'S POSITION**

44. The IAAF submits that the CAS Sole Arbitrator had jurisdiction to resolve the Parties' dispute in the first instance, considering the suspension of ARAF and the consequent "impossibility" of conducting a first-instance hearing in Russia. In its view, Article R47 of the CAS Code does not apply in the manner sought by the Appellant as IAAF Rule 38.3 created a valid arbitration agreement for referral of the matter to CAS. The IAAF claims it agreed only to "coordinate proceedings" in place of ARAF, not to hold a hearing – an ability the IAAF, in any event, does not have. The Athlete, it adds, expressly agreed to a CAS hearing through her correspondence. These submissions merit a more detailed review, as follows.

- (i) *Article R47 of the CAS Code is inapplicable and does not require a first-instance hearing.*

45. In contrast to the Appellant, the IAAF disputes the applicability of Article R47 of the CAS Code as a jurisdictional gatekeeper. As before the CAS Sole Arbitrator in this instance, IAAF charges were brought against a Russian track-and-field athlete at a time when the Russian national member federation, ARAF, was suspended. In these circumstances, the Respondent submits, no first-instance hearing by the IAAF was required under Article R47, whether to establish an "appealable decision" or to show exhaustion of remedies.
46. First, the IAAF submits that its referral of the dispute to CAS should not be considered an "appeal"; instead, the procedure is essentially an ordinary, first-instance arbitration (the IAAF Rules' reference to CAS appeal arbitration procedural rules

notwithstanding). The IAAF notes that it submitted a Request for Arbitration – and not a Statement of Appeal – in accordance with Article R38 of the CAS Code, which relates to the ordinary arbitration procedure. Similarly, the CAS Court Office “submitted the case to the Ordinary Division,” as evident in the assignment of an Ordinary Division case number to the matter (2016/O/4469).

47. The Respondent concedes that IAAF Rule 38.3 also makes reference to the rules “applicable to the appeal arbitration procedure” (which include Article R47) as governing a dispute referred to CAS. This choice of procedural law, however, has “been accepted by numerous CAS arbitrators,” without their finding any contradiction with the actual cases’ fundamental nature as first-instance proceedings. Indeed, to find otherwise would be to render the IAAF Rules without effect, as any reference to the appeal arbitration procedure would then lead to such procedure invariably disqualifying the case. This, the IAAF maintains, cannot be:

*If it were necessary that a [first-instance] decision be rendered in order to proceed on the basis of Rule 38.3, the provision would be completely meaningless. It is aimed precisely at allowing the IAAF to proceed before CAS at first instance where no decision has been made and without exhausting any further channels within the Member’s disciplinary system.*

48. Because, in the IAAF’s view, Article R47 of the CAS Code does not impose any threshold requirements for jurisdiction, the Appellant’s arguments with regard to the exhaustion of legal remedies and the requirement of an appealable decision are irrelevant to the question of CAS jurisdiction.
49. The IAAF adds that it lacks a regulatory basis to conduct its own adjudications in any event. The Appellant’s suggestion that IAAF should “itself have convened a hearing and rendered a first decision instead of [ARAF] ignores the fact that the IAAF has no basis” under its constitution and other applicable regulations to do so, as this is the responsibility of national member federations.

(ii) *IAAF Rule 38.3 is sufficient to vest CAS with jurisdiction.*

50. Having sought to demonstrate that Article R47 of the CAS Code does not impose independent jurisdictional requirements which are lacking in the present case, the IAAF next submits that its internal rules create a valid arbitration agreement providing for jurisdiction to refer a first-instance hearing to CAS. Specifically, the IAAF submits that Rule 38.3 of the IAAF Rules provides such an agreement.
51. As a preliminary matter, the IAAF notes that the law of Switzerland, where this arbitration is seated, provides that sports arbitration agreements be construed with “benevolence” (i.e., broadly), with a view toward “encouraging quick disposition.”
52. Turning to Rule 38.3 of its Rules, the IAAF submits that its terms create an arbitration agreement and a valid and sufficient basis for CAS jurisdiction. This conclusion flows from a literal reading as well as from a purposive reading of the rule.

53. As a textual matter, IAAF Rule 38.3 confers jurisdiction upon CAS where, as here, the relevant national member federation “fails to complete” a hearing within the applicable deadline. The IAAF notes, in response to the Appellant’s submissions, that it is immaterial under Rule 38.3 whether such failure is the result of ARAF’s “neglect[]” of its responsibilities, and that accordingly ARAF’s inability to convene a hearing due to its pre-existing suspension cannot frustrate the IAAF’s subsequent referral of the matter to CAS:

*The aim of Rule 38.3 of the IAAF Rules is manifestly to ensure that, in circumstances where an athlete’s case is not dealt with by the relevant Member in due time, it can be brought to CAS for determination.*

54. Accordingly, it is the IAAF’s position that Rule 38.3 should be interpreted to consider ARAF’s suspension, and the consequent “impossibility” of convening a hearing in the Athlete’s case under ARAF’s auspices, to constitute a “failure” to hold or complete a hearing for the purpose of satisfying the precondition to referral of the matter to CAS. The inability of ARAF to “conduct results management due to its suspension,” the IAAF writes, “fall[s] squarely within the wording of Rule 38.3.”
55. The IAAF further submits that this interpretation is prudentially wise. Recalling that ARAF “voluntarily” accepted its suspension, it would be “paradoxical (if not to say perverse)” for a Russian athlete to be able to avoid prosecution for the duration of the suspension:

*The less [ARAF] does to correct the systemic failings that have been documented in the WADA Independent Commission and Independent Person reports, the longer its athletes would avoid the consequences of their doping.*

In this regard, the IAAF recalls that “results management of the Athlete’s case had commenced well before” the suspension of ARAF in November 2015, with the Athlete having been informed of the abnormalities in her Athlete Biological Passport profile as early as 24 April 2015.

(iii) *The Parties’ correspondence is consistent with a referral to CAS.*

56. Finally, the IAAF considers both its letter of 5 February 2016 and the Athlete’s response of 19 February 2016 to be consistent with the Respondent’s interpretation of Rule 38.3 and its referral of the dispute to a CAS Sole Arbitrator.
57. In response to the Athlete’s arguments with regard to the IAAF’s indication that it had “taken over” the responsibilities of ARAF in coordinating Ms. Chernova’s disciplinary proceedings, the IAAF submits that this was never intended to suggest, nor could it be understood as meaning, that the IAAF would convene a hearing itself and in the place of ARAF. Indeed, this language was understood as referring to its ability to send the matter onward to CAS – an argument that the IAAF considers buttressed by references

to CAS throughout its letter, including in the two procedural options which it offered the Athlete:

*The IAAF did of course “coordinate the disciplinary proceedings” by doing precisely what it said it would do in the 5 February 2016 letter and precisely what is provided for in its Competition Rules i.e. by referring the matter to CAS.*

58. The IAAF further submits that the Athlete was aware of this intention when her counsel acquiesced to the referral of the matter to CAS in the Appellant’s response dated 19 February 2016.
59. Accordingly, the IAAF considers the Appellant to have “explicitly accepted” to proceed before CAS in any event. As the IAAF is of the view that Rule 38.3 is a sufficient arbitration agreement for present purposes, it makes no submissions as to the existence of a separate and independent arbitration agreement.
60. The Respondent requests the following relief:
  - (i) *The appeal and all requests for relief of Ms. Chernova are dismissed.*
  - (ii) *Ms. Chernova is ordered to bear the totality of any arbitration costs.*
  - (iii) *Ms. Chernova is ordered to make a significant contribution to the legal and other costs of the IAAF.*

## V. LEGAL ANALYSIS

### A. JURISDICTION (IN THIS APPEAL)

61. The second paragraph of Article R47 of the CAS Code states: “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.”
62. The relevant sporting federation rules in the present appeal are the IAAF Rules. Rule 38.3 thereof states, in relevant part:

*If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of the notification of the Athlete’s request to the Member [...]. If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. [...] [T]he decision of the*

*single arbitrator shall be subject to appeal to CAS in accordance with Rule 42.*

63. Rule 42(1) of the IAAF Rules, in turn, provides that, “[u]nless specifically stated otherwise, all decisions made under these Anti-Doping rules may be appealed in accordance with the provisions set out below.” Sections 2 and 5 of the same Rule make clear that decisions “that an anti-doping rule violation was committed” qualify as one of the decisions that “may be appealed,” and that the right to commence such an appeal inheres in any International-Level Athlete who is the “subject” of the decision against which recourse is sought. The Athlete in this case is an International-Level Athlete, and is therefore eligible to appeal the decision of the CAS Sole Arbitrator in accordance with Rule 42 of the IAAF Rules.
64. Although the Athlete challenges the jurisdiction in the first-instance proceedings below, neither Party disputes the Panel’s jurisdiction in this appeal.
65. CAS therefore has jurisdiction in this appeal.

**B. ADMISSIBILITY**

66. 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.*

67. Article 42.15 of the IAAF Competition Rules provide as follows:

*Unless stated otherwise in the Rules (or the Doping Review Board determines on the cases where the IAAF is prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS, such period starting from the day after the date of receipt of the decision to be appealed [...].*

68. The Appealed Award is dated 29 November 2017. This appeal was filed on 12 January 2017. The Appellant’s Statement of Appeal and Appeal Brief comply with all procedural and substantive requirements of the CAS Code, and the Respondent does not dispute the admissibility of the Appellant’s claims. Accordingly, the Panel deems the appeal admissible.

**C. APPEAL ARBITRATION PROCEDURE**

69. While the Parties dispute over the jurisdictional effect and precise application of Article R47 of the CAS Code to the first instance procedure before the CAS Sole Arbitrator – reserved for discussion in Section E below – it is undisputed that the present proceedings before this Panel are “appeal arbitration proceedings” (as termed by Article R27 of the CAS Code) and, as such, are fully governed by Article R47 et seq. of the CAS Code.

**D. APPLICABLE LAW**

70. Article R58 of the CAS Code reads:

*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.*

71. The Parties have cited or relied upon the 2016-2017 edition of the IAAF Rules (with an effective date of 1 November 2015), both before the CAS Sole Arbitrator and before this Panel. The Request for Arbitration of the IAAF, moreover, was brought after the Effective Date of the 2016-2017 IAAF Rules, i.e., on 23 February 2016, and the CAS Sole Arbitrator rendered his award on that basis.

72. To the extent that the IAAF Rules do not explicitly resolve a relevant issue, Rule 42.23 states:

*In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise.*

73. It is not in dispute that the IAAF Rules, and Monegasque law on a subsidiary basis, govern these proceedings. Accordingly, the Panel is satisfied that the 2016-2017 IAAF Rules (and Monegasque law subsidiarily) comprise the applicable law.

74. Finally, as it is the principal provision of the IAAF Rules at issue in this appeal, the Panel sets out the text of IAAF Rule 38, which relates to an athlete’s right to request a hearing and the procedure by which hearings are to be held. This rule reads, in relevant part, as follows:

*(38.1) Every Athlete shall have the right to request a hearing before the relevant tribunal of his National Federation before any sanction is determined in accordance with these Anti-Doping Rules. When an Athlete has obtained affiliation status abroad under Rule 4.3 above, he shall have the right to request*



*a hearing either before the relevant tribunal of his original National Federation or before the relevant tribunal of the Member whose affiliation has been obtained. [...]*

*(38.2) When an Athlete is notified that his explanation has been rejected and, where applicable, that he is to be Provisionally Suspended in accordance with Rule 37 above, he shall also be told of his right to request a hearing. If the Athlete fails to confirm in writing to his National Federation or other relevant body within 14 days of such notice that he wishes to have a hearing, he will be deemed to have waived his right to a hearing [...].*

*(38.3) If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete's request to the Member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates as soon as they are fixed. the IAAF shall have the right to attend all hearings as an observer. [...] If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an international-level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure by a Member to hold a hearing for an Athlete within two months under this Rule may further result in the imposition of a sanction under Rule 45.*

#### **E. ANALYSIS (JURISDICTION OF THE SOLE ARBITRATOR)**

75. The Panel turns next to its analysis of the CAS Sole Arbitrator's jurisdiction. To the extent that the reasons for the Panel's findings on jurisdiction differ from those identified by the CAS Sole Arbitrator in the first instance, the Panel draws comfort from the *de novo* power of review conferred upon it under Article R57 of the CAS Code. That article states that the "Panel has full power to review the facts and the law." The Panel further considers its ability to consider jurisdiction anew (and the grounds therefor) to be buttressed by the jurisprudence of the Swiss Federal Tribunal. *See, e.g.,* Swiss Federal Tribunal, Judgment 4A\_392/2008 of 22 December 2008 (in analyzing whether an arbitral tribunal correctly retained jurisdiction, the court can find that it had jurisdiction on grounds different from those enunciated previously, "as long

as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons”).

**a. Applicable requirements of the CAS Code**

76. The Parties disagree as to the application of the CAS Code to the dispute before the CAS Sole Arbitrator. In particular, they adopt divergent positions concerning the extent to which Article R47 of the CAS Code governs and, if it does, whether it imposes threshold requirements beyond those present in IAAF Rule 38.3.
77. Implicit in the Appellant’s position is the view that Article R47 functions as a jurisdictional gatekeeper independently of the rules of federations seeking recourse to CAS pursuant to their internal statutes. The Appellant’s position, in short, conceives of Article R47 as requiring satisfaction separately from the IAAF Rules. In her view, to the extent that a requirement of Article R47 was not satisfied by the IAAF before it referred the dispute to CAS, the CAS Sole Arbitrator lacked jurisdiction.
78. The Respondent, in contrast, denies that Article R47 imposes requirements of its own. It submits that the dispute was referred to CAS as an ordinary arbitration proceeding, not as an appeal; in consequence, jurisdictional hurdles inhere solely in the IAAF’s own rules and in Article R27 – but not Article R47 – of the CAS Code. The appellate procedure outlined in Article R47 et seq. becomes operational only once CAS has assumed jurisdiction over a matter, not before.
79. The Panel, on the basis of the evidence before it, concludes that the case was introduced by the IAAF as an ordinary arbitration proceeding. This is evident in the manner with which the IAAF and the CAS Court Office have designated the dispute since the filing of the Respondent’s Request for Arbitration. It is consistent with the Parties’ correspondence, including the IAAF’s explicit reference to a “first instance hearing panel.” Moreover, this conclusion is consistent with the policy logic underlying both the IAAF Rules and the CAS Code, as explained below.
80. The Appellant’s submission that the CAS Code’s jurisdictional requirements for appeals are triggered in her case principally relies on the reference in IAAF Rule 38.3 to the appeal arbitration procedure. In the Panel’s view, however, this reference merely concerns the procedural rules to be followed during the arbitral proceedings, not the threshold questions of jurisdiction. This is supported by several elements.
81. First, the text of the Rule stipulates that the rules of CAS appeal procedures govern the “handling” of the case only:

*The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal).*

This choice of wording is striking. Rule 38.3 does not, for example, state that a case must be *submitted* pursuant to the rules applicable to appeals, nor that those rules *govern* the case. Indeed, in the first place, Rule 38.3 does not primarily refer to the

appeal arbitration procedure, but more broadly to “CAS rules” (i.e., all of them). The appeal procedure is listed subsequently in a parenthetical clause – but even then the rule derogates from the procedure by waiving “any time limit for appeal.” The IAAF Rules, in short, neither give primacy to the appeal arbitration procedure nor adopt it wholeheartedly. To the contrary: the appeal arbitration procedure appears subordinate and piecemeal.

82. The procedural cocktail evident in Rule 38.3, moreover, is consistent with a policy encouraging expedited proceedings where no decision has been or can be made by the relevant IAAF Member federation. The appeal arbitration procedure offers various time-saving efficiencies relative to ordinary arbitration procedure. For example, the appeal procedure provides for only one round of submissions and requires delivery of the operative part of the award within three months of the transfer of the case file to a CAS panel; the ordinary arbitration procedure, in contrast, allows for two (or even three) rounds of written pleadings and has no time limit for the delivery of the award. The rule’s clear rationale is to obtain a quicker proceeding. In the view of the Panel, this logic is reasonable and appropriate where an IAAF Member’s disciplinary system fails, for whatever reason, to fulfill its function.
83. In contrast, the Panel considers that the interpretation suggested by the Appellant is neither compelled by a textual reading of Rule 38.3 nor consistent with its object and purpose. Indeed, the full applicability of the jurisdictional requirements of Article R47 would lead to the impossibility of applying Rule 38.3 as a basis for CAS jurisdiction, as there would never be a previous decision to review or prior internal remedies to exhaust. Such an interpretation is inconsistent with the interpretive principle *ut res magis valeat quam pereat* (known in French as the principle of *effet utile*), according to which an interpretation rendering a rule effective must prevail over one which renders it superfluous.
84. The Panel therefore concludes that the requirements in Article R47 governing appeals are inapplicable to the IAAF’s referral of the matter to a CAS Sole Arbitrator and did not operate to preclude him from assuming jurisdiction over the dispute. Accordingly, the criterion for jurisdiction of the CAS Sole Arbitrator over the dispute, as an ordinary arbitration proceeding, is found in Article R27 (requiring “*an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement*”) and Article R38 (requiring an “*arbitration agreement*” or “*any document providing for arbitration*”) of the CAS Code. The Panel therefore turns next to whether IAAF Rule 38.3 functions as a valid arbitration agreement.

**b. Adequacy of the IAAF Rules as an “arbitration agreement”**

85. Having determined that the proceedings before the CAS Sole Arbitrator were submitted as ordinary arbitration proceedings and therefore neither constituted an “appeal” nor triggered additional threshold requirements in Article R47 of the CAS Code, the Panel addresses whether there exists an arbitration agreement capable of referring the dispute to CAS.

86. As a general matter, the Appellant's submissions are replete with references to the power dynamics underlying her acceptance of the IAAF Rules. Neither Party disputes the IAAF Rules' application in principle, including its arbitration clause. However, in the Appellant's view, Rule 38.3 must be interpreted narrowly and in her favor to the extent that it admits of ambiguity. The Appellant has given particular emphasis to the IAAF's bargaining power vis-à-vis athletes (who effectively have no choice but to acquiesce to an arbitration agreement in order to be eligible to compete).
87. The Panel agrees that voluntary submission to the jurisdiction of an arbitral tribunal in such circumstances is to be construed parsimoniously. At the same time, it is sensitive to the reality that power asymmetries in sports arbitration agreements are inherent in the governing frameworks of international sport. As recognized by the German *Bundesgerichtshof*, for example, while a sporting federation's unilateral imposition of an arbitration agreement undeniably leaves athletes little bargaining power, the imposition also protects compelling constitutional interests – the autonomy of sporting associations – and is justified by the need for a uniform approach to doping. (See *Pechstein v. International Skating Union*, *Bundesgerichtshof* decision of 7 June 2016, KZR 6/15. The German Federal Constitutional Court stated: "*Andererseits erfolgt durch den Zwang zur Schiedsgerichtsbarkeit eine verfahrensrechtliche Absicherung der gleichfalls verfassungsrechtlich gewährleisteten Verbandsautonomie der Beklagten [...] Zudem vermag ein einheitliches Sportschiedsgericht zur Rechtsfortbildung im Rahmen des internationalen Sportrechts beizutragen*," that is, "On the other hand the imposition of arbitration provides for a procedural safeguard of the likewise constitutionally guaranteed autonomy of association of the respondent [...] Moreover, a unified sports arbitral court may contribute to the development of international sports law." *Id.* at paras. 53-63.)
88. For its part, the Swiss Federal Tribunal – which has jurisdiction to determine any challenges against CAS awards – has adopted a "benevolent" approach toward sports arbitration. (The Swiss Federal Tribunal has explicitly endorsed "*la 'bienveillance' avec laquelle il convient d'examiner le caractère consensuel du recours à l'arbitrage en matière sportive*," that is, "the 'benevolence' by which the consensual character of recourse to arbitration in sporting matters must be examined," Judgment 4P.172/2006 of 22 March 2007, at para. 4.2.2.3.) It accepts as legitimate arbitration clauses "imposed" by international sports organizations on athletes, insofar as those agreements aim "to promote the swift resolution of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS." (Judgment 4A\_428/2011 of 13 February 2012, at para. 3.2.3.) The Panel's continuing analysis of this case is consistent with this jurisprudence.
89. The Panel notes in this context the Swiss Federal Tribunal case of *WADA v. Busch*, Judgment 4A\_358/2009 of 6 November 2009, which appears to depart from that court's principle of benevolence vis-à-vis arbitration agreements. In *Busch*, the World Anti-Doping Agency sought to appeal from a decision of the International Ice Hockey Federation (IIHF) declining to sanction an athlete who had refused to submit to out-of-competition doping control at his apartment. The German ice hockey federation

issued a public reprimand; the IHHF stated in an e-mail to WADA that it lacked competence (or desire) to revisit the issue; WADA disagreed with the outcome and brought the matter to CAS (CAS 2008/A/1564). The CAS panel focused on “Player Entry Forms” as the basis for jurisdiction. On appeal, therefore, the Swiss Federal Tribunal assessed the apparent intentions of the parties and refused to deem the athlete to have agreed to arbitrate on the basis of the Player Entry Forms. There was effectively no nexus between the paperwork (which related to specific competitions) and the alleged violation (which had nothing to do with those competitions). Critically, however, the *Busch* case does not undermine but rather confirms the general validity of arbitration agreements incorporated by reference. Judgment 4A\_358/2009, at para. 3.2.4. It is simply the case that, because the CAS panel failed to ground its decision on incorporation of a sporting federation’s general arbitration clause – focusing instead on competition-specific Player Entry Forms – the Swiss high court did not credit this argument, either. *Id.* On this basis, the Panel understands *Busch* to be consistent with oft-expressed Swiss jurisprudence on the validity of arbitration agreements incorporated by reference. The Panel, moreover, does not consider the attenuated facts of *Busch* apposite to these proceedings, which concern not competition-specific paperwork but rather the IAAF Rules. Those rules’ application – including the arbitration clause at IAAF Rule 38 – is accepted in principle by both Parties.

90. Rule 38.3 of the IAAF Rules is relied upon by the Respondent for jurisdiction:

*(38.3) If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete’s request to the Member. [...] If the Member **fails to complete** a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an international-level Athlete, to **have the case referred directly to a single arbitrator appointed by CAS.** The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure by a Member to hold a hearing for an Athlete within two months under this Rule may further result in the imposition of a sanction under Rule 45. (emphasis added)*

91. The Panel observes, first, that IAAF Rule 38.3 does not define “failure to complete.” There is therefore a degree of doubt as to what role or roles the IAAF, in “taking over” ARAF’s responsibilities, might play in first-instance adjudication of doping charges against Russian athletes. The Respondent denies that “IAAF adjudication” exists as a possible remedy, even in light of ARAF’s suspension, and maintains that it sought to clarify the procedural posture of the case with the Appellant in its written

correspondence. For her part, the Appellant implies that ARAF must have been provided an “opportunity” to fulfill its adjudicatory role prior to being deemed as having failed to do so. One side alleges ARAF has not failed because it is suspended; the other considers ARAF to have automatically so failed.

92. The Panel observes that Rule 38.3 contains no language suggesting – as the Appellant does – that the conduct of a Member federation, or the reasons for its inability to conclude disciplinary proceedings, should determine whether CAS assumes jurisdiction over a dispute. As a general matter, an athlete’s right to a hearing convened by his or her national federation is sensible as a guarantee of access to proximate and culturally attuned adjudicators. But, as the Respondent has noted, “the purpose [of Rule 38.3] is precisely to enable IAAF” to refer cases to CAS where they cannot be done expeditiously in Russia – as they self-evidently cannot in this case.
93. It is plain that, under ordinary circumstances, anti-doping rule violations would be referred by the IAAF to ARAF, the relevant “Member” referenced under Rule 38.3. The Respondent acknowledges as much. Disciplinary matters typically arrive at the CAS as appeals against a prior decision, not as proceedings in the first instance.
94. It is equally plain, however, that the circumstances underlying the case against the Appellant are anything but ordinary. ARAF’s membership in the IAAF has been suspended since 26 November 2015. That suspension was imposed by the IAAF Council, and accepted by ARAF, in response to unprecedented evidence of systematic interference in and circumvention of anti-doping controls in Russia. Athletics is but one of many disciplines affected by these revelations, whose effects continue to reverberate in Russian sport and across the world sporting community. In light of its suspension, ARAF was in no position to convene a hearing in respect of the IAAF’s investigation of Ms. Chernova. Indeed, *no* national entity within the Appellant’s Member State has jurisdiction under the IAAF Rules to conduct a hearing in her case (or others like it).
95. In these circumstances, the CAS Sole Arbitrator accepted the IAAF’s argument that it was unnecessary to impose a deadline on ARAF prior to referring the dispute to CAS. The Panel agrees with that conclusion. Provided that ARAF was incapable of meeting its statutory deadline for adjudicating Ms. Chernova’s case, the IAAF was entitled under Rule 38.3 to refer the matter to CAS.
96. Having determined that the requirements of IAAF Rule 38.3 are met and that Article R47 of the CAS Code does not apply as a jurisdictional gateway, the IAAF has demonstrated that CAS enjoyed jurisdiction over the first-instance hearing before the Sole Arbitrator.

**c. The Parties’ correspondence as an “arbitration agreement”**

97. Since Rule 38.3 is a valid arbitration agreement, the Panel does not consider it indispensable to consider the Parties’ correspondence, and in particular whether the Parties’ exchanges created a later arbitration agreement. Nevertheless, out of an

abundance of caution, the Panel notes that the Appellant's letter of 19 February 2016 is a clear acquiescence to CAS referral and would therefore suffice as an independent basis for jurisdiction.

98. In its letter dated 5 February 2016, the IAAF informed the Appellant that it was bringing charges against her and offered two CAS-administered options (pursuant to IAAF Rules 38.3 and 38.19, respectively). The IAAF also explained that ARAF's suspension and corresponding inability to adjudicate her case (and others like it) comprised the context for its proposal. The Appellant's counsel responded in the following terms:

*We hereby inform you that Athlete requests a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-Related Arbitration (CAS) because the Athlete denies the accusation presented in terms of the Athlete's Biological Passport.*

*According to your letter dated 05.02.2016, Athlete's case shall be transferred to the Court of Arbitration for Sport in Lausanne (Switzerland), should the Athlete request a hearing within the period specified in paragraph 10 of the letter.*

99. The IAAF's intention to submit the dispute to CAS is undisputed. After requesting a hearing as specified in the Respondent's letter, the Appellant acknowledged that the case would be submitted to CAS and governed by the CAS Code. In the Panel's view, this language leaves little doubt that the Appellant agreed to refer her matter to CAS.
100. The Appellant offers two arguments in her favor. First, she notes that her reply invoked Rule 38.2 and not 38.3 – only the latter of which explicitly mentions CAS. Second, in the Appellant's view, the Respondent's interpretation of Rule 38.3 was "false" and the IAAF's insistence on this position deprived the Appellant of an opportunity to respond "*bona fide*."
101. The Panel observes that IAAF Rules 38.2 and 38.3 are adjacent parts of a coherent whole: the request for a hearing under Rule 38.2 proceeds within the parameters set out in Rule 38.3; neither sub-paragraph exists in a vacuum. The Appellant's letter, moreover, was animated by an IAAF letter that *did* expressly refer to Rule 38.3 in the context of setting out the very "option" to which the Appellant was directing her response. Read in context, therefore, it is impossible to conclude that the Appellant was unaware either of Rule 38.3 or the interpretation given to it by the Respondent.
102. To the extent the Appellant disagreed, she was free to take a contrary position. Yet her correspondence indicates not opposition to but rather an endorsement of the IAAF's proposal. Nowhere is this more apparent than in the Appellant's request of a hearing "according to the requirements of the Code of Sports-Related Arbitration (CAS)." Proceedings handled by ARAF alone would not proceed "according to" the CAS Code *per se*, but rather pursuant to internal procedural rules (and in accordance with IAAF

substantive anti-doping rules). There would be no need to invoke the CAS Code if the Appellant did not already envisage referral of her matter to CAS.

103. The Panel does not consider the Appellant to have been deprived of an opportunity to respond “*bona fide*.” The Appellant could have but did not express a position contrary to that of the IAAF – for instance by articulating her belief that ARAF’s suspension did not suffice as a “failure” to meet the two-month deadline anchored in Rule 38.3. To the contrary, her correspondence strikes a specific and unequivocal note of agreement with the very procedural outcome against which this appeal is presently sought. That the Appellant’s counsel failed to articulate such a position, if held, may be strategic error but it is not a due process violation.
104. In requesting a hearing pursuant to Rule 38.2, the Appellant’s counsel explicitly requested a hearing governed by “the Code of Sports-Related Arbitration” and, in the following paragraph, acknowledged the IAAF’s intention to refer the matter to CAS in light of ARAF’s suspension. That these statements, read in context, evince no agreement to arbitrate before CAS beggars belief. Accordingly, even if IAAF Rule 38.3 did not contemplate CAS as the appropriate judicial venue, the Panel would consider the Parties’ correspondence to constitute adequate grounds for finding CAS jurisdiction.
105. In conclusion, the Athlete’s submission concerning the jurisdiction of the CAS Sole Arbitrator fails. As this was the only issue raised by the Athlete in her appeal, the Panel accordingly dismisses the appeal and confirms the Appealed Award.

## VI. COSTS

106. Article R64.4 of the CAS Code provides the following:

*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of the arbitration, which shall include: the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.*

107. In contrast, Article R65.2 provides that the proceedings “shall be free.” The provision applies, however, only to “appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body.”
108. In light of ARAF’s suspension and, consequently, the procedural posture of this appeal, the Panel must first determine whether these proceedings are properly



categorized under Article R64 (costs are assessed by CAS and allocated by the Panel) or Article R65 (fees and costs of the arbitrators, and costs of CAS, are “borne by CAS”). In particular, the Panel considers whether the present appeal is against a decision “rendered by an international federation or sports-body” for the purpose of Article R65.

109. This procedure concerns an appeal from a decision rendered by a CAS Sole Arbitrator substituting for ARAF, the national athletics federation of Russia, during the latter’s suspension. Such substitution, the Panel has held, was legally tenable and justified.
110. The unprecedented revelations precipitating ARAF’s suspension have led to a jurisdictional issue of first impression, but there is no question that an appeal from ARAF, had it been in a position to render a first-instance decision, would proceed only under Article R64. “International federation or sports-body,” in other words, captures entities such as the IAAF but not *national* member federations such as ARAF. It follows that the decision challenged in the present procedure, rendered by a Sole Arbitrator acting in ARAF’s stead, likewise was not “rendered by an international federation or sports-body.” Because a decision by ARAF would fall under Article R64, so too does the Appealed Award. Accordingly, the Panel deems Article R64 – not Article R65 – of the CAS Code to apply.
111. Costs of this procedure must therefore be borne by the Parties. In this regard, Article R64.5 of the CAS Code reads as follows:

*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.*

112. Having taken into account the outcome of the arbitration, the Panel decides that the Appellant shall bear the entire arbitration costs, to be determined and served to the Parties by the CAS Court Office.
113. As to legal and other costs, the Panel observes that the Appellant, though ultimately unsuccessful, raised a plausible claim on appeal. Taking into account both the issues raised and the outcome of the arbitration, as well as the financial resources of each Party, and pursuant to Article R64.5 of the CAS Code, the Panel finds that the Appellant shall pay a contribution toward the IAAF’s legal fees and other expenses incurred in connection with these proceedings, in an amount of CHF 3,000.

## **ON THESE GROUNDS**

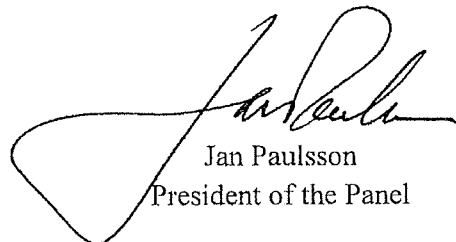
### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by Ms. Tatyana Chernova on 12 January 2017 against the International Association of Athletics Federations (IAAF) against the decision rendered by the Court of Arbitration of Sport (CAS 2016/O/4469) is dismissed.
2. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne by Ms. Tatyana Chernova.
3. Ms. Tatyana Chernova shall bear her own costs and is ordered to pay to the International Association of Athletics Federations (IAAF) the amount of CHF 3,000 (three thousand Swiss Francs) as a contribution toward the legal fees and other expenses incurred in connection with these arbitration proceedings.
4. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 18 July 2017

## **THE COURT OF ARBITRATION FOR SPORT**



Jan Paulsson  
President of the Panel