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Swiss Federal Supreme Court
I. Civil Law Division
Av. du Tribunal fédéral 29
1000 Lausanne 14

January 7, 2025

Case No. 4A_494/2024 / ABS: Comments on the Responses of the Respondents and the Statement of the CAS

Dear Mr. President
Dear Federal Judge [redacted]
Dear Federal Judges

In the matter of

Jordan Lucella Elizabeth Chiles **Applicant**
[redacted]

individually represented by Attorney Gabrielle Nater-Bass, Attorney Dr. Stefanie Pfisterer, Attorney Richard G. Allemann, and Attorney Frédéric Fitzi, Homburger AG, Prime Tower, Hardstrasse 201, 8005 Zurich

against

Federation Romanian Gymnastics **Respondent 1**
[redacted]

represented by Attorney Prof. Dr. Madalina Diaconu, SPLC Avocats & Notaires, Trésor 9, P.O. Box 2232, 2001 Neuchâtel

Ana Maria Bărbosu **Respondent 2**
[redacted]

represented by Attorney Sabin Liviu Gherdan, Gherdan & Associates Sports Lawyers, Calea Turzii 30, 400193 Cluj-Napoca, Romania

and

Non-binding machine translation of the German original version

Fédération Internationale de Gymnastique **FIG /**
Avenue de la Gare 12A, 1003 Lausanne **Respondent 4**

individually represented by Attorney Dr. Vincent Jäggi, Attorney Riccardo Coppa, and Attorney Dr. Michael Kottmann, Kellerhals Carrard Lausanne/Sion SA, Place Saint-François 1, P.O. Box, 1001 Lausanne

together the Respondents

as well as

Donatella Sacchi **Interested Party 1**
c/o Fédération Internationale de Gymnastique,
Avenue de la Gare 12A, 1003 Lausanne

USA Gymnastics **USAG /**
1099 N. Meridian Street, Suite 800, Indianapolis, **Interested Party 2**
IN 46204, USA

represented by Attorney Elliott Geisinger, Attorney Benjamin Gottlieb, and Attorney Anne-Carole Cremades, Schellenberg Wittmer AG, 15bis, rue des Alpes, P.O. Box 2088, 1211 Geneva

regarding the arbitral award of August 10 and 14, 2024, of the Court of Arbitration for Sport, Ad Hoc Division – Games of the XXXIII Olympiad in Paris, Arbitration Case No. CAS OG 24-15 / CAS OG 24-16 (Arbitration)

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Reasoning

I. Formalities

A. General

1 By order of December 3, 2024, received on December 4, 2024, the Applicant was informed of the responses from Respondents 1, 2, and 4, the statement from the Interested Party 2, and the submission from the CAS (act. 23, 26, 29, and 31) and was notified that any comments should be made by December 18, 2024. By order of December 11, 2024, this deadline was extended to January 7, 2025.

2 With the present submission, the Applicant submits timely brief comments on the responses from Respondents 1 and 2 (act. 31) as well as 4 (act. 29) and on the submission from the CAS (act. 26). The Applicant has no comments on the statement from the Interested Party 2 (act. 23).

3 The Applicant has adjusted the heading according to the party selection made by the Federal Supreme Court as per the order of September 19, 2024. Regarding Donatella Sacchi, now listed as Interested Party 1, the Applicant notes that the CAS Panel had denied its jurisdiction *ratione personae* over her (act. 1, para. 35; award, para. 91), which is not reflected in the dispositive part of the arbitral award (award, p. 29).

4 The Applicant uses the same abbreviations as in the set-aside brief (act. 1). All time references continue to refer to Central European Time (**CET**), unless otherwise noted (act. 1, para. 22).

B. Admissibility of the Applicant's Submissions Regarding the Factual Findings of the Arbitral Tribunal

5 Respondents 1 and 2 allege, on formal grounds, that the Applicant has presented a factual situation that goes beyond the scope of the arbitral award (act. 31, para. 59 et seqq.). They overlook that the Federal Supreme Court can review the factual findings of the challenged arbitral award and can accept new evidence if complaints are raised against these factual findings according to Art. 190 para. 2 PILA (SFC 4A_396/2024, cons. 4.2.1; SFC 4A_538/2012, cons. 3.2; SFC 138 III 29, cons. 2.2.1).

6 To the extent that the Applicant has criticized the factual findings of the arbitral award and particularly the summary of the procedural history in her set-aside brief, this was done in the context of her complaints concerning the composition and the right to be heard (Art. 190 para. 2 lit. a and d PILA; detailed in act. 1, para. 139 et seqq. and 183 et seqq.). Contrary to the arguments of Respondents 1 and 2 (act. 31, para. 63 et seqq.), the delayed notification to the Applicant about the initiation of the arbitration proceedings (act. 1, para. 88 et seqq.) constitutes a basis for the complaints concerning the composition of the arbitral tribunal. As already explained in the set-aside brief, the late notification put the Applicant under extreme time pressure, making it unreasonable for

her to investigate potential conflicts of interest of the CAS Panel members (act. 1, para. 173 et seqq.; below, para. 40 et seqq.). The late delivery of the Omega report to attorney Paul Greene is also a basis for the complaint regarding the right to be heard, as it prevented the Applicant from submitting further evidence at an earlier stage (act. 1, para. 98; below, para. 27 et seqq.).

7 To substantiate the complaints raised by her (Art. 190 para. 2 lit. a and d PILA; detailed in act. 1, para. 139 et seqq. and 183 et seqq.), the Applicant is therefore entitled to point out internal contradictions in the arbitral award (act. 1, para. 116 and 120) and a false representation of the procedural history (act. 1, para. 105 et seqq. and 120). It is also her right to address relevant facts that became known to her only after the issuance of the arbitral award and to prove these (act. 1, para. 23). It follows that all factual assertions made by the Applicant are admissible.

II. Facts (act. 26, para. 1 et seqq.; act. 29, para. 15 et seqq.; act. 31, para. 1 et seqq.)

A. Regarding the Long-Standing Mandate Relationship Between Dr. Gharavi and the Romanian State

8 The CAS and Respondents 1 and 2 attempt to downplay the ongoing mandate relationship between Dr. Gharavi and the Romanian state by claiming, among other things, that representing Romania constitutes only a negligible part of Dr. Gharavi's mandate portfolio. Additionally, Respondents 1 and 2 make the entirely unsubstantiated allegation that Dr. Gharavi is a member of one of the wealthiest families in France (act. 31, para. 31).

9 The Applicant is unaware of whether the allegations made by the CAS and Respondents 1 and 2 are true. She can therefore only dispute them with lack of knowledge. However, she permits herself the following remarks:

- Notably, Dr. Gharavi himself, who had the opportunity to comment in the arbitral tribunal's submission and who could have reliably provided information about his activities and income, did not submit comments. Instead, only the *Directeur Général* of the CAS provided a statement (see act. 26, p. 1).
- The assertions of the CAS and the Respondents 1 and 2 are, in any case, completely unsubstantiated and unsupported. The 200 – or is it 250? – arbitration cases in which Dr. Gharavi is said to have been involved over the course of his career (act. 26, para. 48; in contradiction to this: act. 31, para. 30) apparently refer to a period of about 30 years (act. 32/1, p. 14). Furthermore, the speculative insinuations of the CAS and the Respondents 1 and 2 (act. 31, para. 29 et seqq.) do not allow any conclusions to be drawn regarding how the fees received from the Romanian state in the aforementioned ICSID proceedings related to Dr. Gharavi's total income during the period of the proceedings in question.

- Furthermore, the Respondents 1 and 2 seem to have in-depth insights into the finances and media empire of Dr. Gharavi's family, but do not claim that Dr. Gharavi himself is wealthy. Thus, the allegation made in act. 31, para. 31, is irrelevant from the outset. Even if Dr. Gharavi himself were wealthy, this would also be completely irrelevant in light of Art. 180 para. 1 lit. c PILA (see below, para. 31 et seqq.).
- It is also particularly telling that the Respondents 1 and 2 apparently have non-publicly accessible information about Dr. Gharavi's activities, income, and assets, when it is precisely they who want to assert Dr. Gharavi's complete independence.

10 As the Applicant will further demonstrate, the unsubstantiated and unproven attempts at relativization by the Respondents 1 and 2 and the CAS do not change the blatant conflict of interest in which Dr. Gharavi found himself during the arbitration proceedings (see below, para. 31 et seqq.). This conflict of interest would not be diminished in any way, even if it were true (which is disputed) that Dr. Gharavi himself is wealthy. Any other conclusion would lead to absurd shifts in the generally accepted criteria used to assess the impartiality and independence of an arbitrator (see also below, para. 31 et seqq.).

11 The Respondents 1 and 2 (as well as the CAS) rightly do not dispute that:

- Dr. Gharavi was in an **ongoing mandate relationship with the Romanian state** at the time of the arbitral award on August 10 and 14, 2024, and that he represented it in three ICSID arbitration proceedings (act. 1, para. 77);
- this mandate relationship had already lasted **for (at least) eight years** at the time the contested CAS arbitration proceedings were initiated (act. 1, para. 131; see also act. 3/58, p. 1);
- given the dispute values of the relevant ICSID proceedings, it must be assumed that Dr. Gharavi's law firm received **fees in the millions** for handling the two cases ARB/16/19 and ARB/20/15, a significant portion of which went to Dr. Gharavi as the lead partner and name partner of the firm (act. 1, para. 134); and
- **Dr. Gharavi himself also assumed that his representation of Romania in the said ICSID proceedings raised legitimate doubts about his independence and impartiality**, which is why he disclosed his mandates in the acceptance and independence declaration (act. 1, para. 76 and 156), but this was not communicated to the Applicant (see para. 39).

12 Finally, the assertion by Respondents 1 and 2 that Dr. Gharavi decided against Romania as a party arbitrator in ICSID case No. ARB/10/13, ordering the state to pay EUR 10 million (act. 31, para. 25 and 102), is misleading. As the arbitral award shows, the arbitral tribunal unanimously dismissed the arbitration claim against Romania to the extent of at least EUR 440 million (Exhibit 73, p. 117). A representative of Romania was later quoted regarding the award as follows: "*Romania's position was successful on a large number of issues and [...]* ***the amount dismissed was more than 98 per cent of what the claimants sought***" (Exhibit 73, p. 3, emphasis added). The Respondents 1 and 2

submitted the arbitral award in ICSID case No. ARB/10/13 only in excerpts in act. 32/3, violating the rule that exhibits must be submitted in their entirety (instead of all BSK-DOLGE, ZPO 180 N 12). The fact that the investor's arbitration claim was largely dismissed is evident from passages of the award not included in act. 32/3 (Exhibit 73, p. 128 et seq.).

Evidence:

- Global Arbitration Review of March 10, 2015, ICSID panel awards limited damages against Romania, — Exhibit 72
- Final Award of March 2, 2015, in the proceeding ICSID Case No. ARB/10/13, — Exhibit 73

13 The statements of the CAS that Dr. Gharavi is a graduate of an American university, admitted as a lawyer in the US state of New York, began his career at a famous American law firm, and has also represented American clients during his career (act. 26, para. 48 et seq.) are absurd. These connections to the USA correspond to a tradition of European lawyers completing postgraduate studies in the USA and working there for a certain period. However, such connections are in no way comparable to the long-standing, still ongoing mandate relationship with the Romanian state. Dr. Gharavi rightly did not disclose these circumstances as possible grounds for rejection in his acceptance and independence declaration. Moreover, the CAS does not claim that Dr. Gharavi represented the US government or the USA.

14 It also remains unclear what Respondents 1 and 2 are aiming for when they argue that Dr. Gharavi was heavily criticized in the media or even received death threats after the publication of the arbitral award (act. 31, para. 33 et seq.). The Applicant very clearly distances herself from offensive insults and attacks on Dr. Gharavi's person. However, she cannot be held responsible for this, as Respondents 1 and 2 insinuate; the control of the media – including the Los Angeles Times (act. 32/8) – or the public is beyond the Applicant's sphere of influence.

15 Nevertheless, the great media attention and public criticism of Dr. Gharavi and the CAS Ad hoc Division illustrate how obvious the appearance of his bias was from the perspective of uninvolved third parties. They also show how serious the procedural deficiencies in the conduct of the proceedings were, which completely denied the Applicant an effective defense with suitable evidence (see also act. 29, para. 67 et seqq. and 81) and her right to an independent and impartial arbitral tribunal, leading to a materially grossly incorrect decision. Moreover, Respondents 1 and 2 do not deny the said appearance of bias of Dr. Gharavi but even reinforce it with further public statements (act. 31/7 and act. 31/8). Even the newspaper *L'Équipe*, allegedly belonging to Dr. Gharavi's family (act. 31, para. 31), reported on "*unbelievable entanglements*" in the arbitration proceedings in question (Exhibit 74, p. 1: "*Un incroyable imbroglio qui n'en finit pas de faire des remous*").

Evidence:

— L'Equipe of August 22, 2024: "Un coup dur pour moi, et ceux qui m'ont soutenue", Jordan Chiles, the American gymnast, is finding it hard to accept the revocation of her bronze medal, Exhibit 74

B. On the Relationship of Respondents 1 and 2 to the Romanian State and Its Interest In the Outcome of the Arbitration Proceedings in Question

16 Furthermore, Respondents 1 and 2 take issue with the Applicant's statement that Respondent 1 is a legal entity controlled by the Romanian state (act. 31, para. 2). However, Respondents 1 and 2 do not deny and therefore acknowledge that (see in detail act. 1, para. 27 et seqq.):

— the Romanian state has a "national interest" in the activities of Respondent 1 (Art. 35 para. 1 of the Romanian Sports Law [act. 3/6]);

— Respondent 1 exists by virtue of a state concession from the Romanian Ministry of Youth and Sports *(Art. 36 para. 1 of the Romanian Sports Law [act. 3/6]:* "National sports federations may only be established with the express approval of the Ministry of Youth and Sports");

— Respondent 1 is subject to the **ongoing "supervision and control" of the Romanian Ministry of Youth and Sports** (Art. 9 of the statutes of Respondent 1 [act. 3/5]); and

— the Romanian state even has to individually approve the participation of gymnasts in international competitions such as the Olympic Games (Art. 10 of the statutes of Respondent 1 [act. 3/5]).

17 The fact that Respondent 1 is organized in a private law form and is formally classified as "*non-governmental*" or "*apolitical*" by the Romanian Sports Law (so but act. 31, para. 2 and 99) does not change this. The ongoing "*supervision and control*" over Respondent 1 and the "*express approval of the Ministry of Youth and Sports*" for its establishment go far beyond the registration requirement in a public (commercial) register or "*certaines exigences administratives*" that ordinary legal entities with a non-profit purpose must meet (so but act. 31, para. 80 and 100). In any case, in fact, Respondent 1 is very much a legal entity controlled by the Romanian state.

18 The denial in act. 31, para. 6, asserting that Respondents 2 and 3 did not represent Romania at the 2024 Olympic Games, is contradictory. As already shown in the set-aside brief, Respondent 2 explicitly acknowledged this in the media during the medal ceremony in Bucharest (act. 69: "*I am glad to be in possession of this medal and **I hope to continue to represent Romania at the highest level***"). It is also undisputed that Respondent 2 appeared at the Olympic Games in her nation's jersey and carried the Romanian flag (act. 1, para. 160). The statement that it would at most be true in a colloquial sense that the participating athletes at the Olympic Games each represent

their nation is false (act. 31, para. 6). As shown in the set-aside brief, this is even explicitly stated in the Olympic Charter and its by-laws (in detail act. 1, para. 161; see also act. 31, para. 9: "*Neuf gymnastes y ont participé, dont la recourante, Jordan Chiles (USA) et l'intimée,* ***Ana Maria Bărbosu (ROU***)", emphasis added).

19 The Respondents 1 and 2 do not dispute that even the current Romanian Prime Minister has expressed great interest in the present dispute in the media and has even attributed significance to it in a broader geopolitical context (see the comparison of Team USA with the Soviet Union, see act. 1, para. 136, and act. 3/66). It is rather "*chose courante*" that heads of state have a great interest in the Olympic Games (act. 31, para. 101). In this context, the Respondents 1 and 2 even admit themselves that the interest of Romanian politicians in the arbitration proceedings in question is even greater than usual due to the ongoing election campaign (which is likely to refer to the presidential election) in Romania (act. 31, para. 101).

20 In view of the Romanian state's control over Respondent 1, the close entanglement and interests of the Romanian political leadership, and the fact that Respondent 2 itself correctly acknowledges representing Romania, Dr. Gharavi's ongoing mandate for the state of Romania constitutes a clear and unequivocal conflict of interest.

C. Regarding the Alleged Knowledge of the Applicant About the Ongoing Mandate Relationship Between Dr. Gharavi and the Romanian State

21 In their response, Respondents 1 and 2 repeatedly assert that the Applicant was aware of Dr. Gharavi's conflict of interest because his acceptance and independence form was delivered to her by the CAS Ad hoc Division no later than August 9, 2024 (act. 31, e.g., para. 36 and 85: "*La déclaration d'acceptation a été dûment transmise aux parties et aux participants à la procédure, qui l'ont toutes et tous reçue*").

22 This assertion by Respondents 1 and 2 is obviously contrary to the record and contradicts the statements of the CAS (act. 26, para. 39 and 56). As the Applicant has shown in detail and with supporting evidence in her set-aside brief, the acceptance and independence declaration was not included in the download folder that the CAS Ad hoc Division transmitted to USOPC on August 9, 2024, and which USAG forwarded to attorney Paul Greene at 5:16 PM. The Applicant refers at this point to the corresponding statements in the set-aside brief (act. 1, para. 89). The CAS does not dispute the failure to deliver the acceptance and independence declaration to the Applicant, nor its absence from the said download folder (act. 26, para. 17).

23 This remains unchanged by the fact that the download folder received by attorney Greene for the first time on August 9, 2024, at 5:16 PM (act. 3/32) included an email from the CAS Ad hoc Division dated August 7, 2024, at 10:42 AM, which referred to a "*disclosure*" by Dr. Gharavi in the attachment (so act. 26, para. 36 and 56).

— As already mentioned in the set-aside brief, this email was only found at the end of an email chain with the unspecific subject "*R: CAS OG 24/15-16*", which at the top

contained Donatella Sacchi's statement on the matter. This statement did not address the constitution of the arbitral tribunal or Dr. Gharavi's "*disclosure*" (act. 1, para. 89; act. 2/31).

— This email chain, in turn, was not filed as an independent document in the said download folder, as would have been expected in proper record-keeping, but merely as an attachment to another email from the CAS Ad hoc Division dated August 8, 2024, at 8:36 AM (act. 2/31). In this email, the parties were given a deadline to comment on Respondent 4's request to refer the matter to the ordinary CAS procedure according to Art. 20 lit. c CAS OG Rules. The email of August 8, 2024, at 8:36 AM, therefore did not refer to the constitution of the arbitral tribunal but to a completely different topic. Dr. Gharavi's "*disclosure*" was also not mentioned in this email.

24 As already mentioned, the download folder contained a total of 44 emails, 31 other documents, and over 500 pages (act. 1, para. 89). Given this volume of data, the convoluted structure in which the email of August 7, 2024, at 10:42 AM, was hidden, and the massive time pressure the Applicant was under, finding the email of August 7, 2024, at 10:42 AM, was like finding a needle in a haystack without being aware of the existence of this needle. As the Applicant will show again later, it should not be to her detriment that she did not find this email in the short time between the initial notification of the arbitration proceedings and the issuance of the arbitral award (later, para. 47; on the "*contraintes temporelles extrêmement contraignantes*" see also act. 29, para. 63).

25 Therefore, the argument of the Respondents 1 and 2 that the Applicant did not raise the objection regarding the composition of the arbitral tribunal at the arbitration hearing on August 10, 2024, is also untenable (act. 31, para. 93). Since Dr. Gharavi's acceptance and independence declaration was never delivered to the Applicant, and Dr. Gharavi's disclosure was not mentioned at the arbitration hearing, the Applicant was consequently unaware of this throughout the entire arbitration procedure (detailed in act. 1, para. 79, 89, and 101). Therefore, it cannot be held against her that she did not file an objection at the arbitration hearing on August 10, 2024. This remains unchanged even though Dr. Gharavi asked the parties at the arbitration hearing – as is customary in arbitration proceedings – whether they were "*satisfied with the formation of the panel or the constitution of the panel*" (act. 3/9, p. 6 / para. 1 et seqq.; but see act. 31, para. 93). Thus, when Attorney Greene stated at the arbitration hearing that the Applicant had no objections to the composition of the CAS Panel, this was only because the Applicant, Respondent 2, Attorney Greene, and USOPC were not informed about Dr. Gharavi's conflict of interest, unlike all other parties in the arbitration proceedings.

26 The assertion that it has not been proven that the Applicant was only informed about the initiation of the arbitration proceedings and the composition of the arbitral tribunal on August 9, 2024, after 5:00 PM, is also incorrect (act. 31, para. 92). The Applicant has detailed and substantiated this in her set-aside brief (act. 1, para. 95). The CAS did not dispute this in its submission.

D. Comments on the Course of the Arbitration Proceedings and the Testimony of Cécile Canqueteau-Landi at the Arbitration Hearing

27 In their response briefs, Respondents 1 and 2, as well as the CAS, repeat the grossly incorrect finding in the arbitral award (award, para. 137) that the Applicant did not dispute that the one-minute rule for the verbal inquiry was violated (act. 31, para. 42 and 45; act. 26, para. 62, 64, and 66). As the Applicant has shown in detail in her set-aside brief, Attorney Greene and witness Cécile Canqueteau-Landi did indeed dispute this and questioned the (unconclusive) Omega report (act. 1, para. 105 and 107 et seq.). Even Respondent 4 – the federation responsible for the competition and thus for compliance with the rules – stated that the Omega report does not record the time of the verbal inquiry (see act. 29, para. 70 et seqq.). In their response to the set-aside brief, Respondent 4 also emphasizes that "*la position de la FIG a toujours été celle de considérer qu'il y avait (forcément) une différence entre le moment où la* verbal inquiry *a été effectivement formulée (par oral) par Mme Canqueteau-Landi et le moment de son enregistrement dans le système d'Omega qu'effectue l'inquiry officer en pressant le bouton correspondant sur sa tablette*" (act. 29, para. 74). The Applicant refers to the corresponding statements in her set-aside brief and the clear statements of the parties during the hearing (act. 1, para. 105 et seqq. and 120).

28 As Respondent 4 rightly emphasizes, even the arbitral tribunal concluded that the Omega report as means of evidence was "*not fully responsive to the information the Panel had sought*" (act. 29, para. 76; see also act. 1, para. 116). Respondent 4 also rightly points out that the findings made elsewhere, that the evidence was "*crystal clear*", is in total contradiction to this (act. 29, para. 77). It is evident that the CAS Panel felt compelled to rely on the Omega report solely due to the insufficient state of the evidence.

29 Regarding act. 31, para. 42 and 67, concerning the receipt of the Omega report by Attorney Paul Greene, the Applicant allows herself the following clarifications (see already act. 1, para. 93): Respondent 4 submitted the Omega report on August 9, 2024, at 5:29 PM. However, Attorney Greene was not copied on this correspondence (act. 1, para. 98; act. 3/43). The download folder forwarded to Attorney Greene logically did not contain the Omega report, as the former had already been forwarded to Attorney Greene at 5:16 PM (act. 1, para. 98; act. 3/38). It was only at 8:38 PM that the CAS Ad hoc Division circulated Respondent 4's submission, including the Omega report, again, this time also to Attorney Greene (act. 31, para. 42).

Evidence:

— Email from the CAS Ad hoc Division dated August 9, 2024, at 8:38 PM, Exhibit 75

30 As Respondent 4 rightly points out, the dispute underlying the arbitration proceedings should have been referred to the ordinary procedure according to Art. 20 lit. c CAS OG Rules to allow the parties to gather evidence (act. 29, para. 22 et seqq.). Respondent 4 explicitly requested such a referral (act. 1, para. 80; act. 3/24, para. 4 and 8.b), and the

Applicant expressly and unreservedly joined this request (act. 3/42, p. 1). The contradictory statements in the arbitral award regarding the evidence and Respondent 4's inability to identify the name of the technical assistant responsible for recording the verbal inquiry within the short time frame, as well as to submit videos, show how necessary the referral to the ordinary procedure would have been.

III. Legal Argumentation (act. 26, para. 50 et seqq. act. 29, para. 15 et seqq. act. 31, para. 69 et seqq.)

A. Ground for Appeal: Incorrect Composition of the CAS Panel (Art. 190 para. 2 lit. a PILA)

1. Legitimate Doubts About the Independence of Dr. Gharavi

31 Respondents 1 and 2 argue in their response that Dr. Gharavi is completely independent of them (act. 31, para. 28: "*n'a aucun lien avec lesdites parties ou lesdits participants à la procédure*", para. 79). They overlook that the **mere appearance of bias is sufficient** as a reason for rejection (SFC 142 III 521, cons. 3.3.3; BSK-PETER/BRUNNER, PILA 180 N 12; BK-AKIKOL, PILA 180 N 47). Actual proof of bias is not required, as the internal state of mind of an arbitrator can hardly ever be proven (BK-AKIKOL, PILA 180 N 46 with reference to case law).

32 Moreover, the arguments of Respondents 1 and 2, as well as those of the CAS, demonstrate an extremely questionable understanding of (arbitral) judicial independence:

33 Respondents 1 and 2 fail to recognize that actual economic dependence of the arbitrator on a mandate is not required for the appearance of bias under Art. 180 para. 1 lit. c PILA (see act. 1, para. 145; but apparently act. 31, para. 32, and act. 26, para. 38). Even if an arbitration case plays a very minor role in the fee portfolio of an arbitrator, this would not relativize the guarantee of independence. According to section 1.4 of the "*Non-Waivable Red List*" of the IBA Guidelines, the existence of significant financial income from a mandate (see act. 1, para. 150) is determined not relatively in relation to the arbitrator's total income during his entire arbitration activity, but according to absolute criteria. According to the IBA Guidelines, the perspective of an objective third party is decisive (Commentary on the 2024 IBA Guidelines on Conflicts of Interest, p. 2).

34 Likewise, the duty of independence of the arbitrator obviously cannot depend on whether an arbitrator is wealthy or not (see act. 31, para. 29 et seqq. and 105). The notion that extraordinarily wealthy arbitrators are immune to conflicts of interest or bias due to their wealth is absurd, as it would mean that wealthy arbitrators would have to meet lower standards of independence and impartiality.

35 Even if the proportion of fees Dr. Gharavi received from representing Romania were small in relation to his total income and/or Dr. Gharavi were extraordinarily wealthy

(which is disputed with lack of knowledge), this would of course not change the fact that the ongoing mandate relationship with Romania would raise legitimate doubts about his independence (detailed in act. 1, para. 152 et seqq.). It is also irrelevant for the assessment of an arbitrator's independence whether he has held numerous other arbitration mandates over his several decades-long career.

36 It remains unclear what Respondents 1 and 2 intend to derive from the allegation that Dr. Gharavi took on the mandate as chairman of the CAS Panel *pro bono* and did not derive any financial benefit from it, or that the proceedings before the CAS Ad Hoc Division are generally free of charge (act. 31, para. 29). The constitutional right to be judged by an independent and impartial arbitral tribunal does not depend on whether the arbitrators or the arbitration institution receive a fee for their services (see Art. 12 of the CAS OG Rules).

2. The Applicant has Not Forfeited the Objection to the Composition of the Tribunal

2.1 No Knowledge of Dr. Gharavi's Conflict of Interest on the Part of the Applicant

37 Respondents 1, 2, and 4, as well as the CAS, further argue that Dr. Gharavi fully complied with his disclosure obligation under Art. 179 para. 6 PILA (act. 31, para. 82 et seqq.; act. 26, 36; act. 29, para. 29).

38 Disclosure under Art. 179 para. 6 PILA is a **declaration that requires receipt**. If it is not delivered to the parties of the arbitration, it cannot have any legal effect. A disclosure that is not received cannot trigger a forfeiture consequence due to the lack of the possibility of knowledge (see BK-AKIKOL, PILA 179 N 252), so the parties' right to raise a complaint against the composition remains intact.

39 As comprehensively stated in the set-aside brief and mentioned again above, the acceptance and independence form of Dr. Gharavi and the disclosure contained therein were never delivered to the Applicant. She first learned of the ongoing mandate relationship between Dr. Gharavi and the Romanian state on August 13, 2024, from the media (act. 1, para. 129 et seqq.). Thus, it remains that the Applicant had no knowledge of Dr. Gharavi's conflict of interest until August 13, 2024.

2.2 No Obligation on the Applicant's Part to Be Aware of Dr. Gharavi's Conflict of Interest

2.2.1 Investigations Into the Arbitrators Were Unreasonable For The Applicant Due to The Extraordinary Time Pressure

40 In their response to the set-aside brief, Respondents 1 and 2 make considerable effort to allege fundamental shortcomings on the part of the Applicant (act. 31, para. 91: "*la plus élémentaire prudence* ..."). In their view, she should have conducted investigations into the three members of the CAS Panel within the few remaining hours between her

initial notification about the arbitration and the issuance of the arbitral award (act. 31, para. 86 et seqq.).

41 The consequence of forfeiture applies not only to grounds for challenge that the affected party actually knew but also to those that she should have known with due diligence (SFC 136 III 605, cons. 3.2.2; 147 III 65, cons. 6.5; see act. 1, para. 173). However, the Respondents make it too easy for themselves when they blame the Applicant – **comfortably in hindsight** – for not even showing "*un niveau minimal de diligence*" within the few hours between her initial notification and the issuance of the arbitral award and not consulting the twelve-page mandate list of Dr. Gharavi on his law firm's website (act. 31, para. 96; act. 32/2, p. 1 et seqq.). They completely overlook the extraordinary circumstances of the arbitration in question, especially the exorbitant time pressure to which the Applicant and her lawyer were completely unprepared on the evening of August 9 and on August 10, 2024.

42 At the same time, Respondents 1 and 2 do not dispute that:

- Attorney Greene, at the time of receiving the extensive download folder of the arbitration file on Friday evening at 5:16 PM, had about **two and a half hours** for an initial instruction meeting with the Applicant, obtaining powers of attorney, studying the extensive files and submissions of several parties (regarding the volume: act. 1, para. 89; see para. 24 above), legal study, particularly on the so-called field-of-play doctrine, a legal analysis of the case, and the preparation of the only written statement within the deadline extended for the last time (see act. 1, para. 92 et seq. and 95);
- just a **few hours later**, on Saturday morning at 8:30 AM—for Attorney Greene in the middle of the night at 2:30 AM—the nearly **five-hour arbitration hearing** began (see para. 100 above), so that only a few hours remained for further file and legal study, contacting potential witnesses and preparing them, drafting the pleadings, and compiling the questions for the witness examinations (direct and cross-examination) (act. 1, para. 106); and
- between the end of the arbitration hearing and the issuance of the dispositive part of the arbitral award at 5:56 PM, only **four and a half hours** passed (act. 1, para. 109), during which Attorney Greene conducted settlement talks with the Respondents and other parties involved on behalf of the Applicant.

43 Neither Respondents 1 and 2 nor the CAS dispute that the extraordinary time pressure was solely and unnecessarily caused by the fact that:

- the CAS Ad hoc Division used incorrect email addresses for notifying the Applicant as well as Interested Party 2 and USOPC for three days, and these parties—unlike the other parties, including the Respondents—were informed about the arbitration late (detailed in act. 1, para. 72 et seqq.); and

— the CAS Ad hoc Division rejected the referral requested by Respondent 4 and the Applicant to the ordinary CAS procedure according to Art. 20 lit. c CAS OG Rules despite the absence of any time urgency (act. 1, para. 82).

44 This is explicitly acknowledged by Respondent 4 when it points out the "*contraintes temporelles extrêmement contraignantes*" to which the Applicant was subjected and which would have been avoidable in every respect (act. 29, para. 62, 63: "*contraintes temporelles [qui] auraient pu (et dû) être évitées*"; see also para. 65, 68, and 78: "*délais extrêmement courts*"). This is all the more significant as Respondent 4 considers itself a neutral party in the present dispute (act. 29, para. 7 et seqq.).

45 According to the case law of the Federal Supreme Court, the duty to investigate **is not unlimited**, and **the circumstances of the specific case are always decisive** in determining its scope (SFC 147 III 65, cons. 6.5). The investigations must be **reasonable**, also **in terms of time** (see SFC 147 III 65, cons. 6.5; on reasonableness also SFC 4A_528/2007, cons. 2.5.1; BK-AKIKOL, PILA 180 N 113; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 4th ed., Bern 2021, N 881).

46 In the present case, such investigations were not reasonable for the Applicant due to the extraordinary time pressure. The expectation of Respondents 1 and 2 that the Applicant should have conducted investigations into the composition of the CAS Panel within the remaining hours until the issuance of the arbitral award is excessive.

47 The arguments that the Applicant had sufficient time to conduct research on the arbitrators of the CAS Panel (act. 31, para. 92; act. 29, para. 34; act. 26, para. 45 et seqq.), or even to check the completeness of the chaotically structured download folder (above, para. 24) are simply unrealistic. They completely overlook the fact that the Applicant or her lawyer, given the extraordinary time pressure, was forced to prioritize the necessary tasks. Since the CAS Panel and, in particular, its chairman were appointed by the CAS Ad hoc Division and thus by an independent body (act. 1, para. 175), the Applicant was entitled to expect that they would not appoint an arbitrator with such an obvious conflict of interest (act. 1, para. 175; Art. 11 et seq. CAS OG Rules [act. 3/2]). Accordingly, she was entitled and obliged to trust that the remaining time of the arbitration proceedings would be better invested in the essential tasks mentioned in para. 42 above than in researching potential conflicts of interest of the members of the CAS Panel.

48 This remains unchanged by the fact that panels of the CAS Ad hoc Division are generally supposed to issue an award within 24 hours according to Art. 18 of the CAS OG Rules (act. 3/2) (act. 31, para. 47 and 50). Such a tight timeframe as in the present case is unprecedented even in arbitration, which is aimed at efficiency and acceleration, and clearly does not correspond to the usual procedural durations in commercial arbitration or ordinary CAS proceedings. The deadline for rejection alone – and thus also for reasonable research (SFC 4A_110/2012, cons. 2.2.2) – is therefore usually a multiple of the entire procedural duration according to Art. 18 of the CAS OG Rules (e.g. Art. 180a

para. 1 PILA: 30 days; Art. 14 para. 2 ICC Rules: 30 days; Art. 13 para. 2 Swiss Rules: 15 days; R34 of the CAS Code: 7 days). The Federal Supreme Court's case law on the "*devoir de curiosité*" has not been developed in the context of such short deadlines as the present one, but in proceedings with much longer rejection deadlines.

49 The consequence of forfeiture that occurs when the duty to investigate is disregarded is, moreover, an expression of the principle of good faith (also act. 31, para. 95; act. 26, para. 50; SFC 136 III 605, cons. 3.2.2). However, according to the prevailing view, there is no room for forfeiture based on good faith where – as here – "relatively short statutory or contractual deadlines are involved" (BK-MERZ, CC 2 N 513). This applies all the more if, as here, there was demonstrably no time for investigations.

2.2.2 The Argument of the CAS and Respondents 1 and 2 that the Applicant Did Not Fulfill Her Duty of Care Violates Good Faith

50 As mentioned, the CAS also blames the Applicant with great effort for acting in bad faith in connection with Dr. Gharavi's conflict of interest (act. 26, para. 55: "*il faut se demander comment la recourante peut prétendre de bonne foi opposer aujourd'hui un conflit d'intérêts lié à des mandats de Me Gharavi ...*"; para. 57: "*Il serait ainsi choquant que la recourante soit légitimée à passer outre ces manquements majeurs*").

51 These serious accusations are, to say the least, puzzling and incomprehensible in view of the serious errors in the conduct of the proceedings by the CAS Ad hoc Division and the CAS Panel.

52 As shown, the consequence of forfeiture when the duty to investigate is disregarded is an expression of the principle of good faith (Art. 2 para. 1 CC; also act. 31, para. 95; SFC 136 III 605, cons. 3.2.2). However invoking a violation of good faith is only permissible if the party relying on forfeiture has itself acted in good faith. A party should not benefit from its own unlawful or contractual misconduct or that of a third party (e.g. BK-MERZ, CC 2 N 543 et seqq.; ZK-BAUMANN, CC 2 N 255). In other words, forfeiture cannot be assumed if the delay in exercising the right of rejection – as here – was caused by a violation of the duty of equal treatment to the detriment of the affected party.

53 In the present case, the CAS acted both contrary to the rules and the law, and not in good faith, by failing to provide the Applicant with the acceptance and independence declaration of Dr. Gharavi (see SFC 111 Ia 72, cons. 2c: "*Si l'arbitre dissimule des faits constitutifs d'un motif de récusation, il contribue à empêcher le déroulement régulier de la procédure, cela* ***contrairement aux règles de la bonne foi*** *dans la mesure où son silence met la partie intéressée dans l'incapacité de faire valoir un de ses droits légitimes de procédure*", emphasis added). Therefore, it cannot accuse the Applicant of acting in bad faith in this regard. This is all the more evident as the CAS Panel, and in particular its chairman, Dr. Gharavi, once again missed the opportunity during the hearing to inform the Applicant about the long-standing mandate relationship between Dr. Gharavi and Romania and thus make up for the omission (act. 1, para. 101). As already stated in the

set-aside brief, it would be untenable to require the Applicant to investigate potential conflicts of interest on the part of Dr. Gharavi, when this would only have become necessary because the CAS Ad hoc Division or the CAS Panel failed to inform **all parties** to the arbitration about Dr. Gharavi's conflict of interest and the related disclosure that had already taken place, in violation of the duty of equal treatment (see act. 1, para. 177 et seq.). The latter is rightly not disputed by the CAS.

54 The same applies to Respondents 1 and 2: They are aware of the use of incorrect email addresses until August 9, 2024 (see only act. 3/34), Dr. Gharavi's conflict of interest (see only act. 3/20), and the delivery of the incomplete download folder without Dr. Gharavi's acceptance and independence declaration (see only act. 3/28, 3/31, and 3/32). By now nevertheless accusing the Applicant of blatant omissions in the arbitration proceedings, they are consciously exploiting the CAS's rule- and law-violating behavior to secure an undue advantage in the present set-aside proceedings. This behavior violates good faith and deserves no protection.

B. Ground for Appeal: Violation of the Right to be Heard (Art. 190 para. 2 lit. d PILA)

55 Contrary to the statements of Respondents 1 and 2 (act. 31, para. 109 et seqq.) and the CAS (act. 26, para. 60 and 65), it is unclear when the arbitral award became final. Thus, Respondent 4 also acknowledges that there is uncertainty in this regard (act. 29, para. 37 et seqq., especially 55). Respondent 4 confirms in its statements that the conditions for a revision must be examined if the arbitral award has already become final with the delivery of the dispositive (act. 29; para. 56).

56 The Applicant refers in this regard entirely to her statements in the set-aside brief (act. 1, para. 192 et seqq.).

* * * * *

For the reasons mentioned, we respectfully request, dear Federal Judges, that the motion to set aside be upheld.

Yours sincerely

Gabrielle Nater-Bass
Dr. Stefanie Pfisterer
Richard G. Allemann
Frédéric Fitzi

Exhibits: 6-fold / according to separate list