



The ECtHR's Final Ruling in *Semenya v Switzerland*: A Missed Opportunity to Uphold Human Rights in Sports?

Livia Hinz*

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ABSTRACT: The article discusses the recent Grand Chamber judgement of the European Court of Human Rights in *Semenya v Switzerland*, a landmark decision addressing the protection of fundamental rights in sports governance and arbitration. Ms. Semenya, a South-African intersex athlete, was barred from international competitions following her refusal to comply with World Athletics regulations requiring her to undergo medical treatments in order to lower her natural level of testosterone. Following unsuccessful attempts to challenge the legality of such regulations before the Court of Arbitration for Sports and, in appeal, the Swiss Federal Supreme Court, she turned to the ECHR alleging violations of several substantive Convention guarantees, as well as the right to a fair trial. Reversing the first instance decision, the recent Grand Chamber ruling affirmed that the applicant fell under Switzerland's jurisdiction only in relation to the complaint under Article 6 ECHR. This article criticizes the functional distinction between procedural and substantive rights for the purposes of delineating States' jurisdiction introduced – arguably for the first time – in *Semenya*. At the same time, it shows how the stringent standard of review articulated by the Grand Chamber under Article 6 ECHR for national courts hearing appeals over sports arbitrations demands a close engagement with the protection of fundamental rights involved those arbitrations as well as, potentially, other forms of mandatory arbitral proceedings. Finally, the article offers a comparative analysis of parallel developments concerning sports arbitrations before the Court of Justice of the European Union, drawing upon the recent decisions in *RFC Seraing* and *International Skating Union*.

KEYWORDS: intersex – non-discrimination – sports – private governance – compulsory arbitration – state jurisdiction.

* Post-doctoral research fellow, University of Rome UnitelmaSapienza, and part-time research associate, Robert Schuman Centre for Advanced Studies (EUI), livia.hinz@unitelmasapienza.it. I would like to thank my friend and colleague, Giulio Fedele, for his insights and engagement with the piece.



1. Introduction

The increasing influence of private authority in contemporary global governance is widely acknowledged.¹ International sports is one of the domains where this development has become particularly evident: the control and administration of international sports competitions, indeed, lie entirely with private bodies, most notably the International Olympic Committee (IOC) and the various International Sports Federations (IFs) included in the Olympic Movement.² Sports governing bodies exercise extensive regulatory powers, ranging from determining eligibility criteria for international competitions, to regulating the functioning of those competitions, to administering sanctions. This has given rise to an autonomous body of private norms and regulations commonly referred to as *lex sportiva*.³ The private character of the rule-making function is mirrored by the private nature of the judicial function: dispute resolution is governed by mandatory arbitration clauses designating the Court of Arbitration for Sport (CAS), an arbitral institution established by the International Council of Arbitration for Sport and located in Lausanne.⁴ Given the significant weight exerted by sports governing bodies in the selection of arbitrators, the actual independence and impartiality of the CAS remain subjects of ongoing controversy.⁵

While subjecting international sports to private regulation and adjudication may be justified on grounds of efficiency and effectiveness,⁶ it raises significant concerns about the protection of basic legal safeguards for stakeholders in the system, such as

¹ W Mattli, 'Private Transnational Governance' in JK Cogan, I Hurd and I Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016); RB Hall and TJ Biersteker, *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002).

² L Freeburn, *Regulating International Sport Power, Authority, and Legitimacy* (Brill/Nijhoff 2018). More detail on the composition of the Olympic Movement is available at The Olympic Committee, 'Factsheet. The Olympic Movement' (20 June 2024), at stillmed.olympics.com.

³ A Duval, 'Transnational Sports Law: The Living Lex Sportiva' in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021).

⁴ L Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport' (2011) 12 *German Law Journal* 1317. More generally on the contentious role of arbitration in reinforcing private transnational governance see W Mattli and T Dietz, *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014).

⁵ J Lindholm, 'A Legit Supreme Court of World Sports? The CAS(e) for Reform' (2021) 21 *The International Sports Law Journal* 1. The ECtHR seemingly settled the issue in the positive with the ruling in *Mutu and Pechstein*, which involved two professional athletes, a footballer and a speed skater, subject to sanctions by their respective sports associations. Relying on Art 6(1) of the Convention, the applicants submitted that the CAS could not be regarded as an independent and impartial tribunal. Whereas the Court's Third Section rejected the allegation (*Mutu and Pechstein v Switzerland*, App. 40575/10 and 67474/10, (ECtHR 2 October 2018) paras 138–159) this finding was criticized by two dissenting judges: joint partly dissenting, partly concurring opinion of Judges Keller and Serghides in *Mutu and Pechstein*.

⁶ JAR Nafziger, 'International Sports Law' in JAR Nafziger and R Gauthier (eds), *Handbook on International Sports Law* (Cambridge University Press 2022).

national federations and, above all, individual athletes.⁷ Unsurprisingly, sports regulation and arbitration have come under increased scrutiny both before the European Court of Human Rights⁸ and the Court of Justice of the European Union.⁹

Arguably, the most vivid example of how the regulatory powers of sports governing bodies can affect athletes' fundamental rights consists in the practice to adopt and police sex-based eligibility criteria governing the right of individual athletes to compete in male and female categories.¹⁰ Ostensibly driven by the attempt to protect fair competition for female athletes, these regulations generally turn on genetic or physiological traits and necessarily impact on the basic rights of transgender and intersex female athletes.¹¹ While discussing the rationale and legitimacy of such regulations lies beyond the scope of the present article, it is worth noting that they raise a flurry of interrogatives. First, the scientific basis underpinning sex-based categorization in sports remains contested.¹² Secondly, it appears that these regulations disproportionately affect athletes from the Global South, notably from Africa and Asia.¹³ Thus, the suspect that they reflect and rationalize Western preconceptions as to the appearance of the female body, akin to Judith Butler's notion of 'gender performativity', is hard to dismiss.¹⁴

⁷ B Schwab, 'Protect, Respect and Remedy: Global Sport and Human Rights' (2019) 3 *International Sports Law Review* 52.

⁸ For an overview of the ECtHR cases involving the world of sports see European Convention on Human Rights, 'Factsheet – Sport and the European Convention on Human Rights' (Strasbourg, November 2023), at www.echr.coe.int.

⁹ See the discussion below in section 4.3.

¹⁰ Sex-based categorization is commonly adopted in most sports disciplines, ranging from athletics to boxing to – perhaps more surprisingly – chess: PS Shin, 'Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives' (2017) 80 *Law and Contemporary Problems* 47. For an in-depth critical discussion of sex- and gender-based regulation in athletics: M Krech, 'Gender Equality in World Athletics: Transnational Norm Development by Private International Organizations' (2025) 119 *American Journal of International Law* 1.

¹¹ Intersex individuals are born with sex characteristics – at the genetical, hormonal or anatomical level – that do not fit binary conceptions of male or female bodies. There is a rich literature on the status of transgender and intersex women in sports: see, *inter alia*, T Shinohara, *Paving the Way for the Protection of Human Rights in Sports: The Case of Intersex and Transgender Female Athletes* (Stämpfli éditions 2024); MG De Marcilla Muste, 'You Ain't Woman Enough: Tracing the Policing of Intersexuality in Sports and the Clinic' (2022) 36 *Social and Legal Studies* 847; M Krech, 'To Be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics' (2017) 35 *Berkeley Journal of International Law* 262.

¹² Krech (n 10); R Pielke, R Tucker and E Boye, 'Scientific Integrity and the IAAF Testosterone Regulations' (2019) 19 *The International Sports Law Journal* 18.

¹³ OHCHR, 'Intersection of Race and Gender Discrimination in Sport - Report of the United Nations High Commissioner for Human Rights' (United Nations 2020), at www.ohchr.org.

¹⁴ According to Butler, gender identity is a fiction, a social construct 'instituted and inscribed on the surface of bodies': J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2007) 186. Therefore 'gender proves to be performative – that is, constituting the identity it is purported to be': *ibid* 34.

In this context, the legal battle of Caster Semenya, a South-African intersex runner, against regulations issued by the World Athletics (former International Association of Athletics Federations) forcing her to undergo medical treatments in order to lower her natural level of testosterone, has become rather prominent. Following unsuccessful attempts to challenge such regulations before the CAS, Ms. Semenya filed an application before the ECtHR alleging a violation of several substantive Convention rights as well as the right to fair trial.¹⁵ The recent ruling of the Grand Chamber in July 2025, which is at the center of this article, dismissed jurisdiction over the substantive complaints.¹⁶ As such, it could be seen as a step back from the Third Section's decision, which had been heralded as a 'breakthrough' in human rights.¹⁷ However, as will be discussed in this article, this rollback may be more apparent than real.

The article is structured as follows. Section 2 outlines the factual and legal background of the dispute, from the CAS proceedings to the ruling of the ECtHR's Third Section. Section 3 illustrates the main points of the Grand Chamber ruling. Section 4 provides an analytical commentary on selected aspects of the final judgement, focusing especially on the Court's findings on jurisdiction (4.1) as well as on the standard of review employed in the assessment of the complaint under Article 6 ECHR (4.2). The final sub-section 4.3. provides a brief overview of parallel developments before the Court of Justice of the European Union. Section 5 concludes.

2. Factual and legal background

2.1. The DSD regulations and their impact on Ms. Semenya's career

Caster Semenya is a South African middle-distance runner who achieved outstanding results in international competitions early in her career, including winning two Olympic gold medals.¹⁸

Following the adoption of regulations by the International Association of Athletics Federations (now World Athletics)¹⁹ concerning the eligibility of athletes with hyperandrogenism to compete in the female category, she was required to undergo medical treatment in order to lower her natural testosterone level.²⁰ The stated rationale of the regulations – introduced amid increased public scrutiny regarding the

¹⁵ *Semenya v Switzerland* App. 10934/21 (ECtHR, 11 July 2023).

¹⁶ *Semenya v Switzerland* [GC] App. 10934/21 (ECtHR, 10 July 2025).

¹⁷ A Duval, 'Righting the Lex Sportiva: The Semenya v Switzerland Case and the Human Rights Accountability of Transnational Private Governance' (2025) 6 *The European Convention on Human Rights Law Review* 238.

¹⁸ *Semenya v Switzerland* (n 15) para 4.

¹⁹ World Athletics is the world governing body for the sport of athletics. It is established as a private law association under the laws of Monaco.

²⁰ Hyperandrogenism generally refers to the above-range production of androgens in women, most notably testosterone.

perceived competitive advantages of transgender and intersex athletes²¹ – was to protect fair competition in the female category.²² The underlying assumption was that elevated testosterone levels may be associated with physical characteristics conferring a structural advantage in athletic sports.²³ Although Ms. Semenya is a female athlete – assigned female legal gender at birth, raised as female and always identifying as female – she was born with 5 α -Reductase deficiency, leading to an alteration at the level of chromosomes and testosterone production above the typical female range.²⁴

Ms. Semenya reported suffering significant negative effects due to the medical treatment required to lower her testosterone level below the eligibility threshold. In 2015 the regulations were temporary suspended by the IAAF following an order issued by the CAS in the context of the *Dutee Chand* case,²⁵ and she interrupted the treatment.

In 2018 the IAAF adopted a new set of eligibility regulations for athletes with differences in sex development (hereafter DSD), which further lowered the threshold of admissible testosterone production.²⁶ Concerned athletes were required to submit to a medical test to assess the ‘degree of virilization’, and to undergo medical treatment to reduce their natural level of testosterone below the established limit. Since Ms. Semenya refused to comply with these requirements, she was barred from competing in international races.

2.2. The proceedings before the CAS and the Swiss Federal Supreme Court

In conformity with Article 5.2 of the DSD regulations, which attributes exclusive competence for the resolution of disputes to the CAS, Ms. Semenya lodged a request for arbitration in 2018 challenging the lawfulness of the DSD regulations. Athletics

²¹ Duval (n 17).

²² IAAF was the first international sports federation to adopt regulations restricting the eligibility of females with hyperandrogenism to participate in women's competition: IAAF, ‘IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition’ (1 May 2011), at worldathletics.org.

²³ For a discussion of the scientific evidence presented before the CAS in the proceedings concerning Ms. Semenya see *Semenya v Switzerland* (n 15) para 18. However, as previously noted, the scientific basis of this type of regulations is controversial: Pielke, Tucker and Boye (n 12). For a discussion of the concept of fairness from an ethical perspective see S Camporesi, ‘When Does an Advantage Become Unfair? Empirical and Normative Concerns in Semenya's Case’ (2019) 45 *Journal of Medical Ethics* 700.

²⁴ *Semenya v Switzerland* (n 15) para 18.

²⁵ Dutee Chand, an Indian athlete with hyperandrogenism, successfully challenged the regulations before the CAS: CAS 2014/A/3759, *Dutee Chand v AFI & IAAF*, 24 July 2015.

²⁶ DSD refers to a set of congenital conditions affecting human sex development and maturation due to variations of chromosomal, gonadal and phenotypic sex. The new regulations were published on 1 May 2019 and entered into force on 8 May 2019: see IAAF, ‘Eligibility Regulations for the female Classification (Athletes With Differences of Sex Development)’, at worldathletics.org. Compared to the previous 2011 regulations, they halved the admissible threshold of testosterone from 10 nmol/L a day to 5 Nmole/L. The regulations were further amended in 2023: see IAAF, ‘Eligibility Regulations for the female Classification (Athletes With Differences of Sex Development)’ Version 3.0, at worldathletics.org.

South Africa, the national South-African federation, also launched an arbitration supporting her case, and the proceedings were joined.²⁷

To reach its decision, the CAS applied primarily private regulatory sources – namely the IAAF Constitution and the Olympic Charter – while complementing them with Monegasque law.²⁸ It began by acknowledging that the DSD regulations were indeed discriminatory but ultimately found that they were necessary and proportionate in relation to the legitimate aim pursued, namely preserving conditions of fair competition within the female category. According to the CAS, the IAAF had submitted convincing evidence from various sources to demonstrate that testosterone was the ‘primary factor’ associated with certain physical traits conferring performance advantages.²⁹ Interestingly, though, it seemed to be particularly convinced by statistical observations, referring to the ‘striking overrepresentation of 5-ARD athletes on the podium of restricted events at the international level’ compared to the general distribution in the population.³⁰

Even though it dismissed Ms. Semenya’s complaint, the CAS nevertheless expressed serious reservations regarding the practical implementation of the regulations – particularly in view of significant natural fluctuations in testosterone levels³¹ - as well as concerning the selection of the restricted races to which the eligibility criteria applied.³² However, the susceptibility of the regulations to be amended in the course of implementation as ‘living document’ was deemed to represent a sufficient guarantee for athletes.³³

Following the rejection of her complaint by the CAS, Ms. Semenya filed a civil-law appeal with the Swiss Federal Supreme Court (FSC).³⁴ Indeed, in line with a deliberate policy choice aimed at making Switzerland an attractive venue for sports-

²⁷ CAS 2018/O/5794 & 5798 *Mokgadi Caster Semenya and Athletics South Africa v IAAF*, 30 April 2019.

²⁸ *Semenya v Switzerland* (n 15) para 16.

²⁹ *Ibid* para 18.

³⁰ *Ibid* para 18.

³¹ *Ibid* para 25.

³² The CAS noted that the inclusion within the restricted competitions of certain races – specifically the 1,500m and 1 mile races – seemed to be based on a speculative assumption. It suggested that the IAAF could consider postponing the application of the regulations to such events until more evidence was available (*ibid* para 26). Nonetheless, it found that the IAAF had provided ‘a rational overall explanation’ of how the relevant events had been chosen, so that the scope of the restrictions was not disproportionate in toto (*ibid* para 24).

³³ *Ibid* para 25. The award has been subject to sustained criticism: M Krech, ‘The Misplaced Burdens of “Gender Equality” in *Caster Semenya v IAAF*: The Court of Arbitration for Sport Attempts Human Rights Adjudication’ (2019) 3 *International Sports Law Review* 66; L Holzer, ‘What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport’ (2020) 20 *Human Rights Law Review* 387.

³⁴ *Semenya v Switzerland* (n 15) para 27.

related disputes,³⁵ CAS awards are subject to appeal before the FSC pursuant to the Federal Act on Private International Law Act (PILA).³⁶

Specifically, the review of international arbitral proceedings such as the ones before the CAS is governed by section 190(2) PILA, according to which the FSC's power of substantive review is confined to assessing the compatibility of the award with Swiss public policy. This provision is not unique to Swiss law but rather reflects the principles of the New York Convention on the recognition and enforcement of foreign arbitral proceedings.³⁷ The FSC, for its part, has consistently interpreted the concept of public policy in a restrictive manner – limiting it to cases where the effects of an arbitral award would undermine essential and broadly recognized values which, according to the understanding prevailing in Switzerland, should underpin every legal system.³⁸ Notably, since the grounds for review established in the PILA are exhaustive, the rights established in the Convention cannot be directly invoked as basis for appeal. Nonetheless, the FSC has acknowledged the indirect relevance of the Convention, as informing its interpretation of public policy.³⁹

Ms. Semenya alleged that she had been subjected to discriminatory treatment based on sex, and that her dignity and personality rights had been violated. On 25 August 2020, the FSC dismissed her appeal.⁴⁰

The Court first noted that, although its consistent case law considers the prohibition of discrimination part of public policy, the case involved discrimination within private relations. In this context, it observed that, under Swiss constitutional law, the duty to protect against discrimination lies primarily with the State and generally does not apply directly to relations between private individuals. Accordingly, it expressed doubts as to whether a private party's discriminatory conduct could breach a fundamental value of the Swiss legal order and thus fall under the concept of public policy – this, despite the fact that the relationship between athletes and sports federations contains elements of verticality due to significant power imbalances.⁴¹ Secondly, while emphasizing that it was bound by the CAS's findings of fact,⁴² the FSC held that the CAS's conclusions regarding the necessity and proportionality of the DSD regulations were reasonable and reflected a careful balancing of the interests at stake. Therefore,

³⁵ A Duval, 'Embedded Lex Sportiva: The Swiss Roots of Transnational Sports Law and Governance' in A Duval, Al Krüger and J Lindholm (eds), *The European Roots of the Lex Sportiva: How Europe Rules Global Sport* (Hart Publishing 2024).

³⁶ Loi fédérale sur le droit international privé (LDIP) du 18 décembre 1987.

³⁷ Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958] Art V.

³⁸ *Semenya v Switzerland* (n 15) paras 45–46. Notably, the same grounds of review apply to all forms of international arbitration, from sports arbitration to commercial arbitration.

³⁹ *Semenya v Switzerland* (n 15) para 49.

⁴⁰ Swiss Federal Supreme Court, *Mokgadi Caster Semenya v IAAF*, 4A_248/2019 and 4A_389/2019, 25 August 2010.

⁴¹ *Semenya v Switzerland* (n 15) para 33.

⁴² *Ibid* para 35.

the effects of the award could not be considered contrary to Swiss public policy.⁴³ The Court further found that these conclusions applied *mutatis mutandis* to Ms. Semenya's claims concerning the violation of her personality rights⁴⁴ and human dignity.⁴⁵

2.3. The ECtHR's Third Section ruling

Having exhausted all available remedies against the contested DSD regulations, Ms. Semenya applied to the ECtHR against Switzerland, alleging the violation of several Convention guarantees in connection to the failure of the FSC to set aside the CAS award upholding the contested regulations. In particular, she invoked the prohibition of inhuman and degrading treatment (Article 3 ECHR), the right to private life (Article 8 ECHR) – alone and in conjunction with the prohibition of discrimination (Article 14 ECHR) – as well as the right to access to justice (Article 6 ECHR) and to an effective remedy (Article 13 ECHR).

The Court's Third Section, tasked with the application, clarified at the outset that its analysis did not address the legitimacy of the DSD regulations themselves, as these could not be attributed to Switzerland. Instead, its review focused solely on whether the review conducted by the CAS and the FSC satisfied the requirements of the Convention.⁴⁶

The first preliminary issue the Court had to address was that of jurisdiction. Specifically, it needed to determine whether the applicant's filing of a civil law appeal with the FSC against the CAS award was sufficient to establish a jurisdictional link with Switzerland. The Court answered in the affirmative, holding that the act of bringing a civil law action before the courts of a State party to the Convention brought the applicant within the jurisdiction of that State for the purposes of Art. 1 ECHR, although the facts underlying the dispute bore no connection to it.⁴⁷ Specifically, it noted that the FSC enforced and validated CAS awards pursuant to Swiss law.⁴⁸ However, the issue of jurisdiction was highly contentious, prompting three judges to issue a joint dissenting opinion.⁴⁹ As will be discussed below, it also marks the primary point of divergence between the decision of the Third Section and the final Grand Chamber's ruling.

⁴³ Ibid para 36.

⁴⁴ Ibid para 37. The Court acknowledged that physical examinations aimed at verifying androgen sensitivity and the degree of virilization, along with unnecessary medical treatments to reduce testosterone levels, affected the bodily integrity of the applicant. However, it stated that such intrusion did not impair the very essence of the right. A similar reasoning applied to the interference with the applicant's economic freedom, as Ms. Semenya was not completely deprived of the means for economic subsistence.

⁴⁵ Ibid para 38. For a critique of the FSC's findings see L Holzer, 'The Decision of the Swiss Federal Supreme Court in the Caster Semenya Case: A Human Rights and Gender Analysis' (*Opinio Juris*, 30 September 2020), at opiniojuris.org.

⁴⁶ *Semenya v Switzerland* (n 15) para 80.

⁴⁷ Ibid para 104.

⁴⁸ Ibid para 105.

⁴⁹ Joint dissenting opinion of Judges Grozev, Roosma and Ktistakis in *Semenya v Switzerland* (n 15).

Having established jurisdiction, the Court proceeded to examine the substantive allegations, beginning with the complaint of discriminatory treatment under Article 14 ECHR in conjunction with the right to respect for private life set out in Article 8 ECHR. It stated that the key question was whether the respondent State had put in place sufficient institutional and procedural safeguards to protect the applicant from discrimination.⁵⁰ Ultimately, the Court found that the oversight of the CAS award by the FSC was deficient in several respects – including inadequate scrutiny of the scientific basis underpinning the DSD regulations and failure to address the various questions left unresolved by the CAS⁵¹ – due to the overly restrictive standard of review which did not adequately take into account the particular sensitivity of sports arbitration.⁵² Accordingly, the Court concluded that Switzerland had failed in its duty to protect the applicant from discrimination.⁵³ For similar reasons, it also found a violation of Ms. Semenya's right to an effective remedy.⁵⁴

Having found a violation of Article 14 ECHR in conjunction with Article 8 ECHR, as well as a violation of Article 13 ECHR⁵⁵, the Court determined that there was no need to issue a separate ruling on the complaints under Article 8 ECHR and Article 6 ECHR.⁵⁶ It also dismissed the complaint under Article 3 ECHR as manifestly ill-founded.⁵⁷

3. The final ruling of the Grand Chamber

Upon request of the Swiss government, the case was referred to the Grand Chamber on 6 November 2023. In its final judgement, delivered on 10 July 2025,⁵⁸ the Grand Chamber reversed the key innovation introduced by the Third Section's ruling, namely the recognition of Switzerland's responsibility to secure the substantive rights enshrined in the Convention in the context of sports disputes before the CAS and the FSC. However, as the discussion in section 4.3 will explore, this reversal may be more formal than substantive.

Heeding the arguments presented in the government's submissions, the Grand Chamber determined that certain procedural circumstances of the case – specifically,

⁵⁰ *Semenya v Switzerland* (n 15) para 166.

⁵¹ *Ibid* paras 183–185.

⁵² *Ibid* para 77.

⁵³ *Ibid* paras 192–193 and paras 200–202.

⁵⁴ *Ibid* para 239.

⁵⁵ *Ibid* paras 200–202 and para 239.

⁵⁶ *Ibid* para 205 and para 244.

⁵⁷ *Ibid* para 217. However, Judge Serghides issued a partly concurring, partly dissenting opinion arguing that the applicant had been confronted with a forced choice between a violation of her right under Art 8 ECHR and under Art 3 ECHR. Therefore, he contended that both provisions had been violated. Furthermore, he issued a bare statement of dissent regarding the choice not to issue a separate ruling regarding the complaint under Art 6 ECHR.

⁵⁸ *Semenya v Switzerland* [GC] (n 16).

the applicant's lodging of a civil law appeal with the FSC – justified establishing jurisdiction for the sole purposes of the procedural right under Article 6 ECHR,⁵⁹ by way of exception to the principle of territoriality that otherwise governs the determination of jurisdiction under art. 1 ECHR.⁶⁰ However, it found that no similar exception to territorial jurisdiction applied to Ms. Semenya's substantive allegations under Articles 8 and 14 of the Convention.⁶¹ Thus, the Court ultimately ruled that only the complaint under Article 6 ECHR was admissible. Notably, this finding was subject to forceful criticism in the separate partly dissenting joined opinion of four Judges.⁶²

Regarding the analysis on the merits of the complaint under Article 6 ECHR, the Court first circumscribed the scope of its examination, clarifying that it would be limited to evaluating the quality of the review of Ms. Semenya's case conducted by the CAS and the FSC. In contrast, it would not extend to the assessment of the independence and impartiality of the CAS.⁶³ It then went on to examine the peculiar nature of the sports dispute resolution system, emphasizing the compulsory nature of arbitration and the relevant power imbalance in favor of sports governing bodies. According to the Court, these features required a particularly rigorous examination of CAS arbitrations in appeal,⁶⁴ a standard which the FSC had failed to meet.⁶⁵

4. Comment

4.1. The Grand Chamber's analysis on jurisdiction

Despite involving different elements of extraterritoriality – the applicant's nationality and place of residence as well as the legal nature, the place of incorporation and the governing law of the IAAF – the case did not truly raise questions of extraterritorial jurisdiction in the traditional sense.⁶⁶ The crux of the matter, rather, was

⁵⁹ Ibid paras 122–124 and 128–133.

⁶⁰ Ibid paras 122–124 and 118–121.

⁶¹ Ibid paras 122–124 and 136.

⁶² Partly dissenting joint opinion of Judges Bošnjak, Zünd, Šimáčková and Derenčinović in *Semenya v Switzerland* [GC] (n 16).

⁶³ The Grand Chamber noted that the applicant had not raised a complaint in this sense, and that it had no power to formulate new complaints: *Semenya v Switzerland* [GC] (n 16) para 89. This finding was criticized in the separate concurring opinion of Šimáčková. See also F Shahlaci, 'Why the ECtHR's Grand Chamber Should Rule on the Independence and Impartiality of the Court of Arbitration for Sport in Its Semenya Judgment' (EJIL: Talk!, 28 October 2024), at www.ejiltalk.org.

⁶⁴ *Semenya v Switzerland* [GC] (n 16) para 209.

⁶⁵ Ibid paras 211–238.

⁶⁶ In this sense, see S Thin, 'The Questionable "Extraterritoriality" of Switzerland's Jurisdiction in the Semenya Case (ECtHR)' (EJIL: Talk!, 13 June 2024), at www.ejiltalk.org. The conditions for the exercise of extraterritorial jurisdiction under the ECHR and other human rights treaties have been the subject of extensive scholarly commentary: see, *inter alia*, P De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (Giappichelli 2003); and more recently M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).

whether the Federal Supreme Court's review of the CAS award concerning the legality of the DSD regulations was sufficient to engage Switzerland's jurisdiction under Article 1 ECHR, despite the fact that the issuance of those regulations had no connection to it. It is worth emphasizing that the FSC's appellate review of arbitral proceedings indisputably constitutes an act of state, carried out by the highest judicial authority within Swiss territory, and involves the application of Swiss law. Clearly, with respect to the substantive rights protected by Articles 8 and 14 of the Convention, jurisdiction would be triggered in relation to the positive obligations inherent in those provisions⁶⁷.

Nonetheless, the Grand Chamber still insisted on characterizing the case in terms of extraterritoriality.⁶⁸ On such basis, noting that the classic exceptions justifying extraterritorial jurisdiction did not apply in the case at hand, it affirmed that the applicant fell within Switzerland's jurisdiction solely for the purposes of Article 6 ECHR, but not with regard to the substantive rights enshrined in Articles 8 and 14 ECHR.⁶⁹ As will be discussed in further detail below, in so doing the Court appeared to introduce a functional distinction between procedural and substantive rights in the context of delineating the scope of states' jurisdiction under Article 1 ECHR.⁷⁰ This represents a striking development, marking the first time such a distinction has been explicitly articulated.

A differentiation along these lines surfaced only in one previous case, *Markovic*,⁷¹ to which the Court indeed referred.⁷² It concerned the same set of facts that gave rise to the seminal – and much criticized – *Banković* ruling, in which the Grand Chamber clarified its interpretation of the notion of jurisdiction in Article 1 of the Convention, stressing the centrality of the territoriality principle and setting out the exceptional criteria for establishing extraterritorial jurisdiction.⁷³ Specifically, the case involved nationals of the former Serbia and Montenegro and arose out of killings occurred in the context of the bombing by NATO forces of a television station in Belgrade in 1999 during the conflict in Kosovo. Contrary to what had happened

⁶⁷ On the emergence of positive obligations in the framework of the ECHR see AR Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004); and, more recently V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and beyond Boundaries* (Oxford University Press 2023).

⁶⁸ *Semenya v Switzerland* [GC] (n 16) para 127.

⁶⁹ *Ibid* paras 133, 136 and 145–146.

⁷⁰ S Bastianon and M Colucci, 'The *Semenya v Switzerland* ECtHR Grand Chamber Judgement: Jurisdiction, Procedural Rights, and Sports Arbitration' (2025) 21 *Rivista di diritto ed economia dello sport* 1, 9.

⁷¹ *Markovic and Others v Italy* App. 1398/03 (ECtHR, 12 June 2003).

⁷² *Semenya v Switzerland* [GC] (n 16) paras 123–124.

⁷³ *Banković and Others v Belgium and Others* [GC] App. 52207/99 (ECtHR, 12 December 2011). For a critical analysis of the judgement see De Sena (n 66) 91 ff.; M Milanović, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411.

in *Banković*, the applicants in *Markovic* had launched civil proceedings for tort damages in Italy, albeit unsuccessfully as the Italian courts had declined jurisdiction.⁷⁴ In its decision on admissibility, the Court's First Section declared the substantive complaints under Article 2 and Article 10 ECHR inadmissible, whereas the complaint under Article 6 ECHR was referred to the Grand Chamber.⁷⁵ The latter found that Italy's jurisdiction was engaged but dismissed the complaint on the merits.

However, the motivation of the First Section's decision in *Markovic* on the inadmissibility of the substantive complaints merely stated that there were insufficient grounds to depart from the Grand Chamber's findings in *Banković*.⁷⁶ It did not articulate a theoretical distinction between substantive and procedural rights for the purposes of states' jurisdiction such as the one that emerges in *Semenya*. Furthermore, *Markovic* and *Semenya* involve completely different sets of issues, casting doubt as to whether the same legal principles should apply. In *Markovic*, the substantive complaints under Articles 2 and 10 ECHR concerned Italy's participation in the NATO military operations and would have required a finding of Italy's jurisdiction under Article 1 ECHR in relation to those acts, whereas the complaint under Article 6 ECHR concerned the dismissal of the civil lawsuits by the Italian judicial authorities. In *Semenya*, by contrast, the complaints under Articles 8 and 14 ECHR, and the complaint under Article 6 ECHR all arose in relation to the same state conduct, namely the review of the CAS award by the FSC.

The differentiation drawn by the Grand Chamber in *Semenya* might appear logical at first glance: since the only point of contact between the applicant's circumstances and the respondent State were the proceedings before the Federal Supreme Court, it may seem justified to confine Switzerland's accountability to the protection of the procedural safeguards of fair trial under Article 6 ECHR. However, upon closer examination, the Grand Chamber's legal reasoning appears less compelling.

The first striking aspect of the judgment is that the Court bases its conclusions on jurisdiction primarily on a form of *a contrario* reasoning, relying on the absence of relevant precedent.⁷⁷ This is even more notable as the question with which the Court is confronted – to what extent the review of international arbitration proceedings by domestic courts engages the jurisdiction of the state under Article 1 ECHR in relation to procedural and substantive Convention rights – is a novel one.⁷⁸

It should be recalled that the Third Section had advanced a plausible and legally defensible line of argument in affirming jurisdiction over all the complaints raised

⁷⁴ The Italian Court of Cassation held that the decision to participate in NATO military operations constituted a political choice and fell, as such, beyond judicial scrutiny.

⁷⁵ *Markovic and Others v Italy* [first section] App. 1398/03 (ECtHR, 12 June 2003).

⁷⁶ *Ibid.*

⁷⁷ *Semenya v Switzerland* [GC] (n 16) para 140.

⁷⁸ The novelty of the issues at stake in the case was repeatedly in the proceedings before the Third Section, both in support of the majority views and by the dissenting judges: *Semenya v Switzerland* (n 15) para 77 and Joint dissenting opinion of Judges Grozev, Roosma and Ktistakis.

by Ms. Semenya.⁷⁹ In keeping with a broader trend towards the recognition of the positive dimension of human rights,⁸⁰ the ECtHR has long recognized that the Convention imposes also positive obligations on the contracting parties.⁸¹ Among these, the duty to establish an effective regulatory framework to prevent and remedy violations of Convention rights – including in the context of private, interpersonal relationships – features most prominently.⁸² Such duty has been repeatedly affirmed by the Court, particularly in relation to the right to respect for private life protected under Article 8 ECHR.⁸³ The existence of this obligation, indeed, is acknowledged by the Grand Chamber itself.⁸⁴ Crucially for present purposes, this obligation covers also the implementation of the regulatory framework by state authorities, including the interpretation and application of the law by the judiciary.⁸⁵

It is uncontested that Swiss law provides for the substantive review of international arbitral awards on grounds which – though limited – encompass the consideration of human rights.⁸⁶ However, the restrictive reading of the notion of public policy adopted by the FSC casts doubts as to whether the Court's interpretation of the Swiss legal framework allows for meaningful engagement with concerns regarding the protection of fundamental rights, and specifically Convention rights, in international arbitration proceedings. The FSC's special deference when reviewing CAS awards, in particular, is well documented.⁸⁷ In this sense, the FSC's reading of the notion of public policy is difficult to reconcile with its obligation to apply relevant

⁷⁹ See *infra* section 2.3.

⁸⁰ JW Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15 *Human Rights Quarterly* 77; S Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244.

⁸¹ Mowbray (n 67); Stoyanova (n 67).

⁸² For a detailed analysis see Stoyanova (n 67) 171.

⁸³ For instance, *Bărbulescu v Romania* [GC] App. 61496/08 (ECtHR 5 September 2017) para 115. For further discussion see WA Schabas, 'Right to Respect for Private and Family Life/Droit Au Respect de La Vie Privée et Familiale' in WA Schabas (ed), *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 367.

⁸⁴ *Semenya v Switzerland* [GC] (n 16) para 138.

⁸⁵ Stoyanova (n 67) 179; OO Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13 *Maastricht Journal of European and Comparative Law* 195.

⁸⁶ The FSC itself recognized that the principles underlying the Convention or the Swiss Constitution could be taken into account under the head of public policy. It further recognized that, pursuant to its constant caselaw, prohibition of discrimination was a matter of public policy, even though it expressed doubts as to whether the same was true for discrimination among private parties. Moreover, it acknowledged that an infringement of the personality rights of an athlete – encompassing the right to health, bodily integrity respect for one's profession and right to personal development – could be in breach of substantive public policy. See *Semenya v Switzerland* [GC] (n 16) paras 37–40.

⁸⁷ Duval (n 17). This was implicitly acknowledged also by the Grand Chamber in *Semenya*, which noted that according to the material at its disposal, the FSC had only ever set aside one CAS award on grounds of public policy: *Semenya v Switzerland* [GC] (n 16) para 227.

international law norms, including those enshrined in the Convention⁸⁸ – regardless of the fact that breaches of Convention rights do not constitute an autonomous ground of appeal under Swiss law. Furthermore, by preventing individuals from seeking redress for breaches of their fundamental rights in arbitral proceedings, this interpretive approach conflicts with the right to an effective remedy guaranteed under Article 13 of the Convention.⁸⁹ Finally, it bears emphasizing that the FSC’s interpretive stance seems to be at odds also with the subsidiarity principle, which imposes a ‘shared responsibility between the States Parties and the Court’ as regards human rights protection and requires national judicial authorities to apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention.⁹⁰

Notwithstanding the above considerations, the Grand Chamber shied away from substantively engaging with the arguments articulated by the Third Section. First, it merely stated the obvious – namely, that the usual exceptions to territorial jurisdiction did not apply to the case at hand.⁹¹ Secondly, it confined itself to noting that the Third Section’s approach lacked grounding in precedent, asserting that ‘a general exception to territoriality’ for the obligations arising under Articles 8 and 14 ECHR could not be inferred from existing case law.⁹² However, for the reasons outlined above, the transposition of the legal principles developed with regard to traditional cases of extraterritorial jurisdiction to the circumstances in *Semenya* is far from straightforward.⁹³

The Court’s logic is difficult to follow also when approached from a different angle. In fact, the Grand Chamber’s findings imply a differentiation between, on the one hand, the prerogatives of state authorities under domestic law and, on the other, the state’s accountability on the international level. As has been pointed out before, Swiss law empowers the Federal Supreme Court to review international arbitral awards. This power unquestionably extends to substantive review and, through the public policy clause, comprises the protection of fundamental rights as enshrined in the Swiss Constitution and in the human rights instruments to which Switzerland is a party, including

⁸⁸ See, in this sense, the submission of the UN High Commissioner on Human Rights: *Semenya v Switzerland* [GC] (n 16) para 176.

⁸⁹ In order to be effective, the remedy provided under domestic law must be capable of remedying the impugned situation: Council of Europe, ‘Guide to good practice in respect of domestic remedies’ (2013), at www.echr.coe.int. In this sense, see G Fedele, ‘Efficacia orizzontale della Convenzione europea e previo esaurimento dei rimedi interni: in margine alla decisione di inammissibilità nel caso *Lee c. Regno Unito*’ (2022) *Rivista di diritto internazionale* 1141, 1145.

⁹⁰ The principle of subsidiarity has been recently inserted by Protocol No. 15 into the Preamble to the Convention. See *Grzęda v Poland* [GC] App. 43572/18 (ECtHR, 15 March 2022) para 324.

⁹¹ *Semenya v Switzerland* [GC] (n 16) para 136.

⁹² *Ibid* paras 140–148.

⁹³ Interestingly, the Court did not even bother to support its findings by referring to the arguments raised in the joint dissenting opinion issued by Judges Grozev, Roosma and Ktistakis in connection to the Third Section’s ruling, such as the distinction between derogable and non-derogable rights.

the Convention. However, according to the Court's reasoning, the state's accountability on the international plane for the protection of Convention rights does not match the scope of domestic authority; rather, it is limited to procedural rights. While acknowledging the autonomous nature of the concept of jurisdiction within the Convention system,⁹⁴ this separation between the state's jurisdiction and international responsibility is difficult to justify – except of course as a matter of judicial restraint. Moreover, splitting the jurisdictional competence of the Court between procedural and substantive rights is difficult to square with Article 32 ECHR, according to which the Court's jurisdiction extends to 'all matters' concerning the interpretation and application of the Convention and the Protocols duly referred to it.

Finally, a notable shortcoming in the Grand Chamber's reasoning lies in its failure to appreciate the extent to which the system for adjudicating international sports disputes is integrated within the Swiss legal framework. The possibility of appeal before the Swiss Federal Supreme Court is not merely incidental – as could be said of any proceeding for the recognition or enforcement of arbitral awards before domestic courts. Rather, it is a structural element of the international sports justice system. What is more, FSC review represents the sole avenue of legal redress available to athletes challenging awards issued within a framework of mandatory privatized justice. While, in theory, athletes may attempt to bring actions before domestic courts in other jurisdictions to have CAS awards set aside, this option is residual and, due to practical limitations, cannot be considered an effective remedy.⁹⁵ By contrast, FSC oversight constitutes an essential component of the architecture of sports adjudication. Its central role has been explicitly acknowledged by the Court in various precedents, where it recognized that the appeal before the FSC grants legal force to CAS awards.⁹⁶ This degree of embeddedness of the sports justice system within the Swiss legal order provides further grounds for arguing that appeal proceedings before the FSC engage Switzerland's jurisdiction as regards the safeguard of Convention rights in CAS arbitrations.⁹⁷

In sum, the flaws identified above point to an underlying concern with avoiding perceptions of judicial overreach, which appears to have significantly influenced the Court's approach. On the one hand, the Court probably sought to shun the impression that it would obstruct efforts of states parties to position themselves as attractive arbitration hubs, by formally excluding state responsibility for the safeguard of substantive Convention rights. This concern is particularly evident in the submissions

⁹⁴ Milanović (n 73).

⁹⁵ Duval (n 17).

⁹⁶ *Mutu and Pechstein* (n 5) and *Platini v Switzerland* App 526/18 (ECtHR 5 March 2020).

⁹⁷ From a practical perspective, FSC proceedings sanction and enact CAS awards under Swiss law. In this context, it bears emphasizing that the ECtHR's case law recognizes that the responsibility of the State is engaged whenever the domestic law in force at the relevant time validates the contested treatment, regardless of whether the original violation has been committed by a private actor. See, *mutatis mutandis*, *VgT Verein Gegen Tierfabriken v Switzerland*, App. 24699/94 (ECtHR 28 June 2001) para 47.

of the UK – another prominent arbitration center – as intervening party. The UK urged the Court to limit any potential affirmation of state jurisdiction over substantive rights to the peculiar context of sports arbitration, leaving commercial arbitration unaffected.⁹⁸ On the other hand, the Court also seemed intent on avoiding the perception that it was encroaching on the domain of international sports governing bodies.⁹⁹ Nonetheless, as will be discussed in greater detail below, the Court's apparent restraint seems more formal than substantive.

4.2. The Court's assessment as to the violation of Article 6 ECHR

In examining the complaint under Article 6 ECHR, the Court applied a high level of scrutiny, delving into the merits of the Federal Supreme Court's assessment of the compatibility of the CAS award with fundamental rights attracted within the notion of public policy. As discussed below, it went so far as to articulate a specific – and notably stringent – standard for national courts reviewing sports arbitrations, justified by the distinctive features of the system for the resolution of international sports disputes.

The Grand Chamber began its analysis by restating – consistently with its usual approach under Article 6 ECHR¹⁰⁰ – that it was not competent to act as court of fourth instance, and that it would refrain from questioning national courts' assessment of facts and law unless their findings were manifestly arbitrary or unreasonable.¹⁰¹ It then proceeded, though, to examine the specific issues arising in relation to the resolution of sports disputes before the CAS, emphasizing not only that it constitutes a form of compulsory arbitration imposed by a private entity, but also that it is marked by the dominance of sports governing bodies – both in their relationship with athletes and within the sports arbitration system itself.¹⁰² In line with its established case law,¹⁰³ the Court observed that a similar system of private arbitration followed by limited judicial review by state courts is not *per se* incompatible with the Convention. It held however that, particularly where fundamental rights are at stake – as was the case in *Semenya* – the unique vulnerability of athletes requires that respect for their right to a fair hearing be ensured through a 'particularly rigorous examination' of their case.¹⁰⁴

In the Court's assessment, the review conducted by the FSC was deficient in several respects, as it failed to properly examine key issues left unresolved by the

⁹⁸ *Semenya v Switzerland* [GC] (n 16) para 175.

⁹⁹ Bastianon and Colucci (n 70).

¹⁰⁰ WA Schabas, 'Right to a Fair Trial/Droit à Un Procès Équitable' in William A Schabas (ed), *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015).

¹⁰¹ *Semenya v Switzerland* [GC] (n 16) para 193.

¹⁰² *Ibid* paras 199–210.

¹⁰³ See the rulings in *Mutu and Pechstein and Platini* (n 5).

¹⁰⁴ *Semenya v Switzerland* [GC] (n 16) para 209.

CAS. The FSC largely endorsed the CAS's findings without subjecting them to meaningful scrutiny and neglected to adequately engage with the applicant's submissions, thus violating Ms. Semenya's right to a fair trial.¹⁰⁵ Firstly, the Court noted that the FSC did not sufficiently consider the CAS's own concerns about the practical implementation of the DSD regulations, particularly in light of natural fluctuations in testosterone levels – an issue directly relevant to assessing the proportionality of the measures.¹⁰⁶ Second, it omitted to address the fact that the CAS had acknowledged a limited evidentiary basis for the selection of certain restricted competitions, raising doubts about the rationale behind this choice. This was especially problematic given Ms. Semenya's claim that the selection was specifically aimed at targeting her.¹⁰⁷ Third – and most significantly – the Grand Chamber directly criticized the merits of the FSC's evaluation regarding the compatibility of the regulations with fundamental rights and, thus, Swiss public policy. Indeed, it aptly pointed out that the FSC's analysis of whether the regulations were compatible with human dignity and personality rights under Swiss law relied primarily on their stated objectives, rather than on their actual impact on the athletes concerned.¹⁰⁸

The preceding analysis reveals that, through the prism of a procedural right, the Grand Chamber really challenged the FSC's substantive assessment regarding the conformity of the DSD Regulations with fundamental human rights safeguards. Moreover, the Court critically noted that both the provisions of the Swiss private international law framework and the Federal Supreme Court's interpretation of the concept of public policy applied the same standard of review to arbitral proceedings involving purely contractual relationships – typically characterized by equality of arms – and to sports disputes, despite the latter being marked by significant asymmetries between the parties.¹⁰⁹ This is especially significant, because – even if the Court does not say so explicitly – it is tantamount to implying that the Swiss legal framework and its implementation by the judiciary do not adequately safeguard athletes' fundamental rights. Ultimately, this resonates with the reasoning employed by the Third Section in establishing a violation of the positive obligations entailed in Articles 8 and 14 of the Convention.

Finally, the reasoning employed by the Grand Chamber in assessing the complaint under Article 6 ECHR is interesting also for reasons that transcend the peculiarities of the case at hand. Much attention has been devoted over the past years to

¹⁰⁵ Ibid paras 238–239.

¹⁰⁶ Ibid para 229.

¹⁰⁷ Ibid para 233.

¹⁰⁸ Ibid paras 236–237. The Court also noted that the FSC did not sufficiently engage with the applicant's submissions regarding the damage deriving from the publicity of confidential medical information, or regarding the comparability of her case with the challenge previously brought by the footballer Francelino da Silva Matuzalem, which had resulted in the only instance of a CAS award being set aside by the FSC.

¹⁰⁹ *Semenya v Switzerland* [GC] (n 16) para 237.

the ‘procedural turn’ of the ECtHR, referring to the tendency to focus on the adequacy of domestic procedures when assessing complaints regarding breaches of substantive Convention rights.¹¹⁰ Such tendency does not necessarily prevent the Court from engaging in its own normative assessment of the merits of the case, but it involves at least partial deference following the positive verification of procedural due diligence.¹¹¹ In *Semenya*, in turn, the Grand Chamber attracts substantive Convention safeguards in its review of a complaint regarding a procedural right. What is more, it employs quite overtly the protection of such substantive rights as benchmark for the assessment of the adequacy of the national judicial procedures. Once again, this should be probably read as a function of the thin line that the Court has been walking in *Semenya*: on the one hand, displaying judicial restraint to assuage concerns by states and other stakeholders while, at the same time, upholding effective human rights protection.

4.3. Parallel developments regarding sports arbitration before the CJEU

Before concluding, it is worth zooming out from *Semenya* to locate the ECtHR’s approach against the broader context of judicial scrutiny over the activity of sport governing bodies and the sports justice system. Indeed, sports arbitration has come under increased scrutiny also by the Court of Justice of the European Union regarding its compatibility with EU law – most notably, the requirement of effective legal remedies enshrined in Article 19 TEU, read in conjunction with Article 267 TFEU and Article 47 of the EU Charter of Fundamental Rights. The CJEU has recently addressed this issue in two landmark rulings: *International Skating Union*¹¹² and, lastly, in *RFC Seraing*,¹¹³ delivered just a few weeks after the Grand Chamber’s judgement in *Semenya*.

These cases involved very different issues from the ones at stake in *Semenya*. *International Skating Union* concerned the compatibility of regulations adopted by the International Skating Union (ISU) with EU competition law, as well as the role of the sports arbitration system in reinforcing potential infringements by insulating ISU decisions from review on the basis of EU law.¹¹⁴ The ruling in *RFC Seraing*, by contrast,

¹¹⁰ See, inter alia, T Kleinlein, ‘The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution’ (2019) 68 *International & Comparative Law Quarterly* 91; R Spano, ‘The Future of the European Court of Human Rights-Subsidiarity, Process-Based Review and the Rule of Law’ (2018) 18 *Human Rights Law Review* 473.

¹¹¹ OM Arnardóttir, ‘The ‘Procedural Turn’ under the European Convention on Human Rights and Presumptions of Convention Compliance’ (2017) 15 *International Journal of Constitutional Law* 9.

¹¹² Case C-124/21 P *International Skating Union v European Commission*, EU:C:2023:1012.

¹¹³ Case C-600/23 *Royal Football Club Seraing* EU:C:2025:617.

¹¹⁴ For a detailed analysis of the issues involved in the ruling, see S Van den Bogaert and B Van Rompuy, ‘The New Testament for Sports and EU Competition Law in *European Super League*, ISU, and *Royal Antwerp*’ (2025) 62 *Common Market Law Review* 577; H Vedder, ‘On Thin Ice: The Court’s Judgment in Case C-124/21 P, *International Skating Union v Commission*’ (2024) 9 *European Papers*

was issued in the context of a preliminary reference procedure and dealt with the issue of whether national courts should treat CAS award, following appeal before the Swiss Federal Supreme Court, as *res judicata*, and the extent to which the factual findings of the CAS carry probatory value in national proceedings.¹¹⁵ Regardless of the specificities of these cases, what matters for present purposes are the findings of the CJEU regarding the compatibility of the sports justice system with the right to effective judicial review, which are substantially similar across the two cases.

In both instances, the CJEU acknowledged that the establishment by private sports governing bodies of a mechanism of compulsory arbitration before the CAS is, in principle, admissible, in view of the particular needs of expediency, effectiveness and specialization involved in the resolution of sports disputes.¹¹⁶ In *RFC Seraing*, it drew an explicit distinction with other forms of international arbitration which are deemed to be incompatible with EU law, notably treaty-based investor-state dispute settlement.¹¹⁷ However, the CJEU also emphasized that the legal autonomy enjoyed by sports governing bodies cannot go so far as to limit the ability of individuals to invoke rights recognized under EU law.¹¹⁸ Therefore, Member States are required to ensure a minimum degree of judicial supervision by allowing individuals to obtain effective judicial review over CAS awards.¹¹⁹ Whereas the Advocate General in *RFC Seraing* contended that the right to effective judicial protection could only be ensured through full review of arbitral awards via direct judicial appeal before domestic courts in EU Member States,¹²⁰ the CJEU ultimately held that indirect review by national courts limited to assessing the compatibility with EU public policy would suffice, provided that those courts are entitled to refer questions of EU law interpretation under the preliminary

87; A Duval, 'The *International Skating Union Ruling* of the CJEU and the Future of CAS Arbitration in Transnational Sports Governance' (2023) 23 *The International Sports Law Journal* 467.

¹¹⁵ For a more extensive analysis, see S Bastianon and M Colucci, 'Sports Arbitration and Effective Judicial Protection Under EU Law: The RFC Seraing Case' (2025) 21 *Rivista di diritto ed economia dello sport*; DP de Lamo, 'Overruling the Referees: RFC Seraing and the EU Court's Supremacy Over CAS Arbitration' (EU Law Live, Weekend Edition No. 243, 13 September 2025), at eulawlive.com; N Andreotti, 'Game, Set, Review' (Verfassungsblog, 7 August 2025), at verfassungsblog.de.

¹¹⁶ The opinion of the Advocate General Rantos in *International Skating Union* contained a clear endorsement of CAS arbitration for these reasons: Opinion of AG Rantos in Case C-124/21 P *International Skating Union v Commission*, EU:C:2022:988 para 157. The Grand Chamber in the same case was less explicit, but it refused to rule on the independence and impartiality of the CAS and pointed to the fact that the main problem, from its point of view, consisted in the appellate mechanism before the FSC, a court of a non-EU country: *International Skating Union* (n 112) paras 188–191. Similarly, the Court in *RFC Seraing* recognized that imposed recourse to arbitration may be warranted in principle, in the light of the legal autonomy enjoyed by international sports associations and having regard to their responsibilities: *Royal Football Club Seraing* (n 113) para 94.

¹¹⁷ *Royal Football Club Seraing* (n 113) para 79.

¹¹⁸ *Ibid* para 95.

¹¹⁹ *Ibid* paras 100–108. The conclusions reached by the Court on this point in the *International Skating Union* case were very similar: *International Skating Union v Commission* (n 112) paras 188–203.

¹²⁰ Opinion of AG Ćapeta in Case C-600/23, *Royal Football Club Seraing*, EU:C:2025:24 paras 104–105.

reference procedure (Article 267 TFEU).¹²¹ It further specified that EU public policy encompasses core provisions of EU law, including key EU competition rules and the freedom of movement safeguards. In short, in the eyes of the CJEU the problems of the sports justice system do not lie within the arbitration mechanism before the CAS, but rather in the review of the FSC.

In sum, the approaches of the ECtHR and the CJEU are, to some extent, aligned. Both courts rely on procedural safeguards – the right to effective judicial review under EU law and the right to a fair trial under the Convention – as a means of striking a balance between two competing objectives: preserving the viability of private sports arbitration, and upholding core elements of EU public policy as well as Convention safeguards. At the same time, though, the rulings of the two courts seem bound to have rather different implications for the sports justice system going forward. In fact, at least from a theoretical point of view it is conceivable that the FSC might attempt to comply with the standard of review of a ‘particularly rigorous examination’ delineated by the ECtHR under Article 6 ECHR by strengthening its oversight over CAS awards. It could, for instance, differentiate the intensity of its review over arbitral awards based on the nature of the arbitration and taking into account the particular sensitivity of sports arbitration, as implicitly suggested by the Grand Chamber.¹²² By contrast, the FSC is structurally incapable of satisfying the requirements outlined by the CJEU, as it does not apply EU law and is not entitled to activate the preliminary reference procedure. This opens up the possibility to challenge CAS awards, regardless of their confirmation by the FSC, before EU domestic courts and might, ultimately, lead to a relocation of CAS proceedings.¹²³

5. Concluding remarks

The journey of Ms. Semenya before the ECtHR could be described, at a first look, as a trajectory marked by a human rights breakthrough, later tempered by judicial conservatism. However, for the reasons discussed in this article, this is only partially true. The Grand Chamber did confine the responsibility of the state whose courts are tasked with the appellate review of CAS awards to securing the right to a fair trial under Article 6 ECHR, thus formally excluding accountability for the violation of substantive Convention rights involved in the proceedings. At the same time, though, it established a high standard of review, which will arguably lead to a closer engagement by the Swiss Federal Supreme Court – or, for that matter, other appellate courts should the seat of the CAS be moved in the future – with human rights issues at stake in the arbitrations.

¹²¹ *Royal Football Club Seraing* (n 113) paras 98–106.

¹²² *Semenya v Switzerland* [GC] (n 16) para 237.

¹²³ In this sense, see Duval (n 114).

The implications of the Grand Chamber's approach are difficult to fully assess. One might argue that, from a practical point of view, the consequences for Ms. Semenya and, in future perspective, for other athletes may not differ significantly from those that would have followed had the Court reached a different conclusion on jurisdiction, as suggested by the Third Section's ruling. Even in that hypothetical scenario, the Court would not have been in a position to directly challenge the legitimacy of the contested regulations. At most, it could have found that the restrictive review carried out by the Federal Supreme Court prevented a proper assessment of whether those regulations violated the prohibition of discrimination and the right to private life under Articles 14 and 8 of the ECHR. However, the Court's attempt to balance judicial restraint and human rights protection came at the price of establishing - for the first time and on rather shaky legal grounds - a distinction between procedural and substantive rights for the purposes of jurisdiction under Article 1 ECHR. It remains unclear how this distinction will influence the future development of the Court's case law, both in relation to the review of international arbitral awards and more broadly. It is conceivable that the Court could have attempted to achieve the same result through a different, perhaps preferable, interpretative path. Specifically, rather than excluding jurisdiction over substantive complaints, it could have leveraged the flexibility of the relevant substantive provisions to limit the responsibility of the respondent state to instances where the national judicial oversight over arbitral awards manifestly fails to safeguard the substantive rights involved in the dispute.

Finally, it is worth pointing out that the implications of the judicial saga of *Semenya* for the broader world of international arbitration beyond sports are likely to remain rather limited. Indeed, the Court expressly stated that its findings on the intensity of the judicial oversight required for the appellate review of CAS awards were motivated by the peculiarities of sports arbitration, and the particular vulnerability of athletes within the sports justice system. In this sense, it appeared to heed the concerns raised by the Swiss government as well as by the UK as to a possible detrimental impact of its ruling on the attractiveness of states party to the Convention as commercial arbitration fora.

