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THE *SEMENYA V. SWITZERLAND* ECTHR GRAND CHAMBER JUDGEMENT: JURISDICTION, PROCEDURAL RIGHTS, AND SPORTS ARBITRATION

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ABSTRACT: This paper analyses the Grand Chamber judgment of the European Court of Human Rights in the Semenya v. Switzerland case, a landmark ruling clarifying the States' obligation regarding international sports arbitration under the European Convention on Human Rights. The judgement distinguishes procedural from substantive Convention rights in terms of jurisdiction, holding Switzerland responsible under Article 6, paragraph 1, for insufficient judicial review of a CAS award while rejecting jurisdiction over alleged violations of Articles 8, 14, and 13. The Authors focus on key aspects of the ruling, namely: (i) the non-issue of CAS independence and impartiality in the case at stake, (ii) the absence of a territorial link for substantive rights,(iii) the existence of a territorial link for procedural rights, (iv) the emerging doctrinal distinction between these rights, (v) the narrow scope of Swiss judicial review, (vi) and the fact that the Differences of Sex Development regulations remain valid and unchallenged.

Il presente articolo analizza la sentenza della Grande Camera della Corte europea dei diritti dell'uomo nel caso Semenya c. Svizzera*, una decisione storica che chiarisce gli obblighi degli Stati in relazione all'arbitrato sportivo internazionale ai sensi della Convenzione europea dei diritti dell'uomo. La sentenza distingue, in termini di giurisdizione, tra i diritti procedurali e quelli sostanziali garantiti dalla Convenzione, ritenendo la Svizzera responsabile, ai sensi dell'articolo 6, paragrafo 1, per l'insufficiente controllo giurisdizionale di un lodo del TAS, ma dichiarando l'incompetenza in merito alle presunte violazioni degli articoli 8, 14 e 13. Gli Autori si concentrano su alcuni aspetti chiave della pronuncia, e in particolare: (i) l'irrilevanza, nel caso di specie,*

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*dell'indipendenza e imparzialità del TAS; (ii) l'assenza di un collegamento territoriale per i diritti sostanziali; (iii) l'esistenza di un collegamento territoriale per i diritti procedurali; (iv) la crescente distinzione dottrinale tra tali categorie di diritti; (v) la portata limitata del controllo giurisdizionale esercitato dai tribunali svizzeri; e (vi) il fatto che le normative sulle differenze nello sviluppo sessuale (*Differences of Sex Development*) non sono state invalidate.*

Keywords: *Human Rights – Arbitration – Jurisdiction – Public Policy – Fair Trial.*

Diritti umani – Arbitrato – Giurisdizione – Ordine Pubblico – Giusto Processo.

SUMMARY: 1. Introduction – 2. The Scope of the Case: CAS Independence and Impartiality Not at Issue – 3. No Territorial link for Articles 8, 14 and 13 ECHR – 4. Existence of Territorial Link for Article 6, paragraph 1 ECHR – 5. Article 6 ECHR and the Role of Arbitral Tribunals such as CAS – 6.The Scope of the SFT's Judicial Review and the (Too) Narrow Interpretation of the Notion of Public Policy – 7. The Validity of the DSD Regulations – 8. Concluding Remarks

1. Introduction

The European Court of Human Rights (hereafter "ECtHR") Grand Chamber's judgment, delivered on 10 July 2025, in the *Semenya v. Switzerland* case addresses fundamental questions about the jurisdictional reach of the European Convention on Human Rights (hereafter "ECHR" or the "Convention") in the context of international sports arbitration.[1]

Caster Semenya, an elite South African middle-distance runner, challenged the application of IAAF (now World Atlethics)' DSD (hereafter "Differences of Sex Development") regulations.

On 30 April 2019, the Court of Arbitration for Sport (hereafter "CAS") upheld the validity of those regulations: although the latter were considered discriminatory, the majority found that, based on the evidence submitted by the parties, the discrimination constituted a necessary, reasonable, and proportionate means of achieving the World Athletics's stated objective of preserving the integrity

[1] ECtHR, Grand Chamber, *Semenya v. Switzerland*, available at *https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2210934/21%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22],%22itemid%22:[%22001-244348%22]}*.

of athletics in the so-called "restricted events" (female-only track events from 400 m to 1 mile (inclusive).[2]

On the basis of Article 190(2)(e) of the Swiss Private International Law Act (PILA),[3] the Federal Swiss Tribunal dismissed Caster Semenya's appeal upholding World Athletics' regulations requiring female athletes with differences of sex development (DSD) to medically reduce their testosterone levels because these provisions did not breach the threshold of public policy violation.

In reaching its conclusion, the Tribunal endorsed the CAS's findings that the DSD regulations were necessary, reasonable, and proportionate measures aimed at ensuring fairness in women's middle-distance running events. Furthermore, it found no violation of Semenya's human dignity, emphasizing that she was not compelled to undergo medical treatment, as participation in athletics under those conditions remained a matter of personal choice.

Following the decision of the Federal Swiss Tribunal, Ms Semenya brought her case to Strasbourg.[4]

On 11 July 2023, the third section of the ECtHR held, by a majority (4 votes to 3), that there had been a violation of Article 14 (*Prohibition of Discrimination*) taken together with Article 8 (*Right to Respect for*

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[2] The CAS Panel was restrained in its task, due to the strict framework of the arbitration, to solely determine whether the DSD Regulations were invalid or not. It nevertheless considered it appropriate to highlight its concerns with aspects of the DSD Regulations which arose from the submissions and evidence adduced by the parties during the CAS proceedings, namely:

1) The difficulties of implementation of the DSD Regulations in the context of a maximum permitted level of testosterone. The Panel noted the strict liability aspect of the DSD Regulations and expressed its concern as to an athlete's potential inability to remain in compliance with the DSD Regulations in periods of full compliance with treatment protocols, and, more specifically, the resulting consequences of unintentional non-compliance.

2) The difficulty to rely on concrete evidence of actual (in contrast to theoretical) significant athletic advantage by a sufficient number of 46 XY DSD athletes in the 1500m and 1 mile events. The CAS Panel suggested that the IAAF consider deferring the application of the DSD Regulations to these events until more evidence is available.

3) The side effects of hormonal treatment, experienced by individual athletes could, with further evidence, demonstrate the practical impossibility of compliance which could, in turn, lead to a different conclusion as to the proportionality of the DSD Regulations. The full award is confidential but the executive summary is available at *https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf*.

[3] Federal Swiss Tribunal, fsc, 4a_248/2019 and 4a_398/2019, *Mokgadi Caster Semenya v iaaf*, 25 August 2020. For a critical overview of the Fedeeral Swiss Tribunal Decision see A. Duval, *Righting the Lex Sportiva:* The *Semenya v Switzerland Case and the Human Rights Accountability of Transnational Private Governance*, The European Convention Human Rights Law Review, Brill, 25 April 2025, available at *https://brill.com/view/journals/eclr/6/2/article-p238_006.xml?srsltid=AfmBOoro1DpRpj8-rillQVH65VIf6pXvufv4_cDhD8o7C_egD-AS1nZw#fn0034*.

[4] Application no. 10934/21. See also S. Bastianon, *The ECtHR's Ruling in the Semenya v. Switzerland Case, What Is Next for International Sports Arbitration and Athletes' Human Rights*, RDES, Vol. XIX, Issue 1/2023, 151; S. Bastianon, *The Timeline of the Semenya Saga. Waiting for the Grand Chamber*, *https://rivista.eurojus.it/the-timeline-of-the-semenya-saga-waiting-for-the-grand-chamber/*.

Private Life) of the European Convention on Human Rights, and a violation of Article 13 (*Right to an Effective Remedy*) in relation to Article 14 taken together with Article 8 of the Convention.[5]

The third section of the ECtHR found that the athlete had not been afforded sufficient institutional and procedural safeguards in Switzerland to allow her to have her complaints examined effectively, especially since her complaints concerned substantiated and credible claims of discrimination because of her increased testosterone level caused by differences of sex development.

Upon Switzerland's request for referral to the Grand Chamber, on 10 July 2025 the latter ruled that there has been a violation of Article 6, paragraph 1, of the Convention, given that "*the specific characteristics of the sports arbitration to which the applicant was subject, entailing the mandatory and exclusive jurisdiction of the CAS, required an in-depth judicial review – commensurate with the seriousness of the personal rights at issue – by the only domestic court having jurisdiction to carry out such a task. The review of the applicant's case by the Federal Supreme Court, not least owing to its very restrictive interpretation of the notion of public policy, which it also applied to the review of arbitral awards by the CAS, did not satisfy the requirement of particular rigour called for in the circumstances of the case*".[6]

The Grand Chamber ruling is significant for several reasons.

First, it is a rare example of the Court engaging with the intersection of private-international arbitration, domestic judicial review, and Convention obligations.

Second, it carefully delineates the scope of State jurisdiction under Article 1 of the ECHR with respect to both procedural and substantive rights.

Third, it criticizes the minimalism of the Swiss Federal Tribunal's judicial review under its public policy exception.

2. *The Scope of the Case: CAS Independence and Impartiality Not at Issue*

A preliminary but critical clarification in the Grand Chamber's judgment is that the independence and impartiality of CAS was not under review in this case. The ruling made this point unequivocally: "*The applicant did not allege before the Court that the CAS lacked independence or impartiality. Rather, the complaints related to the judicial review exercised by the Swiss Federal Tribunal over the CAS award*".[7]

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[5] ECtHR, third section, judgement of 11 July 2023, *Semenya v. Switzerland*, available at *https://hudoc.echr.coe.int/eng#{%22appno%22:[%2210934/21%22],%22itemid%22:[%22001-226011%22]}*. For a critical analysis of the judgement, see S. Bastianon, *The ECtHR's Ruling in the Semenya v.Switzerland Case: What is Next For International Sports Abritration and Ahtletes's Human Rights?*, RDES, 2023, 151.

[6] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 238.

[7] Ibid., paragraphs 90 and 91.

This statement has an important legal consequence. CAS has long faced critique about its independence and impartiality – especially from athletes compelled to submit to its exclusive jurisdiction under sports governing bodies' rules.[8]

Nevertheless, while this issue was mentioned during the written and oral proceedings, the Court made it clear that it fell outside the scope of the application. The reason lies in the formulation of the complaint submitted by the applicant: Caster Semenya did not allege a structural deficiency or lack of independence or impartiality on the part of the CAS itself. Rather, her grievance under Article 6, paragraph 1 (in conjunction with Article 13) was directed at the limited nature of the judicial review carried out by the Swiss Federal Supreme Court under Article 190(2)(e) PILA, and the consequent lack of effective access to a remedy.

In accordance with the Court's settled jurisprudence on the delimitation of its *ratione materiae* jurisdiction, the scope of a case is defined by the factual and legal elements expressly raised by the applicant. Although the Court enjoys a certain margin in recharacterising the legal grounds of a complaint (*jura novit curia*), it cannot examine issues that were not clearly invoked or implied in the initial application.[9] As such, the Grand Chamber held that it had no jurisdiction to examine the structural features of CAS, including its compliance with the requirements of independence and impartiality under Article 6, paragraph 1, because this issue had not been referred to it.[10]

By confining itself strictly to the specific procedural complaint raised, the Grand Chamber focused on the adequacy of Swiss judicial review and refrained from extending its scrutiny to aspects of the arbitral system not directly challenged by the applicant.

As such, the judgement leaves untouched the broader question of CAS's structural compliance with Article 6, paragraph 1, as previously addressed in the ECtHR's case law.[11]

Nonetheless, the independence and impartiality of CAS remain at the heart of ongoing legal and academic debate, as confirmed both by the observations submitted by some intervening parties[12] and by Judge Simackova's partly concurring opinion.[13]

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[8] See ECtHR, judgment of 2 October 2018, *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10. In this case, the Court examined in detail the question of whether CAS, as the sole available forum for athletes, met the requirements of independence and impartiality under Article 6, paragraph 1.

[9] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 85.

[10] Ibid., paragraphs 92 - 95.

[11] For a detailed analysis of the grounds and limitations applicable to the challenge of CAS awards under Swiss law, See A. Rigozzi, Challenging Awards of the Court of Arbitration for Sport, *Journal of International Dispute Settlement*, Volume 1, Issue 1, February 2010, 217–265, *https://doi.org/10.1093/jnlids/idp010.*

[12] For the interveners on behalf of the International Human Rights Center of Loyola Law School (Los Angeles) and the International Sports Law Center of the T.M.C. Asser Instituut (The Hague), CAS was not an independent and impartial tribunal within the meaning of Article 6, paragraph 1

Moreover, while the Grand Chamber in *Semenya* did not rule on this matter due to the limited scope of the application, this does not preclude future applicants from raising such a complaint directly under Article 6, paragraph 1. In fact, as the Court itself noted,[14] structural issues related to the composition and functioning of CAS – particularly in light of its mandatory jurisdiction[15] over athletes and its ties to international sports federations – remain legally relevant and may be brought before the Court, provided they are properly substantiated in the initial application.[16]

3. No Territorial Link for Articles 8, 14, and 13 ECHR

For the Grand Chamber there was no territorial jurisdiction under Article 1 ECHR for alleged violations of Articles 8, 14, and 13 of the Convention.

The Court needed 30 paragraphs from 98 to 127 to detail the grounds why Switzerland could not be held responsible for the substantive content or effects of the DSD regulations themselves.

This is surely a central part of the ruling.

The starting point of the Court's reasoning was that under Article 1 of the Convention the essentially territorial nature of the jurisdiction of a State is of

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because the jurisdiction of the CAS was in most instances compulsory for athletes who, if they wanted to compete internationally, had no other option but to accept arbitration. ECtHR, *Grand Chamber, Semenya v. Switzerland*, paragraph 184.

[13] In her partly concurring opinion, the judge Simackova affirmed "*I am unable to agree with the finding that the applicant did not put forward sufficient arguments to enable the Court to examine, under Article 6 § 1 of the Convention, whether the CAS was an "independent and impartial tribunal established by law". Given that the applicant submitted that the arbitration was imposed on her and complained about the excessively limited nature of the review carried out by the Federal Supreme Court, the Court ought to have ascertained whether the CAS satisfied those criteria*" (Opinion, paragraph 4).

[14] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 200.

[15] See M. Coccia, *The "Supreme Court" of International Sports: The Courd of Arbitration for Sport*,International Sports Justice, M.Coccia -M.Colucci ed., SLPC, 2024. Drawing on extensive case law, Coccia clarifies the often contentious issues of jurisdiction, admissibility, and the de novo nature of CAS appeals proceedings, including the legal basis for compelled arbitration and the interpretation of sports-related arbitration clauses.

[16] This is particularly relevant given that similar issues have arisen in domestic sports arbitration, as established by the ECtHR in *Ali Riza and Others v. Turkey,* App. No. 30226/10, judgement of 28 April 2020, available at *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-200548%22]}*. The Court found a violation of Article 6 because the Arbitration Committee of the Turkish Football Federation was insufficiently independent from the Federation's Board of Directors – a structural flaw bearing certain parallels with criticisms levelled at CAS. While Ali Riza concerned a national arbitral body rather than CAS itself, it underscores the principle that sports arbitration must satisfy the independence and impartiality requirements of Article 6(1) ECHR, regardless of whether it is domestic or international in scope. For a detailed and critical analysis of the case, see D. Rietiker, *Defending Athletes, Players, Clubs and Fans*, Council of Europe, 2022; Reto T. Annen, *The ECtHR Demandes a fair Trial in the Matter of Ali Riza and Others v. Turkey*, RDES, 2/2020.

essence. In other words, this means that "*the facts complained of by the applicant must, in principle, have taken place on the territory of the respondent State*".[17]

In the case at hand, by contrast, the Courts noted that: (1) the athlete was a South African national residing in South Africa and with no personal link with Switzerland; (2) Switzerland played no role in the drafting or application of the DSD Regulations, which were issued by a Monegasque private-law association; (3) the athlete did not argue that she was prevented from competing in Switzerland because of the DSD Regulations.

Conversely, the links between the case and Switzerland were limited to the fact that:

(i) the case was referred by the athlete to the CAS, which has its seat in Lausanne and is not a domestic court or another institution of Swiss public law, but an entity emanating from a private-law foundation, namely, the International Council of Arbitration for Sport (ICAS), and

(ii) the Swiss Federal Tribunal subsequently examined the civil-law appeal lodged with it by the athlete against the CAS award within its competence to review the award's compatibility with substantive public policy.

Thus, for the purposes of Articles 8 (*Respect for Private Life*), 14 (*Non-Discrimination*), and 13 (*Effective Remedy*), there was no act or omission attributable to Switzerland that would give rise to jurisdiction under the Convention.

In reaching this conclusion the Court also dealt with the possibility to establish the jurisdiction of Switzerland despite the lack of a territorial link.

The Court first ruled out the usual exceptions to the territoriality principle (such as State control over foreign territory or people abroad, or the duty to investigate deaths under Article 2 of the Convention), given that none of these applied to the case at issue.

It then examined the Chamber's reasoning that, when a national court reviews an appeal alleging violations of substantive Convention rights (such as Articles 8 and 14) over events abroad, the State has jurisdiction for the procedural obligations in those rights.

However, the Court noted that the case-law of the ECtHR did not support that view. In particular, while in the *Platini* case[18] the Court accepted jurisdiction under Article 8 because the dispute was clearly linked to Switzerland – the applicant was sanctioned by the internal bodies of FIFA, a legal person under Swiss law whose seat is in Switzerland, for a breach of its Code of Ethics in the course of his duties at FIFA and while he was its Vice-President – the *Semenya* case is different, given that the events at issue did not have a comparable link to Switzerland.[19]

Similarly, case-law on the procedural duty to investigate violent deaths according to Article 2 does not provide a basis in the Semenya case, because that

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[17] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 119.
[18] EctHR, 11 February 2020), *Platini v. Switzerland* (dec.), no. 526/18.
[19] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 141.

duty is "*a separate and autonomous duty, "detachable" from the substantive limb of Article 2 and which may be capable of binding the State Party even when the death occurred outside its jurisdiction*".[20]

Then, the Court rejected analogies to Article 6, paragraph 1 (*Right to a Fair Hearing*), which is uniquely procedural and has its own jurisdictional logic – namely that if a State's court allows a civil action over foreign facts, they must respect procedural rights. That reasoning does not extend to substantive rights like Articles 8 and 14.

Therefore, "*the fact that the Federal Supreme Court examined the applicant's civil-law appeal seeking to have the CAS award of 30 April 2019 set aside does not suffice to establish Switzerland's jurisdiction in respect of the applicant in the context of her complaints under Articles 8 and 14 of the Convention*".[21]

The Court also dismissed the argument that requiring the use of the Swiss legal system gave Switzerland "control" over the applicant's Convention interests. Jurisdiction under Article 1 requires control over the person, not just their legal interests. Accepting such a test would radically and unjustifiably expand extraterritorial jurisdiction.

Finally, the Chamber's concern that denying jurisdiction would block access to the Court for professional female athletes cannot justify creating jurisdiction where none exists under Article 1 of the Convention. Doing so would improperly expand extraterritorial jurisdiction beyond established principles.[22]

4. Existence of Territorial Link for Article 6, paragraph 1 ECHR

In sharp contrast with what was argued for the scope of Articles 8 and 14, the Grand Chamber found jurisdiction under Article 1 in respect of the alleged violation of Article 6, paragraph 1 of the Convention. Paragraphs 128 to 135 of the ruling explain this distinction in detail.

The key reason is that Article 6, paragraph 1, guarantees a right of access to a "tribunal" in disputes over civil rights and obligations. Once the CAS award was challenged before the Swiss Federal Tribunal, Switzerland exercised its sovereign judicial power in reviewing the award. This was a *public act* attributable to Switzerland under the Convention.

In this respect, the Court emphasized that the mere private nature of the arbitration agreement does not negate a State's responsibility under Article 6 when its courts intervene.

The Swiss Federal Tribunal, by virtue of its judicial review, was required to ensure that the applicant's Convention rights were respected.

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[20] Ibid., paragraph 142.
[21] Ibid., paragraph 145.
[22] Ibid., paragraph 150.

This approach aligns with the Court's jurisprudence on the role of domestic courts in recognizing or enforcing foreign or arbitral judgments. Even where the underlying dispute is private, State courts remain bound to secure procedural fairness consistent with Article 6.

According to the Grand Chamber, jurisdiction is not grounded in Switzerland's hosting of the CAS or any regulatory function in international arbitration, but derives instead from the Swiss, sovereign judicial act in enforcing the arbitral award at stake. This *procedural* territorial connection sufficed to bring Article 6, paragraph 1 into play, even though no such link existed for the substantive DSD regulations challenged under Articles 8, 13 and 14 as illustrated above.

In this respect, it is worth noting that Article 1 ECHR does not formally distinguish between procedural and substantive rights in defining jurisdiction ("everyone within their jurisdiction").

By contrast, the Grand Chamber's approach seems to reveal a functional differentiation:

– For substantive rights (Articles 8 and 14), the Court requires the State's act or omission to be directly linked to the alleged interference (i.e. recognizing a private arbitral award is not enough).

– For procedural rights (Article 6 paragraph1), the State's act of judicial review, the decision to confirm or enforce the arbitral award, is itself regarded as the relevant act capable of triggering the Convention's application.

In other words, the judgment seems to take a differentiated approach: while procedural rights under Article 6, paragraph 1, remain the responsibility of the State when its courts engage in judicial review of arbitral decisions, the attribution of responsibility for substantive rights violations is confined to cases where there is a direct involvement of the State, thereby excluding interference attributable solely to private regulatory bodies.

This differentiated approach raises the question of what might constitute such "direct involvement." One hypothetical example would be a scenario in which a State participates in the drafting or formal adoption of sports regulations that directly impact athletes' rights. If, for instance, a State agency co-adopted eligibility rules akin to the DSD Regulations or embedded them into domestic legislation, any alleged substantive rights interference could arguably be attributed to that State for Article 1 purposes.

Nevertheless, this approach of the Grand Chamber, is openly challenged by four judges who, in their partly dissenting opinion, emphasized that "*the positive obligations under Article 8, taken alone and in conjunction with Article 14, include an obligation to put in place both a legal framework to protect private life against interference by private persons and a remedy capable of providing sufficient protection. The fact that the Federal Supreme Court examined the applicant's civil-law appeal against the CAS award created a jurisdictional link with Switzerland; that link is related to the above-mentioned obligation*

to afford a remedy to individuals who claim to be victims of a violation of Article 8, taken alone or in conjunction with Article 14".[23] Accordingly, "*in a case such as the present one, which has an extraterritorial aspect, a State's jurisdiction is established once an action has been brought before its courts and they have ruled on it, not only in relation to Article 6 § 1 or the procedural obligations under Article 2 but also in relation to the procedural obligations arising from the other substantive provisions of the Convention, including those relating to rights that may be subject to restrictions, such as Article 8*".[24]

5. *Article 6 ECHR and the Role of Arbitral Tribunals such as CAS*

In its general assessment under Article 6 of the Convention, the Grand Chamber restates core principles that have significant implications for the legitimacy and functioning of arbitral tribunals, particularly the CAS, which often operates at the intersection of private ordering and fundamental rights.

The Court's Grand Chamber confirms it is not a "fourth-instance" appellate body reviewing the factual or legal determinations of domestic (or arbitral) tribunals. This Court makes a point to exclusively assess whether proceedings have respected the procedural guarantees enshrined in the Convention.[25] This principle is of central importance in the context of CAS, whose decisions frequently turn on complex factual assessments – such as expert medical or scientific evidence – and where the margin of appreciation afforded to evaluative judgments is correspondingly wide.

Nevertheless, the Grand Chamber is equally clear that deference to arbitral autonomy is not absolute. The Court preserves its competence to intervene where decisions are arbitrary, manifestly unreasonable, or procedurally defective in ways that compromise fairness. This reservation is particularly pertinent for arbitral proceedings such as those before CAS, where concerns have been raised regarding structural independence, transparency, and the handling of scientific and personal data in sensitive cases. All of these issues have been at stake in *Semenya v. Switzerland*.

The Grand Chamber deepens the procedural expectations under Article 6 by articulating the right to a meaningful hearing, which includes not only the ability to submit observations but also a duty on the part of the adjudicatory body to genuinely consider and address the submissions made. In the arbitral context, especially within CAS, this requirement imposes a positive obligation to engage with the athlete's arguments, particularly where these are central to the outcome of the dispute and implicate fundamental rights.[26]

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[23] ECtHR, Grand Chamber, *Semenya v. Switzerland*, partly dissenting joint opinion of judges Bosnjak, Zünd, Simacokova and Derencinovic, attached to the judgement, paragraph 7.
[24] Ibid., paragraph 8.
[25] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 193.
[26] Ibid., paragraph 194.

Importantly, the Court also introduces a heightened scrutiny threshold for such sensitive disputes, referring to the need for a "particularly rigorous examination"[27] in cases involving complex scientific assessments, vulnerable individuals, and allegations of discrimination. This standard signals that, even within the procedural framework of arbitration, the intensity of the Court's review will increase proportionally to the gravity of the rights at stake and the potential irreversibility of the consequences.

In this context, the ECtHR reiterates that, while not every argument requires an explicit response, decisive pleas must be addressed with specific and reasoned consideration (*Ramos Nunes de Carvalho e Sá v. Portugal*).[28] For CAS, this translates into a standard whereby awards must be adequately reasoned, especially when they engage rights under the Convention such as privacy, dignity, and non-discrimination.

When combined with the "particularly rigorous examination" requirement, this reasoning standard obliges arbitrators to go beyond formalism and that parties – especially individual athletes with limited procedural leverage – are not left with the impression that their arguments have been summarily dismissed.

The Grand Chamber's analysis thus reinforces a dual imperative for arbitral bodies like CAS: to retain the flexibility and expertise that define arbitration in general as well as in sport, while adhering to procedural safeguards that render their processes Convention-compliant. In doing so, the Court affirms that private adjudication cannot constitute a zone of immunity from human rights obligations, particularly where the arbitration is mandatory or quasi-compulsory, and the outcome has a decisive impact on the individual's professional and personal life.

In the broader framework of the *Semenya v. Switzerland* judgment, this reasoning invites a recalibration of the balance between arbitral autonomy and human rights oversight, highlighting the need for CAS and similar institutions to internalise Article 6-compliant procedural standards, especially when adjudicating cases involving vulnerable individuals, scientific uncertainty, and irreversible consequences.

However, this recalibration is far from straightforward: it raises the difficult challenge of reconciling the indispensable elements of procedural flexibility and sport-specific expertise that characterize CAS arbitration with the demanding

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[27] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraphs 53, 216 and 217. In the case brought by a Brazilian football player against FIFA, the Federal Supreme Court reiterated that, as a fundamental legal interest, human personality rights had to be protected by law. It observed that in Switzerland they were protected at the constitutional level under the fundamental guarantee of personal freedom, which, in addition to the rights to bodily and mental integrity and freedom of movement, protected all the basic prerogatives that were vital for personal development. Economic freedom, which guaranteed the rights to freely choose one's profession and to free access to a (private) economic activity and to practise it, also came under this protection (Francelino da Silva Matuzalem v. Fédération Internationale de Football Association [FIFA], ATF 138 III 322 of 27 March 2012, at 4.3.1).

[28] ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, available at *https://hudoc.echr.coe.int/eng?i=001-187507*.

requirements of the European Convention on Human Rights. Addressing this challenge may also require a broader cross-fertilisation between the culture of sports arbitration and that of human rights adjudication, fostering a shared understanding of fairness and due process that bridges both domains.

6. *The Scope of the SFT's Judicial Review and the (Too) Narrow Interpretation of the Notion of Public Policy*

The heart of the Grand Chamber's ruling concerned the criticism of the Swiss Federal Supreme Court's standard of review with respect to Article 6, paragraph 1.

Swiss law allows recognition of international arbitral awards unless they violate Swiss "public policy" (*ordre public*). The ECtHR found that the Swiss court interpreted this concept too narrowly in the *Semenya*'s case.

In particular, the Grand Chamber criticized the Swiss Federal Tribunal for failing to adequately assess whether the CAS award infringed fundamental rights, especially the principle of non-discrimination.

The Court even referred to one of the very few – perhaps the only – precedents in which the SFT had found a CAS award contrary to *ordre public*, namely the *Matuzalem* case, underscoring how exceptional such findings are in Swiss practice.[29]

The Court took issue with the Swiss judiciary's restrictive interpretation of the *ordre public* exception, noting that is treated as "exceptional" and subjected to a minimal review. Such an approach was considered wanting an adequate protection of the right of access to a court and the right to a fair trial.

However, it is important to note that the Grand Chamber did not rule on the merits of the DSD Regulations themselves, as this question was not the subject matter of the proceedings brought before the European Court of Human Rights.

The violation of Article 6, paragraph 1, lay instead in Switzerland's failure to conduct a proper balancing test and to scrutinize the compatibility of the award with fundamental rights.

In fact the Grand Chamber concluded that "*the specific characteristics of the sports arbitration to which the applicant was subject, entailing the mandatory and exclusive jurisdiction of the CAS, required an in-depth judicial review – commensurate with the seriousness of the personal rights at issue – by the only domestic court having jurisdiction to carry out such a task. The review of the applicant's case by the Federal Supreme Court, not least owing to its very restrictive interpretation of the notion of public policy, which it also applied to the review of arbitral awards by the CAS, did not satisfy the requirement of particular rigour called for in the circumstances of the case.*

[29] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraphs 53 and 235.

In these circumstances, the Court concludes that the applicant did not benefit from the safeguards provided by Article 6 § 1 of the Convention".[30]

Given these findings, the ECtHR thus reinforces the principle that States cannot delegate dispute resolution to arbitration while abdicating their responsibility to ensure Convention rights are respected throughtout the process.

However, this reasoning must be contextualized within two broader considerations:

(i) mandatory arbitration is not unique to the field of sport. It is a common feature in other sectors, including commercial arbitration, consumer contracts in the digital economy, where parties may be bound to arbitrate by contractual or regulatory obligations;

(ii) the Swiss Federal Tribunal's restrictive approach to the ordre public exception is not limited to sport-related disputes but it applies more generally across international commercial arbitration.[31]

Against this backdrop, the Grand Chamber's ruling should not be seen as a targeted critique of the CAS or sports arbitration as such. Rather, it reflects a systemic concern about the Swiss Federal Tribunal's method of judicial review – namely, its reluctance to thoroughly scrutinise arbitral awards in light of fundamental rights protected by the Convention.

This has been seen as a direct indictment of the Swiss Federal Tribunal's longstanding hands-off approach, noting that the ECtHR's analysis exposes the Swiss court's failure to scrutinize even fundamental questions such as the proportionality and human rights compatibility of the DSD regulations.[32]

The ECtHR reaffirmed that States retain the ultimate responsibility to ensure compliance with human rights, even when dispute resolution is delegated to private arbitral bodies. While the Swiss approach has traditionally emphasised a degree of deference to the autonomy of international sports arbitration – motivated by concerns for efficiency, finality, and the specific needs of the sporting context – the Semenya judgment clarifies that such deference cannot come at the expense

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[30] ECtHR, Grand Chamber, *Semenya v. Switzerland*, paragraph 238.

[31] See paragraph 237 of the ruling: "The Court notes that Chapter 12 of the PILA, which includes section 190 (on civil-law appeals which may be brought before the Federal Supreme Court), covers all types of international arbitration without distinction (see paragraph 47 above). The provisions which apply in cases of international arbitration in the field of sport, including where the arbitration in question is compulsory and the dispute concerns respect for "civil" rights corresponding to fundamental rights, are thus the same as those which apply in cases of international arbitration in the field of commercial contracts. In both cases, therefore, the substantive review of arbitral awards conducted by the Federal Supreme Court is confined under section 190(2)(e) PILA to the question whether the award is compatible with public policy (ordre public). Moreover, when the Federal Supreme Court conducts a review of whether a CAS award is compatible with public policy, it follows the same restrictive approach as in cases of commercial arbitration".

[32] A. Duval, *The Finish Line of Caster Semenya's Judicial Marathon: A Wake-up Call for the Swiss Federal Supreme Court and the Court of Arbitration for Sport, VerfBlog,* 11 July 2025, available at *https://verfassungsblog.de/caster-semenya-ecthr/*, DOI: 10.59704/10b996f0cb75f482.

of effective judicial protection of fundamental rights. The ruling should therefore be understood not as a critique of arbitration *per se*, but as a call for robust and meaningful judicial oversight, particularly where arbitral decisions may seriously affect individual rights. To suggest otherwise is to misread the judgment and misplace the responsibility: the focus of concern lies not in the nature of the arbitration forum, but in the quality and intensity of the judicial review exercised by State courts.

Nevertheless, the Grand Chamber's reasoning is likely to have a ripple effect beyond domestic courts. While the judgment does not impose direct obligations on CAS or other arbitral tribunals, it sends a clear signal about the human rights standards expected of State-sanctioned dispute resolution mechanisms. As a result, CAS and other arbitral tribunals may increasingly feel compelled to engage more thoroughly with Convention rights – particularly in cases involving sensitive issues such as discrimination – not only to ensure their awards can withstand judicial scrutiny, but also to preserve the legal soundness and broader legitimacy of the arbitral process in the broader human rights framework.

Finally, it may also encourage sports federations – many of which, like FIFA and UEFA, have already made formal commitments to human rights – to integrate such standards proactively into their regulatory frameworks.[33]

7. The Validity of the DSD Regulations

In the aftermath of the ruling, it was said that the South African athlete had won her battle against the powerful World Athletics. To this respect, however, a final, crucial point of the Grand Chamber's judgment is that it did not challenge the validity or enforceability of the contested DSD Regulations themselves. Because it found no territorial jurisdiction over the substantive Articles 8 and 14 claims, the Court expressly did not adjudicate whether the DSD Regulations violated the Convention. The regulations, therefore, remain in force for international athletics and are unaffected by the ruling.

Even within the Article 6, paragraph 1, violation, the Court did not direct Switzerland to annul the CAS award or bar enforcement of the DSD Regulations. Instead, it held that Swiss courts must ensure future reviews are sufficiently robust to address potential fundamental rights concerns.

This limited remedial approach respects the independence of international sports bodies in setting competition rules, while also recognizing the crucial role of

[33] Article 3 of the FIFA Statutes: "*FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights*". FIFA's Human Rights Policy, adopted in 2017, embeds this commitment across its operations, including in event bidding and hosting phases. Then, UEFA's 2021 Human Rights Commitment references the UN and European human rights instruments and focuses on inclusion, anti discrimination, and safeguarding; its EURO 2024 and Women's EURO 2025 tournaments incorporated human rights declarations, grievance mechanisms, and advisory boards.

national courts in protecting athletes' procedural rights. By doing so, it avoids stepping directly into the global management of athletics, which operates under its own legal systems and dispute mechanisms. In that sense, the ruling walks a fine line – ensuring athletes have fair legal safeguards at the national level, without trying to override the decisions of CAS or World Athletics on who qualifies to compete.

8. Concluding Remarks

The Grand Chamber judgment in *Semenya v. Switzerland* constitutes a milestone in the jurisprudence of the ECtHR, not only with regard to the procedural guarantees enshrined in Article 6, paragraph 1 ECHR, but more broadly in clarifying the contours of State responsibility for acts connected to private arbitration mechanisms in the domain of international sport.

The Court's reasoning is marked by a distinction between procedural and substantive rights. While it held that Switzerland could not be held responsible for the alleged violations of Articles 8, 13 and 14 of the Convention – due to the absence of a territorial or personal jurisdictional link – it nonetheless concluded that the State bore responsibility for the violation of Article 6, paragraph 1, precisely because the Federal Supreme Court exercised judicial authority in reviewing the CAS award. In doing so, the Grand Chamber reaffirmed the principle whereby the exercise of domestic adjudicative functions triggers full Convention responsibilities, irrespective of the private nature of the underlying dispute or the foreign origin of the regulatory norms.

This interpretative approach leads to at least four significant legal consequences.

First, the judgment consolidates the notion that States cannot hide behind the private status of arbitral bodies to evade their obligations under the ECHR. Even where arbitration is mandated by international federations, and even when the substantive rules are adopted by private actors with no territorial link to the respondent State, the moment in which a national court intervenes – particularly where such intervention is the sole available avenue for legal review – the Convention is fully engaged. This reinforces the subsidiarity principle at the heart of the Convention system: it is primarily for domestic legal systems to ensure that human rights are safeguarded in all forms of dispute resolution.

Second, the ruling constitutes a measured but unmistakable critique of the standard of review employed by the Swiss Federal Tribunal, particularly with regard to the restrictive interpretation of the *ordre public* exception under Article 190(2)(e) PILA. By finding a violation of Article 6, paragraph 1, the Court implicitly held that the threshold for annulment of arbitral awards in Switzerland fails to guarantee an effective judicial scrutiny when fundamental rights are at stake. While the ECtHR did not go so far as to require a full review on the merits, it made clear that the Swiss courts' deferential attitude towards arbitral decisions –

especially those involving significant personal and dignitary rights – does not meet the standards of procedural fairness demanded by the Convention.

This critique must be understood in light of the Court's broader jurisprudence under Article 6, paragraph 1. As the Grand Chamber clarified, the ECtHR does not function as a "fourth instance" and does not interfere with the domestic assessment of evidence or the substantive resolution of disputes. However, it retains competence to review whether the proceedings as a whole respected the procedural safeguards required by the Convention. This distinction is especially relevant in the context of arbitral bodies such as CAS, whose legitimacy depends not only on their expertise and efficiency, but also on their compliance with fair trial guarantees. While arbitral tribunals enjoy discretion in evaluating technical and scientific evidence, they must nonetheless provide reasoned decisions that respond to the decisive pleas of the parties – particularly where those pleas concern fundamental rights. The Grand Chamber's reaffirmation that the right to a fair hearing entails a genuine and meaningful consideration of parties' submissions is of direct relevance to CAS and all the other arbitration institutions. It signals that arbitral autonomy does not exempt such bodies from the imperative of human rights scrutiny, especially where arbitration is mandatory and the consequences for the individual are substantial.

Third, the *Semenya v. Switzerland* judgment has implications that extend beyond the confines of sports arbitration. Although the case arises from the specific context of the CAS and the regulatory regime of World Athletics, the reasoning adopted by the Grand Chamber can be transposed to other sectors where mandatory arbitration intersects with fundamental rights, such as in labour, consumer, or commercial law. The message is clear: the finality of arbitral awards cannot come at the expense of the Convention's guarantees – especially when those awards are the product of imbalanced power dynamics or affect constitutionally protected interests.

At the same time, the judgment reveals a reluctance on the part of the Court to interfere directly with the substantive regulatory autonomy of international sports bodies. By declaring inadmissible the complaints under Articles 8, 13 and 14 of the Convention, the Grand Chamber signalled its deference to the structure of global sports governance, which continues to operate largely outside the direct reach of European human rights law. The legitimacy and enforceability of the DSD Regulations remain unaffected, as the Strasbourg Court did not address this issue, which was not at stake in the proceedings; instead, it confined its assessment to the adequacy of the Swiss judicial review process.

Fourth, while the principle that the quality and scope of judicial review should correspond to the seriousness of the rights involved is clear in theory, the judgment offers limited guidance on when such an "in-depth review" is required in practice. It remains uncertain what criteria should be applied to determine whether the level of review by the SFT is sufficient to meet the Convention's standards.

The judgment does not clarify whether the nature of the rights at stake (e.g., physical integrity, privacy, dignity, or access to profession) alone determines the required depth of review, or whether other factors – such as the procedural safeguards available before CAS, the margin of appreciation afforded to sports governing bodies, or the complexity and expertise required in sports-related adjudication – also play a role.

Moreover, the Court does not define what constitutes an "in-depth" review in the context of the SFT's traditionally limited scope of review in arbitration matters, which generally excludes a full re-examination of the facts and merits of the case. This raises a structural tension: if the SFT is bound by its limited supervisory role, to what extent can it truly offer a review proportionate to the seriousness of the rights at issue, particularly where fundamental rights under the European Convention are engaged?

In this respect, the Court's reasoning, while affirming the principle of effective judicial protection, leaves open critical normative and practical questions. Further clarification will likely depend on future case law, particularly in how Strasbourg Justices interpret the obligations of national courts in reviewing arbitral awards in fields involving sensitive or fundamental rights.

Nevertheless, the judgment sends a powerful normative signal to both national courts and arbitral bodies. To the former, it confirms their indispensable role in ensuring that the Convention is not rendered ineffective by procedural formalism or by the unquestioned validation of private orders. To the latter, it issues a warning: the legitimacy of arbitration, particularly in sensitive areas such as gender and bodily integrity, will increasingly depend on its openness to human rights scrutiny. The ECtHR thus calls for a model of arbitration that is not only legally binding but also procedurally responsive and publicly accountable.

In conclusion, *Semenya v. Switzerland* represents a significant development in the Court's evolving doctrine on extraterritoriality, arbitration, and access to justice. It affirms that the State cannot remain passive when private regulatory frameworks have far-reaching effects on individual rights, especially when it is the sole guarantor of judicial protection. While the judgment preserves the autonomy of sports governing bodies, it places the burden of compliance squarely on national, state courts – calling for a heightened standard of judicial, rigourous review whenever fundamental rights are at stake in arbitral proceedings.

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