



Human Rights in Sports Arbitration: What Should the Court of Arbitration for Sport do for Protecting Human Rights in Sports?

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Abstract

Sports governing bodies establish their sporting rules and regulations. Nevertheless, they confront a complex question concerning whether a female athlete who inherently possesses an advantageous quantity of testosterone may participate in female athletic competitions. In *Caster Semenya and Athletics South Africa (ASA) v. IAAF*, the Court of Arbitration for Sport (CAS) held that she could not participate in female sports events because “the elevated testosterone levels that such athletes possess can create an insuperable advantage over other female athletes who do not have a 46 XY DSD condition”. Consequently, the CAS ruled that she would no longer be eligible to compete in professional female competitions. In this scenario, the primary focus of this article is to examine how the CAS should address human rights-related issues, even though it is not a human rights court like the European Court of Human Rights (ECtHR) but rather an arbitral tribunal. To achieve this purpose, this article will address the following questions: (1) How can athletes claim a violation of their human rights before the CAS?; and (2) What steps should the CAS take to safeguard human rights in sports? Through this research, it may serve to identify the CAS’s role in human rights protection in sports.

Keywords Human rights · Sports arbitration · Caster Semenya · Intersex female athletes · Gender identity · Sex characteristics · Article R58 of CAS Code · Court of Arbitration for Sports

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Introduction

Sports governing bodies establish their sporting rules and regulations. Nevertheless, they confront a complex question concerning whether a female athlete who inherently possesses an advantageous quantity of testosterone may participate in female athletic competitions.¹ In *Caster Semenya and Athletics South Africa (ASA) v. IAAF*, the Court of Arbitration for Sport (CAS) addressed this issue and ruled that she could not participate in these female sports competitions. This decision was grounded in the belief that “the elevated testosterone levels that such athletes possess can create an insuperable advantage over other female athletes who do not have a 46 XY DSD condition”.² Consequently, as a result of this arbitral award, she is no longer permitted to compete in professional female competitions due to her inherent biological advantage in testosterone levels.³ However, the *Caster Semenya* case presents numerous intricate and ambiguous matters in the field of sports and human rights.⁴ In particular, Specifically, the boundary between upholding fair competition and safe-

¹ CAS 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations* and CAS 2018/O/5798 *Athletics South Africa v. International Association of Athletics Federations*, award of 30 April 2019 (hereinafter: *Caster Semenya and Athletics South Africa (ASA) v. IAAF*); The CAS also released the Executive Summary: https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary_5794_.pdf; Byczkow and Thompson 2019, pp. 327–347; Lin 2019, pp. 217–251; Holzer 2020, pp. 387–411; The issue of sex verification test has been controversial since 1936 Olympic Events. See Buzuvis 2016, pp. 31–39.

² *Caster Semenya and Athletics South Africa (ASA) v. IAAF*, para. 579.

³ In the *Dutee Chand* case, the CAS Panel evaluated whether the Hyperandrogenism Regulations exhibited discriminatory characteristics against intersex female athletes. The CAS ultimately determined that these regulations were unjustified because the International Association of Athletics Federations (IAAF) did not present adequate scientific evidence to demonstrate that the female athlete in question possessed a competitive advantage in terms of testosterone compared to other female athletes. See CAS 2014/A/3759 *Dutee Chand v. Athletics Federation of India (AFI) & International Association of Athletics Federations (IAAF)*, award of 24 July 2015, paras. 448–548; Viret and Wisnosky 2016, pp. 250–262; Buzuvis 2016, pp. 39–44; Camporesi 2019, pp. 797–798; After this case, the IAAF replaced the Hyperandrogenism Rule with the DSD Regulations. The DSD Regulations came under scrutiny and were the subject of dispute in the *Caster Semenya* case. Holzer 2020, pp. 389–393; On 18 February 2021, Caster Semenya decided to submit her application to the ECtHR. The applicant argued that “there has been a violation of her rights under Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private life), taken alone and in conjunction with Article 14 (prohibition of discrimination), and also a breach of Articles 6 (right to a fair hearing) and 13 (right to an effective remedy)” of the ECHR. See ECtHR 2021; On 25 May 2021, the ECtHR published a statement of the facts with questions to the parties on the Court’s Hudoc site. *Semenya c. Suisse*, requête n° 10,934/21, introduite le 18 février 2021, communiquée le 3 mai 2021, CourEDH.

⁴ In the case of *Martin v. International Olympic Committee*, the U.S. Ninth Circuit Court of Appeals addressed a complaint that the International Olympic Committee (IOC) did not establish a separate female competition for middle-distance running during the 1984 Los Angeles Summer Olympic Games. This case, in contrast to intersex and transgender cases, revolved around the traditional concept of ‘sex’ and was relatively less complex in nature. See *Martin v. Int’l Olympic Comm.*, 740 F.2d 670 (9th Cir. 1984); See also Berman 1987, p. 167–175; In contrast to that case, certain intersex and transgender athletes have encountered similar challenges to Caster Semenya, primarily due to their gender identity in accordance with sports regulations. See Padawer 2016.

guarding individuals from discriminatory actions based on gender identity and sex characteristics⁵ remains unclear.⁶

Against this background, a question that may arise whether athletes can argue a violation of their human rights before judicial or quasi-judicial bodies? In terms of procedural rights, the European Court of Human Rights (ECtHR) identified a violation of the right to a public hearing, as guaranteed by Article 6(1) of the European Convention on Human Rights (ECHR), in the case of *Mutu and Pechstein v. Switzerland*. This was due to the fact that the CAS had conducted the hearing *in camera*.⁷ Consequently, athletes may now raise claims of procedural human rights violations subsequent to hearings at the CAS and the Swiss Federal Tribunal (SFT).⁸

Under Article 190(2) of the Swiss Private International Law Act (Swiss PILA), athletes can require the SFT to set aside the CAS decision on one of five specific grounds: (a) lack of the independence and impartiality of arbitrators or/and arbitral tribunal itself; (b) wrong acceptance or denial of the jurisdiction; (c) *ultra petita* or *infra petita*; (d) violation of the principle of equal treatment of the parties or their right to a public hearing; and (e) incompatibility with the public policy.⁹

However, the SFT has not considered a number of cases involving the violation of fundamental human rights within the framework of Article 190(2) of the Swiss PILA.¹⁰ This is primarily because it has adopted a narrow interpretation of the scope of ‘public policy’ under Article 190(2)(e) of the Swiss PILA.¹¹ Furthermore, athletes are obliged to signed a compulsory arbitration clause that prevent them from lodging complaints before ordinary courts in order to participate in international competitions.¹² Given these circumstances, athletes are left with no alternative but to assert violations of their substantive human rights within the existing sports dispute resolution system due to the limited review power of the SFT under Article 190(2)(e) of the Swiss PILA.

⁵ The differentiation between ‘gender’ and ‘sex’ holds significant importance because it is structured around a strict binary categorization of male and female. In this context, ‘gender’ typically pertains to the societal and cultural aspects related to being male or female, while ‘sex’ pertains to the biological and physical distinctions between males and females. See Cooper 2010, pp. 236–238; Glazer 2012, pp. 548–553; Vieweg and Nafziger 2016, pp. 283–284; Menon 2010, pp. 397–403.

⁶ *Caster Semenya and Athletics South Africa (ASA) v. IAAF*, para. 460; TF 4A_248/2019 & 4A_398/2019, Arrêt du 25 août 2020, Ire Cour de droit civil, para. B.c.a.

⁷ *Mutu and Pechstein v. Switzerland*, nos. 40,575/10 and 67,474/10, Judgment of 2 October 2018, ECtHR, para. 115 and para. 123; See also Rigozzi 2020, pp. 77–130; Laurent 2019, pp. 1–17.

⁸ In *WADA v. Sun Yang & FINA* case, the CAS followed the ECtHR’s instruction that it had to hold a public hearing guaranteed by Article 6(1) of the ECHR in light of *Mutu and Pechstein v. Switzerland* case. See CAS 2020; As regards the detailed analysis of this case, see Rudkin 2019; Anderson 2019; See also *Mutu and Pechstein v. Switzerland*, para. 92–96.

⁹ Article 190(2)(a)–(e) of the PILA; See also Shinohara 2019a, pp. 124–141.

¹⁰ TF 4P_12/2000 of 14 June 2000 that German national law distinguishing between “Juifs” and “Aryens” was contrary to public order under Article 190(2)(e) of the PILA. The SFT cited this part of the judgment in TF 4A_370/2007 of 21 February 2008. TF 4A_370/2007, *X. c. Association A. et SASP B.*, Arrêt du 21 février 2008, consid. 5.4.

¹¹ *Semenya v. Switzerland*, no. 10,934/21, 11 July 2023, ECtHR, para. 175.

¹² Rigozzi 2010, pp. 226–227; Kaufmann-Kohler and Rigozzi 2010, pp. 476–477, paras. 766–767; Lukomski 2013, pp. 60–70.

Based on this understanding, the primary focus of this article is to examine how the CAS should address human rights-related issues, even though it is not a human rights court like the ECtHR but rather an arbitral tribunal.¹³ To achieve this purpose, this article will address the following questions: (1) How can athletes claim a violation of their human rights before the CAS?; and (2) What steps should the CAS take to safeguard human rights in sports? Through this research, it may serve to identify the CAS's role in human rights protection in sports.

In light of the foregoing, it will be divided into the following sections: After this introduction, this article will provide an overview of a regulatory framework of the prohibition of discrimination based on sex (or gender), gender identity and sex characteristics created by sports governing bodies (e.g. the International Olympic Committee (IOC) and World Athletics).¹⁴ Furthermore, it will consider how such anti-discrimination regulatory framework may be applied by internal dispute resolution bodies within the sports governing bodies. Furthermore, this article will consider the CAS system concerning applicable law and arbitrators' power in the CAS arbitral proceeding. On this basis, it will take into account a question of what the CAS should do for human rights protection in sports. Finally, this article will consider a message from the ECtHR in the Chamber judgment of *Semenya v. Switzerland*.

The Regulatory Framework for the Prohibition of Discrimination Based on Gender Identity and Sex Characteristics in Sports Governing Bodies

Generally speaking, international human rights law cannot directly impose legal obligations on sports governing bodies. Therefore, it is incumbent upon sports governing bodies to voluntarily declare their commitment to upholding human rights in the realm of sports through their sporting regulations and rules.¹⁵ Within this context, this section will provide a brief overview of the regulatory framework set forth by sports governing bodies to prevent discrimination based on gender identity and sex characteristics. In doing so, it will address the following questions: (1) To what extent do sports governing bodies establish rules aimed at preventing discrimination?; and (2) How can internal dispute resolution bodies, which are established by sports governing bodies, effectively apply these anti-discrimination rules in practice?

¹³ In 1975, Renee Richards (formerly Richard Raskind), a professional male tennis player, underwent sex-change operations. However, the United States Tennis Association (USTA) prohibited her from competing in women's professional tournaments on the grounds of her physical development and training prior to the surgery. In response, she filed a complaint before a national court, which subsequently ruled that the USTA's decision lacked justification based on medical evidence. See *Renee Richards v. The United States Tennis Association* [1977] 400 NYS 2d 267; Davies 2017, pp. 6–8; See also Shy 2007, pp. 95–110.

¹⁴ This is because the Caster Semenya case stands as one of the prominent cases dealing with human rights issues in sports arbitration. As such, this article will closely examine this case and explore the implications of anti-discrimination rules related to gender identity and sex characteristics.

¹⁵ Regarding the legal status of sporting regulations, see van Kleef 2013, pp. 31–35.

Sporting Regulations on the Prohibition of Discrimination in Sports

International Olympic Committee (IOC)

The IOC has embarked on the development of a human rights protection framework.¹⁶ This initiative led to the creation of the IOC Advisory Committee on Human Rights on 1 December 2018. This Committee is composed of six to nine members who possess expertise in both sports and human rights.¹⁷ The primary purpose of this Committee is to “be a key instrument to help the IOC meet its human rights responsibilities and addressing the organization’s salient human rights risks through a comprehensive strategic approach and policy”.¹⁸

In March 2019, it recommended a strategic framework on human rights. This framework aimed to assess “the IOC’s current approach, including through consultation with key internal staff and expert civil society stakeholders”.¹⁹ In this context, two human rights experts, HRH Prince Zeid Ra’ad Al Hussein and Rachel Davis, jointly submitted their recommendations for an IOC Human Rights Strategy to IOC President Thomas Bach in February 2020.²⁰ However, despite the IOC’s notable efforts in the realm of human rights protection, it remains unclear how the IOC plans to enhance human rights protection within the Olympic Movement.

In the pursuit of safeguarding human rights in sports, the IOC has addressed the matter of human rights protection within the Olympic Movement. Paragraph 6 of the Fundamental Principles of Olympism stipulates that:

The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.

On this basis, the mission of the IOC is “to act against any form of discrimination affecting the Olympic Movement” (para. 6) and “to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women” (para. 8) (Rule 1.2 of the Olympic Charter). the IOC must commit to improving gender equity and anti-discrimination policies within the Olympic Movement.

Concretely speaking, the IOC has codified some human rights-related provisions in the IOC Code of Ethics (2020) (hereinafter, the ‘ICE’).²¹ Article 1.4 of the ICE prescribes that:

¹⁶ Shift 2020.

¹⁷ IOC 2018a.

¹⁸ IOC 2018a.

¹⁹ IOC 2020.

²⁰ IOC 2020.

²¹ IOC Code of Ethics (2020). <https://www.olympic.org/code-of-ethics>.

Respect for international conventions on protecting human rights insofar as they apply to the Olympic Games' activities.

Furthermore, it enumerates the content of the human rights protections:

- (1) respect for human dignity;
- (2) rejection of discrimination of any kind on whatever grounds, be it race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status;
- (3) rejection of all forms of harassment and abuse, be it physical, professional or sexual, and any physical or mental injuries.

This provision can be construed as the IOC acknowledging its responsibility to uphold the human rights protected by international human rights treaties within the Olympic Movement.²²

According to the ICE, the IOC Ethics Commission may implement the IOC Basic Universal Principles of Good Governance of the Olympic and Sports Movement (hereinafter, the 'Basic Universal Principles').²³ Article 6 of the Basic Universal Principles clarifies the responsibilities of sports governing bodies within the Olympic Movement for the protection of human rights. It stipulates that:

- (1) The right of athletes to participate in sports competitions, and the right to have a voice²⁴;
- (2) The right of young athletes to protection from economic exploitation²⁵;
- (3) The rights to life and development for all athletes including children,²⁶ in particular, the fight against doping²⁷;
- (4) The reduction of the risk in sport through insurance service for all athletes²⁸; and
- (5) The right to education developing, in particular, "Sport and Studies" programmes.²⁹

Based on these human rights-related provisions, the IOC has dealt with a complex issue of gender discrimination within the Olympic Movement.³⁰ It declared the importance of gender equality in the Olympic Agenda 2020, Recommendation 11 (Foster gender equality),³¹ which reads as follows:

²² See ICE, scope of the application.

²³ ICE, Article 19.

²⁴ Basic Universal Principles, Principle 6.1.

²⁵ *Ibid.*, Principle 6.2.

²⁶ *Ibid.*, Principle 6.3.

²⁷ *Ibid.*, Principle 6.4.

²⁸ *Ibid.*, Principle 6.5.

²⁹ *Ibid.*, Principle 6.7.

³⁰ Jones 2015, pp. 223–245.

³¹ IOC 2014.

1. The IOC to work with the International Federations to achieve 50 per cent female participation in the Olympic Games and to stimulate women's participation and involvement in sport by creating more participation opportunities at the Olympic Games.
2. The IOC to Encourage the Inclusion of mixed-gender team Events.

On that basis, it launched the IOC Gender Equality Review Project on 16 March 2017 and published the IOC Gender Equality Report in 2018,³² including twenty-five recommendations with five key themes: sports, portrayal, funding, governance, and HR, monitoring and communications.³³ More importantly, it points out that:

The adoption and implementation of these project recommendations will fulfil the IOC's obligation under the Olympic Charter "to encourage and support the promotion of women in sport and in all structures".³⁴

Furthermore, it indicates that:

Promoting gender quality not only enhances the position reputation of the IOC, it also demonstrates corporate social responsibility to our commercial partners and it utilizes the influence of the IOC to benefit society at large.³⁵

In this context, it can be inferred that the IOC has gradually committed to upholding human rights and implementing measures aimed at realizing gender equality, in line with recommendations to combat gender discrimination within the Olympic Movement.

In accordance with these rules and regulations, the IOC is held responsible for addressing the participation of intersex and transgender athletes in Olympic Events. The IOC publicly released its consensus in November 2015, which specifically focused on guidelines for transgender athletes, particularly those transitioning from male to female, as well as guidelines pertaining to hyperandrogenism in female athletes, including intersex athletes.³⁶

Regarding male-to-female transgender athletes, the guidelines delineate the eligibility criteria for participation in the female category of Olympic events, as outlined below:

- 2.1. The athlete has declared that her gender identity is female. The declaration cannot be changed, for sporting purposes, for a minimum of four years.
- 2.2. The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition (with the requirement for any longer period to be based on a confidential case-by-case

³² IOC 2018b.

³³ IOC 2018b, p. 7.

³⁴ IOC 2018b, p. 4.

³⁵ IOC 2018b, p. 4.

³⁶ IOC 2015.

- evaluation, considering whether or not 12 months is a sufficient length of time to minimize any advantage in women's competition).
- 2.3. The athlete's total testosterone level in serum must remain below 10 nmol/L throughout the period of desired eligibility to compete in the female category.
 - 2.4. Compliance with these conditions may be monitored by testing. In the event of non-compliance, the athlete's eligibility for female competition will be suspended for 12 months.

In contrast to transgender athletes, the IOC has not established specific regulations for intersex athletes. The IOC emphasized the need for itself and other International Federations (IFs) to formulate a dedicated rule for "the protection of women in sport and the promotion of the principles of fair competition" in response to the CAS interim award of *Chand v. AFI and IAAF*.³⁷ In other words, the development of regulations for intersex athletes is an ongoing process, and the IOC has not yet reached a definitive resolution regarding whether intersex athletes can participate in sporting competitions without possessing gender-related advantages over other female athletes.³⁸

In this context, the *Caster Semenya* case has provided certain guidance on the issue of intersex athletes. The IOC conveyed in its statement concerning the *Caster Semenya* case that:

We have taken note of the CAS decision in this case and recognise these issues are complex. The IOC is currently working with a group of experts on the creation of guidelines to help International Federations shape sport specific policies and regulations in relation to fairness, safety, inclusivity, and non-discrimination on the basis of gender identity and sex characteristics.³⁹

In this regard, the IOC has not yet arrived at a definitive solution to this question and is actively engaged in the ongoing development of rules and regulations addressing gender discrimination within the Olympic Movement.

On 16 November 2021, the IOC released the 'Framework on Fairness, Inclusion and Non-discrimination on the basis of gender identity and sex variations' (hereinafter, the 'IOC Framework').⁴⁰ The purpose of this framework is "to offer sporting bodies – particularly those in charge of organising elite-level competition – a 10-principle approach to help them develop the criteria that are applicable to their sport".⁴¹ According to the IOC Framework, it is composed of 10 principles: (1) Inclusion; (2) Prevention of harm; (3) Non-discrimination; (4) Fairness; (5) No presump-

³⁷ IOC 2015, p. 3.

³⁸ However, the IOC declared its position on how to treat transgender athletes in the Stockholm Consensus. The Stockholm Consensus is composed of three requirements of how transgender athletes can be eligible to compete: (1) the completion of surgical changes to the transitioned sex; (2) the legal recognition by appropriate authorities; and (3) the completion of hormone therapy to minimize advantages. See IOC 2004; However, there were also many critics against the Stockholm Consensus. Crincoli 2011, pp. 176–177.

³⁹ Busch 2019.

⁴⁰ IOC 2021a; IOC 2021b.

⁴¹ Para. 5 of the IOC Framework (Introduction).

tion of advantage; (6) Evidence-based approach; (7) Primacy of health and bodily autonomy; (8) Stakeholder-centred approach; (9) Right to privacy; and (10) Periodic reviews. However, it does not indicate how the IOC can achieve these principles in practice and, thus, it still has no answer to the complex issue of intersex female athletes in sports.

Accordingly, despite the presence of certain mechanisms aimed at combatting discrimination based on gender identity and sex characteristics, the IOC encounters challenges in resolving issues related to discrimination against intersex and transgender athletes. Nevertheless, it is important to note that the IOC has progressively acknowledged the significance of protecting human rights in sports within the framework of the Olympic Movement.

World Athletics (Former IAAF)

World Athletics, formerly known as the International Association of Athletics Federations (IAAF), serves as a sports governing body responsible for overseeing international athletics competitions. Similar to the IOC, World Athletics has put in place a number of rules and regulations pertaining to human rights, including rules related to anti-discrimination.

Article 4.1(j) of the 2019 World Athletics Constitution (amended 1 November 2019; hereinafter the WAC) provides that: The purposes of World Athletics are to: ...

j) preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play.

In doing so, Article 3.3.9 of the Integrity Code of Conduct (in force from 1 to 2019) stipulates that:

The Integrity Standards require Applicable Persons: ... Equality: not to unlawfully discriminate on the basis of race, sex, ethnic origin, colour, culture, religion, political opinion, marital status, sexual orientation or other differences and in particular to encourage and actively support equality of gender in Athletics.

In this context, World Athletics bears the responsibility to proactively prevent discrimination, whether based on sexual orientation or any other differences, against all athletes participating in its events.

In this context, the Eligibility Regulations For The Female Classification (athletes with differences of sex development) (C 3.6, in force from 1 to 2019: hereinafter DSD Regulations) contained a complex question relating to the anti-discrimination rules in light of *Caster Semenya* case.⁴² Article 1.1 of the DSD Regulations provides for the objective of ensuring fair competition for female athletes who do not possess any biological performance advantages. This objective aims to mitigate the risk of

⁴² The World Athletics published briefing notes and Q&A on Female Eligibility Regulations. See World 2019.

discouraging women from participating in female athletic competitions.⁴³ To achieve this objective, Article 1.1.5 stipulates that:

These Regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes. In no way are they intended as any kind of judgement on or questioning of the sex or the gender identity of any athlete. To the contrary, World Athletics regards it as essential to respect and preserve the dignity and privacy of athletes with DSDs, and therefore all cases arising under these Regulations must be handled and resolved in a fair, consistent and confidential manner, recognising the sensitive nature of such matters. Any breach of confidentiality, improper discrimination, and/or stigmatisation on grounds of sex or gender identity will amount to a serious breach of the World Athletics Integrity Code of Conduct and will result in appropriate disciplinary action against the offending party.

Furthermore, Article 3.4 of the DSD Regulations prescribes that:

The dignity and privacy of every individual must be respected at all times. All breaches of confidentiality and all forms of abuse and/or harassment are prohibited. Such conduct will be considered a serious breach of the World Athletics Integrity Code of Conduct and will be subject to sanction accordingly.

In this sense, if World Athletics were to carry out gender verification in a discriminatory manner against female athletes, such conduct would potentially constitute a violation of Article 3.3.9 of the Integrity Code of Conduct taken in conjunction with Article 4.1(j) of the 2019 WAC.

In summary, World Athletics has put in place anti-discrimination rules, and as such, it shares a responsibility to prevent discrimination against transgender and intersex female athletes, akin to the IOC's efforts in this regard.

How Can Internal Dispute Resolution Bodies Established by Sports Governing Bodies Apply Anti-Discrimination Rules?

Considering the sporting regulations that prohibit discrimination, one might raise a question how internal dispute resolution bodies may apply anti-discrimination rules to address cases involving discrimination based on gender identity and sex characteristics against female athletes in sports. This subsection will address this question by examining examples of the IOC and World Athletics.

International Olympic Committee (IOC)

The IOC Executive Board has the authority to impose sanctions on athletes or international and national federations in cases of violations of the Olympic Charter, the World Anti-Doping Code (WADC), the Olympic Movement Code on the Preven-

⁴³ In particular, Article 1.1.1(a) and (b) of the DSD Regulations.

tion of Manipulation of Competitions, or any other relevant regulations.⁴⁴ If they are dissatisfied with the decision of the IOC Executive Board, athletes or international and national federations have the option to file a complaint regarding a breach of anti-discrimination rules through the CAS Appeals Arbitration Division, as outlined in Rule 61(1) and (2) of the Olympic Charter. It is important to note that, during the period of the Olympic Games, they must bring their complaints before the CAS ad hoc Arbitration Division.⁴⁵

World Athletics (Former IAAF)

World Athletics has established the Disciplinary Tribunal, which is authorized to consider complaints related to breaches of the World Athletics Integrity Code of Conduct.⁴⁶ The Disciplinary Tribunal operates in accordance with the Disciplinary Tribunal Rules, which have been in effect since 1 November 2019. These Rules outline the composition of the Disciplinary Tribunal and the procedures that athletes can follow to submit their complaints for consideration by the Tribunal.⁴⁷ The Disciplinary Tribunal is comprised of a minimum of six members, all of whom must possess substantial legal expertise or have served as former members of the judiciary. This membership should include a minimum of three individuals who are recognized experts in matters related to doping.⁴⁸ A chairperson of the Tribunal is appointed by the Congress (or in the case of the inaugural Disciplinary Tribunal by Council).⁴⁹

The Disciplinary Tribunal has jurisdiction cases involving “Non-Doping Violations” occurring within the context of international athletics events.⁵⁰ In this regard, Article 6.1 of the Disciplinary Tribunal Rules stipulates that:

The Disciplinary Tribunal shall have jurisdiction to hear and decide any alleged Non-Doping Violations over which jurisdiction is conferred on it by the Integrity Code of Conduct and the Integrity Unit Rules and any Preliminary Proceeding under the Reporting, Investigation and Prosecution Rules – Non-Doping.

In other words, “Non-Doping Violations” encompass any breaches of the Integrity Code of Conduct, such as discriminatory actions taken against intersex or transgender athletes.

In this context, should individuals or entities contravene the Integrity Code of Conduct, the Panel possesses the authority to impose sanctions it deems suitable, as

⁴⁴ Rule 59 of the Olympic Charter.

⁴⁵ During the Olympic Games, all athletes participating in the Olympic Event must be subject to the exclusive jurisdiction of ad hoc Arbitration Division of the CAS. Arbitration Rules for the Olympic Games, <https://www.tas-cas.org/en/arbitration/ad-hoc-division.html>.

⁴⁶ See <https://www.worldathletics.org/about-iaaf/structure/independent-bodies/disciplinary-tribunal>.

⁴⁷ World Athletics, *Disciplinary Tribunal Rules* (In force from 1 to 2019) (D.5.1). <https://www.worldathletics.org/about-iaaf/documents/book-of-rules>.

⁴⁸ Article 1.3 of the Disciplinary Tribunal Rules.

⁴⁹ Article 1.4 of the Disciplinary Tribunal Rules.

⁵⁰ Specific Definitions in the Disciplinary Tribunal Rules.

detailed in Article 11.1 of the Disciplinary Tribunal Rules. If they remain dissatisfied with the Panel's decision, athletes retain the option to lodge an appeal with the CAS Appeals Arbitration Division, as outlined in Article 13 of the Disciplinary Tribunal Rules.

In summary, athletes engaged in athletic competitions have the avenue to assert a breach of anti-discrimination regulations before the Disciplinary Tribunal in accordance with the Disciplinary Tribunal Rules.⁵¹ If the Panel decided that there was a violation of the Integrity Code, sanctions outlined in Article 11.1 of the Disciplinary Tribunal Rules may be imposed. Subsequently, athletes have the right to appeal such a decision to the CAS Appeals Arbitration Division. In this manner, athletes within World Athletics may lodge their complaints regarding violations of anti-discrimination rules through both the internal dispute resolution body and CAS.

Applicable Law and Arbitrators' Powers in CAS Arbitral Proceedings

The Code of Sports-related Arbitration (hereafter referred to as the CAS Code), which came into effect on 1 July 2020, provides for the applicable law to arbitral proceedings and the arbitrators' power.⁵²

Regarding the applicable law, it is essential to provide a concise overview of the CAS system. The CAS primarily consists of three distinct divisions: the Ordinary Arbitration Division, the Anti-doping Division, and the Appeals Arbitration Division.⁵³ Following the procedures within the internal dispute resolution bodies established by international sports federations, athletes have the option to appeal against the decisions made by these bodies to the Appeals Arbitration Division.⁵⁴

Article R47(1) of the CAS Code stipulates that:

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

In accordance with this provision, the Appeals Arbitration Division has the authority to consider the admissibility of an appeal against the decision of a sports governing body once all legal remedies have been exhausted.⁵⁵

⁵¹ Article 3.3.9 of the Integrity Code of Conduct.

⁵² CAS, *The Code of Sports-related Arbitration*, In force as from 1 to 2020. https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2020_EN_.pdf.

⁵³ Article S20 of the CAS Code.

⁵⁴ Article S20 (c) of the CAS Code.

⁵⁵ Mavromati and Reeb 2015, pp. 382–383; Concerning the definition of 'decision' under Article R47 of the CAS Code, Mavromati and Reeb stated that "the principal criterion for the qualification of a communication as a decision is the binding character of the latter and the 'animus decidendi', which is the intention of a sports body to decide bindingly on a specific subject, thus affecting the addressee(s) of the decision". See Mavromati and Reeb 2015, p. 388.

However, a question arises as to how the term ‘exhaustion of all legal remedies’ should be interpreted within the context of sports-related disputes. Does ‘legal remedies’ encompass proceedings in national courts? Generally speaking, applicants are typically required to exhaust all available legal remedies under the established rules and regulations before pursuing an appeal with CAS.⁵⁶ In this sense, it would be interpreted that athletes can file a complaint with CAS after they have already exhausted the dispute resolution processes within the internal bodies of sports federations.⁵⁷ Therefore, they would not be obligated to seek resolution through national courts before bringing an appeal against decisions made by sports governing bodies to the Appeals Arbitration Division.

By the same token, the presence of a valid arbitration clause within the sporting regulations or an arbitration agreement between the parties in dispute is a crucial requirement for CAS to assume jurisdiction.⁵⁸ Article R27 of the CAS Code stipulates that:

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

On this basis, Mavromati and Reeb stated that “the statutes or regulations of the sports body that issued the decision must expressly recognize the CAS as an arbitral body of appeal” in accordance with Articles R27 and R47 of the CAS Code.⁵⁹ When these conditions are met, the CAS Panel may indeed assume jurisdiction over sports-related disputes before the Appeals Arbitration Division.

Fuurthermore, Article R58 of the CAS Code provides that:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

In other words, the CAS Panel would take into account human rights instruments when these instruments are chosen as the applicable law by the parties in dispute or when the Panel deems it suitable to apply them in CAS proceedings.⁶⁰

⁵⁶ *Ibid.*, p. 391.

⁵⁷ *Ibid.*, pp. 390–393.

⁵⁸ *Ibid.*, p. 389.

⁵⁹ *Ibid.*, p. 389.

⁶⁰ See also *ibid.*, pp. 535–558.

Besides, the CAS Code permits the CAS arbitrators to exercise a comprehensive power to render an arbitral award. Article R57(1) of the CAS Code explicitly states that “[t]he Panel has full power to review the facts and the law”. On this basis, AS arbitrators would independently interpret a human rights-related clause as the applicable law in sports arbitration under the Panel’s full power of review.

Nonetheless, the CAS Ad hoc Arbitration, which is established by the Arbitration Rules for the Olympic Games (hereafter referred to as the ‘Ad hoc Arbitration Rules’)⁶¹ during the Olympic Games period, exhibits some distinctions from the Appeals Arbitration Division. Article 17 of the Ad hoc Arbitration Rules specifies that:

The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate.

According to this provision, the parties in dispute do not have the option to choose the applicable law, and therefore, the CAS Ad hoc arbitrators have the authority to determine the applicable law in CAS Ad hoc proceedings.

In summary, CAS arbitrators have the authority to take into account international human rights instruments only when the disputing parties choose these instruments as the applicable law or when the arbitrators consider it appropriate to apply them in CAS proceedings as per Article R58 of the CAS Code. Additionally, during the Olympic Games period, CAS arbitrators may also refer to international human rights instruments if they believe it is suitable to apply such instruments to the CAS proceedings, as outlined in Article 17 of the Ad hoc Arbitration Rules.

What Should the CAS do for Human Rights Protection in Sports?

All individuals are entitled to enjoy the protection of fundamental human rights. These rights are considered inalienable rights and cannot be deprived of by any other persons or entities.⁶² However, these rights, except for absolute rights (ex. the prohibition of torture and degrading treatment⁶³), may also be subject to restrictions. For instance, Article 8 of the ECHR guarantees the right to respect for private and family life, but interference with that right can be justified under Article 8(2) of the ECHR.⁶⁴ In cases where such human rights are violated, the victims may the violation of their rights against the states that are parties to the relevant international agreements to ensure the protection and enjoyment of these rights.

Concerning the application of international human rights law to arbitral proceedings, procedural rights set forth in Article 6(1) of the ECHR are relevant to such

⁶¹ CAS, *Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games* (Version 2021), available at <https://www.tas-cas.org/en/arbitration/ad-hoc-division.html>.

⁶² See Preamble of the UDHR.

⁶³ Article 3 of the ECHR; Harris 2018, p. 237.

⁶⁴ Harris 2018, pp. 511–513.

proceedings.⁶⁵ In *Mutu and Pechstein* case, the ECtHR determined that Article 6(1) of the ECHR is applicable to CAS arbitral proceedings.⁶⁶ The ECtHR ruled that there was a violation of the right to a public hearing before the CAS because were not held in public.⁶⁷ Consequently, CAS arbitrators are obligated to ensure that the procedural rights guaranteed by the ECHR are upheld and must take them into consideration during CAS arbitral proceedings.⁶⁸

In the case of arbitration, a waiver clause may be inserted in the arbitration agreement. This clause allows the parties involved to voluntarily relinquish some of their fundamental human rights,⁶⁹ including the right of access to a court.⁷⁰ The ECtHR held that “[p]arties to a dispute may waive certain rights guaranteed by Article 6 § 1 in so far as that waiver is expressed freely, lawfully and unequivocally”.⁷¹ Furthermore, such a waiver clause would be considered valid as long as it does not contravene the procedural public order in the relevant jurisdiction.⁷²

Contrary to the procedural rights, however, substantive human rights have not generally been considered in the arbitral proceedings.⁷³ The CAS operates under the regulations set forth in Article 393 of the Swiss Civil Procedure Code (CPC)⁷⁴ and Article 190(2) of the Swiss PILA,⁷⁵ which outline the grounds for challenging arbitral awards, given that CAS is situated in Switzerland.⁷⁶ For instance, Article 393(d) of the CPC and Article 190(2)(d) of the Swiss PILA allow parties to seek the setting aside of the arbitral awards if “the principles of equal treatment of the parties or the right to be heard were violated” during the arbitration process. In this sense CAS is obliged to safeguard the right to a fair hearing and the equal treatment of parties, as specified in Article 393(d) of the CPC and Article 190(2)(d) of the Swiss PILA. Nevertheless, the application of substantive human rights in arbitration differs from that of procedural rights.⁷⁷ This discrepancy arises because there is no explicit provision within Article 393 of the CPC and Article 190(2) of the Swiss PILA that dictates the

⁶⁵ Jaksic 2002, pp. 227–320.

⁶⁶ *Mutu and Pechstein v. Switzerland*, para. 115 and para. 123.

⁶⁷ Benedettell 2015, pp. 643–651; *Mutu and Pechstein v. Switzerland*, paras. 178–184.

⁶⁸ A clear example is *WADA v. Sun Yang & FINA* case because the CAS immediately responded to the judgment of *Mutu and Pechstein* case rendered by the ECtHR in order to achieve the protection of right to public hearing guaranteed by Article 6 (1) of the ECHR. See CAS 2020; Rudkin 2019; Anderson 2019.

⁶⁹ Jaksic 2002, pp. 205–210.

⁷⁰ Krūmiņš 2020, pp. 64–91; For instance, Article 192 (1) of the Swiss PILA allows parties to voluntarily waive their right of access to a court. In the *Tabbane v. Switzerland* case, the ECtHR determined that there was no breach of the right of access to a court under Article 6(1) of the ECHR due to Article 192(1) of the Swiss PILA. See Krūmiņš 2020, p. 26, pp. 132–133 and pp. 144–153; *Tabanne v. Switzerland*, no. 41,069/12, Judgment of 1 March 2016, ECtHR, para. 36.

⁷¹ *Mutu and Pechstein v. Switzerland*, para. 145.

⁷² Jaksic 2002, p. 207.

⁷³ Krūmiņš 2020, p. 12.

⁷⁴ RS 272.

⁷⁵ RS 291.

⁷⁶ Jaksic 2002, p. 150; Krūmiņš 2020, p. 103; Netzle 2015, p. 26.

⁷⁷ Shinohara 2021a.

applicability of substantive human rights.⁷⁸ Given this context, can arbitral tribunals take substantive human rights into account during arbitral proceedings, and how can disputing parties raise concerns about the violation of substantive human rights before it?

To address these questions, it is necessary to refer to R58 of the CAS Code and Article 17 of the Ad hoc Arbitration Rules. According to these provisions, the CAS Panel can consider human rights instruments in cases where the disputing parties have chosen human rights instruments as the applicable law or when the Panel deems it necessary to apply them in CAS proceedings.⁷⁹ In this regard, it is important to note that individuals cannot assert a violation of their rights against private entities. However, the disputing parties could potentially raise concerns about a violation of anti-discrimination rules established by sports governing bodies through a human rights-related clause in sporting regulations, as discussed in Sect. 2.

Nonetheless, the disputing parties do not usually rely on human rights instruments to strengthen their arguments before the CAS. As demonstrated earlier, human rights law is typically viewed as legal norms that are not applicable to private relationships between individuals. In contrast to this conventional understanding, it is important to consider the legal doctrine of horizontal effect or third-party applicability (*Drittwirkung*) originating from German legal scholars. This legal theory considers the applicability of human rights law to private relationships.⁸⁰ Based on this perspective, current legal doctrine supports the idea that international human rights instruments are indeed applicable to private relationships under states' positive obligations. In this context, it can be considered that the states are held responsible for the violation of human rights caused by private entities, such as sports governing bodies, under the positive obligations stemming from international human rights treaties.⁸¹ At the same time, Simultaneously, private actors should also voluntarily assume the responsibility to respect human rights within the scope of these positive obligations.⁸²

In light of the foregoing, the CAS arbitrators in *Caster Semenya* case did not rely on human rights instruments to decide whether the DSD Regulations were justified under the anti-discrimination rules. This omission stemmed from the fact that Caster Semenya did not explicitly specify which of her fundamental human rights, as guaranteed by international human rights law, were violated by the DSD Regulations. Had she done so, the CAS arbitrators would have been obliged to examine a human rights-related clause in accordance with international human rights instruments. However, they lacked sufficient expertise in the realm of human rights law concerning discrimination related to gender identity and sex characteristics.⁸³

⁷⁸ However, the notion of 'public policy' would play a pivotal role in application of substantive human rights in sports arbitration. Shinohara 2021a.

⁷⁹ See also Mavromati and Reeb 2015, pp. 535–558.

⁸⁰ Jaksic 2002, pp. 108–113; Krūmiņš 2020, p. 17.

⁸¹ Concerning a question of which states should be held responsible for human rights violations in sports, see Shinohara 2021b, pp. 1–11.

⁸² See Shinohara 2021a.

⁸³ Ruggie 2016, p. 24; The CAS also tried to show its intention to respect human rights through the publication on "Sports and Human Rights: Overview from A CAS perspective". See CAS 2021.

In this situation, discriminatory measures against athletes based on gender identity and sex characteristics are subject to certain provisions of international human rights law. However, it is important to note that international human rights law does not impose legal obligations on private actors; rather, it places these obligations on states. Therefore, the athletes cannot argue a violation of their human rights against the sports governing bodies established under national private law on the basis of international human rights law.

Nevertheless, athletes could contend that they have been subjected to gender-based regulations created by sports governing bodies due to the failure of states, which are parties to international human rights treaties, to fulfil their positive obligations in safeguarding individuals against discriminatory measures based on gender identity and sex characteristics. In this context, sports governing bodies bear a responsibility to respect human rights under the international human rights law.⁸⁴

In this context, what steps should the CAS take to protect athletes' human rights in accordance with international human rights instruments? According to Article R58 of the CAS Code and Article 17 of the Ad hoc Arbitration Rules, CAS arbitrators have a primary obligation to consider the sporting regulations put forth by organisations such as the IOC and World Athletics. In this regard, CAS arbitrators are tasked with scrutinizing whether the sporting regulations established by sports governing bodies violate the anti-discrimination rules delineated in Article R58 of the CAS Code and Article 17 of the Ad hoc Arbitration Rules.

However, how can the CAS arbitrators decide whether the sporting regulations are incompatible with anti-discrimination rules? In this regard, the athletes may claim that the arbitrators should refer to international human rights law for the purpose of interpreting the provisions of anti-discrimination rules established by sports governing bodies. This is because these governing bodies have not provided explicit guidance on how to interpret their rules and regulations in light of anti-discrimination principles. Additionally, CAS arbitrators typically do not possess expertise in the field of human rights law. It is also crucial to note that international human rights law cannot be directly applied to sports disputes because sports governing bodies are private entities, not states. However, athletes can contend that CAS arbitrators should refer to international human rights instruments to gain insights into the interpretation of anti-discrimination rules enacted by sports governing bodies.

To sum up, it follows that the CAS arbitrators have the authority to assess whether there is a breach of anti-discrimination rules within sporting regulations by drawing on the interpretation provided by international human rights instruments, as stipulated in Article R58 of the CAS Code and Article 17 of the Ad hoc Arbitration Rules.

⁸⁴ In this context, the concept of corporate social responsibility (CSR) will serve as a crucial factor in establishing a connection between private entities and the safeguarding of human rights within the framework of international human rights law. Nevertheless, when it comes to CSR in the context of human rights, adherence will be voluntary. Consequently, each sports governing body will have the autonomy to decide for themselves whether they choose to align their regulations with the principles of international human rights law. See Principle 11 of the United Nations General Principles on Business and Human Rights (UNGPs).

Message from the ECtHR to the CAS in *Semenya v. Switzerland*

On 11 July 2023, the ECtHR rendered a landmark Chamber judgment in *Caster Semenya v. Switzerland*. In this judgment, it finally found several violations of the provisions of the ECHR, especially the right to non-discrimination under Article 14 in conjunction with Article 8 of the ECHR.

As explained earlier, athletes are unable to assert a violation of their substantive human rights within the existing sports dispute resolution system for two main reasons: (1) the SFT has limited power to review cases concerning violation of fundamental human rights based on the concept of ‘public policy’ within the meaning of Article 190(2)(e) of the Swiss PILA, and (2) a compulsory arbitration clause, which they are obliged to accept in order to participate in international sports competitions, restricts them from initiating legal proceedings in ordinary courts. In this situation, athletes have no choice but to address their grievances related to substantive human rights violations within the confines of dispute resolution bodies.⁸⁵ Furthermore, the SFT has adopted a narrow interpretation of the concept of ‘public policy’ under Article 190(2)(e) of the Swiss PILA. Consequently, it has not extensively examined the potential violations of substantive human rights stemming from the DSD Regulations, primarily due to the SFT’s limited power of review. As a result, the *Semenya v. Switzerland* case holds significant importance for the sports society.

In this case, the ECtHR found a violation of Article 14 in conjunction of Article 8 of the ECHR. The violation occurred because Switzerland failed to provide sufficient institutional and procedural safeguards to protect the applicant from discrimination based on her sex and sex characteristics.⁸⁶ In this sense, Switzerland exceeded the narrow margin of appreciation. Therefore, it did not implement positive obligations to prevent discrimination based on sex and sex characteristics within the Swiss legal framework.⁸⁷

However, the ECtHR did not criticize the CAS award itself. The CAS is not a national tribunal or an institution established under Swiss law, and therefore, it is not obligated to take international human rights treaties into consideration.⁸⁸ Nonetheless, the ECtHR did observe that the CAS employed similar criteria as the ECtHR to assess the existence of discrimination resulting from the DSD Regulations in this case.⁸⁹ In this context, the ECtHR noted that the CAS did not thoroughly examine the well-substantiated claim made by the applicant regarding the side-effects caused by the use of oral contraceptives to lower her naturally high testosterone levels, in the context of Article 14 in conjunction with Article 8 of the ECHR.⁹⁰ This can be interpreted as the ECtHR’s expectation for the CAS to align its handling of the case with the provisions of the ECHR. However, it is important to note that the Court mainly clarified the insufficient institutional and procedural safeguard for intersex female

⁸⁵ *Semenya v. Switzerland*, para. 200.

⁸⁶ *Ibid.*, para. 201.

⁸⁷ *Ibid.*, para. 201.

⁸⁸ *Ibid.*, para. 171.

⁸⁹ *Ibid.*, para. 184.

⁹⁰ *Ibid.*, paras. 179–184.

athlete against discrimination based on her sex and sex characteristic before the SFT due to the limitation of Article 190(2)(e) of the Swiss PILA.

Conclusion

This article considered how the CAS should address human rights-related issues, even though it is not a human rights court like the ECtHR but rather an arbitral tribunal. In doing so, this article referred to anti-discrimination rules created by sports governing bodies and took into consideration how international dispute resolution bodies apply them to complaints from athletes. On this basis, this article addressed the following questions: (1) How can athletes claim a violation of their human rights before the CAS?; and (2) What steps should the CAS take to safeguard human rights in sports? This concluding section will address these questions to bring this article to a close.

Firstly, how can athletes claim a violation of their human rights before the CAS? For this question, it can be said that athletes can have access to the internal dispute resolution body. Following the hearing before the internal dispute resolution body, athletes have the option to challenge its decision before the CAS Appeals Arbitration Division. In such cases, the CAS proceedings are governed by sporting regulations or Swiss law. In this context, if there is an infringement of anti-discrimination rules, athletes can invoke these rules as the basis for presenting their grievances to the CAS. Additionally, it is incumbent upon the CAS Panel to assess whether the actions or omissions of sports governing bodies are justified in light of the anti-discrimination rules.

Secondly, what steps should the CAS take to safeguard human rights in sports? In this regard, it would be considered that the CAS is competent to hear a case concerning a violation of procedural and substantive human rights. However, it is difficult to say at this moment that the victims can directly claim a violation of their human rights due to acts or omissions of their sports governing bodies. Conversely, the CAS may examine whether sporting regulations align with anti-discrimination rules as guided by international human rights instruments used as interpretative aids for anti-discrimination rules.⁹¹ Within this framework, CAS arbitrators should also look to international human rights law to understand the interpretation of anti-discrimination rules established by sports governing bodies.

In conclusion, the CAS can determine whether the rules and regulations governing sports are in alignment with anti-discrimination rules established by sports governing bodies, taking into account the interpretation provided by international human rights instruments. This can occur when the complainants specifically choose these instruments as the applicable law in their allegations, as outlined in Article R58 of the CAS Code. Additionally, if the parties do not make a choice regarding the applicable law, CAS arbitrators also have the authority to decide on their own initiative to refer to international human rights instruments as the governing law when they are deemed relevant, as per Article R58 of the CAS Code (and Article 17 of the Ad hoc Arbitra-

⁹¹ See Shinohara 2021b.

tion Rules). In this capacity, CAS plays a pivotal role in safeguarding human rights within the sports society.

In this connection, can athletes claim a violation of human rights before the SFT under Article 190(2) of the PILA on the ground of discriminatory measures based on gender identity and sex characteristics? After the SFT proceedings, can athletes bring their complaints of a violation of human rights guaranteed by Article 8 in conjunction with Article 14 of the ECHR before the Strasbourg Court?⁹² These crucial questions were examined by the ECtHR in the case of *Semenya v. Switzerland*. However, this case is not final, and Switzerland still has the option to refer it to the Grand Chamber of the ECtHR.

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⁹² Article 14 of the ECHR is a subsidiary provision that cannot be invoked independently before the ECtHR. Thus, the applicants must rely on other Convention rights taken in conjunction with Article 14 of the ECHR. Radacic 2008, p. 842; Rietiker 2020, pp. 95–99; In the context of sports, see Shinohara 2021a.

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