pending before ICSID and the PCA,[27] all involving attempts to establish jurisdiction based on restrictive ISDS clauses, and more are likely to follow. China's position remains difficult: it advocates for narrower interpretations to safeguard its government, yet broader ones to benefit its investors. Nonetheless, arbitral decisions are not always predictable or favorable. The *Junefield* award, however, offers a positive signal for both Chinese and foreign investors, as it provides future tribunals a reference point for adopting a broader reading of restrictive clauses. Notably, *PowerChina and others v. Viet Nam (II)*—one of the four pending China-related cases referenced earlier—is based on the 1992 China-Vietnam BIT, whose restrictive ISDS clause and the contextual structure are nearly identical to those of the 1994 China-Ecuador BIT in *Junefield*. Whether the *PowerChina* tribunal will follow *Junefield*'s broad interpretation is thus a matter of significant interest. More broadly, cases like *Junefield* highlight the pressing need for China and other treaty parties to revise and refine their treaty drafting practice. They provide a compelling justification for adopting more precise, coherent language in the next generation of BIT negotiations.

JUAN DU*
Xi'an Jiaotong University School of Law
doi:10.1017/ajil.2025.10140

Human rights—discrimination—equality—intersectionality—sports

SEMENYA V. SWITZERLAND. Application No. 10934/21. Judgment. *At* https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-244348%22]}.
European Court Of Human Rights Grand Chamber, July 10, 2025.

Caster Semenya's legal battle against World Athletics'[1] Regulations on Differences in Sexual Development (DSD)[2] represents one of the most contentious cases in recent years at the intersection of human rights, sporting fairness, and international arbitration. The South African middle-distance champion, born with DSD, was from 2018 onward required by the International Association of Athletics Federations (IAAF), the predecessor to World Athletics (whose headquarters is in Monaco), to undergo contraceptive treatment to suppress her endogenous testosterone levels to below 5 nmol/L or forfeit her right to compete internationally. What followed was a judicial odyssey that exposed the profound limitations of both international arbitration and international human rights law as her case traversed the Court of Arbitration for Sport (CAS), the Swiss Federal Supreme Court (SFSC), the Third Section of the European Court of Human Rights (ECtHR), and ultimately the Grand Chamber of the ECtHR. In its July 10, 2025 decision concerning World Athletics' DSD Regulations, the Grand Chamber found that Switzerland breached Article 6(1) of the European Convention on Human Rights (ECHR) (right to a fair trial) for failing to conduct

[27] *Wang v. Ukraine*, *Goh Chin Soon v. China*, *PCCW Cascade v. Saudi Arabia*, *PowerChina v. Vietnam*, *supra* note 4.

* Acknowledgement: This research was supported by the National Social Science Fund of China (grant number 23BFX152).

[1] Formerly the International Association of Athletics Federations (IAAF).

[2] World Athletics, C3.6A – Eligibility Regulations for the Female Classification (effective Apr. 2018).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

a sufficiently rigorous examination of the Court of Arbitration for Sport's (CAS) award for compliance with public policy. Though an important decision on intersectional discrimination, it ultimately fails to address the troubling accountability gap that continues to exist where transnational sporting organizations not only prescribe compulsory arbitration but also impose discriminatory regulations with minimal regard for human rights. This case note examines three troubling implications of the decision: first, jurisdictional formalism that privileged procedure over substance; second, the missed opportunity to address intersectional discrimination; and third, the perpetuation of the accountability gap that gives primacy to the interests of private sporting bodies over the rights of vulnerable athletes.

* * * *

In 2019, Semenya challenged the DSD Regulations as being discriminatory and an attack on her dignity before the CAS. The CAS,[3] which had compulsory and exclusive jurisdiction over the dispute pursuant to Article 5.2 of the DSD Regulations, acknowledged that World Athletics' Regulations were *prima facie* discriminatory on the ground that they established conditions and restrictions that targeted a subset of the female/intersex athlete population, and did not impose any equivalent conditions or restrictions on male athletes, but found them to be objectively justifiable as necessary and proportionate for ensuring fair competition.[4] According to the CAS, athletes with differences in sex development gained an unfair performance advantage over female athletes from their elevated testosterone levels. In 2020, the SFSC[5] then upheld the CAS award on appeal, finding that the Regulations served legitimate sporting purposes and were proportionate. Given the principle of finality in international arbitration, the SFSC countenanced a limited review of the CAS award under Section 190(2)(e) of the Swiss Federal Act on Private International Law (PILA), determining that the award was not contrary to "public order."

Dissatisfied with the SFSC's decision, Semenya filed a claim before the ECtHR in 2021. The Third Section of the ECtHR[6] found that Switzerland had violated Articles 14 (prohibition of discrimination) and 13 (right to an effective remedy) of the ECHR. The Third Section ruled that the SFSC failed to provide sufficient institutional and procedural guarantees to protect the applicant, inadequately examined her discrimination complaints, and applied an overly restrictive interpretation of "public order." It emphasized that states must protect individuals against discrimination even by private actors, particularly in the context of compulsory arbitration.

[3] Mokgadi Caster Semenya and Athletics South Africa (ASA) v. IAAF, Arbitral Award, CAS 2018/O/5794 & 5798.

[4] The DSD Regulations established conditions and restrictions that targeted a subset of the female/intersex athlete population, and did not impose any equivalent conditions or restrictions on male athletes. As such, the CAS considered that the Regulations were *prima facie* discriminatory on the ground of legal sex. Similarly, since the DSD Regulations created conditions and restrictions that targeted a group of individuals who have certain immutable biological characteristics (namely a 46 XY DSD coupled with a material androgenizing effect arising from that condition), and which did not apply to individuals who did not have those characteristics (e.g., 46 XX individuals with or without DSDs) it followed that the DSD Regulations were *prima facie* discriminatory on grounds of innate biological characteristics.

[5] Semenya v. IAAF, Federal Supreme Court of Switzerland, 4A_248/2019 and 4A_398/2019, Judgment, (Aug. 25, 2020), *at* https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://25-08-2020-4A_248-2019&lang=de&zoom=&type=show_document.

[6] Semenya v. Switzerland, App. No. 10934/21, ECtHR Third Section Judgment, Merits and Just Satisfaction (July 11, 2023).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

The government of Switzerland then requested that the case be referred to the Grand Chamber in accordance with Article 43 of the ECHR. On November 6, 2023, a panel of the Grand Chamber accepted that request. The Grand Chamber[7] upheld (13–4) Switzerland's preliminary objection that the complaints under Article 8 (right to private and family life), taken alone or in conjunction with Articles 14 and 13, were incompatible *ratione personae* and *ratione loci* with the provisions of the Convention. Nevertheless, the Grand Chamber found (15–2) that there had been a violation of Article 6(1) (right to a fair trial).

The Grand Chamber appeal focused on two core issues. First, whether the applicant satisfied the *ratione personae* and *ratione loci* requirements of the ECHR, given that she was a South African national, and the Regulations were enacted by World Athletics, whose seat is in Monaco. Second, whether there was a violation of Article 6 ECHR.

On the first issue, the Grand Chamber explained that a state's jurisdiction for purposes of Article 1 ECHR is essentially territorial such that the facts complained of by an applicant must, in principle, have taken place on the territory of the respondent state (para. 119). The Grand Chamber acknowledged, however, that a matter may fall within a state's jurisdiction in exceptional circumstances where the state has exercised effective control over an area outside its national territory or where an official of that state exercised authority or control over individuals outside its territory. Furthermore, even if events occurred outside a state's territory, once a person affected by those events brings a civil action in that state's courts concerning a recognized right, they fall within its jurisdiction under Article 1, and the state must ensure the fairness guarantees of Article 6(1) apply to those proceedings. On the facts, the Grand Chamber concluded that, while there was not a territorial link between Switzerland and the applicant, the jurisdictional exception in respect of Article 6 applied given that the CAS has its seat in Switzerland in accordance with Swiss law (Chapter 12 of PILA), which provides for civil law appeals to the SFSC against CAS awards (paras. 129–31).

By contrast, the Grand Chamber determined that the applicant did not fall within Switzerland's jurisdiction for purposes of Article 8 and Article 14 (para. 154). In its view, the facts complained of by the applicant did not take place in Switzerland, nor did it concern the procedural obligation to investigate under Article 2 (right to life) of the Convention. In rejecting the Third Section's finding in this connection, a majority of the Grand Chamber distinguished Article 6(1) from Articles 8 and 14. It found that Article 6 relates exclusively to procedural rights (para. 144) but that Articles 8 and 14 were not triggered by the applicant's civil law appeal to the SFSC seeking to have the CAS award set aside. Ultimately, the Grand Chamber considered that there was no support for a criterion such as "control over the Convention interests" as a basis for extraterritorial jurisdiction (para. 149). It observed that extraterritorial jurisdiction requires control over the person himself or herself rather than the person's interests as such, thereby resisting the "radical departure from established principles under Article 1" proposed by the applicant (*id.*).

The Grand Chamber then proceeded to the merits of the case. A majority of the Chamber held that, given the mandatory and exclusive jurisdiction of the arbitration to which the applicant had been subject, the SFSC was obligated to conduct an in-depth review of the arbitral decision (para. 238). The review of the applicant's case by the SFSC, owing to its very restrictive interpretation of the notion of "public policy," did not satisfy this requirement.

[7] *Id.*

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

The court thus concluded that the applicant did not benefit from the safeguards provided by Article 6(1) of the Convention.

In arriving at this conclusion, the court identified multiple shortcomings in the SFSC's (and, by extension, in the CAS's) decision. First, the Grand Chamber found that, in assessing whether the Regulations were reasonable and proportionate, the CAS had left open a decisive issue—the potential difficulty for Semenya to maintain her testosterone levels below the maximum permitted (5 nmol/L). Indeed, Semenya's testosterone levels had shown significant fluctuation, ranging from 0.5 to 7.85 nmol/L, and the CAS had accordingly expressed concern that "a regulation which is impossible or excessively difficult to apply fairly cannot be characterised as a proportionate interference with the rights of [46 XY DSD athletes]."[8] In the Grand Chamber's view, the SFSC's failure to examine this important issue when reviewing the CAS award for its compatibility with substantive public policy meant that a particularly rigorous examination of the CAS's reasoning, as required by Article 6, was not conducted (para. 230).

Second, the CAS had found that the decision to include the events in which the applicant competed within the list of "Restricted Events" seemed to be based, at least in part, on speculation that 46 XY DSD athletes such as Semenya were likely to have a significant performance advantage over other female athletes in these events. Although the CAS concluded that "[t]he scope of the Restricted Events [could not] be described as arbitrary," it expressed concern over the adequacy of the evidentiary basis provided, inviting the IAAF to consider deferring the application of the DSD Regulations to those events until more evidence was available (para. 232). The Grand Chamber was concerned that, despite these misgivings, the SFSC merely stated that it was unable to find that the CAS's conclusions were incompatible with public policy. According to the Grand Chamber, such a deferential approach meant that the SFSC did not subject this aspect of the applicant's dispute to a rigorous examination as Article 6 requires (para. 233).

Third, the CAS had found that the DSD Regulations could result in the status of female athletes with DSD being made public where athletes who qualified in national competitions were excluded from subsequent international competitions. Although the CAS observed that confidential medical information could be made public by inference, it merely considered, without an in-depth proportionality assessment, that "this [was] likely to be an inevitable detrimental effect of the DSD Regulations" (para. 234). The Grand Chamber was concerned that the SFSC should have subjected this compromised reasoning to more rigorous examination under Article 6 (*id.*).

Finally, the Grand Chamber was concerned that the SFSC had ruled that it was simply unable to accept "the conclusion [reached by] the CAS . . . [was], *per se*, incompatible with human dignity," even as the SFSC acknowledged that "one consequence of the regulations was that 'biological characteristics' could 'transcend the legal sex or gender identity of a person'" (para. 236). The Grand Chamber held that this reasoning demonstrated the absence of a sufficiently rigorous examination of whether the impugned measure was compatible with fundamental rights. The SFSC's focus was seemingly not on the consequences complained of by the applicant, but rather on the theoretical aim of the Regulations which had resulted in those consequences. According to the Grand Chamber, by

[8] CAS Award, *supra* note 3, para. 616.

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

directing its analysis primarily to the abstract aim of the DSD Regulations, rather than to the concrete effects complained of by the applicant, the SFSC failed to undertake the level of scrutiny demanded by Article 6 of the Convention.

* * * *

Despite the technical victory secured through the Grand Chamber's positive finding that the right to a fair trial had been violated, the judgment reveals a troubling disjuncture between procedural protection and substantive justice for athletes like Semenya who face intersectional discrimination by transnational sporting bodies.

That the Grand Chamber cautioned against the SFSC adopting a restrictive interpretation to the public policy ground where civil rights are in issue, in contradistinction to other commercial arbitration proceedings (para. 237), is a significant outcome that has implications for how public policy as a ground for setting aside an arbitral award is construed in future cases. More particularly, should the SFSC closely adhere to the Grand Chamber's admonition that public policy should not be too restrictively construed in cases raising human rights concerns, future sporting cases on appeal from the CAS are likely to be more rigorously examined for their consistency with human rights.

However, the majority's ruling that it could not "discern any special features" (para. 146) in this case which could constitute a jurisdictional link between the applicant and Switzerland in relation to her complaint under Articles 8 and 14 is concerning for several reasons.

First, apart from the fact that the CAS has its seat in Switzerland, and the SFSC examined the applicant's civil law appeal seeking to have the CAS award set aside, arbitration before the CAS was not merely optional, but compulsory in nature.

Second, notwithstanding the mandatory nature of arbitration and the structural power imbalance in this connection, the procedure before the SFSC was very limited, as only a restricted number of procedural grounds, including public policy—the only relevant ground here, could be relied upon to set aside the CAS award.[9] The challenge in this connection is that only in one case to date has the SFSC overturned an award on public policy grounds (para. 227), evidencing the extreme degree of deference generally shown to CAS awards by the SFSC, and the attendant extremely restricted nature of avenues available to the applicant to have her rights vindicated.

Third, the majority mischaracterized the nature of Semenya's complaint. In rejecting "control over . . . interests under the Convention" as a jurisdictional basis (para. 149, citing *Duarte Agostinho v. Portugal*[10]), the majority treated this case as analogous to diffuse environmental harm claims. But Semenya's complaint concerned direct, immediate interference with bodily autonomy; she was compelled to take hormones or forfeit her livelihood. This is control over her person, not merely her "interests." The Court's own

[9] Under Article 190 of the PILA, only a very limited number of grounds could be relied upon at the SFSC as a basis for challenging an arbitral award rendered by the CAS, namely: "a. where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal improperly constituted; b. where the arbitral tribunal wrongly accepted or declined jurisdiction; c. where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims; d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated; e. where the award is incompatible with public policy." Federal Act on Private International Law, Art. 190 (Switz.) [hereinafter PILA].

[10] Duarte Agostinho and Others v. Portugal and 32 Others, App. No. 39371/20, para. 205 (Apr. 9, 2024).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

jurisprudence recognizes that forced medical treatment engages the "very essence" of human dignity.[11] By conflating direct bodily coercion with abstract "interests," the majority has arguably created a dangerous precedent to the effect that private actors can evade Convention scrutiny by routing mandatory arbitration through Switzerland while targeting individuals abroad. Indeed, judges Bošnjak, Zünd, Šimáčková, and Derenčinović's dissent is instructive in this regard:

> It is inconceivable that domestic courts, ruling within the territory of Europe, should disregard international fundamental rights obligations in the area of the protection of bodily integrity, equality and human dignity, even where highly specialised proceedings—in this instance, sports arbitration—are in issue.[12]

Fourth, the court's reliance on *Banković and Others v. Belgium and Others*[13] and *Duarte Agostinho and Others v. Portugal and 32 Others*[14] to assert that extending Switzerland's jurisdiction over the applicant's Article 8 and 14 complaints, on the basis of facts said to have occurred outside its territory, would "expand the scope of extraterritorial jurisdiction and depart from established principles under Article 1" (para. 150) mischaracterizes the applicant's circumstances. In so doing, the Court privileged procedural formalism over the foundational values of equality and human dignity that underpin the spirit, object and purpose of the Convention. It is submitted that the jurisdictional question in respect of the aforementioned rights need not have been resolved by resorting to the extraterritorial jurisdiction point in the first place; it could have been resolved by having regard to the fact that the applicant appeared before the CAS and later the SFSC on Swiss territory, and therefore the facts complained of—the SFSC active affirmation of the CAS's award and by parity of reasoning the discriminatory DSD Regulations—occurred *within* the state. Sarah Thin argues in this connection:

> Semenya was present in Lausanne when the CAS ruling confirmed the decision of World Athletics. The CAS decision is given force of law in Switzerland. These aspects therefore lie squarely within the territorial jurisdiction of Switzerland. Purely on this basis, therefore, there appears to be a sufficient territorial link for the purposes of establishing jurisdiction under Article 1 ECHR.[15]

Instead of so ruling, the majority sought to distinguish the present case from *Platini v. Switzerland*,[16] where the court held that it had jurisdiction to examine the applicant's complaints as to the acts and omissions of the CAS that were validated by the Federal Supreme Court, including a complaint under Article 8 of the Convention. In the majority's

[11] V.C. v. Slovakia, App. No. 18968/07, para. 105 (Feb. 8, 2012).

[12] Semenya v. Switzerland, App. No. 10934/21, ECtHR, Grand Chamber Judgment, Partly Dissenting Opinion of Judges Bošnjak, Zünd, Šimáčková, and Derenčinović, para. 1 (July 10, 2025), *at* https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-244348%22]}.

[13] Banković and Others v. Belgium and Others, App. No. 52207/99, ECHR 2001-XII (Dec. 12, 2001).

[14] *Duarte Agostinho*, *supra* note 10.

[15] Sarah Thin, *The Questionable "Extraterritoriality" of Switzerland's Jurisdiction in the* Semenya *Case (ECtHR)*, EJIL:*Talk!* (June 13, 2024), *at* https://www.ejiltalk.org/the-questionable-extraterritoriality-of-switzerlands-jurisdiction-in-the-semenya-case-ecthr.

[16] Platini v. Switzerland, App. No. 526/18 (Feb. 11, 2020).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

view, in contrast to Semenya's case, there was in *Platini* a link between the facts complained of by the applicant under Article 8 and Switzerland as that case concerned domestic arbitration governed by the Code of Civil Procedure in which sanctions were imposed on Platini 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. As explained by the Court in that decision, that case did not concern international arbitration, governed by the PILA, but domestic arbitration, governed by the Code of Civil Procedure. By contrast, the majority in Semenya held that the proceedings were international, governed by the PILA, and therefore lacked a sufficient territorial link. This distinction, however, is unconvincing. The cumulative effect of the compulsory and exclusive nature of international arbitration before the CAS, the fundamental rights at stake, Semenya's physical presence in Lausanne during the CAS and SFSC hearings, and the SFSC's active role in affirming the CAS award without rigorous scrutiny, together establish a territorial and institutional nexus with Switzerland comparable to, if not stronger than, that in *Platini*. The fact that *Platini* involved domestic rather than international arbitration should not have been accorded such determinative weight. From the standpoint of effective protection of Convention rights, the nature of the arbitration regime, whether governed by the Code of Civil Procedure or by the PILA, ought not to have been dispositive where both were seated in Switzerland and subject to review by the same judicial authority. It is therefore difficult to reconcile the Court's finding of jurisdiction in *Platini* with its refusal to recognize it in *Semenya*. It is unsurprising, therefore, that the dissenters felt compelled to comment: "we cannot subscribe to [the majority's] contradictory approach."[17]

The practical effect of the majority's ruling is to leave unprotected a small but vulnerable group of women, such as Semenya, who remain unable to pursue litigation in other jurisdictions to substantively challenge the discriminatory Regulations. This is a direct consequence of the mandatory and exclusive nature of arbitration before the CAS, seated in Switzerland, which precludes recourse to alternative fora unless the claim concerns a violation of Article 6. The Court's rigid distinction between Article 6 (procedural) and Articles 8 and 14 (substantive) collapses in circumstances where, as here, the procedural mechanism *is* the only means of vindicating substantive rights. It is therefore submitted that Switzerland's positive obligation under Article 8 to provide effective remedies against private interference, having regard to *Söderman*,[18] was triggered by the SFSC's affirmation of the discriminatory DSD Regulations, rather than by facts occurring in South Africa.

More generally, in failing to address the applicant's substantive complaint under Article 8 in conjunction with Article 14, namely that the DSD Regulations violated her right to respect for her private life, owing to their effects on her bodily and psychological integrity and identity, her right to self-determination and her right to exercise her professional activity without being subject to less favorable treatment than her male counterparts, the court was essentially deprived of the opportunity to assess the intersectional nature of the discrimination alleged by the applicant. Intersectional discrimination,[19] which is increasingly

[17] *Semenya*, Partly Dissenting Joint Opinion of Judges Bošnjak, Zünd, Šimáčková, and Derenčinović, *supra* note 12, para 2.

[18] Söderman v. Sweden, App. No. 5786/08, ECHR 2013, paras. 78–85 (Nov. 12, 2013).

[19] Shreya Atrey, Intersectional Discrimination (2019).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

being recognized in international human rights jurisprudence,[20] arises where a person, like Semenya, experiences less favorable treatment on the basis of multiple intersecting vectors of their personhood,[21] in this case, her sex, gender identity and race (as a Black female athlete from the Global South).[22] Interestingly, while the majority implicitly recognized that Semenya may have been targeted by the Regulations (para. 233), only Judge Šimáčková—in her dissent—was prepared to implicitly recognize the intersectional nature of the discrimination occasioned to the applicant:

> the applicant was at a disadvantage vis-à-vis the IAAF, not only as a professional athlete, for the reasons set out in the present judgment, but also because she is a woman, she is black, and she is from the Global South.[23]

An intersectional approach would have recognized that Semenya was targeted by the clearly paternalistic, arbitrary and disproportionate Regulations, described by the dissenters as a type of "*lex Semenya*" approach,[24] for less favorable treatment not simply on one ground, but on multiple grounds all at once. In this context, Semenya's position was palpably different from her white European colleagues, who, had they challenged the Regulations, would likely have succeeded in having the ECtHR hear the matter on the basis of Article 8 in conjunction with Article 14 since they would easily have satisfied the territorial link for jurisdiction purposes, as required by the majority.

Overall, then, while the majority's ruling on Article 6, in accordance with established jurisprudence, including *Markovic and Others v. Italy*,[25] that the SFSC is required to conduct a rigorous assessment of CAS awards for their compatibility with public policy, is progressive in many respects, the impact of the judgment falls far short of what could otherwise have been expected since the majority did not substantively rule that the Regulations were in fact discriminatory, or a breach of the claimant's right to privacy. As such, while damages of Euro 80,000 were awarded in this case, the fundamental mischief challenged by Semenya remains substantively intact—the disproportionate and discriminatory restriction imposed on intersex athletes primarily from the Global South by the Regulations.

More fundamentally, the ruling represents only the tip of the iceberg in holding sporting organizations liable for human rights violations committed against athletes who are invariably in an unequal hierarchical relationship *vis-à-vis* these organizations. Indeed, while

[20] *See, e.g.*, Shreya Atrey, *Fifty Years on: The Curious Case of Intersectional Discrimination in the ICCPR*, 35 NORD. J. HUM. RTS. 220 (2017); Jason Haynes, *International Human Rights Law's Complicity in Status Subordination: A Postcolonial Critique of Treaty Bodies' Engagement with Human Trafficking*, LEIDEN J. INT'L L. 1 (2025).

[21] INTERSECTIONALITY AND HUMAN RIGHTS LAW (Shreya Atrey & Peter Dunne eds., 2020).

[22] Jason Haynes, *An Intersectional Approach to Fairness in Sport*, *in* PERSPECTIVES ON CARIBBEAN LAW (Shazeeda Ali & Stephen Vasciannie eds., 2024). Note that several other African athletes have been affected by the DSD rules, including Burundi's Olympic silver medallist Francine Niyonsaba of Burundi and her fellow 800m runner Margaret Wambui of Kenya. Two Namibian teenagers, Christine Mboma and Beatrice Masilingi, were also forced to step down from the 400m weeks before the Tokyo Olympics after they were informed of their elevated testosterone levels. *See also* JASON HAYNES & J. TYRONE MARCUS, COMMONWEALTH CARIBBEAN SPORTS LAW 335–40 (2018).

[23] *Semenya*, Partly Concurring Opinion of Judge Šimáčková, *supra* note 12, para. 26.

[24] *Semenya*, Partly Dissenting Joint Opinion of Judges Bošnjak, Zünd, Šimáčková, and Derenčinović, *supra* note 12, para. 3.

[25] Markovic and Others v. Italy, App. No. 1398/03, ECHR 2006-XIV, paras. 49–55 (Dec. 14, 2006).

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

the court's ruling on Article 6 requires the SFSC to adopt a robust interrogation of cases that raise civil rights considerations in respect of the public policy ground for setting aside arbitral awards, it does little to stem the burgeoning "accountability gap" besetting transnational sporting organizations, who remain largely untouchable, thanks to their private, "global, monopolistic, and autonomous authority,"[26] the prohibition of "governmental interference" in their activities,[27] the general reluctance of domestic courts to subject the regulations of sporting bodies to judicial review,[28] the fundamental failure of international law to bind (or at least impose positive human rights obligations on) these entities directly,[29] and the enormous power asymmetry that exists between these organizations and athletes occasioned by forced arbitration.[30] These realities were in part recognized by dissenters who surmised:

> sports federations' decisions and regulations have an impact on the private life of high-level athletes. It also bears witness to the importance of arbitral and judicial bodies in protecting this right. The Court's role is to protect fundamental rights. In choosing not to examine on the merits the question of the applicant's rights as guaranteed by Articles 8 and 14 of the Convention, the Court has failed to fulfil its role in the present case.[31]

Against this backdrop, scholars in the field of international sports law remain understandably frustrated, despite renewed calls for greater accountability on the part of powerful transnational sporting bodies, including through a move away from traditional international law (which does little to bind these organizations to positive human rights obligations) to global law or global administrative law.[32] Although the dissenters in the *Semenya* case did not use the language of "global law" or "global administrative law," the ethos of these legal paradigms was aptly recognized by these judges who rightly noted:

> The fact that the transnational regulation and arbitration of sport is of a private-law nature cannot exempt the entities involved from all accountability with regard to fundamental rights .... The protection offered by international fundamental rights law would be illusory if it could be circumvented simply by private actors generating their own private-law system of rules and adjudication mechanism. The Court should be capable of protecting the fundamental rights of those persons who are obliged to accept the CAS's jurisdiction.[33]

[26] Michele Krech, *Gender Equality in World Athletics: Transnational Norm Development by Private International Organizations*, 119 AJIL 1 (2025).

[27] Henk Erik Meier & Borja García, *Protecting Private Transnational Authority Against Public Intervention: FIFA's Power Over National Governments*, 93 PUB. ADMIN. 890 (2015).

[28] Jason Haynes, *The Death of Judicial Review of Sporting Bodies in the Commonwealth Caribbean*, 22 INT'L SPORTS L.J. 33 (2021).

[29] Doriane Lambelet Coleman, *The Olympic Movement in International Law*, 114 AJIL UNBOUND 385 (2020).

[30] Lena Holzer, *International Sports Federations as De Facto Lawmakers: Queer-Feminist Explorations of the Gendered Power of Sports Law*, 37 LEIDEN J. INT'L L. 891 (2024).

[31] *Semenya*, Partly Dissenting Joint Opinion of Judges Bošnjak, Zünd, Šimáčková, and Derenčinović, *supra* note 12, para. 14.

[32] Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROB. 15, 23 (2005).

[33] *Semenya*, Partly Dissenting Joint Opinion of Judges Bošnjak, Zünd, Šimáčková, and Derenčinović, *supra* note 12, para. 10.

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press

In the final analysis, then, although the majority's ruling goes some way in ensuring that, in future, fair trial safeguards are adhered to by the SFSC in its review of CAS awards, the substantive accountability gap besetting sporting organizations remains largely unaddressed. As such, the *Semenya* judgment, though an important one, is only a pyrrhic victory in the grand scheme of things.

Jason Haynes
University of Birmingham
doi:10.1017/ajil.2025.10144

https://doi.org/10.1017/ajil.2025.10144 Published online by Cambridge University Press