Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport

Duval, A.

DOI
10.1007/s40318-022-00221-6

Publication date
2022

Document Version
Final published version

Published in
International Sports Law Journal

License
CC BY

Citation for published version (APA):
Duval, A. (2022). Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport. International Sports Law Journal, 22(2), 132-151. https://doi.org/10.1007/s40318-022-00221-6

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

UvA-DARE is a service provided by the library of the University of Amsterdam (https://dare.uva.nl)
Lost in translation? The European Convention on Human Rights at the Court of Arbitration for Sport

Antoine Duval

Accepted: 6 May 2022 / Published online: 1 June 2022
© The Author(s) 2022

Abstract

The Court of Arbitration for Sport (CAS) is not known as a human rights court. Instead, its primary focus is on applying and interpreting the regulations of international (and sometimes national) sport governing bodies (SGBs). It is only recently that the intersection between the CAS jurisprudence and human rights has become of interest in the academic literature and public debates. In particular, the Mutu and Pechstein decision of the European Court of Human Rights (ECtHR) in October 2018 made clear that the CAS does not escape the indirect scrutiny of the Strasbourg court. Nevertheless, until today, very few publications have been dedicated to the interplay between the European Convention on Human Rights (ECHR) and the CAS. This paper aims to contribute to remedying this want by charting the CAS awards in which a reference to the ECHR or a decision of the ECtHR was made and tracing the impact and function of such references in the CAS jurisprudence. The findings highlight the various functions of the references to the ECHR in CAS awards, the discrepancies between some of the interpretations of the ECHR advanced by the CAS and the ECtHR’s own understanding of the Convention, and the limited success of appellants to challenge SGBs’ decisions on the basis of the ECHR. The paper concludes by arguing that the CAS would need to be institutionally reformed in order for human rights to act as an effective check on the transnational power of SGBs in CAS proceedings.

Keywords Court of Arbitration for Sport · European Convention on Human Rights · Mutu and Pechstein · European Court of Human Rights · Transnational law

The Court of Arbitration for Sport (CAS) is not known as a human rights court, its main focus is on applying and interpreting the regulations of international (and sometimes national) sport governing bodies (SGBs).¹ The primary function of the CAS in the global governance of sport is to provide an (supposedly independent) external avenue for review of the decisions of the SGBs. It is only recently that the intersection between the judicial work of the CAS and human rights has become of interest in academic scholarship and public debates.² After the Mutu and Pechstein decision of the European Court of Human Rights (ECtHR) in 2018, it became evident that the CAS does not escape the indirect scrutiny of the Strasbourg court.³ Nevertheless, until today, very few publications have been dedicated to the interplay between the European Convention on Human Rights (ECHR) and the CAS.⁴

This paper aims to contribute to remedying this gap by analysing CAS awards in which a reference to the ECHR or a decision of the ECtHR was made.⁵ In some of these awards, the reference was included in the parties’ pleas and

¹ On the CAS, see Rigozzi (2005), Latty (2007), Maisonneuve (2011), Casini (2011).
² The CAS itself published in March 2021 a factsheet on ‘Sport and Human Rights: Overview from a CAS perspective’, available at https://www.tas-cas.org/fileadmin/user_upload/Human_Rights_in_sport_CAS_report_updated_31_03_2021.pdf.
³ See ECtHR, Mutu and Pechstein v. Switzerland, app. no. 40575/10 & 67474/10, Third Section, Judgment of 2 October 2018 and Platini v. Switzerland, app. no. 526/18, Third Section, Judgment of 11 February 2020.
⁴ See only: Rigozzi (2020), Haas (2012) and the short piece by Geistlinger and Gappmaier (2013).
⁵ To identify the relevant awards I searched specific keywords in French (Convention europeenne de sauvegarde and CEDH) and English (European convention on Human Rights, ECHR and ECtHR) in the CAS database. The last search was conducted on 30 May 2021.
the CAS panel (or a single judge) did not weigh on the application of the ECHR in the holdings of the award. However, in many others the ECHR and the ECtHR’s case-law did play a (often relatively minor) role in the assessment of the merits of the case. In the following sections, I review and analytically distinguish these references. Thereby, I aim to trace the argumentative function of such references in the CAS jurisprudence and in some instances highlight the discrepancy between the CAS and the ECtHR’s understanding of the meaning and implications of the ECHR. To some, it might be questionable whether the CAS has at all the legitimacy to deal with human rights matters. In this article, I take as a starting point that the CAS is already interpreting and applying human rights in cases submitted to its jurisdiction. This fact should not detract us, as the conclusion will show, from interrogating the conditions in which it is to do so legitimately.

The paper starts by discussing the way in which CAS panels have dealt with the question of the applicability of the ECHR to CAS proceedings, delving into the much-discussed issue of the horizontal application of the ECHR to the transnational private regulators governing international sport. The second section of the article turns to analysing how the ECHR was used in a number of CAS awards to protect and widen the scope of jurisdiction of the CAS. It is followed by a third section looking at awards in which the ECHR was invoked to challenge the compatibility of the decisions and regulations of the SGBs. The fourth section of the paper focuses on awards discussing whether CAS proceedings respect Article 6 §1 of the ECHR. Finally, the conclusion outlines the main findings of the paper and reflects on the position of the CAS in the European human rights pluralism underpinning the ECHR.

1 Questioning the applicability of the ECHR in CAS proceedings

The ECHR is an international treaty to which states are parties. In principle, it is not meant to be directly applicable between private parties, only public decisions are in theory targeted by it. This starting point is being widely discussed in the literature on the (direct and indirect) horizontal effect of human rights and in particular the ECHR. It has also been of relevance before the CAS, which usually involves proceedings between private parties. Indeed, even though SGBs are presented as “governing bodies”, they are usually constituted as private associations or corporations. The private nature of SGBs raises the question of whether their decisions can at all be subjected to a review on the basis of the ECHR. As we will see in this section, CAS panels have answered this question in very different fashions in the past. Moreover, due to recent developments, it might become a superfluous question.

1.1 Denying the horizontal applicability of the ECHR at the CAS

CAS tribunals, when confronted with pleas grounded in the ECHR, have had to repeatedly decide whether the ECHR was at all applicable in the framework of CAS proceedings. Accordingly, several CAS awards denied the applicability of the ECHR to disciplinary disputes involving private parties. This position is usually grounded in a traditional understanding of the scope of application of the ECHR as directed exclusively against state action. The exercise of public power is presented as the necessary trigger for the application of the rights guaranteed in the ECHR.

Concretely, a CAS award stated for example “that procedural fundamental rights protect citizens against violations of such rights by the State and its organs and are therefore only applicable to a jurisdiction established by a State and not to legal relationships between private entities such as associations and their members”. In the same case, the arbitrators held that the “CAS has consistently held that the ECHR does not apply to an association’s disciplinary bodies, which cannot be qualified as ‘Tribunals’ within the meaning of the ECHR”. Most of the awards adopting this position refer as well to the decision of the Swiss Federal Tribunal in the Abel Xavier case, which held that “[the Appellant] was not the subject of a measure taken by the State, with the result that these provisions [Article 7 CAS 2006/A/1102, Johannes Eder v/Ski Austria, award of 13 November 2006, para. 14 ; TAS 2006/A/1146 Agence Mondiale Anti-dopage (AMA/WADA) c/Johannes Eder & Ski Austria, para. 45; CAS 2008/A/1513 Emil Hoch v. Fédération Internationale de Ski (FIS) & International Olympic Committee (IOC), award of 29 January 2009, para. 9; CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), award of 5 July 2010, paras 14–19; TAS 2011/A/2433 Amadou Diakite c. Fédération Internationale de Football Association (FIFA), award of 8 March 2012, para. 23; TAS 2012/A/2862 FC Girondins de Bordeaux c. Fédération Internationale de Football Association (FIFA), award of 11 January 2013, paras 105–107; CAS 2016/A/4697, Elena Dorofeyeva v. International Tennis Federation (ITF), award of 3 February 2017, para. 97.

8 CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), award of 5 July 2010, para. 15.

9 Ibid., para. 18 with reference to CAS 2000/A/290 Xavier and Everton FC c. UEFA, award of 2 February 2021.
8 ECHR] are, as a matter of principle, inapplicable”.10 One can also find references in CAS awards to the fact that “the ECHR is not applicable to sports law matters”11 or which expressed “serious doubts”12 as to its applicability.

Such a strict position on the applicability of the ECHR seems at odds with the peculiar function and operation of the governance of international sports. Indeed, this is an area of social life in which private bodies (mostly Swiss associations) exercise transnational regulatory power in the interest of the sporting community. While these powers are often formally justified on the basis of consent, in practice it is difficult to argue that they are. Indeed, most SGBs have monopolist control over a particular sport, thus the participants in international sporting competitions can hardly escape their jurisdiction. In short, it is relatively easy to argue that SGBs seem at odds with the peculiar function and operation of social life in which private bodies (mostly Swiss associations) exercise transnational regulatory power in the interest of private parties.13 This relaxation of the dogmatic border between public and private in the context of the application of the ECHR can also be witnessed in practice in more recent CAS awards.

1.2 The growing recognition of the ‘indirect’ applicability of the ECHR by CAS panels

In recent years, however, CAS panels have started to regularly recognize the indirect applicability of the ECHR in disputes before the CAS, even though they involve challenges against the regulations and decisions of private associations. They were encouraged in doing so by the scholarly shifts discussed above, as noted by a CAS panel, “there are more and more authorities in legal literature advocating that the ECHR also applies directly to sports associations”.14 This is particularly true insofar as Article 6 §1 ECHR is concerned. Accordingly, in 2012, a much-cited holding of a CAS award recognized:

“[…]that some guarantees afforded in relation to civil law proceedings by article 6.1 of the ECHR are indirectly applicable before an arbitral tribunal—when the Swiss Confederation, as a contracting party to the ECHR, must ensure that its judges, when checking arbitral awards, are bound by the ECHR.”15

In another influential award from the same year, it was held that:

“However, the Panel is conscious of the fact that certain procedural guarantees enshrined in article 6(1) of the ECHR, in disputes relating to civil rights and obligations, are indirectly applicable even before an arbitral tribunal—even more so in disciplinary matters. This follows from the fact that Switzerland, being a member state of the ECHR, the judges must ensure that when implementing arbitral awards (in the stage of enforcement of the arbitral award or in the context of an appeal against the latter), that the parties to the arbitral proceeding had the benefit of an equitable procedure, that was conducted within reasonable time by an independent and impartial arbitral tribunal.”16

Furthermore, many CAS awards provide that even though panels are not directly bound by the provisions of the ECHR, they should nevertheless account for their content within the

Footnote 14 (continued)

International de Volleyball (FIVB), award of 6 October 2015, para. 73.

15 CAS 2011/A/2426 Amos Adamu v FIFA, award of 24 February 2012, para. 66 and CAS 2011/A/2425 Ahongalu Fuamalohi v FIFA, award of 8 March 2012, para. 70. This holding is cited in CAS 2017/A/5003 Jérôme Valcke v. FIFA, award of 27 July 2018, para. 251 and CAS 2011/A/2477 FC Spartak Moscow v. Football Union of Russia (FUR) & FC Rostov, award of 29 October 2012, para. 63.

16 TAS 2011/A/2433 Amadou Diakité c. Fédération Internationale de Football Association (FIFA), award of 8 March 2012, para. 70. This holding is cited in CAS 2011/A/5003 Jérôme Valcke v. FIFA, award of 27 July 2018, para. 251 and CAS 2011/A/2477 FC Spartak Moscow v. Football Union of Russia (FUR) & FC Rostov, award of 29 October 2012, para. 63.
framework of Swiss public policy.\textsuperscript{17} The eventuality of a review exercised by the Swiss Federal Tribunal (SFT) over CAS awards on the basis of Swiss public policy provides an entry for the ECtHR to be considered before the CAS. In other words, many CAS arbitrators adhere to the view that they need to engage with the ECtHR, even though they are dealing exclusively with private parties, as they are “bound to observe the Swiss public policy, which includes the European Convention on Human Rights (the ‘ECHR’”).\textsuperscript{18} One sole arbitrator even found “rather obvious” that “a federation cannot opt out from an interpretation of its rules and regulations in light of principles of ‘human rights’ just by omitting any references in its rules and regulations to human rights”.\textsuperscript{19}

The recent \textit{Mutu and Pechstein} decision of the ECtHR will most likely reinforce this indirect effect of the ECHR at the CAS.\textsuperscript{20} While Adrian Mutu and Claudia Pechstein were both challenging the compatibility of CAS proceedings with the ECHR, their applications were targeting Switzerland as a signatory of the ECHR. In challenging the admissibility of the applications, the Swiss government emphasized the fact that the CAS was “underpinned by an organisation and rules that [were] fully independent of those of the State”.\textsuperscript{21} While the Swiss government did not object directly to the jurisdiction of the ECtHR, the latter decided to consider the question of its own merit. The judgement reminded that “the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State’s responsibility under the Convention”.\textsuperscript{22} In the context of the case, the Court pointed out that the Swiss Federal Tribunal “dismissed the appeals of both applicants in the present case, thereby giving the relevant awards force of law in the Swiss legal order”.\textsuperscript{23} And concluded, “that the impugned acts or omissions are thus capable of engaging the responsibility of the respondent State under the Convention”.\textsuperscript{24} In other words, the dismissal by the SFT of an appeal against a CAS award is clearly susceptible of engaging the responsibility of Switzerland under the ECHR if the award violates procedurally or substantially the Convention. This case will strengthen the relevance of the ECHR before the CAS, as it cements the responsibility of Switzerland if the SFT fails to properly review the compliance of CAS awards with the ECHR. Henceforth, we can anticipate the SFT to show greater attention to challenges to CAS awards grounded in the ECHR and, therefore, CAS arbitrators to be increasingly ready to assess the compliance of SGBs decisions and regulations with the ECHR.\textsuperscript{25} The CAS administration released in 2021 a document entitled “Sport and Human Rights—Overview from a CAS Perspective”\textsuperscript{26} aimed at providing arbitrators with background information on human rights and their potential relevance in CAS proceedings.

1.3 The death of a question? The integration of human rights commitments into the statutes of SGBs

As we have seen, CAS awards have gradually recognised that the ECHR is indirectly applicable in CAS proceedings, yet it is likely that the entire question of the applicability of the ECHR will be diminishing in importance in years to come. Indeed, some SGBs, such as FIFA,\textsuperscript{27} have recently

\begin{itemize}
  \item CAS 2011/A/2384 \textit{Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC)} & CAS 2011/A/2386 \textit{World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC}, award of 6 February 2012, para. 22.
  \item Similarily, CAS 2013/A/3274, para. 65; CAS 2015/A/4304 \textit{Tatyana Andrianova v. All Russia Athletics Federation (ARAF)}, award of 14 April 2016, para. 46; CAS 2016/O/4464 \textit{International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Ekaterina Sharmina}, award of 29 November 2016, para. 185. See as well CAS 2016/O/4469 \textit{International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Tatyana Chernova}, award of 29 November 2016, para. 170 (“This award is subject to review by the Swiss Federal Tribunal. The Sole Arbitrator, thus, is bound to observe the Swiss public policy, which—as far as emanating from the European Convention on Human Rights (the ‘ECHR’)—is also binding for the IAAF under the law of Monaco, which is the subsidiary law applicable on the present case. Monaco has ratified the ECHR on 30 November 2005.”) and CAS 2019/A/6345 \textit{Club Raja Casablanca v. Fédération Internationale de Football Association (FIFA)}, award of 16 December 2019, para. 35 (“To the extent that there are gaps in these statutes, the Sole Arbitrator will have recourse to Swiss law (which, anyway reflects a standard of protection of human rights at least equivalent to that embedded in the European Convention on Human Rights) to fill the observed gaps.”).
  \item CAS anti-doping Division (OG Rio) AD 16/011, para. 36
  \item CAS 2015/A/4304, \textit{Tatyana Andrianova v. All Russia Athletic Federation (ARAF)}, award of 14 April 2016, para. 45.
  \item ECtHR, \textit{Mutu and Pechstein v. Switzerland}, appln. no. 40575/10 & 67474/10, Third Section, Judgment of 2 October 2018.
  \item Ibid, para. 60
  \item Ibid, para. 64. Referring to ECtHR, \textit{Ras¸cu and Others v. Moldova and Russia} [GC], app. no. 48787/99, § 318, ECHR 2004-VII, and ECtHR, \textit{Solomou and Others v. Turkey}, no. 36832/97, § 46, Judgment of 24 June 2008.
  \item Ibid, para. 66.
  \item Ibid, para. 67.
  \item This assessment is shared Rigozzi (2020) at 128 (“At the end of this discussion of the relevance of human rights in sports arbitration, one could easily predict that the ECHR will be increasingly relied upon by the parties both before the CAS and before the Swiss Federal Tribunal.”).
  \item CAS (2021).
  \item Article 3 FIFA Statutes states that “FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.” On FIFA and human rights, see Duval and Heerdt (2020) and Büttler and Schöddert (2020).
\end{itemize}
amended their statutes to integrate an express commitment to internationally recognized human rights. Furthermore, human rights requirements are also being included into bidding requirements and hosting contracts, for example with regard to the Olympic Games. By doing so SGBs render human rights law contractually binding on themselves and their members, and consequently CAS panels will from thereon recognise easily the direct applicability of the ECHR in disputes involving such SGBs. In short, if this integration of human rights into the statutes of SGBs was to be generalised, the question of the applicability of the ECHR would soon be a forgotten problem and the attention would turn to scrutinising the application of the ECHR by CAS panels.

This section has shown that indirectly or directly the ECHR has progressively been recognised by CAS panels as a relevant legal source to solve disputes submitted to them. Unlike for national states, the increasing “reception” of the ECHR at the CAS is not the result of a formal change in the Convention, through the adoption of a specific protocol or its ratification. Instead, this evolution is reminiscent of the process that led the ECHR to become relevant in the context of EU law, as the EU is until today not a signatory of the ECHR. It was both the internal recognition by the EU of the relevance of the ECHR and the external pressure put by the ECtHR in reviewing EU-related decisions of the signatory states that led to an increasing integration of ECHR standards into EU law. A similar dynamic characterised by a dialectic between internal and external drivers seems to be at play in the context of the CAS and more widely the lex sportiva.

2 The ECHR as support to the competence and scope of review of the CAS

This article turns now to the question of the use of the ECHR (and/or ECtHR case law) in CAS awards. To do so, I distinguish different types of use found in CAS awards. The first type identified concerns the reference made by a number of CAS awards to the ECHR (and in particular Article 6 §1 ECHR) to support the jurisdiction of the CAS over a particular dispute, as well as to protect its scope of review.

2.1 The compatibility of the CAS arbitration clause with Article 6 §1 ECHR

Amongst the many legal questions that have triggered references to the ECHR in CAS awards, some are connected to the compatibility of CAS arbitration clauses with the ECHR. For example, when an athlete challenged the validity of a CAS arbitration clause on the basis of the ECHR. To allow the case to proceed, the CAS had to determine whether the clause in question was compatible with the ECHR. The main argument advanced by the claimant was that the unequal bargaining power between the parties to the arbitration (the athlete and the SGB) threatened the validity of the arbitration agreement. To reject this argument, the Panel contended that “[i]f—according to this jurisprudence of the ECtHR—the right of access to the courts enshrined in Art. 6.1 ECHR can be subject to a weighing up in the event that arbitral jurisdiction is prescribed by statute, then the same must apply also in a case of unequal bargaining power”. Thus, allowing the panel to argue that “only if there were no reasons in terms of ‘good administration of justice’ in favour of arbitration a violation of article 6.1 ECHR could be acknowledged”. The Panel then identified the presence of such reasons, arguing that “in order to be able to compare sports performances internationally, competitive sport must be performed in accordance with the

28 See the list of references provided in CAS (2021), pp. 1–8.
29 See Heerdt (2018) and Grell (2018).
30 It is a situation envisaged in CAS 2009/A/1957 Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), award of 5 July 2010, para. 20 (“The situation would differ if the LEN [Ligue Européenne de Natation] had inserted into its Constitutional Rules and Regulations procedural rights based on the ECHR or if it had referred to the ECHR as applicable to disciplinary proceedings before its jurisdictional bodies. In such a case, the ECHR would be applicable based on the LEN’s own Rules and Regulations and LEN members could benefit from what could then be qualified as internal associative rights. But the LEN has not integrated the ECHR into its Regulations.”)
31 On the process of reception of the ECHR at national level, see Keller and Stone Sweet (2008), Assessing the Impact of the ECHR on National Legal Systems Helen Keller and Alec Stone Sweet.
32 See the story of this evolution in Krisch (2008), at 198–202.
33 For a first basic engagement with this issue, see TAS 2006/A/1119 Union Cycliste Internationale (UCI) c/ Ilgio Landaluze Intsaurrargui & Real Federación Española de Ciclismo (RFEC), award of 19 December 2006, para. 20; TAS 2010/A/2141 M. c. Fédération Royale Espagnole de Cyclisme (RFEC) and TAS 2010/A/2142 Union Cycliste Internationale (UCI) c. M. & Fédération Royale Espagnole de Cyclisme (RFEC), partial award of 8 June 2011, para. 44. For a sceptical view about this compatibility, see Lukomski (2013).
34 CAS 2010/A/2311 & 2312, Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W, award of 22 August 2011, paras. 14–18.
35 Ibid., para. 18, referring to ECtHR, Lithgow and others v The United Kingdom, app. nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, Court (Plenary), Judgment of 8 July 1986.
36 Ibid.
same and uniform rules”. In addition, “the risk to consistency increases with the number of fora before state courts and—as a consequence thereof—of national legal standards that apply”. Therefore, if “sport wishes to preserve its global character and the principle of uniformity this is only possible by concentrating jurisdiction at a single forum in the form of arbitration”. In effect, such an argumentation amounts to an open embrace of the post-consensual foundations of the CAS linked to its function in preserving the equality before the rules of the participants in international sports competitions.

Thus, the jurisprudence of the ECtHR played a fundamental role as in supporting the validity of the CAS arbitration clause in a situation in which the athlete claimed that he had not freely consented to arbitration. Nevertheless, one can question the parallel drawn by the CAS award between the context of sports arbitration and the situation at the heart of the Lithgow judgment of the ECtHR. The latter concerned arbitration imposed by democratically legitimised state authorities, while the former concerns forced arbitration imposed by private associations in a monopoly position. Whether the two can be analogised is debatable and it remains uncertain whether the ECtHR would condone the use made by the CAS of its precedent. Nevertheless, there is some indication in the Mutu and Pechstein judgment that the Strasbourg Court might be ready to endorse forced CAS arbitration on similar grounds. In any event, this is a question that could be raised directly before the ECtHR in the near future.

2.2 The compatibility with the ECHR of restrictions to the scope of jurisdiction and review of the CAS

The ECHR was also invoked to assess the validity of restrictions imposed by the SGBs on the scope of CAS jurisdiction and review. In most cases, the arbitration clauses referring appeals against the decisions of SGBs to the CAS are enshrined in the statutes of the respective SGB and can, therefore, in principle be shaped according to the preferences of the SGB in question. However, specific restrictions imposed by SGBs on access to the CAS have been contested by appellants, and the ECHR played a significant role in the resulting CAS awards. For example, appellants have sought to challenge a then applicable 10-day time limit to request a decision from FIFA’s dispute resolution bodies to lodge a CAS appeal. In a string of awards on the question, CAS panels recognised “that the time limit of ten days is short”, but concluded that “the provision serves a legitimate purpose i.e. to cope with the heavy caseload of FIFA and contributes to the goal of an efficient administration of justice”. To support this conclusion, the panel invoked the fact that “even” the ECtHR “has all along allowed the right of access to the courts to be limited ‘in the interests of the good administration of justice’”.

In another set of awards, the CAS panels interpreted the ECHR as denying the possibility for SGBs to restrict the scope of review of the CAS. This view was expressed strongly in a case involving the Union Cycliste Internationale (UCI)’s provision (Article 2.15.239 of the UCI Cycling Regulations) stating that:

“The CAS shall examine only whether the contested decision was arbitrary, i.e. whether it was manifestly unsustainable, in clear contradiction with the facts, or made without objective reasons or subsequent upon a serious breach of a clear and unquestioned rule or legal

---

37 Ibid., para. 19.
38 Ibid.
39 Ibid.
40 Duval (2020a, b).
41 For a critical perspective see Lukomski (2013) and Frumer (2016).
42 ECtHR, Mutu and Pechstein v. Switzerland, app. no. 40575/10 & 67474/10, Third Section, Judgment of 2 October 2018, para. 98 (“In the specific case of sports arbitration, the Court takes the view that it is certainly of interest for the settlement of disputes arising in a professional sports context, especially those with an international dimension, to refer them to a specialised body which is able to give a ruling swiftly and inexpensively. High-level international sports events are held in various countries by organisations based in different States, and they are open to athletes from all over the world. Recourse to a single and specialised international arbitral tribunal facilitates a certain procedural uniformity and strengthens legal certainty; all the more so where the awards of that tribunal may be appealed against before the supreme court of a single country, in this case the Swiss Federal Court, whose ruling is final. On that point the Court thus agrees with the Government and acknowledges that a non-State mechanism of conflict resolution at first and/or second instance, with the possibility of appeal, albeit limited, before a State court at last instance, could be an appropriate solution in this field”)
43 CAS 2008/A/1708, Football Federation Islamic Republic of Iran (IRIFF) v. Fédération Internationale de Football Association (FIFA), award of 4 November 2009, para. 21; CAS 2008/A/1705, Neue Grasshopper Fussball AG Zurich v. Club Alianza de Lima, award of 18 June 2009, para. 23; see also CAS 2011/A/2439, Football Association of Thailand v. Fédération Internationale de Football Association (FIFA), award of 17 June 2011, para. 16.
44 CAS 2011/A/2439, Football Association of Thailand v. Fédération Internationale de Football Association (FIFA), award of 17 June 2011, para. 16.
45 CAS 2012/A/3031, Katusha Management SA v. Union Cycliste Internationale (UCI), award of 2 May 2013, paras 68–69; CAS 2013/A/3055, Risi Cycling AG v. the Licence Commission of the Union Cycliste Internationale (UCI), award of 11 October 2013, para. 7.12; CAS 2013/A/3274, Mads Glasner v. Fédération Internationale de Natation (FINA), award of 31 January 2014, para. 65.
principle. It may only be overturned if its outcome is found to be arbitrary”.

The award stressed that “arbitration may be accepted, in the eyes of the European Convention on Human Rights, as a valid alternative to access to State courts, only if arbitration proceedings constitute a true equivalent of State court proceedings”.46 Therefore, “a significant limitation to the mandate of CAS Panels can be viewed as a way to restrict the athlete’s access to justice: therefore, its imposition through mandatory arbitration could be seen as unsatisfactory if it prevents the athlete from obtaining at least the minimum standard of review provided by State court proceedings”.47 Consequently, the Panel held “that the unrestricted scope of review of the CAS Panel as provided under Article R57 of the CAS Code may be validly limited to the same standard of review as the standard provided by State court proceedings”.48 And concluded that “a provision such as Article 2.15.239 of the Regulations, as interpreted in the light of both the exclusion of the competence of Swiss State courts, the exclusive competence of CAS, and of the necessity to guarantee the Appellant’s right of access to justice, limiting the CAS’ power of review to arbitrariness, would not be in line with Swiss mandatory rules and/or with the Swiss ordre public”.49 Similarly, in a subsequent case involving a similar situation concerning the Federation Internationale de Natation (FINA), a CAS arbitrator invoked Article 6 §1 ECHR to argue that “a person affected by a decision must have, in principle, access to (at least) one instance of justice”.50 He emphasised “that doping sanctions strongly affect the rights of an athlete and that federation instances do not provide for access to justice within the meaning of Art. 6(1) ECHR, since they do not guarantee adjudication of the facts and the law by a truly independent judicial instance”.51 Therefore, he concluded that “[r]estrictions to the fundamental right of access to justice should not be accepted easily, but only where such restrictions are justified both in the interest of good administration of justice and proportionality”.52 In this instance, the sole arbitrator failed “to see why a restriction of his mandate—contrary to the clear wording of the Art. R57 of the CAS Code—would be in the interest of good administration of justice”.53

In conclusion, the ECHR played an important role in defending the jurisdiction of CAS panels and protecting their wide scope of review. In this regard, the ECHR as interpreted by CAS arbitrators has been opposed to both an athlete, who was challenging the validity of a CAS arbitration clause, as well as to SGBs, who were trying to reduce the scope of the review exercised by CAS panels. In these cases, the CAS panels are invoking the ECHR to legitimise their own existence and reinforce their scope of review vis-à-vis the executive and legislative powers of SGBs. As pointed out by Stone Sweet and Keller in their study of the impact of the ECHR on national law, a similar dynamic affected national courts which rely on the ECHR to reinforce their institutional position and power.54 However, as the next section will show, while the CAS has used the ECHR to protect its existence and review powers, it did not make (until now) a systematic use of the ECHR to challenge the SGBs’ decisions and regulations.

3 Challenging the compatibility of SGBs decisions and regulations with the ECHR

In the national context, the ECHR is typically invoked to challenge national laws or administrative decisions taken by public authorities. Accordingly, some are referring to it as cosmopolitan legal order, which has in practice empowered lower-level national courts to engage in constitutional review.55 In the context of transnational sports law, one could have expected the ECHR to play the functionally equivalent role of the “’shadow’ or ‘surrogate’ constitution”56 allowing the CAS to regularly challenge the constitutionality of the decisions and regulations of the SGBs. The ECHR as transnational constitution would thus extend its reach beyond the state parties to private regimes engaging in transnational regulation. Yet, in practice, as we will show in this section, CAS Panels remained extremely prudent in using the ECHR as a constitutional check on the SGBs.

3.1 The CAS refusal to assess due process inside the SGBs

The first notable dimension of the engagement of CAS panels with the ECHR in the framework of their review of decisions of SGBs is their (almost) absolute refusal to review the compatibility of internal proceedings with Article 6 §1 ECHR. Despite the fact that only a small share of the decisions of the internal disciplinary bodies of SGBs are

---

46 CAS 2012/A/3031, Katusha Management SA v. Union Cycliste Internationale (UCI), award of 2 May 2013, para. 68.
47 Ibid.
48 Ibid., para. 69.
49 Ibid.
50 CAS 2013/A/3274, Mads Glasner v. Fédération Internationale de Natation (FINA), award of 31 January 2014, para. 65.
51 Ibid.
52 Ibid.
53 Ibid.
54 Keller and Stone Sweet (2008), 687–688.
55 See Stone Sweet (2012).
56 Ibid, at 67.
being appealed to the CAS, arbitral panels have consistently declined to assess the compatibility of internal processes with Article 6 §1 ECHR, relying instead on the curative quality of the CAS appeal.

In particular, CAS panels have long held that “if the hearing in a given case was insufficient in the first instance (...) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured”.57 This curing ability of the appeal has been systematically supported with references to the case-law of the ECtHR.58 Awards regularly claim that this jurisprudence is “in line”59 with the Bryan v. The United Kingdom60 ruling of the ECtHR and the Wickramsinghe61 decision of the European Commission of Human Rights. More specifically the latter held citing the former that “even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)”.62

This reference to the ECtHR case-law by numerous CAS panels has fundamental consequences for the individuals going through the internal disciplinary bodies of the SGBs, as it basically whitewashes, with the (alleged) support of the ECtHR and the European Commission of Human Rights, all procedural wrongs at first instance. As appealing to the CAS is not a realistic possibility in all cases due to time constraints and issues of costs, it amounts to a considerable limitation on the access to justice for athletes. In this regard, the analogy drawn by the CAS between SGBs and state administration is quite an interpretative stretch as it equates private associations to public administrations, while the former are subject to very different accountability mechanisms than the latter and lack any grounding in democratic legitimacy. In any event, this stable jurisprudence ensures that the use of Article 6 §1 ECHR against disciplinary bodies of the SGBs is permanently neutralised at the CAS.

3.2 The superficial assessment of the compatibility of the World Anti-Doping Code with the ECHR

One of the vexing questions of transnational sports law is whether the current world anti-doping regime based on the World Anti-Doping Code (WADC) is infringing on the human rights of athletes subjected to it.63 Many commentators have argued that this is the case and it is, therefore, unsurprising to see the validity of the WADC being tested on the basis of the ECHR.64 Knowing this, WADA has over the years requested a number of opinions from respected legal scholars and judges to certify the compatibility of the WADC with human rights and the ECHR in particular.65

---

57 CAS 94/129, USA Shooting & Q. / Union Internationale de Tir (UIT), award of 23 May 1995 para. 59. For similar conclusions, see TAS 2002/A/358, para. 16; CAS 2007/A/1286 Johannes Eder v. International Olympic Committee (IOC) & CAS 2007/A/1288 Martin Tauber v. International Olympic Committee (IOC) & CAS 2007/A/1289 Jürgen Pinter v. International Olympic Committee (IOC), award of 4 January 2008, paras 10–11; CAS 2008/A/1513 Emil Hoch v. Fédération Internationale de Ski (FIS) & International Olympic Committee (IOC), award of 29 January 2009, paras 9–10; CAS 2009/A/1957, Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN), award of 5 July 2010, para. 21; CAS 2009/A/1985, Franchon Crews v. International Boxing Association (AIBA), award of 10 June 2010; para. 24. For a slightly more active review, see CAS 2015/A/4095, Bernardo Rezende & Mario da Silva Pedreira Junior v. Fédération Internationale de Volleyball (FIVB), award of 6 October 2015, paras 74–77.

58 ECtHR, Wickramsinghe v. The United Kingdom, app. no. 31503/96, Decision of 9 December 1997 referenced in CAS 2007/A/1396 & 1402, World Anti-Doping Agency (WADA) and Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC), award of 31 May 2010, para. 43; CAS 2008/A/1513 Emil Hoch v. Fédération Internationale de Ski (FIS) & International Olympic Committee (IOC), award of 29 January 2009, paras 9–10; CAS 2009/A/1920, FK Pobeda, Aleksandar Zubčanec, Nikolce Zdravski v. UEFA, award of 15 April 2010, para. 28; CAS 2009/A/1985, Franchon Crews v. International Boxing Association (AIBA), award of 10 June 2010, para. 24; CAS 2011/A/2430, Football Club Apollonia v. Albanian Football Federation (AFF) & Sulejman Hoxha, award of 18 October 2012, para. 9.24; CAS 2013/A/3262, Joel Melchor Sánchez Alegria v. Fédération Internationale de Football Association (FIFA), award of 6 October 2013, paras. 74–77.

59 ECtHR. Bryan v. The United Kingdom, app. no. 31503/96, Decision of 9 December 1997.

60 Ibid., para. 41.

61 Soek (2006). See also Houlihan (2004), Schneider (2004), Hard (2010), Tamburrini (2013), Goldsworthy (2018), van der Sloot et al. (2020).

62 The ECtHR has recently decided two cases related to anti-doping, see ECtHR, Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France, app. no. 48151/11 & 77769/13, Fifth Section, Judgment of 18 January 2018 and ECtHR, Bakker v. Switzerland, app. no. 7198/07, Third Section, Judgment of 3 September 2019.

63 Kaufmann-Kohler et al. (2003), Kaufmann-Kohler and Rigozzi (2007), Costa (2013, 2019).
CAS awards have consistently referred to these opinions as authoritative support for the compatibility of the WADC with the ECHR and refused to engage further in the assessment of the compatibility of the WADC with the ECHR. For example, the 2013 expert opinion by Jean-Paul Costa, the former President of the ECHR, was invoked to conclude that the WADC is “in harmony” with “the accepted principles of international law and human rights”. Another Panel noted that “the previous President of the European Court of Human Rights” had “vouched for” the proportionality of the WADC. More broadly, with regard to the fixed minimum sanctions in doping cases, a CAS panel held that “legal scholars, CAS panels and the Swiss Federal Tribunal seem to concur that the current sanctioning system based on the WADA Code does not conflict with fundamental human rights”. Finally, the minimum four-year suspension in doping cases is said to have “been reviewed by human rights experts, who have confirmed that it is in line with the European Convention on Human Rights”.

The only exception to this prima facie presumption of compatibility of the WADC with the ECHR based on expert opinions requested (and potentially retributed) by WADA is an award that reviewed the compatibility of the long-term storage of doping samples with Article 8 ECHR, e.g. the right to respect for private life. However, in the latter case, the CAS Panel merely held that “it wouldn’t hesitate to conclude that the storage by CONI of biological samples of the athlete for a duration of eight years is justified by the necessity to protect health and morals, as set out in Article 8(2) ECHR”. Thus, the engagement with Article 8 ECHR remained quite superficial with few supporting elements being adduced to support the compatibility of the WADC with the ECHR.

Until today, the CAS arbitrators systematically refused to engage in a serious assessment of the compatibility of the WADC with the ECHR. Instead, they merely invoked the (scholarly or professional) authority of expert opinions obtained by WADA to summarily reject challenges on this basis. Hence, contrary to a large segment of the academic literature pointing out potential issues in terms of the compatibility of the WADC with the ECHR, CAS panels consider it as prima facie given and are reluctant to engage in a serious human rights review of the Code. A proper assessment of the compatibility of the rules of the WADC with the ECHR, would more likely have to be conducted in line with the ECHR’s assessment of the compatibility of the French whereabouts requirements in its judgment in Fédération Nationale des Syndicats Sportifs (FNASS) and Others v. France. It is certainly not excluded that such an assessment

Footnote 69 (continued)
Norwegian Athletics Federation & International Association of Athletics Federations, award of 29 August 2011, para. 39.
CAS 2017/A/5315 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) and Yohani Jose Ricardo Garcia & CAS 2017/A/5316 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) and Daniel Londono Castaneda, award of 16 May 2018, para. 146: CAS 2018/A/5546, José Paolo Guerrero v. FIFA & CAS 2018/A/5571, WADA v. FIFA & José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018); para. 87: CAS 2018/A/5581, Filip Radojevic v. Fédération Internationale de Natation (FINA), award of 10 July 2018, para. 85; and CAS 2018/A/5739, Levi Cadogan v. National Anti-Doping Commission of Barbados (NADC), award of 20 February 2019, para. 81.
CAS 2017/A/4927, Misha Aloyan v. International Olympic Committee (IOC), award of 16 December 2017, para. 82; CAS 2017/A/5099, Artur Taymazov v. International Olympic Committee (IOC), award of 4 December 2017, para. 82; CAS 2017/A/5515 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) and Yohani Jose Ricardo Garcia & CAS 2017/A/5316 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) and Daniel Londono Castaneda, award of 16 May 2018, para. 146; CAS 2018/A/5546, José Paolo Guerrero v. FIFA & CAS 2018/A/5571, WADA v. FIFA & José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018); para. 87: CAS 2018/A/5581, Filip Radojevic v. Fédération Internationale de Natation (FINA), award of 10 July 2018, para. 85; and CAS 2018/A/5739, Levi Cadogan v. National Anti-Doping Commission of Barbados (NADC), award of 20 February 2019, para. 81.
CAS 2015/A/4184, Jobson Leandro Pereira de Oliveira v. Fédération Internationale de Football Association (FIFA), award of 25 April 2016 (operative part of 24 March 2016), para. 188. Or that “CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation” in CAS 2009/A/2012, Doping Authority Netherlands v Mr Nick Zuijkerbuijk, award of 11 June 2010, para. 47. See as well CAS 2011/A/2353, Erik Tysse v. Norway.

Footnote 66 The opinion by Kaufmann-Kohler et al. (2003) is cited in CAS 2004/A/690, H. v. Association of Tennis Professionals (ATP), award of 24 March 2005, para. 54; CAS 2005/A/830, S. v. FINA, award of 15 July 2005, para. 41; CAS 2006/A/1025, Mariano Puerta v. International Tennis Federation (ITF), para. 78; CAS 2009/A/2012, Doping Authority Netherlands v Mr Nick Zuijkerbuijk, para. 50; CAS 2009/A/1915, World Anti-Doping Agency (WADA) v. Polish Wrestling Federation (PWF), Kamil Błonski & Wojciech Zieziulewicz, award of 12 August 2010, para. 17; CAS 2010/A/2307, WADA v. Jobson Leandro Pereira de Oliveira, CBF and STJD, para. 45 and 99. While the Costa opinion is referred to in CAS 2016/A/4534, Maurico Fiol Villanueva v. Fédération Internationale de Natation (FINA), award of 16 March 2017, para. 52; CAS 2017/A/4927, Misha Aloyan v. International Olympic Committee (IOC), award of 16 June 2017, para. 82; CAS 2017/A/5099, Artur Taymazov v. International Olympic Committee (IOC), award of 4 December 2017, para. 82; CAS 2017/A/5315 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) v. and Yohani Jose Ricardo Garcia & CAS 2017/A/5316 World Anti-Doping Agency (WADA) v. Federacion Colombiana de Futbol (FCF) and Daniel Londono Castaneda, award of 16 May 2018, para. 146: CAS 2018/A/5546, José Paolo Guerrero v. FIFA & CAS 2018/A/5571, WADA v. FIFA & José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018); para. 87: CAS 2018/A/5581, Filip Radojevic v. Fédération Internationale de Natation (FINA), award of 10 July 2018, para. 85; and CAS 2018/A/5739, Levi Cadogan v. National Anti-Doping Commission of Barbados (NADC), award of 20 February 2019, para. 81.
CAS 2017/A/4927, Misha Aloyan v. International Olympic Committee (IOC), award of 16 December 2017, para. 82; and CAS 2017/A/5099, Artur Taymazov v. International Olympic Committee (IOC), award of 4 December 2017, para. 82.
CAS 2018/A/5546, José Paolo Guerrero v. FIFA & CAS 2018/A/5571, WADA v. FIFA & José Paolo Guerrero, award of 30 July 2018 (operative part of 14 May 2018); para. 87 and and CAS 2018/A/5739, Levi Cadogan v. National Anti-Doping Commission of Barbados (NADC), award of 20 February 2019, para. 81.
CAS 2015/A/4184, Jobson Leandro Pereira de Oliveira v. Fédération Internationale de Football Association (FIFA), award of 25 April 2016 (operative part of 24 March 2016), para. 188. Or that “CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation” in CAS 2009/A/2012, Doping Authority Netherlands v Mr Nick Zuijkerbuijk, award of 11 June 2010, para. 47. See as well CAS 2011/A/2353, Erik Tysse v.
would find the WADC compatible with the ECHR, as was foreshadowed to some extent by the ECtHR decision in FNASS. Nevertheless, it would entail a much more rigorous control of this compatibility, which until now CAS panels have been very reluctant to engage in.

3.3 The ECHR compatibility of other disciplinary rules and decisions of the SGBs

Beyond the WADC, the compatibility with the ECHR of a variety of disciplinary rules and decisions adopted by SGBs has been discussed more or less extensively in a range of CAS awards. Only a handful of these awards have concluded that the decisions in dispute were contrary to the ECHR.

3.3.1 The principle of nulla poena sine lege and disciplinary sanctions

A number of CAS awards have recognised that SGBs must comply with the nulla poena sine lege principle enshrined in Article 7 ECHR.\(^74\) The principle entails that “before a person can be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he is charged”.\(^75\) In particular, the principle was invoked (however no reference was made to the ECHR in that case) to support the annulment of the disciplinary sanctions issued by the World Karate Federation (WKF) against its former Secretary General.\(^76\) Specifically, the CAS panel considered that the provision invoked by the WKF to support the sanction did not cover the allegedly wrongful behaviour of Mr. Yerolimpos. For our purposes, it is important to note the recognition of the relevance of Article 7 ECHR as a limitation on the discretion of SGBs in the exercise of their disciplinary power.

3.3.2 The compatibility of strict liability with Article 6 §2 ECHR

The ECHR was also unsuccessfully invoked to challenge the SGBs’ disciplinary rules providing for strict liability in specific circumstances.\(^77\) Strict liability plays an important role in the regulation of sport as SGBs often lack the capacity to prove that, for example, athletes have deliberately taken a particular doping product. In such a case, imposing strict liability when a particular circumstance arises enables the SGBs to issue disciplinary sanctions without demonstrating that the athlete or club in question intended to breach the regulations. Therefore, clubs and athletes have attempted to argue that strict liability runs contrary to the presumption of innocence guaranteed in Article 6 §2 ECHR.\(^78\) In this regard, the first CAS award to deal with such a challenge referred to the case-law of the ECtHR to support the claim that the recourse to strict liability is not per se contrary to the right to a fair trial.\(^79\) This view was endorsed in a later award as “consistent over the past decades”.\(^80\)

In a more recent case related to the strict liability of football clubs for the behaviour of their fans, the panel rejected altogether the applicability of Article 6 §2 ECHR to the disciplinary sanctions of SGBs “as Article 6(2) is only applicable to criminal proceedings and the present proceedings are not of a criminal nature”.\(^81\) Furthermore, the Panel also considered that “the strict liability principle [...] is neither in violation of Swiss law, nor of Article 6(1) of the ECHR”.\(^82\) More precisely, the “club’s right to a fair hearing is, in general, not violated by the application of the strict liability principle, particularly not because the Panel finds that the application of such principle is justified in light of the responsibility of clubs over its supporters and UEFA’s lack of disciplinary authority over clubs’ supporters, but also

Footnote 77 (continued)
because of the membership structure of European football and the clubs’ subordination to UEFA’s regulatory power over its members”.

On this question, the CAS will feel comforted by the judgment of the ECtHR in Mutu and Pechstein, in which the ECtHR concluded that Pechstein doping sanction involved a disciplinary procedure “in the context of which the right to carry on an occupation is at stake” and, therefore, that “there is no doubt as to the ‘civil’ nature of the rights in question”. Such an interpretation of the nature of the disputes involved in anti-doping cases, and more broadly disciplinary cases, would seem to exclude the applicability of Article 6 §2 ECHR. While in this case the ECtHR was not requested to determine the criminal or civil nature of the dispute, it is nonetheless likely indicative of the position of the Court on this matter.

### 3.3.3 The compatibility of disciplinary regulations with the privilege against self-incrimination

In another set of cases, appellants have sought to challenge FIFA’s regulations obligating them to collaborate in disciplinary investigations as contrary to the privilege against self-incrimination recognized by the ECtHR as an implied right under Article 6 ECHR. One of the CAS Panel involved found that “in the context of sport, the privilege against self-incrimination may not be easily invoked in a disciplinary proceeding”. It justified this position by stating that the “cooperation of the individuals subject to the ethics or disciplinary rules of a sports association is necessary if the integrity of sport is to be protected”. Thus, “the danger that the result of such cooperation finding may at a later point trigger a criminal proceeding is—per se—not a valid justification to invoke the privilege of self-incrimination.” However, it also considered that “whether the same applies in a case where there are concurrent disciplinary and criminal proceedings, appears debatable”. Especially, if “it is obvious that the sports organisation will pass on the information obtained to the public authorities which have opened proceedings against the same individual in the same matter”. In such circumstances, there is “a real danger that the sports organisation will be (mis)used by public authorities to collect information that they could be otherwise unable to obtain”. Therefore, the Panel recognizes that there may be “a valid claim by the party or witness concerned to refrain from delivering self-incriminating information”.

The difference drawn between criminal investigations by state authorities and the disciplinary investigations of SGBs leads again the CAS panels to consider that the privilege against self-incrimination does not apply fully in the latter context. Even though the application of the principle was not entirely excluded, its practical relevance is curtailed to very specific circumstances in which disciplinary investigations are concurrent to criminal proceedings. The current position of the ECtHR on the civil nature of disciplinary proceedings in the sporting context appears to support as well the interpretation put forward by the CAS panels on this matter.

### 3.3.4 The compatibility with the ECHR of the retroactive application of disciplinary rules by the SGBs

A rare example of a successful challenge of disciplinary rules of an SGB on the basis of the ECHR involved the retroactive application of a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision. Referring to the Volkov ruling of the ECtHR, the Sole Arbitrator held that “[a]pplying retroactively a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision is incompatible with a ‘fair
proceeding". Indeed, “the legitimate procedural interests of the ‘debtor’/‘defendant’ would be violated if an association could retroactively allow for the persecution of a disciplinary offense already time-barred”. Hence, the Sole Arbitrator found “that the 10-year statute of limitation in Rule 47 of the 2015 ADR can only apply to those cases that were not already time-barred on 1 January 2015, i.e. at the time of the entry into force of the 2015 ADR”. The prohibition of a retroactive application of disciplinary rules, however, does not apply to more favorable rules, in this regard the CAS panels have systematically emphasized the lex mitior principle recognized by the ECtHR. On this point, it seems that the ECHR and its interpretation by the ECtHR have been carefully considered by CAS panels.

3.3.5 The compatibility of a membership decision with the freedom of association enshrined in Article 11 ECHR

In a recent case involving the acceptance by UEFA of the membership application of the Football Federation of Kosovo, the Football Association of Serbia invoked the freedom of association enshrined in Article 11 of the ECHR to contest this decision on the basis that UEFA’s “Resolution forces football clubs, which are currently members of the Appellant, to join FFK against their will”. The panel acknowledged that an Appellant “can avail itself of the principle of freedom of association, a principle that is well enshrined in Swiss law as well as in Art. 11 ECHR”. Nevertheless, it also held that “such right is not absolute”. In particular, the Appellant “has submitted itself to the rules and regulations of UEFA by applying and being granted UEFA membership”. Henceforth, the Panel concluded that in the case at hand “no breach of the Appellant’s freedom of association has occurred”, as “Appellant has no protected right that its status within UEFA remains unchanged”. Thus, for the panel, if the Appellant’s status “is affected by a resolution of the UEFA Congress taken in conformity with the rules and regulations of UEFA it is difficult to see how such resolution may—illicitly—interfere with the Appellant’s freedom of association”. Nevertheless, this remains one of the few examples in which the CAS assessed the compatibility of a decision of an SGB on the basis of a substantial right enshrined in the ECHR.

3.3.6 The compatibility of a disciplinary sanction with the right to freedom of expression enshrined in Article 10 ECHR

In another recent case, the president of the Palestinian Football Association invoked the case-law of the ECtHR on freedom of expression to challenge a disciplinary sanction issued by FIFA based on comments he had made in the press. Specifically, he had urged fans to burn t-shirts of an Argentinean player, Lionel Messi, following the decision of the Argentinean Football Association to play a game against the Israel Football Association in Jerusalem.

The CAS award distinguished this situation from the ECtHR jurisprudence invoked by the Appellant by stating that the cases cited involved balancing “criminal law (state/public) interests against an individual’s freedom of speech”, unlike the matter at hand which concerns “the private interests of FIFA”. Instead, “the balancing to be made by the Panel is therefore between FIFA’s interest to suppress actions inciting hatred, to which Mr. Rajoub has voluntarily submitted against Mr. Rajoub’s interest to exercise his freedom of speech”.

97 Ibid., para. 48. Referencing decision ECtHR Oleksandr Volkov v. Ukraine, app. no. 21722/11, Fifth Section, Judgment of 9 January 2013, marg. no. 137.
98 CAS 2015/A/4304 Tatyana Andrianova v. All Russia Athletic Federation (ARAF), award of 14 April 2016., para. 49 referring to ECtHR, Oleksandr Volkov v. Ukraine, app. no. 21722/11, Fifth Section, Judgment of 9 January 2013, marg. no. 139 seq.
99 CAS 2015/A/4304 Tatyana Andrianova v. All Russia Athletic Federation (ARAF), award of 14 April 2016., para. 49.
100 Referencing the ECtHR decision Scoppola v. Italy, app. no. 10249/03, Grand Chamber, Judgment of 17 September 2009 in CAS 2012/A/2817, Fenerbahçe Spor Kulübü v. Fédération Internationale de Football Association (FIFA) & Roberto Carlos Da Silva Rocha, award of 21 June 2013, para. 122 and CAS 2010/A/2083, UCI v. Jan Ullrich & Swiss Olympic, para. 63.
101 CAS 2016/A/4602 Football Association of Serbia v. Union des Associations Européennes de Football (UEFA), award of 24 January 2017, para. 38.
102 Ibid., para. 134.
103 Ibid.
104 Ibid.
105 Ibid., para. 135.
106 Ibid.
107 CAS 2018/A/6007 Jibril Rajoub v. Fédération Internationale de Football Association (FIFA), award of 18 July 2019, para. 34 (“It is also remarkable that the FIFA Disciplinary Committee imposed a sanction for inciting hatred when the case law of the ECHR considers that burning a t-shirt, a photograph or even a flag is nothing but an expression of free speech. Mr Rajoub submits that ‘we are not even admitting that Mr. Rajoub may have proposed to burn a t-shirt what we are saying is something very simple: even burning a t-shirt is part of the right to the freedom of speech and it seems that for FIFA such a right, recognised both in Swiss law and the ECHR seems to disturb FIFA [sic], FIFA can’t live and act as if the Swiss law and the ECHR doesn’t affect them’. With reference to the decisions of the ECtHR, the FIFA Appeal Committee argued that the case law is not applicable, but Mr Rajoub submits that it is.”]
freedom of speech”. In this regard, the Panel concludes “that an association—based on the special contractual legal relationship—may impose stricter duties on its members than the duties imposed on citizens by criminal law”. This is because associations “have a large freedom to manage their own affairs and Mr Rajoub can freely opt-out of his obligations as a FIFA official by resigning from any role that subjects him to FIFA’s rules and regulations”. The Panel’s ultimate conclusion is that “the balance sways in favour of FIFA”, as it determines that Mr Rajoub “exceeded the legitimate boundaries of the freedom of speech by targeting persons that have no direct involvement whatsoever in the political issues between Israel and Palestine”. Furthermore, the Panel considered that Mr. Majoub’s statement was not proportionate, as “he requested ‘everybody’ to burn their Messi shirts, thereby specifically calling upon Messi’s fans in Arabic and Islamic countries, using mass media to convey his message”. Additionally, in light of his “high political position” his “statements had a much higher impact than an ‘anonymous’ individual forming part of a larger demonstration actually burning a t-shirt”.

This is a rare example of a case in which the CAS engaged in a relatively extensive assessment of the compliance of an SGB with a human right enshrined in the ECHR and its interpretation by the ECtHR. While one might disagree with the outcome of this assessment, it is noticeable that the Panel conducted a constitutional style review of the proportionality of the FIFA decision. In general, this section highlighted the rarity of such ECHR-based constitutional checks at the CAS. It is only with regard to certain procedural principles, such as nulla poena sine lege, non-retroactivity of disciplinary sanctions or the privilege against self-incrimination, that CAS panels have shown some willingness to rely on the ECHR to strike down decisions of the SGBs or to limit their scope of action. Whether this is due to a structural bias at the CAS in favour of the SGBs, the limited experience of CAS lawyers and arbitrators on the ECHR or the very narrow review exercised by the SFT on CAS awards cannot be definitely determined in this article. At this point in time, we can, however, conclude that the ECHR’s impact on the review by the CAS of the SGBs’ decisions and regulations is quite limited. Until now CAS arbitrators have not, unlike national courts, relied on the ECHR to expand their powers of control vis-à-vis the political and executive powers of the SGBs. In the future, however, we could witness a more detailed (and potentially critical) review by CAS panels of the ECHR compatibility of the SGBs’ decisions, especially if a growing number of CAS awards are challenged (indirectly) before the ECtHR and if the SFT decides to exercise a more stringent review of the ECHR compatibility of CAS awards. Unsurprisingly, this tamed application of the ECHR extends as well to the assessment of the compatibility of CAS proceedings with the ECHR.

4 Assessing the compatibility of CAS proceedings with Article 6 §1 ECHR

The final cluster of CAS awards referring to the ECHR concerns the compatibility of CAS arbitration proceedings with the due process guarantees enshrined in Article 6 §1 ECHR, and in particular their interpretation by the ECtHR. While numerous claimants have argued that CAS proceedings do not comply with the requirements of Article 6 §1 ECHR, we will see that none of them have prevailed before the CAS.

4.1 The applicability of Article 6 §1 ECHR to CAS proceedings

The first question raised in CAS awards regarding Article 6 §1 ECHR concerns its applicability to CAS proceedings. Denying this applicability, the CAS panel in the Azpeleta case referred to the case-law of the ECtHR to distinguish voluntary arbitration from forced arbitration imposed by state law, arguing that only the latter must abide by all guarantees imposed by Article 6 §1 ECHR. The Panel argued that in the case at hand the athlete “gave her explicit consent to arbitration before the CAS” and that there was no constraint on the First Respondent’s consent”. More precisely, it claimed that “athletes are not prevented to form, as did the professional tennis players in the 1970’s, their own ‘association’ to collectively defend their rights and to organize their own professional competitions”. Therefore, the award concluded that the athlete had freely consented to

---

109 Ibid.
110 Ibid., para. 94.
111 Ibid.
112 Ibid., para. 95.
113 Ibid., para. 96.
114 Ibid.
115 This is a well-charted dynamic at the national level, see Keller and Stone Sweet (2008), at 687–688 and Stone Sweet (2012), at 68.
116 For a first discussion of fair trial guarantees at the CAS, see Cercic 2012.
117 CAS 2014/A/3561 & 3614 International Association of Athletics Federation (IAAF) & World Anti-Doping Agency (WADA) v. Marta Dominguez Azpeleta & Real Federación Española de Atletismo (RFEA), award of 19 November 2015, paras 166–167.
118 Ibid., para. 169.
119 Ibid., para. 171.
120 Ibid.
CAS arbitration and that Article 6 §1 ECHR was, therefore, not fully applicable to CAS proceedings. Therefore, the CAS had to decide whether recourse to anonymous witnesses infringes the right to be heard under Article 6 §1 ECHR against the independence and impartiality of the CAS.

4.2 Article 6 §1 ECHR and the independence and impartiality of the CAS

The CAS panel in Azpeleta also assessed whether the CAS was fulfilling the requirements of independence and impartiality as provided for under Article 6 §1 ECHR. In this regard, it held that “the manner of appointment of the arbitrators on the list of the CAS provides no cause for treating those individuals as biased: although nominated by the ICAS, they do not act as representatives of the ICAS, or of any other entity, but in a personal capacity”. Moreover, the Panel concluded “that athletes do have an influence on the list of members of the ICAS as they can indirectly nominate a certain number of the members, that this influence is not manifestly disproportionate with regards to the overall number of cases dealt with by the CAS in relationship to the number of cases involving athletes and that the athletes have a large choice when it comes to designating an arbitrator, as they can choose from a list of over 300 personalities”. In addition, the Panel considered “that the First Respondent’s arguments that the arbitrators are not independent from the executive or the parties because the President of each CAS panel is designated by an ICAS member allegedly chosen by the ‘sports associations’ or because the arbitration award is to be ‘reviewed’ by the CAS Secretary General are meritless”. On this point, the Mutu and Pechstein decision of the ECtHR does seem to support the view of the CAS Panel by endorsing the independence and impartiality of the CAS.

4.3 Article 6 §1 ECHR and the evidentiary process before the CAS

In the past, the CAS also referenced the ECtHR case law in discussing whether certain types of evidentiary processes can be relied on in CAS proceedings. First, the CAS had to decide whether recourse to anonymous witnesses infringes the right to be heard under Article 6 §1 ECHR.
6 §1 ECHR. In this context, a CAS Panel referred to the jurisprudence of the SFT, which was, in turn, basing itself on the case-law of the ECtHR allowing the recourse to anonymous witnesses if necessary for the personal safety of the witness. Another Panel specifically pointed out that the ECtHR “allowed the use of ‘protected’ or ‘anonymous’ witnesses even in criminal cases (covered also by the far-reaching guarantees set by Article 6(3) of the ECHR), if procedural safeguards are adopted”. Nevertheless, the same Panel also relied on the ECtHR’s jurisprudence to nuance its conclusion by highlighting that the right to be heard must be guaranteed by other means such as “by cross examination through ‘audiovisual protection’ and by an in-depth check of the identity and the reputation of the anonymous witness by the court”.

Second, the CAS had to decide whether in disciplinary proceedings the use of illegally obtained evidence is contrary to the ECHR. In a first case involving a FIFA disciplinary decision based on recordings obtained by undercover journalists and later communicated to FIFA, the Panel refused to draw an analogy between the Teixeira de Castro decision of the ECtHR, which found that Portugal contravened the ECtHR in a case in which the police had gathered evidence through illegal means, and the reliance of FIFA on evidence gathered illegally by an English newspaper. This led the panel to deny the claimant the right to rely on the ECtHR’s case law to challenge the admissibility of evidence obtained indirectly through unlawful wiretapping by the press. In support of this conclusion, the Panel referenced the ECtHR’s decision based on recordings obtained by undercover journalists and later communicated to FIFA.

In subsequent awards connected to the Russian doping scandal triggered by secret recordings taken by a whistle-blower, the CAS Panel went further by invoking the ECtHR’s finding that “the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth”. And held that “the interest underlying the fight against doping can be preponderant over the individual’s interest, whether an athlete or athlete support personnel, in not having an illicitly obtained evidence admitted in an arbitral procedure concerning an alleged anti-doping rule violation”. The Panel concluded that “even if the recordings were to be qualified as illicit, the interest in discerning the truth must prevail over the interest of the Trainer that the recordings are not used against him in the present proceedings”. The arbitrators insisted that this balancing test is “in line” with the jurisprudence of the ECtHR.

Finally, in a case in which a party was challenging the decision of the CAS panel to refuse to hear its witnesses after it failed to abide by the procedural deadline, the award considered the ECtHR’s case law on the principle of equality of arms from which it derived that each party must have “a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent or opponents”.

136 CAS 2009/A/1920, FK Pobeda, Aleksandar Zabranec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 13. See as well CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012, paras. 167–186 and CAS 2019/A/6388, Karim Keramuddin v. FIFA, award of 14 July 2020, paras 124–127.

137 CAS 2009/A/1920, FK Pobeda, Aleksandar Zabranec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 13. However, in CAS 2011/A/2384 Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC) & CAS 2011/A/2386 World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC, award of 6 February 2012, para. 184, the CAS refused to allow a witness to testify anonymously because the Panel considered that “it was insufficiently demonstrated that the interests of the witness worthy of protection were threatened to an extent that could justify a complete protection of the witness’ identity from disclosure to the Respondents”.

138 CAS 2019/A/6388 Karim Keramuddin v. FIFA, award of 14 July 2020, para. 125.

139 CAS 2009/A/1920, FK Pobeda, Aleksandar Zabranec, Nikolce Zdraveski v. UEFA, award of 15 April 2010, para. 32. See as well CAS 2011/A/2425 Amogalu Fustinalo si FIFA, award of 8 March 2012, paras 28–29 and CAS 2011/A/2426 Amos Adamu si FIFA, award of 24 February 2012, paras 72–73.

140 CAS 2016/A/4480 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) and Vladimir Kazarin, award of 7 April 2017, para. 76.

141 Ibid, paras. 31–32. See as well CAS 2011/A/2426 Amos Adamu si FIFA, award of 24 February 2012, para. 125.

142 CAS 2016/A/4480 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) and Vladimir Kazarin, award of 7 April 2017, para. 77 and CAS 2016/A/4486 International Association of Athletics Federations (IAAF) v. Ekaterina Poistogova, award of 7 April 2017, para. 105.

143 CAS 2016/A/4480, International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) and Vladimir Kazarin, award of 7 April 2017, para. 80.

144 Ibid., para. 78. See as well CAS 2016/O/4481, para. 97; CAS 2016/A/4486 International Association of Athletics Federations (IAAF) v. Ekaterina Poistogova, award of 7 April 2017, para. 106; CAS 2016/A/4487 International Association of Athletics Federations (IAAF) v. Alexey Melnikov, award of 7 April 2017, para. 108; CAS 2016/O/4488 International Association of Athletics Federations (IAAF) v. All-Russia Athletics Federation (ARAF) & Anastasiya Bazyreva, award of 23 December 2016, para. 82; CAS 2016/O/4504 International Association of Athletics Federations (IAAF) v. All-Russia Athletics Federation (ARAF) & Vladimir Mokhnev, award of 23 December 2016, para. 70. All referring to ECtHR, K.S and M.S v. Germany, app. no. 33969/11, Judgment of 6 October 2016.

145 CAS 2011/A/2463 Aris FC v. Javier Edgardo Campora & Hellenic Football Federation (HFF), award of 8 March 2012m para. 12.
question, however, the panel held that “the First Respondent had twenty days to present its witnesses” and he was, therefore, “afforded a reasonable opportunity to present its case, including any witnesses, under conditions that did not place him at any disadvantage”. 148 Thus, the fact that the party was ultimately not allowed to present evidence and hear witnesses was deemed compatible with Article 6 §1 ECHR. As we can see, the CAS has considered in a number of instances whether its practices in terms of the admissibility of certain types of evidence or belated evidence are in line with Article 6 §1 ECHR. The interpretation of the ECHR and the case-law of the ECHR by CAS panels points to a quite liberal understanding of the admissibility of illegally obtained evidence and anonymous witness statements and a strict approach to the admissibility of late submissions. In general, the CAS systematically sided with the interpretation of the ECHR which is more favourable to the SGBs and their investigatory processes.

4.4 Article 6 §1 and §3 ECHR and the language of CAS proceedings

The CAS was until recently hearing cases only in English and in French (since 2020 also in Spanish).149 this limited choice in terms of the language of the proceedings has been the subject of challenges on the basis of Article 6 §1 and §3 ECHR. 150 Regarding the compatibility of English proceedings with Article 6 §3 ECHR, a CAS Panel held that “no violation of this provision can be observed” as the “Respondent was fully aware of the accusation against him”151 and, therefore, “Article 6.3(a) of the ECHR was satisfied—as this provides simply that the accused has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.152 In that particular case, the Panel reminded that “the procedures before the KNSB bodies were conducted in Dutch and that this is an appeal against the decision of the Appeals Committee”, thus “it cannot be said that the Respondent did not understand the nature and cause of the accusation”153 Moreover, “at all times it was open for the Respondent to appoint an interpreter both to assist with the written procedure and at the hearing”.154 Therefore, the Panel concluded that the English-only proceedings in a case involving a Dutch-speaking athlete were compatible with Article 6 §3 ECHR. This position was further endorsed in a later award, in which the Panel confirmed the compatibility of English proceedings with Article 6 §1 ECHR by simply recalling “that according to Article R29 of the Code the parties may request that a language other than French or English be selected for the arbitration” and “may be assisted, during the hearing, by an interpreter”. 155

Hence, on this question as well the CAS awards dismissed the challenges based on the ECHR, even though the CAS does not provide, as required under Article 6 §3(e) ECHR and under the case-law of the ECHR, free access to an interpreter. 156 The situation at the CAS might be more problematic than presented by the Panels, as hiring an interpreter is a costly matter and can constitute an important hurdle for the access to justice for many athletes.

4.5 Article 6 §1 ECHR and the right to a public hearing during CAS proceedings

Lastly, the CAS has had to consider whether the denial of a public hearing at the CAS, which until recently needed to be jointly agreed by the parties and in practice was extremely rare,157 was compatible with Article 6 §1 ECHR. 158 On this

Footnote 147 (continued)

Referring to ECHR, Ankert v. Switzerland, app. no. 17748/91, Judgment of 23 October 1996, Reports 1996-V, p. 1567–68, § 38; ECHR, Nideröst-Huber v. Switzerland, app. no. 18990/97, Judgment of 18 February 1997, Reports 1997-I, p. 107–08, § 23; ECHR, Kress v. France [GC], app. no. 39594/98, Judgment of 10 June 2001, ECHR 2001-VI, § 72.; ECHR, Gorraz Lizarraga and others v. Spain, app. No. 62543/00, Judgment of 27 April 2004, §56.

148 CAS 2011/A/2463, Aris FC v. Javier Edgardo Campora & Hellenic Football Federation (HFF), award of 8 March 2012, para. 13.

149 Article R29 CAS Code of Sports-related Arbitration (2020 edition).

150 CAS 2009/A/2014 WADA v. European Cyclists’ Federation (ASBL) & Keisser, award of 6 July 2010, paras 91–95; CAS 2010/A/2311 & 2312, Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W, award of 22 August 2011, paras 31–35 and CAS 2014/A/3561 & 3614, International Association of Athletics Federation (IAAF) & World Anti-Doping Agency (WADA) v. Marta Domínguez Azpeleta & Real Federación Española de Atletismo (RFEA), award of 19 November 2015, para. 207.

151 Stichting Anti-Doping Autoriteit Nederland (NADO) & the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W, award of 22 August 2011, para. 34.

152 Ibid.

153 Ibid.

154 Ibid.

155 CAS 2014/A/3561 & 3614 International Association of Athletics Federation (IAAF) & World Anti-Doping Agency (WADA) v. Marta Domínguez Azpeleta & Real Federación Española de Atletismo (RFEA), award of 19 November 2015, para. 207

156 ECHR, Guide on Article 6 of the European Convention on Human Rights, 2021, p. 99–102.

157 Duval 2019.

158 See CAS 2014/A/3561 & 3614 International Association of Athletics Federation (IAAF) & World Anti-Doping Agency (WADA) v. Marta Domínguez Azpeleta & Real Federación Española de Atletismo (RFEA), award of 19 November 2015, para. 207 and CAS 2018/A/5746 Trabzonspor Sporif Yatırım ve Futbol İstemecliliği A.S., Trabzonspor Sporif Yatırım Futbol İstemecliliği A.S. & Trabzonspor Kulübü Derneği v. Turkish Football Federation (TFF),
question, the Panel in the *Azpeleta* case considered that the need for both parties to agree for a hearing to be held in public does “not constitute a violation of Article 6 para. 1 of the ECHR as this provision allows, in its second sentence, restrictions with regards to the publicity of the hearing”. 159 More precisely, it concluded that disputes “relating to doping controls very often give rise to numerous questions concerning, on the one hand, the private life of the parties involved and, on the other hand, sophisticated technical mechanisms and data especially developed to establish anti-doping rule offences”, and, therefore, it found that “publicity of the hearing would have prejudiced the interests of justice”. 160 In addition, it insisted that “confidentiality of hearings is very common in private arbitration and no judicial precedent has to date stated that such confidentiality would violate Article 6 para.1 ECHR”. 161 Ironically, a few years later, the ECtHR itself stated that such confidentiality would violate Article 6 para. 1 ECHR”. 161 Interestingly, a few years later, the ECtHR itself would provide that judicial precedent by holding in the *Mutu and Pechstein* judgment that “the questions arising in the impugned proceedings—as to whether it was justified for the second applicant to have been penalised for doping, and for the resolution of which the CAS heard testimony from numerous experts—rendered it necessary to hold a hearing under public scrutiny”. 162 Thus, the *Azpeleta* award is a stark reminder of the fact that there is no guarantee that CAS panels will be applying the ECHR like the ECtHR would. This situation of interpretive pluralism is not dissimilar to the interaction between national courts and the CJEU or the ECtHR but without the relatively straightforward possibility to challenge CAS interpretations at the European level. 163 Thus, this entanglement opens up a field of dialectical play between textual proximity and interpretative distance, which will likely never be entirely bridged.

The ECtHR’s *Mutu and Pechstein* ruling led to a re-writing of Article 52 of the CAS Code of Sports-related Arbitration which now provides for the possibility of public hearing in disciplinary cases involving athletes. This provision did not stop the CAS from denying in a recent award a public hearing to an Appellant. 164 Interestingly, it relied on ECtHR case law to support this decision. 165 The Panel held “that the issues to be discussed were rather complex, so that the exception in case of ‘limited legal issues’ was not to be applied in the present matter” and that “the only questions to be decided by the Panel at the hearing were of a purely legal and technical nature and the right to a public hearing could be restricted, given that the representatives of the press and the general public cannot be expected to be fully conversant with, or interested, in such procedural legal questions”. 166 It concluded, that “[i]n such cases, other judgments of the ECtHR, cited above, allow an exception to the principle of public hearing”. 167 Whether this interpretation does justice to the ECtHR’s approach to the right to a public hearing will have to remain an open question. However, the example of the clash between the interpretation of the application of Article 6 §1 ECHR to public hearings by the CAS in the *Azpeleta* case and its interpretation by the ECtHR in *Mutu and Pechstein* shows that alignment between the two should not be presumed.

This section has exposed how CAS panels assessed in several awards the compatibility of CAS proceedings with Article 6 §1 ECHR. In doing so, the CAS arbitrators have systematically used the ECtHR’s case law as a shield to defend CAS proceedings and have proven unable to voice self-criticism as in none of the cases identified did a CAS panel conclude that procedural rights before the CAS were lacking or could be improved. This might be expected, it is in any event hard for a court to recognise its own limitations in terms of due process. However, this also highlights the need for external checks and in particular the crucial responsibility of the SFT and the ECtHR when applying Article 6 §1 ECHR to CAS proceedings.

## 5 Conclusion

Contrary to what is often assumed, this paper argues that the CAS is already a part-time human rights court as it engages quite regularly with the ECHR and the jurisprudence of the ECtHR interpreting the Convention. The types of engagement of the CAS with the ECHR are analytically separated in three categories. The first set of references to the ECHR

Footnote 158 (continued)

159 CAS 2014/A/3561 & 3614, *International Association of Athletics Federation (IAAF) & World Anti-Doping Agency (WADA)* v. *Marta Domínguez Azpeleta & Real Federación Española de Atletismo (RFEA)*, award of 19 November 2015, para. 207.

160 Ibid.

161 Ibid.

162 ECtHR, *Mutu and Pechstein v. Switzerland*, app. no. 40575/10 & 67474/10, para. 182. See: Duval 2017.

163 For a pluralist model of the evolution of the human rights regime which could fit the way CAS integrates and interprets the ECHR, see Krisch (2008).
was mobilised by CAS panels to defend the compatibility of the jurisdiction of the CAS with the ECHR and to support a wide interpretation of their scope of review against attempts by some SGBs to restrict their competences. Second, I have shown that CAS arbitrators have made only timid use of references to the ECHR to challenge the human rights compatibility of SGBs’ decisions and regulations. On this front, which amounts to the functional equivalent of a constitutional check on the executive and legislative power of the SGBs, the CAS panels have rarely engaged in a detailed and critical assessment of these decisions and regulations. Currently, the CAS can hardly be seen as an activist human rights court. However, this could change as there is a potential for CAS arbitrators to seize the opportunity provided by the ECHR to strengthen their judicial power inside the regime of transnational sports governance. Finally, the third dimension of the CAS’s engagement with the ECHR concerns the CAS itself and the compatibility of CAS proceedings and structures with Article 6 §1 ECHR. In this regard, CAS panels have been particularly defensive and have systematically denied all attempts to challenge the procedural fairness of their proceedings. This blindness to their own limitations in terms of due process rights is at odds with the Mutu and Pechstein decision of the ECtHR, which contradicted frontally the interpretation of Article 6 §1 ECHR adopted in the Azpeleta award. In the future, CAS panels will probably be more attentive to Article 6 §1 ECHR arguments, but it remains unlikely that they will encourage further institutional reforms. Instead, the external check exercised by the ECtHR, the SFT and potentially other national courts on the basis of the ECHR remains crucial to ensure that the CAS operates in a manner that is compatible with fundamental due process rights.

This paper has shown that the CAS has become an integral part of the “judicial pluralism” or “jurisdictional pluralism” of the ECHR’s “cosmopolitan legal order”. Until today, scholars have largely failed to register that beyond national and EU institutions, private judicial institutions, such as the CAS, are also in the process of becoming active participants in the concert of “European Human Rights Pluralism”. What this broadening reception of the ECHR entails in terms of the legitimacy and the deference that should be afforded to the human rights assessments of private judicial institutions like the CAS (but the same would apply to the interpretation of the ECHR by the Facebook Oversight Board) will need to be thoroughly debated and investigated in the future. Existing pluralist models, which emphasize the dialogue or complementarity between a democratically legitimized national level and the ECHR, will struggle to explain and justify the involvement of functional private institutions which have no basis in democratic legitimacy. The active enmeshment of private actors in the implementation of the ECHR is far from constituting an unmitigated good and might require that the ECtHR revises its understanding of some of its core doctrines aimed at managing the European human rights pluralism, such as the margin of appreciation. For example, when the SFT applies the ECHR to CAS awards, it is not acting as a parochial national court affecting only (or even just mostly) the interests of Swiss citizens. In practice, its decisions are defining the life of every athlete worldwide and have a clear transnational dimension and effect. Hence, in this context, the SFT acts as a global constitutional court and should be treated as such by the ECtHR.

Finally, instances in which the ECHR is used as a tangible constitutional check on the private authority of SGBs remain very rare at the CAS. This raises the question under which conditions could a turn to human rights at the CAS be beneficial for those, in particular the athletes, whose freedoms and interests are primarily affected by the regulations and decisions of the SGBs? Human rights are famously open-ended and set at a high level of abstraction, they are necessarily subject to interpretation. Argumentative tools, such as the proportionality analysis, allow for their contextual application in specific cases and leave a considerable amount of discretion to the judges that employ them. This implies that gift lawyers, such as CAS arbitrators, are in a position to selectively use the ECHR case law to come to preferred results. Therefore, if human rights and the ECHR in particular are to be of use at the CAS to offer a counter-power to the private regulatory authority exercised by the SGBs, it is essential to ensure that CAS arbitrators are fully independent from the bodies that they are supposed to check. Currently, unfortunately, this is not the case. The structural control exercised by the Olympic Movement over the ICAS remains overwhelming, while the ICAS exercises decisive oversight competences over the CAS and its arbitrators. In other words, I share the view of the dissenting judge at the ECtHR that “the CAS presents no appearance of independence and that, more generally, does not offer the safeguards of Article 6 §1 of the Convention”. However, as pointed out by Keller and Stone Sweet in the context of national courts, when there are “massive structural problems in the functioning of

---

168 Besson (2014), 179
169 Keller and Stone Sweet (2008), 688.
170 Krisch (2008).
171 Stone Sweet (2012) and Stone Sweet and Ryan (2018).
172 Besson 2014.
173 Ibid., 189–190.
174 ECtHR, Mutu and Pechstein v. Switzerland, app. no. 40575/10
& 67474/10, Third Section, Judgment of 2 October 2018, dissent by judges Keller and Serghides at para. 15.
judicial institutions\textsuperscript{175} a commitment to the ECHR remains generally a surface-level one with no real transformative effects in practice. In this regard, human rights activists and reformists would be well-advised to direct their advocacy towards making sure that the institutional pre-requisites for an effective human rights turn at the CAS are in place. Having SGBs embrace human rights in their statutes and policies is an important step for them to matter at the CAS, but it is far from enough.

Acknowledgements I would like to thank Daniela Heerdt and William Rook for providing feedback on the first draft of this paper, as well as the two anonymous reviewers for their constructive engagement with my work. I have as well benefitted from the research assistance of Maciej Gajos in finalizing this article.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article’s Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article’s Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

Besson S (2014) European Human Rights pluralism: notion and justification. In: Maduro M, Tuori K, Sankari S (eds) Transnational law rethinking European law and legal thinking. Cambridge University Press, Cambridge, pp 170–205

Bützler B, Schöddert L (2020) Constitutionalizing FIFA: promises and challenges. Tilburg Law Rev 25(1):40–54

CAS (2021) Sport and Human Rights: overview from a CAS perspective. https://www.tas-cas.org/fileadmin/user_upload/Human_Rights_in_sport_CAS_report_updated_31_03_2021_.pdf

Casini L (2011) The making of a Lex Sportiva by the Court of Arbitration for Sport. Ger Law J 12(5):1317–1340

Costa J-P (2013) Legal opinion regarding the draft World Anti-Doping Code. http://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code

Costa J-P (2021) Legal opinion on the 2021 code. http://www.wada-ama.org/en/resources/the-code/legal-opinion-on-the-2021-code-by-judge-jean-paul-costa

Dzemskiowski A (1979) The European Human Rights Convention and relations between Private Parties. Neth Int Law Rev 26(2):163–181

Duval A (2020a) Time to go public? The need for transparency at the Court of Arbitration for Sport. In: Duval A, Rigozz A (eds) Yearbook of International Sports Arbitration 2017. T.M.C. Asser Press, The Hague, pp 3–27. https://doi.org/10.1007/15757_2019_29

Duval A (2020b) Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport. In: Ruiz Fabi H et al (ed) International Judicial Legitimacy: new voices and approaches. Nomos, Baden-Baden, pp 169–202

Duval A, Heerdt D (2020) FIFA and human rights—a research agenda. Tilburg Law Rev 25(1):1–11

ECtHR (2021) Guide on Article 6 of the European Convention on Human Rights, pp 99–102

Furmer P (2016) L’arbitrage sportif, la lutte contre le dopage et le respect des droits fondamentaux des sportifs professionnels: une incertitude peu glorieuse. Revue Trimestrielle Des Droits De L’homme 108:817–853

Geistlinger M, Gamppaier S (2013) Some thoughts on the role of the European Convention on Human Rights in the jurisprudence of the Court of Arbitration for Sport. Yearb Int Arbitr 3:307–314

Goldsworthy D (2018) Athletes’ rights under the World Anti-Doping Code: a legitimate public interest? Altern Law J 43(3):197–202

Grell T (2018) The International Olympic Committee and human rights reforms: game changer or mere window dressing? Int Sports Law J 17:160–169

Haas U (2012) Role and application of Article 6 of the European Convention on Human Rights in CAS procedures. Int Sports Law Rev 3:43–60

Hard M (2010) Caught in the net: athletes’ rights and the World Anti-Doping Agency. South Calif Interdiscipl Law J 19:533–564

Heerdt D (2018) Tapping the potential of human rights provisions in mega-sporting events’ bidding and hosting agreements. Int Sports Law J 17:170–185

Hessert B (2021) The exchange of self-incriminating information of athletes between sport organisations and law enforcement. Int Sports Law J 21:62–73. https://doi.org/10.1007/s40318-021-00194-y

Houlihan B (2004) Civil rights, doping control and the World Anti-Doping Code. Sport in Society 7(3):420–437

Kaufmann-Kohler G, Rigozz A (2007) Conformity of Art. 10.6 with fundamental rights of athletes. https://www.wada-ama.org/en/resources/world-anti-doping-program/conformity-with-fundamental-rights-of-athletes

Kaufmann-Kohler G et al (2003) Conformity of certain provisions of the draft WADC with commonly accepted principles of international law. https://www.wada-ama.org/en/resources/legal/conformity-with-international-law

Keller H, Stone Sweet A (2008) Assessing the impact of the ECHR on National Legal Systems. In: Keller H, Stone Sweet A (eds) A Europe of Rights: the impact of the ECHR on National Legal Systems. Oxford University Press, Oxford

Krisch N (2008) Human Rights unravelled: an analysis of their characteristics and relations between Private Parties. Neth Int Law Rev 3:43–60

Lane L (2018) The horizontal effect of international human rights law in practice. Eur J Comp Law Govern 5(1):5–88

Latty F (2007) La lex Sportiva: Recherche sur le droit transnational, Brill Leiden

Letnar Cernic J (2012) Fair trial guarantees before the court of arbitration and the Court’s approach to them. Neth Quart Hum Rights Law. Mod Law Rev 71:183–216. https://doi.org/10.1111/j.1468-2230.2008.00688.x

Lanne L (2018) The horizontal effect of international human rights law in practice. Eur J Comp Law Govern 5(1):5–88

Maisonneuve M (2011) Arbitrage des litiges sportifs. LGDJ, Paris

Rigozz A (2005) L’arbitrage international en matière de sport. Helbing & Lichtenhahn, Basel

Rigozz A (2020) Sports Arbitration and the European Convention of Human Rights—Pechstein and beyond. In: Muller C et al (ed)
New developments in International Commercial Arbitration. Stampfli, Bern, pp 77–130
Schneider AJ (2004) Privacy, confidentiality and human rights in sport. Sport in Society 7:438–456
Soek J (2006) The strict liability principle and the human rights of the athlete in doping cases. T.M.C. Asser Press, The Hague
Somek A (2020) Cosmopolitan constitutionalism: the case of the European Convention. Glob Cons 9(3):467–489
Stone Sweet A (2012) A cosmopolitan legal order: constitutional pluralism and rights adjudication in Europe. Glob Const 1(1):53–90
Stone Sweet A, Ryan C (2018) A cosmopolitan legal order: Kant, Constitutional Justice, and the European Convention on Human Rights. Oxford University Press, Oxford
Tamburrini C (2013) WADA’s anti-doping policy and athletes’ right to privacy. Revista De Filosofía, Ética y Derecho Del Deporte 1:84–96

van der Sloot B et al (2020) Athletes’ human rights and the fight against doping: a study of the European Legal Framework. ASSER International Sports Law Series, T.W.C. Asser Press, The Hague
Zgliniski J (2018) Doing too little or too much? Private law before the European Court of Human Rights. Yearb Eur Law 37:98–129

Publisher’s Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.