

PANEL OF THE IAAF ETHICS BOARD

Ms Catherine M.E. O'Regan (Chairperson)

Mr Kevan Gosper

Mr Tafsir Ndiaye

In the matter of Vanessa Spinola and the IAAF Code of Ethics

DECISION

Introduction

1. This decision concerns a gesture made by an athlete at the 15th IAAF World Championships in Athletics in Beijing in August 2015, at the start of the women's heptathlon 100m hurdles event . It raises the question whether and in what circumstances a gesture perceived to be offensive by a complainant, although not made with the intention of giving offence, may constitute a violation of the IAAF Ethics Code (the "Code").

Complaint and Procedure

2. On 27 August 2015, Mr Philip Ha ("the complainant") wrote to the IAAF to complain (the "Complaint") about a gesture (which is described in detail below)

made by Ms Vanessa Spinola (the “Athlete”), a Brazilian athlete, as she lined up prior to a 100m-hurdle race at the World Championships in Beijing. The complainant alleged that the gesture was “racist”, “absolutely disrespectful” and “unacceptable”. He requested the IAAF to investigate the matter and “punish the athlete if necessary”.

3. The IAAF acknowledged receipt of the complaint on 28 August 2015 and forwarded it to the IAAF Ethics Commission for investigation in terms of the IAAF Code of Ethics (the “Code”). Since that date, the name of the IAAF Ethics Commission has been changed to the IAAF Ethics Board and it is accordingly referred to as “the Ethics Board” in the remainder of this decision.

4. On 29 October 2015, the Chairman of the IAAF Ethics Board, Mr Michael J Beloff QC, wrote to the Athlete informing her that he had concluded in terms of Rule 13.2 – 13.4 of the IAAF Ethics Board’s Procedural Rules (references to a Rule or Rules in this decision are references to these Rules) that there was a *prima facie* case that she had violated Part C1, paragraph 11 and Part C2, paragraph 17 of the Code as a result of the gesture she made at the start of the 100m hurdle race during the World Championships. He also informed the athlete that he had appointed an independent senior barrister, Ms Kate Gallafent QC, to investigate (the “Investigator”) in terms of Rule 13.6.

5. The investigator proceeded to conduct an investigation in terms of the Rules, which included requests for information to the Athlete to which the Athlete responded. In accordance with the Rules, upon the conclusion of her investigation the Investigator then prepared a report and recommendation dated 16 February 2016 that was submitted to the Chairman of the Ethics Board. In her report, the investigator made a recommendation in terms of Rule 13.9 that the complaint against the Athlete proceed to adjudication in respect of a possible violation of both Part C1, paragraph 11 and Part C2, paragraph 17 of the Code.

The investigator's report and recommendation was reviewed by Mr Tom Murray, a member of the Ethics Board, in terms of Rule 13.10 - 13.12, and he concluded that there was sufficient evidence for the case to proceed to adjudication.

6. The Chairman of the Ethics Board then appointed this Panel in terms of Rule 13.15 to adjudicate the charges. The Athlete was informed of the charges against her on 8 April 2016 and given an opportunity to respond to them. She appointed a legal representative, Mr VM Calixto, to represent her, who lodged a statement of defence on her behalf on 6 May 2016.

7. The Athlete did not request an oral hearing in this case. Her statement of defence recorded that an oral hearing should only take place if the Panel deemed it necessary. In terms of Rule 13.18, the Chairperson of the Panel may decide whether to hold an oral hearing, in circumstances where the parties do not request a hearing. In this case, the Panel has been provided with a full file of information. It includes the original complaint, the original notification of prima facie case to the athlete, the investigator's report and related documents, the notification to the athlete of the charge against her, the athlete's statement of defence, as well as a video recording of the television coverage of the gesture which led to the complaint, and other documentation relating to the matter. In the light of there having been no request by the Athlete for an oral hearing, the full record before the Panel, and the desirability of acting expeditiously and cost-effectively always consistent with the fair disposal of the proceedings, the Chairperson of the Panel did not consider it necessary to convene an oral hearing.

The Facts

8. As mentioned above, the Athlete is a Brazilian heptathlete who participated in the World Championships in Beijing in August 2015. When she was lining up for the start of the 100m hurdles race, she was recorded on television making the gesture that was the subject of the complaint. The members of the Panel have viewed a video clip of the gesture.

9. A viewing of the video clip shows that when the camera rested on the athlete to introduce her to the stadium crowd and television viewers before the race, the athlete responded by starting to make a “thumbs up” gesture with her hands. She then moved her hands to the outer corners of her eyes and pulled the corners of both her eyes towards the side of her face (the “Gesture”). It was this Gesture that gave rise to the complaint. After making this Gesture, the Athlete then put both her hands together in a gesture of prayer. She then smilingly gave another “thumbs up” gesture. The complaint described the Gesture as being “a slanty-eyed face which is a commonly known racist slur against oriental people”.

10. The Athlete does not deny that she made the gesture as described. However, in both her response to the Investigator and in the statement of defence provided on her behalf to this Panel, the Athlete asserted that she did not intend to act in a racist or disrespectful manner when she made the gesture. She also asserts that she did not intend adversely to affect the reputation of the IAAF or the sport of Athletics, nor did she intend to bring the sport into disrepute. Instead, she explained that she intended the Gesture as a spontaneous greeting and way of thanking the Chinese people for their organisation of the World Championships.

11. Having viewed the video clip of the Gesture, and the smiling manner in which the Athlete greeted the crowd after making the Gesture, the Panel has no hesitation in accepting, as did the Investigator, that the Athlete did not act in an intentionally racist or disrespectful manner when she made the Gesture, nor did

she act with the intention of adversely affecting either the IAAF or the sport of athletics.

The charges

12. The Panel must consider whether the athlete's Gesture constitutes a violation of either Part C1, paragraph 11 or Part C2, paragraph 17 of the Code. Part C1, paragraph 11 provides as follows:

"Persons subject to the Code shall not act in a manner likely to affect adversely the reputation of the IAAF, or the sport of Athletics generally, nor shall they act in a manner likely to bring the sport into disrepute."

And Part C2, paragraph 17 provides:

"There shall be no discrimination in Athletics on the basis of race, sex, ethnic origin, colour, culture, political opinion, marital status, sexual orientation, or any other unfair or irrelevant factor, except as permitted by law, including in the IAAF Council, Committees, Commissions or other elected or appointed bodies of the IAAF."

These two charges are dealt with separately.

The first charge: Part C1, paragraph 11

13. Part C1, paragraph 11 contains two prohibitions. The first is a prohibition on actions that are likely to affect adversely the reputation of the IAAF, or the sport of athletics generally. The second is a prohibition on actions that are likely to bring the sport of athletics into disrepute. If either prohibition is violated then a

violation of Part C1, paragraph 11 arises. Accordingly, the Panel will consider whether the gesture at issue in this case was likely to affect adversely the reputation of the IAAF, or the sport of athletics generally. Given the Panel's conclusion on this issue, it is not necessary for the Panel to consider the second prohibition in Part C1, paragraph 11.

14. Two questions must be answered to determine whether there has been a violation of Part C1, paragraph 11. The first is whether the gesture was an action that was likely to affect adversely the reputation of the IAAF, or athletics, or was likely to bring the sport of athletics into disrepute. The second is whether given that the athlete did not intend to act in a manner that was in violation of the Code, her making of the gesture nevertheless constituted an infringement of the Code.

Likely to affect adversely the reputation of the IAAF or the sport of athletics or bring the sport into disrepute

15. The Panel is of the view that if an athlete or official publicly makes a gesture that is widely considered to be offensive or racist or otherwise discriminatory, that action is likely adversely to affect the reputation of the IAAF, or the sport of athletics generally. Most people will consider that international sporting codes should not tolerate or foster offensive or racist or otherwise discriminatory views or modes of expression (whether language or gestures), nor should sporting codes permit such views, words or gestures to be expressed by participants or officials engaged in international sporting competitions. Accordingly, if an athlete or official involved in competitions organised under the auspices of the IAAF expresses himself or herself in such a way, then both the reputation of the sport of athletics and that of the IAAF, is likely to be adversely affected.

16. In this case, the complainant clearly viewed the Athlete's gesture as one that constituted an offensive slur on people of East Asian or Oriental origin. Is this sufficient to establish that the Gesture was likely adversely to affect the reputation of the IAAF or the sport of athletics generally? In the view of the Panel, it is not. The fact that one viewer considers a gesture made by an athlete to be offensive will not, without more, give rise to a violation of the Code. It must be shown that the complainant's view that the gesture was offensive is a reasonable view that may be shared by others with the result that the gesture can be said to be objectively likely to affect adversely the reputation of the IAAF, or the sport of athletics generally (rather simply than by reference to a single individual's subjective perception).

17. The question therefore arises whether the complainant's view was a reasonable one that is likely to be shared by others and therefore whether the making of the Gesture was objectively likely to have affected adversely the reputation of the IAAF or the sport of athletics. In considering this question, the Investigator noted several occasions in recent years, particularly during the Beijing Olympics, when international athletes and sports teams had made gestures similar to that made by the Athlete in this case, whose gesture was described by the complainant as "a slanty-eyed face which is a commonly known racist slur against oriental people" and has in other contexts been referred to as a "slit-eyed gesture". In particular, the Investigator referred to the following controversies (i) the making of "slit-eyed gestures" by the Spanish Olympic basketball teams in pre-Beijing Olympics advertising in 2008; (ii) the Argentinian women's football team being photographed making slit-eyed gestures during the course of the Beijing Olympics in summer 2008 and (iii) the Brazilian swimmer César Cielo making a slit-eyed gesture on the podium after winning a gold medal in the 50m freestyle in Shanghai in July 2011. The Investigator noted that there had been widespread criticism of this conduct in the international press,

even though the athletes and teams who had made the gesture asserted that they did not intend to cause offence, and although those who made the gesture did not consider the use of the gestures to be racist or otherwise inappropriate. The investigator reasoned that the controversy and criticism of the use of the gesture indicated that even if in some countries its use was not frowned upon, there were many places where it was considered offensive. Accordingly, she concluded that the use of the gesture was objectively likely to adversely affect the reputation of the sport of athletics.

18. In this regard, the Panel notes that the Athlete also argued that the gesture she made is not everywhere construed as a racist or offensive gesture. The Panel accepts that this may be so. However, the Panel also recognises that athletics is a global sport watched by millions of viewers, some of whom would reasonably construe the Gesture to be highly offensive, as did the complainant. The Athlete does not deny that some (or many) people may have considered the Gesture to be offensive.

19. In the view of the Panel, it is reasonable to find even well-meant gestures offensive, where they mimic racial, religious, gender or other personal characteristics and where the gestures have previously given rise to widespread controversy and criticism. Such gestures made by athletes in front of crowds and television cameras will often be objectively likely adversely to affect the reputation of the IAAF or the sport of athletics.

20. Accordingly, the Panel concludes that the gesture made by the athlete in this case is one that was objectively likely to adversely affect the reputation of the IAAF or the sport of athletics generally.

The absence of intention on the part of the athlete

21. The next question that arises is whether a violation of Part C, paragraph 11, may only arise if the person intends adversely to affect the reputation of either the IAAF, or the sport of athletics. The Investigator considered that Part C, paragraph 11 of the Code does not require that a person intends adversely to affect the reputation of the IAAF, or the sport of athletics generally, in order for its provisions to be violated, although she did consider that the question of intention would be “highly germane” to any sanction imposed.

22. On the other hand, the statement of defence lodged on behalf of the Athlete suggested that it would be inappropriate for a violation of Part C, paragraph 11 to be found where it is clear that there was no intention adversely to affect the reputation of either the IAAF or the sport of athletics, or to bring the sport of athletics into disrepute. The statement of defence argued that finding a violation of the Code in the absence of intention would be to impose strict liability on those bound by the Code, something that can only legitimately be applied in very special circumstances.

23. We should start by considering the overall purpose of the Code. The Preamble to the Code states that it is an object of the IAAF “to safeguard the authenticity and integrity of athletics.” The Code binds all the members of the “IAAF Family” which includes, amongst others, all IAAF officials, as well as officials and members of the IAAF’s constituent bodies, all participants in international athletics competitions held under the auspices of the IAAF (Part A, paragraphs 1(a) - (d) of the Code) and it applies to all conduct “that damages the authenticity, integrity and reputation of Athletics” (Part A, paragraph 2 of the Code). Sanctions for violations of the Code that may be imposed by this Ethics Board for proven violations of the Code stretch from lesser sanctions of caution or censure to fines, suspensions or expulsions from office, and suspensions or

bans from participation in events and competitions (see Section D17 of the Statutes of the Ethics Board).

24. It is apparent from a reading of the Code and the Statutes of the Ethics Board that the primary purpose of the Code is to protect the authenticity, reputation and integrity of the sport of athletics. The need to protect the sport should be seen in light of the fact that athletics is one of the most popular sports in the world. International athletics competitions draw participants and millions of viewers from across the globe. Interest in the sport is rooted in widespread admiration and respect for the talents and rigorous discipline of individual athletes. There is a clear public interest in protecting the integrity and reputation of both the sport of athletics, and the organisation that promotes and fosters it around the world, the IAAF.

25. The Code is not a criminal code imposing criminal sanctions. It is a disciplinary code that seeks to regulate the conduct of those bound by it. Those bound by the Code are people who have a direct involvement in the sport of athletics, either as participants, officials, or members of athletics federations. They are thus people who themselves have a personal interest in the integrity and reputation of the sport of Athletics, and by extension, in the reputation of the IAAF. Those bound thus have a common interest in ensuring that all those who have a direct involvement in athletics observe the principles of the Code.

26. In respect of the argument in the statement of defence that strict liability for disciplinary provisions should arise only in special circumstances, the nature of the elements to be proved will depend on the nature of the specific violation alleged and by contrast to a criminal code, strict liability is a more common principle in disciplinary codes than it is in the criminal law (see for example athletes' personal responsibility in respect of anti-doping rules to which lack of intent is not a sufficient answer). However, to the extent that it is arguable that

special circumstances are necessary to be able to uphold a charge of this nature without any requirement of intentionality, the Panel considers that such special circumstances arise in relation to Part C1, paragraph 11. The Panel reaches this conclusion for two main reasons. First, to limit violations of Part C1, paragraph 11 to those cases only where it can be established that a person acted intentionally to affect adversely the reputation of either the IAAF or the sport of athletics, or to bring the sport of athletics into disrepute would be to weaken the effect of the provision and to undermine the achievement of the overall purposes of Part C, paragraph 11. It would mean that conduct that is likely to damage the sport of athletics would not constitute a violation of the Code if it could not be shown that the conduct was intentional. A restricted interpretation of Part C1, paragraph 11 would thus weaken the role of this Ethics Board and the Code both in providing protection to the reputation of the sport of athletics and the reputation of the IAAF, and in providing guidance to those engaged in the sport of athletics as to appropriate conduct.

27. Secondly, the Panel notes that there is a wide range of sanctions that may be imposed for violations of the Code. Were sanctions for the violation of Part C, paragraph 11 to be severe in all circumstances, then an interpretation that dispensed with a requirement of intention might not be the correct interpretation. Here, however, as the Investigator pointed out the absence of intention to harm will be a key consideration in determining the appropriate sanction. Where there is no intention to harm, a lesser sanction may be imposed to reflect the fact that the action was not intentional.

28. Accordingly, the Panel is of the view that a violation of Part C1, paragraph 11 may be found even where no intention to harm the reputation of the IAAF or the sport of athletics exists. Part C1, paragraph 11 thus imposes an obligation upon those bound by the Code to act conscientiously to protect the reputation of the sport of Athletics and the reputation of the IAAF. Where the conduct of people

bound by the Code objectively is likely adversely to affect the reputation of athletics or the IAAF, they will be in violation of Part C, paragraph 11, even if they have not acted with the intention to harm the reputation of athletics or the IAAF.

29. Furthermore, however, the Panel notes that there may be circumstances where a person bound by the Code has acted in a manner that is likely to affect adversely the reputation of the IAAF, or the sport of athletics generally, yet they will not be found to be in violation of Part C1, paragraph 11 because there is justification for their action. In this regard, it was argued on behalf of the athlete that she made the gesture to express her gratitude from participating in the World Championships and for the support that she had received from Chinese fans. This justification is similar to the athlete's argument that she did not intend to cause offence. The Panel has accepted as a matter of fact that the athlete did not intend to cause offence, and also accepts that she was expressing her gratitude to the Chinese people for their organisation of the World championships and their support. In view of the panel, however, the athlete's benevolent intention in making the gesture is not a sufficient basis to justify the Gesture that the Panel has concluded was objectively likely adversely to affect the reputation of athletics or the IAAF. It is not necessary here to consider fully what might constitute a ground of justification for conduct that objectively is likely adversely to affect the reputation of athletics or the IAAF, as the athlete has not sought to assert any other ground of justification for her action.

The second charge: Part C 2, paragraph 17

30. The athlete was also charged with a violation of Part C2, paragraph 17. That provision provides that "[t]here shall be no discrimination in Athletics on the basis of race, sex, ethnic origin, colour, culture, political opinion, marital status,

sexual orientation, or any other unfair or irrelevant factor, except as permitted by law". In her report, the Investigator noted that the interpretation of Part C2, paragraph 17 is not clear. It may prohibit discriminatory conduct by those bound by the Code but in relation only to others engaged in the sport of athletics, or it may have a broader scope. This difficult question of interpretation was not fully aired in the record before the Panel.

31. The charge of a violation of Part C2, paragraph 17 is based on the same course of conduct that formed the basis of the charge of a violation of Part C1, paragraph 11. The Panel accepts that there will be cases where the same course of conduct may appropriately give rise to more than one charge under the Code. In particular, it will be appropriate to bring more than one charge against a person in circumstances where the finding of a violation of more than one charge would result in heavier sanctions because the violation of more than one provision of the Code renders the conduct more culpable in some manner. By contrast, in this case, the Panel considers the even if it were to conclude that Part C2, paragraph 17, did cover the conduct in question, and a violation of it were to be found, the Panel is of the view that it would not result in aggravated sanctions being imposed upon the athlete.

32. In these circumstances, the Panel considers it is unnecessary to determine whether the Athlete's Gesture constituted a breach of Part C1, paragraph 17.

Appropriate Sanction

33. The range of sanctions that may be imposed by a panel of the Ethics Board is set out in Part D, paragraph 17 of the Statutes of the Ethics Board. The Ethics Board is empowered:

"(i) to caution or censure;

- (ii) to issue fines;
- (iii) to suspend a person (with or without conditions) or expel the person from office;
- (iv) to suspend or ban the person from taking part in any Athletics-related activity, including Events and Competitions;
- (v) to remove any award or other honour bestowed on the person by the IAAF;
- (vi) to impose any sanctions as may be set out in specific Rules;
- (vii) to impose any other reasonable sanction that it may deem to be appropriate, including community service within athletics and/or restitution; and
- (viii) for any appeals under C16(v) above, to uphold, dismiss or refer back to the Member Federation for further consideration and to do so without procedural costs."

34. In determining the appropriate sanction in any case, the Panel will take into account, amongst other things, the nature and severity of the violation or violations, the effect of the violation on the sport of athletics, any previous violations of the Code by the same person, the manner in which the person found to have violated the Code has co-operated in the disciplinary process and any apologies or expressions of remorse or regret by the person who violated the Code.

35. In this case, the Panel notes that the violation of the Code was neither severe nor egregious. Moreover, it was not intentional. In addition, the Panel records that the IAAF received only one complaint about the conduct. Furthermore, the

Panel records that the athlete co-operated fully with both the Investigator and the Ethics Board, and also that the Athlete has expressed her regret at any offence that may have been caused by her conduct. In all these circumstances, the Panel considers that in this case a lesser form of sanction is appropriate. The Panel therefore issues a censure to the athlete for her conduct.

36. The Panel notes that the function of the decisions of the Ethics Board should be to guide those bound by the Code as to the bounds of appropriate conduct. Given the global reach of the sport of Athletics, and the diversity of both its participants and fans, the Ethics Board hopes that its decision in this case will remind those who are bound by the Code of the obligations upon them to act conscientiously and sensitively in all their actions relating to athletics to avoid giving offence on grounds of racial, religious, gender, language cultural, sexual orientation, gender identity or other relevant difference. Accordingly, this decision should serve as a guide to those taking part in international athletic competitions to avoid making gestures, such as the gesture made by the Athlete here, where there is an objective likelihood that some or many of those who observe the gesture would reasonably consider it to be offensive.

37. Rule 16.2 provides that where the Panel finds there has been a violation of the Code, the procedural costs shall be borne by the party that has been sanctioned, unless the Panel decides that there are exceptional circumstances to reduce or waive the costs, in particular taking into account the financial circumstances of the parties concerned. In this case, the Athlete has not provided any information concerning her financial circumstances, but the Panel does note that she requested no oral hearing “in order to reduce costs” which implies that costs are a matter of concern to the Athlete. The Panel considers that it is appropriate to reduce the costs award against the Athlete, given that her violation of the Code was not intentional, and given her full and candid responses to both the Investigator and before the Panel. The Athlete is therefore required to contribute

Euros 250 towards the procedural costs of the Ethics Board. The costs amount is to be paid within 28 days of the date of this award.

38. This decision is final subject to any appeal lodged with the Court of Arbitration for Sport according to its rules, pursuant to Articles F35-38 of the IAAF Code.

C. M.E. O'Regan

K. Gospar

T. Ndiaye

30 June 2016