



Arbitration CAS 2019/A/6274 Inês Henriques, Claire Woods, Paola Pérez, Johana Ordóñez, Magaly Bonilla, Ainhoa Pinedo, Erin Taylor-Talcott & Quentin Rew v. International Olympic Committee (IOC), award of 3 February 2020

Panel: Prof. Luigi Fumagalli (Italy), President; the Hon. Annabelle Bennett AC SC (Australia); Mr Pierre Muller (Switzerland)

Athletics (race walking)

IOC decision not to include a new event in the OG

Prerequisites to be met in order for CAS to have jurisdiction

Principles of interpretation of an arbitration agreement

*Lack of CAS jurisdiction *ratione personae* on athletes with only an interest in taking part in the OG*

- 1. Pursuant to Articles R27 and R47 of the CAS Code, there are three prerequisites that have to be met in order for CAS to have jurisdiction, namely (i) the parties must have agreed to the competence of the CAS; (ii) there must be a “decision” of a federation, association or another sports-related body; and (iii) the (internal) legal remedies available must have been exhausted prior to appealing to CAS. Each of the three conditions must be fulfilled with respect to each of the respondents.**
- 2. The interpretation of an arbitration agreement is governed by Article 178.2 of the Swiss Private International Law Act. Based on this provision, first and foremost the principles of Swiss law on the interpretation of an arbitration agreement apply. According thereto, the statutes and regulations of an association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than to contracts. The interpretation has to be rather objective and always start with the wording of the rule, which falls to be interpreted. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located.**
- 3. It is a basic principle that arbitration is based on consent. Based on Rule 1.1 and 1.3 of the Olympic Charter (OC), athletes are part of the Olympic Movement. However, it is not enough to be part of the Olympic Movement in order to benefit from the arbitration clause contained in Rule 61.2 of the OC. Only Olympic athletes, namely athletes duly accredited by the IOC, are able to refer to Rule 61.2 of the OC to submit a request for arbitration or an appeal to the CAS whereas athletes with only an interest in taking part in the Olympic Games cannot use this arbitration clause to justify the jurisdiction of the CAS. Thus, professional athletes who have a sporting interest in taking part to a specific competition at the Olympic Games and who at the stage of**

the proceedings before the CAS have not entered into a legal relationship with the IOC, on which consent to arbitration under the OC can be based, cannot benefit from the arbitration clause contained in Rule 61.2 OC.

I. PARTIES

1. Ms Inês Henriques is a female athlete member of the Portuguese Federation of Athletism (*“Federação Portuguesa de Atletismo”*), which is a member federation of the International Association of Athletics Federations (“IAAF”). Ms Claire Woods is a female athlete member of the Athletics Australia, which is a member federation of the IAAF. Ms Paola Pérez is a female athlete member of the Ecuadorian Federation of Athletism (*“Federación Ecuatoriana de Atletismo”*), which is a member federation of the IAAF. Ms Johana Ordóñez is a female athlete member of the Ecuadorian Federation of Athletism, which is a member federation of the IAAF. Ms Magaly Bonilla is a female athlete member of the Ecuadorian Federation of Athletism, which is a member federation of the IAAF. Ms Ainhoa Pinedo is a female athlete member of the Spanish Federation of Athletism (*“Real Federación Española de Atletismo”*), which is a member federation of the IAAF. Ms Erin Taylor-Talcott is a female athlete member of the USA Track & Field, which is a member federation of the IAAF. Mr Quentin Rew is a male athlete member of Athletics New Zealand, which is a member federation of the IAAF.
2. The International Olympic Committee (“IOC”) is the world governing body of Olympic sport having its registered offices in Lausanne, Switzerland. The IOC is incorporated as an association pursuant to Articles 60 *et seq.* of the Swiss Civil Code.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the Parties’ submissions and allegations. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. The present dispute concerns the Tokyo 2020 Olympic Events Program, as set up by the IOC, and, in particular, arises from the fact that although it offers a 50km Race Walk for men, it does not offer it for women.
5. On 9 June 2017, the IOC Executive Board, acting pursuant to Rule 45 of the Olympic Charter (“OC”), adopted the events program for the 2020 Tokyo Olympic Games.
6. On the same day, the IOC Director General informed the President of the IAAF as follows:
“The IOC Executive Board met today in Lausanne to finalise the event programme and athlete quotas of the Olympic Games Tokyo 2020. As you know, these considerations were based on the requests received from you,

the research data collected at Rio 2016 at an event level and the recommendations received from the Olympic Programme Commission, which were reviewed in the context of the adoption of the Olympic Agenda 2020.

The Olympic Charter mandates a framework of approximately 10,500 athletes and 310 events for the Olympic Games. In addition to providing a sustainable model for the hosting and organisation of the Games, the proposals of all IF's were reviewed in the context of innovation and youth appeal, overall gender equality, and respect of the overall approximate framework figures.

In this context, the IOC Executive Board has finalised the following Tokyo 2020 event programme for both events and athletes quotas in the sport of Athletics (...).

OFFICIAL PROGRAMME OF THE OLYMPIC GAMES TOKYO 2020										
SPORTS	QUOTAS			MEN'S EVENTS		WOMEN'S EVENTS		MIXED/OPEN EVENTS		TOTAL
	M	W	T							
ATHLETICS	988	912	1900	24		23		1		48
					100m		100m		4x400m Mixed Relay	
					200m		200m			
					400m		400m			
					800m		800m			
					1,500m		1,500m			
					5,000m		5,000m			
					10,000m		10,000m			
					110m Hurdles		100m Hurdles			
					400m Hurdles		400m Hurdles			
					3,000m Steeplechase		3,000m Steeplechase			
					4 x 100m Relay		4 x 100m Relay			
					4 x 400m Relay		4 x 400m Relay			
					High Jump		High Jump			
					Pole Vault		Pole Vault			
					Long Jump		Long Jump			
					Triple Jump		Triple Jump			
					Shot Put		Shot Put			
					Discus Throw		Discus Throw			
					Hammer Throw		Hammer Throw			
					Javelin Throw		Javelin Throw			
					Decathlon		Heptathlon			
					20km Race Walk		20km Race Walk			
					Marathon		Marathon			
					50km Race Walk					

(...)

As our respective teams have discussed, we would also like to already initiate and progress discussions with a view towards the evolution of the Athletics programme of the 2024 Olympic Games, with a particular focus on Race Walk events (...)”.

7. At its meetings of 3 and 4 December 2018, the IAAF Council decided to submit an official request to the IOC to add the Women’s 50km Race Walk to the Tokyo 2020 Athletics Programme.

8. On 10 December 2018, the Counsel for the Appellants wrote to the IOC president, Mr Thomas Bach, *inter alia*

“(...) to urge that the IOC grant the IAAF’s request to include the women’s 50km race walk event in the Tokyo 2020 Olympic Programme. (...)

Granting the IAAF request will neither increase the total number of athletes at the Tokyo Games nor increase the number of events, as the women’s 50km will be conducted jointly with the men’s 50km, albeit with separate classifications. (...)”.

9. On 28 December 2018, Mr Paul Hardy, IAAF Competitions and Events Directors, wrote to Mr Kit McConnell, IOC Sports Director, to inform him that:

“The IAAF Council meeting in Monaco on 3, 4 December 2018, agreed to submit an official request to the IOC to add the Women’s 50km Race Walk to the Tokyo 2020 Athletics Programme. The women’s race could be contested at the same time as the Men’s 50km Race Walk using the same course.

This request follows a previous decision of the IAAF Council to add the Women’s 50km Race Walk to the programme of the IAAF World Athletics Championships (...).

We understand that the inclusion of the Women’s 50km Race Walk would have to fit within the IAAF athlete quota of 1900. Once accepted, we will provide you with our ideas on how to remain within our overall quota with the inclusion of this event”.

10. In a letter dated 15 February 2019, the IOC Sports Director, Mr Kit McConnell, replied to the IAAF as follows:

“Thank you for your letter of 28 December requesting the inclusion of the 50km Women’s Race Walk in the event programme of the Olympic Games Tokyo 2020.

I am sure you can understand that it is not possible to make any changes to the confirmed event programme of the Olympic Games Tokyo 2020 at this time, not least because of the advanced stages of the Games planning and also the precedent it would open for all other International Federations to make similar requests. As you are aware, the IOC Executive Board finalised the Tokyo 2020 event programme in June 2017 (...)”.

11. On 24 March 2019, IOC Media Relations received an email of the Counsel for the Appellants inquiring about his request to the IOC President to include the 50km Women’s Race Walk in the event programme of the Olympic Games Tokyo 2020, and more specifically *“whether this gender equality inclusion has been effected or whether the upcoming Executive Board meeting will finalize this inclusion”*. On the same day, the IOC Sports Director, Mr Kit McConnell, received an email of

the Counsel for the Appellants of equivalent content.

12. On 25 March 2019, the IOC Media Relations Team replied to the email of the Counsel for Appellants as follows:

“This is one of the topics that will be part of the reports given to the IOC Executive Board during the meeting”.

13. The IOC Executive Board met on 26-28 March 2019. The press releases published by the IOC at the end of each day and at the conclusion of the meeting did not mention any discussion regarding the inclusion of women in the 50km Race Walk at the Tokyo 2020 Olympic Games.

14. On 2 April 2019, the IOC Media Relations Team replied to the email of the Counsel for the Appellants of 24 March 2019 to the IOC Sports Director, Mr Kit McConnell, as follows:

“Following the Olympic Charter, the IOC Executive Board finalised the Tokyo 2020 event programme in June 2017, three years prior to the Olympic Games”.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

15. On 7 May 2019, in accordance with Article R47 of the Code of Sports-related Arbitration (the “CAS Code”), the Appellants filed a Statement of Appeal with the Court of Arbitration for Sport (“CAS”) naming the IOC as Respondent. The Statement of Appeal filed by the Appellants identified as the “subject of this appeal” the decision contained in the letter sent by the IOC Sports Directors, Mr Kit McConnell, to the IAAF on 15 February 2019. In addition, in their Statement of Appeal, the Appellants requested the present proceedings to be consolidated with the appeals arbitration procedure under the reference *CAS 2019/A/6225 Inês Henriques et al. v. IOC & IAAF* (the “Other Arbitration”) that the Appellants had initiated on 31 March 2019 against the IOC and the IAAF. Alternatively, the Appellants requested the present matter to be referred to the same Panel as that in the Other Arbitration. Finally, the Appellants appointed the Honourable Dr Annabelle Bennett, former Judge in Sydney, Australia, as arbitrator.
16. On 10 May 2019, the CAS Court Office acknowledged receipt of the Statement of Appeal and initiated the present appeals procedure under reference *CAS 2019/A/6274*. The CAS Court Office informed the Parties that the Appellants’ request that the present proceedings and the Other Arbitration be consolidated could not be granted, since the appeals were not directed against the same decision. At the same time, however, it invited the IOC to indicate whether it would agree to submit the present procedure to the same panel appointed in the Other Arbitration.
17. On 20 May 2019, the IOC informed the CAS Court Office that it agreed to submit the present procedure to the same panel as in the Other Arbitration. The IOC further stated its position in the present matter, in particular with regard to the lack of jurisdiction and the lack of standing of the Appellants. The IOC therefore requested that the procedure be terminated, with a preliminary decision issued without the examination of the merits of the case.

18. On 21 May 2019, the CAS Court Office noted the IOC's agreement to submit this matter to the same panel as in the Other Arbitration. It also invited the Appellants to comment on the IOC's request that the proceedings be terminated on a preliminary basis.
19. On 25 May 2019, the Appellants filed their Appeal Brief with the CAS Court Office, including a request for production of documents.
20. On 28 May 2019, the CAS Court Office acknowledged receipt of the Appeal Brief, and invited the IOC to comment on the Appellants' request for production of documents.
21. On the same day, the Appellants sent a letter to the CAS Court Office, providing its comments to the letter from the IOC dated 20 May 2019.
22. On 6 June 2019, the CAS Court Office invited the IOC to file its Answer in the set deadline. It also informed the Parties that the Panel appointed to decide on the present proceedings was constituted as follows:

President: Prof. Luigi Fumagalli, Attorney-at-law in Milan, Italy
Arbitrators: The Hon. Dr Annabelle Bennett AC SC, former Judge in Sydney, Australia
Mr Pierre Muller, former Judge in Lausanne, Switzerland.
23. On 7 June 2019, the IOC requested the CAS Court Office to confirm that the preliminary issues would be decided before any further proceedings and in particular before the setting of a deadline for its Answer. The IOC also objected to the Appellants' request for production of documents.
24. On 12 June 2019, the CAS Court Office informed the Parties that the IOC's objections to admissibility and standing would be determined as a threshold matter (the "Threshold Matters") and bifurcated from the merits of this dispute. In the interim, the deadline for the Respondent's answer on the merits would remain suspended. It also confirmed that, although formal consolidation of this procedure with the Other Arbitration was rejected, the Panel would procedurally align this procedure with the Other Arbitration and proposed to hear the Parties on the Threshold Matters in a combined hearing. Finally, the CAS Court Office informed the Parties that until otherwise noted, all correspondence will be sent to all parties in both cases.
25. On 12 June 2019, the CAS Court Office informed the Parties that a hearing would be held on 29 and 30 July 2019 in Lausanne to decide on the Threshold Matters in the present proceedings. Considering the Panel's decision to align the procedure in the present proceedings with the Other Arbitration, the hearing would cover the Threshold Matters in both proceedings.
26. On 14 June 2019, the CAS Court Office informed the Parties that it would send the documents in the present case to the IAAF only to the extent that the latter so requested.
27. On 14 June 2019, the CAS Court Office informed the Parties that Ms Stéphanie De Dycker

was appointed as *ad hoc* Clerk to assist the Panel in the present matter.

28. On 21 June 2019, the CAS Court Office sent to the Parties two “Redfern Schedules” in the present proceedings as well as in the Other Arbitration. With respect to the “Redfern Schedule” in the present case, the CAS Court Office requested the Appellants to fill in the relevant columns on the basis of their requests already on file and indicated that the IOC would have the opportunity to insert its position regarding the Appellants’ requests.
29. On 26 June 2019, the Appellants filed the “Redfern Schedule” in the present case with their position and requests for the production of documents.
30. On the same day, the CAS Court Office noted the Appellants’ inclusions into the “Redfern Schedule” concerning the evidence on file and invited the Respondents to complete the “Redfern Schedule” in that case. Finally, with respect to the Other Arbitration, the CAS Court Office took note of the Parties’ agreement as to the completed “Redfern Schedule” save for the additions set out by the IAAF.
31. On 5 July 2019, the Appellants wrote to the CAS Court Office to seek clarification as to whether the witness, Mr Kit McConnell, IOC Sports Director, would appear by videoconference or by telephone at the hearing.
32. On 9 July 2019, the CAS Court Office noted the IOC’s comment that Mr Kit McConnell would be heard by videoconference at the hearing.
33. On 12 July 2019, the CAS Court Office invited the Parties to propose a joint hearing schedule for the present case as well as the Other Arbitration.
34. On 19 July 2019, the CAS Court Office acknowledged receipt of the IOC’s letter of the same day stating that the Parties were able to agree on a common hearing schedule, except for the duration of the hearing of Mr Kit McConnell.
35. On 22 July 2019, the CAS Court Office informed the Parties that the Panel had taken note of the proposed hearing schedule, as well as of the Parties’ positions on the duration of Mr Kit McConnell’s testimony. In addition, the CAS Court Office informed the Parties of the Panel’s decision on the Appellants’ requests for document production. In the “Redfern Schedule”, as completed by the Panel, the document requests were either denied as at the time presented or considered generic, as insufficiently identifying the document sought, not available or not existing, based on the other Parties’ indications or irrelevant for the decision on the Threshold Matters.
36. A hearing was held in Lausanne on 29 July 2019. In addition to the Panel, Mr Brent Nowicki, Managing Counsel to the CAS, and the *ad hoc* Clerk, the following persons attended the hearing:

For the Appellant: Mrs Inês Henriques, Mrs Ainhoa Pinedo, Mrs Claire Woods, Mrs Erin Taylor-Talcott, athletes; Mr Paul F. DeMeester, attorney-at-law; Mrs Monica Lang, interpreter.

For the Respondent: Mr François Carrard, Mr Jean-Pierre Morand, Mrs Sophie Roud, attorneys-at-law.

37. In addition, Mrs Frédérique Reynertz, IAAF Director; Mr Jonathan Taylor, Mrs Arantxa King, attorneys-at-law, attended the hearing on behalf of IAAF, the Second Respondent in the Other Arbitration.
38. At the outset of the hearing, the Parties confirmed that they had no objection to the constitution and composition of the Panel.
39. The Panel, then, heard evidence from Mr Kit McConnell, Sports Director at the IOC. The witness was invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine the witness. The testimony of Mr Kit McConnell can be summarized as follows:

Mr Kit McConnell works in the capacity of Sports Director with the IOC since 2014 and is familiar with the present proceedings, as well as the Other Arbitration. Mr Kit McConnell indicated that, on 9 June 2017, the IOC Executive Board decided the Events Programme for the 2020 Tokyo Olympic Games, based on the proposals made by the international federations including the IAAF. The IAAF requested the inclusion of a women 50km Race Walk competition in the 2020 Tokyo Olympic Games Event Programme for the first time in December 2018, well after expiration of the deadline of three years prior to the opening of the Tokyo Olympic Games, as provided under BLR 45.2.2 of the OC. With respect to the letter from the IOC to the IAAF dated 15 February 2019, Mr Kit McConnell indicated that he wrote that letter without consulting his hierarchy, because his reply was consistent with the internal practice at the IOC, thereby reflecting a policy of the IOC. Indeed, over recent Olympic Games, Events Programmes, once decided, have never been reviewed despite requests from international federations to do so, including with respect to gender equality issues. With respect to the IOC Executive Board meeting of 26-28 March 2019, Mr Kit McConnell indicated that he was consulted in the process of formulation of the agenda of that meeting and that the issue of the inclusion of a woman 50km Race Walk competition at the 2020 Tokyo Olympic Games was not discussed at that meeting.
40. The Parties thereafter were given full opportunity to present their case, submit their arguments and answer the questions posed by the Panel. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and as to their right to be heard.
41. On 30 October 2019, the Appellants submitted a request for an order to produce further written pleadings pursuant to Article R44.2 of the CAS Code in relation to the IOC decision to move the venue for the Race Walk Events at the 2020 Tokyo Olympic Games.
42. On the same 30 October 2019, the IOC opposed the Appellants' request, on the basis that the facts referred to by the Appellants were irrelevant to the decision on the Threshold Matters.

IV. THE PARTIES' SUBMISSIONS

43. The following summary of the Parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. Furthermore, this summary focuses on the Parties' positions on the Threshold Matters identified by the Panel, specifically jurisdiction, admissibility and standing to appeal. The Panel, however, has carefully considered all the submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellants

44. The Appellants' submissions may be summarized as follows:

- The jurisdiction of the Panel to decide upon the present matter is based on Rule 61.2 of the OC. This arbitration clause contains an offer to arbitrate and the Appellants accepted such offer by filing their Statement of Appeal, thereby creating an agreement on which the jurisdiction of the Panel is based.
- The present appeal is directed against the letter dated 15 February 2019 from the IOC Sports Director, Mr Kit McConnell, to the IAAF, by which the IOC refused to include women athletes in the 50km Race Walk event at the 2020 Tokyo Olympic Games. The Appellants were indeed informed on 24 April 2019 of that letter and the present appeal was initiated within 21-day time limit as from receipt of this letter, as provided under Article R49 of the CAS Code.
- Pursuant to Article R58 of the CAS Code, the Panel is bound to apply the OC and, on a subsidiary basis, Swiss law. In addition, Switzerland having acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the provisions of such Convention shall apply to the present dispute.
- The IOC is responsible for the Olympic athlete programme, including the 50km Race Walk. With its decision of 15 February 2019, the IOC wrongfully excluded women athletes from the 50km Race Walk of the 2020 Tokyo Olympic Games, violating in particular Rules 2, 19 and 45 of the OC as well as Swiss Law. Moreover, the IOC cannot avail itself of any defence that the 2020 Olympic Programme was decided upon in June 2017, because (i) it was its decision of 15 February 2019 to deny IAAF's request to include women in the Tokyo 2020 Race Walk event, and (ii) such defence relies on an ordinary statute that must give way to the requirements of the constitutional gender equality values stated in the fundamental principles of Olympism.
- In addition, the IOC's failure to eradicate sexism in the present matter is actionable on any day since 9 June 2017, as the IOC is acting in violation of its duties to provide gender equality and not to discriminate on the basis of sex ever since.
- The decision of the IOC's Executive Board on 9 June 2017 dealt only with the 2020 Olympic Games 50km Race Walk for men, as the IAAF did not propose to include women at that time. As a result, the letter dated 15 February 2019 cannot qualify as a mere reconsideration of a pre-existing decision but rather as a decision not to include

women in the 2020 Tokyo Olympic Games 50km Race Walk. Even if it qualifies as reconsideration, the decision dated 15 February 2019 is appealable because it dealt with the merits of the IAAF request. Indeed, it qualifies as an appealable decision since it produced legal effects in that the IAAF then did not include women in its 10 March 2019 entry standards thereby affecting the legal situation of all 50km Race Walkers.

- The Appellants' standing to appeal in the present proceedings is conferred upon them by the OC, which states that "*Every individual must have the possibility of practising sport, without discrimination of any kind (...)*", that "*the enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as (...) sex (...)*", and which describes the athletes' interests as "*a fundamental element of the Olympic Movement's action (...)*" (Fundamental Principles of Olympism 4 and 6; Rule 1.3 of the OC). The present proceedings are neither about adding someone's favourite pastime to the Olympics nor about claiming a right to be at the 2020 Tokyo Olympic Games, but rather about making a discriminatory Olympic existing event gender equal.

45. The Appellants therefore requested the Panel to decide as follows:

- (a) *The Court order Respondent IOC to include women athletes in the 50km Race Walk at the 2020 Olympic Games in Tokyo with separate classifications for men and women;*
- (b) *The Court order Respondent IOC to implement any Court orders hereby requested with immediate effect, in order to allow women athletes to properly prepare for the 2020 Olympic 50km Race Walk;*
- (c) *The Court order Respondent IOC to immediately publish the inclusion of women athletes in the 2020 Olympic Games 50km Race Walk on its public websites and in a communication by Respondent IOC to all National Olympic Committees (NOCs) as well as to the IAAF;*
- (d) *The Court order Respondent IOC to pay Appellants their legal fees and costs associated with this appeal; and*
- (e) *The Court order such further and other relief as may be appropriate and just.*

B. The Respondent

46. The IOC submissions may be summarized as follows:

- The IOC first submits that what the Appellants are actually requesting is the inclusion of a new event, within the meaning of Rule 45.2.2 paragraph 2 of the OC, in the Events Programme for the Tokyo Olympic Games. However, in accordance with Rule 45 of the OC and the Bye-Law 2.2. to Rule 45 ("BLR"), the Tokyo Olympic Games Events Programme was decided upon by the IOC Executive Board within the set deadline of three years prior to the opening of the Tokyo Olympic Games, namely on 9 June 2017, after consultation of the international federations. In addition, there was no subsequent tripartite agreement to waive such deadline for deciding on the Events Programme as required under BLR 45.3.4 of the OC. As a result, pursuant to Article R49 of the CAS Code, the appeal filed by the Appellants is manifestly late.

- In addition, the IOC contends that the letter from the IOC to the IAAF on 15 February 2019 is not a decision on the inclusion of a new event on the Tokyo Olympic Games Events Programme, but rather a decision not to open a review process of the Events Programme, which – in order to succeed – would in any case have required the approval of three parties, namely the IOC, the IAAF and the Tokyo Organising Committee for the Olympic Games (“TOCOG”). Such a communication does not constitute a “decision” within the meaning of article R47 of the CAS Code since it had no additional effect in regard with the matter which had already been dealt with on 9 June 2017.
- The IOC further submits that the Panel lacks jurisdiction *ratione personae* based on Rule 61.2 of the OC, since the IOC has no legal relationship with the individual athletes until they sign their eligibility form with the IOC with respect to their participation in a specific event, which the Appellants obviously have not done at this stage with respect to the 2020 Tokyo Olympic Games.
- Moreover, the Appellants have no standing to appeal in the present matter. The decision of the IOC on the Events Programme is a decision of a general nature, which potentially concerns all athletes, and there is consequently no individual right of the athletes to appeal against the decision on the Events Programme for the Tokyo Olympic Games. The CAS has no jurisdiction to decide upon matters of such constitutional nature.

47. The IOC therefore “requests that the arbitral proceedings be terminated based on a preliminary decision issued without examination of the merits”.

V. JURISDICTION OF THE CAS

48. The question whether or not the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and not all Parties are domiciled in Switzerland, the provisions of the Swiss Private International Law Act (“PILA”) apply, pursuant to its Article 176.1. In accordance with Article 186 of PILA, the CAS has the power to decide upon its own jurisdiction (“*Kompetenz-Kompetenz*”).

49. Pursuant to Article R27 CAS Code:

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

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport”.

50. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if

the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

51. Rule 61.2 of the OC states as follows:

“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”.

A. Position of the Parties

52. As a preliminary point, the Panel notes that the Parties disagree on what is the substance of the Appellants’ request. According to the Appellants, the present appeal proceedings aim at bringing an end to on-going gender discrimination, which consists in opening a specific competition at the 2020 Tokyo Olympic Games to men while refusing it to women. According to the Appellants, what they request is therefore that an existing event be gender equal. However, the IOC submits that what the Appellants are actually requesting is the inclusion of a new event, within the meaning of Rule 45.2.2 paragraph 2 of the OC, in the Events Programme for the Tokyo Olympic Games.
53. The Appellants submit that the Panel has jurisdiction to decide on the present matter against the IOC based on Rule 61.2 of the OC. In their view, Rule 61.2 of the OC constitutes an offer to all the world to arbitrate at CAS any dispute covered by the provision. By filing their Statement of Appeal, the Appellants say that they accepted such offer to arbitrate, thereby creating an agreement between the Parties, on which the Panel’s jurisdiction is based. Moreover, the Appellants submit that the present appeal is brought with respect to the IOC, against the IOC Executive Board meetings of 26-28 March 2019, because despite having been expressly informed of the existing gender discrimination with respect to the 50km Race Walk event, the IOC Executive Board decided not to remedy the issue. The Appellants also submit that in the letter dated 15 February 2019 from IOC Sports Director, Mr Kit McConnell, to the IAAF, the IOC confirmed that it would not remedy the gender discrimination issue regarding the women’s 50km Race Walk at the 2020 Tokyo Olympic Games.
54. The IOC submits, to the contrary, that the Panel lacks jurisdiction to decide in the present matter. The IOC does not dispute the fact that the present matter qualifies as a *“dispute arising on the occasion of, or in connection with, the Olympic Games”* as provided under Rule 61.2 of the OC. However, in the IOC’s view, only the parties to the OC can invoke such arbitration clause, and the Appellants do not have such quality. Athletes may invoke Rule 61.2 of the OC only as from the moment they have signed an eligibility form.
55. The IOC also contends that the letter from the IOC to the IAAF on 15 February 2019 is not a decision on the inclusion of a new event on the Tokyo Olympic Games Events Programme, but rather a decision not to open a review process of the Events Programme, which would have required the approval of three parties, namely the IOC, the IAAF and the TOCOG. As

a result, it is not an appealable decision in the meaning of the CAS Code.

B. Position of the Panel

56. First, the Panel notes that, in their Statement of Appeal and their Appeal Brief, the Appellants request the Panel to order the IOC “to include women athletes in the 50km Race Walk Event at the 2020 Olympic Games in Tokyo with separate classifications for men and women”. The Panel is of the view that what the Appellants are requesting in substance is the inclusion of a new event in the meaning of Article 45.2.2 paragraph 2 of the OC, i.e. “a specific competition in a sport resulting in a ranking giving rise to the award of medals and diplomas”, in the Events Programme for the Tokyo Olympic Games.

57. Therefore, the Panel shall consider its jurisdiction to decide on the present matter, keeping in mind that the inclusion of a new event in the 2020 Tokyo Olympic Games Events Programme is indeed the core issue at stake. This does not mean that, in the Panel’s view, the issue of gender discrimination in sports in general is neither relevant nor essential. To the contrary, it is a substantive law issue of utmost importance. Such issue of substantive law – however fundamental it may be – cannot, however, exempt from nor alleviate the Panel’s examination of the procedural issues of a preliminary nature, such as its jurisdiction, on the basis of the CAS Code and the applicable regulations.

58. The Panel then turns to the conditions for CAS to have jurisdiction. Based on the consistent jurisprudence of CAS panels pursuant to Articles R27 and R47 of the CAS Code, there are three prerequisites that have to be met in order for CAS to have jurisdiction (see *inter alia*: CAS 2008/A/1513; CAS 2009/A/1919; CAS 2011/A/2436; CAS 2014/A/3775), namely:

- the parties must have agreed to the competence of the CAS;
- there must be a “decision” of a federation, association or another sports-related body; and
- the (internal) legal remedies available must have been exhausted prior to appealing to CAS.

59. Moreover, the Panel notes that interpretation of an arbitration agreement is governed by Article 178.2 PILA (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials* (2015), p. 30-31, nos. 38-40; ATF 4P.253/2003, 25.03.2004). Based on this provision, the Panel applies first and foremost the principles of Swiss law on interpretation of an arbitration agreement. According thereto, the statutes and regulations of an association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than to contracts (BSK-ZGB/HEINI/SCHERRER, Art. 60 SCC no. 22; BK-ZGB/RIEMER, *Systematischer Teil* no. 331; BGE 114 II 193, E. 5a; 4A_600/2016, at 3.3.4.1). The Panel concurs with this view, which also accords with CAS jurisprudence, which has held in the matter CAS 2010/A/2071 as follows:

“The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body - in this instance the Panel -

will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (...)” (CAS 2010/A/2071, para. 20 of the abstract published on the CAS website; see also: 2017/A/5063; 2016/A/4787; 2016/A/4903; 2016/A/4602; 2014/A/3863).

60. This is the approach the Panel will follow in the examination of the three cumulative prerequisites for it to find jurisdiction to decide upon the present matter.
61. The Panel starts its examination by underlining that it is a basic (and obvious) principle that arbitration is based on consent. Arbitration can be started by an entity against another only if an agreement exists between them to arbitrate a given dispute. As a result, in order to determine the existence of CAS jurisdiction in the case at hand, the first task of this Panel is to verify whether an agreement exists between the IOC and the Appellants (jurisdiction *ratione personae*) covering the dispute at stake (jurisdiction *ratione materiae*) and providing for CAS arbitration.
62. As mentioned, the Appellants ground the CAS jurisdiction to hear the appeal they filed against the IOC on Rule 61.2 of the OC under which “*Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration*”.
63. In regard to that provision, the Panel notes that it undoubtedly provides for CAS arbitration and that it covers the dispute between the Appellants and the IOC, which concerns the inclusion of the 50km Race Walk women competition at the 2020 Tokyo Olympic Games. Therefore, it is without doubt a dispute “*arising on the occasion of, or in connection with, the Olympic Games*”. The Parties did not challenge this point. As a result, this Panel would have jurisdiction *ratione materiae*.
64. The crux of the issue, however, concerns the existence of an agreement to arbitrate between the Appellants and the IOC (jurisdiction *ratione personae*), giving the Appellants the right to start CAS proceedings against the IOC and obliging the IOC to submit to arbitration a dispute with the Appellants covered *ratione materiae* by such agreement
65. The Panel starts the examination from the text of the provision invoked by the Appellants and notes that the arbitration clause contained in Rule 61.2 of the OC describes the jurisdiction of the CAS as exclusive. This follows from the objective construction of the arbitration clause, which states as follows: “*any dispute ... shall be submitted exclusively to the Court of Arbitration for Sport...*” (underlining added). Such exclusive character of the arbitration clause means that the parties concerned are not only entitled but also compelled to bring the disputes covered by the arbitration clause to the CAS.
66. In light of the foregoing, the Panel is not convinced by the construction offered by the Appellants of Rule 61.2 of the OC. If, as the Appellants contend, any person can accept the offer to arbitrate included in Rule 61.2 of the OC, then this would mean that before filing

their Statement of Appeal, that person has the option of accepting the offer to arbitrate or to disregard it and seize national courts. Such a reading would, in the view of the Panel, mean that Rule 61.2 of the OC contains an optional arbitration clause rather than an exclusive one, which is incompatible with the wording of Rule 61.2 of the OC.

67. In the Panel's view, the corollary of the exclusive character of Rule 61.2 of the OC is that it can only be binding on, and invoked by, persons on a "pre-existing" different basis. Hence, the Appellants would not only have the right to accept an offer to arbitrate at CAS, but also the obligation to do so, so that recourse to ordinary courts would be precluded (because CAS would have "exclusive" jurisdiction). The question is then to determine who is bound by, and can invoke, the arbitration clause contained in the OC, and on which basis. In particular, considering that the Appellants are athletes, the Panel has to examine under what conditions athletes can rely on (and have the obligation to observe) Rule 61.2 of the OC.

68. In order to answer this question, the Panel first reverts to the OC. Pursuant to Rule 1.4 of the OC, *"any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC"*.

69. Based on Rule 1.2 of the OC, athletes are not one of the three main constituents of the Olympic Movement, which are *"the International Committee ("IOC"), the International Sports Federations ("IFs") and the National Olympic Committees (...)"*. However, as provided by Rule 1.1 of the OC, *"the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter"*. Moreover, Rule 1.3 of the OC provides that *"the Olympic Movement also encompasses (...) persons belonging to the IFs, in particular the athletes, whose interests constitute a fundamental element of the Olympic Movement's action (...)"*.

70. Hence, it arises from the above that the athletes are part of the Olympic Movement. This does not mean, however, that the athletes are members of the IOC, an association established pursuant to Articles 60 *et seq.* of the Swiss Civil Code, and are therefore directly parties to the OC.

71. The Panel is of the view that it is not enough to be part of the Olympic Movement in order to benefit from the arbitration clause contained in Rule 61.2 of the OC, as was confirmed by other CAS awards (CAS 2000/A/288; CAS 2000/A/297; CAS OG 98/001; CAS 2011/A/2474).

72. Indeed, CAS Panels already had the occasion to determine the scope *ratione personae* of Rule 61.2 of the OC or its predecessor. In particular, several CAS Panels stated that: *"olympic" athletes, namely athletes duly accredited by the IOC, were able to refer to rule 74 of the Olympic Charter [currently Rule 61.2 of the OC] to submit a request for arbitration or an appeal to the CAS. The Court has considered that athletes with only an interest in taking part in the Olympic Games could not use this arbitration clause to justify the jurisdiction of the CAS"* (CAS 2000/A/288; CAS 2000/A/297; CAS OG 98/001; CAS 2011/A/2474). The Panel concurs with this view.

73. In the Panel's view, there is no doubt that the Appellants do not qualify as "Olympic" athletes. Indeed, at the stage of the present proceedings, the Appellants are professional athletes who

request the inclusion of women in a specific competition at a specific edition of the Olympic Games with separate classifications. Hence, the only relationship that the Appellants have with the IOC is that they have a “sporting interest” in participating in a specific competition at the Olympic Games organised under the auspices of the IOC: they do not have any enforceable right. In the Panel’s view, this is not enough to demonstrate that the Appellants are “Olympic” athletes “*duly accredited by the IOC*”, qualified as eligible to compete in the Olympic Games and/or who have signed an agreement with the IOC (such as an entry form for the Olympic Games) providing for the CAS jurisdiction.

74. Moreover, the Panel deems it relevant to make a distinction between this case and a case where a procedure is brought against a sports federation regarding the latter’s decision not to admit the appellant as its member. The Swiss Federal Tribunal has accepted that, in such specific circumstances, the appellant - who is not a member of the sports federation - may nevertheless avail itself of the arbitration clause included in the sports federation’s statutes, based on the appellant’s formal commitment to abide by those statutes as part of the admission process. In its judgment, the Swiss Federal Tribunal states as follows:

“Dans ce contexte, on notera enfin - pour ce qui est de la procédure d'admission des FMN [Fédérations Motocyclistes Nationales] que l'art. 11.1.3 des Statuts confie au CD [Conseil de Direction] le soin de définir dans le RI [Règlement Intérieur]- qu'en vertu de l'art. II.1) al. 1 let. f de ce dernier règlement, pour devenir Membre affilié de la FIM [Fédération Internationale de Motocyclisme] une FMN doit déposer une demande d'admission accompagnée, entre autres documents, d'une déclaration par laquelle elle s'engage notamment à respecter les Statuts, règlements et décisions de l'association faitière. Or, à l'art. 5 des Statuts, figure précisément la clause arbitrale qui forme l'un des objets de l'engagement à souscrire par la candidate. Dès lors, il est possible d'inférer de la conjugaison de la clause arbitrale et de la disposition topique du RI l'existence d'un devoir implicite de la FMN candidate à l'affiliation auprès de la FIM de n'entreprendre que devant le TAS les décisions que rendra cette association à son sujet et, plus particulièrement, une éventuelle décision de rejet de sa candidature prise par l'AG de la FIM. » (SFT, 4A_314/2017, cons. 2.3.2.3).

Unofficial translation: *“In this context, it should be noted - with regard to the admission procedure of the FMNs [National Motorcycling Federations] that Article 11.1.3 of the Statutes entrusts the DC [Governing Council] to define the RI [Internal Regulations]- that under Article II.1.1(f) of the Statutes, in order to become an affiliated member of the FIM (International Motorcycling Federation), a FMN must make a demand of admission accompanied, among other documents, by a declaration that it will obey the statutes, regulations, and decisions of the association. In Article 5 of the Statutes can be found the exact arbitration clause that forms one of the candidate’s obligations. Therefore, it is possible to infer from the combination of the arbitration clause and the notion of the existence of an implicit duty of the candidate FMN with the FIM to bring exclusively before the CAS the FIM decisions and particularly potential decisions rejecting applications made by the AG of the FIM” (SFT, 4A_314/2017, cons. 2.3.2.3).*

75. In the Panel’s view, the present case covers a very different situation. Indeed, the Appellants are not requesting to become members of the IOC. Rather, they are professional athletes who have an interest in taking part to a specific competition at the Olympic Games. In addition, at the stage of the present proceedings, the Appellants have not entered into a legal relationship with the IOC, on which consent to arbitration under the OC could be based.
76. As a result, the Panel finds that it does not have jurisdiction, under Rule 61.2 of the OC, to

decide upon the present dispute. In view of the conclusion reached by the Panel as to the consent of the IOC and the Appellants to the competence of the CAS, there is no need to analyse the other conditions for the CAS to have jurisdiction in the present matter, namely the existence of an “appealable decision” in the meaning of the CAS Code as well as the exhaustion of internal legal remedies before starting a procedure before CAS. Similarly, there is no need to consider the separate question of the standing of the Appellants to bring these proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to rule on the appeal filed on 7 May 2019 by Ms Inês Henriques, Ms Claire Woods, Ms Paola Pérez, Ms Johana Ordóñez, Ms Magaly Bonilla, Ms Ainhoa Pinedo, Ms Erin Taylor-Talcott and Mr Quentin Rew against the International Olympic Committee.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.