CAS 2022/O/8722 Simidele Adeagbo v. International Bobsleigh and Skeleton Federation & International Olympic Committee

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Prof. Massimo Coccia, Professor and Attorney-at-law, Rome, Italy

Arbitrators: Mr. Jeffrey Mishkin, Attorney-at-law, New York City, NY, U.S.A.

The Hon. Dr. Annabelle Bennett AC SC, Senior Counsel, Sydney, Australia

Ad hoc Clerk: Mr. Francisco A. Larios, Attorney-at-law, Miami, FL, U.S.A.

in the arbitration between

Ms. Simidele Adeagbo

Represented by Messrs. Jeffrey K. Kessler and David G. Feher and Ms. Angela A. Smedley, Attorneys-at-law, Winston & Strawn LLP, New York, NY, U.S.A.

Claimant

and

International Bobsleigh and Skeleton Federation

Represented by Mr. Stephan Netzle, Attorney-at-law, TIMES Attorneys AG, Zurich, Switzerland

First Respondent

International Olympic Committee

Represented by Messrs. Antonio Rigozzi and Michele Potestà, Attorneys-at-law, Lévy Kaufmann-Kohler, Genève, Switzerland

Second Respondent

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I. THE PARTIES

1. Ms. Simidele Adeagbo (the "Claimant"), born on 29 July 1981, is an elite Nigerian monobob and skeleton athlete who competed in the 2018 Olympic Winter Games in the women's skeleton event, where she finished 20th overall, and who attempted to qualify for the monobob event at the 2022 Olympic Winter Games.

2. The International Bobsleigh and Skeleton Federation (the "IBSF" or the "First Respondent"), headquartered in Lausanne, Switzerland, is the international federation and world governing body for the winter sports of bobsleigh and skeleton.

3. The International Olympic Committee (the "IOC" or the "Second Respondent"), headquartered in Lausanne, Switzerland, is the world governing body of the Olympic Movement.

4. The Claimant and the Respondents are collectively referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as submitted by the Parties in their written pleadings and adduced at the hearing. Additional facts 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.

A. The Olympic Agenda and creation of the ISBF Women's Working Group

6. Pursuant to Rule 40 of the Olympic Charter, the "*conditions of participation*" in the Olympic Games are "*established by the IOC*" as well as by "*the rules of the relevant IF as approved by the IOC*". Then, paras. 1 and 2 of the Bye-law to Rule 40 of the Olympic Charter provide as follows: "*1. Each IF establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval. 2. The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities*".

7. Pursuant to Bye-law 3.2 of Rule 45 of the Olympic Charter, with regard to the Olympic Winter Games ("OWG") of 2022, the IOC capped the number of participants at 2,900 athletes and the number of events at 100. The IOC also capped at 170 the total number of spots for bobsleigh athletes.

8. At the IOC Session in December 2014, the IOC adopted the "Olympic Agenda 2020" for the purposes of the future editions of the Olympic Games. Recommendation 11, titled "*Foster gender equality*", of the Olympic Agenda 2020 called for "*[t]he IOC to work with the International Federations to achieve 50 per cent female participation in the Olympic Games and to stimulate women's participation and involvement in sport by creating more participation opportunities at the Olympic Games*".

9. On 16 March 2017, to act upon said Recommendation 11 of the Olympic Agenda 2020, the IOC Executive Board launched the IOC Gender Equality Review Project with a mandate to "*push gender equality globally*" with "*action-oriented recommendations for change*". This led to the IOC Gender Equality Working Group issuing a report in March 2018, under which it recommended that the IOC "*[e]nsure there is full gender equality in athlete quotas and medal events for both genders from the Olympic Games 2024 and the Olympic Winter Games 2026 onwards*" and, "*[f]or all team sports/disciplines/events, [to] ensure an equal number of teams and, where appropriate, an equal number of athletes for both genders*".

10. Further to the IOC's Recommendation 11 and the IOC's plan to have gender balance by the OWG 2026, the IBSF Executive Committee ("IBSF ExCo") established the Women's Working Group ("WWG") on 14 December 2017 with the task of assessing the addition of a women's event at the OWG 2022 and, more specifically, to evaluate two proposals: women's monobob or 4-woman bobsleigh. The aim was to have a proposal ready for the IOC by March 2018 and a 4-year business plan established.

11. On 23 March 2018, the WWG issued a report to the IBSF Executive Committee. The WWG informed the IBSF Executive Committee that, after studying different options, it recommended, by a narrow majority (4 to 3), to apply to the IOC to introduce the 4-woman bobsleigh competition in the OWG 2022 as an additional medal event and, to that end, to apply to the IOC for 12 additional quota places for women's bobsleigh. In reaching that recommendation, the WWG noted the objectives of the application would be: "*1. To achieve equality of medal events in IBSF disciplines in 2022 (current 3 men's, 2 women's)*", "*2. To improve the gender balance of athletes competing at the 2022 OWG (current 73/27%)*", "*3. To achieve gender balance of athletes competing at the 2026 OWG (minimum 55/45%), and* "*4. To simultaneously maintain at least the same number of men's nations at OWG (to avoid a negative impact on men's bobsleigh and skeleton)*". The WWG noted the benefits and drawbacks of each of 4-woman bobsleigh and monobob. For monobob, the WWG noted *inter alia* as benefits, that (i) it "*kn[e]w the concept*" and that the "*system works*", (ii) it was the simplest method to achieve Objective 1 (equal number of medal events), (iii) the sleds could also be used for Youth and Paralympics, (iv) it was the easiest method to attract new female pilots into bobsleigh. As negatives it noted *inter alia* that (i) it was not a driving stepping stone towards 4-woman bobsleigh, (ii) 20 new sleds would need to be purchased, (iii) it would be an inefficient use of quota places, (iv) it would be more difficult to ask for additional quota places from the IOC as the total women's athlete numbers would be lower than 4-woman bobsleigh. For 4-woman bobsleigh, the benefits pointed out were *inter alia* that (i) it was a significantly easier move to 50% women's participation in the OWG 2026, (ii) an opportunity to ask the IOC for additional quota places, and (iii) a higher women's percentage that would help move towards satisfying the IOC's wishes of equality. The drawbacks included "more uncertainty" and a concern for filling twelve 4-woman sleds.

12. The issue of what discipline to propose to the IOC was discussed by the IBSF Executive Committee. In an internal IBSF document dated 30 March 2018, called "Women's Promotion in Sport", the ISBF compared monobob and 4-woman bobsleigh. The IBSF Executive Committee noted that monobob was already used by several national

federations ("NFs") and the IBSF to enhance the participation and that the IBSF had developed a good structure for the Youth and Parasport and would be able to use this experience to introduce the monobob at the OWG 2022. As for 4-woman bobsleigh, the Executive Committee noted that "*there is a strong demand by current female pilots to do a 4-woman bobsleigh. The IBSF should respect the demand and establish a 4-woman bobsleigh race…*". The IBSF concluded that it would "*inform the IOC that the IBSF strongly supports Agenda 2020 and the gender equality approach by establishing the Women's Monobob and the 4-woman bobsleigh event; the IBSF request the IOC to enter a new female bobsleigh event in 2022 whereas the IBSF in coordination with the IOC will review both disciplines after the 2019/20 season to propose one for Beijing 2022 – the aim is to have 4-woman bobsleigh*".

13. On 6 April 2018, the IOC Sports Director reminded the IBSF President of the parameters outlined and published in the Olympic Charter and in the Olympic Agenda 2020, in particular that the IOC was working with "*a strict cap of approximately 2,900 athletes*", that "*IFs must demonstrate efforts to include athletes for any new events within existing individual sport quotas)*" and that there was "*[t]he push for gender balance in the Winter Games through the inclusion of additional women's and mixed events*". The IOC Sports Director explained that the IOC "*hope[d] to achieve 50% gender balance by the Olympic Winter Games 2026, but take a significant [step] towards this for Beijing 2022*".

14. On or before 19 April 2018, at a meeting on the occasion of the SportAccord conference in Bangkok, the IBSF informed the IOC Sports Department about its intention to propose to the IOC the 4-woman bobsleigh as an additional medal event at the OWG 2022. Present at this meeting was the IBSF Secretary General Ms. Heike Groesswang. According to an email from Ms. Groesswang to the members of the IBSF Executive Committee dated 19 April 2018, at this meeting the IOC Sports Department questioned why the IBSF did not intend to propose monobob for women, which had successfully been implemented in the Youth Olympic Games 2016. Ms. Groesswang reported that the IOC Sports Department had doubts about the successful acceptance of the 4-woman bobsleigh for the OWG 2022 and that it believed there was a bigger chance for women's monobob to be accepted by the IOC as the new discipline for women, since data were available and experience and supporting documents could be provided. Ms. Groesswang also reported that the IOC was keen on getting more information on both options – 4-woman bobsleigh and monobob. Ms. Groesswang informed the members of the IBSF Executive Committee that they had to decide whether to propose only the 4-woman bobsleigh or also the monobob to the IOC.

15. Eventually, the IBSF decided to present both events to the IOC. The IBSF proposals for monobob and 4-woman bobsleigh were submitted on 27 and 30 April 2018, respectively.

16. In the proposal for monobob, the IBSF noted that the discipline's added value to the Olympic Games would be to "*allow female athletes to show their best performance without being directly compared to the men as it is a new event which men do not do – we believe this would give them a much higher recognition and appreciation as they do have their own event*" and to "*enhance the female participation in bobsleigh*

immense[ly]". As for value added to the sport, it noted: "*We see some National Federations lacking in development for women in sport. With an additional event at the Olympic Winter Games and the possibility to be ranked this will increase the motivation for several National Federations to improve their women´s program. As the Monobobs will be given by the IBSF only, there will be minimized cost impact to the National Federations (the IBSF will bring mechanics as well as the whole equipment). Additionally, the technical aspect of the sled itself will be zero as all Monobobs will be the same. The driving technique of the female pilot will be decisive. We believe this will give the female pilots more recognition and appreciation of their driving skills which at least are as good as the men but get lost in the overall discussion about the push times and the technical aspects of the bobsleigh. Generally, we believe the Women´s Monobob will enhance the female participation in bobsleigh immense[ly]*".

17. In the proposal for bobsleigh, the IBSF noted that the discipline's added value to the Olympic Games would be: "*Gender equality achieved in terms of events; a large step towards participation gender equality also achieved*". As for added value to the sport it noted: "*Athlete and National Federation numbers in women's bobsleigh have been an issue for some time (the reasons why/challenges have been outlined earlier on separate document). This would be a step-change for women's bobsleigh, creating a strong positive impact in culture, participation, messaging and empowerment both within and beyond our sport*".

18. On 18 July 2018, the IOC decided to add women's monobob to the OWG 2022 Programme as the IBSF's sixth discipline.

19. Questions arose within the IOC as to the decision to admit women's monobob instead of 4-woman bobsleigh. In response, on 28 June 2018, the IOC Sports Director sent to other IOC officers an email answering such questions. The IOC Sports Director explained:

> "- *Firstly it is great that there is debate over which women's event to add to the Olympic bobsleigh programme, not whether to add one or not. The addition of any women's event also gives equality on event numbers in the sport.*
>
> - *There is an argument for the 4-woman event as it gives a fully equivalent programme between the men's and women's event programmes in the sport, however any new additional event needs to have integrity and have a sustainable development pathway which gives an appropriate level of universality and competitiveness at the Olympic level.*
>
> - *Monobob was included in the Lillehammer 2016 Winter YOG and will also be included in the Lausanne 2020 YOG as well, meaning there is an existing competition pathway for young athletes in monobob that does not exist in 4-woman bob, along with national investment programmes to support this. There is no existing programme of 4-woman bobsleigh events.*
>
> - *Irina can give the stats on the referenced 4-woman bobsleigh "World Championships" below, but I believe there were very few NOCs (maybe 3 from*

memory?) and athletes involved and it was hard to call it a legitimate World Championships.

- *The 4-man bob event has been open to women pilots for several years but there are an incredibly small number who have actually done so.*
- *The cost of a monobob is approximately US $17k while a 4-woman bob is approximately $60k. The impact of the IF investment would therefore be able to provide 3x-4x the number of bobs for events and training, meaning greater numbers of NOCs / NFs involved in training and competition. Likewise the cost and numbers of athletes needed mean it is likely there will be more investment programmes at a national level in more countries for monobob than 4-woman bob – in simple terms the cheaper it is to invest in a programme and more likely you are likely to be competitive as a result, then the more likely you are to invest in it.*
- *As a result of this we were concerned with the number of countries that would actually invest in a 4-woman programme, beyond the very small number of countries (USA, CAN, may be GER and RUS) which would see it is a very fast pathway towards an Olympic podium. It is not coincidence we have heard from the female athletes from this small number of countries rather than a wider voice in favour of 4-woman bob from the global bobsleigh community*".

20. In a December 2019 memo from the IOC's Sports Department to the IOC Executive Board, the IOC's Sports Department noted that bobsleigh would add the women's monobob event enabling it "*to achieve gender balance in terms of number of events*".

B. The Qualification System for the OWG 2022

21. By email of 10 January 2019, the IOC notified the Presidents and Secretaries General of the international federations ("IFs") of the qualification systems principles for the OWG 2022 and provided them with the templates for the qualification system for each sport at the OWG 2022. The IBSF Secretary General submitted a first draft of the qualification System for bobsleigh to the IOC on 17 May 2019. There were further versions until the last version was approved by the IOC Executive Board on 4 December 2019, published and communicated to the NFs on 5 December 2019.

22. However, further versions of the IBSF qualification system were discussed with and approved by the IOC to take into account the IBSF's difficulties in organizing the originally contemplated qualification events during the Covid-19 pandemic. Nonetheless, the principle of the quota allocation for women's monobob remained unchanged, including in the latest version of 6 September 2021. On that date, pursuant to Rule 40 of the Olympic Charter, the IBSF released the final version of its qualification system for the bobsleigh events at the OWG 2022 (the "Qualification System"), which will be summarized below.

23. The Qualification System (i) presented 4 medal events, 2 for each gender: the 4-man and 2-man bobsleigh for men, and the 2-woman bobsleigh and monobob for women, (ii) allocated 124 quota places for men and 46 for women, to reach the total of 170 allocation spots set aside by the IOC for bobsleigh athletes, and (iii) presented twenty-eight 4-man bobsleigh crews and thirty 2-man bobsleigh crews, compared to twenty 2-

woman bobsleigh crews and twenty female monobob pilots, totaling 31 male pilots (and thus 31 sleds in male bobsleigh competitions) and 26 female pilots (and thus 26 sleds in female bobsleigh competitions). The Qualification System explained that "*the quota place/s is/are allocated to the NOC*", i.e. the National Olympic Committee, and that *"[t]he selection of the athletes for its allocated quota places is at the discretion of the NOC subject to eligibility requirements*".

24. With regard to the monobob, which would see its first inclusion ever in the Olympic Games, the Qualification System reserved 20 slots. Qualification for the monobob event would be achieved on the basis of the IBSF Women's Monobob Ranking and the 2-woman Bobsleigh Ranking for the 2021/2022 season. The Qualification System published on 6 September 2021 determined the qualification procedure as follows:

> **D.2.3 Women's Bobsleigh IBSF Combined Ranking List**
>
> The Women's Bobsleigh IBSF Combined Ranking List will be made by combining the best results of each pilot in both the 2-woman and Women's Monobob events during the 2021/2022 season until the deadline of 16 January 2022 (23:59 Lausanne time) in all races that she had participated in regardless of the race series below in which the results were scored:
>
> - World Cup
> - Europe Cup
> - North American Cup
> - Women's Monobob Series
>
> The maximum number of races taken into account for determining the Women's IBSF Ranking List is seven (7). The Monobob Series may have a lower number of races taken into consideration.
>
> In cases of equal points, the following decision criteria apply for the Women's IBSF Ranking List:
>
> c) First, the highest points obtained in a single race;
> d) Next, the highest points obtained at the last race before the qualification deadline.
>
> (World Cup points are of higher priority than points obtained in the other race series)
>
> **D.2.4 Women's Monobob IBSF Ranking List**
>
> During the 2021/2022 season until the deadline of 16 January 2022 (23:59 Lausanne time), the best results of each pilot's result in the Women's Monobob Series are totaled to form by name for the respective Women's Monobob IBSF Ranking List.
>
> The maximum number of races taken into account for determining the Monobob IBSF Ranking List will be the overall number of IBSF Women's Monobob races within the IBSF Women's Monobob Race Series carried out in the season 2021/2022.

D.2.5 Allocation of quotas for Women's Monobob

D.2.5.1 The quotas for the 4 NOCs with 2 pilots will be allocated to the best 4 NOCs already qualified for the 2-woman bobsleigh event and determined by the second-best ranked pilots in the Women's Bobsleigh IBSF Combined Ranking List (as described in **D.2.3**);

D.2.5.2 The quotas for the 6 NOCs with 1 pilot will be allocated to the best 6 NOCs already qualified for the 2-woman bobsleigh event which have not been allocated a quota place from **D.2.5.1** as of 16 January 2022 (23:59 Lausanne time).

D.2.5.3 The remaining 6 quota places in Women's Monobob will be allocated to the top 6 NOCs with the highest ranked pilot on the Women's Monobob IBSF Ranking List (as described in **D.2.4**) as of 16 January 2022 (23:59 Lausanne time) which have not been allocated a quota place from **D.2.5.1** and **D.2.5.3**.

D.2.5.4I f the host country is not allocated a quota place from D.2.5.1, D.2.5.2 or D.2.5.3, the quota place of the NOC with the lowest ranked pilot on the Women's Monobob IBSF Ranking List (as described in D.2.4) from D.2.5.3 will be allocat-ed to the highest ranked pilot from the host country on the Monobob IBSF Ranking List (Refer to Host Country Places).

25. In summary: for the 20 starting positions in the women's monobob, 14 positions were allocated through a combined ranking including both the 2-woman bobsleigh and women's monobob, while 6 positions were allocated exclusively on the basis of the women's monobob rankings only.

26. In order to be eligible under the Qualification System, a monobob athlete, in addition to age and medical requirements, had to possess a valid IBSF International license and to have been "*participating and ranked in a minimum of six (6) IBSF races on at least 3 different tracks in the period between of 15 October 2020 and 16 January 2022. In addition, the pilot must have been ranked in at least five (5) of the six (6) above mentioned races on a minimum of two (2) different tracks during the 2021/2022 season by 16 January 2022 (23:59 Lausanne time) and must have been ranked among the top 50 in the 2-man and 4-man or Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time)*".

27. The Qualification System also set the procedure for reallocating unused quota places. The procedure stated inter alia that: "*If there are places still available for reallocation, only NOCs which do not already have a qualified team by the end of the qualification period will be considered. Among the potential candidates for reallocation, only the highest ranked pilot in the respective IBSF Ranking List will enable his/her NOC to send a crew to fill a reallocation position*".

28. Finally, the Qualification System established the qualification timeline. Notably, on 16 January 2022 the IBSF Ranking list would be published, on 17 January 2022 the IBSF would inform the NOCs of their allocated quota places, by 19 January 2022 the NOCs would need to confirm use of allocated quota places, between 20-23 January 2022 the IBSF would reallocate unused quota places, and 24 January 2022 would be deadline for the 2022 OWG sports entries.

C. Ms. Adeagbo's failure to qualify for the OWG 2022

29. In February 2021, the Claimant began competing in women's monobob. Before the beginning of the qualification season 2021/2022 for monobob, on 15 August 2021, the Claimant asked specific questions about the workings of the Qualification System to the IBSF Secretary of Sport Administration Mr. Martin Kerbler, who answered them first by email of 20 August 2021 and then, after a follow-up question, by another email of 21 August 2021. Essentially, the Claimant sought to understand how a pilot would qualify for the monobob event in the OWG 2022.

30. The Claimant went on to compete in the 2021/2022 season and accumulated 440 points in the IBSF Women's Monobob Rankings, which put her in 33rd place on the rankings list (out of 45 participants).

31. On 17 January 2022, IBSF informed the NOCs of their allocated quota places for the Olympic bobsleigh and skeleton events at the OWG 2022. With regard to monobob, based on the Combined Ranking, 4 NOCs (Germany, Canada, USA and China) were allocated 2 quota spots each, and 6 NOCs (Russia, Switzerland, Romania, Austria, United Kingdom and Australia) each received 1 quota spot. The remaining 6 quota spots were allocated on the basis of the Women's Monobob Ranking to the NOCs of the Netherlands, Korea, France, Slovakia, Jamaica, and Ukraine. Based on the female pilots' ranking and competition status, the Claimant's NOC was second in line to earn a reallocated quota place in the monobob event, behind the Italian NOC. The NOCs which were granted a spot had until 19 January 2022 to confirm that they would use it or their unused quota places would be reallocated to other NOCs.

32. The British NOC, which had the right to obtain a spot, informed the IBSF that it did not claim its quota place; hence, as an Italian monobob pilot was ranked next, on 18 January 2022 the IBSF offered the unused quota place to the Italian NOC, which accepted it on the same day. The Nigerian NOC, which was next in line due to the Claimant's ranking, was not offered a quota place.

33. On 18 January 2022, the Nigerian NOC sent the following email to the IBSF:

> "*Thank you for the email regarding the quota allocation in monobob to GBR. However, it is still unclear why this quota allocation would go to a monobob pilot that was not within the top 40.*
>
> *Per the below email from the IBSF's Martin Kerbler to our athlete, Simidele, on August 23rd, 2021, the IBSF confirmed that according to the 'QUALIFICATION SYSTEM FOR XXIV OLYMPIC WINTER GAMES, BEIJING' within Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).*
>
> *A quota allocation for a pilot ranked 43rd in monobob does not fit this criteria. We understand that she is qualified for 2-women per her participation in that event. However, she did not rank in monobob and giving her a spot in monobob based on her qualification in 2-woman is not justified against those athletes who competed in a full season of monobob. Especially those athletes who are monobob specialists. It*

is not clearly stated in the qualification rules that she should have a default quota spot in monobob for this reason.

Is this something we can file a formal objection on?"

34. The same day, Ms. Groesswang, replied on behalf of the IBSF as follows:

"*The Qualification System speaks about:*

Selected pilots must have been participating and ranked in a minimum of six (6) IBSF races on at least 3 different tracks in the period between of 15 October 2020 and 16 January 2022. In addition, the pilot must have been ranked in at least five (5) of the six (6) above mentioned races on a minimum of two (2) different tracks during the 2021/2022 season by 16 January 2022 (23:59 Lausanne time) and must have been ranked among the top 50 in the 2-man and 4-man or Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).

The difference would have been if we had spoken only about the 2-woman and Women´s Monobob Top 40 from which the Women´s Combined List is created.

But since we explicitly mention the Top 40 for the Women´s combined List, GBR is under the Top 40 of that list and therefore considered for the allocation of the 2-woman bobsleigh quota. Which then furthermore allows her to move to the Women´s Monobob allocation process".

35. Later that day of 18 January 2022, the Claimant followed-up with the following email to the IBSF Athletics Committee and its Chairman:

"*I would like to get more clarity on the Beijing 2022 Olympic quota selection spots for Women's monobob. It is my understanding that the women's monobob will be inclusive of 14 total athletes including 6 NOCS with one team from the combined Women's Bobsled Ranking List. We noticed that GBR received a quota spot in Women's Monobob, however that athlete is not ranked in Women's Monobob; she is only ranked in 2-Women's bobsled.*

Per an email that I received from the IBSF's Martin Kerbler on August 23rd, 2021, the IBSF confirmed that according to the 'QUALIFICATION SYSTEM FOR XXIV OLYMPIC WINTER GAMES, BEIJING' within Top 40 in the 2-woman, Women's Monobob and Women's Bobsleigh Combined Ranking List per event (IBSF Discipline Ranking List) of the season 2021/2022 by 16 January 2022 (23:59 Lausanne time).

A quota allocation for a pilot ranked 43rd in Women's monobob does not fit this criteria. Per below email communication, my federation, The Bobsled and Skeleton Federation of Nigeria, has reached out to the IBSF for clarity. However, it is still unclear why this quota allocation would go to a monobob pilot that was not within the top 40.

My federation will continue to seek clarity and take necessary action to file a formal objection on this quota allocation selection. From an athlete's perspective, can you please let me know what steps I can take to also file a formal objection to this quota

allocation selection? Stephen H. Hess is listed as the Chairman of the Appeals Tribunal and I would like to engage him to action a formal appeals process. Can you please provide his email address so I can reach out to him immediately? I also welcome your recommendations on any available IBSF formal processes for athletes to address matters of this nature.

As this is time sensitive, I'd be grateful if you can please revert back to me as soon as possible with clarification and recommended next steps on this matter".

36. The IBSF Athlete's Committee Chair, Ms. Christina Hengster, replied on the same day as follows: "*Your NOC has always the possibility to go the legal way, if they interpret the rules different. I just studied the criterias and read it again and again. In my opinion the IBSF like Heike wrote you interprets it the right way. The way to contact Stephen Hess, is contacting the sectetary general of the ibsf, they forward your mail. Hope this Information helps you, if you ve any firther questions, just let me know*" (mistakes in the original).

37. On 23 January 2022, the IBSF published the final quota allocation for monobob. It did not include the Nigerian NOC and, on 24 January 2022, it informed the Claimant that no more spots were available.

38. On 2 February 2022, the Claimant answered Ms. Hengster's email of 18 January 2022 (*supra* at para. 36) by thanking for her "*response and perspective on this*" and specifying that she had "*no further questions at this time*".

39. On 13 and 14 February 2022 the monobob competition took place at the OWG 2022.

40. On 15 February 2022, during the OWG, Counsel for Claimant wrote to the IBSF (and cc to the IOC) indicating that "*Ms. Adeagbo intends to seek redress before the Court of Arbitration for Sport ('CAS'). Before filing a petition with CAS, we are writing to confirm that there is no internal IBSF procedure that should first be exhausted to seek redress for Ms. Adeagbo with respect to her illegal exclusion from the Beijing Olympics and to seek a ruling requiring IBSF, and the IOC, to provide equal sled allocation for male and female bobsleigh athletes in the future. Unless the IBSF identifies such an internal procedure for first seeking this legal relief within the next ten days, Ms. Adeagbo will file a petition for relief directly with CAS*". Counsel for Claimant closed the letter by declaring that "*unless IBSF informs us otherwise by 5:00 pm EST (22:00 UTC) on February 25, 2022, we will proceed with initiating an arbitration proceeding before CAS to seek redress for Ms. Adeagbo and to end this continuing discrimination against female bobsleigh athletes*".

D. Expected quota split for the OWG 2026

41. According to the Official Programme of the next Winter Olympics – OWG Milano Cortina 2026 – there is further growth in the number of female bobsleigh athletes. The quota places for women will increase from 46 to 56, with five additional starting positions in the 2-woman Bobsleigh (totalling 25 instead of 20) and there will be a reduction of male bobsleigh athletes by 10 quota places. This will mark the first time that female pilots outnumber male pilots by 3 (31/28).

III. THE PROCEEDINGS BEFORE THE CAS

42. On 8 March 2022 the Claimant filed a Request for Arbitration in accordance with Article R38 of the Code of Sport-related Arbitration (the "CAS Code").

43. On 23 and 27 May 2022, respectively, the First Respondent and Second Respondent filed their respective Answers to the Request for Arbitration in accordance with Article R39 of the CAS Code.

44. On 24 May 2022, the CAS Court Office notified the Parties that, on behalf of the Deputy President of the CAS Ordinary Arbitration Division and pursuant to Article R40.3 of the CAS Code, the Panel appointed to decide the matter would be constituted by Prof. Massimo Coccia, as chairman, Mr. Jeffrey Mishkin nominated by the Claimant, and Dr. Annabelle Bennett nominated by the Respondent.

45. On 1 June 2022, the CAS Court Office notified the Parties that Mr. Francisco Larios, Attorney-at-Law in Miami, Florida, USA had been appointed as a*d hoc* clerk in the present arbitration in accordance with Article R40.3 of the CAS Code.

46. On 27 July 2022 the Panel, in accordance with Article R44.1 of the CAS Code and based on the agreement reached by the Parties on the procedural calendar, issued Procedural Order no. 1 ("PO1"), giving directions in connection with the Parties' written submissions and requests for production of documents.

47. On 26 August 2022, the Claimant filed her Statement of Claim in accordance with Article R44.1 of the CAS Code.

48. On 2 December 2022, the Respondents filed their respective Responses in accordance with Article R44.1 of the CAS Code.

49. In accordance with PO1, the Parties submitted their respective Redfern Schedules, following which, on 25 January 2023, the Panel issued Procedural Order no. 2 ("PO2") on the requests for the production of documents in accordance with Article R44.3 of the CAS Code. The Panel issued further instructions on this matter following disputes between the Parties about the search terms for the production of documents. The Parties fully complied with the Panel's instructions and produced the documents ordered to be produced.

50. On 10 March 2023, the Panel, in accordance with Articles R43 and R.44.1 of the CAS Code, issued a Confidentiality Order, related in particular to any document produced during the document production phase, which was subsequently signed for acceptance by each of the Parties.

51. On 2 May 2023, the Claimant filed her Reply Brief in accordance with Article R44.1 of the CAS Code.

52. On 26 July 2023, the Panel sent the Parties a copy of the judgment dated 11 July 2023 of the European Court of Human Rights ("ECtHR") in the *Semenya v. Switzerland* case and invited them to submit comments thereupon.

53. On 29 August 2023, the Claimant submitted her comments on the ECtHR's *Semenya v. Switzerland* judgment.

54. On 9 and 10 October 2023, respectively, the First Respondent and Second Respondent filed their respective rejoinders in accordance with Article R44.1 of the CAS Code. Both Respondents provided their comments on the ECtHR's *Semenya v. Switzerland* judgment in their respective Rejoinder.

55. On 23 November 2023, the Panel rejected the Claimant's request of 21 November 2023 to hire a court reporter to attend – either in person or virtually – and transcribe the first day of the two-day hearing set for 28 and 29 November 2023. The Panel denied the request because it was submitted too late to allow the Parties to try and find an agreement, or, alternatively, to allow the CAS Court Office to organize it by appointing a neutral court reporter. The Panel noted that, in any case, the hearing would be recorded and the CAS Court Office would make every effort to deliver the recording of the first day immediately after that day ended (which it duly did).

56. On 28 and 29 November 2023, a hearing was held at the CAS headquarters. In addition to the Panel, the *ad hoc* clerk Francisco A. Larios and the CAS Head of Arbitration Antonio de Quesada, the following individuals attended the hearing either in person or remotely:

- For the Claimant:
  - Ms. Simidele Adeagbo (Claimant)
  - Ms. Cardelle Spangler (Counsel)
  - Ms. Mathilde Lefranc-Barthe (Counsel)
  - Ms. Angela Smedley (Counsel)
  - Mr. Scott Sherman (Counsel)
  - Ms. Juliette Huard-Bourgouis (Counsel)
  - Mr. David Feher (Counsel)
  - Mr. Drew Washington (Counsel)
  - Ms. Charlotte Monroe (Counsel)
  - Mr. Patrick Quinn (Expert Witness)
- For the First Respondent:
  - Mr. Stephan Netzle (Counsel)
  - Mr. Frank Meyer (Counsel)
  - Ms. Miram Koller-Trunz (Counsel)
  - Mr. Heike Groesswang (IBSF Secretary General)
  - Mr. Nicola Minichiello (IBSF)

- Mr. Martins Dambergs (IBSF VP Legal)

– For the Second Respondent:

- Mr. Antonio Rigozzi (Counsel)
- Mr. Michele Potestà (Counsel)
- Mr. Donald Slater (Counsel)
- Ms. Marie-Christin Bareuther (Counsel)
- Ms. Mariam Mahdavi (IOC Director of Legal Affairs)

57. At the beginning of the hearing, the Parties stated that they had no objections to the constitution and composition of the Panel.

58. At the end of the hearing, the Parties made no procedural objections and acknowledged that the Panel had fully respected their rights to be heard and to be treated equally throughout the proceedings.

59. On 29 December 2023, the Panel informed the Parties that it did not consider itself sufficiently briefed by the Parties on the issue of exhaustion of legal remedies and, for that reason, invited the Parties to submit post-hearing briefs with their respective views on legal questions asked by the Panel related to that matter. The questions were the following:

> "*1. Is there a requirement of exhaustion of internal remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes?*
>
> *2. Does Swiss jurisprudence related to exhaustion of internal remedies and Article 75 CC (see for example ATF 85 II 525) apply to CAS proceedings? Does it apply only to CAS appeals proceedings or also to CAS ordinary proceedings? (See for example an ordinary case where the issue of exhaustion of internal remedies was discussed: CAS 2003/O/466 NISA v. ISU, published in Sweet & Maxwell's International Sports Law Review, no. 4/2004, SLR-48).*
>
> *3. Is exhaustion of internal remedies an admissibility or a jurisdictional requirement under Swiss law?*
>
> *4. In another CAS case (CAS OG 22/05), the IBSF explicitly waived the requirement of exhaustion of internal remedies; in the case at hand, did the IBSF waive such requirement by not explicitly raising it as a defense?*
>
> *5. If the IBSF were to be considered to have waived the requirement of exhaustion of internal remedies, would this affect the Respondents' defence that Ms. Adeagbo did not comply with the 21-day time-limit?*".

60. On 29 January 2024, the Parties submitted their respective post-hearing briefs answering the aforementioned questions.

IV. OVERVIEW OF THE PARTIES' POSITIONS

A. The Claimant: Ms. Adeagbo

61. In her prayers for relief, identically submitted in her Statement of Claim and in the subsequent briefs, the Claimant requests that the Panel order the following:

> "*1. Declaring that Respondents' Olympic Bobsleigh Qualification System for the 2022 Winter Olympics discriminated against female athletes, on the basis of gender, because it employed a quota allocation scheme that allocated disproportionately fewer quota places to women than to men in their respective bobsleigh events, without any justification;*
>
> *2. Declaring that Respondents' Olympic Bobsleigh Qualification System for the 2022 Winter Olympics discriminated against female athletes, on the basis of gender, because it applied a total athlete quota that further inequitably and disproportionately reduced the number of athlete competition spots available to women as compared to men in their respective bobsleigh events, without any justification;*
>
> *3. Requiring Respondents to provide equal quota place allocation for comparable male and female bobsleigh events on a going-forward basis;*
>
> *4. Requiring Respondents to pay Ms. Adeagbo monetary damages in an amount corresponding to her lost earnings and lost potential earnings due to her unjustifiable exclusion from the 2022 Winter Olympics; and*
>
> *5. Directing any other relief necessary to eliminate the practice of gender discrimination by Respondents that the CAS Tribunal shall deem appropriate*".

62. In support of her position, the Claimant submits the following:

<u>On admissibility</u>:

a. The Claimant's claim was properly qualified as an ordinary arbitration subject to Article R38 of the CAS Code and Respondents are prohibited, pursuant to Article R20 of the CAS Code, from challenging said designation now. Even if Respondents could challenge the designation, it would still not qualify as an "appeal" under Article R47 of the CAS Code because no "decision" of a federation was ever reached.

b. The Claimant's claim is not a challenge to an IBSF decision at all: it is a tort and discrimination claim for damages based on Article 41 SCO, Articles 27 and 28 SCC and Articles 8 and 14 of the European Convention on Human Rights ("ECHR"). As such, the Claimant was not required to take her case through IBSF internal procedures. Nor can it be qualified as an appeal or be subject to the time limits applicable to appeals. It is only subject to the statute of limitations for tort claims under Swiss law, which is three years as provided in Article 60 SCO.

c. The CAS is the court of exclusive jurisdiction over athletes' discrimination claims against their sports federations. Any proposition that the IBSF internal bodies should be the first instance in a statutory tort and damage claim brought against the IBSF is irrational and contrary to basic principles of due process, as it would

not comply with a party's right of access to an impartial and independent judge as guaranteed under Swiss law by Article 6 of the ECHR. The Claimant has not waived, under Article 18 of the IBSF Statutes, her right to submit statutory claims arising from personality rights infringements under Swiss law or claims of gender discrimination protected by the ECHR.

d. There is no requirement of exhaustion of remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct. Article 18 of the IBSF Statutes, by its terms, provides no internal procedure suitable for adjudication of the Claimant's tort claim for damages. Neither of the provisions covers a dispute between an athlete and the IBSF based on statutory rights under Swiss law and does not concern the interpretation or enforcement of any IBSF statute. Where no internal remedy is readily available, exhaustion is not required. This was confirmed by the IBSF's and IOC's silence to the email from Claimant to the IBSF dated 15 February 2022, where she inquired as to whether there was an internal IBSF dispute resolution procedure that the Claimant could exhaust. Moreover, it is supported by CAS 2004/O466 which held that in the absence of a "*true internal remedy*", a party is permitted to submit a dispute directly to CAS as an ordinary arbitration. The CAS panel in that case found that an internal remedy must be "*readily and effectively available to the aggrieved party and it must grant access to a definite procedure*".

e. Swiss law of international arbitration, as set forth in Chapter 12 PILA, is the only law that governs issues of international arbitration procedure for arbitrations seated in Switzerland. Article 75 CC provides the basis for an action for annulment or nullity of a decision adopted by a sports federation. Since the Claimant has not challenged any resolution by IBSF, Article 75 CC is inapplicable. In any case, Swiss law confirms that tort actions remain available to parties aggrieved by the decision of an association, separate and apart from their right to challenge a decision under Article 75 CC. Therefore, Article 75 CC would not bar the Claimant from pursuing the present tort action pursuant to Article 41CO.

f. In the context of CAS arbitration proceedings, the exhaustion of internal remedies is an admissibility requirement not a jurisdictional one.

g. Even if the Claimant were required to exhaust internal remedies in this matter, CAS precedents and Swiss law confirm that the IBSF waived any such requirement by failing to raise this defense in its Answer to the Request for Arbitration, and, separately, by failing to provide any response to letter of the Claimant to the IBSF dated 15 February 2022 making it clear that it was not willing to grant the Claimant effective legal protection or hear her case.

h. The IBSF's waiver of the exhaustion of internal remedies requirement nullifies its appeal and 21-day time limit arguments, which were, in any case, belatedly raised and have no bearing on this Ordinary Arbitration Procedure. But even if the present case were considered an appeal procedure, and there was a "decision", it would be the IBSF's silence to the letter of the Claimant to the IBSF dated 15 February 2022 (see e.g. CAS 2020/A/6921 & 7297 at paras. 123 and 126; CAS 2005/A/944 at para. 7). Since the Claimant's counsel gave the IBSF 10 days to respond to that letter, the "decision" would be of 25 February 2022 – fewer than

21 days before the Claimant filed her Request for Arbitration on 8 March 2022, thereby making the Claimant's claim timely and admissible.

On the merits:

i. The Claimant was narrowly excluded – by a single quota place – from the monobob event at the OWG 2022 because of gender discrimination in the allocation of quota places for men and women to compete in the bobsleigh sports, which violated the Olympic and sporting principles, Swiss law, international public policy, and the Claimant's human rights.

j. The Qualification System used a discriminatory quota allocation scheme to qualify athletes for the bobsleigh sports, allocating fewer quota places to women than to men in their respective events and applying caps on the total number of bobsleigh athletes permitted to qualify, in a manner that further and disproportionately restricted the number of women athletes. This allocation scheme drastically limited the number of competition spots for women in the bobsleigh sports compared to the number of competition spots available for men. As a result, the Claimant was excluded from Olympic competition even though she would have qualified – being the next eligible monobob athlete on the list – if the same number of quota places had been made available to men and women and if the total athlete quota had been equitably applied, i.e. if women bobsledders were allocated the same number of quota places as men.

k. The Qualification System's allocation scheme produced a 2.7-to-1 male/female ratio (124:46). The Qualification System also inflicted discrimination in other forms, such as requiring 14 of the 20 quota spots allocated to women's monobob to be reserved for athletes already competing in the 2-woman bobsleigh event, which resulted in only 6 quota places being available to women athletes competing exclusively in the monobob event.

l. If women bobsledders had been allocated the same number of quota places as the men, 10 more monobob and 8 more 2-woman bobsleigh quota places would have been available to women for the OWG 2022, resulting in 10 more monobob and 16 more 2-woman bobsleigh competition spots, for a total of 86 women's competition spots altogether. And if the total athlete quota were applied equitably to men and women, this number would have been capped at no less than 62 women bobsleigh athletes – half of the men's total quota – instead of the 46 that the Qualification System actually permitted. Alternatively, if the IBSF and IOC had interest in maintaining the same overall number of 170 total athletes, a proper 2:1 ratio would have yielded 114 competition spots for men bobsleigh athletes and 56 athlete competition spots for women. In either case, the quota places allocated to the women's bobsleigh events, including monobob, required an increase, and any increase in quota places allotted to the monobob event would have qualified the Claimant to the OWG 2022.

m. The evidence supports the contention that the IBSF committed willful discrimination and that the IOC was complicit therein. The IBSF knew that it should be offering equal opportunities to women – not only in terms of equal number of events but also in competition spots – but refused to do so. Indeed, a March 2018 document from the WWG revealed acknowledgment within the IBSF

of the ethical imperative to promote equality and increase female participation in bobsleigh, noting that it was "*the right thing to do*" and that "*now [wa]s the time to create gender equality in bobsleigh*". The same document noted that the ISBF had "*the lowest percentage of females participating in all Olympic sports both summer and winter*" and underscored the need to "*improve the gender balance of athletes competing at the 2022 OWG*" because the then current breakdown for bobsleigh was 73% men and 27% women. Regrettably, despite efforts by the WWG, resistance from within the IBSF hindered progress towards creating additional opportunities for women athletes, as the "conservative" leadership sought to prioritize maintaining a greater number of bobsleigh opportunities for male athletes. This difficulty –and outright resistance to actual gender equality – severely frustrated WWG member Mr. Martin Kerbler, who reached a boiling point when he was informed that the WWG's proposal for the addition of a 4-woman bobsleigh event would have to be reduced "dramatically." Mr. Kerbler contacted the IBSF Secretary General to advise that he had determined the WWG had "*not the slightest interest in serious further development of our sports*" and to report how "*appalled*" he was "*at how costs are knowingly falsified, facts are denied, and thus my own colleagues are 'duped'*" when trying to execute the group's mission. Because of the IBSF's intransigence when it came to effectuating gender equity, Kerbler asked to be dismissed from the WWG. Ultimately, the IBSF rejected the 4-woman bobsled proposal and only agreed to add an additional women's bobsleigh event – monobob – to the OWG 2022, creating far fewer new competitive opportunities for women to close the gender equality gap. This decision was made despite many factors weighing in favor of introducing the 4-woman bobsleigh event. The IBSF internally acknowledged that the reason for adding the monobob as opposed to a 4-woman event was to "*[a]void [any] negative impact on men's bobsleigh*" and avoid "*reducing [the] men's quota drastically*". While the IBSF understood that the IOC's principle goal was to achieve 50% female participation, the ISBF ended up adding 21 bobsleigh athlete competition spots for men for the OWG 2022, while increasing women spots by only 6, actually worsening the male/female ratio.

n. The Qualification System's differential treatment between male and female bobsleigh athletes constitutes discrimination on grounds of sex and violates the principle of equality between men and women and the prohibition of gender-based discrimination enshrined in:

i. The Fundamental Principles nos. 4 and 6 of Olympism set forth in the Olympic Charter.

ii. Article 1.5 of the IBSF Statutes and Article 4 of the IBSF Code of Ethics.

iii. Swiss domestic law, specifically, Article 8 of the Swiss Constitution, Article 3 of the Federal Act on Gender Equality (the "Gender Equality Act"), and Article 10 of the Constitution of the Canton of Vaud dated 14 April 2003.

iv. The principle of equality between women and men and the prohibition of gender-based discrimination forming part of substantial public policy in the meaning of Article 190 of PILA and emanating from:

- Articles 1 and 2 of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations ("UN") on 10 December 1948 (General Assembly resolution 217 A);
- Articles 1 and 13(c) of the UN Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979, which was ratified by Switzerland);
- Article 14 in combination with Article 8 ECHR and Protocol no. 12 of the ECHR;
- Article 23 of the Charter of Fundamental Rights of the European Union; and
- Mandatory European Union law.

o. The Qualification System also violated the Claimant's personality rights under Articles 27 and 28 of the Swiss Civil Code of 10 December 1907 ("SCC"), including her right to participate in the sport of her choice and her right to professional and economic freedom.

p. Respondents have not established that the discrimination was necessary, reasonable and proportionate. The only and true reason the IBSF did not implement a gender-equal system for the OWG 2022 is that it wished to preserve a greater number of spots for male athletes. None of the following justifications raised by Respondents for not creating a gender-equal quota system are legitimate:

i. That men and women had an equal number of events in the OWG 2022. This is not a legitimate justification because the opportunity to compete remains entirely unequal. It is "*equality of opportunity*" that is required, as has even been recognized by the IBSF itself (see the April 2018 IBSF document concluding that "*now is the time to create gender equality in bobsleigh and have the same opportunities for women as there are for men*"). Under the IBSF's errant logic, it could offer two events with 4 quota places to woman and two events with 1,000 quota places to men and call this "equal".

ii. That there was an insufficient number of women bobsledders and pilots to fill additional quota places. There were unquestionably enough licensed and ranked women bobsledders and pilots to fill the 18 additional quota places that would have provided the 2-woman and monobob events with the same number of places afforded to men (58).

iii. That there was a lack of athletic skill and training in women to hold a 4-woman bobsleigh event in the OWG 2022. This is not a legitimate justification because it is factually inaccurate. Claimant was skilled enough (having competed in monobob for 3 seasons) and if only one additional spot was open, she would have qualified. Moreover, the IBSF never established any multi-year experience or training requirement for men seeking to qualify for the OWG 2022, so it cannot be expected from women.

iv. That about 20% of both male and female licensed bobsleigh athletes qualified for the OWG 2022 or that a greater percentage of women bobsledders competing at international level qualified for the OWG 2022. This is not a

legitimate justification because it is likely the IBSF's discriminatory policies that led to the smaller number of overall female bobsledders. Moreover, even if men's interest in the sport was higher, this does not justify having a system that does not give equal opportunity to those women interested in competing. This was shown in the sport of skeleton which reached gender equality in the OWG 2022 despite the pool of licensed male skeleton athletes (180 individuals) being nearly 50% higher than licensed female skeleton athletes (138).The only relevant question is whether there were enough qualified female bobsleigh athletes to compete which, undeniably, there were.

v. That there were alleged safety concerns preventing an increase in women quota places. There is no evidence that increasing women quota places would put athlete safety at risk.

vi. That Respondents amended "over the years" to increase the number of female teams in the 2-woman bobsleigh from 15 to 20 and had taken other actions to benefit women bobsleigh athletes (such as giving them financial support, awarding them equal prize money, providing maternity leave and creating a Diversity and Gender Equity Working Group). These are not legitimate justifications because they do not excuse or compensate for the creation and maintenance of a Qualification System that violated the most fundamental gender equity requirement of an equal opportunity to compete.

vii. That Rule 45 of the Olympic Charter caps spots to 170 athletes for all bobsleigh disciplines. This is not a legitimate justification because nothing prevented the IOC from increasing the number of spots (over which it has full control and which it has not strictly enforced in the past) or the IBSF from dividing the 170 quota places equally between men and women. In fact, as part of its Agenda 2020 for the OWG 2022, the IOC added and reallocated quota places and reached full gender balance in 10 out of 15 disciplines, but did not do the same for bobsleigh.

viii. The fact that there is a larger number of licensed male bobsledders than licensed women bobsledders. This is not a legitimate justification because in skeleton, which is the most comparable sport to bobsleigh, the IOC removed 5 men's quota places and added them to the women's skeleton events in the OWG 2022, despite the fact that there were significantly more male than female athletes licensed in the sport. The same could and should have been done with bobsleigh. Instead, the IBSF rejected its own WWG's suggestions to have a 4-woman bobsleigh event in the OWG 2022 that would have eliminated the discrimination in order to preserve spots for men.

ix. That the Combined Ranking Rule allegedly brings new female pilots to bobsleigh. As a result of this rule, only 2 monobob-only athletes got to compete in the 2022 Olympics; the other 18 spots went to athletes who also compete in 2-woman bobsleigh. The Combined Ranking Rule only offered more opportunities for the same women to compete in more events, and denied other capable female monobob pilots from competing in the OWG 2022.

q. The fact that bobsleigh is to reach gender equality for the 2026 OWG is an implicit admission that the Qualification System for the OWG 2022 was discriminatory, since Respondents reached gender equality with the total athlete quota remaining the same and no evidence that the number of women licensed in bobsleigh has changed significantly.

r. Due to this gender discrimination, the Claimant has been unjustly and unjustifiably excluded from the OG, causing her to suffer actual and potential economic damages for which Respondents are liable pursuant to Article 41 SCO. The expert witness, Mr. Quinn (founding partner of Chicago Sports & Entertainment Partners, a full-service sports and entertainment marketing, management, and consulting agency), after interviewing the Claimant, reviewing her endorsements and other sponsorships, and analyzing data regarding her sports-related earnings, estimated that her exclusion from the OWG 2022 resulted in the following losses:

i. The loss of […] from her […] sponsorship for qualifying for the OWG 2022 and the opportunity for an additional […], […] and […] for medalling gold, silver or bronze at the OWG 2022;

ii. The lost opportunity to earn from her […] sponsorship […] for gold, […] for silver and […] for bronze at the OWG 2022;

iii. The lost opportunity to earn more money via sponsorship agreements and endorsement deals (for example, […] decided not to renew her sponsorship and Mr. Quinn estimated that the […] renewal deal would have been […] higher had she not been excluded from the OG);

iv. The lost opportunity for higher earnings and more speaking engagements (for which she had earned a total of […] in 2021, but only […] in 2022 after her exclusion from the OWG 2022 and an expected […] lower than that in […] leading up to the next Olympics);

v. The loss of sales of her children's book *Sleigh, Sleigh, Sleigh All Day* which would have received higher media attention;

vi. The loss of media coverage, in particular a stunted growth of her social media account.

s. Mr. Quinn submits that the Claimant suffered estimated damages in the total amount of […], calculated as follows: […]. This does not include additional losses from the Claimant's endorsement earnings, social media activity, and publishing business. Claimant is also entitled to moral damages pursuant to Article 49 SCO for the Respondents' breach of her personality rights. She has suffered a loss of reputation, as evidenced by her loss in social media growth, decrease in speaking engagements and contracts which were never executed due to the breach.

B. The First Respondent: IBSF

63. In its prayers for relief, submitted in its Answer, the First Respondent requests the Panel to rule as follows:

<u>In the Answer to the Request for Arbitration</u>:

"*1) to dismiss the Claimant's Requests for Relief to the extent they are admissible;*

2) to order that the Claimant shall pay the entire costs of this arbitration procedure;

3) to order that the Claimant shall pay a fair contribution to the Respondent's legal costs and expenses related to the present arbitration procedure".

In the Answer to the Statement of Claim:

"*(1) To terminate the present procedure because of the Claimant's late filing of her complaint (Article R49 CAS Code);*

(2) Subsidiarily: to dismiss all of the Claimant's Requests for Relief.

(3) To order that the Claimant shall bear the costs of this arbitral proceeding.

(4) To order that the Claimant shall pay a fair contribution to the legal costs and expenses of the First Respondent and that the CAS shall return the share of the Advance on Costs paid by the First Respondent to the IBSF".

In the Rejoinder:

"*(1) To terminate the present procedure because the Claimant's complaint is inadmissible;*

(2) Subsidiarily: to dismiss all of the Claimant's Requests for Relief;

(3) In any event, to order that the Claimant shall bear the costs of this arbitral proceeding;

(4) In any event, to order that the Claimant shall pay a fair contribution to the legal costs and expenses of the First Respondent and that the CAS shall return the share of the Advance on Costs paid by the First Respondent to the IBSF".

64. In support of its position, the First Respondent submits the following:

On admissibility:

a. The Claimant's action is procedurally inadmissible because she failed to (i) timely challenge the IBSF's decision to adopt the Qualification System or the IBSF's final decision, communicated to the NOCs and the NFs on 24 January 2022, on who was admitted to the OWG 2022, and (ii) exhaust legal remedies at the IBSF before submitting her claim to the CAS. Claimant's complaint qualifies as an appeal and, as such, she had to exhaust legal remedies and submit her appeal within 21-days of the challengeable decision. Moreover, Claimant's request to change the Qualification System "*on a going-forward basis*" is inadmissible because it deals with future policy choices.

b. There is a requirement of exhaustion of legal remedies under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes. Article 18 provides an internal dispute resolution procedure to the exclusion of any other remedies or means. A dispute can only be submitted to CAS if it was first heard and decided by the IBSF Appeals Tribunal. If a party fails to comply with the pre-arbitration requirement of Article 18, the CAS must declare any claim filed

directly with it inadmissible and dismiss it for lack of a precondition for arbitration.

c. Swiss jurisprudence related to exhaustion of internal remedies and Article 75 CC apply to CAS proceedings because the IBSF and the IOC are subject to Swiss law and, more generally, because Swiss law applies to the dispute. A challenge of a decision of an association under Article 75 CC may be brought before an independent arbitral tribunal such as the CAS if so provided by the statutes of that association. Such a challenge requires the applicant to exhaust any internal remedies and for the association to issue a final decision. The allocation of a case as an appeal or ordinary procedure before the CAS is only administrative and affects only the set of procedural CAS rules to be applied; it does not prejudice in any way the "nature of the claim", nor does it preclude the fulfilment of the exhaustion of legal remedies. The requirement of exhaustion of internal remedies only comes into play if a "true internal remedy" is available and applies to both CAS appeals and ordinary arbitrations. The ISBF did provide an internal remedy for the Claimant's challenge: a claim before the IBSF Appeals Tribunal. Therefore, she had to exhaust it.

d. The exhaustion of legal remedies under Article 75 CC is an admissibility and not jurisdictional requirement under Swiss law.

e. As a consequence (and considering the imperative character of the exhaustion of internal remedies as a requirement under Art. 75 CC), the requirement of exhaustion of internal remedies may be waived under the truly exceptional circumstances, that otherwise, the time needed to exhaust the internal remedies would make the appeal to the court or arbitral tribunal ineffective. Such waiver may not easily be implied, as it is a true exception to the otherwise mandatory rule. In addition, such waiver must be limited to the requirement of exhaustion of internal remedies but cannot be extended to any other admissibility requirements. Therefore, a waiver of the exhaustion of internal remedies must require an explicit statement of the waiving party. These strict requirements have not been met in the present case. The IBSF accepted the jurisdiction of CAS but never waived the requirement of the exhaustion of internal remedies or any other admissibility condition required by Art. 75 CC or Art. 18 of the IBSF Statutes or Art. R47 CAS Code, neither explicitly nor implicitly. There was no urgency to do so, since the case was initiated only *after* the closing of the OWG 2022 and had no impact on the starting list for the Olympic competitions.

f. Even if the IBSF is found to have waived the exhaustion of internal remedies (*quod non*), this would not affect the Claimant's obligation to comply with the 21-day time-limit. The IBSF never waived the objection of late filing.

<u>On the merits:</u>

g. The IBSF did not discriminate against the Claimant on the basis of gender in her attempt to qualify for the OWG 2022. The Claimant fails to even make a *prima facie* case for discrimination. Claimant was never "excluded" from the monobob competition of the OWG 2022. Her NOC simply did not qualify under the clear, transparent and fair Qualification System. The allegation of discrimination has no factual or legal foundation because:

i. The IBSF developed and implemented a balanced qualification system for the OWG 2022, carefully taking into account all relevant framework conditions, requirements and policy considerations. It decided to introduce into the OWG 2022 the discipline of women's monobob, by which it (i) added 20 more pilot spots, increasing the opportunity for female athletes to compete in bobsleigh at the international level, and (ii) leveled the number of bobsleigh medal races available to men and women at two each.

ii. There is no law or rule, which demands the IBSF to have the exact same number of male and female athletes participating in all its disciplines at the Olympic Games.

iii. The monobob event was open for women only. There is no category for male monobob to which the number of quota places for women's monobob can be compared.

iv. The goal in sports is not a mathematically equal treatment of both genders but fairness of treatment according to their needs and possibilities. What can be objectively compared is the number of medal races in all disciplines managed by the IBSF. Here female and male athletes had the opportunity to participate in the same number of bobsleigh medal events – two – in the OWG 2022. What also can objectively be compared are the numbers of IBSF licensed male and female athletes participating in international bobsleigh competitions and the opportunities to make it to the OWG 2022, which show:

   – In the 2020/2021 season, the IBSF issued 851 annual licenses for bobsleigh, namely 235 for female athletes and 612 for male athletes.

   – In the 2021/2022 season, there were 38 female pilots starting in both the 2-woman bobsleigh and the women's monobob, 10 female pilots starting only in the 2-woman bobsleigh, and 8 female pilots starting only in the women's monobob. When it comes to male athletes, 60 pilots started in both the 2-man bobsleigh and the 4-man bobsleigh, while 23 pilots started in the 2-man bobsleigh only and no male pilot started exclusively in the 4-man bobsleigh. By comparison, 46 Olympic quota places were available for 235 licensed female athletes, which corresponds to a ratio of 19.6%, whereas 124 Olympic quota places were available to 612 licensed male athletes, which corresponds to a ratio of 20%.

   – 20 starting positions in the discipline of women's monobob at the OWG 2022 were available to 45 pilots. This means that 44.4% of all women's monobob pilots competing at international level qualified for the OWG 2022.

v. There was no significant gender discrepancy among bobsleigh pilots in the OWG 2022. There were 26 female bobsleigh pilots participating in the OWG 2022, as compared to 31 male bobsleigh pilots. Indeed, 14 female pilots started in both events at the 2022 OWG. In addition, 6 pilots started only in the 2-woman bobsleigh and 6 pilots started only in the women's monobob. As for the men, 30 pilots started in the 2-man bobsleigh, 27 of whom also

started in the 4-man bobsleigh and with only one 4-man bobsleigh pilot not starting in the 2-man bobsleigh.

h. The Claimant was not assured to have qualified for the OWG 2022 even if more spots had been given to women. In fact, in the OWG 2026, despite general participation for females increasing, the six spots open to monobob without a combined ranking has remained exactly the same. Therefore, there is no causation between the alleged discrimination and her missing out on the OWG 2022.

i. The ISBF does not contest at all that it is a desirable goal to close the gender gap in the sports and disciplines for which it is responsible. The IBSF has taken a number of actions to close that gap including, *inter alia*, the 2-woman bobsleigh event at the OWG 2002, increasing the number of female pilots/crews in 2-women bobsleigh at the OWG from 15 to 20 between 2002 and 2010, attempting to introduce 4-woman bobsleigh in 2014, adding monobob as a second medaling discipline in 2022, providing financial support to educate and train female bobsleigh athletes, making entry of female pilots more attractive and less expensive (by offering NOCs the opportunity to buy pre-financed monobob sleds from the IBSF, which Claimant took advantage of), paying out the same prize money to men and women, creating beneficial maternity leave rules and establishing a Diversity and Gender Equity Working Group to help the move towards gender equality. Gender equality cannot be reached overnight but by steps, as has been demonstrated by the most recent changes for the OWG 2026, which for the first time will have a majority of female bobsleigh pilots compared to the number of male pilots (31/28).

j. In developing the Qualification System, the IBSF has not discriminated against women. On the one hand, the IBSF has strictly adhered to the content and formal requirements of the IOC (i.e. competition calendar, number of quota places, compliance with the Qualification System Principles) and, on the other hand, it has used the discretion granted to the international federations by the law and the Olympic Charter in such a way as to ensure high-quality and safe bobsleigh competitions with fair consideration of the broader, not primarily performance-oriented interests of the sport of bobsleigh in general and the Olympic Games in particular, including the promotion of female athletes in bobsleigh competitions.

k. The Claimant has failed to demonstrate that the IBSF violated any sporting rules or laws on gender discrimination with the Qualification System:

i. <u>The Fundamental Principles nos. 4 and 6 of Olympism set out in the Olympic Charter</u>: There is no question that the practice of sport is a human right as set out under the Olympic Charter, but there is no right to participate in the Olympic Games or in the monobob competition. In this respect, the cases of *Chand* and *Semanya* are not relevant. Unlike those cases, the Claimant was admitted to the IBSF competitions without any restrictions or conditions and was never prevented from participating because of her gender or any other personal particularity. She was not deprived of her right to compete but simply failed to achieve the necessary sporting results to qualify for the competition.

ii. The IBSF Statutes and the Code of Ethics: The IBSF Statutes and IBSF Code of Ethics do explicitly prohibit discrimination. The Claimant, however, was not discriminated against. She was eligible to compete in the women's monobob event at the OWG 2022, but she simply did not qualify based on sporting performance.

iii. Swiss law: Article 8 of the Swiss Constitution is inapplicable because it does not have horizontal effects. Article 3 of the Gender Equality Act is inapplicable – directly or by analogy – because it only applies to employment matters and the Claimant is not an employee of the IBSF or IOC. As for Articles 27 and 28 SCC, the fact that the Claimant did not qualify to the OWG 2022 is not a violation of personality rights but the consequence of the correct application of the Qualification System.

iv. ECHR: Article 14 ECHR prohibits discrimination, but it is not a stand-alone guarantee and only applies when there is a violation of another right or freedom guaranteed by the ECHR or another explicit legal provision. The Claimant invokes Article 8 ECHR. However, that provision does not guarantee that an athlete has a "right to exercise a profession by participating in the Olympic Games". There is nothing in *Semenya v. Switzerland* that would endorse the theory that the Claimant has such a right. The *Semenya* case is not a gender discrimination case but deals with discrimination against women compared to other women based on sexual differences. Unlike Ms. Semenya, the Claimant has not been excluded from sporting competition, she simply did not qualify to the OWG 2022 based on sporting criteria and she has not been restricted in the practice of competitive sport. The Claimant had unrestricted access to international competitions in her monobob; she simply did not qualify for the OWG 2022 based on sporting criteria, not because of gender discrimination.

l. The Claimant has failed to demonstrate that men and women are in comparable situations when it comes to the qualification for the bobsleigh events at the OWG 2022. Like must be compared with like. Therefore, the overall numbers of quota places for male and female bobsleigh athletes across all bobsleigh events are irrelevant for determining whether discrimination occurred. The Claimant's claim deals with her alleged exclusion from monobob, a discipline available exclusively for women that, accordingly, lacks a counterpart for comparison in terms of discrimination. As there is no comparator, there is no discrimination.

m. The Claimant actually benefitted from the Qualification System by (i) the introduction of the women's monobob as an additional medal event exclusively for female individual athletes, (ii) the limitation of the number of quota places per NOCs, restricting athletes from countries with a strong presence in international bobsleigh and (iii) the reservation of six starting places exclusively for female pilots who had not already qualified via the combined ranking list. Thus, the Claimant had not only unrestricted access to a level playing field when it comes to the qualification for the OWG 2022 but she also had a privileged chance to qualify for the women's monobob event at the OWG 2022.

n. Any alleged discrimination is justified and proportionate because the Qualification System pursued legitimate sporting and policy goals. The discrepancy in quota places between male and female athletes is not due to gender discrimination but rather to ensure sporting performance, long-term development, and resource availability in women's bobsleigh. More specifically, in setting up the Qualification System, the IBSF aimed to promote female participation in bobsleigh and took into consideration that:

i. bobsleigh has been practiced by women for significantly less time than by men;

ii. the number of active female athletes in national and international bobsleigh competitions is significantly smaller than that of men;

iii. there are far fewer female license holders than male license holders; and

iv. the number of female participants in IBSF events has been and still is significantly smaller than that of male participants;

o. On damages, the Claimant has failed to cumulatively prove (i) a substantiated loss, (ii) an unlawful act by the obliged, (iii) an adequate causal correlation between the unlawful act and the loss, and (iv) culpable conduct by the obligor. With respect to the alleged loss, it is insufficient to offer an expert witness to make general remarks and hypothesize assumptions and draw comparisons to determine her business potential if she had made the OWG 2022. The Claimant has offered no real evidence of a loss. Indeed, there is no evidence that any sponsor or event management terminated or refrained from entering into a contract because she did not qualify the OWG 2022 or that the lower revenues from speaking engagements and other were actually attributable to her non-qualification to the OWG 2022 and not for another reason. All the Claimant has provided are unsubstantiated estimates. Finally, no moral damages are due under Article 49 CO because the Claimant's personality rights were not unlawfully infringed and there is no evidence that her non-qualification led to a lasting negative image.

p. In her motions for relief, the Claimant asks the CAS to require the "*Respondents to provide equal quota places for comparable male and female bobsleigh events on a gong-forward basis*" (3rd Request for Relief). However, to order a party how it should draft its rules and regulations "*on a going-forward basis*" is not the mission of the CAS and it would not even have the competence to do so. The CAS shall adjudicate specific and actual disputes that have arisen between two or more parties. The CAS is not a regulatory authority that prescribes to sports organizations how they should manage their own affairs in the future. That would be outside of the scope of the CAS.

C. The Second Respondent: IOC

65. In its prayers for relief the Second Respondent requests the Panel to render an award:

In the Answer to the Request for Arbitration:

"*(i) Dismissing the Claimant's requests for relief; and*

(ii) Ordering the Claimant to pay all the arbitration costs and all of the costs incurred by the IOC in connection with the present arbitration proceedings".

In the Answer to the Statement of Claim and in the Rejoinder:

"i. Declaring that the Claimant's requests are inadmissible or, to the extent they are admissible, dismissing the Claimant's requests for relief as unfounded; and

ii. Ordering the Claimant to pay all the arbitration costs and all of the costs incurred by the IOC in connection with the present arbitration proceedings".

66. In support of its position, the Second Respondent submits the following:

On admissibility:

a. The Claimant's claim is inadmissible because she did not (i) exhaust legal remedies and (ii) appeal within the applicable 21-day time limit.

b. With regard to the exhaustion of legal remedies, this is a requirement under Article 18 of the IBSF Statutes and Section 5 of the IBSF Code of Conduct for Athletes. Article 18 provides that disputes shall be resolved "*in first instance*" by the IBSF Appeals Tribunal before being brought before CAS and Article 5 reiterates the fundamental obligation of exhaustion of internal remedies by specifically referring to the requirement to "*use the appropriate IBSF appeal and dispute resolution channels*" and specifying that CAS "*will be the final arbitrator of any dispute*". The requirement to exhaust internal remedies applies to all CAS proceedings in which a party is challenging a decision rendered by a Swiss association, whether the challenge has been (correctly) brought under the CAS Appeals proceedings or (incorrectly) brought under the CAS Ordinary Proceedings.

c. As to the 21-day time limit, Claimant seeks to circumvent it by purporting her case to be of an "ordinary" nature. The fact that the CAS Court Office assigned the present proceeding to the CAS Ordinary Division does not prove that there was no appealable decision triggering the limited appeal window. The inability under Article S20 of the CAS Code to challenge this assignment is irrelevant since the allocation is a mere administrative action without any legal consequences apart from defining the applicable arbitration rules.

On the merits:

d. The reason that the Claimant did not compete in the OWG 2022 is because her sporting results were not good enough and, accordingly, her NOC did not meet the qualification criteria for participation therein. There was no "discrimination", let alone willful discrimination, based on gender or otherwise against the Claimant. From a legal perspective, the fact that the OWG 2022 do not provide the same number of quotas places for male and female bobsledders is not an unlawful discrimination based on gender.

e. A fair reading of the IBSF documents related to the proposals for women's monobob and 4-woman bobsleigh shows that the exchanges of views within the WWG were due to legitimate considerations about the best way to promote women bobsled as an important part of the development of the sport as a whole and that the goal was certainly not to preserve most of the places for men.

f. The IOC strives to achieve gender equality in athlete quotas and medal events at the Olympic Games, but there is no enforceable obligation to do so – and it is a goal for the Olympic Games as a whole, not necessarily the immediate goal for each sport, let alone discipline. Nevertheless, taking guidance from the UN Convention on the Elimination of All Forms of Discrimination Against Women, the IOC has achieved a level of gender equality at the Olympic Games that exceeds that of many other fields of society. Indeed, the IOC has achieved full gender equality with respect to the total number of athlete quotas and the total number of medal events at the impending Olympic Summer Games in Paris 2024. As for the OWG, which covers sports like bobsleigh that, traditionally, have been predominantly if not exclusively practiced by men, the IOC has made significant strides towards full gender equality and the OWG 2026 will see a total number of medal events of 54 for men and 50 for women and a total number of athlete quotas at 1,538 for men and 1,362 for women. This is a 47% total quota spots for women and a steady increase from past OWGs (40% in 2014, 41% in 2018, 45% in 2022). As for bobsleigh specifically, it is remarkable that only 20 years after its first time in the OWG, it already has an equal number of medal events between men and women and that, at the OWG 2026, there will be a proportionally equal number of quota places for men and women.

g. The Claimant does not have a legal "right" to participate in the Olympic Games. Even assuming her sporting results were good enough to earn a quota place for her NOC, the NOC would have been free to choose a different athlete and would not have been obliged to select the Claimant.

h. The Claimant's case is based on the simplistic assumption that she suffered the same kind of discrimination as the athletes in the *Dutee Chand* and *Semenya* cases. Unlike in the present case, in *Dutee Chand* and *Semenya* women athletes were objectively (and admittedly so by the IAAF) discriminated against compared to other women athletes because of their physiological characteristics. In those cases, the panels were concerned with the narrow, and entirely different, question of the "*conflicting rights concerning the rights of female athletes who do, and do not, have DSD [differences of sex developments]*". In this case, contrary to *Chand* or *Semenya*, the Claimant has entirely failed to prove that there is any discrimination. Indeed, the Claimant has not shown that she has been treated differently than a male athlete in a similar or like circumstance. There is in fact not even a comparator for discrimination since monobob is an event that exists and was created only for female athletes.

i. The Claimant has failed to show that any of the following legal instrument provide her with an actionable right for gender discrimination:

i. <u>The Fundamental Principles nos. 4 and 6 of Olympism set out in the Olympic Charter</u>: The principles do not specifically guarantee female bobsleigh athletes a proportional quota of spots at the Olympics. Furthermore, the IOC's principles do not explicitly state participation in the Olympics as a guaranteed right. The Claimant's claim that she was discriminated against in the "possibility of practicing sport" is unfounded since the qualification system does not hinder her from practicing bobsleigh.

ii. The ECHR: Protocol no. 12 of the ECHR is not applicable and does not form part of Swiss international public policy because Switzerland has neither signed nor ratified it. As for Article 14 of the ECHR, it is not a stand-alone guarantee, but one of "ancillary nature", needing to be combined with another provision of the ECHR. The Claimant invokes Article 8 of the ECHR, arguing that she suffered unlawful discrimination hindering her right to private life within the meaning of Article 8 ECHR, as it encompasses her right to exercise her profession by participating in the Olympic Games; however, this argument is meritless because professional activities like sports fall within Article 8 ECHR only if they are relevant for private and family life and under very specific conditions. The Claimant has failed to prove how the Qualification System directly affected her right to respect for private life. She has not been restricted access to her profession as such (as the Qualification System does not control access to a profession, but rather sets the preconditions to compete in a selected group at a specific sporting event). Furthermore, for a breach of Article 8, the ECtHR requires that the consequences arising from a certain measure for the applicant's private life must be very serious (so-called consequence-based approach) or that the underlying reasons of the measures are very serious (reasons-based approach). Unlike Ms. Semenya, the Claimant is not being excluded from her profession, so there is no consequence-based breach. And there is no allegation, let alone evidence, of improper purposes being pursued in the adoption of the Qualification Standard so there is no reasons-based breach.

iii. Swiss international public policy: Claimant does not provide any meaningful discussion of what aspect of the notion of public policy is at stake in the present case. The fact that protection of women's rights and gender equality features amongst the priorities of Swiss policy does not mean that an arbitral award upholding the disputed qualification system would be against public policy within the meaning of Article 190(2)(e) PILA. As to the contention that Article 14 of the ECHR as well as Article 1 of the Protocol No. 12 to the ECHR provide the proper legal basis for the prohibition of gender discrimination in Swiss international public policy, it is conceptually wrong.

iv. Swiss domestic law: Articles 8(2) and 8(3) of the Swiss Constitution are inapplicable because they do not have horizontal effect. As for the Swiss Gender Equality Act, it applies in the context of employment relationships only and the Claimant is not an employee of the IBSF or IOC.

v. EU law: EU law is not applicable by virtue of Article 19 PILA. Switzerland not being a member of the EU and the law applicable to the merits not being the law of an EU Member State, EU law can be "taken into consideration" by an arbitral tribunal seated in Switzerland only through application by analogy of the requirements of Article 19 PILA. The CAS has taken into consideration mandatory rules of EU law which are not part of the *lex causae* – here Swiss law – under Article 19 PILA but only when three requirements are met. However, these requirements are not met here. The Claimant has failed to show that EU law "wants" to apply to the present dispute, that there exists a close connection between EU law and the present dispute, and that there

exists legitimate and clearly preponderant interest to the application of EU law and the present dispute. Even if EU law applied, the Claimant failed to establish any relevant discrimination under EU law.

j. As to damages, Claimant has failed to show the existence of an unlawful act, a causality link between the alleged damage and the alleged wrongdoing, or any recoverable damages as they are speculative in nature. No moral damages are due because no there is no severe illicit breach of the Claimant's personality rights and the loss in social media growth and decrease in speaking engagements does not prove reputational damages.

k. As to Claimant's requests for relief, (i) Request no. 3 is inadmissible because it is declaratory, premature and moot and, furthermore, upholding this claim would result in the CAS exceeding its judicial function (the CAS cannot be expected to legislate in an arbitration award prospective matters that are inherently reserved to the autonomy of the IBSF and IOC); and (ii) Request no. 5 should be dismissed because it is totally unspecified – an award rendered based on a "catch-all" prayer for relief or an "indeterminate request" risks being set aside by the Swiss Federal Tribunal for violation of Respondents' right to be heard.

V. JURISDICTION

67. In her Request for Arbitration dated 8 March 2022, the Claimant bases the jurisdiction of the CAS on Section 5 of the IBSF Code of Conduct for Athletes, with respect to the IBSF, and on Rule 61 of the Olympic Charter, with respect to the IOC.

68. The IBSF Code of Conduct for Athletes (the "Code of Conduct"), which must be signed for acceptance by all athletes wishing to obtain an IBSF license and compete or train in IBSF events, was signed by the Claimant on 15 September 2021. Section 5 of the Code of Conduct reads as follows:

> "*If a dispute arises between the IBSF and me, or any third party involved in bobsleigh or skeleton, I will use the appropriate IBSF appeal and dispute resolution channels, and I acknowledge that ultimately Swiss law and the Court of Arbitration for Sport CAS in Lausanne, Switzerland, will be the final arbitrator of any dispute*".

69. The present dispute arose between an athlete (the Claimant) who, by means of her signature, accepted the Code of Conduct and the sports organization which adopted and published the Code of Conduct (the First Respondent). CAS is indicated in Section 5 thereof as the "*final arbitrator of any dispute*". Moreover, Section 1 of the same Code of Conduct provides that the athletes who sign such document agree to submit to the IBSF's "*rules, regulations and procedures and to the jurisdiction of the bodies which are in charge of applying them*". The Panel is thus satisfied that the Code of Conduct provides a legal basis to retain jurisdiction over this case with respect to the dispute between the Claimant and the First Respondent, the IBSF.

70. In turn, Rule 61 of the Olympic Charter reads 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*".

71. The present dispute concerns the Qualification System for the OWG 2022; therefore, the Panel is satisfied that the dispute is "in connection with" the Olympic Games and that the requirement under Rule 61 of the Olympic Charter is thus met, providing jurisdiction with respect to the dispute between the Claimant and the Second Respondent, the IOC.

72. In their respective Answers to the Request for Arbitration, dated 23 and 27 May 2022, the IBSF "*acknowledges the jurisdiction of the CAS*" and the IOC "*confirms that it agrees to CAS jurisdiction and does not bring any plea of lack of jurisdiction within the meaning of Article 186(2) of the Swiss Federal Act on Private International Law*".

73. Furthermore, the Claimant and both Respondents confirmed the jurisdiction of the CAS with their respective signature of the Order of Procedure.

74. Therefore, the Panel holds that it has jurisdiction to adjudicate the present matter.

VI. APPLICABLE LAW

75. Article 187.1 of the Swiss Federal Private International Law Act ("PILA"), applicable to the present arbitration because the Claimant has never had her domicile or her habitual residence in Switzerland (see Article 176.1. PILA), provides that the "*arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection*".

76. By initiating an arbitration before the CAS and by signing the Order of Procedure, the Parties accepted the application of the CAS Code, whose Article R45 provides that the "*Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono*". The reference to the "rules of law" (mirroring the language of Article 187.1 PILA), as commonly understood in the Swiss legal community, allows the parties to choose and apply not only State laws but also private sets of rules.

77. Indeed, the Parties have chosen as applicable rules of law in this arbitration the various regulations of the IBSF and Swiss law, as well as the Olympic Charter. As a matter of fact, both the Claimant and the Respondents, throughout these arbitration proceedings, have made reference to and accepted as applicable to this dispute the IBSF rules and Swiss law, as well as the Olympic Charter.

78. Pursuant to Article 7.1 of the IBSF Statutes, "*Members and their individual members are subject to and must comply with the IBSF Statutes, all IBSF Rules and Regulations, the IBSF Anti-Doping Rules, the IBSF Code of Ethics, all relevant Codes of Conduct*

and to the decisions taken by the Congress and/or the IBSF Executive Committee". This provision applies to the Claimant as an individual member of the Bobsled & Skeleton Federation of Nigeria (the "Nigerian Federation"), which is a member of the IBSF. The Claimant must also be considered, according to the constant jurisprudence of the Swiss Supreme Court (the "Federal Tribunal"), as an indirect member of the IBSF.

79. Furthermore, the Claimant has agreed to Section 1 of the Code of Conduct (which she signed on 15 September 2021). That provision reads: "*I am fully aware, conscious and understand and accept all IBSF Rules and the international rules that IBSF fully adheres to. I accept that my participation at any event which is part of the IBSF calendar is subject to my acceptance of all IBSF rules applicable in connection with such event. I therefore agree to be submitted to such rules, regulations and procedures and to the jurisdiction of the bodies which are in charge of applying them*". Moreover, Section 5 of the same Code of Conduct makes an express reference to the application of "*Swiss law*" to resolve disputes between an athlete and the IBSF (see *supra*, para. 68).

80. In light of the aforementioned provisions, and as is undisputed by the Parties, the applicable rules of law are the IBSF rules and Swiss law, as well as the Olympic Charter.

VII. ADMISSIBILITY

81. To summarize, the Claimant argues that she has properly brought forward an ordinary arbitration as she has not challenged any decision of the IBSF, but rather filed a tort and damages claim against the federation. As such, she argues that she had no duty to exhaust internal remedies before going before the CAS (and even if she did, the IBSF has waived that requirement) and the only applicable time limit to file her claim is the 3-year limit for torts under Article 60 SCO with which she complied (for a more detailed exposition of the Claimant's position on admissibility see *supra* para. 62).

82. The Respondents, on the other hand, argue that the claim is inadmissible because the Claimant has failed to satisfy her pre-arbitration conditions of exhausting legal remedies before the IBSF and filing the appeal within 21-days of the challenged decision of 24 January 2022 (for a more detailed exposition of the Respondents' position on admissibility see *supra* paras. 64 and 66).

83. Based on the Parties' disagreement, the Panel, to determine the admissibility of the Claimant's claims, must decide the following issues:

(A) whether the exhaustion of legal remedies and time limit for appeals are admissibility requirements;

(B) what is the consequence, if any, of the CAS Court Office's designation of a case as ordinary or appellate;

(C) what is the nature of the Claimant's claims and whether there was an appealable decision;

(D) whether the Claimant had a legal interest to challenge any decision of the IBSF;

(E) whether the Claimant was required to exhaust legal remedies;

(F) whether the IBSF waived the Claimant's requirement to exhaust legal remedies and, if so, what are the consequences;

(G) what was the time limit for the Claimant to file her claim, if any; and

(H) whether the third, fourth and fifth Claimant's requests for relief are admissible.

84. The Panel will address these questions separately in the sub-sections to follow.

A. Exhaustion of internal remedies and time limit to appeal as admissibility issues

85. As is common ground between the Parties, the exhaustion of internal remedies is an admissibility requirement under CAS jurisprudence and Swiss law, not a jurisdictional one; see the following judgments by the Federal Tribunal ("SFT"), i.e. the Swiss supreme court: ATF 147 III 500, 4A_612/2020, para. 5.4; 4A_682/2012, at para 4.4.3.2 *in fine*; ATF 85 II 525, at para. 2. Furthermore, the Panel notes that, under Swiss law, admissibility issues such as the exhaustion of internal legal remedies must be addressed *ex officio* by judges or arbitrators, even if parties do not raise them in their submissions or, *a fortiori*, if they raise them at a late stage of the proceedings (SFT Judgment ATF 85 II 525). In fact, while the IBSF since the beginning of the case has requested the CAS to dismiss the Claimant's requests "*to the extent they are admissible*" (IBSF's Answer to the Request for Arbitration, page 2), the specific issue of exhaustion of internal remedies was first raised in the IOC's Rejoinder (at paras. 58-67) and then discussed by the Parties during the hearing and, prompted by the Panel, within the post-hearing briefs. Therefore, the Panel must assess whether the Claimant exhausted all legal remedies within the IBSF before taking her case to CAS.

86. With regard to the time limit to appeal, this is also undisputedly an admissibility requirement under CAS jurisprudence and Swiss law (see e.g. SFT 4A_2/2023, para. 3.3) when a Swiss association's decision is challenged by one of its direct or indirect members. Article 75 SCC provides for a time limit of one month to challenge a decision of a Swiss association; however, if the association has inserted an arbitration clause in its rules, the time limit is that provided by the arbitration clause or the applicable arbitration rules (as is the case of the CAS Code). The Panel notes that both Respondents raised this issue in their respective answer briefs and, accordingly, the Panel will also address whether the Claimant had a time limit within which to file her claim and, if so, whether she complied with it.

B. Effect of the CAS Court Office's designation of a case as ordinary or appellate

87. The Claimant argues that this is an ordinary arbitration, that the CAS Court Office correctly designated it as such, and that the CAS Court Office's assignment can no longer be challenged under Article R20 of the CAS Code. In support, the Claimant invokes a CAS award which stated that "*the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard*

the arguments put forward by the parties with respect to the characterization of this arbitration as an 'appeal' or an 'ordinary' arbitration" (CAS 2004/A/748).

88. The Panel finds that the Claimant has misconstrued the quoted CAS award. To clarify, the CAS Court Office designating the case as an ordinary arbitration merely defines the procedural framework within which the case will be administered, i.e. it establishes the set of CAS Code provisions applicable to the CAS proceedings. However, the designation assigned by the CAS Court Office may not alter the inherent nature of a case. It does not affect whether in substance a case is truly ordinary or appellate and, in turn, what requirements of admissibility are applicable (in particular, whether the time limit to file a claim provided by the CAS Code for appeal procedures is applicable). Precisely for this reason, the assignment of a case to one or the other CAS Division has been deemed in CAS 2004/A/748 as "administrative in nature" and not requiring any arguments, reasons or allowing appeals – because it does not change substantively what type of case truly it is.

89. If one were to accept that the CAS Court Office's assignment of a case to the ordinary or appellate division – which is a mere administrative deed – may fundamentally alter the nature of the case, it would open the door to abuse by the parties to manipulate the procedural designation of a case. That is, a party that has missed the deadline to appeal against a decision would attempt to circumvent the appeal deadline (in most cases 21 days) by filing its appellate case in the guise of an ordinary claim inserted in a request for arbitration, in the hopes that the CAS Court Office would simply characterize the case as "ordinary" under the CAS Code, not realizing – due to lack of information, time pressure, and/or a claimant's disguised presentation of the issues – that the claimant is actually challenging a decision and, thus, in truth and substance the case should have been filed by the claimant through a statement of appeal and treated by the Court Office as an appeal procedure.

90. The Panel is of the view that the power to characterize a given CAS case as substantively ordinary or appellate, and the related responsibility, must logically lie with those who are appointed to adjudicate the case (the arbitrators) and not with those who are merely tasked to oversee the arbitration proceedings and take care of its organizational and administrative aspects (the CAS Court Office). This view is corroborated, for example, by the case CAS 2007/O/1237 (award on jurisdiction), where the panel had no hesitation in discussing and determining whether the case was substantively ordinary or appellate, regardless of the CAS Court Office's administrative characterization of the case.

91. The Panel thus holds that, even though the CAS Court Office has designated the present case as an "ordinary" arbitration under the CAS Code, this does not determine in a binding manner whether it is in substance an ordinary arbitration and not an appeal against a challengeable decision of the IBSF and IOC. The Panel must therefore determine what is the proper nature of the present case, looking in particular at the Claimant's motions for relief. For the sake of clarity, the Panel does not consider its determination of this issue to be a challenge to the CAS Court Office's assignment of the present arbitration. The case was submitted as ordinary by Claimant and consequently designated as such by the CAS Court Office. Rather, this is an assessment

of what is the true nature of the case and, in turn, what are the applicable admissibility requirements.

C. Nature of the claim and existence of a challengeable decision

92. The Claimant argues that the nature of the claim is ordinary – as designated by the CAS Court Office – because she does not challenge any decision of the IBSF, but rather presents an independent right of action – a tort and discrimination claim for damages against the federation based on Article 41 SCO, Articles 27 and 28 SCC and Articles 8 and 14 ECHR.

93. The Panel does not agree and, looking at the first and second of the Claimant's requests for relief (*supra* at para. 61), considers that the Claimant, by asking the Panel to determine that the Olympic Bobsleigh Qualification System is unlawful because it discriminates against women without any justification and that it is only because of this gender discrimination that Ms. Adeagbo was excluded from the OWG 2022, is actually challenging a "decision" – in fact, more than one decision – of the IBSF and the IOC within the meaning of CAS jurisprudence and Swiss law.

94. The concept of what constitutes an "appealable decision" has been well established in CAS jurisprudence (see e.g. CAS 2005/A/659 at paras. 10-12, CAS 2004/A/899 at paras. 12-14, CAS 2014/A/3744-3766 at para. 191; CAS 2015/A/4266 at para. 51). A decision is a statement or communication issued by a sports organization in whatever type of document – letter, email, press release, etc. – that contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee or of other parties; it is a statement or communication characterized by an "*animus decidendi*", that is, by its objective content and irrespective of its form, it conveys the will of the sports organization to decide on a matter. In other words, and summarizing CAS jurisprudence, a statement or communication from a sports organization must be characterized as a true "decision", and thus deemed as appealable to the CAS, if the following cumulative criteria are met: (i) it is a unilateral act brought to the attention of one or more addressees, being irrelevant that such act is not formally characterized as a decision, (ii) it is not of a mere informative nature but denotes the sports organization's *animus decidendi* (i.e. will to decide on a matter), and (iii) it has a content which affects the legal situation of the addressee(s) or of other concerned parties.

95. Taking into consideration the above criteria, the Panel finds that the IBSF and the IOC made three separate decisions relevant to the present case (see *infra* at paras. 96-98). In this connection, preliminarily, the Panel must observe that, under Rule 40 of the Olympic Charter and the related Bye-law (see *supra* at para. 6), the rules governing the athletes' qualification for and participation in the Olympic Games are, first, drafted by the IFs in close collaboration with the IOC and, then, adopted by the IFs with the indispensable IOC's approval. In fact, this is what occurred with the Qualifications System for the OWG 2022 bobsleigh competitions. As a consequence, the below-described decisions related to the Qualification System, although formally enacted and published by the IBSF, must be ascribed to both the IBSF and the IOC; this is corroborated by the fact that (i) the Claimant attributed all along the responsibility of

her missed qualification to both the IBSF and the IOC – see e.g. the Claimant's witness statement of 26 August 2022 at para. 46: "*the Olympic Bobsleigh Qualification System created by the IBSF and the IOC denied me the opportunity to compete in the 2022 Olympic Winter Games*" – and (ii) the IOC did not argue that it lacked standing to be sued and never denied the shared parenthood with the IBSF of the Qualification System and related decisions.

96. The Panel finds that the first decision was the publication on the IBSF's website and communication by email to the NFs, on 5 December 2019, of the Qualification System, which had been shaped in collaboration with the IOC (the "First Decision"). The publication of the Qualification System qualifies as a decision because it was a unilateral act that was meant to definitively decide the qualification system for the OWG 2022, including the number of quota spots to be allocated to male and female bobsleigh athletes, and affected the legal situation of the addressees – the NOCs, the NFs and, in turn, all concerned athletes of those committees and federations.

97. The second decision was the publication on the IBSF's website and communication by email to the NOCs and NFs, on 17 January 2022, of the ranking determining the allocation of the quota spots for monobob at the OWG 2022, which informed that, based on Claimant's ranking, the Nigerian NOC was second in line for a reallocation quota in case one of the qualifying NOCs decided to waive its spot (the "Second Decision"). This communication qualifies as a decision because, with it, the IBSF pronounced which NOCs qualified for the competition and offered them a spot. It affected the legal situation of the addressees – the NOCs, the NFs and, in turn, the concerned athletes of those NOCs and NFs – because it determined who qualified and who did not qualify for the Olympic bobsleigh competitions. Indeed, it left unqualified the Nigerian NOC and, in turn, the Nigerian bobsleigh athletes such as the Claimant.

98. This was followed up by a third and final decision made on 24 January 2022, when the IBSF published on its website and communicated by email to the NOCs and NFs the final quota allocation for monobob at the OWG 2022, indicating that the spot waived by the British NOC would be assigned to the first in line, the Italian NOC (the "Third Decision"). This communication qualifies as a decision because, with it, the IBSF definitively closed the list of qualified participants for the Olympic monobob competition, affecting the legal situation of those that qualified and those, such as the Nigerian NOC and its monobob athletes (and thus the Claimant), who did not qualify.

99. The Panel observes that, pursuant to well-established CAS jurisprudence, the publication by an international federation of the list of eligible and/or qualified athletes or NFs or NOCs into a specific competition, in particular into the Olympic Games, has been considered a "decision" in the sense of the CAS Code. Indeed, there have been several cases administered by the CAS Appeals Division in relation to the qualification of athletes to various editions of the Olympic Games, in which an international federation's publication of the results of the allocation or re-allocation of quota places for the Olympic Games was appealed by a non-qualified athlete (and/or her or his NF or NOC) and considered by the CAS arbitrators as an appealable decision. For example, the award CAS 2021/A/8140 so states at paras. 10-12: "*on 21 June 2021, the Respondent published the official list of countries that had qualified quota places in trampoline*

gymnastics for the 2020 Olympic Games for both men and women. Canada qualified two female quota places, yet no male quota for the 2020 Olympic Games in trampoline gymnastics. The dispute herein arose on the interpretation and application of such criteria as the Appellant contends that the Respondent incorrectly applied its Olympic Qualification System, which consequently did not lead to the qualification of Canadian athlete Jérémy Chartier under Criteria 3 of the Olympic Qualification System. In a correspondence dated 7 July 2021, and in accordance with Articles R47, R48, and R51 of the Code of the Court of Arbitration for Sport (the 'Code'), the Appellant filed with the Court of Arbitration for Sport (the 'CAS') a Statement of Appeal, serving as Appeal Brief, with respect to Respondent's decision, published on 21 June 2021, 'not to allocate Canada a quota place in men's trampoline gymnastics' (the 'Appealed Decision')" (paragraph numbers omitted, emphasis added). In a similar vein, with regard to the reallocation of quota places for the Olympic Games, see also CAS 2015/A/4222.

100. There also have been many cases administered by the CAS Ad Hoc Division at various editions of the Olympic Games in which an international federation's publication of the results of the allocation or re-allocation of quota places for the Olympic Games was challenged by a non-qualified athlete (and/or its NF or NOC) and considered by the CAS panel as a challengeable decision (see for example CAS OG 02/02, CAS OG 02/05, TAS OG 12/08). In the case CAS OG 10/02, concerning the qualification system decided by the IBSF (known then as "FIBT") for participation in bobsleigh competitions at the Vancouver OWG 2010, the Panel so stated: "*the allocation of a certain place in the Olympic competition is not based on a single decision, but on a whole series of decisions which built one upon another. In a first step, the FIBT has to decide which teams are allowed to enter or participate in the World Cup and other competitions for the purpose of qualification. In a further step, points have to be allocated to the various athletes in the competitions according to the nature of the competition and the competition results obtained by the athletes. Then, at the end of the qualification period, a ranking is compiled on the basis of the competition results. Finally, the Qualification System has to be applied to the FIBT ranking as it stands at the end of the qualification period. It is disputed between the Parties whether when appealing the last (and final) step of the qualification process the Panel's scope of review extends to all preceding steps or decisions*." (paras. 12-14, paragraph numbers omitted, emphasis added).

101. Even at the very same OWG 2022, in two cases also dealing with IBSF competitions, the CAS panel clearly regarded the final allocation of Olympic quota places in skeleton and bobsleigh as "decisions" adopted by the IBSF:

- "*On 23 January 2022, the IBSF published the final allocation of 25 quota places for men's skeleton and which did not include a quota place for the OFI's athlete (the 'Decision')*" (CAS OG 22/05, para. 2.8).
- "*On 31 January 2022, the Applicant submitted a petition […] against 'the decision of the IBSF Executive Committee awarding the France NOC the last 2-woman bobsleigh Olympic Qualification spot for the 2022 Beijing Winter Olympics'. The Athlete challenged the point ranking table and the allocation of the final 2-woman Bobsleigh quota spot to France instead of Jamaica*" (CAS OG 22/07, para. 14).

102. The Panel further observes that even the Claimant herself in some passages of her written submissions characterized the IBSF's determinations as to the Qualification System and to the allocation of quota spots as "decisions" and complained that the IBSF "excluded" her from the OWG 2022. For example, Claimant made reference to (i) "*the decision to deny Claimant a spot to compete at the 2022 Olympic Winter Games*", and "*the decision to create a discriminatory System*", (ii) the "*decision to perpetuate gender discrimination*", and (iii) the "*discriminatory decision that cannot be justified by the IOC quota caps*" (respectively, pages 14, 15 and 18 of the Claimant's Reply, emphasis added), as well as to the fact that (iv) the Qualification System "*determined by the International Bobsleigh & Skeleton Federation ('IBSF') in collaboration with the International Olympic Committee ('IOC') used a discriminatory quota allocation scheme to qualify athletes for the bobsleigh sports*" with the result that she "*was narrowly excluded – by a single quota place – from the monobob event at the 2022 Olympic Winter Games*" (page 2 of the Claimant's Statement of Claim, emphasis added).

103. Although the Claimant presents her claim as a tort and discrimination claim for damages untied to any specific decision, in reality – with the first and second of her requests for relief – she is challenging the legality of the eligibility/qualification decisions of the IBSF (in collaboration with the IOC) with regard to the women's monobob competition at the OWG 2002, and the requested compensation for damages (included in the Claimant's fourth request for relief, *supra* at para. 61) is simply the consequence thereof. Before awarding damages to the Claimant, this Panel would necessarily have to find that the IBSF adopted and applied to the Claimant qualification rules that are unlawful under one of the various legal paradigms referred to by the Claimant (to be found in the IOC rules, ECHR, EU law and/or Swiss law). By challenging the legality of the mentioned decisions of the IBSF, the Claimant is trying to fulfil a necessary pre-condition to then be awarded compensation for damages.

104. Therefore, the Panel finds that the Claimant's first and second motions for relief (*supra* at para. 61) evidently have an appellate character and should have been submitted through a timely statement of appeal challenging (at least) the last of the relevant decisions, that is, the Third Decision communicated to the Claimant through her national federation on 24 January 2022 (see *supra* at para. 98). As to the request for damages included in the fourth Claimant's motion for relief, in principle this might be properly brought to the CAS as an ordinary arbitration. However, if the alleged damages were caused by one or more decisions of the Respondent (as occurs in the present case), the unlawfulness of those decisions must first be determined, otherwise a fundamental element under Swiss law to obtain compensation for damages is missing and the request for compensation becomes moot (see *infra* at para. 192).

D. Claimant's legal interest

105. According to well-established CAS jurisprudence only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision (see e.g. CAS 2014/A/3744 & 3766; CAS 2009/A/1880-1881, award of 1 June 2010, at para. 29).

106. The Panel does not consider that the Claimant already had a legal interest to challenge the First Decision of the IBSF because she could still qualify for OWG 2022. A challenge back on 5 December 2019 would have been premature as the Claimant had not yet lost the chance to compete in the Olympic Games (had not yet been "excluded" from the OWG 2022, as she puts it in her submissions). On the other hand, the Claimant had clear and sufficient legal interest to challenge both the Second and Third Decisions, which determined her non-qualification to or "exclusion" from (as characterized by the Claimant) the OWG 2022. Pursuant to Article 18 of the IBSF Statutes, the Claimant should have appealed those decisions.

E. Requirement to exhaust internal remedies

107. The principle of exhaustion of internal remedies holds significant importance within the Swiss law of associations. At its core, exhaustion of legal remedies serves to uphold the freedom, autonomy and associational life of the relevant association, by granting it the right to make a first decision on matters concerning its own members and to internally redress any incorrect decision, thus limiting costly and time-consuming external litigation. In fact, exhaustion of legal remedies is mandatorily required under Swiss law. Swiss jurisprudence has established, as a general requirement (based on the principle of the freedom and autonomy of associations), that any direct or indirect member of an association must exhaust the internal remedies of the association before suing the association before a Swiss court (see ATF 118 II 12 dated 25 March 1992, citing the landmark judgment ATF 85 II 525 dated 10 December 1959). As arbitration is an alternative to State courts, this Swiss law requirement also applies to arbitration (if and when an association has in its statutes an arbitration clause).

108. Accordingly, international federations constituted as Swiss associations commonly shape their rules so as to require that their direct or indirect members – national federations, clubs and athletes – exhaust the available avenues for dispute resolution within the federation's internal structures before seeking external intervention by an ordinary judge or, if there is a CAS arbitration clause, by a CAS panel. The CAS Code has duly recognized this principle of Swiss law and has inserted it in Article R47, within the context of the CAS appeals procedure. However, this principle would apply in CAS arbitration even without the express provision of Article R47 (that is, when sports federations based in Switzerland are concerned). In fact, even in the context of a case brought to CAS as an "ordinary" arbitration, it is required that internal remedies be exhausted, if any are available. This was stated in the case CAS 2003/O/466, where the panel analyzed whether the internal legal remedies had been exhausted, given that "*under Swiss case-law related to Art. 75 CC a member of an association is expected to exhaust any internal remedies prior to challenging a decision of the association before an outside tribunal*", notwithstanding the fact that the "*present procedure is an ordinary arbitration procedure [and] the provisions of the CAS Code applicable to the ordinary arbitration procedure do not require explicitly the exhaustion of internal legal remedies prior to the CAS arbitration*".

109. To determine whether there is a requirement to exhaust legal remedies in the present case, the Panel must first look at IBSF rules, given that all Parties agreed that the IBSF rules are applicable to the present case (see *supra*, paras. 77-80). The Panel observes

that the IBSF rules do require the exhaustion of internal remedies before submitting a case to the CAS. Indeed, pursuant to Article 18 of the ISBF Statutes, "*any dispute*" between the IBSF and an individual who is affiliated to a national federation must be filed with the IBSF Appeals Tribunal before appealing to the CAS:

> "*18.1 Any dispute arising between Members, or between one or more Members and the IBSF (including any dispute as to sanctions imposed by the Executive Committee), or between the IBSF and any individual or entity that is a member of or affiliated to a Member (each, a Dispute), shall be resolved exclusively by the means set out in this Article 18, to the exclusion of any other means. All of the aforementioned parties waive (to the fullest extent permitted under applicable law) any rights of recourse they might otherwise have to any court or other forum for resolution of such Disputes.*
>
> *18.2 In the first instance, a Dispute shall be referred to the IBSF Appeals Tribunal for hearing and determination in a fair and impartial manner in accordance with these Statutes and the IBSF Appeals Tribunal Rules.[…]*
>
> *18.3 Decisions of the IBSF Appeals Tribunal shall be final and binding on the parties, and may only be challenged by way of appeal to the Court of Arbitration for Sport in Lausanne, Switzerland (CAS), which is independent of the IBSF and which will resolve the dispute definitively in accordance with the CAS Code of Sports-Related Arbitration. The time limit for filing the appeal against a decision of the IBSF Tribunal is twenty-one days after receipt of the decision*" (emphasis added).

110. Section 5 of the IBSF Code of Conduct (quoted *supra* at para. 68), i.e. the provision invoked by the Claimant to establish CAS jurisdiction, also requires that an athlete first go through the internal remedies channel. Section 5 provides that if a dispute arises between an athlete and the IBSF, the athlete "*will use the appropriate IBSF appeal and dispute resolution channels*", and only "*ultimately*" will go to the CAS that "*will be the final arbitrator of any dispute*".

111. The Claimant argues that there is no requirement of exhaustion of legal remedies because no internal remedy existed at all or was of an illusory character. More specifically, the Claimant argues that Article 18 of the IBSF Statutes provides no internal procedure suitable for adjudication of a tort or damages claim and that, where no internal remedy is readily available, exhaustion is not required. The Panel finds, however, that an internal remedy did exist and was not illusory, as the IBSF internal dispute settlement system was readily available to the Claimant. Article 18 of the IBSF Statutes, combined with Section 5 of the Code of Conduct, is very clear in making reference to "*any dispute*" (thus including one that, besides challenging some IBSF decisions, encompassed a request for compensation) and in specifying that an athlete must submit its claim to the IBSF Appeals Tribunal "*to the exclusion of any other means*" before "*ultimately*" referring her or his case to the CAS. In fact, other parties that had not qualified to the OWG 2022 resorted to such IBSF internal remedy before lodging their complaint with the CAS (see CAS OG 22/03, CAS OG 22/05 and CAS OG 22/07). It can be noted, in particular, that with respect to the cases CAS OG 22/03 and CAS OG 22/07, the IBSF Appeals Tribunal was remarkably efficient as it rendered

its decision, respectively, just one day and two days after receiving the athlete's petition, so allowing a prompt appeal to the CAS Ad Hoc Division (see *infra* at para. 122).

112. Indeed, the Claimant was aware of the legal need for this procedural passage through the IBSF Appeals Tribunal, as she wrote the following in her email to the IBSF on 18 January 2022 (see *supra* at para. 35): "*From an athlete's perspective, can you please let me know what steps I can take to also file a formal objection to this quota allocation selection? Stephen H. Hess is listed as the Chairman of the Appeals Tribunal and I would like to engage him to action a formal appeals process. Can you please provide his email address so I can reach out to him immediately?*" (emphasis added). The IBSF answered on the very same day advising the Claimant that there was "*always the possibility to go the legal way*" and that the "*way to contact Stephen Hess, is contacting the secretary general of the IBSF, they forward your mail*" (see *supra* at para. 36). On 2 February 2022, the Claimant expressed thanks for the information and wrote that she had "*no further questions at this time*" (see *supra* at para. 38). Unfortunately, the Claimant did not follow the course of action that had been confirmed as correct by the IBSF and did not lodge a complaint with the IBSF Appeals Tribunal prior to submitting her case to the CAS. So to speak, she did not "check the box" as she was required to do.

113. The Panel further observes that, with specific regard to the IOC, one could argue that no internal remedies are provided by the IOC rules and that, therefore, no internal remedies should be exhausted vis-à-vis the IOC. However, no distinct decisions attributable only to the IOC have been brought to the attention of the Panel. The decisions that are at stake in this case are to be attributed, in terms of accountability, to both the IBSF and the IOC (see *supra* at para. 95), but they were ultimately adopted by the IBSF and must follow the procedural course provided by the IBSF rules, which, as acknowledged by all Parties, constitute the applicable law governing this case, complemented by Swiss law (see *supra* at paras. 75-80).

114. In light of the foregoing, the Panel finds that, regardless of the characterization of this arbitration as "ordinary" by the CAS Court Office, the Claimant was required to exhaust the available internal remedies by filing a claim with the IBSF Appeals Tribunal before referring her case to the CAS.

F. No waiver of exhaustion of legal remedies

115. The Claimant submits that the IBSF waived the requirement of exhaustion of legal remedies and that, accordingly, her claim is admissible. In the Claimant's view, the IBSF waived the exhaustion of legal remedies requirement by not raising that objection in its Answer to the Request for Arbitration. The Claimant argues that any procedural objection is waived if not raised in a timely manner.

116. The Panel recognizes that an association may waive the requirement of the exhaustion of internal remedies prior to the appeal to the CAS. For example, this occurred in the case CAS OG 22/05 at the Beijing OG, where the IBSF willingly waived this requirement because its internal Appeals Tribunal had not yet issued its decision under Article 18 of the IBSF Statutes ("*Even though the above-referenced Petition was still pending, to the extent no written decision had been delivered up before the hearing on*

the Application, in its written submissions and on the record at the hearing the IBSF waived the requirement under Article 1 of the CAS Ad Hoc Rules for the Applicant to have exhausted all the internal remedies available pursuant to the IBSF statutes").

117. In another Beijing case (CAS OG 22/04) where the IBSF was a respondent, the panel applied the following exception provided by Article 1 of the CAS Ad Hoc Rules: "[…] *In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to her/him pursuant to the statutes or regulations of the sports body concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective*". Indeed, the CAS panel stated as follows: "*given the exceptional circumstances of the case, amplified by the pandemic context within which OWG Beijing 2022 are taking place, the need for the Athlete to fulfil several administrative and health-related formalities* […], *the Panel accepts that the Applicants could reasonably not be expected to instigate proceedings before the IBSF Appeals Tribunal, obtain a decision and eventually file an application with the CAS Ad Hoc Division in due time for the appeal before the CAS to be effective*" (CAS OG 22/04, para. 65). This CAS panel also mentioned that "*the burden to prove the existence of exceptional circumstances justifying a depart* [sic] *from the principle of exhaustion lies on the applicant, which shall prove the 'illusory character' of the internal legal remedies*" (*id.*, para. 64), quoting the Commentary on the CAS Code authored by M. Reeb and D. Mavrommati, who write – in reference to the appeals procedure under Article R47 of the CAS Code – that "*the exhaustion of legal remedies may be waived if the remedies do not exist or are illusory*" (para. 35).

118. The Panel also notes that the award CAS 2003/A/534 similarly held: "*The exhaustion of local remedies is one of the most established common rules in the international judicial process. It is compulsory even in the absence of a specific instrument. The rule is based on the principle that a local remedy is better than a more complex international judicial process and on the assumption that the rule of law is strictly upheld. Given these premises, the fulfilment of the prescription may be waived if the legal remedies are non existent or illusory. In such cases, a litigant seeking to establish the existence of a fact bears the burden of proving the non-existence and illusory character of local remedies*" (para. 20, citations omitted).

119. In light of the above, the question for the Panel is thus whether the IBSF waived said requirement in the present case and/or whether the Claimant has proven that the internal remedy had an illusory character.

120. First, the Panel observes that there is no indication that the IBSF waived the requirement. Nor does the Panel agree that the internal remedy is non-existent and illusory in character so as to deem the requirement to exhaust it waived. Indeed, as explained above at para. 111, the Claimant had to take her case to the IBSF Appeals Tribunal since the pivotal issue of her case was, and is, the alleged illegality of the Olympic qualification decisions adopted by the IBSF (see supra at paras. 95-98) and, therefore, the internal remedy was existent and not illusory.

121. Second, the Panel observes that under Swiss law, as already mentioned (*supra* at para. 85), admissibility issues such as the exhaustion of internal remedies must be addressed *ex officio* by judges or arbitrators even if parties do not raise them in their submissions or only raise them at a late stage of the proceedings; therefore, no waiver can be implied from the fact that the Respondents initially did not raise this issue (as mentioned, it was first raised in the IOC's Rejoinder).

122. Then, the Panel notes that, generally speaking, the exhaustion of legal remedies can be waived but only in truly exceptional circumstances – for instance, where the time necessary to exhaust internal remedies would make the appeal ineffective (see CAS OG 22/04, CAS OG 22/05 and CAS 2003/A/534). As such, a waiver may not, in the Panel's view, be easily implied. In the present case, the Panel is of the view that Claimant had the time to attempt to exhaust the existing internal remedy, considering that on 18 January 2022 she received confirmation that her complaint had to be lodged with the IBSF Appeals Tribunal (see *supra* at para. 112) before going to the CAS. In fact, this is exactly what occurred in the CAS Olympic cases of the US skeleton athlete Megan Henry (CAS OG 22/03), the Irish Bobsleigh & Skeleton Association or "IBSA" (CAS OG 22/05), and the Jamaican bobsleigh pilot Jazmine Fenlator-Victorian (CAS OG 22/07):

- CAS OG 22/03: Ms. Henry, seeking a quota place in the OWG 2022, challenged the skeleton equivalent of the Third Decision adopted by the IBSF (*supra* at para. 98), by (i) first petitioning on 24 January 2022 the IBSF Appeals Tribunal to select her for the open quota spot allocated for the women's skeleton event, and (ii) then filing on 28 January 2022 an application with the CAS Ad Hoc Division, challenging the IBSF Appeals Tribunal's decision of 25 January 2022 that had rejected her petition.
- CAS OG 22/05: The IBSA, also seeking a quota place in the OWG 2022, challenged the men's skeleton equivalent of the Second Decision adopted by the IBSF (*supra* at para. 97) by (i) first petitioning on 22 January 2022 the IBSF Appeals Tribunal, arguing that the IBSF skeleton qualification system was arbitrary and caused gender discrimination having a disparate impact against male athletes from emerging nations with only one athlete, and (ii) then filing on 29 January 2022 an application with the CAS Ad Hoc Division, given that the IBSF Appeals Tribunal had not delivered any decision yet and the IBSA's petition was still pending (and, consequently, at the hearing the IBSF waived such requirement).
- CAS OG 22/07: Ms. Fenlator-Victorian, seeking a quota place in the OWG 2022, challenged the IBSF's point ranking table published on 17 January 2022 and the related allocation of the final 2-woman bobsleigh quota spot to France instead of Jamaica by (i) first petitioning on 31 January 2022 the IBSF Appeals Tribunal, and (ii) then filing on 5 February 2022 an application with the CAS Ad Hoc Division, challenging the IBSF Appeals Tribunal's decision of 2 February 2022 that had rejected her petition.

123. The Claimant argues that she was allowed to skip the procedural step of the IBSF Appeals Tribunal because the IBSF did not answer when her counsel sent on her behalf

a letter to the IBSF and the IOC (*supra* at para. 40) to ask whether there was an internal IBSF procedure that should first be exhausted before filing a petition with the CAS. Even leaving aside the justification put forward by the IBSF that its personnel was at that time very busy with the ongoing OWG 2022, the Panel does not find this Claimant's submission persuasive because Articles 18 of the IBSF Statutes and 5 of the Code of Conduct are very clear in requiring the previous exhaustion of internal remedies and they cannot be considered as virtually abolished because a letter asking about this matter was not answered (however deplorable it is that the letter remained unanswered), especially considering that (i) the Claimant already knew at least as of 18 January 2022 (see *supra* at para 112) that she had to first file her complaint with the IBSF Appeals Tribunal, and (ii) other athletes or NFs wishing to challenge the Qualification System and related IBSF's decisions complied with said procedural requirement (see *supra* at para. 122).

124. The Panel, therefore, finds that the IBSF and the IOC never waived the requirement of exhaustion of internal remedies and rejects this Claimant's submission. Nor did the Claimant prove that the IBSF Appeals Tribunal was an illusory remedy; on the contrary, the fact that two other athletes wishing to contest the IBSF allocation of quota places did go to the IBSF Appeals Tribunal and quickly obtained a decision that they then challenged before the CAS (cases CAS OG 22/03 and OG 22/07) proves that the IBSF's internal remedy was existent and non-illusory.

G. Failure to submit the claim within the 21-day time limit

125. Even assuming *arguendo* that the requirement of exhaustion of internal remedies had been implicitly waived (*quod non*), it would not result in a waiver of the 21-day time limit to file an appeal. By waiving the exhaustion of legal remedies, the organization that adopted a decision simply waives the procedural passage through the internal remedy, meaning that the party challenging that decision is then allowed to take the case directly to the CAS. That party must still, however, comply with the time limit to appeal, which is a separate and independent requirement that the IBSF and IOC never waived. In fact, in the present case, both the IBSF and the IOC did strongly argue in their Answers to the Statement of Claim that the Claimant had missed the deadline to appeal due to the late filing of her claim with the CAS.

126. According to Article 18 of the IBSF Statutes any appeal against a decision of the IBSF Appeals Tribunal shall be "*twenty-one days after receipt of the decision*". In the present case, however, there is no decision of the IBSF Appeals Tribunal because the Claimant did not internally challenge the qualification decisions of the IBSF. Therefore, the time limit of Article 18 of the IBSF Statutes must necessarily apply to the decision that has been challenged, that is (in the most favourable scenario for the Claimant) the Third Decision adopted on 24 January 2022 (*supra* at para 98).

127. Even if one were to consider that the time limit of Article 18 of the IBSF Statutes may not be applied when there is no decision of the IBSF Appeals Tribunal, Article R49 of the CAS Code provides for the same 21-day time limit in instances where the applicable statutes of the federation do not provide a time limit. Indeed, Article R49 of the CAS Code states: "*In the absence of a time limit set in the statutes or regulations of the*

federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against". So, even if Article 18 were inapplicable, as there is no other provision in the IBSF or IOC rules and regulations establishing a time limit to challenge an IBSF's or IOC's decision to the CAS, the time limit of Article R49 would apply.

128. The count of the 21-day deadline must necessarily start, at the latest, on the date of the decision (published on 24 January 2022) which left out the Claimant's NOC from those having the right to send an athlete to compete in the monobob event. Indeed, in the context of qualification for a competition, the essence of the 21-day time limit is to ensure timely submission of appeals from the date of the decision stating who is in and who is out, given that athletes need to swiftly know if they qualify for a competition or not. Even if the Claimant – as she argues – had the right to disregard the internal remedies process (*quod non*), the decision that triggered her right to appeal was the one by which she was left out from the OWG 2022. Therefore, the time limit to appeal started from the date of that decision (as said, in the most favourable scenario for the Claimant, the Third Decision adopted on 24 January 2022). The Panel rejects the Claimant's claim that the time limit started on 25 February 2022, 10 days from the letter of 15 February 2022 in which Claimant gave the IBSF and the IOC 10 days to confirm whether she was required to exhaust legal remedies, given that a party wishing to challenge a decision may not extend the time limit to appeal at will by sending a letter asking for an answer within a given deadline.

129. The Panel has already underlined that the last of the decisions taken by the IBSF on the eligibility/qualification of the Claimant – the Third Decision – was made on 24 January 2022 (*supra* at para 98). Therefore, the Claimant had until 14 February 2022 to file her appellate claim. However, she did not challenge that decision until 8 March 2022. As a result, the Panel holds that her claim of an appellate nature is untimely and inadmissible.

H. Admissibility of the third and fifth Claimant's requests for relief

130. In her third motion for relief (quoted *supra* at para. 61), the Claimant asks the Panel to order the Respondents to enact non-discriminatory regulations for comparable male and female bobsleigh events "*on a going-forward basis*".

131. The Panel finds that, under Swiss law, this request for relief is inadmissible because an arbitral tribunal (or a judge for that matter) may not issue an order based on a wholly hypothetical scenario (that in the future the Respondents will unjustifiably discriminate against female bobsleigh athletes). If and when the Respondents adopt decisions or engage in conduct that the Claimant will deem to be illegally affecting her, she will be able to bring a legal action either before a State judge or, if there is a CAS arbitration clause, to the CAS. In any event, looking at the future, the qualification system for the OWG 2026 appears to be essentially compliant with the Claimant's requests to achieve gender balance, by even providing more spots to female bobsleigh pilots than to male bobsleigh pilots (see *supra* at para. 41 and *infra* at para. 143).

132. In her fifth motion for relief (quoted *supra* at para. 61), the Claimant requests the Panel to order "*any other relief*" that "*the CAS Tribunal shall deem appropriate*" to eliminate gender discrimination by Respondents.

133. The Panel finds that, under Swiss law, this type of vague "catch-all" motion for relief is too indeterminate to be admitted by an arbitral tribunal seated in Switzerland (see BERGER & KELLERHALS, *International and Domestic Arbitration in Switzerland*, 4th ed., 2021, p. 438). In addition, to uphold such request would translate into the necessity for this Panel to make some policy choices and become a rule-maker for the sport of bobsleigh, something which clearly is foreign to the mandate of an arbitral tribunal. Even in circumstances where such motions for relief are admitted by some courts outside of Switzerland, it is not for the purposes of some vague proactive orders to be made by a tribunal but, for example, to cover any ancillary relief for which a basis has been made out and which could not be specifically detailed in the other prayers for relief.

134. Therefore, the Panel dismisses as inadmissible the third and fifth Claimant's motions for relief.

VIII. MERITS

135. The Panel is of the view that, even if the Claimant's claims were found to be admissible (*quod non*), it would reject them on the merits for the reasons to follow in the next subsections. While the Panel acknowledges and appreciates the Claimant's efforts in advocating for gender equality and supports the broader mission of gender equality in sports, the Panel finds that in the particular circumstances of this case the Claimant has failed to prove any unlawful discrimination committed by the IBSF and/or the IOC against her or any breach of the various legal sources invoked by the Claimant (the Olympic Charter, IBSF Statutes, IBSF Code of Ethics, Swiss law, Swiss international public policy, the ECHR or EU law). In this case, the issue of gender equality is as between male and female athletes. References to gender should be understood in this context.

A. The Olympic Charter and the 2020 Agenda

136. The Claimant submits that the Respondents have violated the Fundamental Principles of Olympism set forth in the Olympic Charter and the 2020 Agenda, which provide:

- Principle no. 4 of the Olympic Charter: "*The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play*"; and

- Principle no. 6 of the Olympic Charter: *"The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as… sex…*"

- Recommendation 11 of the Olympic Agenda 2020: "*The IOC to work with the International Federations to achieve 50 per cent female participation in the Olympic Games and to stimulate women's participation and involvement in sport by creating more participation opportunities at the Olympic Games*".

137. While the Claimant acknowledges that the Fundamental Principles of Olympism do not guarantee a right to participate in the Olympic Games, she believes they do guarantee the right to have the "*possibility of practicing sport … without discrimination*" and "*right to have the opportunity to qualify for the Olympics in a system free of gender discrimination*" and that the Respondents have violated said right with the Qualification System. The Claimant contends the Qualification System discriminated against female athletes, on the basis of gender, because it employed a quota allocation scheme that allocated disproportionately fewer quota places to women than to men in their respective bobsleigh events, without any justification. The Claimant relies on *Semenya* (CAS 2018/O/5794 & 5798) and *Chand* (CAS 2014/A/3759) in support of her claim that the Respondents violated the Fundamental Principles of Olympism, arguing that her case is analogous with the discrimination found in those cases. The Claimant believes that, as in those cases, her case "*involves mandated differential treatment between male and female athletes whereby limits are placed on the number of Olympic quota places available to women that are not similarly imposed on men*".

138. The Panel accepts that, as set out in the Fundamental Principles of Olympism, the practice of sport is indeed a human right. In the Panel's view, the Respondents have not, however, breached this aspect of the Olympic Charter based on the particular facts and circumstances of this case. The Claimant has not been denied the right to practice the sport of bobsleigh or to compete in IBSF and Olympic competitions and, for the reasons discussed below, the Qualification System did not constitute unlawful gender discrimination.

139. The Claimant notes that the Qualification System allocated fewer quota places to women than men. The Panel does not agree, however, that such disparity amounted to unlawful gender discrimination under the Olympic Charter, because the Qualification System represented a good faith, ongoing, and ultimately successful effort to improve gender parity, which took into account matters of practical implementation. The Olympic Charter combined with the 2020 Agenda – the latter being a policy plan rather than a legally binding instrument – did not promise female bobsleigh athletes the same number of quota as men at the Olympic Games. Together the two instruments only set out the IOC's objective to foster gender equality and proceed towards gender parity in the whole of the Olympic Games – that is, considering all Olympic sports together, given that, as commonly known, there are also Olympic sports having a prevalent female participation (e.g. artistic swimming) – but did not establish a hard rule or obligation to reach gender parity immediately and in every single Olympic competition or event. If anything, the IOC pledged to pursue, together with all international federations, a *process* towards gender parity in athletes' Olympic participation (and, as was publicly announced, the total number of male and female athletes competing in the 2024 Paris Olympics is the same).

140. The Panel believes that the IBSF and IOC have achieved this objective, set out in the Olympic Charter and the 2020 Agenda, of working towards gender parity. The Panel takes note of the efforts made by them towards that goal – the IBSF and IOC analyzed in depth the situation of how to promote gender balance in bobsleigh and skeleton, even introducing the WWG to advance those initiatives – and pushed in that direction. Indeed, the Panel observes that the IBSF, with the explicit purpose of pursuing gender parity, presented both the option of the 4-woman bobsleigh and the option of the monobob to the IOC, noting the benefits and drawbacks of each type of competition and that, ultimately, it was decided in agreement with the IOC that monobob was the better option to advance gender equality while taking into account the practicalities of the sport. The Panel finds that the IBSF and IOC conducted a *bona fide* process to determine what female event to add at the OWG 2022.

141. The Panel does not find any evidence of "wilful discrimination" or of a prioritization by the IBSF and IOC to maintain male athlete quotas at the expense of advancing opportunities for women and achieving gender balance. While reports from the WWG acknowledge the importance of promoting equality and increasing female participation in bobsleigh, merely recognizing the benefits of a proposed 4-woman bobsleigh competition does not necessitate its adoption over monobob. As is evident from the record, there were legitimate concerns about the viability of adding the 4-woman bobsleigh to the OWG 2022, among them, (i) the major cost of the 4-woman sled – a 4-woman sled costs about three or four times more than a monobob – and the related risk of having only a few NOCs (those of the countries that are traditionally powerful in bobsleigh) that would ultimately participate in the competition and invest in a 4-woman program, (ii) the lack of an existing program (unlike the monobob which already had a program due to the inclusion of said discipline in the 2020 Youth Olympic Games), (iii) the number of female athletes available and interested in competing in the new discipline, and (iv) the general uncertainty on whether it would be successful. Conversely, the IBSF and IOC expressed confidence in the successful implementation of the monobob and they were satisfied that it would bring gender equality in the number of medal events in the OWG 2022, thereby taking a fundamental step towards full gender balance. It is no secret that throughout the process the WWG did, in fact, consider as objectives to "*simultaneously maintain at least the same number of men's nations at OWG (to avoid a negative impact on men's bobsleigh and skeleton)*" and that, at one point, the WWG considered requesting additional quota spots from the IOC to "*avoid significant damage to bobsleigh*" as "*reducing men's quota dramatically could devastate the whole sport*". The Panel does not, however, find this to be evidence of discrimination. The WWG simply and correctly sought to pursue the process advocated by the IOC and promote gender equality while at the same time ensuring the financial stability and popularity of the sport. Indeed, it must be underlined that women competed in bobsleigh for the first time at the OWG 2002 in Salt Lake City and, more than twenty years later, the number of male athletes licensed by the IBSF to compete in bobsleigh is still much higher than the number of female athletes (in the season prior to the OWG 2022, out of 851 annual bobsleigh licenses issued by the IBSF, 612 were issued to men and 235 to women).

142. The Panel considers that the introduction of the monobob in the OWG 2022 was a considerable step towards achieving gender balance, as it increased the number of events and medals in bobsleigh available for women to equal those available to men (2 each). It also increased the total number of women quota spots to 46 from the 40 allotted in 2018 and the number of female pilots to 26 from the 20 competing in 2018. Importantly, at the OWG 2022, 26 female pilots competed in two female bobsleigh events, while 31 male pilots competed in two male bobsleigh events; accordingly, the percentage of spots for female bobsleigh pilots (as the Claimant is) out of the total of pilots present at the OWG 2022 was of 45,6%, thus getting quite close to parity. In short, the OWG 2022 marked a clear improvement from the OWG 2018 for female bobsleigh athletes, in particular for pilots (and, as was mentioned at the hearing, pilots are the most technically skilled and, thus, the most relevant athletes in the sport of bobsleigh, compared to the brakers and pushers). Considering that, prior to the OWG 2022, the total number of male pilots competing internationally in bobsleigh was still considerably higher than the total number of female pilots (83 vis-à-vis 56), the improvement was remarkable.

143. Moreover, the Panel notes that the introduction of the female monobob – and thus the achieved gender parity in medal events – was only a step in the process and that, thereafter, the IBSF and IOC have continued to move even further towards gender balance. In fact, the Panel observes that for the OWG 2026, as acknowledged at the hearing by the Claimant, there will be a more balanced situation in terms of teams and sleds and pilots. The Panel notes that there is still a difference in the total quota spots for male and female bobsleigh athletes but this is attributable to the 4-men bobsleigh which requires more athletes, but that in terms of sleds and pilots the Respondents have essentially reached gender balance. In the OWG 2026, the men will have 28 sleds in each of the 4-men bobsleigh and the 2-men bobsleigh, with the requirement that they compete in both events, meaning that there will be a total of 28 male pilots. The women will have 25 sleds in each of the 2-woman bobsleigh and the monobob, and will have a total of 31 pilots, 25 pilots in the 2-woman bobsleigh and 6 female pilots in the monobob (with the other 19 monobob sleds piloted from women competing also in the 2-woman bobsleigh). That is, for the first time in the history of bobsleigh, there will be more women as bobsleigh pilots than men at the OWG. In the Panel's view, the fact that the IBSF and IOC were able to reach some gender balance in the OWG 2026 – notwithstanding the fact that (i) traditionally (and until not so long ago) bobsleigh was a men-only sport, and (ii) still now the gender of bobsleigh pilots competing at international level is predominantly male – is not proof of discrimination in the previous edition of the competition, since, as stated above, it was a process that the IBSF and IOC committed to do, and this process was conducted *bona fide* and with the aim of achieving gender balance while considering various practical aspects of the sport.

144. Additionally, in the Panel's view, the fact that the IBSF was able to reach full gender balance in the skeleton competition with 25 quotas for each male and female, and that the IOC saw 10 out of 15 reach equal gender numbers, does not mean that the IBSF and IOC did not meet their objectives under the Olympic Charter to work towards equality. This is because the process of achieving such parity across different sports and disciplines varies due to factors such as historical participation rates, infrastructure

development, and overall athlete interest and talent pool. Each sport faces unique challenges and considerations in moving towards gender balance, and while progress has been made in some areas, it does not necessarily require parallel and uniform advancements in all sporting disciplines.

145. As for the Claimant's reliance on *Semenya* and *Chand* in support of her claim that the IBSF and IOC violated of the Olympic Charter, the Panel finds that it is misplaced. In those cases, the athletes were prevented from participating in their elected competitions based on biological factors, whereas in the Claimant's case, the IBSF and IOC have simply adopted a qualification system setting out the criteria for qualifying to the 2022 OWG. The Claimant was not prevented from participating in bobsleigh and had an opportunity to qualify for the OWG through the Qualification System, which, as stated above, the Panel does not find to have breached the Olympic Charter's principle against discrimination.

146. In light of the foregoing, the Panel finds that the Claimant's claim for discrimination based on the IBSF and IOC's alleged breach of the Olympic Charter and the 2020 Agenda is unfounded.

B. IBSF Statutes and Code of Ethics

147. The Claimant submits that the Respondents violated Article 1 of the IBSF Statutes and Article 4 of the Code of Ethics. Those provisions state the following:

- Article 1 of the IBSF Statutes: *"The IBSF does not allow any kind of discrimination on improper grounds, in particular discrimination on grounds of… sex …"*.
- Article 4 of the Code of Ethics: "*Individual dignity must always be safeguarded, and no form of discrimination or harassment shall be permitted. … Likewise, in the preparation of elections or appointments, no discrimination of any type shall be tolerated. The same principle must apply to any sporting regulation*".

148. As with the Olympic Charter, the Panel does not consider that either of these provisions were breached by the Respondents (apart from the fact that the IOC is not legally bound by the IBSF Statutes). Article 1 of the IBSF Statutes prohibits discrimination on improper grounds, including sex. However, for the reasons stated in the previous sub-section, the Panel finds that the allocation of quota spots by the IBSF and IOC was not discriminatory under the facts and circumstances of this case; rather, it was a result of a legitimate process aimed at promoting gender balance in bobsleigh while considering the actual situation and practicalities of the sport. Similarly, Article 4 of the Code of Ethics emphasizes safeguarding individual dignity and prohibiting discrimination or harassment. The Panel finds no evidence to suggest that the actions of the IBSF and IOC violated this provision.

149. The Panel thus dismisses the Claimant's claim for discrimination based on an alleged violation of Article 1 of the IBSF Statutes and Article 4 of the Code of Ethics.

C. Swiss public policy

150. The Claimant submits that CAS is bound by Article 190.2(e) PILA to apply Swiss international public policy to her case. This, as per the Claimant's assertion, encompasses the general principle of equality between women and men and the prohibition of gender-based discrimination. According to the Claimant, this general principle emanates from European and universal laws including Article 14 ECHR in combination with Article 8 ECHR (as well as Article 1 of Protocol 12 of the ECHR), Article 23 of the Charter of Fundamental Rights of the European Union ("EU Charter of Fundamental Rights"), Articles 1 and 13(c) of the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 ("CEDAW Convention") and Articles 1 and 2 of the Universal Declaration of Human Rights adopted in 1948 by the UN General Assembly ("UN Universal Declaration of Human Rights").

151. The Panel recognizes that, under Article 190.2(e) PILA, it has a duty to ensure that it issues an award that does not run counter to public policy and risk being overturned by the SFT. The Panel must ensure that its decision aligns with the fundamental values and legal principles that underpin Swiss public policy and, accordingly, will consider whether the ECHR, EU Charter of Fundamental Rights, CEDAW Convention or UN Universal Declaration of Human Rights provide support for the Claimant's claim of unlawful gender-based discrimination.

i) ECHR

152. The Claimant argues that the principles of equality between men and women and protection against gender discrimination are enshrined in Article 14 ECHR, which reads in the relevant part: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex […]*". The Panel notes that the Claimant also invokes Protocol no. 12 to the ECHR which extends the prohibition of discrimination of Article 14 ECHR to all rights protected by law, regardless of whether they are explicitly mentioned in the ECHR; however, the Panel finds that this provision is inapplicable because Switzerland has not ratified Protocol no. 12. As a consequence, this international instrument has not become part of Swiss law and will not be dealt with in this award.

153. The Panel must first point out that, as confirmed by the jurisprudence of the ECtHR, Article 14 ECHR is not a stand-alone guarantee and does not grant *per se* an enforceable right against discrimination. Rather, it only prohibits discrimination in the enjoyment of the rights and freedoms set for in the ECHR. That is, it operates as a provision that complements other rights and freedoms guaranteed by the ECHR. It ensures that these rights are enjoyed without discrimination based on certain grounds listed in the ECHR. Article 14 must therefore be invoked in conjunction with other articles of the ECHR when alleging violations of rights due to discriminatory treatment. Indeed, the Grand Chamber of the ECtHR so stated in a 2022 judgment: "*According to the consistent case-law of the Court, Article 14 of the Convention only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms'*

safeguarded by those provisions" (ECtHR Judgment of 11 October 2022, no. 78630/12, *Beeler v. Switzerland*, at para. 47).

154. To that end, the Claimant invokes Article 8 ECHR, which provides that everyone "*has the right to respect for his private and family life, his home and his correspondence*". The Claimant argues that the Qualification System affected her participation in bobsleigh competitions at the international level and had a direct impact on the exercise of her profession. She claims that she "*suffered unlawful discrimination hindering her right to private life within the meaning of Article 8 ECHR, as it encompasses her right to exercise her profession by participating in the Olympic Games*".

155. The Claimant compares her case to that of *Semenya v. Switzerland* where the ECtHR found that the right to private life as guaranteed by Article 8 ECHR may extend to professional activities. She specifically cites the passage where "*the Court considers that the applicant is seriously hindered in the exercise of her profession since the [challenged rules] prevent her from taking part in the international competitions in which she has achieved her greatest successes. Insofar as this regulation has its own logic concerning the sexual characteristics, in particular the genetic characteristics, of athletes, the Court considers that the 'reasons' behind the adoption of the disputed regulations relate the applicant's private life*". Relying on this passage, the Claimant contends that the Qualification system has endangered her professional career and her ability to achieve economic success by depriving her of the opportunity to take part in a major international competition that is essential to her professional life.

156. The Panel observes that in *Semenya v. Switzerland*, the Court found that the applicant's sexual characteristics fell within the scope of her private life within the meaning of Article 8 ECHR and that her personal identity was affected since, due to her differences in sex development ("DSD"), she would be forced to undergo medical treatment to avoid exclusion from participation in women's athletics competitions. The ECtHR held that, given that personal autonomy is protected under Article 8 ECHR and that the intrusive choice she faced necessarily affected rights falling within the scope of Article 8 (including her right to practice her profession), her case fell within the ambit of Article 8. The ECtHR found that Ms. Semenya was seriously hindered in the exercise of her profession since the DSD Regulations adopted by IAAF (now World Athletics) prevented her from taking part in her profession. The ECtHR thus concluded that Ms. Semenya could rely on Article 8 of the ECHR to invoke Article 14 ECHR.

157. The Panel finds the Claimant's case to be markedly distinguishable from *Semenya v. Switzerland*. The Qualification System did not affect the rights and liberties granted to her under the ECHR. It did not prevent the Claimant from practicing her profession. Nothing in the Qualification System denied or even limited the Claimant from exercising her profession as a bobsleigh athlete and taking part in international competitions. She has not been put in the situation of Ms. Semenya, where she had to choose between medical treatment and being totally excluded from the sporting competitions in which she excelled. The Qualification System has simply set out the sporting, not personal, preconditions to qualify, as part of a selected group, to a specific sporting event – the OWG 2022.

158. Based on the jurisprudence of the ECtHR, including *Semenya v. Switzerland*, the Panel finds that professional and business activities fall within the substantive scope of application of Article 8 ECHR only if they are of sufficient relevance for the right to private and family life (ECtHR Judgment of 5 September 2017, no. 61496/08, *Bărbulescu v. Romania,* at para. 71; ECtHR Judgment of 12 June 2014, no. 56030/07, *Fernández Martínez v. Spain*, at paras. 109-110; ECtHR Judgment of 9 January 2013, no. 21722/11, *Volkov v. Ukraine*, at para. 165). In other words, the ECHR does not grant a general right to exercise a given profession unless the professional activities are relevant for private and family life.

159. Furthermore, the Panel notes that, when assessing the applicability of Article 8 ECHR, what matters is whether the challenged action generated a restriction of access to a profession as such (see e.g. ECtHR Judgment of 27 July 2004, nos. 55480/00 and 59330/00, *Sidabras and Džiautas v. Lithuania*, at para. 47; ECtHR Judgment of 27 June 2017, no. 50446/09, *Jankauskas v. Lithuania* (no. 2), at para. 56; ECtHR Judgment of 27 June 2017, no. 48427/09, *Lekavičienė v. Lithuania*, at para. 36; ECtHR Judgment of 2 February 2016, no. 18650/05, *Sodan v. Turkey*, at paras. 57-60; ECtHR Judgment of 25 September 2018, no. 76639/11, *Denisov v. Ukraine*, at paras. 101, 104-105, 108 and 109). Accordingly, the ECHR does not grant a right to reach certain professional results.

160. Different from the aforementioned cases, the Claimant was not denied any access to her profession as a bobsleigh athlete and did not face any general prohibition on working in that field. This also distinguishes the present case from the ECtHR judgments of 24 June 1993, no.14518/89, *Schuler-Zgraggen v. Switzerland*, and of 2 December 2014, no. 61960/08, *Emel Boyraz v. Turkey*, on which the Claimant relies, where the applicants were dismissed from their positions and thus denied access to employment. The Qualification System does not control access to a profession but simply adopts qualification provisions in relation to the access to a single high level competition.

161. Furthermore, neither *Semenya v. Switzerland* nor any of the aforementioned ECtHR cases support the notion that the Claimant would have a protected, enforceable right under Article 8 ECHR beyond that of participating in her profession when private and family life are at risk. The ECtHR jurisprudence does not support that the Claimant would have a right in participating in a specific event such as the OWG 2022. In any case, the Claimant was not even prevented from doing so. She had the right to participate in that competition, but failed to qualify under a Qualification System the Panel has found to be lawful.

162. In light of the foregoing, the Panel concludes that, based on the facts and circumstances of this case, the Claimant may not rely on Article 8 of the ECHR to invoke Article 14 ECHR. Therefore, the Claimant's assertion that the Qualification System breaches the principles of equality and prohibition of gender-based discrimination under Article 14 ECHR, in conjunction with Article 8 ECHR, is ungrounded.

ii) EU Charter of Fundamental Rights

163. The Claimant also argues that the principle of gender equality and the prohibition against gender discrimination is established by Article 23 of the EU Charter of

Fundamental Rights. That article states as follows: "*Equality between women and men must be ensured in all areas, including employment, work and pay*".

164. The Claimant acknowledges that, as Switzerland is not a member of the European Union, the EU Charter of Fundamental Rights does not apply directly within the Swiss legal system, but contends that it is a "*critical contextual resource demonstrating that the principle of equality is so widely recognized that it has, across the EU, the value of a general principle, which is a component of Swiss public policy*".

165. The Panel finds that the EU Charter of Fundamental Rights does not apply, directly or indirectly, to the present dispute. First, the EU Charter of Fundamental Rights does not apply in Switzerland because it is part of a foreign legal system. Second, the EU Charter of Fundamental Rights only applies as a protection vis-à-vis the rules and deeds of the institutions, bodies, offices, and agencies of the EU, as well as of the EU Member States when they are implementing EU law, and to national authorities of the EU member States when they are implementing national law within the scope of EU law. Indeed, the scope of application of the EU Charter of Fundamental Rights is defined in Article 51 thereof, pursuant to which:

> "*1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
>
> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties*".

166. The Panel notes that the jurisprudence of the EU Court of Justice confirms that the provisions of the EU Charter of Fundamental Rights are addressed (i) to the EU institutions, bodies and agencies, including when they act outside the EU legal framework and accept international agreements (see e.g. Court of Justice Judgment of 20 September 2016 [Grand Chamber], C-8/15P to C-10/15P, *Ledra Advertising*; Court of Justice Opinion 1/15 of 26 July 2017, *EU-Canada PNR Agreement*), as well as (ii) to the EU Member States and their national authorities, but only when they are implementing EU law or act within the scope of application of EU law; in this respect, the Court of Justice pointed out that it could not examine the compatibility with the EU Charter of Fundamental Rights of national legislation of a Member State lying outside the scope of EU law (see e.g. Court of Justice Judgment of 26 February 2013 [Grand Chamber], C-617/10, *Akerberg Fransson*).

167. Therefore, the EU Charter of Fundamental Rights does not extend to protect individuals against the rules and deeds of the IBSF and IOC because, being private associations headquartered in Switzerland, they obviously are not part of the EU institutional framework and are not public authorities of a EU Member State acting within the scope of EU law. Moreover, given the above, the EU Charter of Fundamental Rights certainly cannot be considered to be part of Swiss public policy.

168. In light of the foregoing, the Panel concludes that the Claimant may not rely on the EU Charter of Fundamental Rights to support her claim of gender-based discrimination or breach of the principle of equality as a violation of Swiss public policy.

iii) UN Universal Declaration of Human Rights and CEDAW Convention

169. The Claimant also contends that Articles 1 and 2 of the UN Universal Declaration of Human Rights and Articles 1 and 13(c) of the CEDAW Convention should be considered in the context of Swiss public policy.

170. Articles 1 and 2 of the UN Universal Declaration of Human Rights provide that "*[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*" and "*[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as […] sex […]*".

171. Article 1 of the CEDAW Convention defines discrimination against women as "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*" and, then, Article 13(c) of the CEDAW Convention provides that "*States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: […] the right to participate in recreational activities, sports and all aspects of cultural life*".

172. The Panel finds, however, that the UN Universal Declaration of Human Rights serves as a foundational and inspirational document outlining fundamental human rights and freedoms aspiring to be vertically granted to individuals by sovereign States, but its provisions are not legally binding to sovereign States (unless demonstrated to have become part of international customary law) and, certainly, not to private parties unless specifically incorporated into domestic legislation rendering them horizontally applicable. Accordingly, the IBSF and IOC are not directly bound by the UN Universal Declaration of Human Rights and the Swiss public policy filter cannot transform those vertical principles into horizontal ones to be applied between private parties.

173. With regard to the CEDAW Convention, the Panel finds that it only imposes obligations upon its contracting States and requires implementation through domestic legislation. The Panel is thus of the view that Article 13(c) of the CEDAW Convention is not directly applicable in the context of relationships between private parties and does not grant rights horizontally enforceable against private organizations, and Swiss public policy may not be invoked to transform those vertical principles into horizontal ones.

174. In light of the foregoing, the Panel concludes that the Claimant may not rely on the UN Universal Declaration of Human Rights or the CEDAW Convention to support her claim of gender-based discrimination as a violation of Swiss public policy.

D. Swiss domestic law

175. The Claimant submits that the Respondents violated various provisions of Swiss law, notably Articles 8, paras. 2 and 3, of the Swiss Constitution, Article 3 of the Swiss Gender Equality Act, Article 10 of the Constitution of the Canton of Vaud, and the Law of application in the Canton of Vaud of the Federal law of 24 March 1995 on equality between women and men (the "LVLeg"). Those provisions of Swiss law stipulate as follows:

- Article 8 of the Swiss Constitution so provides in the relevant paragraphs:

  "*(2) No person may be discriminated against, in particular on grounds of… gender….*

  (3) Men and women have equal rights. The law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women have the right to equal pay for work of equal value".

- Article 3 of the Swiss Federal Act on Gender Equality (the "Gender Equality Act") so provides:

  "*1. Employees must not be discriminated against on the basis of their sex, whether directly or indirectly, including on the basis of their marital status, their family situation or, in the case of female employees, of pregnancy.*

  2. This prohibition applies in particular to hiring, allocation of duties, setting of working conditions, pay, basic and continuing education and training, promotion and dismissal.

  3. Appropriate measures aimed at achieving true equality are not regarded as discriminatory".

- Article 10 of the Constitution of the Canton of Vaud dated 14 April 2003 so provides:

  "*1. All human beings are equal before the law.*

  2. No one shall be discriminated against in particular because of their… sex….

  3. Women and men are equal in law. The law provides for equality in law and in fact, in particular in the areas of the family, training and work".

- The relevant provision of the LVLeg so states:

  "*The Cantonal Office for Gender Equality promotes gender equality in all areas and works to eliminate all forms of direct or indirect discrimination*" (free translation from the French original).

176. With regard to paras. 2 and 3 of Article 8 of the Swiss Constitution, the Claimant argues that it imposes on the legislator and the authorities which apply the law the obligation to take the measures necessary to achieve legal and substantive equality in all areas of

life for both sexes and that the SFT considers that this obligation applies directly between private persons.

177. The Panel is of the opinion, however, that the prohibition against gender discrimination of Article 8, paras. 2 and 3, of the Swiss Constitution is directed at the Swiss Confederation and does not apply horizontally between private parties, with the exception of the third sentence of Article 8, para. 3, which only deals with employment relationships and which is thus inapplicable in the present case, since the Claimant has no such employment relationship with the IBSF or IOC. Indeed, as held by SFT in its Judgement 4P.253/2002: "*Article 8 para. 3, 3rd sentence Cst provides that men and women have the right to equal pay for work of equal value. This constitutional norm, which has a direct horizontal effect, was concretized by the Equality Law*" (para. 2.2, free translation from the French original). Swiss jurisprudence has held that the other parts of Article 8, paras. 2 and 3, are addressed to the State and do not, in principle, have direct horizontal effect on relations between private persons (see SFT Judgements 4A_248/2019 and 4A_398/2019, citing ATF 137 III 59 at para. 4.1; 136 I 178 at para. 5.1; ATF 133 III 167 at para. 4.2; 5D_76/2017 of 11 May 2017 at para. 5; 5A_362/2016 of 20 February 2017 at para. 6.3; 5A_847/2015 of 2 March 2016 at para. 4.1).

178. As for Article 3 of the Swiss Gender Equality Act, it does not apply to the present case because it is effective only for employment relationships. As already underlined, however, the Claimant is not an employee of the IBSF or IOC.

179. Regarding Article 10 of the Constitution of the Canton of Vaud, its scope is primarily limited to matters within the jurisdiction of the Canton of Vaud. As such, it does not extend to governing the regulatory actions of private international sporting bodies such as the IBSF or IOC, even if they are headquartered in the Canton of Vaud. Article 10 is fundamentally a provision of local law intended to govern relationships and affairs within the Canton, and it lacks extraterritorial applicability. Since the Qualification System had worldwide effect and both the Olympic qualifying competitions and the OWG 2022 primarily occurred outside the jurisdictional bounds of the Canton of Vaud, Article 10 does not provide a suitable legal basis for adjudicating the Claimant's claim of gender discrimination.

180. Finally, the LVLeg is also inapplicable. The Claimant points out that the LVLeg established the Cantonal Office for Equality between Women and Men to, as set out in Article 4(1) of that legislation, promote the achievement of gender equality in all areas of the law and not just employment-related areas. The Panel notes, however, that according to Article 4(3) of that same legislation, the function of said Office is to deal with disputes related to the Gender Equality Act ("*Dans les litiges relevant de la LEg, l'autorité appelée à statuer peut demander au Bureau cantonal de l'égalité d'émettre une appréciation sur la base du dossier. Elle peut également requérir du Bureau de l'égalité toutes les informations nécessaires à l'accomplissement de sa tâche*"). It follows that since the Gender Equality Act is limited to employment matters, the LVLeg does not provide a mechanism for addressing gender equality issues that go beyond the scope of employment law.

181. In light of the foregoing, the Panel holds that none of the Swiss domestic laws cited by the Claimant are applicable nor provide a proper basis for the Claimant's claim for alleged gender discrimination.

E. EU law

182. The Claimant submits that the Qualification System infringes the prohibition of gender discrimination and the principle of equality between men and women which, in the her view, are mandatory rules of EU law applicable by virtue of Article 19 of PILA. The Claimant argues that mandatory rules of EU law are applicable to the present dispute even though (i) Swiss law is the law directly applicable to the dispute, (ii) the Claimant is not an EU citizen, and (iii) the IBSF and IOC are based in Switzerland. The Claimant relies on CAS 2016/A/4492 *Galatasaray v. UEFA*, CAS 98/201 *Celtic PLC v. UEFA* and CAS 98/200, *AEK Athens and SW Slavia Prague v. UEFA,* where the CAS panels took into account EU competition law for disputes in which the parties had agreed on the applicability of Swiss law.

183. The Panel recognizes that, as found in the aforementioned awards, drawing inspiration from Article 19 PILA, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met: (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called "*lois d'application immediate*"); (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force; (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.

184. The Panel finds, however, that these cumulative requirements have not been met in the present case and, therefore, EU law should not be taken into account pursuant to (the application by analogy of) Article 19 PILA. In particular, there is a lack of close connection between the subject matter of the dispute – the alleged gender discrimination of the IBSF and IOC against a Nigerian athlete based on the Qualification System for the Beijing OWG 2022 – to the EU. The Panel observes that the Claimant is not an EU national, resides outside of the EU and is making a discrimination claim located outside the EU territory and related to a qualification system for a sporting event that is adopted and applied by sporting federations – the IBSF and IOC – seated outside of the EU in order to qualify for a competition held in China. The present case is thus distinguishable from those cited by the Claimant, where the CAS panels found that there were close connections between the subject matter and the EU since the disputes concerned directly or indirectly football clubs headquartered in EU Member States and the relevant geographic market affected by the UEFA regulatory and disciplinary power certainly encompassed the EU territory.

185. In light of the foregoing, the Panel concludes that the Claimant's claim that the Respondents violated EU law is ungrounded.

F. Personality rights under Articles 27 and 28 SCC

186. The Claimant submits that the Qualification System violates her personality rights recognized under Articles 27 and 28 SCC. Those provisions provide as follows:

> Article 27:
>
> *"1. No one may, even partially, waive the enjoyment or exercise of his or her civil rights.*
>
> *2. No one may alienate his freedom, nor prohibit the use of it to an extent contrary to law or morality.*
>
> Article 28:
>
> *"1. Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement.*
>
> *2. An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law*".

187. The Claimant argues that personality rights under Swiss law give her a "*right to have an equal opportunity to the opportunity of male athletes to qualify for her chosen Olympic event*". The Claimant believes that due to the alleged discriminatory rules of the Qualification System her personality rights to professional and economic freedom and to participate in a sporting activity of her choice have been violated. In Claimant's view, the alleged discrimination has led to severe damage to her professional and economic existence, "diminishing" her revenues and potential to develop her economic activity in the field of bobsleigh.

188. The Panel observes that CAS panels and the SFT have recognized personality rights under various instances, such as with respect to the freedom to participate in sporting activity of one's choice (TAS 2012/A/2720), the right to private life (TAS 2011/A/2433) and the right to professional and economic freedom (see *Matuzalem v. FIFA* SFT Judgement 4A_558/2011 dated 27 March 2012). However, personality rights do not extend to the right to compete at a specific event. The Panel also observes the SFT has found that "*for a restriction of economic freedom to be considered excessive within the meaning of the case law of the Federal Tribunal, it must force the person who has obliged itself to the arbitrariness of its co-contractor, suppresses its economic freedom or limits it in such a measure that the bases of its economic existence are endangered*" (see SFT Judgement 4A_248.2019 & 4A-398/2019, 25 August 2020, at para. 10.5).

189. The Panel finds that the Claimant was not deprived of her professional and economic freedom or her right to participate in the sporting activity of her choice. She simply failed to qualify to the OWG 2022 based on the Qualification System, and this did not prevent her from participating in bobsleigh or from making a living therefrom. The Claimant's case is thus markedly different from *Matuzalem* where the player was subject to an unlimited occupational ban that imperilled his possibility to gain his living as a professional. In the Claimant's case, there is no such restriction placed on her

economic freedom; in fact, she did not claim, let alone prove, that the alleged decrease of her bobsleigh-related revenues endangered her economic subsistence. There was also no restriction to the Claimant's possibility to practice her chosen profession or threat to her physical integrity, which clearly distinguishes her case from that of Ms. Semenya (see *supra* at paras. 157-161).

190. The Panel thus rejects the claim that the Respondents violated the Claimant's personality rights under Articles 27 and 28 SCC.

G. Conclusion on the alleged unlawfulness of the Qualification System

191. The Panel concludes that, even if her claims could be considered as admissible (*quod non*), the Claimant failed to prove that the Qualification System discriminated against her in breach of any of the legal instruments she cited and, thus, failed to demonstrate its unlawfulness.

H. Request for damages

192. Under Swiss law, Articles 41 and 97 SCO require, among the fundamental elements to award compensation for damages, proof of an unlawful act committed by the Respondents. As the Claimant did not prove that the Respondents acted unlawfully against her, any damages she allegedly suffered by failing to qualify to compete in the OWG 2022 are not subject to be compensated by the Respondents. The Panel thus dismisses the claim for damages.

I. Further or different motions

193. All further or different motions or requests of the Parties are rejected, to the extent that they are admissible.

IX. COSTS

(…)

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The claims filed by Ms. Simidele Adeagbo on 8 March 2022 are inadmissible and dismissed.

2. (…).

3. (…).

4. All further or different motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 31 March 2025

THE COURT OF ARBITRATION FOR SPORT

Massimo Coccia
President of the Panel

Jeffrey Mishkin
Arbitrator

Annabelle Bennett
Arbitrator

Francisco A. Larios
Ad hoc Clerk