



**Arbitration CAS ad hoc Division (OG Beijing) 22/007 Jazmine Fenlator-Victorian v. International Bobsleigh & Skeleton Federation (IBSF), award of 9 February 2022 (operative part of 7 February 2022)**

Panel: Mr Fabio Iudica (Italy), President; Mrs Maria Gwynn (Paraguay); Judge Vesna Bergant Rakočević (Slovenia)

*Bobsleigh*

*Decision of the executive committee of the federation establishing a ranking list granting access to the Olympic Games*

*Standing to appeal*

*Standing to appeal of third parties*

*Non-retroactivity*

*Reliance on good faith*

- 1. To have standing, the applicant must have a protectable or a legitimate interest. This is the case if (i) the applicant is sufficiently affected by the impugned decision and (ii) a concrete interest of a financial or sporting nature is at stake. Sufficient interest is a broad, flexible concept without undesirable rigidity and includes whether the complainant can demonstrate a sporting and pecuniary interest. In order to have a “tangible” or “concrete” interest, the applicant must have suffered harm or prejudice deriving from the challenged decision. 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 that decision. The “aggrievement requirement” is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body’s decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision. An indirect interest is not sufficient to establish standing.**
- 2. Third parties generally have standing before the CAS in two cases. First, when a regulation explicitly confers it. Secondly, when an association’s measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered “directly affected” and thus enjoys standing to sue. This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial or sporting nature at stake may bring a claim, even if they are not addressees of the measure being challenged.**
- 3. The principle of non-retroactivity is a fundamental legal principle, which does basically apply to measures taken by associations having the character of a sanction. However, it does not follow from this that the principle applies without limitation. In particular, it does not apply to a rule which governs the requirements for being admitted to a**

**competition.**

- 4. When considering whether a person’s reliance on good faith merits protection, it makes a difference whether that party already holds a legal position or will do so only in the future. Someone, who has already acquired a legal position in any event deserves to have his reliance on good faith protected to a greater extent. By contrast, someone, who would like to obtain a legal position in the future cannot simply rely on the fact that the conditions for obtaining that legal position will not change in the future.**

## **I. PARTIES**

1. The Applicant is Ms Jazmine Fenlator-Victorian, a bobsled pilot of dual Jamaican and U.S. citizenship, affiliated with the Jamaica Bobsleigh and Skeleton Federation (JBSF), competing in the 2-woman bobsleigh discipline (also referred to as the “Athlete”).
2. The Respondent is the International Bobsleigh and Skeleton Federation (IBSF), the organization administering the sports of Bobsleigh and Skeleton at international level.
3. The First Interested Party is the Jamaican Olympic Association (JOA), member of the International Olympic Committee, having its headquarters in Kingston, Jamaica. The mission of the JOA is to develop, promote and protect the Olympic Movement in Jamaica and to ensure that athletes from Jamaica attend the Olympic Games.
4. The Second Interested Party is the International Olympic Committee (IOC), the governing body of the Olympic Games and the organisation responsible for the Olympic Movement, having its headquarters in Lausanne, Switzerland. One of its primary responsibilities is to organise, plan, oversee and sanction the summer and winter Olympic Games, fulfilling the mission, role and responsibilities assigned by the Olympic Charter.
5. The Third Interested Party is the Comité National Olympique et Sportif Français (CNOSF), the governing body of the Olympic Games and the organisation responsible for the French Olympic Movement, having its headquarters in Paris, France. As a representative of the IOC in France, the CNOSF fills missions related to the Olympic Games, Olympism and the Olympic Movement and it represents the French sports movement, including sports federations, both nationally and internationally.
6. The Fourth Interested Party is Ms Margot Boch, a bobsled pilot of French nationality and an affiliated athlete of the Fédération Française des Sports de Glace (FFSG), competing in the 2-woman Bobsleigh discipline.

## II. FACTS

### A. Background Facts

7. The elements set out below are a summary of the main relevant facts as established by the Panel on the basis of the submissions of the Parties. Additional facts may be set out, where relevant, in the legal considerations of the present award.
8. On 17 January 2022, the IBSF published the Ranking List of the 2-woman Bobsleigh event (the “Ranking List”) at the XXIV Olympic Winter Game Beijing 2022 (the “OWG Beijing 2022”). According to the Ranking List, Ms Fenlator-Victorian tied with the French Athlete, Ms Margot Boch, in the 2-woman Bobsleigh ranking, each with 674 total points.
9. Based on this point ranking, the IBSF allocated the final quota spot for the 2-woman event to the CNOSF instead of the Jamaican NOC. The tie was broken in favour of Ms Boch pursuant to the provisions of the IBSF Qualification System for XXIV Olympic Winter Games, Beijing 2022 – Bobsleigh (the “Qualification System”).
10. According to the IBSF official records of the athletes’ results during the 2021/2022 Beijing 2022 qualification period, the Applicant took part in 8 races in the North American Cup Competition, scoring a total of 674 points in her best 7 races; on the other side, Ms Boch accrued the same number of points competing in the World Cup Competition and in the Europe Cup Competition, which last was scheduled to take place in Winterberg, Germany, from 29 November 2021 until 5 December 2021.
11. Although the table reporting the results of Ms Boch shows a total of 6 competitions valid for the qualification to the OWG Beijing 2022, it turns out that she actually competed in only 5 races since the Europe Cup competition scheduled on 4 December 2021 did not take place as it was cancelled due to weather conditions. The relevant race was not rescheduled, and the 2-woman Bobsleigh event took place on a single date on 5 December 2021 with the French team with pilot Ms Margot Boch placed second.
12. Before the Ranking List was published, on 9 December 2021, the Secretary General to the IBSF had previously communicated to the National Federations and Officials, that, on 6 December 2021, the IBSF Executive Committee had decided the following with respect to the cancelled race of 4 December 2021:

*“Due to the weather conditions the 2-woman and 4-man bobsleigh Europacup races in Winterberg on 4th of December, 2021 had to be cancelled. After having consulted with the IBSF sports department, the IBSF Executive Committee decided to count the 2-woman and 4-man bobsleigh Europacup races in Winterberg, conducted the following day (5 December 2021), twice as it will not be possible to reschedule these by the end of the season. If you have any further question, please contact: martin.kerbler@ibsf.org”* (the “Executive Committee Decision”).

13. From the documentation on file it results that the Bobsleigh Canada Skeleton (BCS) and the USA Bobsled and Skeleton Federation (USABS) had raised their concerns and submitted an enquiry to the IBSF about the Executive Committee Decision, questioning the legal basis of such measure and requesting the latter to reconsider the double-count solution and re-schedule the cancelled race. The reply of the Secretary General to the IBSF on 10 January 2022 reads as follows, with regard to the grounds of the Executive Committee Decision:

*“We turn your attention to the fact that IBR Article 10.6.12 reserves a right, rather than a duty for the IBSF Executive Committee to re-schedule races, as it is understandable that disruptions can be unforeseen, and the scheduling of replacement races (although practiced) can also be affected by changing circumstances. In present case, the IBSF Executive Committee had indeed turned the attention to the dates and times proposed in the December 19 Letter. Unfortunately, adding one more race to the already very tight schedule of the Europe Cup series was not possible, whether it was for training and competition time availability or having to change the whole testing program, especially in Winterberg EC set for January 9<sup>th</sup> -15<sup>th</sup>. The possibility to damage the integrity of the competition itself, as IBSF is already experiencing difficulties with medical resources to conduct the increased rhythm of testing following the increased number of cases at the Sigulda [Sigulda, editor’s note] World Cup. So adding another event in Winterberg would not have been feasible. Therefore, rescheduling in the provided dates was not possible, and this had been considered by the IBSF Executive Committee, along with other weeks, where the same type and level of difficulties were encountered. Secondly, to ensure the consistency of the point count fairly and impartially in the least disruptive manner, IBSF Executive Committee acted within its competence and decided on “counting” the subsequently conducted December 5<sup>th</sup> race in in Winterberg twice. This competence is expressly provided in Article 22 of the Statutes of IBSF: “22 GENERAL 22.1 The Executive Committee is deemed competent to take any decision not foreseen in the present Statutes. 22.2 The Executive Committee is obliged to report any decision that it takes pursuant to this Article to the next Congress”.*

14. On 31 January 2022, the Applicant submitted a petition to the IBSF Appeals Tribunal according to Article 18 of the IBSF Statutes, 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 stating the following: *“There was a tie with the Jamaica NOC where myself [Jazmine Fenlator-Victorian of JAM] was the athlete along with France’s Margot Boch. The tie was broken in favor of the French pilot due to priority given to the athlete with World Cup points accumulated. But in the points total after 7 races (the number of races counted for ranking for qualification), IBSF counted the points the Executive Committee awarded for the 2-woman race that did NOT occur in Winterberg on December 4 2021 for the EC circuit within the ranking point totals”*.
15. The Applicant argued that, according to Article 7 of the IBSF Code of Ethics, it is not expressly permitted for the Executive Committee to award points twice for a competition that did not take place: *“As a result of the ultra vires decision, I have suffered the great consequences of the IBSF’s Executive Committee decision and was denied the Olympic Qualification spot that I had earned and accrued points for by racing rightfully so”*.
16. According to the Athlete, the IBSF should have rescheduled the cancelled competition; that awarding points for the cancelled competition for the purpose of the Olympics qualification was extremely unfair; that the Appealed Decision had created a fictitious tie with the French

athlete; that the Appealed Decision violates the statutory requirement of fair play under Article 3.8 of the IBSF Statutes; that there is no provision in the IBSF Regulations or Statutes allowing the Executive Committee to double count the results of a race (the competition on 5 December 2021 in the present case) instead of rescheduling a cancelled competition and therefore, that the Appealed Decision is *ultra vires*.

17. On 2 February 2022, the IBSF Appeals Tribunal issued a decision dismissing the Athletes' petition, without holding a hearing (the "Appealed Decision").

### III. THE GROUNDS OF THE APPEALED DECISION

18. The Appealed Decision rejected the petition based on the assumption that the Applicant lacked standing, as an individual athlete, "*to pursue relief in light of allocation to quota spots to NOCs under the applicable qualification rules*".
19. In fact, shortly after receiving the petition, on 1 February 2022, the Appeals Tribunal informed the Athlete of the following: "*Section B.3 of the IOC/IBSF Qualification System for XXIV Olympic Winter Games, Beijing 2022 (attached) specifically allocates quota spots to National Olympic Committees and not to individual athletes. In other words, an athlete who qualifies a quota spot for an NOC does not "own" the spot and does not have an automatic right to participate in the Olympic Games. Because the Jamaica Olympic Association is the only entity that can claim a right to a quota spot, please submit evidence that the JOA has approved pursuit of this appeal on its behalf. If the Appeals Tribunal were to grant any relief, it would be in the form of allocation of quota spots to NOCs and not in the form of ordering that any particular athlete(s) would be entitled to participate. This verification should come from JOA and not your national federation, as Olympic entry is allocated to NOCs*".
20. The Athlete replied stating as follows: "*The use of that quota spot is an internal matter for the JOA and Jamaica Bobsled, but it is my understanding that the JOA is supportive of me and my teammate competing if a spot were allocated to the JOA*".
21. On 2 February 2022, the Appeals Tribunal further replied specifying the following: "*You misinterpreted my last e-mail as posing a question. It was not intended as a question -- it was an observation that the ability to seek relief may be restricted in the eyes of the law to the party whose legal rights are being abridged. In this case, the Jamaica Olympic Association is arguably the party whose rights would be at issue if the IBSF misapplied the rules related to Olympic qualification. The Appeals Tribunal understands your position, and is requesting evidence from the JOA that the JOA is aware of and supports your pursuit of this appeal*".
22. Thereafter, based on the alleged Athlete's lack of legal standing, the Appeals Tribunal informed the latter that the hearing which was scheduled on 3 February 2022 would be cancelled and the claim would be dismissed "*unless Ms. Fenlator-Victorian submits documentation from the Jamaica Olympic Association, duly authorized and authenticated, that either substitutes the JOA as the Claimant or ratifies any action taken by Ms. Fenlator-Victorian as representing the interests of the JOA. The documentation must be received by the Appeals Tribunal not later than the time set for the commencement of the hearing*".

23. Later on, in reply, by e-mail dated 2 February 2022, the Athlete’s counsel submitted that “*Ms Fenlator does not represent the JOA and will not furnish the requested documentation in the time set by the Tribunal. We understand, therefore, that her appeal has been dismissed. Ms Fenlator fully reserves all of her rights*”.
24. Based on the foregoing, the Appeals Tribunal vacated the hearing and dismissed the petition.

#### IV. THE CAS PROCEEDINGS

25. On 5 February 2022, at 09:01 (time of Beijing) the Applicant filed an Application with the CAS Ad Hoc Division against the Respondent with respect to the Appealed Decision. The Applicant requested that a decision be issued as soon as possible and no later than 7 February 2022. “*This urgency arises because the applicant’s brake woman, Audra Segree, is in Jamaica and will need to travel to Beijing as soon as possible in order to be in a condition to compete in the Two-Woman Bobsleigh event on 18 February 2022*”.
26. Later on, the Application was notified by the CAS Ad Hoc Division to the Respondent and to the Interested Parties.
27. On the same day, at 11:51 (time of Beijing), pursuant to Article 15 lit. c para. 1 of the CAS Arbitration Rules for the Olympic Games (the “CAS Ad Hoc Rules”), the Parties were notified with the composition of the Arbitral Tribunal (the “Panel”) as follows:  
  
President: Mr Fabio Iudica, Italy  
  
Arbitrators: Dr Maria A. Gwynn, Paraguay  
  
Judge Vesna Bergant Rakočević, Slovenia
28. At the same time, the CAS Ad Hoc Division invited the Respondent to file its Answer by 6 February 2022, at 07:00 (time of Beijing) and informed the Interested Parties of their entitlement to file an *amicus curiae* brief within the same deadline. Pursuant to Article 15 lit. c para. 1 of the CAS Ad Hoc Rules, the Parties were also invited to appear at the hearing which would be held by videoconference on 6 February 2022, at 21:00 Beijing time.
29. On 6 February, on 04:58 (time of Beijing), IOC sent an email informing the Panel that, since “*the present matter concerns primarily the interpretation and application of the IBSF’s Rules*” will not file any *amicus curiae* brief.
30. On the same date, at 06:54 (time of Beijing) the Respondent filed its Reply and relevant exhibits.
31. The CNOSF filed its *amicus curiae* brief and attached exhibits at 06:56 (time of Beijing) on 6 February 2022.

32. The other Interested Parties, namely the Jamaican Olympic Association (JOA) and Ms Margot Boch, did not file any *amicus curiae* and did not participate in these proceedings.
33. Later on, at 10:33 (time of Beijing) the Applicant filed an Outline of Oral Argument together with the Book of Authorities containing a list of applicable rules and regulations as well as jurisprudence which the Applicant intended to refer to during the hearing.
34. Also on 6 February 2022, at 12:44 (time of Beijing), the CAS Ad Hoc Division informed the Parties that by application of Article 18 of the CAS Arbitration Rules for the Olympic Games, the Co-President of the CAS Ad Hoc Division had extended the time-limit for the Panel to give a decision until 7 February 2022 at 12:00 (noon) (time of Beijing).
35. On 6 February 2022 at 21:00 (time of Beijing) a hearing was held with the participation of the following persons, in addition to the Panel and Mr Giovanni Maria Fares, Counsel to the CAS, all attending remotely via videoconference:

For the Applicants:

- Ms Jazmine Fenlator-Victorian, Applicant
- Mr James Bunting, Counsel
- Mr Carlos Sayao, Counsel
- Ms Alexandria Matic, Counsel
- Ms Audra Segree, Witness
- Ms Sarah Storey, Witness
- Mr Chris Stokes, Observer (IBSF).

For the Respondent:

- Ms Heike Grösswang, IBSF Secretary General;
- Mr Stephan Netzle, Counsel.

For the International Olympic Committee (IOC):

- Mr Antonio Rigozzi, Counsel.

For the Comité National Olympique et Sportif Français (CNOSF)

- Ms Nathalie Alaphilippe, Counsel

- Mr Nicolas Blanchard, Counsel
  - Mr Alexandre Vanhoutte, Bobsleigh team leader for the French team;
  - Ms Constance Popineau, Legal Director of the CNOSF.
36. There were no objections to the composition of the Panel and the Parties confirmed that the Panel has jurisdiction over the present dispute. Before the hearing was concluded, the Parties expressly stated that they did not have any objection to the procedure adopted by the Panel and confirmed that their right to be heard and to be treated equally was respected.
37. On 7 February 2022, at 11.46 (time of Beijing), the Panel issued the operative part of the award which was notified by the Parties by the CAS Ad Hoc Division.

## V. THE PARTIES' SUBMISSIONS AND REQUESTS FOR RELIEF

38. The Parties' submissions and arguments shall only be referred to in the sections below if and when necessary, even though all such submissions and arguments have been considered.

### A. The Applicant

#### a. *Applicant's Submissions*

39. The Applicant's submissions may be summarized, in essence, as follows:
40. The Executive Committee Decision arbitrarily allowed that fictitious points be accrued for the cancelled race in view of the qualification at the OWG Beijing 2022 for the benefit of Ms Boch, finally resulting in the unfair allocation of quota spot to the CNOSF instead of the JOA.
41. Not only the Appealed Decision is unfair and illegitimate, but it has the further effect to exacerbate the already existing unbalance between European-based and non-European-based competitors.
42. In fact, Jamaican athletes do not have the same opportunities to participate in European competition due to logistic and financial reasons; moreover, their possibility to travel to Europe in the last two years has been further restricted due to the Covid-19 pandemic. Therefore, the Applicant was able to compete only in the North American Cup series during the 2021-2022 Olympics qualifying season. Such circumstance results in the double counting for the 5 December 2021 race in the Europe Cup to be even more unfair to the Applicant. In fact, "*By deciding to double count the race held in Winterberg on 5 December 2021, a race which Jamaica could not attend and where nine of the eleven teams were from Europe or Russia, the IBSF discriminated against Ms. Fenlator-Victorian based on national origin*".



43. The Applicant is entitled to appeal with the CAS Ad Hoc Division according to Article 18.3 of the IBSF Statutes and Article X of the IBSF Appeals Tribunal Code and moreover, the present dispute falls within the 10-day period preceding the Opening Ceremony of the OWG Beijing 2022, as the Appealed Decision was issued on 2 February 2022.
44. As to the legal standing, the Applicant has standing to bring this appeal before the CAS and the Appeals Tribunal was wrong in stating the opposite given that she was seeking the recalculation of her ranking in accordance with the Qualification System, *“She is challenging a decision concerning her individual point rankings as calculated by the IBSF. Her name clearly appears on the IBSF point ranking table which she seeks to have set aside and have recalculated. She is directly affected by the IBSF’s decision to award the final 2-woman bobsleigh quota spot to the French NOC instead of the JOA, as she will be named by the JOA to that spot. She has a tangible sporting interest worthy of being protected, namely her ability to compete in the 2-woman bobsleigh for Jamaica at the Beijing Games. Moreover, she has the full support and endorsement of the JOA for the relief she seeks in this application”*. In addition, the JOA has no right or standing before the IBSF Appeals Tribunal as it is not a member of the IBSF.
45. In this respect, the Applicant submitted a written statement by the JOA reading as follows: *“The JOA has been made aware that Jamaican bobsleigh athlete, Jazmine Fenlator-Victorian, is pursuing an application at the Court of Arbitration for Sport in connection with the decision of the International Bobsled and Skeleton Federation (IBSF) not to allocate a quota spot to Jamaica in the two women bobsled competition. We confirm that if the CAS application results in the allocation of the quota spot to the JOA, the JOA will accept the quota spot and assign it to Ms. Fenlator-Victorian and her brake woman Audra Segree to compete in the two-women bobsled at the 2022 Beijing Olympic Games. We continue to support our athletes in their endeavours to realise their dreams on the Olympic stage and accordingly advise the Court of Arbitration of our full endorsement of the appellate proceedings and permission to Ms. Fenlator-Victorian to pursue the reliefs [...]”*.
46. In addition, the Applicant was deprived of the right to be heard before the Appeals Tribunal due to its decision not to hold a hearing, amounting to a breach of procedural fairness.
47. As to the Executive Committee Decision, the IBSF did not respect the applicable regulations as regards the athletes’ point rankings and namely: a) Section D.2.1 of the Qualification System which requires that the results to be included in the ranking are restricted to *“the best results of each pilot in all races that she had participated in...”*, thus excluding fictitious results; b) Article 3.8 of the IBSF Statutes under which the IBSF is permitted *“To recognise only those competitions which comply with these Statutes and the Rules of IBSF”*; c) Article 7 of the IBSF Code of Ethics, under which the IBSF cannot *“alter the course or result of a competition except as expressly permitted by the rules and regulations governing the competition”*, given that there is no provision within the IBSF Statutes or Regulations allowing the IBSF to award points for a competition which did not take place, based on the results of another race.
48. The decision to rely on the double count of the results of the race on 5 December 2021 is also arbitrary since sports results are unpredictable and the results of the race on 4 December 2021, had it been performed, would have been completely different from the results of the race on 5

December 2021, as experience has shown. Moreover, there is no rational basis to double count the 5 December 2021 race as opposed to double counting other races in the qualification period.

49. As a consequence, the IBSF's point ranking calculation for 2-woman Bobsleigh should be set aside and recalculated without the improperly double-counted fictitious points. This recalculation necessarily results in Ms Fenlator-Victorian having 674 points and Ms Boch having 564 points. As a consequence, the final quota allocation must be awarded to the Jamaican NOC and removed from the CNOSF.
50. On the other hand, the Applicant maintains she doesn't mean this appeal to be unfavourable to the French Athlete and therefore requests to the Panel to order the IOC and the IBSF to add another quota spot for the CNOSF, "*considering that the IOC quota spot for the 2-women bobsleigh were allocated in breach of Fundamental Principles 4 and 6 of the Olympic Charter which prohibit discrimination "of any kind", including on the basis of sex*" (being the available quota spot for woman bobsleigh in the 2-woman event 50% less than the quota spots available for men in the same event).

**b. Applicant's Requests for Relief**

51. The Applicant's request for relief is as follows
  - 1) *Setting aside the IBSF's athlete point ranking table for the Beijing 2022 Quota Allocation 2-woman bobsleigh;*
  - 2) *Recalculating the point rankings for the Beijing 2022 Quota Allocation 2-woman bobsleigh based only on races that actually occurred and without retroactively double counting any races;*
  - 3) *Granting the final 2-woman quota spot to the Jamaican NOC instead of French NOC; and*
  - 4) *Ordering the IBSF and IOC to add an additional quota spot to be allocated the French NOC to permit greater inclusion of female athletes in the Beijing Winter Games.*

**B. The Respondent**

**a. Respondent's Submissions**

52. The Respondent's submissions may be summarized, in essence, as follows:
53. As to the facts outlined by the Applicant, they are not contested.
54. With regard to the tie between the Applicant and the French athlete, the Respondent points out that, according to the IBSF Rules, priority is given to the points gained at the event immediately preceding the issue of the IBSF ranking, where Ms Boch achieved 110 points compared to 96 points gained by the Applicant.

55. Regarding the background of the Executive Committee Decision, the following facts are to be considered.
56. During the qualification period for the OWG Beijing 2022, the athletes had the opportunity to collect points for the IBSF Ranking 2-woman Bobsleigh in 8 events for each of the following competitions: IBSF World Cup, IBSF Europe Cup and IBSF North America Cup.
57. Because of the expected impact of the COVID-19 pandemic, the IBSF decided that only seven races would be taken into account for the calculation of the relevant ranking, which was communicated in advance, on 8 September 2021 and is not in dispute.
58. It is also important to note that, unlike the Applicant, Ms Boch met the minimum requirement for participation in the IBSF World Cup (while there is no such minimum requirement for participation in the IBSF Europe Cup and North America Cup).
59. When the Europe Cup competition on 4 December 2021 was cancelled, the IBSF Executive Committee actually considered all the possibilities for a replacement race, but the rescheduling was prevented by specific circumstances of time and logistic reasons (the remaining schedule for training and competitions in Europe was tight; adding another event in Winterberg was not feasible, the track in Koenigsee, Germany, was still not available due to a previous landslide; the need to share the same tracks with the International Luge Federation).
60. In view of the difficulties above, and considering the urgency to take a decision, in the middle of the qualification period, the Executive Committee ultimately decided to double count the points of the race which took place on 5 December 2021 for the IBSF Ranking for the OWG Beijing 2022: *“On the other hand, it was important for the IBSF to provide the athletes from Europe and North America who could not participate in the World Cup races an equal minimum number of races, namely 8 from which 7 would count. To simply strike one race from the Europe Cup while maintaining the number of 8 races in the North America Cup would have created an obvious disadvantage for the European federations. In order to minimize the impact of the cancellation on the number of available competitions on the Europe Cup compared to the North America Cup, the IBSF Executive Board therefore decided to double-count the points scored at the Europe Cup race in Winterberg. To make this double count transparent, the result of the race of 5 December 2021 was entered also for 4 December 2021 and published in the “Race & Results” section of the IBSF website”*.
61. It is also important to consider that the Applicant had also other opportunities to gain points as the Europe Cup did not end with the race on 5 December 2021 and there were two more competitions (namely on 8 January 2022 in Innsbruck, Austria, and 15 January 2022 in Winterberg, Germany), where the Applicant could have scored further points *“in particular if she or her national federation felt that the Decision of the IBSF Executive Board had prejudiced them as they claim today”* but did not make that choice. According to the Respondent, *“To add one or two further races to her schedule was not a remote and theoretic option for the Applicant: Many bobsleigh athletes from overseas took these chances, travelled to Europe and scored points for the Olympic qualification, most notably the Jamaican 2-man bobsleigh team of Stephen Shanwayne. Retrospectively, one more point would have tipped the balance in favour of the Applicant”*.

62. From a legal point of view, the Executive Committee Decision is justified under Article 22 of the IBSF Statutes, according to which the Executive Committee is competent to take any decision unforeseen in the Statutes, and under Article 10.6.12 of the IBSF Rules, according to which the replacement in case of race cancellation is an option and not a requirement for the Executive Committee, especially if replacement is not feasible.
63. In addition, no formal complaint was timely raised against the Executive Committee Decision which was communicated to the stakeholders on 9 December 2021. In this respect, *“A decision of the governing body, which gives guidance in the ongoing qualification process to the Olympic Games, must be challenged when it has been issued. To wait until the end of the qualification period and raise a complaint depending on the outcome of the qualification is inconsistent with the principle of good faith”*.
64. In fact, *“If the decision of the IBSF Executive Committee of 6 December 2021 had been reversed while there were still further opportunities to qualify, Margot Boch and others would have had the chance to plan their race schedule accordingly – as the Applicant had the chance to adapt her race schedule based on that decision of 6 December 2021”*.
65. Furthermore, the Applicant’s argument based on discrimination are misplaced since **a)** the Athlete was not precluded to take part in the Europe Cup competition remaining races; **b)** the Executive Committee Decision was not aimed at a particular athlete or a category of athletes but applied to all National Federations and athletes alike; **c)** no complaint was ever raised against the Qualification System based on the allegedly discriminating discrepancy between male and female quota places, besides the fact that the Applicant has failed to demonstrate how this discrepancy may have affected the result of allocation of quota places to the JOA.
66. Finally, the Applicant’s request to add an additional quota for the CNOSF for the 2-woman Bobsleigh competition is not allowed under the IBSF Qualification System as it is expressly prohibited under Section F; therefore, in case the Panel would uphold the Athlete’s Application, this would inevitably lead to the disqualification of Ms Boch.

***b. Respondent’s Requests for Relief***

*“The Respondent requests the CAS ad hoc Division to dismiss the Application in its entirety to the extent that it is admissible”*.

**C. The Interested Parties**

67. The Panel considered all arguments submitted by the Interested Parties, namely the *amicus curiae* brief filed by the CNOSF and the submissions made by the IOC at the hearing. Nonetheless, the Panel will not address each and every contention put forward by the Interested Parties. Unless not specifically stated otherwise, submissions not contemplated in the below summary are to be considered rejected by the Panel.

**1. The CNOSF**

*a. CNOSF's Submissions*

68. The Third Interested Party's Submissions may be summarized, in essence, as follows:

69. The Athlete's Application is inadmissible on the basis of the following arguments:

- a. as already established by the IBSF Appeals Tribunal, the Athlete does not have standing to sue the allocation of quota spot before the CAS, since according to the IBSF Qualification System, quota places are awarded to the NOCs and not to individual athletes; in this respect, the JOA's statement of "*full endorsement*" submitted by the Applicant cannot be considered as a formal application by the Jamaican NOC before the CAS;
- b. in the event the Panel believes an individual athlete to be entitled to claim for quota places (*quod non*), this application should also have been filed by the Brake woman competing with the Applicant in the 2-woman Bobsleigh;
- c. the Application should have been filed against the Executive Committee Decision and not against the decision of the IBSF consisting in the issuance of the 2-woman Bobsleigh Ranking List on 17 January 2022 allocating the final quota place to the CNOSF. In fact, the Applicant seeks to challenge the Executive Committee Decision through a formal petition against the IBSF decision on 17 January 2022. On the contrary, the Executive Committee Decision, which was published on 9 December 2021, has not been challenged neither by the Athlete, nor the Jamaican NOC, nor the Jamaican Federation, pursuant to Article 18 of the IBSF Statutes, and therefore this application is not admissible under Article 1 of the CAS Ad Hoc Rules, since the internal remedies within the IBSF have not been exhausted.

70. Alternatively, the CNOSF submits that the Executive Committee Decision was rendered in accordance with the applicable IBSF Statutes (namely, Articles 1.3, 3.6, 3.8, 22, establishing the purposes and competence of the IBSF as the "*supreme authority*" in all matters relating to International Bobsleigh and Skeleton) and the IBSF Rules 2021 (namely, Article 10.6.12 according to which it's not imperative for the Executive Committee to replace a cancelled race with another race).

71. Moreover, the specific circumstances of the present case show that rescheduling the race of 4 December 2021 was not feasible for the Executive Committee which had however considered this option. Therefore, by deciding to retroactively double count the results of the race on 5 December 2021 and award them to the cancelled race, the Executive Committee acted within the scope of its competence.

72. Following this decision, the Executive Committee has then logically applied the rules provided by sections D.2.1 and D.2.2.3 of the Qualification System Rules.

73. Furthermore, “*it should be emphasised that the application of their Olympic Qualification Rules by International Federations is a choice to be made by them in what they understand is the best interests of the sport. As pointed out by CAS, unless taken against specific duties or norms, the decisions taken by an International federation on this basis, cannot be reviewed by the Arbitrator. The latter has full power to review the International Federation’s <correct application of its rules, but he cannot mandate a specific interpretation on the sole basis of what he considers to be more adequate to sporting logic> Cf. CAS 2020/A/6681*”.
74. In any event, should the Panel decide to grant a quota place to the Jamaican NOC, for the 2-woman Bobsleigh event at the OWG Beijing 2022, such decision should not lead to the withdrawal of the quota spot already allocated to the CNOSF, given that this would be extremely unfair as it would also negatively affect the brake woman competing in the 2-woman Bobsleigh with Ms Boch, who has relied on her admission and already arrived in Beijing after having fulfilled all the administrative and sanitary conditions.
75. Such a consequence, would also be against the principle of *venire contra factum proprium*, as already established by another CAS panel in OG 02/006.

*b. The CNOSF ’s Requests for Relief*

76. CNOSF hereby requests CAS Ad Hoc Division Panel:

“Principally:

- *To dismiss the Application filed by Ms Jazmine Fenlator-Victorian which is inadmissible;*

Alternatively:

- *To dismiss the Application filed by Ms Jazmine Fenlator-Victorian considering that the IBSF applied correctly its statutes and rules by allocating the last quota place for the Beijing 2022 2-Woman Bobsleigh event to CNOSF;*

Alternatively:

- *To rule that the quota place for the Beijing 2022 2-Woman Bobsleigh event allocated to CNOSF should not be removed at any rate”.*

**2. The IOC**

77. The Second Interested Party did not file any *amicus curiae* brief. However, during the hearing Counsel for the IOC observed the following:
78. Regarding the issue of standing, the IOC clarified that the Panel should verify whether the Application is based on a right that belongs to the Applicant. Second, it pointed out that the Applicant should have called as a Respondent also the French athlete, Ms Boch. This obligation stems from the fact that the decision, if accepted, would also have an effect on the latter’s

participation to the OWG Beijing 2022. On the claimed issues of discrimination, the IOC observed that Jamaica was not the only country which experienced difficulties to travel to race venues, as, e.g., Australia, which was also competing in IBSF sanctioned events, would have faced the same issues. In addition, the IOC emphasized that the Applicant also holds a U.S. passport, which status should have allowed her to travel to Europe to participate other races like other athletes. Finally, the IOC also stressed that the unequal number of quotas was provided by the Qualification System since its release, and such difference does not constitute any discrimination.

## VI. JURISDICTION AND ADMISSIBILITY

79. Rule 61.2 of the Olympic Charter provides as follows:

*“61 Dispute Resolution*

*[...]*

*2. 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 (CAS), in accordance with the Code of Sports-Related Arbitration”.*

80. The jurisdiction of CAS Ad Hoc Division in relation to the Applicant also arises out the Entry form signed by each and every participant in the Olympic Games, as established By-law to Rule 44.6(ii) of the Olympic Charter.

81. Article 1 of the CAS Arbitration Rules for the Olympic Games (hereinafter referred to as the “CAS Ad Hoc Rules”) provides as follows: *“Article 1. Application of the Present Rules and Jurisdiction of the Court of Arbitration for Sport (CAS) The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games. 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 him/her 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”.*

82. The present dispute concerns an application against the decision rendered by the IBSF Appeals Tribunal dismissing the petition filed by the Applicant on 31 January 2022 in connection with the IBSF 2- woman Bobsleigh Ranking List for the OWG Beijing 2022.

83. In view of the above, the Panel considers that the CAS Ad Hoc Division has jurisdiction to hear the present matter. The jurisdiction of the CAS Ad Hoc Division was not contested in the written submissions and was expressly confirmed by all Parties at the hearing.

## VII. APPLICABLE LAW

84. Under art. 17 of the CAS Ad Hoc Rules, the Panel must decide the dispute *“pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”*.
85. The Panel notes that the “applicable regulations” in this case are the IBSF Statutes and Regulations and namely, the IBSF Qualification System.

## VIII. DISCUSSION

### A. Legal framework

86. These proceedings are governed by the CAS Ad Hoc Rules enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003 (amended on 8 July 2021). They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PILA”). The PILA applies to this arbitration as a result of the express choice of law contained in art. 17 of the Ad Hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to art. 7 of the CAS Ad Hoc Rules.
87. According to art. 16 of the CAS Ad Hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*. In this regard, the Panel notes the Applicant’s submission according to which the dismissal of her petition in front of the IBSF Appeals Tribunal without holding a hearing amounts to a breach of procedural fairness. However, any issues with regard to due process in that tribunal are cured by this hearing before the Panel, which is conducted de novo and which the Applicant confirmed respected her right to be heard.

### B. Merits

#### 1. Preliminary Issues

88. As a preliminary consideration, the Panel observes that the CNOSF raises objections to the admissibility of the Application for two reasons:
- a) the Athlete lacks standing to sue in the present case since, according to the IBSF Qualification System, quota spots for events at the Olympic Games are allocated to the NOCs and not to individual athletes who have therefore no right to claim any quota place for their participation in the Games;
  - b) the subject of the present appeal is the IBSF decision with respect to the 2-woman Bobsleigh Ranking List published on 17 January 2022, while the Athlete should have filed an appeal before the IBSF Appeals Tribunal against the Executive Committee Decision, which established the double-counting of points for the cancelled race on 4



December 2021, but failed to do so; therefore, the conditions under Article 1 of the CAS Ad Hoc Rules are not met since the available internal remedies have not been exhausted.

89. In order to resolve the preliminary issues above, the Panel recalls that the Applicant submitted the following requests for relief before the CAS:

- 1) *Setting aside the IBSF's athlete point ranking table for the Beijing 2022 Quota Allocation 2-woman bobsleigh;*
- 2) *Recalculating the point rankings for the Beijing 2022 Quota Allocation 2-woman bobsleigh based only on races that actually occurred and without retroactively double counting any races;*
- 3) *Granting the final 2-woman quota spot to the Jamaican NOC instead of French NOC; and*
- 4) *Ordering the IBSF and IOC to add an additional quota spot to be allocated the French NOC to permit greater inclusion of female athletes in the Beijing Winter Games.*

a. *Does the Applicant have legal standing to submit the present appeal?*

90. The Panel notes that, according to CAS jurisprudence, the applicant must have a protectable interest (CAS 2013/A/3140 para. 8.3) or a legitimate interest (CAS 2015/A/3880 para. 46 with further references) to have standing. This is the case if (i) the applicant is sufficiently affected by the impugned decision and (ii) a concrete interest of a financial or sporting nature is at stake (CAS 2015/A/3880 para. 46 with further references; see in this sense also CAS 2013/A/3140 para. 8.3; CAS 2014/A/3665, 3666 & 3667 para. 47; CAS 2015/A/3959 par. 143 et seq.). Sufficient interest is a broad, flexible concept without undesirable rigidity and includes whether the complainant can demonstrate a sporting and pecuniary interest (CAS 2008/A/1674 para. 11).

91. In principle, standing to sue is recognised if a person appealing against a certain decision can demonstrate that he or she is sufficiently affected by the appealed decision and has a tangible interest, of financial or sporting nature, at stake (CAS 2013/A/3140).

92. The Panel abides by previous CAS jurisprudence according to which in order to have a “tangible” or “concrete” interest, the applicant must have suffered harm or prejudice deriving from the challenged decision: *“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 that decision. The “aggrievement requirement” is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body’s decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision”* (CAS 2009/A/1880 & 1881).

93. Turning now the attention to the present case, it is recalled that, under Section B3 of the IBSF Qualification System, quota places are allocated to the NOCs which have discretion in selecting their athletes to fill the awarded places, subject to eligibility requirements according to Section C. Pursuant to the following Section D of the IBSF Qualification System, athletes gain their qualification slot for their respective NOC, through the results achieved participating in the competitions of the Federation, according to subsection D1 (for male athlete) and D2 (for female athlete). Such results, calculated according to the IBSF Qualification System and the IBSF Rules, are then totalled to form the IBSF Ranking List per Event, on which the athlete's access to the Olympic Games is based.
94. In this legal framework, there is no doubt that the IBSF ranking, and the way of calculation of the ranking points are able to affect the Applicant's sporting activity and interest. In particular, the Panel considers that the Applicant, as an individual athlete, has a direct interest in the proper conduct of the qualification process and in the compliance with the applicable rules, with a view to her possible qualification. It is in fact undisputable that in order for the Athlete to have at least a chance to be selected by the NOC, she first needs to qualify through the qualification process of which the Ranking List is the final act.
95. In addition, it is undisputed that such interest became "tangible" when the effects of the Executive Committee Decision to double count the results achieved in the race disputed on 5 December 2021, finally resulted in a tie with the French athlete in the IBSF ranking. In fact, it is to note that, although the Executive Committee Decision was not originally directed at the Applicant, so that we can affirm she was a "third party" (since she did not take part in the competition of 5 December 2021, nor was she registered for the cancelled race of 4 December 2021), she was finally nonetheless affected.
96. In this regard, CAS jurisprudence establishes that *"Third parties generally have standing before the CAS in two cases. First, when a regulation explicitly confers it. Secondly, when an association's measure affects not only the rights of the addressee, but also and directly those of a third party, that third party is considered 'directly affected' and thus enjoys standing to sue. This is consistent with the general definition of standing that parties, who are sufficiently affected by a decision, and who have a tangible interest of a financial or sporting nature at stake may bring a claim, even if they are not addressees of the measure being challenged"* (CAS 2016/A/4924 & 4943 para 85).
97. In view of the above considerations, the Panel is satisfied that the Applicant has standing, at least for her first two claims mentioned above.
98. Pursuant to the applicable rules of the Olympic Charter, the quota places for the Olympic Games are not allocated to specific athletes but to the NOCs. At national level, a national Olympic committee (NOC) has the exclusive right to *"send competitors, team officials and other team personnel to the Olympic Games in compliance with the Olympic Charter"* (Rule 27.7.2 of the OC). According to CAS jurisprudence, *"[i]t is not in issue that it is for an NOC to select its competitors for the Olympics. No other body or person within a member country has that right"* (CAS OG 08/03).

99. Rule 44.4 of the OC provides that: “[a]n NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the OCOG. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination”.
  100. Therefore, it appears clearly that the Applicant lacks a sufficient legal interest to obtain a change in the allocation of the quota place from one NOC to another or to order an additional quota for her NOC. This applies irrespective of an NOC's commitment that the disputed quota would be granted to the Applicant.
  101. An indirect interest is not sufficient to establish standing (see CAS 2015/A/4289). In this respect, the Panel notes that the Statement of Support signed by the JOA, which was not a party in these proceedings, and submitted by the Applicant has no effect whatsoever on the Athlete standing to claim the allocation of quota places.
  102. Therefore, the Panel holds that the Applicant does not have standing to bring her third and fourth claims mentioned above.
  103. Incidentally, the Panel wishes to emphasize that, in any event, it would not be appropriate for the CAS to grant additional quota places in Olympic competitions for the only purpose to satisfy all parties. Such an order would require a change in the competition format, as well in the organisation and logistic. The organisation of Olympic competitions is a complex matter. Any change to the competition format shall be carefully considered as it could lead to disruptions affecting the smooth running of Olympic competitions, to the detriments to Athletes and involved teams. Therefore, the Panel is not in position to grant the fourth claim of the Applicant.
- b. *Did the Applicant's failure to file a formal appeal against the Executive Committee Decision before the Appeals Tribunal prevent her from filing the present Application before CAS based on Article 1 of Cas Ad Hoc Rules?*
104. According to the CNOSF, since the aim of this Application is the challenge of the duplication of the results of 5 December 2021 race, the Applicant should have filed a formal appeal against the Executive Committee Decision before the Appeals Tribunal according to Article 18 of the IBSF Statutes, but failed to do so, and therefore, the present Application is not admissible according to Article 1 of CAS Ad HOC Rules. The argument put forward by the CNOSF is that the Applicant seeks to challenge the Executive Committee Decision through a formal petition against the IBSF decision on 17 January 2022.
  105. The Panel is not persuaded by this argument for the following reasons.
  106. The Panel considers that the Ranking List which was published on 17 January 2022 is the final step of the previous stages of the qualification process which also includes the Executive Committee Decision.

107. Although the Panel does not exclude that, in principle, the Executive Committee Decision itself could have been appealed before the Appeals Tribunal according to Article 18 of the IBSF Statutes, and article IV.B(i) of the IBSF Appeals Tribunal Code, in order to challenge the contested measure, it is noteworthy that, when the decision was published on 9 December 2021, the Applicant was not immediately affected and had no “tangible interest” to appeal.
108. In fact, the documentation on file regarding the athletes’ results shows that until 8 January 2022 (when the French athlete qualified second in the race in Innsbruck), the Applicant was placed better in the ranking compared to the French athlete. In any case, at the moment when the Executive Committee Decision was published, the Athlete did not immediately suffer any prejudice from the double count of points.
109. In such context, the Panel believes that the Athlete actually lacked legal interest and standing to appeal before the IBSF Appeals Tribunal until the adverse effects of the Executive Committee Decision ultimately impacted on her qualification.
110. The Panel’s view in this respect is also supported by the provision under Article V of the IBSF Appeals Tribunal Code which establishes the entitlement to file a petition with the Appeals Tribunal to “*Any person whose rights are affected by a matter within the jurisdiction of the Tribunal*”, confirming the requirement of a “tangible interest” mentioned above (emphasis added).
111. Therefore, the Panel considered that when the Athlete filed her petition to the IBSF Appeals Tribunal on 31 January 2021 against the IBSF decision with respect to the Ranking List published on 17 January 2022, she was entitled to challenge the underlying Executive Committee Decision which, in the interim, had impacted on her qualification to the OWG Beijing 2022.
112. As a consequence, the Panel rejects the CNOSF’s objection to the admissibility of the Application based on Article 1(2) of the CAS Ad Hoc Code.

## **2. *Legal analysis regarding the substance of the matter***

113. Having established that the present Application is admissible, the Panel shall now address the main issue in order to establish whether the Executive Committee Decision on which the Ranking List was based is justified, which is objected by the Applicant.
  - a. *Is the Executive Committee Decision justified or arbitrary?*
114. The main arguments put forward by the Applicant are the following: that there is no provision in the IBSF Statutes or in the IBSF Rules, i.e. no legal basis according to which the Executive Committee was allowed to award points for the cancelled race, based on the results of the race disputed on 5 December 2021; that, on the contrary, according to Section D.2.1 of the Qualification System, the athletes points taken into account to form the Ranking List are “*the best results of each pilot in all races that she had participated in*”; that, in addition, Article 10.6.12 of the IBSF Rule expressly provides a solution in case of race cancellation, namely, to hold a

replacement race; that although this is not a mandatory solution but an option for the IBSF, it is specifically provided, therefore the Executive Committee solution is not justified under Article 22 of the IBSF Statutes which in fact allows the Executive Committee to take any decision “not foreseen” in the Statutes, which is not the present case. Moreover, the Executive Committee Decision resulted in a discriminatory measure against the Athlete.

115. On the other hand, the Respondent and the CNOSF maintain that the Executive Committee Decision is warranted under Article 22 of the IBSF Statutes, in consideration of the fact that the replacement of a cancelled race is not imperative for the IBSF and in the present case the rescheduling of the race of 4 December 2021 was not feasible due to the specific circumstances of the case; in addition, such a measure was not discriminatory towards the Applicant. Finally, under Article 7 of the Code of Ethics, the IBSF cannot “*alter the course or result of a competition except as expressly permitted by the rules and regulations governing the competition*”.
116. The Panel, before assessing the merits of the Executive Committee Decision, deems it necessary to first highlight the policy that the IBSF follows for the organisation of sanctioned events, which is, as submitted by the Respondent, to ensure that European and North American athletes who cannot participate in World Cup events, have the same opportunities to compete in other qualifying events, namely the Europe Cup and the North America Cup. Therefore, for the IBSF it is important that an equal number of non-World Cup races are held in Europe and North America. The Panel finds no fault or problem with this policy.
117. Having noted this, the Panel recalls that the Executive Committee is the supreme authority in all matters relating to international Bobsleigh (Art. 1.3 IBSF Statutes) and has the task to administer and control participation in the Olympic Winter Games (Art. 3.8 IBSF Statutes).
118. Article 10.6.12 of the IBSF Rules provides that “*If a race is cancelled, the IBSF Executive Committee can decide to hold a replacement race at a later date on the same or a different track*” and the Panel observes in this respect that the Parties do not dispute that replacement is an option and not a requirement for the Executive Committee in case of cancellation of a race.
119. Moreover, according to Article 22 of the IBSF Statutes, “*(1) The Executive Committee is deemed competent to take any decision not foreseen in the present Statutes. (2) The Executive Committee is obliged to report any decision that it takes pursuant to this Article to the next Congress*”.
120. In view of the conflicting positions of the Parties and within the applicable legal context, the Panel having considered all the circumstances of the present case deems that due to the cancellation of the race, which was scheduled on 4 December 2021, the Executive Committee had to face an exceptional circumstance where due to many different factors, the replacement of the race was not feasible, which fact has been substantiated by the Respondent.
121. In such a context, the Panel considers the following:
  - The IBSF determination to provide that an equal number of non-World Cup races are held in Europe and North America is a legitimate policy.

- Due to the impossibility to replace the relevant race, the Executive Committee was eager to find a solution in order to minimize the impact of the cancellation on the number of available competitions on the Europe Cup compared to the North American Cup and therefore to compensate the disadvantage for the European Federations;
- The decision was a matter of urgency;
- The athletes who participated in the race of 5 December 2021 (and benefited from the double count) were the same athletes who were registered for the cancelled race, since the purpose of the Executive Committee Decision was to compensate all and only the athletes who were affected by the cancellation of the race;
- When the Executive Committee Decision was published, the qualification period was still ongoing and the Applicant still had the chance to participate in other races (as she actually did on 18, 19 and 20 December 2021) and she could also have participated in 2 competitions of the Europe Cup;
- In this respect, the Applicant's allegation that she was practically "excluded" from World Cup or Europe Cup events due to the fact that Jamaican teams have less opportunities than the European competitors due to financial and logistic issues, combined with travel/visa restrictions have remained undemonstrated. However, other athletes of the Jamaican Federation took part in competitions in Europe for the qualification in the OWG Beijing 2022, which fact demonstrates that such possibility existed. In addition, the Applicant also holds an U.S. passport, which would have allowed her to overcome any possible visa obstacle. Besides that and, in any event, participation in the World Cup is also made conditional upon minimum sporting requirement which the Athlete did not meet. For these reasons, the Panel therefore considers that there was no exclusion of any kind against the Athlete;
- The Panel has looked very closely at the discrimination issues raised by the Applicant. There is no doubt that discrimination of any kind has no place in the world of sport, especially Olympic sport (as also expressly stated by the Olympic Charter). However, the Panel found no evidence that discrimination against the Applicant (and any other athlete of the IBSF circuit) had taken place in the present case. The Applicant claimed that she had been discriminated against because she represented a small country that had no tradition in winter sports and that she had also been discriminated against because of her gender. None of these allegations is correct. The contested Executive Committee Decision was of a general nature and made no distinction between athletes on the basis of their nationality. On its face, this decision applied equally to all athletes who had participated in the competition on 5 December 2021; it did not distinguish between athletes from small countries and/or "non-winter sports nations" and others;
- The Applicant also see it as discriminatory that there are more male athletes who can participate in bobsleigh competitions (especially at the Olympic Games) than women. This is certainly a policy issue that can be considered by the Respondent in the future. But it has

nothing to do with the Applicant's arguments in this case. She is competing in the women's category and wants to keep the starting place in the women's category as it is. The disputed calculation of ranking points based on the Executive Committee Decision has nothing to do with the fact that she is a woman, as are all her competitors in this and all other disciplines;

- Incidentally, the Panel notes that in her submissions, the Applicant has given some emphasis to the fact that the Executive Committee has decided to “retroactively” double count the results of the race of 5 December 2021. Such reference reminds the general principle of non-retroactivity which prohibits the application of a law to events that occurred prior to the enactment of said law. However, the Panel observes that such principle is fundamental in the context of criminal law (*nullum crimen sine lege*) and establishes that criminal penalties may not be applied to acts which took place before the relevant rule entered into force, or in other words, it prohibits the imposition of laws that would allow an individual to be punished for conduct that was not criminal at the time it was carried out;
- As it is also established in CAS Jurisprudence, *“The principle of non-retroactivity is a fundamental legal principle, which does basically apply to measures taken by associations having the character of a sanction. However, it does not follow from this that the principle applies without limitation. In particular, it does not apply to a rule which governs the requirements for being admitted to a competition”* (CAS 2020/A/7444). In addition, CAS jurisprudence has stated *“when considering whether a person’s reliance on good faith merits protection, it makes a difference whether that party already holds a legal position or will do so only in the future. Someone, who has already acquired a legal position in any event deserves to have his reliance on good faith protected to a greater extent. By contrast, someone, who would like to obtain a legal position in the future cannot simply rely on the fact that the conditions for obtaining that legal position will not change in the future”* (CAS 2008/A/1583 & 1584);
- The Executive Committee Decision was applied immediately to all participants that were already registered, who are the ones who had a legitimate interest when participating in the race of 4 December 2021. The same participants were the registered participants of the race on 5 December 2021. Thus, the decision, irrespective of where the participants came from or what their race was, was to the benefit of the participants that already had acquired rights, i.e., a legitimate right to rely on the counting of the points of the December 4 race that, due to force majeure reasons, could not take place. The Applicant, not having been registered for the cancelled race, and not having provided evidence of her intention to do so, did not have an acquired right as to rely on those particular races;
- As a consequence, the Panel is of the view that notwithstanding any possible reference to the “retroactive” double count of the results of the race on 5 December 2021, the principle of non-retroactivity is not applicable to the present case;
- The Panel is mindful that, had the race on 4 December 2021 actually taken place, the results would have been probably different from those achieved in the race of 5 December 2021 and that the Executive Committee Decision awarded a fictitious score, while fair competition is naturally based on actual merits, and therefore, the Executive Committee Decision cannot be considered a desirable or recommended decision. Notwithstanding the above, the Panel

believes that the particular circumstances of the present case made it impossible for the Executive Committee to replace the cancelled race or adopt an alternative solution due to time constraints and other practical impediments. Therefore, in the Panel's view, the Executive Committee Decision was a compromise solution taken in order to compensate the disadvantage created by the cancellation of the race on 4 December 2021 due to force majeure;

122. In such context, the Panel finds that the Executive Committee Decision of 6 December 2021 was neither arbitrary nor unreasonable, and it was justified on the basis of Article 22 of the IBSF Statutes within the discretionary powers granted to the Executive Committee. On the basis and arguments presented, there is no basis to disturb that decision.

#### **IX. COSTS**

123. According to Article 22 para. 1 of the CAS Ad Hoc Rules, the services of the CAS ad hoc Division "*are free of charge*".
124. According to Article 22 para. 2 of the CAS Ad Hoc Rules, parties to CAS ad hoc proceedings "*shall pay their own costs of legal representation, experts, witnesses and interpreters*".
125. It was confirmed at the hearing that none of the Parties seek costs. Accordingly, there is no order as to costs.

#### **X. CONCLUSION**

126. In view of the above considerations, the Applicant's application filed on 5 February 2022 shall be dismissed.

## **DECISION**

**The Ad Hoc Division of the Court of Arbitration for Sport renders the following decision:**

The Application filed by Ms Jazmine Fenlator-Victorian is dismissed.