

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal**

Case No. 01-19-0001-4377

In the Matter of the Arbitration between

VICTOR LIU, Claimant

and

USA TABLE TENNIS ASSOCIATION, INC., Respondent

and

NICHOLAS TIO, Affected Athlete.

FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated by the American Arbitration Association ("AAA"), and in accordance with the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §220505 et seq., and Section 9 of the United States Olympic Committee ("USOC") Bylaws, having been duly sworn, and having fully considered the Claimant's Second Restated Demand for Arbitration as well as the parties' respective exhibits and witness testimony during a June 5, 2019 telephonic hearing and their respective post-hearing briefs, proposed findings of fact, and conclusions of law, does hereby, AWARD, as follows:

THE PARTIES

Claimant Victor Liu is a 17-year old table tennis player who is a member in good standing of USA Table Tennis Association, Inc. ("USATT"). Mr. Liu was represented by Edward G. Williams, Stewart Occhipinti LLP, New York, New York.

USATT is the National Governing Body ("NGB") for the sport of table tennis in the United States, which is recognized by the USOC and the International Table Tennis Federation ("ITTF"). USATT's headquarters is in Colorado Springs, Colorado, and it was represented by

William J. Robers, Sparks Willson Borges Brandt & Johnson, P.C, Colorado Springs, Colorado.

The Affected Athlete Nicholas Tio is an 18-year old table tennis player who is a member in good standing of USATT.

PROCEDURAL BACKGROUND

On March 22, 2019, Ms. Chen Wang filed a Section 9 Complaint with the USOC and an Amended Section 9 Complaint on April 22, 2019; neither complaint was resolved.

On May 5, 2019, Mr. Liu filed a Section 9 Complaint with the USOC, which was not resolved.

On May 13, 2019, Ms. Wang and Mr. Liu filed a joint “Amended Demand for Arbitration” asserting that USATT was denying them the opportunity to participate in the 2020 Olympic Games and 2019 Pan Am Games, respectively. They requested that the portions of USATT’s selection criteria for the 2019 Pan Am Games and 2020 Olympic Games that “run afoul” of the January 2013 USOC Athlete Selection Procedures Instruction Manual (“Manual”) “be stricken by direction of the arbitrator and set aside” and that USATT be ordered “to use the remaining valid portions of the selection criteria . . . as the basis to nominate to the USOC athletes to represent the United States for both [competitions] in the sport of table tennis.” They also requested that “the arbitrator retain continuing jurisdiction over this matter, to ensure compliance with the relief granted herein.”

On May 15, 2019, the AAA appointed the Arbitrator.

On May 21, 2019, a telephonic preliminary hearing was held during which the parties’ counsel participated. Based on the two Claimants’ assertions and in accordance with Section 9.8 of the U.S. Olympic Committee Bylaws, the Arbitrator determined that the following six athletes, whom USATT selected as the members of the U.S. men’s and women’s table tennis team for the 2019 Pan American Games, are “Affected Parties” who “may be adversely affected by [this] arbitration” and requested that the AAA provide each of them with written notice of this arbitration proceeding: Kanak Jha, Nikhil Kumar, Nicholas Tio, Amy Wang, Yue Wu, and Lily Zhang. After the Arbitrator raised questions about the Claimants’ requested relief and whether Ms. Wang’s claims are premature, their counsel agreed to submit a second amended demand for

arbitration on behalf of only Mr. Liu and to modify the requested relief on his behalf.

On May 22, 2019, Mr. Liu requested that USATT answer 22 interrogatories and produce 25 documents during discovery.

On May 23, 2019, Claimants' counsel filed a "Restated and Amended Demand for Arbitration" on behalf of only Mr. Liu, captioned *Victor Liu and USA Table Tennis Association, Inc.*, which again asserted that USATT's selection criteria for the 2019 Pan Am Games violate the Manual, thereby denying him the opportunity to participate in the 2019 Pan Am Games. It identified Kanak Jha, Nicholas Tio, and Amy Wang as athletes who may be adversely affected by this arbitration proceeding. Mr. Liu requested that the portions of USATT's selection criteria for the 2019 Pan Am Games that "run afoul" of the Manual, including its discretionary selection provisions and those that deny athletes the opportunity to compete and be considered for selection to the Pan Am Games, "be declared null and void [and] stricken by the arbitrator." He requested that the arbitrator consider "the objective and performance based results of the Pan Am Tryouts held on March 1-3, 2019 in making the selection of athletes to represent the United States in the 2019 Pan American Games and, in so doing name [him] to the team."

In a May 30, 2019 email to the USOC, counsel for Mr. Liu and Ms. Wang stated:

I want to advise you, at the earliest possible time that, after carefully reviewing opposing counsel's objections to Claimant's Document Request and Interrogators and following further reflection of our claims in this Section 9 proceeding, we will not be needing, at least in this proceeding, the documents we requested in Claimant's Document Request No 10 [All /each / any written communications between individual(s) from or acting on behalf of USATT and any individual(s) from the USOC (including, but not limited to any member of the USOC's Sports Performance Team) regarding USATT's Selection Procedures for the 2019 Lima Peru Pan American Games (including the original procedures and each and all amendments thereto)] directed to USATT (also embodied in the proposed Subpoena directed to the USOC, as to which USATT withdrew its objections)

This Section 9 proceeding calls for a de novo determination by the arbitrator of whether Victor Liu or Nicholas Tio will be the discretionary pick to be the third male member to represent the United States at the upcoming Pan Am competition in Lima Peru.

It is not an appeal of USATT's decision to designate Nicholas Tio as its discretionary choice. Nor is this proceeding a "Section 10" proceeding, concerning USATT's failure to adhere to / follow the USOC's Athlete and Staff Selection Procedures Instruction Manual.

Accordingly, while the application of retroactive criteria, as set forth in the discretionary criteria under Section 2.2 at page 3 of USATT's Amended Selection Criteria (dated February 12, 2019), and other criteria which violates the USOC's Athlete and Staff Selection Procedures Instruction Manual may well be taken into account by the arbitrator in determining the weight to be accorded that (or other) criteria, we will not need the documents we requested to argue that point, or others.

I apologize for the lateness of this realization that the documents I had previously requested will no longer be needed and very much appreciate your (and the USOC's) efforts to locate and produce those documents.

Notwithstanding, I respectfully suggest that the USOC nonetheless continue to maintain these documents, and also those related to the 2020 Tokyo Olympic Games selection procedures in table tennis, in connection with the Chen Wang proceeding, now in abeyance, and a possible Section 10 proceeding which may be brought by Victor Liu and others against USAT.

In a May 30, 2019 email, Mr. Liu's counsel requested permission to file an amended demand for arbitration on his behalf narrowing the focus of this arbitration proceeding:

Assuming no objection from USATT and the permission of the arbitration [sic], I will prepare and submit a Further Restated and Amended Demand for Arbitration, reflecting the now much streamlined issue to be decided, de novo, by the arbitrator in accordance with the role of an arbitrator in a section 9 case . . .

With this further Restatement / Amendment to the Demand for Arbitration, there no longer will be a need for the arbitrator to hear testimony on how USATT reached the criteria it came up with, or about its interactions with the USOC in connection with the same.

The focus on the arbitration will now simply be who the arbitrator, in this de novo proceeding, will determine (Victor vs Nicholas) will be the third male player to represent the US at the upcoming Pan Am games . . .

On May 31, 2019, without objection by USATT and with the Arbitrator's permission, Mr. Liu filed a "Second Restated Demand for Arbitration" captioned *Victor Liu and USA Table Tennis Association, Inc.* stating that he "does not challenge or contest in any way the nomination[s] of Kanak Jha or Nikhil Kumar [or any women] by [USATT] to represent the United States at the upcoming Pan Am Games." It identifies Nicholas Tio as the only athlete who may be adversely affected by this arbitration proceeding. He asserts that USATT's Athlete Selection Procedures for the 2019 Pan Am Games, specifically criteria 3, 4, and 5 of its Discretionary Selection criteria in Section 2.2, violate the USOC Athlete Selection Procedures

Manual. He also contends that USATT failed to comply with its published discretionary selection criteria and “wrongfully discriminated” against him, which renders its discretionary selection of Mr. Tio invalid. Mr. Liu requests that the “arbitrator, as a consequence of his de novo consideration of the valid discretionary criteria from among those set forth in Section 2.2 . . . should determine [him] as better qualified than Nicholas Tio to be the third male athlete to be nominated to the USOC to represent the United States at the upcoming Pan American Games in the sport of table tennis.”

Thereafter, in a May 31, 2019 email, USATT requested permission from the Arbitrator to file a motion seeking to recover its reasonable attorneys’ fees and costs from Mr. Liu for the following reasons:

Claimant’s attorney, five days away from the hearing, has decided to change his claims, knowing that USATT has expended an enormous amount of time and money to defend Mr. Williams’ original claims. In addition, Mr. Williams improperly used the discovery process to harass USATT by propounding a number of interrogatories and document requests that he knew full well he would not need, requiring USATT to spend massive amounts of time and money to gather the information (including requiring USATT to harass the USOC for assistance).

In in a May 31, 2019 email response, the Arbitrator stated: “At this point, I don’t want to consider any requests to file any motions until after next Wednesday’s hearing.”

USATT did not file a written answer or response to Mr. Liu’s “Restated and Amended Demand for Arbitration” or his “Second Restated Demand for Arbitration.”

At the Arbitrator’s request, the parties’ counsel identified and submitted the authorities relied upon in support of their respective positions (a combined total of 29 AAA awards and judicial cases) on the issues likely to arise in this arbitration proceeding, but neither side submitted a prehearing brief.

In a June 4, 2019 email, the Arbitrator requested that counsel identify the specific authorities that “most directly support your client’s position” prior to the hearing, which they both did. He also requested that they be prepared to discuss the potential relevance of two additional authorities during the hearing: 1) *Viola and USA Diving*, a 2005 AAA Section 9 case resulting in two separate but related awards (copies attached); and 2) *Bloom v NCAA*, 93 P.3d

621 (Colo. App. 2004), which sets forth the legal requirements that a private sports governing body's discretionary decisions must satisfy to be valid under Colorado law.

On June 5, 2019, a telephonic hearing was held from 11am until shortly after 6pm CT. As a preliminary matter, regarding the bifurcation of the respective claims of Mr. Liu and Ms. Wang (which her counsel stated are in abeyance), USATT's counsel expressed concern that this had been done to avoid potential res judicata and/or collateral estoppel effects on Ms. Wang's potential future claims. Without resolving these issues, the Arbitrator noted that Ms. Wang effectively had been voluntarily dismissed as a claimant in this arbitration proceeding and subsequently decided that Mr. Liu should be listed as the sole claimant in this proceeding for purposes of clarity.

During the hearing, Mr. Liu and Louis Liu (his father who coached Victor for one year, but he is not a current or former table tennis player) testified on his behalf. Tara Profitt (Chairperson, USATT Athlete Advisory Council, and Athlete Member, USATT High Performance Committee), Joerg Bitzigeio (USATT High Performance Director), and Carl Danner (Chairperson, USATT High Performance Committee, and Chairperson, Pan Am Games Selection Committee) testified on behalf of USATT. Counsel stipulated that all of the parties' respective documents (i.e., Claimant's Exhibits A-J; Respondent's Exhibits 1-21) are admissible.

Despite being notified of this arbitration proceeding by AAA, Mr. Tio chose not to participate in the hearing himself or by representation. Dennis Taylor, (USATT's General Counsel) and Sara Pflipsen (Sr. Counsel NGB and Athlete Affairs, USOC) listened to the arbitration hearing.

At the conclusion of the hearing, USATT and its counsel agreed they had received a full and fair opportunity to be heard. However, counsel for Mr. Liu asserted he had not received a full and fair opportunity to be heard solely because the Arbitrator sustained USATT's objection to counsel's question on cross examination to Mr. Danner regarding his knowledge of whether anyone currently or formerly associated with the USOC had ever expressed regrets or reservations about the USOC's approval of USATT's Athlete Selection Procedures for the 2019 Pan Am Games. Because the only issue for resolution in this Section 9 arbitration proceeding is whether Mr. Tio or Mr. Liu should be the USATT's discretionary selection as the third male

table tennis athlete to participate in the Pan American Games,¹ the Arbitrator ruled that this question is irrelevant and immaterial pursuant to AAA Commercial Rules R-34 (b) as well as outside the scope of the direct examination of Mr. Danner.

In lieu of oral closing arguments, the Arbitrator requested that counsel submit post-hearing briefs, proposed findings of fact, and conclusions of law by midnight CT on June 12, 2019, which their counsel agreed to do.

On June 12, 2019, the parties submitted their respective post-hearing briefs, proposed findings of fact, and conclusions of law. In its brief, USATT requested that the Arbitrator award costs and fees to it because “Claimant unreasonably and vexatiously increased the costs of this arbitration through a frivolous facial challenge to the Procedures and discovery abuse.”

On June 14, 2019, Mr. Liu responded to USATT’s request for costs and fees by asserting he “did not make, and is not now making, a ‘facial challenge’ to USATT’s Pan Am Games selection procedures” and denying the alleged discovery abuse.

On June 17, 2019, the hearing was closed by the Arbitrator.

Because the entry deadline for the 2019 Pan Am Games is June 26th, the Arbitrator agreed to submit an Operative Award by June 24, 2019.

JURISDICTION

It is undisputed that the Arbitrator has jurisdiction to resolve this team selection dispute pursuant to the ASA, 36 U.S.C. §220522(a)(4)(B), and Section 9 of the USOC Bylaws because USATT’s discretionary selection of Mr. Tio denies Mr. Liu the opportunity to participate in the 2019 Pan Am Games, which is a “protected competition” under Section 1.3 (w) of the USOC Bylaws.

UNDISPUTED AND/OR FINDINGS OF MATERIAL FACTS

¹ In his May 30, 2019 email requesting permission to file a third amended demand for arbitration, Mr. Liu’s counsel expressly stated “With this further Restatement Amendment to the Demand for Arbitration, there no longer will be a need for the arbitrator to hear testimony on how USATT reached the criteria it came up with, or about its interactions with the USOC in connection with the same.”

Pursuant to the ASA, the USOC has “exclusive jurisdiction, directly or through constituent members [e.g., NGBs] . . . “over all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games.” 36 U.S.C. §220503(3)(A). The USOC has both the authority and responsibility “to obtain for the United States, directly or by delegation to the appropriate national governing body, the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and the Pan-American Games.” 36 U.S.C. §220503(4). The USOC is authorized “(i) to approve or disapprove selection procedures recommended by NGBs” for the Olympic, Paralympic, and Pan-American Games. USOC Bylaws, Section 19.3. An NGB “shall satisfy such other requirements as are set forth by the [USOC].” USOC Bylaws, Section 8.7(w).

In January 2013, the USOC promulgated and published the Manual, which states that it “shall be used for the Olympics, Paralympic, Pan American and Parapan American Games.” (p. 2). The Manual provides that an NGB “is responsible for creating selection procedures that are performance-oriented, fair, equitable and clearly written” (p. 2) to achieve the goal of selecting “the most competitive U.S. Olympic, Paralympic, Pan American and Parapan American Games Teams through a fair and open process that is published well in advance of the selection process.” (p. 6). Because “[t]he USOC has placed considerable emphasis on how U.S. athletes and teams are selected and how they perform at the Games to which it sends teams . . . as well as the importance of reducing potential arbitration issues arising from the selection process,” the Manual, in relevant part for purposes of this proceeding, requires an NGB to establish team selection procedures that comply with the ASA and USOC Bylaws; are “performance-oriented,” “fair, equitable and clearly written,” and “not retroactive”; use “objective based criteria or discretionary/subjective criteria that are supported by objective measures”; and [a]llow for selection of the most competitive team.” (p. 6).

As the NGB for the sport of table tennis, USATT is authorized to “establish procedures for the determination of eligibility standards for participation in competition” and to “recommend to the [USOC] individuals and teams to represent the United States in the . . . Pan-American Games” 36 U.S.C. §220523(a)(5)-(6). In exercising this authority, USATT is required to “establish a written procedure . . . thereafter approved by the [USOC], to fairly select athletes . . .

for the . . . Pan American Games teams, and, upon approval, timely disseminate such procedure to the athletes.” USOC Bylaws, Section 8.7(g).

After the 2016 Rio Olympic Games, USATT sought to enhance the performance of its adult table tennis teams in the Olympic Games and other international competitions. In 2017, USATT hired Mr. Bitzigeio, who had a successful career as a table tennis player and coach in Germany (which has one of the world’s top four teams in recent years) as its High Performance Director, whose duties include coaching and managing its national teams. Based on his extensive national and international professional experiences in the sport of table tennis, he does not believe that selection of athletes based only on their domestic competition results (which was the historical and then-existing method of selecting USATT’s national table tennis teams) is the best means of developing U.S. adult teams that will be successful in the Olympic Games and other international competitions. To achieve this objective, he consulted with the USOC High Performance Team and prepared the initial draft of proposed athlete selection procedures for the 2019 Pan Am Games, which provided for the discretionary selection of female and male players based on her/his results in multiple domestic and international table tennis competitions against players with differing styles of play.

The USATT’s High Performance Committee, which consisted of seven members (including two table tennis athletes), finalized and approved the “USA Table Tennis Athlete Selection Procedures Pan American Games, 2019” (“Athlete Selection Procedures”). Committee members Ann W. Cribbs (Chair, USATT Board of Directors), Mr. Danner, and Ms. Proffitt signed the Athlete Selection Procedures, certifying they represent “the method approved by USATT.” The Athlete Selection Procedures were published on or about October 6, 2018 and were subsequently amended with no material changes on October 18, 2018, January 24, 2019, and February 12, 2019.

In relevant part, the Athlete Selection Procedures provide as follows:

1. **SELECTION SYSTEM**

- 1.1 Provide the minimum eligibility requirements for an athlete to be considered for selection to the Team:

...

1.1.4 Other requirements (if any):

* Athlete must be a member of USATT in good standing at the time of selection.

...

1.2 Tryout Events:

1.2.1 Provide the event names, dates and locations of all trials, events and camps to be used as part of the selection process.

* 2018 Pan America Championships, (Santiago, Chile), November 20-25, 2018)

* January 2019 ITTF World Ranking General List-
<https://www.ittf.com/rankings/>

* USA Table Tennis 2019 PanAm Games Team Trial, (March 1-3, 2019, location TBA)

1.2.2 Provide event names, dates, locations and description of how athletes qualify for the trials, events and camps listed above in 1.2.1 (if any).

* 2018 USA Table Tennis Team Selection Procedure selects athletes to compete in the 2018 Pan America Championships-(
<https://www.teamusa.org/USA-Table-Tennis/Team-USA/Selection-Procedures>)

*The USATT 2019 Pan Am Games Team Trial is an open event. Any athlete meeting the eligibility criteria in Section 1.1 is eligible to compete.

1.3. Provide a comprehensive step-by-step description of the method that explains how athletes will go through the selection process. The maximum team size is 3 male and 3 female athletes.

1.3.1. 2018 Pan American Championships and February 2019 ITTF World Ranking – Up to 2 (two) athletes, per gender, will be selected using the following criteria in order:

1.3.1.1. Any U.S. Athlete, per gender, who wins a gold medal in the singles events at the 2018 Pan America Championships will be named to the 2019 Pan Am Games Team.

...

- 1.3.2. USATT 2019 Pan Am Games Team Trial – (Up to 1 (one) athlete per gender) will be selected using the following criteria:
 - 1.3.2.1. The winner, per gender, of the USATT 2019 Pan Am Games Team Trial will be named to the Pan Am Games Team.
- 1.3.3. Discretionary Selection – All remaining slots, per gender, will be filled using the following criteria:
 - 1.3.3.1. Discretionary Selection will be used to fill remaining slots. Please see Section 2 of this document for further details.

2. DISCRETIONARY SELECTION (if applicable)

- 2.1 Provide rationale for utilizing discretionary selection (if any):

Discretionary selection will be made if a full team of three (3) players are not qualified through automation qualification listed in Section 1.3.
- 2.2. List the discretionary criteria and explain how they will be used (if any):

The following criteria will be considered by the Pan Am Games Selection Committee in no particular order:

 - 1. May 2019 ITTF World Ranking
 - 2. Results at the USATT Pan Am Games Team Trial
 - 3. Results at the Pan Am Games Qualification Event
 - 4. Competitive international competition results over the prior 12 months
 - 5. Results at National Ranking Tournaments over the prior 12 months
 - 6. Declaration of participation in future Pan Am Games preparation camps and competitions and training per Section 9 of this document
- 2.3. Provide the name of the committee that will be responsible for making discretionary selections, along with a complete list of the members' titles currently serving on the committee:

Pan Am Games Selection Committee

High Performance Director, USA Table Tennis

Chair of the High Performance Committee, USA Table Tennis

Two National Team Coaches, USA Table Tennis

One Athlete Representative, USA Table Tennis

The October 2018 Athlete Selection Procedures and each amendment were approved by

the USOC.

As the Chairperson of the USATT Athlete Advisory Council, Ms. Profitt had no concerns about any of the Athlete Selection Procedures, including the Discretionary Selection criteria, and testified that she “agreed with them.” From the date of their publication on or about October 6, 2018 through the USATT Pan Am Games Team Trial on March 1-3, 2019, there were no objections to the Athlete Selection Procedures by any USATT member athletes, including Mr. Liu, who admittedly was aware of the Discretionary Selection criteria and acknowledged that all six of the criteria listed in Section 2.2 are objective factors (although he does not agree that each criterion is valid and entitled to the same weight).

In accordance with 1.3.1.1 of the Athlete Selection Procedures, USATT selected Kanak Jha, who won the gold medal in the men’s singles event at the 2018 Pan America Championships, as one of the three members of the 2019 Pan Am Games men’s table tennis team.

Pursuant to 1.3.2.1 of the Athlete Selection Procedures, USATT selected Nikhil Kumar, who won the USATT 2019 Pan Am Games Team Trial, as another of the 2019 Pan Am Games men’s table tennis team.

In late April or early May, 2019, based on their application of the Discretionary Selection criteria in Section 2.2 of the Athlete Selection Procedures, USATT’s five-person Pan Am Games Selection Committee, which included Messrs. Bitzigeio and Danner, unanimously selected Mr. Tio as the third member of the 2019 Pan Am Games men’s table tennis team. The Committee selected Mr. Liu as the alternate for the team. The “Confidential Minutes of Pan Am Games Selection Committee Process May 2019” (“Minutes”), drafted by Mr. Danner and submitted to committee members for comment, states “it contains candid, specific assessments of the athletes involved as evaluated according to the selection criteria” and “that all of the athletes discussed here are outstanding individuals who have already contributed to Team USA, and will hopefully continue to do so in the future.” Exhibit R18, p. 1.

In a May 2, 2019 email to Messrs. Tio and Liu regarding its decision, Mr. Bitzigeio explained: “the PAG Selection Committee decided based on performances/results/achievements

Nick [Mr. Tio] to be the third team member and Victor [Mr. Liu] as the alternate. It was a close, but at the end an obvious decision between two good players.” Exhibit E. This conclusion is consistent with his testimony that the Committee’s “common decision” was “close” and “rational” in favor of Mr. Tio as its discretionary selection for the men’s team.

Regarding criterion 1 (May 2019 ITTF World Ranking), it is undisputed that Mr. Tio was ranked #222, and Mr. Liu was ranked #480. Mr. Bitzigeio’s email states: “Throughout the last 12 months, Nick has usually been in the 250-300 WR range, while Victor has been in 800-1000 range. When Nick was still a junior, his world ranking was also much higher than Victor’s junior world ranking—for example, #89 versus #269 for the last such month, December 2018.” (Exhibit E). The Minutes explain: “Because the ITTF has separated the data used for junior and adult world rankings, each must be interpreted separately and consideration should be given to athletes who primarily compete in one category or the other. Regardless of how it is viewed, Nicholas’ world ranking is much higher than Victor’s, and consistently so.” Exhibit R18, p. 2.

Regarding criterion 2 (Results at the USATT Pan Am Games Team Trial), Mr. Liu placed second with a 6-1 record and defeated Mr. Tio (who placed third with a 5-2 record) 4-2 in a best of seven games match, which Mr. Bitzigeio’s email states “was considered to be a small difference in performance.” Exhibit E. The Minutes are consistent with his email and state that this is an “advantage for Victor.” Exhibit R18, p.2.

Regarding criterion 3 (Results at the Pan Am Games Qualification Event), Mr. Bitzigeio’s email (Exhibit E) and the Minutes (Exhibit R18, p.2) both state as follows:

In the 2018 Pan Am Championships, both Nicholas and Victor were on the team , although Nicholas was selected to play the team matches while Victor was not—in part for the doubles pairing. Regardless, Nicholas did contribute some important wins for the team, including over Nicolas Galavano (WR 216) to the deciding match over Argentina, and a doubles match in the team’s 3-2 win over Chile in addition to another doubles match against the Dominican Republic. These team wins allowed Team USA to qualify for the Pan Am Games and the World Team Cup. In the singles, Nicholas went one round further, while Victor won a round in Men’s Doubles (where Nicholas did not play). Overall, Nicholas had the stronger performance here in the qualifying competition for the Pan American Games.

Regarding criterion 4 (Competitive international competition results over the prior 12

months), Mr. Bitzigeio's email (Exhibit E) states:

Nicks' competitive international results including youth competitions like World Juniors and continental events in last 12 months reflected a higher level of performance than Victor. Victor's record included two good wins at the 2019 World Championships over adult opponents ranked 133 and 340. This was the highest level of play that Victor has demonstrated. However, on the same trip Victor lost both matches in his preliminary round robin in the French Junior and Cadet Open, and lost in the first round of the consolation—results far below those from the Worlds. In formal league play, Victor played in the German league fourth division and had a record of 4 wins, 8 losses in singles, while Nick played in the higher German league third division and had a singles record of 14 wins and 4 losses.

Similarly, the Minutes (Exhibit R18, pp.2-3) state:

Nicholas' competitive international results reflected a higher level of performance than Victor. Victor's record included two good wins at the 2019 World Championships over adult opponents ranked 133 and 340. This was the highest level of play that Victor has demonstrated. However, on the same trip Victor lost both matches in his preliminary round robin in the French Junior and Cadet Open, and lost in the first round of the consolation—results far below those from the Worlds. In formal league play, Victor played in the German league fourth division and had a record of 4 wins, 8 losses in singles, while Nick played in the higher German league third division and had a singles record of 14 wins and 4 losses. The coaches evaluated their overall international records as showing that Victor's highest level may be higher than Nicholas (although Nicholas' key win in the Pan Am Championships team event argues to the contrary), but Victor's potential for good wins is accompanied by a tendency for weak losses as well. This is a particular concern for the team competition in the Pan Am Games.

Although the phrase "international competition results" is not defined in the Athlete Selection Procedures, Mr. Danner testified that the Committee broadly considered all international competitions (i.e. events with players or teams from different countries) in which Mr. Liu or Mr. Tio participated from May 1, 2018-April 30, 2019, including the German League in which both of them contemporaneously participated, not only the specific table tennis events listed on the ITTF website during this time period.

Regarding criterion 5 (Results at National Ranking Tournaments over the prior 12 months), Mr. Bitzigeio's email (Exhibit E) states: "With regard to domestic results, Victor's record has a slight edge over Nick, as evidenced by finishing one place ahead of Nicholas in the Trial. Nick did finish one round ahead of Victor in both Men's Singles and Junior Boys' Singles

at the Nationals, while Victor won the under 21 men's singles beating Nicholas in the semi-finals." The Minutes (Exhibit R18, p.3) are virtually identical regarding the Committee's evaluation of this criterion.

Regarding criterion 6 (Declaration of participation in future Pan Am Games preparation camps and competitions and training per Section 9 of this document), it is undisputed that both Mr. Tio and Mr. Liu satisfied it.

The Minutes state: "In light of the above criteria and the Committee's discussion of them, the vote was unanimous to select Nicholas Tio for the team, and to make Victor the alternate." Exhibit R18, p.3. This conclusion is consistent with Mr. Danner's testimony that the Minutes are a "complete and accurate summary" of all the reasons the Committee unanimously chose Mr. Tio rather than Mr. Liu as its discretionary selection for the men's team as well as an April 30, 2019 press release titled " USA Table Tennis Completes Selection of Pan American Games Team" stating "Nicholas Tio was selected due to his May, 2019 adult world ranking, his consistent international results over the last twelve months, and his performance in the 2018 Pan American Championships in Santiago, Chile through which the USA qualified for the Pan Am Games." Exhibit D.

USATT's Pan Am Games Selection Committee consistently, fairly, and rationally applied all six of the Discretionary Selection criteria in Section 2.2 of the Athlete Selection Procedures to both Mr. Liu and Mr. Tio.

USATT did not deny Mr. Liu the opportunity to participate in or prevent him from competing in any open international table tennis competitions at any time. He was a high school student in California until his May/June 2019 graduation, which effectively limited his ability to participate in international table tennis competitions during his high school's academic year, including after the October 2018 publication of the Athlete Selection Procedures.

There is no evidence that USATT or anyone acting on its behalf was biased against Mr. Liu or acted in bad faith towards him in applying the Discretionary Selection criteria in Section 2.2 of its Athlete Selection Procedures.

The Minutes reflect that the Committee may have considered an additional factor in its comparison of Mr. Liu with Mr. Tio, which is not expressly listed as one of the discretionary selection criteria: “The coaches also noted that Nicholas is an experienced and successful doubles partner with Nikhil Kumar, who is already qualified for the team. This is important for the Pan American Games team event, as it was for the Pan Am Championships.” Exhibit R18, p.3. There is no evidence of record that the Committee likely would have chosen Mr. Liu as its discretionary selection for the men’s team if this factor had not been raised by the two coaches that were committee members.

Understandably, Mr. Liu, who placed second in the 2019 Pan Am Games Team Trial and defeated Mr. Tio in that event (and in the only two other table tennis competitions in which they played each other during the past three years) and whose relative performance in the 2019 World Championships was better than Mr. Tio’s, is very disappointed he was not the Committee’s discretionary selection for the 2019 Pan Am Games men’s table tennis team.

Mr. Liu’s Section 9 arbitration demand seeking arbitral review of USATT’s discretionary selection of Mr. Tio rather than himself was not brought in bad faith because the claims in his “Second Restated Demand for Arbitration” have both a factually and legally plausible basis.

LEGAL ANALYSIS

The sole issue for resolution in this arbitration proceeding is whether Mr. Liu or Mr. Tio is entitled to be named as the third member of USATT’s 2019 Pan Am Games men’s table tennis team (i.e., discretionary selection) pursuant to its Athlete Selection Procedures.

Burden of Proof and Standard of Review

In a Section 9 team selection dispute, it is well established that the athlete (i.e., Mr. Liu) has the burden of proving by a preponderance of evidence a claimed denial of a fair opportunity to compete for selection as a member of a team that will participate in a “protected competition” (i.e., 2019 Pan Am Games). *Tibbs v. United States Paralympics*, AAA Case No. 71 190 E 00406 12 at 14 (August 28, 2012) (citing several prior Section 9 awards). “Section 9 jurisprudence

requires [Mr. Liu] to prove [USATT] breached its approved and published Athlete Selection Procedures for the [2019 Pan Am Games], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [her], and/or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).” *Id.* See also *Komanski v. USA Cycling*, AAA Case No. 01-15-0004-9907 (Nov. 15, 2015) at 5 (adopting this substantive standard for evaluating the merits of a team selection dispute).

Although not expressly incorporated or referenced therein, “[i]t is well accepted that the [arbitral] standard of review for cases arising under Section 9 of the USOC Bylaws is de novo.” *Komanski* at 5. In exercising de novo review in a team selection dispute, the arbitrator ensures that: 1) the athlete is given adequate procedural due process by providing a full and fair opportunity to be heard regarding his claims; and 2) the merits of an NGB’s challenged decision comply with the foregoing requirements of the law of private associations by analyzing whether its athlete selection procedures are valid; were followed and applied consistently; its discretionary decision was rational/reasonable (i.e., not arbitrary or capricious) and in good faith (i.e., without any bad faith or bias); and complies with applicable federal and state laws.

Komanski states that “Section 9 proceedings are not appeals of NGB decisions and there is no requirement for an arbitrator in these proceedings to give deference to any prior decision and, in fact, it would be incorrect to do so.” *Id.* at 5. (quoting *Craig v. USA Taekwondo, Inc.*, AAA Case No. 77 190E 00144 11 (August 21, 2011)). Despite this language, in practical application and effect, an arbitrator’s de novo review in a team selection dispute generally is deferential to an NGB’s professional judgment regarding how to satisfy its USOC-delegated legal duty under the ASA “to obtain for the United States , , , the most competent amateur representation possible” if the NGB complies with the law of private associations.

In a Section 9 team selection dispute, “[a]rbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large.” *Lindland v U.S. Wrestling Ass’n, Inc.*, 227 F.3d 1000, 1004 (7th Cir. 2000). Therefore, the scope of my de novo review of USATT’s discretionary selection of Mr. Tio rather than Mr. Liu is limited as follows:

I have authority only to determine whether [Mr. Liu] had a fair opportunity to compete for a position on the [USATT men’s team for 2019 Pan Am Games] and whether

[USATT's] Team Selection Committee used and rationally applied [its] published [Athlete Selection Procedures]. My role is not to determine whether [USATT] "chose the best process for selecting teams" *Cameron Booth* at 19, or to substitute my judgment for the expert professional judgment of [USATT] in establishing selection criteria or the Team Selection Committee in applying the criteria to individual [athletes]." (emphasis original).

Beckom and USBSF, AAA Case No. 77 190 E 00105 10 (February 10, 2010) at 8. See also *Komanski* at 5 ("In the context of selections cases, that review is not one that substitutes the arbitrator's assessment of performance for that of the NGB experts who are involved in the decision making.").²

Protection of Mr. Liu's Procedural Due Process Rights

In accordance with the ASA, 36 U.S.C. §220522(a)(4)(B), and Section 9 of the USOC, Mr. Liu brought an arbitration proceeding before an independent and impartial arbitrator conducted in compliance with AAA's Commercial Rules. He initially filed a joint "Amended Demand for Arbitration" with Co-Claimant Chen Wang, was permitted to subsequently submit a "Restated and Amended Demand for Arbitration" (bifurcating his claims from those of Ms. Wang), and finally a "Second Restated Demand for Arbitration," which focused and narrowed his specific claims in this proceeding. He was allowed to engage in his requested discovery, including requesting the USATT answer 22 interrogatories and produce 25 documents.

At the beginning of the hearing, all of Mr. Liu's exhibits were admitted into evidence. During the hearing, which lasted more than seven hours, he was permitted to call and directly examine his chosen witnesses (himself and his father) and to extensively cross-examine USATT's three witnesses regarding the relevant and material issues in dispute. The Arbitrator sustained USATT's objection to Mr. Liu's counsel's question on cross examination to Mr. Danner regarding his knowledge of whether anyone currently or formerly associated with the USOC had ever expressed regrets or reservations about the USOC's approval of USATT's Athlete Selection Procedures for the 2019 Pan Am Games. Because the only issue for resolution

² In the immediately following sentence, *Kamansky* states "Rather, it is a *de novo* review, with no deference, of the application of the published selection procedures to the facts of the individual case." This statement, however, appears to conflict with its foregoing sentence and the generally applied standard of review for athlete selection cases,

in this Section 9 arbitration proceeding is whether Mr. Tio or Mr. Liu should be the USATT's discretionary selection as the third male table tennis athlete to participate in the 2019 Pan American Games, the Arbitrator ruled that this question is irrelevant and immaterial pursuant to AAA Commercial Rules R-34 (b) as well as outside the scope of USATT's direct examination of Mr. Danner. At the conclusion of hearing, Mr. Liu acknowledged that all of his evidence had been submitted and heard. However, in response to the Arbitrator's question, his counsel denied he had been given a fair and full hearing solely because the Arbitrator sustained USATT's objection to his foregoing cross-examination question.

Based on the foregoing, the Arbitrator rules that Mr. Liu's procedural due process rights were both fully and fairly protected and respected in this arbitration proceeding.

Validity of USATT's Athlete Selection Procedures for 2019 Pan American Games

Regarding this issue, Mr. Liu states he "did not make, and is not now making, a 'facial challenge' to USATT's Pan Am Games selection procedures." Claimant Victor Liu's Brief in Opposition To USATT's Motion For Sanctions at p. 1. However, relying on the two *Viola and USA Diving* AAA Section 9 awards, he contends that some of USATT's discretionary selection criteria do not conform to the Manual: "even though the USOC staffers on the Sport Performance Team approved selection procedures for the Pan Am Games, they do not have the authority to override the mandates of the duly- adopted and published [Manual] The arbitrator must look to the published USOC standards, not to what some wayward USOC staffers may have done." Claimant Victor Liu's Post Hearing Memorandum of Law, p. 6.

Specifically, Mr. Liu contends:

[O]f the six criteria published by USATT, only No. 1 (the May 2019 ITTF World Ranking); No. 2 (the results at the USATT Pan Am Games Tryouts on March 1 – 3, 2019)); and No. 6 (Declaration of participation in future camps) may be taken into consideration by the arbitrator in connection with his *de novo* review of this matter . . .

Criteria No. 3 (the results of the Pan Am Games Qualification Event in Santiago, Chile in Nov 2018) may not be used because . . . there is no way that the results of events competed in by the two athletes there can be applied or evaluated in a consistent manner (since Joerg did not permit Victor to compete in any of the team events).

Criterion Nos 4 and 5 may not be used in [that] they both run afoul of the USOC's "no retroactive" rule, in that they both call for the consideration of result of competitions which took place in the 12 months prior to the February 2019 posting of the USATT's amended criteria.

Id. at p. 16.

In response, USATT asserts as follows:

First, Claimant cannot show that USATT had no rational basis for its decision to add discretionary criteria in the Procedures. The evidence shows that not only did USATT's High Performance Committee (the "HPC") deliberate and consider the best way to select competitors for the Games, as obligated by the Amateur Sports Act (the "Act") and Bylaws of the United States Olympic Committee (the "USOC"), but they used their expert professional judgment in establishing the criteria.

Second, Claimant has not proven that the Procedures were not clear, transparent and easy to apply without confusion. The athletes knew how they would be selected and against what criteria they would be judged. The criteria under the Procedures were all based on objective facts and were performance-based.

Third, Claimant did not, and cannot, show that the USOC did not approve the Procedures, after they were adopted by the HPC. This approval carries considerable weight, as Claimant argued that the Procedures did not meet with the USOC guidelines. This argument is illusory, since the USOC not only approved the Procedures, but worked directly with USATT in developing them, pursuant to their Congressional grant of authority.

Fourth, Claimant did not provide any evidence to suggest that Claimant was not given a fair opportunity to compete for a position on the team to represent the United States at the Games. In fact, Claimant participated in the 2019 Pan American Games Trials (the "Trials"), in an attempt to qualify for the Games, as provided in the Procedures. It was only after he was unsuccessful that he brought a challenge to the selection and the Procedures themselves.

Respondent USA Table Tennis Post-Hearing Brief, pp. 1-2.

It is undisputed that the USOC approved USATT's Athlete Selection Procedures for 2019 Pan American Games, including his discretionary selection process and criteria, which he did not object to or challenge until after he was not selected as a member of the men's table tennis team for this competition. The inclusion of a discretionary selection process and criteria in the Athlete Selection Procedures is a valid means of achieving the legitimate and ASA-mandated objective of improving the performance of the USATT's adult table tennis teams and players in

international competitions, including the Pan Am Games. In a good faith and well-reasoned effort to accomplish this goal, USATT chose to provide for the discretionary selection of female and male players based on her/his results in multiple domestic and international table tennis competitions against players with differing styles of play “if a full team of three (3) players are not qualified through automatic qualification” pursuant to its Athlete Selection Procedures. Athlete Selection Procedures, Section 2.1.

The Arbitrator recognizes there is a difference of opinion in the U.S. table tennis community regarding the best way to select national teams (i.e., solely by domestic head-to-head competitions results or by a combination of factors, including discretionary criteria). In accordance with *Beckom*, *Cameron Booth*, and *Komanski*, “my role is not to determine whether [USATT] “chose the best process for selecting teams” . . . or to substitute my judgment for the expert professional judgment of [USATT] in establishing selection criteria” or that of the USOC in approving them. *Beckom* at 8. See also *Yun v. USA Taekwondo*, AAA Case No. 01 15 0005 7406 (December 23, 2015) at 20 (“It is not up to this Arbitrator to determine whether the Procedures use the best possible way to select the members of the Olympic team, but rather to evaluate the process USA Taekwondo chose and determine whether it acted rationally and in accordance with the [ASA] in developing and adopting them.”).

Mr. Liu correctly asserts that the discretionary criteria in Section 2.2 of USATT’s Athlete Selection Procedures must comply with the Manual, which requires them to be “performance-oriented, fair, equitable and clearly written” as well as to be “not retroactive” and to use “objective based criteria or discretionary/subjective criteria that are supported by objective measures. (Manual, pp. 2 and 6). USATT acknowledges its “responsibility to athletes and others to make the rules clear, transparent, and easy to apply without confusion.” *McConneloug v. USA Cycling*, AAA Case No. 30 190 00750 04 (July 20, 2004) at 7. Respondent USA Table Tennis Post-Hearing Brief, p. 5. It also “admits that the evaluation of athletes under ‘discretionary’ factors should be based on objective facts so that the factors are appropriately applied” in accordance with *Viola v. USA Diving*, AAA Case No. 30 190 00828 05 (August 1, 2005) (“*Viola I*”). *Id.*

Mr. Liu acknowledges that all six of the discretionary criteria listed in Section 2.2 are objective (which effectively constitutes an admission that they also are “performance-oriented”),

but he contends that criteria 3, 4, and 5 are invalid because as applied or written they violate the Manual for various reasons based on *Viola I*, which requires an NGB's team selection criteria to comply with "USOC standards." *Viola I* at 8.

In considering this contention, the Arbitrator relies on *Yun's* guidance:

The fact that USOC experts reviewed and approved [an NGB's team selection procedures is one of the factors to be considered in evaluating whether [they] comply with the [ASA]. This can not however be controlling. It nevertheless carries considerable weight as the USOC team who reviewed [them] are all well aware of the requirements of the [ASA] as set forth in the Manual and they are considered to be well qualified to evaluate selection procedures independently.

Yun at 18.

Mr. Liu asserts that the Athlete Selection Committee's use of criterion 3 (Results at the Pan Am Games Qualification Event) was inequitable and inconsistent because he did compete in any team events during this competition (which Mr. Tio did). The Arbitrator rejects his contention that its doing so violated the Manual because Mr. Liu participated in this event's singles and doubles competition, and the Athlete Selection Committee considered Mr. Tio's overall performance, particularly in his singles and doubles matches, to be "stronger" than his overall performance. Thus, the Athlete Selection Committee's use and application of criteria 3 was "fair" and "equitable" as required by the Manual.

Mr. Liu asserts that criteria 4 and 5 as written violate the Manual's requirement that athlete selection procedures "are not retroactive" because "both call for the consideration of result[s] of competitions which took place in the 12 months prior to the February 2019 posting of the USATT's amended criteria." The Arbitrator notes that the Athlete Selection Procedures initially were published on or about October 6, 2018 (which is approximately seven months before being used and applied by USATT's Athlete Selection Committee in choosing its teams for the 2019 Pan Am Games) and that the three subsequent amendments did not make any material changes. As a result, despite being approved by the USOC, criteria 4 and 5 do not literally and strictly satisfy this requirement of the Manual. Mr. Liu correctly points out that the Manual's reason for prohibiting retroactive criteria "is clear: athletes must know which events will be used for team selection at a point in time when they can still participate in the relevant events." Claimant Victor Liu's Post Hearing Memorandum of Law, p. 8. *Klug v. US Ski and*

Snowboard Association, AAA Case No. 30 190 0056 06 (January 27, 2006) at 2 (“The whole purpose for the development of criteria for qualification for [protected competitions] is for the contenders to know how they will be selected and against what criteria they will be judged.”).

Regarding criterion 4 (Competitive international competition results over the prior 12 months), USATT did not deny Mr. Liu the opportunity to participate in or prevent him from competing in any open international table tennis competitions at any time. His ability to do so was significantly limited because he was attending high school in California (and likely subject to compulsory attendance requirements) until his May/June 2019 graduation. Regarding criterion 5 (Results at National Ranking Tournaments over the prior 12 months), the Athlete Selection Committee considered it to be a factor favoring Mr. Liu as the discretionary selection for the 2019 Pan Am Games men’s table tennis team. Therefore, the Arbitrator determines that any retroactive application of criteria 4 and 5 did not harm Mr. Liu. Moreover, despite his awareness of these criteria when they were initially published in October 2018, Mr. Liu did not object to them until after he was not chosen as USATT’s discretionary selection. *Yun* at 17 (“There is an illogic to accepting [athlete selection procedures] when published, failing to qualify under their requirements and then claiming [they] are as a matter of law invalid. . . . Nevertheless, even if published earlier, the [athlete selection procedures] would have retained the retroactive characteristics at issue, taking into account ranking points previously earned onto which points the Claimants would then attempt to add additional points.”).

Mr. Liu also contends that criteria 4 and 5 are not “clearly written” in violation of the Manual; specifically, he asserts that “competitive international competition results” in criteria 4 is undefined and the phrase “prior 12 months” in both criteria 4 and 5 is ambiguous regarding its specific time period. Despite his actual or constructive knowledge of the specific language of these criteria when they were initially published in October 2018, Mr. Liu did not challenge or object to either criterion on this ground until after he was not chosen as USATT’s discretionary selection. Ms. Profitt testified that table tennis players understood the meaning of “competitive international competition[s],” which USATT’s Pan Am Games Athlete Selection Committee broadly and consistently applied to encompass all table tennis events and competitions between athletes of foreign countries from May 1, 2018—April 30, 2019 in which its member athletes had participated. During the hearing, Mr. Liu did not identify any specific harm or detrimental

reliance caused by any alleged ambiguities in criteria 4 and 5 that more likely than not resulted in him not knowing the relevant competitions and time period to be considered by the committee in making its discretionary selection for the 2019 Pan Am Games men's table tennis team.

The Arbitrator concludes that criteria 3, 4, and 5 and their respective application by the Athlete Selection Committee are not material violations of the Manual, which either 1) denied Mr. Liu a fair opportunity to compete for selection as a member of the 2019 Pan Am Games men's table tennis team; or 2) more likely than not would have resulted in his discretionary selection for the team if these three criteria were not considered or applied in the foregoing manner by the Athlete Selection Committee.

The Arbitrator determines that all of USATT's six discretionary selection criteria in Section 2.2 are appropriate, rational, and valid factors, which in combination satisfy the Manual's important requirement of "[a]llow[ing] for selection of the most competitive team"—an objective consistent with the USOC's statutory obligation under the ASA to ensure "the most competent amateur representation possible in each event of . . . the Pan-American Games." In accordance with *Yun*, their individual and collective approval by the USOC "carries considerable weight" because it is "well qualified to evaluate" the merits of whether they achieve this objective. The USOC's professional judgment that USATT's six discretionary selection criteria do so is not subject to contravention or second guessing by the Arbitrator, who finds no record evidence to support a contrary conclusion to the USOC's determination.

The Arbitrator rejects Mr. Liu's argument that Section 2.2's statement that the Pan Am Games Athlete Selection Committee will consider the six discretionary criteria "in no particular order" gives its members "both individually and as a group, almost totally unfettered discretion—a violation of USOC rules" pursuant to *Viola I*. Claimant Victor Liu's Post Hearing Memorandum of Law, pp. 8-9. He provided no evidence to support this assertion, which is convincingly refuted by the written reasons in the Athlete Selection Committee's Minutes for selecting Mr. Tio as well as Mr. Danner's uncontroverted testimony that Mr. Bitzigeio had no "unfettered discretion" in making the discretionary selection for the 2019 Pan Am Games because he was only one committee member. Based on *Yun* and because of his failure to object to (or at least inquire about) this specific provision of Section 2.2 until after he was not chosen as

USATT's discretionary selection, the Arbitrator is unpersuaded by Mr. Liu's unsupported assertion that "without guidance . . . as to 'an order of importance' [he had] no way to know which competitions [he] should enter in order to increase the likelihood [he] will be selected" for the 2019 Pan Am Games contrary to *Viola I* and *Viola and USA Diving*, AAA Case No. 30 190 00828 05 (December 21, 2005) ("*Viola II*"). *Id.* at 9-10. The Arbitrator observes that this argument also is used to claim that criteria 4 and 5 are invalid because they are not "clearly written," which was rejected for the above reasons.

USATT's Application of Discretionary Selection Criteria

Regarding this issue, Mr. Liu asserts:

It would be manifestly unjust if the arbitrator left standing the discretionary selection [of Mr. Tio] by USATT for the Pam Games in the face of the following:

...

USATT's published criteria was not followed in that factors that were not criteria were nonetheless used to make the selection;³

Victor Liu and Nicholas Tio were not evaluated in in a consistent manner; and

There is evidence that Joerg Bitzigeio, the USATT High Performance Director, and member of the Pan Am Athlete Selection Committee, as well as Carl Danner, the Chair of the High Performance and Athlete Selection Committees, are biased in favor of Nicholas Tio and prejudiced against Victor Liu.

...

In light of the foregoing, the task of the arbitrator is to undertake a *de novo* review of the selection using only USATT criteria which comply and not those portions of the USATT criteria published which comply with the USOC Athlete and Staff Selection Procedures Instruction Manual. It is respectfully submitted that, using that criteria, Victor Liu, who has consistently beaten Nicholas Tio in *every* face to face match over the last three years, including at the recent official Pan American Games tryouts, must be the nominee to the

³ More specifically, he asserts: "And, of course, it was wrong for USATT to consider any of the "hidden criteria" (that is, factors used by USATT that are and never were part of the published criteria) and which it considered in picking Nicholas over Victor." Claimant Victor Liu's Post Hearing Memorandum of Law, p.2.

USOC for the third male position for the upcoming Pan American Games in the sport of table tennis.

Claimant Victor Liu's Post Hearing Memorandum of Law, pp. 1-2.

More specifically, he contends:

[O]f the six criteria published by USATT, only No. 1 (the May 2019 ITTF World Ranking); No. 2 (the results at the USATT Pan Am Games Tryouts on March 1 – 3, 2019); and No. 6 (Declaration of participation in future camps) may be taken into consideration by the arbitrator in connection with his *de novo* review of this matter. And, in that regard, the actual tryouts (criteria No. 2) must be given greater weight than the ITTF May 2019 World Ranking on account of the fact that the ITTF World Ranking is so dependent on participation in ITTF events, as compared to results (e.g., the World Ranking for Nicholas actually *went up 26 places* after the April 2019 World Championships, notwithstanding the fact he failed to win a single match at the ITTF World Championships).

Id. at p. 16.

In summary, USATT responds as follows:

Claimant has not shown, by a preponderance of the evidence, that USATT breached the Procedures. The evidence shows that USATT and the Athlete Selection Committee deliberated over the selection between Claimant and Nicholas Tio ("Tio"), using only the criteria outlined in the Procedures.

Claimant has not shown that USATT applied the Procedures inconsistently to athletes similarly situated. The evidence shows that all athletes were treated similarly in their attempt to qualify for the Games.

Claimant has not shown that USATT acted in bad faith toward Claimant, or with any bias toward him. In fact, the evidence shows that USATT has no bias against Claimant, giving him numerous opportunities for international competition.

Claimant has not shown that USATT, in any way, violated applicable federal law (namely, the Act), and no state law violations were alleged. USATT followed the Act to the letter of the law and was guided by the USOC in doing so.

Respondent USA Table Tennis Post-Hearing Brief, pp. 2-3.

Pursuant to *Beckom* and *Cameron Booth* (and contrary to Mr. Liu's contention regarding the appropriate exercise and scope of my *de novo* review of USATT's discretionary selection of Mr. Tio),

I have authority only to determine whether [Mr. Liu] had a fair opportunity to compete for a position on the [USATT men's team for 2019 Pan Am Games] and whether

[USATT's] Team Athlete Selection Committee used and rationally applied [its] published [Athlete Selection Procedures]. My role is not to . . . substitute my judgment for . . . [that of] the Team Athlete Selection Committee in applying the criteria to individual [athletes]." (emphasis original).

Beckom at 8. See also *Komanski* at 5 ("In the context of selections cases, that review is not one that substitutes the arbitrator's assessment of performance for that of the NGB experts who are involved in the decision making."). This fundamental arbitral principle is consistent with and adheres to Colorado's law of private associations, which requires an independent tribunal to uphold a sports governing body's discretionary decision "rationally related to [its] legitimate purpose" that is "not manifestly arbitrary, unreasonable or unfair." *Bloom v NCAA*, 93 P.3d 621, 626 and 628 (Colo. App. 2004).

The above undisputed and/or findings of material facts prove that USATT's five-member Pan Am Games Athlete Selection Committee consistently, fairly, and rationally applied all six of the Discretionary Selection criteria in Section 2.2 of the Athlete Selection Procedures to both Mr. Liu and Mr. Tio, and then reasonably and unanimously concluded that Mr. Tio is their discretionary selection for the men's table tennis team in accordance with USATT's delegated duty pursuant to the ASA and the USOC Manual to select the most competent team to participate in the 2019 Pan Am Games.

Because the Arbitrator previously concluded that all six discretionary criteria "are appropriate, rational, and valid factors," I would be acting *ultra vires* by considering only criteria 1, 2, and 6 in connection with my de novo review of their application, which Mr. Liu requests be given outcome determinative weight by me. I also would be acting *ultra vires* by accepting Mr. Liu's request to name him as USATT's discretionary selection for the 2019 Pan Am Games because he "has consistently beaten Nicholas Tio in every face to face match over the last three years, including at the recent official Pan American Games tryouts" (emphasis original), which would require use and application of a factor that is not one of USATT's published Section 2.2 discretionary selection criteria.

The Arbitrator concludes that criteria 1-5 (all of which are objective performance-based factors) were each consistently, fairly, and rationally considered and applied by the Athlete Selection Committee. Regarding criterion 1 (May 2019 ITTF World Ranking), it favored Mr.

Tio (#222) because his adult ranking was higher than Mr. Liu's adult ranking (#480) (even if it is partially based on simply participation in international table tennis competitions) at the time of his discretionary selection as was his junior ranking (#89 versus #269) in December 2018. Regarding criterion 2 (Results at the USATT Pan Am Games Team Trial), it favored Mr. Liu because he placed second and defeated Mr. Tio, who placed third. Regarding criterion 3 (Results at the Pan Am Games Qualification Event), Mr. Liu participated in this event's singles and doubles competition, and the Athlete Selection Committee considered Mr. Tio's overall performance, particularly in his singles and doubles matches, to be "stronger" than his overall performance—the same standard by which both athletes were compared. Regarding criterion 4 (competitive international competition results over the prior 12 months), the Athlete Selection Committee considered the comparative performances of both Mr. Liu and Mr. Tio in all of their respective domestic and international table tennis competitions from May 1, 2018-April 30, 2019, which favored Mr. Tio (notwithstanding that "international competition results" is undefined, "prior 12 months" is ambiguous regarding its specific time period, and this criterion was retroactively applied). Regarding criterion 5 (Results at National Ranking Tournaments over the prior 12 months), the Committee considered it to be a factor favoring Mr. Liu's discretionary selection, which benefited him. The Arbitrator finds no basis for determining this criterion was not consistently, fairly, and rationally applied even if its phrase "prior 12 months" is ambiguous regarding its specific time period and it may have been retroactively applied to both Mr. Liu and Mr. Tio.

The Minutes reflect that the Athlete Selection Committee may have considered that Mr. Tio "is an experienced and successful doubles partner with Nikhil Kumar, who is already qualified for the team," in its comparison of Mr. Liu with Mr. Tio, which is an additional factor not expressly listed as one of USATT's published discretionary selection criteria. However, the Arbitrator found no evidence of record that the Athlete Selection Committee likely would have chosen Mr. Liu as the discretionary selection for the men's team if this factor had not been raised by the two coaches that were committee members. Therefore, this failure to strictly follow USATT's published discretionary selection criteria was immaterial under the circumstances.

There is no evidence that USATT or anyone acting on its behalf was biased against Mr. Liu or acted in bad faith towards him in applying the Discretionary Selection criteria in Section

2.2 of its Athlete Selection Procedures. Mr. Bitzigeio's decision to have Mr. Tio play in the Pan Am Games Qualification Event team events (which had the collateral effect of not enabling Mr. Liu to do so) was made in good faith to enhance the men's table tennis team's overall performance in this competition. The Arbitrator rejects Mr. Liu's contention that USATT's alleged biased application of its discretionary selection criteria is proven even if the following is true: "Joerg Bitzgiero [decided] not to have USATT pay the way for Victor to attend the Budapest Hungary World Championships [at] the end of April 2019 or to even invite Victor to the Pan Am Games Prep Camp in China in June [2019], notwithstanding the fact that Victor was named the first male alternate by USATT to participate in the Pan Am Games." Claimant Victor Liu's Post Hearing Memorandum of Law, p. 12.

Previously the Arbitrator determined that Section 2.2's statement that the Athlete Selection Committee will consider the six discretionary criteria "in no particular order" does not invalidate any of these criteria or evidence noncompliance with the USOC Manual. This provision gives the Athlete Selection Committee flexibility to weigh these criteria in accordance with their individual and collective expertise and experience in the sport of table tennis, although its members must consistently, fairly, and rationally apply each criterion and make a discretionary decision consistent with their obligation to select the most competitive team for the 2019 Pan Am Games. Recognizing that application of 3 of the 5 objective, performance-based criteria favored Mr. Tio, the Arbitrator rules that the Athlete Selection Committee satisfied the foregoing legal requirements in selecting him as its discretionary selection. Because this provides a reasonable basis for this decision, there is no factual or legal grounds for the Arbitrator to substitute his lay judgment for its members' unanimous collective professional judgment.

Allocation of Fees and Costs Between Parties

Relying on AAA Commercial Arbitration Rules R-47, USATT requests that the Arbitrator require Mr. Liu to pay its costs and fees, including attorneys' fees, for allegedly "commenc[ing] this arbitration frivolously, vexatiously, and without merit." Respondent USA Table Tennis Post-Hearing Brief, p. 12. Among other things, USATT asserts that he improperly brought this Section 9 claim to facially attack its discretionary selection procedures for the 2019 Pan Am Games "in an effort to harass and annoy. . . ignor[ing] the law, with no hopes of a

decision in his favor.” *Id.* at 12. It contends that “Claimant’s counsel: (i) presented his original demand for the improper purpose of harassing USATT and needlessly increasing the cost of this arbitration, (ii) made claims that he know or should have known (after simple cursory research) were not warranted by existing law, and (iii) abused the discovery process.” *Id.* at 13.

In response, Mr. Liu denies making any facial challenge to USATT’s discretionary selection procedures, abusing the discovery process, or asserting any unfounded arbitration claims (which were amended and narrowed after reviewing USATT’s responses to his interrogatories and production of documents).

Although it was not successful, the Arbitrator finds that Mr. Liu’s Section 9 arbitration demand seeking arbitral review of USATT’s discretionary selection of Mr. Tio rather than himself was not brought in bad faith because the claims in his “Second Restated Demand for Arbitration” have both a factually and legally plausible basis. Because the Arbitrator does not want to discourage athletes from bringing potentially meritorious Section 9 arbitration claims in team selection disputes (which is a legal right conferred by the ASA) because of concern about having to pay an NGB’s costs and fees if he or she is unsuccessful, USATT’s request that Mr. Liu pay its costs and fees (including attorneys’ fees) is denied. The Arbitrator notes that any abuse of the discovery process (which is not found to have occurred in this case) would be committed by a party’s counsel (not a party such as an athlete) and that Rule R-47 does not authorize an arbitrator to require counsel to pay the other side’s costs and fees (including attorneys’ fees) or to sanction counsel for such misconduct.

DECISION AND AWARD

Based on the foregoing facts and legal analysis, the Arbitrator decides and awards:

Mr. Liu’s procedural due process rights were fully and fairly protected in this arbitration proceeding.

The six discretionary selection criteria in Section 2.2 of USATT’s Athlete Selection Procedures Pan American Games, 2019 (which all were approved by the USOC individually and in combination) are appropriate, rational, and valid factors consistent with the USOC’s statutory obligation under the ASA and USATT’s delegated duty to ensure “the most competent amateur

representation possible in each event of . . . the Pan-American Games.”

USATT’s Pan Am Games Athlete Selection Committee members consistently, fairly, and rationally applied all six discretionary selection criteria to both Mr. Liu and Mr. Tio, and then reasonably and unanimously concluded that Mr. Tio is their discretionary selection for the men’s table tennis team.

Mr. Tio is entitled to be USATT’s discretionary selection for its men’s table tennis team that will compete in the 2019 Pan American Games.

All of the claims in Mr. Liu’s Second Restated Demand for Arbitration and his requested relief are denied.

USATT’s request that Mr. Liu be required to pay its costs and fees, including attorneys’ fees, in connection with this arbitration proceeding is denied.

The Administrative fees of the AAA totaling \$1,000 are to be borne as incurred. The Compensation of the Arbitrator totaling \$2,000 is to be borne as incurred. The parties shall bear their own attorney’s fees and/or costs associated with this arbitration.

This Award fully resolves all claims and defenses submitted by the parties in connection with this arbitration proceeding. All claims and defenses not expressly granted herein are denied.



June 20, 2019

Matthew J. Mitten, Arbitrator