

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

Case No. 01-19-0002-6729

In the Matter of the Arbitration between

NICOLE MELCH AND NADIA JOHNSTON, Claimants

and

THE UNITED STATES TENNIS ASSOCIATION, Respondent

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 and Paralympic Committee Bylaws, having been duly sworn and having fully considered the parties' respective factual evidence and legal arguments during a September 17, 2019 evidentiary hearing, does hereby, AWARD, as follows:

INTRODUCTION

This is an unique case in which the United States Tennis Association (USTA) violated its team selection rules, thereby enabling the International Tennis Federation (ITF) to determine that an athlete who is an Austrian national is eligible to represent the U.S. and to participate in the 2019 Association of National Olympic Committees (ANOC) World Beach Games (AWBG) women's doubles beach tennis event. This Section 9 arbitration proceeding arises out of the United States Olympic and Paralympic Committee (USOPC)'s subsequent determination that an athlete who is not a U.S. citizen does not satisfy ANOC's nationality requirements to compete for Team USA, which resulted in USOPC's withdrawal of the nomination for entry of the athlete and her playing partner for the AWBG. The issue of whether an athlete who is not a U.S.

citizen or national is eligible to represent the U.S. and to participate in the AWBG will be resolved in a pending Court of Arbitration for Sport (CAS) arbitration proceeding against ANOC. Resolution of the disputed issues in this AAA arbitration proceeding against USTA and the USOPC requires determination of the scope of the Arbitrator's jurisdiction, whether the two athletes' ASA, Section 9, or any other rights have been violated, and if so, the appropriate relief (if any) to be granted.

THE PARTIES

Claimants Nicole Melch and Nadia Johnston are former professional tennis players who currently are beach tennis players. They were represented by Robert A. de By, Cannon Wood LLP, London, England.

Respondent United States Tennis Association (USTA) is the National Governing Body ("NGB") for the sport of tennis in the United States, which is recognized by the USOPC and the International Tennis Federation ("ITF"). USTA was represented by Howard L. Jacobs and Katy Freeman, Law Offices of Howard L. Jacobs, Westlake Village, California.

The USOPC, which was named as a Respondent by Claimants in their Demand for Arbitration, exercised its right not to be involuntarily joined as a party under Section 9.7 of the USOPC Bylaws, while choosing to participate in this proceeding and agreeing to be bound by this arbitration award. The USOPC was represented by Sara Pflipsen, Sr. Counsel NGB and Athlete Affairs.¹

PROCEDURAL BACKGROUND

On August 22, 2019, Claimants filed a Section 9 Complaint against USTA with the USOPC. In the accompanying transmittal letter, their legal counsel asserts they were "previously selected and nominated to participate as Team USA in the beach tennis competition at the ANOC World Beach Games (AWBG), to be held in Qatar in October of this year" and that their Section 9 Complaint challenges USTA's "decision to declare Ms. Melch ineligible for the AWBG." They requested the following relief: "Decision that Melch is eligible to participate in the [AWBG] pursuant to the eligibility criteria for the beach tennis event set out in the ANOC

¹ The Arbitrator expresses his appreciation to all counsel for their excellent advocacy on behalf of their respective clients.

World Beach Games Qatar 2019—Technical Handbook/Qualification Guidelines [AWBG Technical Handbook) because she is directly eligible to represent the United States pursuant to Article 1(b)(iii) of Appendix A of the ITF Beach Tennis Tour Regulations (as determined by the ITF Independent Adjudication Panel (ITF-IAP) on July 15, 2019) & nomination of Melch and Johnston as ‘Doubles Team No. 1’ for and placement to compete in the AWBG beach tennis women’s doubles competition for AWBG-QATAR 2019.”

On August 22, 2019, Claimants contemporaneously filed their “Demand for Arbitration” pursuant to Section 9.7 of the USOPC Bylaws against USTA and the USOPC, alleging that “[j]urisdiction over the USOPC is proper because [36 U.S.C.] §220509 of the Stevens Act, under the circumstances prevailing here, by necessity implies the USOPC’s August 1, 2019, decision declaring Melch ineligible is subject to review before the AAA and, hence, requires that the USOPC be deemed to have consented to be joined as a necessary party in this arbitration.” ¶26.

In ¶27 of their Demand for Arbitration, they alleged:

Without the USOPC as a Respondent, only the USTA’s decision can be reviewed and any relief will lie against the USTA only. This will not ensure a “swift and equitable resolution” of the dispute concerning the denial of the Claimants’ Athletes’ Rights, not even of that part of the dispute between Claimants and the USTA, because USOPC is the party that must nominate beach tennis athletes to the AWBG. Hence, the USOPC’s own decision that Melch is ineligible is an integral part of the dispute and is at stake here, and an effective remedy requires review of both the USTA’s and USOPC’s decisions, and for the resulting arbitration award to bind both Respondents.

In ¶¶35-37 of their Demand for Arbitration, Claimants asserted their exhaustion of all available administration remedies to resolve their dispute with USTA and the USOPC prior to filing their demand for arbitration. In particular, they noted that the Grievance Procedures set forth in the AWBG “Games Delegation Terms—Athletes,” which generally apply to “disputes concerning the USOPC’s submission of official entries to [the Organizing Committee of the ANOC World Beach Games 2019 (OCWBG)],” are not used to resolve disputes “involv[ing] selection and nomination to the USOPC by an NGB for participation in the [AWBG] (such matters will be conducted pursuant to Section 9 of the USOPC Bylaws).”

In ¶38 of their Demand for Arbitration, pursuant to Section 9.9 of the USOPC Bylaws, they requested expedited resolution of their arbitration demand within 48 hours because "[c]ompliance with regular AAA procedures would not allow for an award to be made in time for Melch and Johnston to be able to participate in the beach tennis competition in Qatar, starting on October 12, 2019." ¶39.

In their Demand for Arbitration, Claimants requested the following relief: a determination that Ms. Melch is eligible to participate in the AWBG pursuant to the eligibility criteria for the beach tennis event in the AWBG Technical Handbook; a determination that Ms. Melch is directly eligible to represent the United States in the AWBG pursuant to the July 15, 2019 ITF-IAP decision; an order that USTA and the USOPC separately and jointly implement the foregoing determinations and refrain from any conduct that would prevent them from representing the United States in the AWBG beach tennis event; imposition of "a fine of US\$10,000 for each day after the AAA arbitrator has rendered his/her decision until such time as the Respondents [comply with it] as well as "a fine of US\$5,000 on each of the Respondents for each violation of [the foregoing order]; and an order requiring Respondents to pay all of the arbitrator's fees and costs of this arbitration proceeding. ¶153.

On August 28, 2019, AAA confirmed the appointment of the Arbitrator.

On August 29, 2019, a telephonic preliminary hearing was held in which the following counsel participated: Mr. de By for the Claimants; Mr. Jacobs and Ms. Freeman for USTA, and Ms. Pflipsen for the USOPC. During the preliminary hearing, Ms. Pflipsen acknowledged that the Claimants' Section 9 Complaint had been received and stated that it is pending and unresolved. The USOPC exercised its right not to be involuntarily joined as a party under Section 9.7 of the USOPC Bylaws, but Ms. Pflipsen stated that the USOPC would participate in this proceeding and agree to be bound by the arbitration award. Counsel represented that there are no "Affected Parties" (i.e., U.S. athletes) who may be adversely affected by this arbitration proceeding under Section 9.8 of the USOPC Bylaws.

Because the competition in which Claimants allegedly are denied an opportunity to participate in violation of their Section 9 rights (i.e., AWBG) will not be held until October 12-16, 2019, the Arbitrator determined that it is not necessary (or even possible) to hear and resolve

the claims asserted in Claimants' Demand for Arbitration within 48 hours after its August 22, 2019 filing pursuant to Section 9.9 of the USOPC Bylaws. Rather than having the expedited procedures of the AAA Commercial Arbitration Rules (Rules E-1 through E-10) apply, counsel agreed that all dispositive issues, including jurisdiction, the merits of Claimants' claims and appropriate relief (if successful), and any defenses, will be raised and briefed in accordance with an agreed schedule as well as heard during a September 17, 2019 telephonic hearing (if requested by counsel or the Arbitrator) and will be resolved by the Arbitrator in a written reasoned award rendered by September 20, 2019 at 8pm CT. Pursuant to their request, the Arbitrator granted USTA and the USOPC permission to file a motion to dismiss this arbitration for lack of jurisdiction pursuant to AAA Commercial Arbitration Rule R-33.

On August 30, 2019, the AAA determined that this arbitration proceeding would be administered under the Regular procedures of its Commercial Arbitration Rules.

In a September 3, 2019 letter to ANOC on behalf of Ms. Melch, Mr. de Bey inquired whether "ANOC agrees that a dispute about its [following August 27, 2019] decision is subject to the jurisdiction of the Court of Arbitration for Sport (CAS)":

After consulting with our legal counselors, we would like to state the following regarding the participation of Mrs. Melch in the Beach Tennis competition at the ANOC World Beach Games:

1. In order to be eligible to be entered in the AWBG by the USOPC a competitor must be a national of the US (evidenced by a passport); and
2. The quota spot that would have been available had Mrs. Melch been eligible to compete has been reallocated to the next eligible country, a team from Venezuela.
3. All quota spots for this sport have now been allocated leaving none available.

In a September 6, 2019 letter to Mr. de Bey, ANOC confirmed its August 27, 2019 decision regarding Ms. Melch's ineligibility to participate in the AWBG and stated:

1. All legal cases related to the ANOC World Beach games will be under the jurisdiction of the Court of Arbitration for Sport (CAS). We would agree that this case, if it is proceeded with, be referred to CAS.

2. The ANOC regulation governing the World Beach Games stipulates that a competitor must be a national of the country of the NOC that enters the competitor;
3. The USOPC is the only authority permitted to enter a competitor who will compete for the USOPC ANOC World Beach Games Team;
4. The quota spot has already been allocated to Team Venezuela. That being the case, the competitors already entered into the competition who may be affected by the decision, would also need to be a party to any CAS case.

In a September 9, 2019 responsive letter to ANOC, Mr. de Bey stated:

1. The issue that my client would need to raise before CAS [in an arbitration against ANOC]– whether she was eligible to participate in the [AWBG] – is the same issue that is currently before the arbitrator in my client’s AAA-arbitration against the United States Tennis Association (USTA) already.

...

The United States Olympic & Paralympic Committee (USOPC) has kindly agreed to participate as a non-party in that arbitration, and to be bound voluntarily by the arbitrator’s determination with regard to Ms. Melch’s eligibility *vel non*. The USOPC agreed despite its position that it cannot involuntarily be joined as a party in an arbitration before the American Arbitration Association (AAA). Of course, the same applies to the Association of National Olympic Committees.

...

May I respectfully suggest, and request, that the Association of National Olympic Committees follows the example of the USOPC and that you agree to join the AAA-arbitration as a non-party participant and to be bound by Prof. Mitten’s ultimate determination concerning Ms. Melch’s eligibility *vel non*, please?

This will avoid unnecessary, duplicate arbitration before CAS, prevent additional costs that my client can ill-afford, avert further delay, and it will ensure that a decision is reached as soon as practically possible.

In a September 13, 2019 letter to Mr. de Bey, ANOC responded “we would like to inform you that all legal cases related to the ANOC World Beach Games will be under the jurisdiction of the Court of Arbitration for Sport (CAS), with an ad hoc CAS office during the Games in Doha. For that reason, we would prefer the case to be handled by CAS.”

On September 13, 2019, after reviewing the Demand for Arbitration, the respective motions to dismiss, supporting briefs, and answers thereto by USTA and the USOPC, and Claimants' reply and brief in opposition, the Arbitrator emailed the parties' counsel the following list of issues, which he requested they address during the September 17, 2019 evidentiary hearing:

Were Ms. Melch's Section 9 rights violated if she does not satisfy USTA's Athlete Selection Procedures for the 2019 ANOC World Beach Games (e.g., hold a valid U.S. passport and be a U.S. national)?

Were the Section 9 rights of Ms. Melch and Ms. Johnston violated by USOPC's August 1, 2019 withdrawal of their July 5, 2019 entry in the World Beach Games (after the ITF's July 15, 2019 determination that Ms. Melch satisfied its nationality requirement and is directly eligible to participate as well as confirmation of their entry into this event) based on its determination that Ms. Melch does not meet the applicable ANOC nationality requirement even if I determine that USTA did not take any action to deny them the opportunity to participate in the World Beach Games?

Am I required to find that I have jurisdiction to determine and find that Ms. Melch satisfies ANOC's applicable nationality requirement in order to conclude that her Section 9 rights were violated and to grant the relief requested by her and Ms. Johnston (i.e., USTA's re-nomination of them for the World Beach Games tennis team and their attempted re-entry by USOPC's re-nomination of them to ANOC)?

Given ANOC's September 6, 2019 statements that "USOPC is the only authority permitted to enter a competitor [as a member of its] World Beach Games Team," the direct acceptance quota spot (#10) was reallocated to Team Venezuela after USOPC's withdrawal of the entry of Ms. Melch and Ms. Johnston in the World Beach Games, and there are no additional available team spots, do I have jurisdiction to grant the foregoing relief?

On September 16, 2019, Ms. Melch filed a Statement of Appeal with the CAS, which challenges ANOC's August 27, 2019 decision that she is ineligible to participate in the AWBC because she is not a U.S. national who holds a U.S. passport. ANOC is the only named Respondent in the CAS arbitration proceeding.

On September 17, 2019, a telephonic evidentiary hearing was held from 9-1130am CT in which the following counsel participated: Mr. de By for the Claimants; Mr. Jacobs and Ms. Freeman for USTA, and Ms. Pflipsen for the USOPC. In addition, Staciellen Mischel listened to the hearing on behalf of USTA. Counsel stipulated that all exhibits submitted on behalf of their

respective clients are admissible. No witness testimony was provided during the hearing. The Arbitrator heard oral arguments regarding the claims asserted in the Demand for Arbitration, the motions to dismiss filed by USTA and the USOPC and Claimants' opposition thereto, and other defenses asserted by USTA and the USOPC in their respective Answers. In response to his question, Ms. Pflipsen agreed that the Arbitrator has jurisdiction and authority to order the USOPC to comply with a future CAS award regarding Ms. Melch's eligibility to participate in the AWBG's beach tennis competition on behalf of the United States. At the conclusion of the hearing, all counsel agreed that their clients had received a fair and full opportunity to be heard regarding their respective positions on the issues for resolution in this Section 9 arbitration proceeding, and it was closed. Counsel agreed to extend the time by which the Arbitrator's written reasoned award is required to be rendered until September 24, 2019 at 8pm CT.

FINDINGS OF MATERIAL FACTS

Claimants Ms. Melch and Ms. Johnston currently are the top ranked U. S. women's beach tennis doubles team who want to compete in the AWBG women's beach tennis doubles competition on behalf of the United States.

Ms. Melch is an Austrian national who holds an Austrian passport. She has lived in New Jersey and New York during the past 15 years. She currently resides in Brooklyn, New York with her domestic partner and their 15-year old son. Based on her beach tennis ability, she was granted Permanent Resident status by the United States in 2013. In 2009, she began playing competitive beach tennis and has declined to play beach tennis for Austria in any World Team Championships or European championships, so she did not disqualify herself from participation in this sport for the United States. Ms. Melch is not a U.S. citizen and does not hold a U.S. passport.

Ms. Johnston, who was born in Australia, is a U.S. citizen who currently resides in Baldwin, New York.

The 2019 AWBG Technical Handbook states: "In this document you will also find all the individual qualification criteria for each event by sport." (p. 6). Regarding "ATHLETE

ELIGIBILITY” for the sport of beach tennis, it provides: “Any beach tennis athlete is eligible for participation in the ANOC World Beach Games Qatar 2019 Tennis Event provided he/she is in good standing with his/her National Association and the International Tennis Federation (‘ITF’) and is ‘Eligible to Represent a Nation’ as defined in Appendix A of the ITF Beach Tennis Tour Regulations. A team’s acceptance into the event will be confirmed by the ITF.” (p. 30). The “ATHLETE ELIGIBILITY” requirements for several other sports (e.g., Triathlon/Aquathlon; Karate/Individual Kata; Skateboarding/Park; Sailing/Kitefoil Racing; Swimming/Open Water 5km; Beach Volleyball/4x4; Wrestling/Beach Wrestling) state that “athletes must comply with the provisions of the Olympic Charter currently in force, including but not limited to, Rule 41 (Nationality of Competitors)” or similar language referring to Rule 41. The “ATHLETE ELIGIBILITY” requirements for beach tennis and some other sports (e.g., Basketball/3x3 Basketball; Sport Climbing/Bouldering; Handball/Beach Handball; Football/Beach Soccer; Waterskiing/Waterski Jump & Wakeboard) do not reference Rule 41 of the Olympic Charter and substitute other eligibility criteria.

In relevant part, the AWBG Eligibility Conditions Form states:

As a participant in the 1st ANOC World Beach Games 2019 [“AWBG2019”], I acknowledge and agree that my participation in AWBG2019 is conditional upon my acceptance of and my compliance with all the provisions of this Eligibility Conditions Form and related rules referred to herein, which have been determined by the Association of National Olympic Committees [“ANOC’] and the AWBG2019 Local Organizing Committee.

. . .

3. Compliance with the provisions of the Olympic Charter applicable to the Olympic Games and other rules: participating in AWBG2019 is subject to the compliance with the fundamental rules governing the Olympic Movement, which aim to ensure the integrity of AWBG2019 and the protection of clean athletes. The provisions (Rules and their Byelaws) of the Olympic Charter applicable to the Olympic Games apply, with necessary modification, to the AWBG2019. These provisions include, without limitation, Rule 40 (Conditions of Participation), Rule 41 (Nationality of Competitors) . . .

Rule 41 (“Nationality of competitors”) of the Olympic Charter states: “1. Any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor.”

In relevant part, regarding “Eligibility of a Player or Captain to Represent a Nation,” Appendix A of the ITF Beach Tennis Tour Regulations (Appendix A) provides that [a]ny player . . . in good standing with his/her National Association . . . shall be qualified to represent that nation as a player . . . at a Beach Tennis World Team Championship if he/she:

(a) has not previously represented any other nation at beach tennis world championship level; and

(b) (i) is a citizen of that nation and holds a current valid passport of that nation; or

...
(iii) after a consecutive period of two (2) years (24 months) residence in that nation, can provide a genuine reason for being unable to hold or make application to hold a current valid passport where:

...
(b) he/she has obtained or procured the right to remain permanently or has been granted humanitarian protection in that nation.

(p. 28).

Section 1.1.1 (“Nationality/Passport requirements”) of the USTA’s April 29, 2019 Athlete Selection Procedures for the 2019 AWBG, which were approved by the USOPC prior to their publication, expressly provides that an “athlete must be a national of the United States at the time of nomination” and “must hold a valid U.S. passport.” Ms. Johnston satisfies these requirements, but Ms. Melch does not. It is undisputed that both Ms. Johnston and Ms. Melch satisfy all of the USTA’s other minimum athlete eligibility requirements for selection as a member of its beach tennis team for the 2019 AWBG.

In a May 23, 2019 letter to Jeff Waters (USTA Beach Tennis), Thomas Schweda (CEO, Austrian Tennis Federation) supported Ms. Melch’s request to represent the U.S in the 2019 AWBG. In relevant part, he stated:

Ms. Melch . . . holds a valid Austrian passport, but has lived in the United States for 14 years and has built her complete social and sportive Beach Tennis life in the U.S.

She has never competed in any Team Beach Tennis events representing Austria and is a permanent resident of the United States.

The Austrian Tennis Federation is in good standing with Nicole Melch and respects and encourages her wish to compete with her regular, long term partner Nadia Johnston, who

is eligible to play for the United States, and thus, represent the United States of America in the Beach Games 2019. We fully support her request to represent the U.S. in official ITF Team Competitions.

On July 2 or 3, 2019, Ms. Melch uploaded a copy of her Austrian passport to the USOPC website portal.

On July 5, 2019, although Ms. Melch is not a national of the United States and does not hold a valid U.S. passport, the USTA nominated her and Ms. Johnston as women's "Doubles Team No. 1" to represent the U.S. in the sport of beach tennis at the 2019 AWBG. The nomination form was signed by a representative of USTA and by Ms. Rebecca Crawford, the USOPC's Senior Director of Games Operations and the U.S. Chef de Mission for the 2019 AWBG. The USTA submitted this nomination form to the ITF on July 5, 2019.

On July 10, 2019, the ITF, which was aware that Ms. Melch does not hold a U.S. passport, emailed Mr. Waters to inform USTA that it needed an eligibility form and updated statement from Ms. Melch to enable her case to be submitted to the ITF-IAP to determine whether she is eligible to represent the U.S. in the 2019 AWBG pursuant to the ITF's rules. On the same day, he forwarded this email to Ms. Melch, who submitted the completed eligibility form and provided the requested information to the ITF later that day.

On July 11, 2019, USTA submitted an eligibility appeal on behalf of Ms. Melch to the ITF-IAP seeking a determination that she is eligible to be nominated as a participating athlete for the AWBG despite not being a U.S. citizen who holds a U.S. passport as required by Article 1(b)(i) of Appendix A.

On July 15, 2019, although she is not a U.S. citizen, the ITF-IAP determined that Ms. Melch is "directly eligible" to represent the United States in the beach tennis competition at the 2019 AWBG pursuant to Article 1(b)(iii) of Appendix A because she:

1. holds a current, valid passport for Austria;
2. has lived in the United States for fifteen years;
3. has permanent right to reside in the United States;
4. is engaged to an American citizen and has a son born in America;
5. has been playing national-level Beach Tennis in the US since 2009, which demonstrates a long-standing dedication to tennis in the Applicant Nation; and

6. submitted the following as to why she had not yet applied for a US passport despite being eligible:

“I have every intention of becoming a U.S. citizen, I have built my life here, have a fiancée and son here. I have been eligible to do so since the end of 2018, however, my case is not as simple as just taking the citizenship test.

Unfortunately, Austria does not typically allow dual citizenship, unless one presents special circumstances, sufficient paperwork/ documentation for them to consider, which is a rather lengthy process. My aging parents are still in Austria so it’s rather important for me to maintain my Austrian citizenship to be able to help care for them. This is the reason I don’t hold an American passport.”

On July 15, 2019, Mr. Waters provided Ms. Melch with a copy of the ITF-IAP’s decision.

On July 17, 2019, the ITF issued its acceptance list for the AWBG, confirming that Ms. Melch and Ms. Johnston had qualified and received the 10th Direct Acceptance place for the women’s doubles beach tennis event.

On July 18, 2019, Mr. Waters provided Brandon McCarty, a USOPC employee, with a copy of the ITF-IAP’s decision.

On July 21, 2019, Ms. Melch signed the “Athlete’s Pledge” in USOPC’s “Games Delegation Terms—Athletes” for the AWBG, which states: “As a member of the Team, I hereby promise and agree that I . . . am eligible to compete under the rules of [the] Association of National Olympic Committees (“ANOC”), my IF and my NGB [and] am in possession of a valid U.S. passport.”

On July 30, 2019 at 6:22pm MT, Ms. Crawford received an email from Laura Canals Cruz, a member of the AWBG Organizing Committee, requesting to “talk with regards to Nicole Melch’s nationality.” Thereafter, Ms. Crawford inquired about Ms. Melch’s nationality and first became aware of ITF-IAP’s July 15, 2019 decision that she was eligible to compete in the AWBG on behalf of the U.S. as an Austrian national when she obtained a copy of it from Mr. McCarty. (Crawford Affidavit, ¶10). Ms. Crawford then consulted with Ms. Pflipsen regarding the athlete nationality requirements for the AWBG. They concluded that ANOC is using Rule 41 of the Olympic Charter as its nationality requirement for athletes, which based on past

communications with the International Olympic Committee, they interpreted as requiring an athlete to have a valid passport of the country that he or she would represent in the AWBG. (Crawford Affidavit, ¶11).

On July 30, 2019 at 10:13pm, Ms. Crawford called Ms. Cruz via Whatsapp and spoke with her for approximately eight minutes regarding Ms. Melch's eligibility to participate in the AWBG on behalf of the U.S. Ms. Crawford stated she was unaware that Ms. Melch is an Austrian national prior to receiving Ms. Cruz's email regarding her nationality and "had not previously known that [USOPC was entering] a non-U.S. citizen" in the AWBG." (Crawford Affidavit, ¶12). Ms. Crawford "told Ms. Cruz that [she] had no reason to believe that the USTA would not have followed their own Athlete Selection Procedures and noted that the USOPC interprets the [AWBG] rules to require athletes to be citizens of the country they represent." (Id.). During this discussion, Ms. Cruz told her that "ANOC agreed with the USOPC's interpretation" (Crawford Affidavit, ¶12), which was based on the ANOC Legal Commission's prior determination that Ms. Melch is "not eligible to be entered as a competitor by the USOPC as ANOC had adopted the Olympic Charter's Rule 41 for the [AWBG] . . . [requiring] a competitor who is sought to be entered in the Games [to] be a national of the NOC that is submitting the entry." (September 17, 2019 Cruz email to Pflipsen).

On July 31, 2019, Ms. Crawford emailed Mr. Waters stating that "we only became aware of [the issue regarding Ms. Melch's eligibility to compete for the U.S. in the AWBG] earlier today when I received a phone call from the AWBG Organizing Committee." She informed him that "unfortunately Nicole does not meet the necessary nationality requirements to compete for Team USA at the AWBG" for the following reasons:

The AWBG is following the IOC's Olympic Charter, which states the following, "Rule 41.1 of the Olympic Charter states that 'any competitor in the Olympic Games must be a national of the country of the NOC which is entering such competitor'. The IOC [previously] explained to the USOPC that 'In practice, the athlete must possess a valid passport of the country of the NOC that the athlete will represent during the Olympic Games, and must present this passport during the accreditation process at the Olympic Games. These requirements are reiterated to all NOCs prior to each edition of the Olympic Games and it is the NOC's responsibility to ensure that any athlete in its delegation meets the eligibility requirements."

In accordance with the above, the AWBG Eligibility Conditions Forms (ECF) – 2nd attachment states: “Compliance with the provisions of the Olympic Charter applicable to the Olympic Games and other rules: participating in AWBG2019 is subject to the compliance with the fundamental rules governing the Olympic Movement, which aim to ensure the integrity of AWBG2019 and the protection of clean athletes. The provisions (Rules and their Byelaws) of the Olympic Charter applicable to the Olympic Games apply, with necessary modification, to the AWBG2019. These provisions include, without limitation, Rule 40 (Conditions of Participation), Rule 41 (Nationality of Competitors) . . .”

In her email, Ms. Crawford informed Mr. Waters that “USOPC has requested approval [from ANOC] to enter a different qualified US female in the Beach Tennis event” as a doubles partner for Ms. Johnston “and is awaiting notification.”

In an August 1, 2019 email, Mr. Waters informed Ms. Melch: “despite the eligibility notice we received from the ITF concerning your participation, we have been notified by the USOPC that the USOPC has determined that you do not meet the necessary nationality requirements to compete for Team USA at the ANOC Beach Tennis World Games.”

In an August 2, 2019 email, Mr. Waters notified Ms. Crawford that the ITF confirmed that in accordance with the applicable rules for replacing Direct Acceptance teams, the women’s beach tennis doubles spot previously allocated to Ms. Melch and Ms. Johnston would go to the next highest ranked doubles team from another country, and moreover that there was not another eligible U.S. women’s doubles player to pair with Ms. Johnston.

On August 2, 2019, based on the information she received from Mr. Waters, Ms. Crawford informed ANOC that “the USOPC officially confirms that we will not be sending a women’s doubles team to the 2019 ANOC World Beach Games.”

In an August 7, 2019 email to Mr. Waters, the ITF’s Alex Hughes confirmed their prior discussion regarding the nomination of U.S. players for the AWBG, stating in relevant part:

For these Games, the ITF deemed Nicole Melch eligible to participate. The USOPC subsequently superseded this decision and, as all athletes fall under the jurisdiction of their NOC at such Games, we must respect this decision.

. . . Unfortunately the USOPC decision arrived after the nomination deadline had passed and after they had initially signed and stamped approval on the USA nomination form. It also appears that the usual prenomination eligibility checks based on the long list

registrations were not implemented, possibly affected by the late switch of organising committee from San Diego to Doha.

With the nomination deadline passed, the reallocation process dictated the slot be filled by the next highest ranked pair (from Venezuela in this instance). Consequently the entry lists are now complete. In our call we noted that the other player listed by USOPC on the long list, Caroline Hannes, was also ineligible, thus excluding the possibility to form a new pair should that option have existed.

In an August 27, 2019 email to Ms. Crawford from Gustavo Harada, ANOC confirmed that “[i]n order to be eligible to be entered in the AWBG by the USOPC a competitor must be a national of the US (evidenced by a passport)” and that Ms. Melch is ineligible to compete in the Beach Tennis competition at the AWBG because she does not meet this nationality requirement.

LEGAL ANALYSIS

A. Jurisdiction

Claimants contend that the Arbitrator has jurisdiction pursuant to Sections 9.1 and 9.7 of the USOPC Bylaws because USTA and the USOPC denied them the opportunity to participate in the AWBG, although they are eligible to compete in the women’s doubles beach tennis event pursuant to the athlete eligibility criteria for this event in the AWBG Technical Handbook, July 15, 2019 ITF-IAP decision that Ms. Melch is “directly eligible” to represent the United States in this event, and July 17, 2019, ITF confirmation that they qualified and received the 10th Direct Acceptance place for this event. Specifically, on August 1, 2019, the USOPC determined that Ms. Melch is ineligible to participate in the AWBG beach tennis competition because she “does not meet the necessary nationality requirements to compete for Team USA at the AWBG.” Demand for Arbitration, ¶81. On the same day, USTA “following the USOPC’s decision, decided and informed Ms. Melch ‘that you do not meet the necessary nationality requirements to compete for Team USA at the ANOC Beach Tennis World Games.’” ¶82.

USAT moved to dismiss the Demand for Arbitration without an evidentiary hearing for the following reasons: The Arbitrator has no Section 9 jurisdiction to adjudicate Claimants’ challenge the USOPC and ANOC’s rejection of USTA’s selection and nomination of them for the AWBG because Ms. Melch is not a U.S. national who holds a U.S. passport; therefore, this

arbitration proceeding should be dismissed because USTA did not deny them the opportunity to participate in a protected competition. It is moot because Claimants' requested relief (i.e., an order that they be permitted to participate in the AWBG) cannot be granted by the Arbitrator because the women's doubles beach tennis spot originally allocated to them has been reallocated to a Venezuelan team and there are no other available spots. The CAS is the proper arbitral forum for final and binding resolution of Claimants' assertions because ANOC, which is not a party to this AAA arbitration proceeding and is subject only to CAS jurisdiction, ultimately determined that Ms. Melch is ineligible to compete in the AWBG. Respondent United States Tennis Association's Consolidated Motion to Dismiss and Answer to Section 9 Complaint and Demand for Arbitration (USTA Brief).

The USOPC also moved to dismiss this Section 9 arbitration proceeding for essentially the same reasons as USTA did: It is moot, and the CAS is the appropriate forum to provide the remedy Claimants seek (i.e., an order permitting them to participate in the AWBG). The Arbitrator has no jurisdiction because "Section 9 only provides [for] arbitration against [an NGB] for denying an athlete with the opportunity to participate, but here it is not the USTA that is denying Claimants with the opportunity to participate." United States Olympic & Paralympic Committee Motion to Dismiss & Response (USOPC Brief), ¶35. The "restriction on [Claimants'] participation exists at a higher level, through ANOC's rules as ANOC is the official governing authority hosting the AWBG2019 and oversees citizenship issues. ANOC attests and requires that "[i]n order to be eligible to be entered in the AWBG by the USOPC a competitor must be a national of the US (evidenced by a passport)." ¶37.

In response, Claimants assert that this arbitration proceeding is not moot because "[they] are not asking the arbitrator here to award them a spot in the AWBG competition but to determine that Melch is eligible under the applicable [ANOC] eligibility criteria, and to order Respondents to re-enter them in the competition." Claimants' Reply and Opposition to USTA's Answer and Motion to Dismiss & To USOC's Response and Support of Motion to Dismiss (Claimants Brief), ¶33. Specifically, they contend: "USTA can re-nominate Claimants (in accordance with the ITF-IAP July 15, 2019, decision that Melch is eligible), and USOPC can nominate and enter Claimants in the AWBG beach tennis competition. In fact, that is a pre-

condition for ANOC being able to re-admit Claimants to the AWBG.” ¶41. Claimants assert the Arbitrator has jurisdiction to grant their requested relief because they “do not request relief against ANOC here, but against the USTA and USOPC for their decisions denying Melch her opportunity to participate in the AWBG.” ¶47. They contend “there is nothing futile about Claimants’ requested relief that USTA and USOPC re-nominate Claimants and enter them into the AWBG beach tennis competition [because] it is a necessary if, perhaps, not yet entirely sufficient condition to restore Claimants’ opportunity to participate under Section 9.” ¶68.

Pursuant to AAA Commercial Rule R-7 (a), the Arbitrator has “the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” “The claimant has the burden of proving the arbitrator’s jurisdiction by a preponderance of evidence.”

Diakomihalis v. United States of America Wrestling Ass’n, AAA Case No. 01-19-0002-2206 (August 15, 2019) at 15.

The ASA provides:

An amateur sports organization is eligible to be recognized . . . as a national governing body only if it—

...

4) agrees to submit to binding arbitration in any controversy involving—

...

B) the opportunity of any amateur athlete . . . to participate in amateur athletic competition, upon demand . . . of any aggrieved amateur athlete . . . conducted in accordance with the Commercial Rules of the American Arbitration Association . . .

36 U.S.C. §220522 (a)(4)(B).

The relevant provisions of the USOPC Bylaws provide as follows:

Section 1.3 -- Definitions

k) “corporation” means the United States Olympic and [Paralympic] Committee;

p) “members” means those organizations accepted into the membership of the

corporation as provided for in Section 8 of these Bylaws;

q) “NGB” means a National Governing Body that is an amateur sports organization recognized by the corporation in accordance with Section 8 of these Bylaws;

w) “protected competition” means:

1) any amateur athletic competition between any athlete or athletes officially designated by the appropriate NGB or PSO as representing the United States, either individually or as part of a team, and any athlete or athletes representing any foreign country where (i) the terms of such competition require that the entrants be teams or individuals representing their respective nations and (ii) the athlete or group of athletes representing the United States are organized and sponsored by the appropriate NGB or PSO in accordance with a defined selection or tryout procedure that is open to all and publicly announced in advance, except for domestic amateur athletic competition, which, by its terms, requires that entrants be expressly restricted to members of a specific class of amateur athletes such as those referred to in Section 220526(a) of the Act; and

2) any domestic amateur athletic competition or event organized and conducted by an NGB or PSO in its selection procedure and publicly announced in advance as a competition or event directly qualifying each successful competitor as an athlete representing the United States in a protected competition as defined in 1) above.

Section 9.1 Opportunity to Participate. No member of the corporation may deny or threaten to deny any amateur athlete the opportunity to participate in . . . [a] protected competition as defined in Section 1.3 of these Bylaws . . . The corporation shall, by all reasonable means, protect the opportunity of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions. . .

Section 9.7 Opportunity to Participate. If the complaint is not settled to the athlete’s satisfaction[,] the athlete may file a claim with the AAA against the respondent for final and binding arbitration. If an impending competition requires immediate resolution of the complaint, an athlete may file a claim with the AAA simultaneously with the filing of the complaint with the CEO of the [USOPC].

The corporation has the right to participate in the arbitration proceeding, but it cannot be involuntarily joined by a party.

Section 9.1 prohibits USAT, an NGB that is a member of the USOPC, from denying Claimants the opportunity to participate in the AWBG, which is an undisputed “protected competition.” Pursuant to Sections 9.1 and 9.7, the Arbitrator has jurisdiction to review the merits of Claimants’ Section 9 claim against USTA as well as its defense that it did not deny them the opportunity to participate in the AWBG.

Section 9.1 requires the USOPC to use “all reasonable means” to protect the opportunity of Claimants to participate in the AWBG because of their July 5, 2019 selection to participate on behalf of the U.S. in its women’s doubles beach tennis event. Although Section 9.7 precludes Claimants from involuntarily joining it as a respondent, the USOPC has exercised its right to participate in this arbitration proceeding and has agreed to be bound by the arbitration award. Therefore, the the Arbitrator has jurisdiction to review the merits of Claimants’ assertion that the USOPC denied them the opportunity to participate in the AWBG.

Although the Arbitrator does not have the authority to award Claimants a spot in the AWBG women’s beach tennis doubles competition (which is not the remedy they request in this arbitration proceeding), the scope of his Section 9 jurisdiction includes the power to grant just and equitable relief to ensure they are not denied an opportunity to participate in this event in violation of the ASA or USOPC Bylaws if both of them are eligible to participate as members of Team USA. R-47 of AAA’s Commercial Rules, which is applicable pursuant to the ASA, 36 U.S.C. §220522 (a)(4)(B), empowers the Arbitrator to “grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.” The Arbitrator’s jurisdiction to order this relief is not negated, nullified, or otherwise precluded because ANOC is not a party to this Section 9 arbitration proceeding or because Ms. Melch has filed a CAS arbitration proceeding against ANOC. However, for the reasons discussed below, the Arbitrator’s ruling that he has jurisdiction to grant just and equitable relief to protect Claimants’ Section 9 rights does not mean that Claimants are entitled to the specific relief requested in this arbitration proceeding (i.e., a determination that Ms. Melch is eligible under the applicable ANOC eligibility criteria and an order that USTA and the USOPC re-enter them in the AWBG).²

² In its brief in support of its motion to dismiss this Section 9 proceeding, USTA asserted that Claimants’

The Arbitrator rejects the contentions of USTA and the USOPC that this case is moot and should be dismissed for lack of jurisdiction because the AWBG women's doubles beach tennis spot originally allocated to them has been reallocated to a Venezuelan team and there are no other available spots for another team in the AWBG. If the CAS award determines that Ms. Melch is eligible to participate in the AWBG, ANOC would be bound by this award, but there is no CAS jurisdiction to require and order the USOPC to re-enter Claimants into the AWBG women's doubles beach tennis event. In this AAA arbitration proceeding, even though it is not a party to the CAS arbitration proceeding, the USOPC agreed that the Arbitrator has jurisdiction and authority to order it to comply with the CAS award. Therefore, the Arbitrator could order appropriate conditional relief in this AAA Section 9 arbitration proceeding that would require USTA and the USOPC to re-nominate Claimants for entry into the AWBG (thereby preventing any future denial of their opportunity to participate in this protected competition) if the CAS rules in favor of Ms. Melch.

In conclusion, the Arbitrator rules that there is arbitral jurisdiction to review the merits of Claimants' Section 9 claim and to grant limited conditional relief to ensure that USTA and the USOPC do not deny Claimants an opportunity to participate in the AWBG if Ms. Melch prevails in her pending CAS arbitration proceeding against ANOC.

B. Merits of Section 9 Claim

1. Denial of Opportunity to Compete in Protected Competition

“In a Section 9 team selection dispute, it is well established that [Claimants have] the burden of proving by a preponderance of evidence [their] claimed denial of a fair opportunity to compete for selection as a member of a team that will participate in a ‘protected competition’

allegations in its Demand for Arbitration that USTA's AWBG team selection rules requiring Ms. Melch to be a U.S. national who holds a U.S. passport discriminate against Ms. Melch based on her national origin in violation of 36 U.S.C. §220522 (a) (8) and are athlete eligibility criteria more restrictive than those of the ITF in violation of 36 U.S.C. §220522 (a) (14) are claims that can be asserted only pursuant to Section 10 of the USOPC's Bylaws. USTA Brief, ¶¶ 7.1 and 7.3. Because Claimants' requested relief to remedy the alleged violation of their Section 9 rights does not require resolution of these issues, the Arbitrator concludes that USTA's assertions do not provide valid grounds for dismissing this arbitration proceeding.

[2019 AWBG]. *Tibbs v. United States Paralympics*, AAA Case No. 71 190 E 00406 12 (August 28, 2012) at 14 (citing several prior Section 9 awards). ‘Section 9 jurisprudence requires [them] to prove [USTA] breached its approved and published Athlete Selection Procedures for the [2019 AWBG], applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against [them], 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).” *Diakomihalis v. United States of America Wrestling Ass’n*, AAA Case No. 01-19-0002-2206 (August 15, 2019) at 19-20.

“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.’ *Liu and USA Table Tennis, Inc.*, AAA Case No. 01-19-0002-0105 (June 20, 2019) at 17.

Based on the acknowledgement of their counsel at the end of the evidentiary hearing, the Arbitrator finds that Claimants had a full and fair opportunity to be heard in this arbitration proceeding. Counsel for USAT and the USOPC also acknowledged receiving a full and fair opportunity to be heard.

a. USTA Conduct

Claimants contend that USAT violated their Section 9 rights because it previously selected and nominated them to participate as Team USA in the women’s doubles beach tennis competition at the AWBG and subsequently withdrew their nomination after the USOPC declared Ms. Melch ineligible because she is not a U. S. national with a U. S. passport, despite the ITF-IAP’s determination that she is “directly eligible” to represent the U. S. in this event as a permanent U.S. resident.

In response, USAT acknowledges that it selected and nominated Claimants to participate in the AWBG women's doubles beach tennis competition on July 5, 2019 as well as applied for the ITF-IAP's July 15, 2019 ruling that Ms. Melch is eligible" to represent the U. S. as a permanent U.S. resident. It asserts that, if Claimants are being denied the opportunity to compete in the [AWBG], that denial is not coming at the hands of the USTA; rather, the denial came primarily from the ANOC, and secondarily from the USOPC." USTA Brief, ¶5.1. On July 31, 2019, USTA was informed that Ms. Melch is ineligible to compete for the U.S. in the AWBG in an email from Ms. Crawford to Mr. Waters stating "unfortunately Nicole does not meet the necessary nationality requirements to compete for Team USA at the AWBG." *Id.* at ¶5.3. USAT contends that "at no time prior to being apprised of this decision or thereafter, did [it] take any action to withdraw Claimants' nomination to the [AWBG and it] was left in the unenviable position of having its chosen nominees deemed ineligible to compete and having no other team eligible to qualify for the competition." *Id.* The USTA's position generally is consistent with Mr. Waters' August 1, 2019 email informing Ms. Melch "despite the eligibility notice we received from the ITF concerning your participation, we have been notified by the USOPC that the USOPC has determined that you do not meet the necessary nationality requirements to compete for Team USA at the ANOC Beach Tennis World Games."

The USOPC also "contends that it is not USTA that has denied Claimants the opportunity to participate [in the AWBG]" because "USTA put Ms. Melch forward and nominated her," "submitted an appeal to the ITA on [her] behalf," [and] "appears to be supportive of Ms. Melch and Ms. Johnston to participate." USOPC Brief, ¶36. The USOPC's position is that, without its knowledge or approval, USTA nominated Claimants to represent the U.S. in the beach tennis event at the AWBG, although USTA knew Ms. Melch is not a U.S. citizen and holder of a U.S. passport as required by its AWBG athlete selection procedures, it and submitted a July 11, 2019 eligibility appeal on her behalf to the ITF-IAP, which determined she is eligible to represent the U.S. despite not satisfying these requirements. *Id.* at ¶¶ 8-11. The USOPC asserts that "the restriction on participation exists at a higher level, through ANOC's rules as ANOC is the official governing authority hosting the AWBG2019 and oversees citizenship issues." *Id.* at ¶37.

USAT's apparent breach of its AWBG athlete selection procedures by selecting and nominating Ms. Melch as a member of its women's doubles beach tennis team does not violate

Claimant's Section 9 substantive right not to be denied an opportunity to participate in a "protected competition" because this conduct, combined with the successful ITF-IAP eligibility appeal it filed on her behalf, benefited them by resulting in their nomination for entry into the AWBG by the USOPC. Any denial of Claimants' opportunity to participate in this competition was caused by USOPC's withdrawal of their nomination for the AWBG or the rejection of their nomination for entry by ANOC because Ms. Melch is not a U.S. citizen, not by any action or independent decision by USTA. As the ITF's Alex Hughes explained in an August 7, 2019 email to USTA's Mr. Waters: "For these Games, the ITF deemed Nicole Melch eligible to participate. The USOPC subsequently superseded this decision and, as all athletes fall under the jurisdiction of their NOC at such Games, we must respect this decision."

b. USOPC Conduct

Claimants assert that the USOPC's August 1, 2019 withdrawal of Claimants' July 5, 2019 entry into the AWBG based on its determination that Ms. Melch does not satisfy the necessary nationality requirements to compete for Team USA in the beach tennis competition violates their Section 9 rights even if USTA did not deny them the opportunity to participate in the AWBG. They contend that Section 9.1 "imposes a *direct obligation* on USOPC to 'by all reasonable means, protect the [Claimants'] opportunity to participate if selected'" for a protected competition such as the AWBG as well as "creates and vests a concomitant right in Claimants . . . 'as [athletes] representing the United States' not to have their protection denied by the USOPC." Claimants' September 16, 2019 Pre-Hearing Notice—Outline of Claimants' Answers/Skeleton-Argument, p. 3. "Therefore, USOPC itself violated Section 9's command that it 'protect' Claimants' opportunity to participate *irrespective and independent of any action or inaction by the USTA.*" *Id.*

In response, the USOPC contends that only an NGB is subject to an athlete's claim that he or she has been denied an opportunity to participate in a protected competition, which is why Section 9.7 of its Bylaws states that the USOPC "cannot be involuntarily joined by a party" in a Section 9 proceeding. The USOPC asserts that its mission is "to support 'U.S. athletes' and it is a fundamental tenant of the Olympic Movement that competitors are citizens of the country they represent" in National Olympic Committee (NOC) Delegation Events. USOPC Brief, ¶68. These athletic competitions "are multi-sport events in which the NOC is responsible for entering

and overseeing the team representing their country,[]” including “the very first ANOC World Beach Games.” *Id.* at ¶59. The AWBG is “an ANOC event, which is an NOC delegation event and Ms. Melch is not eligible under ANOC’s rules.” *Id.* at ¶69. The USOPC contends that the “highest governing body of an event [i.e., ANOC] must be afforded with the ultimate decision-making authority on citizenship issues, as contemplated by Rule 41 of the Olympic Charter.” *Id.* Therefore, it did not owe or breach any duty to Ms. Melch under Section 9.1 because she is ineligible to participate in the AWBG beach tennis event as a member of Team USA.

In response to the Arbitrator’s question during the September 17, 2019 evidentiary hearing, Ms. Pflipsen stated that the “Games Delegation Terms—Athletes” for the ANOC World Beach Games, 2019 establishes a grievance procedure for resolving an athlete’s claim that the USOPC precluded him or her from participating in the AWBG. In Part III (Grievance Procedures), it describes the procedures to be followed “in disputes concerning the USOPC’s submission of official entries to OCWBC,” including a complaint filed by “an athlete . . . who was not submitted by the USOPC as an official entry to OCWBC, but who believes that he or she should have been,” which is required to be filed in writing with the USOPC’s CEO. If the complaint is not resolved by USOPC’s CEO or his/her designee, the Games Administrative Board has the authority to resolve the complaint (although the complainant may bypass this hearing procedure and immediately file an arbitration demand with the AAA), and its resolution may be appealed to in AAA arbitration conducted in accordance with its Commercial Rules.

On July 21, 2019, Ms. Melch signed the last page of this 17-page document, acknowledging that she read the Grievance Procedures (thereby providing her with at least constructive notice of their requirements), which Claimants apparently did not utilize to in an effort to remedy the USOPC’s preclusion of their participation in the AWBG by withdrawing their entry in the women’s doubles beach tennis competition because Ms. Melch is not a U.S. national. Instead, Claimants filed an August 22, 2019 Section 9 Complaint against USTA with the USOPC and contemporaneously filed a demand for arbitration against USTA and the USOPC, which raise essentially the same issues they could (and should) have asserted against the USOPC in an internal administrative proceeding pursuant to the Grievance Procedures. Because the USOPC agreed to be bound by this Section 9 arbitration award and the Grievance Procedures provide for final resolution of disputes by AAA arbitration pursuant to its

Commercial Rules (which also apply in this case), the Arbitrator will determine whether the USOPC violated Claimants' rights under the "Games Delegation Terms—Athletes" by withdrawing their July 5, 2019 nomination for entry into the women's doubles beach tennis competition on August 1, 2019, thereby preventing them from participating in the AWBG.

In doing so, the Arbitrator concludes it is appropriate to apply the well-established general principles of Section 9 jurisprudence set forth in *Diakomihalis, supra*, which require Claimants to prove the USOPC breached its "Games Delegation Terms—Athletes" for the AWBG, applied them inconsistently to athletes similarly situated, acted in bad faith towards or with bias against them, or violated applicable federal or state laws (e.g., Ted Stevens Olympic and Amateur Sports Act).

The "Athlete Pledge" in "Part II—Athlete Behavior and Pledge" in the "Games Delegation Terms—Athletes" expressly provides: "As a member of the Team, I hereby promise and agree that I:

- * am eligible to compete under the rules of Association of National Olympic Committees ("ANOC"), my IF and my NGB;

- * am in possession of a valid U.S. passport . . ."

(p. 2).

"Part IV—Signature Page" in the "Games Delegation Terms—Athletes" states:

By checking "I agree" below, I acknowledge and agree that:

- * I have read the above Athlete Behavior and Pledge . . .

- * I understand that I am agreeing to the rules, guidelines, jurisdiction, procedures and releases stated in these Games Terms . . .

(p. 17). Ms. Melch placed an "X" in the box after "I agree" and signed her name on the Signature page.

After receiving a July 30, 2019 email from Laura Canals Cruz, a member of the AWBG Organizing Committee, requesting to "talk with regards to Nicole Melch's nationality," Ms. Crawford, the USOPC's Senior Director of Games Operations and the U.S. Chef de Mission for the 2019 AWBG, first became aware of the ITF-IAP's July 15, 2019 determination that Ms.

Melch was eligible to compete in the AWBG on behalf of the U.S. despite being an Austrian national. Ms. Crawford apparently did not know that Ms. Melch had uploaded a copy of her Austrian passport to the USOPC website portal (or checked it) before the USOPC nominated Claimants as Team USA's women's doubles beach volleyball team for the AWBG on July 5, 2019. After consulting with Ms. Pflipsen and talking to Ms. Cruz on July 30, 2019, Ms. Crawford informed USTA's Mr. Waters in a July 31, 2019 email of the USOPC's determination that "unfortunately [Ms. Melch] does not meet the necessary nationality requirements to compete for Team USA at the AWBG" because she is not a U.S. national who holds a U.S. passport. She explained that ANOC is using Rule 41 of the Olympic Charter as its nationality requirement for athletes, which requires that an athlete must possess a valid passport of the country of the NOC that the athlete will represent at the AWBG. She noted that the AWBG Eligibility Conditions Forms (ECF) – 2nd attachment requires: "Compliance with the provisions of the Olympic Charter applicable to the Olympic Games and . . . participating in AWBG2019 is subject to the compliance with the fundamental rules governing the Olympic Movement, which . . . include, without limitation . . . Rule 41 (Nationality of Competitors)." On August 1, 2019, Mr. Waters informed Ms. Melch that "the USOPC has determined that you do not meet the necessary nationality requirements to compete for Team USA at the ANOC Beach Tennis World Games," which resulted in its withdrawal of the entry of her and Ms. Johnston into the AWBG's women's doubles beach tennis event.

The USOPC's withdrawal of Claimants' entry into the AWBG women's doubles beach tennis competition did not breach the "Games Delegation Terms—Athletes" because an athlete's "possession of a valid U.S. passport" is an express condition of eligibility to participate in the AWBG as a member of Team USA. It also is a requirement of Section 1.1.1 ("Nationality/Passport requirements") of the USTA's Athlete Selection Procedures for the AWBG, which were approved by the USOPC, that Ms. Melch is required to satisfy as an athlete member of USTA. Although it is regrettable that the USOPC apparently did not check to ensure that Ms. Melch met this requirement prior to entering Claimants in the AWBG, especially because checking the USOPC's website portal would have evidenced that she did not satisfy this nationality requirement, its failure to do so does not constitute noncompliance with the "Games Delegation Terms—Athletes." Nor does it establish that the USOPC acted in bad faith towards or with any bias against Ms. Melch.

Claimants do not contend that the USOPC applied the “Games Delegation Terms—Athletes” inconsistently to athletes similarly situated or specifically identify any applicable federal or state laws that it violated in determining that Ms. Melch does not satisfy the nationality requirements set forth in the “Games Delegation Terms—Athletes” and USTA’s Athlete Selection Procedures for the AWBG.

Assuming (without deciding) that the USOPC has an obligation under Section 9.1 to “by *all reasonable means, protect the opportunity of an amateur athlete [who is not a U.S. citizen] to participate if selected . . . as an athlete representing the United States*” in an NOC delegation event, the Arbitrator finds that the USOPC’s determination that Ms. Melch is ineligible to participate as a member of Team USA in the AWBG because she does not satisfy ANOC’s nationality requirement was both reasonable and in good faith under the circumstances, especially because it is consistent with ANOC’s position on this issue. During their July 30, 2019 discussion, Ms. Cruz told Ms. Crawford that “ANOC agreed with the USOPC’s interpretation,” which was based on the ANOC Legal Commission’s prior determination that Ms. Melch is “not eligible to be entered as a competitor by the USOPC as ANOC had adopted the Olympic Charter’s Rule 41 for the [AWBG] . . . [requiring] a competitor who is sought to be entered in the Games [to] be a national of the NOC that is submitting the entry.” In an August 27, 2019 email to Ms. Crawford from Gustavo Harada, ANOC confirmed that “[i]n order to be eligible to be entered in the AWBG by the USOPC a competitor must be a national of the US (evidenced by a passport)” and that Ms. Melch is ineligible to compete in the Beach Tennis competition at the AWBG because she does not meet this nationality requirement. In a September 6, 2019 letter to Claimants’ attorney, ANOC re-confirmed its August 27, 2019 decision regarding Ms. Melch’s ineligibility to participate in the AWBG: “The ANOC regulation governing the World Beach Games stipulates that a competitor must be a national of the country of the NOC that enters the competitor.” The Arbitrator concludes that the USOPC’s determination regarding Ms. Melch’s ineligibility to participate in the AWBG was reasonable and in good faith as of August 1, 2019 (the date USTA informed Ms. Melch of the USOPC’s decision) even if were made prior to consulting with ANOC or if the CAS subsequently rules that Ms. Melch is eligible under ANOC’s nationality requirements for the AWBG’s beach tennis event.

The Arbitrator rejects Claimants' contention that the USOPC acted unreasonably in violation of Section 9.1 because its August 1, 2019 determination regarding Ms. Melch's eligibility is contrary to the ITF-IAP's July 15, 2019 prior determination that she is eligible to compete in the AWBG on behalf of the U.S. despite being an Austrian national. The "Games Delegation Terms—Athletes" provides that a U.S. athlete must be eligible to compete under the rules of ANOC as well as those of his or her IF and NGB. This is a conjunctive requirement, so Ms. Melch also must satisfy ANOC's nationality eligibility requirements. In addition, she must comply with USTA's April 29, 2019 AWBG objective team selection requirements, and it is questionable whether the ITF can effectively supersede its NGBs' eligibility rules by the ITF-IAP's subsequent subjective determinations of individual athletes' eligibility to compete in the AWBG on a case-by-case basis. Moreover, because the USOPC did not know that the USTA submitted an eligibility appeal on behalf of Ms. Melch to the ITF-IAP seeking a determination that she is eligible to be nominated for the AWBG contrary to its "Games Delegation Terms—Athletes," the USOPC is not bound by or required to accept the ITF-IAP's decision regarding her eligibility to participate in the AWBG as a representative of the U.S.

Although its effort was unsuccessful, the USOPC took "all reasonable means" to protect the opportunity of Ms. Johnston, a U.S. citizen, to participate in the AWBG by requesting approval from ANOC to enter a different qualified U.S. female in the beach tennis event as a doubles partner for Ms. Johnston before it informed ANOC it "will not be sending a women's doubles team to the 2019 ANOC World Beach Games." The ITF determined that in accordance with the applicable rules for replacing Direct Acceptance teams, the women's beach tennis doubles spot previously allocated to Ms. Melch and Ms. Johnston would go to the next highest ranked doubles team from another country, and there was not another eligible U.S. women's doubles player to pair with Ms. Johnston.

In conclusion, based on the material facts of this case, the Arbitrator finds that the USOPC's August 1, 2019 withdrawal of Claimants' nomination for entry into the AWBG beach tennis event did not contravene any general principles of Section 9 jurisprudence or violate its obligations under Section 9.1.

2. Just and Equitable Relief to Protect Claimants' Rights Under Section 9 and the "Games Delegation Terms—Athletes" for the AWBG

The Arbitrator's ruling that neither USTA nor the USOPC has violated either Claimant's rights under Section 9 or the "Games Delegation Terms—Athletes" for the AWBG ordinarily would mean that Claimants are not entitled to any relief. On the other hand, because only the USOPC is authorized to enter an athlete who will compete for Team USA in the AWBG and the USOPC is not a party to the CAS arbitration proceeding that will determine whether Ms. Melch satisfies ANOC's nationality requirement to participate in the AWBG, it is appropriate for the Arbitrator to grant limited relief to protect Claimants' future rights if the CAS rules in Ms. Melch's favor because the USOPC has consented to the Arbitrator's jurisdiction and authority to order it to comply with the CAS award.

In relevant part, Rule 47 of the AAA Commercial Arbitration Rules provides:

R-47. Scope of Award

(a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

, , ,

(c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

In this Section 9 proceeding, Claimants ask the Arbitrator to determine that Ms. Melch is eligible under the applicable ANOC nationality eligibility requirements and to order USTA and the USOPC to re-enter them in the AWBG women's doubles beach tennis event. They also request an order that USTA and the USOPC separately and jointly implement the foregoing determinations and refrain from any conduct that would prevent them from representing the United States in the AWBG beach tennis event; imposition of "a fine of US\$10,000 for each day after the AAA arbitrator has rendered his/her decision until such time as the Respondents [comply with it] as well as "a fine of US\$5,000 on each of the Respondents for each violation of [the foregoing order]; and an order requiring Respondents to pay all of the arbitrator's fees and costs of this arbitration proceeding. Demand for Arbitration, ¶153.

In response, USTA and the USOPC contend that the Arbitrator should not render a nonbinding advisory opinion in this AAA Section 9 arbitration (which ANOC refused to join as a party or to otherwise participate in) regarding the very issue that a CAS panel or sole arbitrator will adjudicate in a written reasoned award, which will be a final and binding determination regarding ANOC's athlete nationality requirements for the AWBG beach tennis event that ultimately will determine whether Ms. Melch is eligible to participate as a member of Team USA in the women's beach tennis doubles competition. In her Statement of Appeal filed with the CAS, Ms. Melch requests that the CAS annul "ANOC's August 27, 2019, decision that revoked Melch and her beach tennis partner's 10th Direct Acceptance place for the Beach Tennis Women's event at the AWBG 2019" and declare she "is eligible to participate in the AWBG 2019." ¶8 (a) and (b). "[B]ecause ANOC is the official governing authority of the AWBG2019 and has the final determination in participation[,] [t]he USOPC submits that the arbitrator does not have the proper authority to make a determination on the interpretation of an external body's rules without that body being a party to the case." USOPC Brief, ¶39.

The Arbitrator finds these arguments persuasive and declines to opine regarding this issue for the above reasons advocated by USTA and the USOPC. Although the Arbitrator is a U.S. CAS arbitrator, in this Section 9 arbitration proceeding, he is acting solely in his capacity as a AAA arbitrator whose jurisdiction and authority is limited to rendering an award that is final and binding only on USTA and the USOPC. The Arbitrator refuses Claimants' request to render a AAA advisory arbitration award providing his interpretation of ANOC's athlete nationality requirement. for the CAS panel's subsequent consideration. It clearly would be improper for the Arbitrator to do so because Ms. Melch has requested that "the President of the CAS Appeals Division to appoint [him] a[s] Sole Arbitrator," or "if the President does not so decide, . . . nominates [him] from the CAS List of Arbitrators" as a member of a three-person CAS panel. Statement of Appeal, ¶¶ 9-10.

"The USOPC also believes that it would be futile for the arbitrator to render a decision requiring the USOPC resubmit the names of the athletes, subject to the acceptance of ANOC. First, any resubmission of the names of the athletes could only be completed after looking at the merits of the case to determine *if* they should be resubmitted. This would be circular in nature as it would lead the arbitrator to make a determination on the rules at play without the participation

of the governing bodies of those rules. Second, ANOC has already provided its determination on the matter. They contend that citizenship is a requirement. To try and resubmit the names may appear to undermine their authority and determination when we already know their stance on this issue. Lastly, if the arbitrator were to ask the USOPC to try and resubmit the names, the arbitrator must consider that on that same token, this inevitably may mean the removal of the Venezuelan team who has already been given and accepted this spot. Although there are no ‘U.S. affected athletes,’ there are other athletes who would be impacted. The Venezuelan athletes are not parties to this case, and thus could lose their opportunity to participate without being afforded the opportunity to be heard. Potentially, those athletes would have a voice in a proceeding at CAS. Even though another U.S. team is not at issue here, the procedural rights of all athletes should be considered.” USOPC Brief, ¶44.

Contrary to Claimants’ contention, it is not necessary to order USTA and the USOPC to re-nominate and re-enter them in the AWBG women’s doubles beach tennis event prior to a CAS award resolving Ms. Melch’s appeal of ANOC’s August 27, 2019 written determination that she is ineligible to entered in the AWBG by the USOPC because she is not “a national of the US (evidenced by a passport).” Although only an NOC can nominate athletes for entry into the AWBG, the USOPC has agreed that the Arbitrator has jurisdiction and authority to require it to comply with a CAS award in her favor. Therefore, the appropriate “just and equitable relief” in this case that will prevent Claimants from being denied an opportunity to compete in the AWBG as a representative of the U.S. is the following order: If the Court of Arbitration for Sport determines that Ms. Melch is eligible to participate in the AWBG pursuant to ANOC’s athlete nationality requirements and both Claimants satisfy all other USTA and USOPC athlete eligibility requirements for selection and nomination as a member of Team USA’s beach tennis team, USTA is ordered to re-select and the USOPC is ordered to re-nominate Ms. Johnston and Ms. Melch for re-entry as Team USA in the women’s doubles beach tennis event in the AWBG.

Because USTA is a party to this arbitration proceeding and the USOPC has agreed to be bound by this AAA arbitration award as well as the future CAS award, the Arbitrator trusts that both USTA and the USOPC will comply with the foregoing conditional order. The Arbitrator has no authority to impose Claimants’ proposed fines or any other sanctions on USTA or the USOPC.

for any future noncompliance with this order, which can only be enforced by a court if there is no voluntary compliance. See, e.g., *Lindland v U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000 (7th Cir. 2000). Because Claimants did not prevail on the merits of their Section 9 claim, it is not appropriate to order USTA to pay all of the arbitrator's fees and the costs of this arbitration proceeding, which are to be shared equally between Claimants (50%) and USTA (50%). Because it is not a party to this arbitration proceeding, the USOPC is not required to pay any of the arbitrator's fees or its costs.

DECISION AND AWARD

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

The Arbitrator has jurisdiction to determine whether USTA has violated Claimants' rights under the ASA or Section 9 of the USOPC Bylaws.

The Arbitrator has jurisdiction to determine whether the USOPC has violated Claimants' rights under the ASA, Section 9 of the USOPC Bylaws, or "Games Delegation Terms—Athletes" for the ANOC World Beach Games, 2019 because the USOPC exercised its right to participate in this arbitration proceeding without being involuntarily joined as a party and has agreed to be bound by the Arbitrator's award.

USTA did not deny either of the Claimants the opportunity to participate in a protected competition in violation of the ASA or Section 9 because it selected and nominated them as Team USA for the AWBG women's doubles beach tennis event, which selection and nomination subsequently was effectively withdrawn by the USOPC based on its determination that Ms. Melch is ineligible to participate in the AWBG because she is not a national of the United States and does hold a valid U.S. passport.

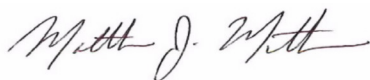
The USOPC's withdrawal of Claimants' nomination for entry as Team USA for the women's doubles beach tennis event in the AWBG, which occurred only after ANOC inquired about Ms. Melch's nationality, was a reasonable, good faith decision consistent with ANOC's determination that athletes must be a national of the NOC submitting the entry to be eligible to compete in the AWBG as well as its "Games Delegation Terms—Athletes" and the USTA's

approved Athlete Selection Procedures that require Team USA athletes to be U.S. citizens. It did not violate Claimants' rights under the "Games Delegation Terms—Athletes" or deny either of them the opportunity to participate in a protected competition in violation of the ASA or Section 9.1 of the USOPC Bylaws.

If the Court of Arbitration for Sport determines that Ms. Melch is eligible to participate in the AWBG pursuant to ANOC's athlete nationality requirements and both Claimants satisfy all other USTA and USOPC minimum athlete eligibility requirements (other than the AWBG nationality requirements in USTA's Athlete Selection Procedures and the USOPC's "Games Delegation Terms—Athletes") for selection and nomination as a member of Team USA's beach tennis team, USTA is ordered to re-select/re-nominate and the USOPC is ordered to re-nominate Ms. Johnston and Ms. Melch for re-entry as Team USA in the AWBG women's doubles beach tennis event.

The Administrative fees of the AAA totaling \$1,000 are to be borne as incurred. The Compensation of the Arbitrator totaling \$10,000 is to be shared equally between Claimants (50%) and USTA (50%). 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 Claimants and Respondent USTA as well as the defenses submitted by the USOPC as a non-party participant pursuant to Section 9.7 of the USOPC Bylaws in connection with this arbitration proceeding. All claims and defenses not expressly granted herein are denied.



September 24, 2019

Matthew J. Mitten, Arbitrator