

UNITED STATES OLYMPIC COMMITTEE

Matthew Fogarty	)	
	)	
Complainant,	)	
	)	
v.	)	DECISION
	)	
USA Badminton	)	
	)	
Respondent.	)	April 28, 2008

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I. THE PARTIES

1. Matthew Fogarty (“Fogarty”) is a member of USA Badminton (“USAB”). He is also a badminton player, having represented the US in various international events, primarily as a doubles player.

2. USAB is the National Governing Body (“NGB”) for badminton in the United States, as recognized by the United States Olympic Committee (“USOC”) pursuant to the Ted Stevens Olympic and Amateur Sports Act (36 USC §§ 220501-220529) (the “Act”). USAB is also a member of the Badminton World Federation (“BWF”),<sup>1</sup> which is the international federation for badminton as recognized by the International Olympic Committee.

II.

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<sup>1</sup> In 2006 the International Badminton Federation (“IBF”) changed its name to the Badminton World Federation or BWF. Any reference to the International Badminton Federation or IBF in this Decision is a reference to the BWF.

## COMMENCEMENT OF PROCEEDING

3. On May 21, 2007, Fogarty filed four Complaints against USAB pursuant to Article VIII, Section 8.1 of the USOC Bylaws and Section 220527 of the Act.<sup>2</sup>

### III. PANEL COMPOSITION

4. In accordance with Article VIII, Section 8.1 of the Bylaws, USOC Chair, Peter Ueberroth, appointed a Hearing Panel of five members for the purpose of hearing this matter. The Panel members are:

Mary McCagg, Chair  
USOC Board of Directors  
Max Cobb  
USOC National Governing Body Council, U.S. Biathlon Association  
Debbie Hesse  
USOC National Governing Body Council, USA Diving  
Courtney Johnson  
USOC Athletes' Advisory Committee, US Water Polo  
Robert P. Latham  
USOC Multisport Organizations Council, USA Rugby

### IV. BACKGROUND

#### A. History of this Proceeding

5. Of the four Complaints filed by Fogarty, two remain subject to this proceeding. However, for the purpose of having a complete procedural record, all four Complaints are set forth below.

6. Fogarty's four Complaints, as best as they can be summarized, are as follows:

- (a) Complaint 1 Fogarty challenges the provision in Article 12 of USAB's Bylaws, which requires that a grievant pay a \$100 filing fee when filing an internal grievance. Fogarty contends that this provision

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<sup>2</sup> For administrative purposes the four Complaints were consolidated into one proceeding.

in Article 12 violates Section 220522(a)(13) of the Act, which requires an NGB to have procedures for the prompt and equitable resolution of disputes.

- (b) Complaint 2 Fogarty contests USAB's International Tournament Entry Procedure, which requires that an athlete who wishes to participate in an international competition notify USAB five days prior to the entry date for the international competition so that USAB can administratively process the athlete's entry. Fogarty contends that this procedure violates Section 220522(a)(14) of the Act, which limits an NGB from having eligibility criteria that are more restrictive than its international federation.
- (c) Complaint 3 Fogarty challenges USAB's 2007 Pan American Selection Procedures. Fogarty further challenges USAB's actions stating i) that "USA Badminton refuses to require the WBF<sup>3</sup> [*sic*] and WBF [*sic*] Continental Confederation to follow the WBF [*sic*] Competition Regulations which state that entry into the men's doubles draw is determined by WBF [*sic*] World Ranking," ii) "USA Badminton refuses to require the WBF [*sic*] and WBF [*sic*] Continental Confederation to follow the WBF [*sic*] Competition Regulations which specifies no limit on the number entries per country in Men's Doubles for all BWF events including the 2007 Pan Am Games,"<sup>4</sup> and iii) that "USAB has refused to submit Dean Schoppe<sup>5</sup> and Matt Fogarty's entry in Men's Doubles to the Pan Am Games." Fogarty states that USAB's 2007 Pan American Selection Procedures, and USAB's actions, do not conform to BWF rules. Fogarty contends that BWF rules require that "entry into the men's doubles draw [for the 2007 Pan American Games] is determined by WBF [*sic*] World Ranking." Fogarty asserts that USAB's 2007 Selection Procedures, and its actions, violate Section 220522(a)(14) of the Act, which limits an NGB from having eligibility criteria that are more restrictive than its international federation.
- (d) Complaint 4 Fogarty challenges USAB's 2008 Olympic Selection Procedures. Fogarty further challenges USAB's actions stating i) that "USA Badminton refuses to require the BWF to fulfill its obligation to comply with the WBF [*sic*] competition Regulations which state that entry into the men's doubles draw is determined by WBF [*sic*] World Ranking," and ii) that "USAB has refused to submit Dean Schoppe and Matt Fogarty's entry in Men's Doubles to the 2007 World

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<sup>3</sup> Fogarty at times refers to the Badminton World Federation ("BWF") as the "WBF."

<sup>4</sup> On June 19, 2007 Fogarty filed a Motion to amend his Complaint 3 by adding language contained in subsection ii.

<sup>5</sup> Dean Schoppe is Fogarty's doubles partner.

Championships.” Fogarty also contends that “USA Badminton refuses to require the BWF to acknowledge [Fogarty and Shoppe’s] entry into the 2007 World Championships.” Fogarty asserts that USAB’s 2008 Olympic Selection Procedures, and its actions, violate Section 220522(a)(14) of the Act, which limits an NGB from having eligibility criteria that are more restrictive than its international federation.

7. On June 6, 2007 USAB filed a Motion to Dismiss on three grounds. Regarding all four Complaints, USAB asserted that Fogarty had failed to exhaust his administrative remedies as is required by Section 8.1 E of the USOC Bylaws and Section 220527(b) of the Act. As to Complaints 3 and 4, USAB further asserted that those Complaints are improperly filed as Article VIII Complaints. USAB stated that since Fogarty’s allegations pertain to his claims that he has been denied an opportunity to compete in the 2007 Pan American Games and the 2008 Olympic Games, Complaints 3 and 4 should be filed pursuant to Article IX of the USOC Bylaws, which allows for resolution before the American Arbitration Association (“AAA”).<sup>6</sup> As to Complaint 3, USAB further asserted that the issue raised by Fogarty, “that the selection process must be based solely on the world ranking list of the Badminton World Federation,” has already been decided against Fogarty by an AAA arbitrator in January 2006 in an Article IX proceeding initiated by Fogarty.<sup>7</sup>

8. On June 12, 2007 Fogarty filed a Motion to Withdraw Complaints 1, 2 and 4, asserting that “[t]he time necessary to resolve each of the complaints prior to the 2007

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<sup>6</sup> Article IX provides that if an athlete believes that he or she has been denied or will be denied his or her opportunity to participate in the Olympic Games, the Pan American Games, a World Championship or other such protected competition, the athlete may file a complaint with the USOC. If the matter can not be resolved by the USOC, then the athlete may have his or her complaint heard by an AAA arbitrator, whose decision is final. There is no requirement that an athlete exhaust his or her administrative remedies in order to proceed to arbitration before the AAA. Further, Article IX Complaints can be heard on an expedited basis, allowing an athlete to have his or her case heard prior to an impending competition.

Pan Am Games would deny proponent of proponent's rights to compete in the 2007 Pan Am Games.”

9. On June 12, 2007 with regard to Complaint 3, Fogarty filed a Motion for Default Judgment. Fogarty asserted that “USA Badminton filed a motion to dismiss on no basis in the applicable Statutes of the Olympic Charter, the Act, USOC Bylaws, USA Badminton Bylaws, Badminton World Federation Constitution nor Badminton World Federation Competition Regulations.”

10. Further, between June 14 and June 20, 2007 Fogarty filed four other motions with the Hearing Panel dealing with various procedural aspects of his Complaints.<sup>8</sup>

11. On June 20, 2007, Fogarty filed a Motion for Summary Judgment with regard to Complaint 3 requesting that the Hearing Panel find on his behalf as to the merits of his case.<sup>9</sup>

12. On June 20, 2007 the Hearing Panel heard argument on USAB's Motion to Dismiss, on Fogarty's Motion to Withdraw, on Fogarty's Motion for Default Judgment, on Fogarty's Motion for Summary Judgment and on Fogarty's four procedural motions.

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<sup>7</sup> *Fogarty v. USAB*; AAA Case No. 30 190 01374 05 (Award dated January 27, 2006).

<sup>8</sup> Those motions are: (1) Motion for Production of Documents; (2) Motion in Limine to exclude documents not admitted as evidence through an evidentiary hearing; (3) Writ of Habeas Corpus; and (4) Motion that USAB be ordered to provide all applicable Olympic Statutes prior to the hearing on USAB's Motion to Dismiss.

<sup>9</sup> The Motion for Summary Judgment was filed by Fogarty by email during the June 20, 2007 hearing.

13. On June 22, 2007 the Hearing Panel issued a Decision. In its Decision, the Hearing Panel:

- (a) granted Fogarty's Motion to Withdraw Complaints 1, 2 and 4;<sup>10</sup>
- (b) granted USAB's Motion to Dismiss Complaint 3;
- (c) denied Fogarty's Motion for Default Judgment; and
- (d) ruled that in light of granting USAB's Motion to Dismiss, it did not have to rule on Fogarty's Motion for Summary Judgment or on Fogarty's four procedural motions.

14. In granting USAB's Motion to Dismiss Complaint 3, the Hearing Panel determined that it did not have the authority under Article VIII of the Bylaws and Section 220527 of the Act to provide Fogarty with the relief that he requested, which was to be named to the 2007 Pan American Games Team.<sup>11</sup> The Hearing Panel stated that Fogarty, in effect, was using the Article VIII proceeding as a mechanism to pursue his Article IX claims.<sup>12</sup> As such, his Complaint was improperly filed. The Hearing Panel further commented that Fogarty's efforts to circumvent the procedures afforded to him pursuant to Article IX were misguided, in that even if it wanted, it could not name Fogarty to the 2007 Pan American Team.

15. In response to the Hearing Panel's Decision dismissing Complaint 3, and in an attempt to cure the deficiencies of that Complaint, Fogarty re-filed his Complaint on

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<sup>10</sup> Fogarty re-filed Complaint 2 with the USOC on April 3, 2008. The re-filed Complaint will be heard as a separate matter, so as not to prolong this proceeding.

<sup>11</sup> In light of the Hearing Panel's decision, the Hearing Panel ruled that it was not necessary to rule on USAB's other two grounds for dismissal (failure to exhaust administrative remedies and res judicata or collateral estoppel).

<sup>12</sup> Fogarty filed an Article IX Complaint with the USOC on October 27, 2006 in which he alleged that his opportunity to compete in the 2007 Pan American Games was being denied as "USA Badminton's trial process is more restrictive than the IF and is in violation of USOC Bylaws." Further, he demanded that USA Badminton "follow the IF regulations for qualification for the Pan Am Games." However, Fogarty never pursued his Article IX Complaint by filing a claim with the AAA.

June 22, 2007. The June 22 re-filed Complaint is essentially the same as Fogarty's initial filing on May 21, except that Fogarty amended that section of the Complaint entitled "the relief sought," setting forth two additional claims for relief, which purportedly conform with the requirements of Article VIII of the USOC Bylaws and Section 220527 of the Act. Those two new requests for relief are:

- (a) that the Hearing Panel place USAB on probation or revoke USAB's membership in the USOC; and
- (b) that the Hearing Panel "continue to evaluate and determine all USA Badminton Athletes whom may have been damaged by USAB & USOC actions which violated Applicable Statutes, including, the Olympic Charter, the Act, USOC Bylaws, BWF Constitution, BWF Competition Regulations, and USAB Bylaws so that the Hearing Panel may determine the severity of harm to USA Badminton and its athletes in order for the USOC Hearing Panel to make recommendations to either place USAB on probation or revoke USOC Membership of USAB."<sup>13</sup>

16. In response to the June 22 re-filed Complaint, USAB on June 27, 2007 filed a Motion to Dismiss asserting that Fogarty has failed to exhaust his administrative remedies as is required by Section 8.1 E of the USOC Bylaws and Section 220527(b) of the Act.

17. On September 11, 2007 the Hearing Panel issued an Order in which it requested that Fogarty and USAB respond to certain questions posed by the Panel. Both Fogarty and USAB responded. In USAB's response it again reiterated its position, which it first stated in its June 6, 2007 Motion to Dismiss, that the underlying issue in this proceeding has already been heard and decided against Fogarty by an AAA arbitrator, and therefore is barred by res judicata or collateral estoppel.

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<sup>13</sup> This second claim for relief was incomplete when originally filed, but was clarified by Fogarty in response to one of the questions posed by the Hearing Panel in its September 1, 2007 Order.

18. Between October 23 and November 4, 2007 Fogarty filed 13 Motions for consideration by the Hearing Panel.<sup>14</sup>

19. On November 20, 2007 the Hearing Panel issued an Order:

(a) setting a hearing date for December 6, 2007 as well as promulgating procedures for the conduct of the hearing;

(b) denying Fogarty's thirteen motions;

(c) reserving its ruling on USAB's Motion to Dismiss (explaining that USAB's Motion is considered to encompass all of the grounds set forth in the Motion filed on June 27, 2007 as well as its Motion filed on June 6, 2007);

(d) ordering that neither Party shall file a further motion with the Hearing Panel, unless first making a request to the Hearing Panel and second being granted permission to file such motion by the Hearing Panel; and

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<sup>14</sup> Those motions are: (1) Motion to preclude USAB's response to Hearing Panel's September 11 Order, which contained questions to be answered by USAB; (2) Motion that the USOC Hearing Panel order USAB to provide the entire 2006 Bylaws, the USAB published board minutes from 2004, 2005, 2006 and 2007 to determine if USAB has actually provided the correct documents; (3) Motion that the Hearing Panel conduct an evidentiary hearing regarding the documents submitted by USAB; (4) Motion that USAB/USOC produce the final Pan American Trial Procedures, the date they were approved by USAB, the USOC, and the final date of publishing those procedures; (5) Motion that USAB/USOC produce the original Trial Procedures rejected by the USOC, the date they were submitted, the date they were reviewed and the date they were rejected; (6) Motion that USOC employees Skinner, Ruger, Johansen and Scherr give testimony as to why the USOC rejected the USAB's Trial Procedures, why USOC approved Trial Procedures 7 months after retroactive to the beginning of the trial period, why the USOC approved Trial Procedures that violated USOC Bylaws, why the USOC required US athletes to have world rankings, and other matters relating to the USOC's reasoning as to requiring world rankings in opposition to the American Arbitration Association's Ruling; (7) Motion that USOC Board Member Ueberroth, and USOC employees Scherr, Dershowitz, Johansen, Ruger, and Skinner give testimony as to their actions regarding the selection procedures for the 2007 Pan Am Games, and all Article IX Complaints, Article VIII Complaints, and Ethics complaints from 2003 to present by USAB athletes in the hearing on the Motion to Dismiss; (8) Motion that USOC employee Johansen provide testimony regarding his stated position to determine if it is based on his personal beliefs or his position is based on all applicable Olympic Statutes; (9) Motion that USOC employees produce all Article IX Complaints against USAB and each of the USOC's investigative reports regarding those Article IX Complaints since 2003; (10) Motion that USOC Employee Johansen produce the letter he wrote in June 2003 to the Court of Arbitration for Sport in opposition to Fogarty's position as a US athlete who qualified for the 2003 Pan Am Games in both Men's Doubles and Mixed Doubles according to the BWF Statutes; (11) Motion that the Hearing Panel order USOC employee Johansen to produce all letters written to the IOC and the BWF explaining how the USOC would like to develop its own procedures, which in effect would be more restrictive than the BWF's eligibility criteria; (12) Motion that the USOC Hearing Panel remove USOC employee Johansen from any involvement in the current Article VIII Complaint; (13) Motion that the USOC Hearing Panel review and determine if they have been prejudiced by USOC employees and if any member of the Hearing Panel has been prejudiced by USOC employees to declare a mistrial.



(e) directing that both Parties produce certain documents to the Hearing Panel.<sup>15</sup>

20. Further, in its November 20 Order the Hearing Panel indicated that since the issues raised in Fogarty's re-filed June 22 Complaint dealing with USAB's 2007 Pan American Games Selection Procedures and their alleged violation of Section 220522(a)(14) of the Act are similar to or are the same as the issues raised by Fogarty in his withdrawn Complaint 4, dealing with the 2008 Olympic Games and their alleged violation of Section 220522(1)(14) of the Act, the Hearing Panel would hear argument and receive evidence pertaining to both Complaints.

21. On November 25 and 26, 2007 Fogarty requested that the December 6, 2007 hearing be postponed to allow him additional time to prepare for the hearing. As USAB did not object to the postponement, the Hearing Panel postponed the hearing.

22. On February 15, 2008 the Hearing Panel issued an Order rescheduling the hearing for March 17, 2008. Additionally, the Hearing Panel requested that both parties submit pre-hearing briefs, exhibits and affidavit testimony by March 7, 2008. Further, the Hearing Panel directed that Fogarty should be prepared to specifically explain how USAB's selection procedures are more restrictive than what BWF rules allow in providing for the selection of athletes to the Pan American Games and the Olympic Games. It further directed that USAB should be prepared to defend its selection procedures. Both Parties submitted pre-hearing briefs as requested.

23. On March 13, 2008 the Hearing Panel issued a Request for Information directed to both Parties in an effort to clarify certain issues and provide the Hearing Panel

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<sup>15</sup> Fogarty never adequately responded to the Hearing Panel's request.

with needed information. USAB timely responded to the Hearing Panel's request. Fogarty failed to respond.

24. On March 17, 2008 the Hearing Panel conducted a hearing at which both parties were allowed to present their cases. Fogarty presented no witnesses, other than himself. USAB presented two witnesses, Dan Cloppas, USAB Executive Director and Kelly Skinner, USOC Director Sport Partnerships. Fogarty cross-examined Mr. Skinner, but did not request to cross-examine Mr. Cloppas. USAB cross-examined Mr. Fogarty. Both parties submitted exhibits and presented oral argument.

25. On March 20, 2008 the Hearing Panel gave Fogarty until March 26, 2008 to respond to the Hearing Panel's Request for Information. Fogarty responded to the Hearing Panel's request on April 3, 2008.

26. On March 23, 2008 Fogarty filed four motions for consideration by the Hearing Panel. Those motions are: (1) Motion for a new hearing, (2) Motion to continue the hearing, (3) Motion to cross-examine Dan Cloppas, (4) Motion to provide rebuttal witnesses to the testimony of Kelly Skinner, and (5) Motion for a time extension to reframe a response to the Hearing Panel to include "applicable statutes."

B. Other Actions by Fogarty

27. This is not the first time that Fogarty has raised the issue of compliance with BWF rules, and his assertion that he should be named to a US team based on his ranking on the BWF World Ranking list.

28. Since 2003 Fogarty has filed ten Article IX Complaints, dated: April 11, 2003; February 18, 2005; November 29, 2005; October 27, 2006; October 28, 2006; November 6, 2006; November 6, 2006; April 9, 2007; May 1, 2007 and October 26, 2007,

that at least in part focus on his contention that nomination to US teams for certain international events should be based on the BWF World Ranking list, and that a trials or other selection method used by USAB is prohibited.<sup>16</sup> These Complaints are based on Fogarty's interpretation of BWF rules. Fogarty only proceeded with two of these Article IX Complaints by filing claims with the AAA, as listed below.

29. The first of Fogarty's two AAA claims was filed with the AAA on April 18, 2003, regarding his April 11, 2003 Article IX Complaint. In that matter, Fogarty alleged that US team entries into the 2003 Pan American Games must be based upon BWF World Rankings, and not upon the results of a one-time trial. Fogarty argued that USAB's use of a trials event to select athletes to the 2003 Pan American Games Team was in contradiction to the BWF rules, which required that entries to the Pan American Games be based solely on the BWF World Ranking list. In this proceeding, the arbitrator ruled against Fogarty, without expressing the reasons for his decision. *Fogarty v. USA Badminton*, Case No. AAA 30 190 00308 03, page 1 (Award dated April 30, 2003).

30. The second of Fogarty's two AAA claims was filed with the AAA on December 9, 2005. That filing related to Fogarty's November 29, 2005 Article IX Complaint. Fogarty alleged, in this proceeding, that USAB's use of a trials event to select athletes to the 2006 Thomas Cup was in violation of BWF rules, which required that entries to the Thomas Cup be based solely on the BWF World Ranking list. The arbitrator in his ruling summarized Fogarty's claim, stating, "[Fogarty's] position is that [USAB] is acting outside of the 'clear' rules of the IBF which [Fogarty] believes preclude a competition to determine the nominees [to the Thomas Cup] and requires [USAB] to select the highest

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<sup>16</sup> Since 2003 Fogarty has filed twenty-seven Article IX Complaints against USAB with the USOC.

rated players based on then current world ranking.” *Fogarty v. USA Badminton*, Case No. AAA 30 190 01374 05, page 1 (Award dated January 27, 2006). The arbitrator asked the question, “Did [USAB] properly apply applicable IBF rules in selecting its representative participants for the 2006 Thomas Cup?” *Id* at page 1. In analyzing BWF rules, the arbitrator disagreed with Fogarty’s assertion, held that USAB had properly selected its Thomas Cup team and ruled against Fogarty. *Id* at page 2.

31. Further, Fogarty filed two cases with the Court of Arbitration for Sport (“CAS”) in which he alleged that BWF rules require his entry by USAB into certain team competitions, because such entry must be based solely on the BWF World Ranking list.

32. On July 15, 2003, Fogarty brought a claim with CAS against the BWF, the Pan American Sports Organization (“PASO”), the Pan American Badminton Confederation (“PABC”) and USAB.<sup>17</sup> In this proceeding, Fogarty alleged that he should be entered into the 2003 Pan American Games because BWF rules require that available badminton positions to the Pan American Games be filled based on the BWF World Ranking list. The arbitrator held that CAS lacked jurisdiction as to the BWF, PABC and USAB. As to PASO, the arbitrator dismissed Fogarty’s request for interim measures on the grounds that Fogarty had not shown that “PASO has breached any particular rule related to the implementation of the Technical Manual for badminton or more generally to his non-selection for the 2003 Pan American Games.” *Fogarty v. International Badminton Federation, et al.*, Case No. CAS 2003/O/489, page 4 (Order dated July 31, 2003).

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<sup>17</sup> This claim was filed with CAS after Fogarty received an adverse ruling in his AAA arbitration proceeding, *Fogarty v. USA Badminton*, Case No. AAA 30 190 00308 03 (Award dated April 30, 2003).

33. On July 3, 2007 Fogarty and Schoppe filed a complaint with CAS against the BWF relating to Fogarty and Schoppe's participation in the 2007 Pan American Games and their assertion that entry into the Games should be based on the BWF World Ranking list. Fogarty requested that the CAS panel direct the BWF, the PABC, and the Host Member Association Brazilian Badminton Confederation to accept the entry of Fogarty and Schoppe as the number two doubles entry from the US in the 2007 Pan American Games. Further, Fogarty requested that the CAS panel (i) direct the BWF, USAB and the USOC to provide travel to Rio de Janeiro (the site of the 2007 Pan American Games) and (ii) direct the BWF, the Pan American Badminton Confederation, and the Host Member Association Brazilian Badminton Confederation to provide housing and training facilities in Rio de Janeiro for Schoppe and Fogarty. The CAS panel denied Fogarty and Schoppe's application for provisional and conservatory measures stating in part:

The Pan American Sports Organization (PASO) states in its Regulation for the Pan American Games, art. 9 that "only the National Olympic Committees have the sole right to enter athletes and officials for the Pan American Games." Therefore, based on the documents filed by the Appellants thus far, the Panel cannot consider that the Appellants are likely to succeed on the merits of the appeal.

*Fogarty v. Badminton World Federation*, Case No. CAS 2007/A/1317, paragraph 22 (Order dated July 12, 2007). The CAS panel has not made a final decision on the ultimate outcome of the case.

## V. FOGARTY'S CLAIMS

34. Fogarty alleges that USAB's selection procedures for the 2007 Pan American Games and for the 2008 Olympic Games are more restrictive than that allowed by the BWF.

35. With regard to the Pan American Games, it appears that Fogarty's argument is that BWF rules require that selections to the US Pan American Games Team be based solely on BWF World Ranking list. USAB used the BWF World Ranking list, in conjunction with a trials event to choose badminton athletes for the 2007 Pan American Games Team.<sup>18</sup> Therefore, Fogarty concludes that USAB is not in compliance with Section 220522(a)(14) of the Act.

36. Further, Fogarty alleges that as the 2007 Pan American Games selection procedures for badminton limit the number of US athlete entries per event that will be sent to the Pan American Games, the procedures are in violation of the BWF rules, which have no such restriction. Again, Fogarty infers that USAB is not in compliance with Section 220522(a)(14) of the Act.

37. As to the Olympic Games, it is more difficult to understand Fogarty's argument, since badminton athletes to the US Olympic Team are selected based on the BWF World Ranking list. However, it appears that Fogarty's argument is not that the procedures are themselves defective, but that USAB's actions relative to the procedures result in a selection process that is more restrictive than allowed by the BWF. Fogarty relies on two examples to prove his point.

38. The first of these examples relates to selection of athletes to represent the US at the 2007 World Championships, and the effect that has on the selection of athletes to the 2008 Olympic Team.<sup>19</sup> As Fogarty states in his Complaint, he and his doubles

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<sup>18</sup> As stated previously, Fogarty filed an Article IX Complaint against USAB based on this same argument on October 27, 2006, however, he never pursued his claim with the AAA.

<sup>19</sup> Fogarty filed an Article IX Complaint against USAB based on this same argument on May 1, 2007, however, he never pursued his claim with the AAA.

partner, Schoppe, should have been entered into the men's doubles event at the 2007 World Championships. He bases this claim on his assertion that a player on a doubles team invited to compete at the 2007 World Championships did not meet BWF nationality requirements for representing the US, even though the BWF, pursuant to its rules, determined that nationality requirements were met. Since Fogarty and Schoppe were not entered, and therefore did not participate, they could not accumulate points in the BWF World Ranking list, and therefore their ability to make the 2008 Olympic Team was lessened. However, as Fogarty acknowledges, invitations to the 2007 World Championships were made by the BWF, which based its invitations on the BWF World Ranking list. In order to deal with this dilemma, Fogarty asserts that the USAB should have compelled the BWF to invite him and Schoppe,<sup>20</sup> and by not doing so, it failed in its responsibilities under the Act. Accordingly, Fogarty concludes that USAB's actions are not in compliance with Section 220522(a)(14) of the Act.

39. The second example relates to the selection of athletes to represent the US in the Thomas Cup and the effect that has on the selection of athletes to the 2008 Olympic Team.<sup>21</sup> Fogarty alleges that BWF rules require that selections to the Thomas Cup be based solely on the BWF World Ranking list. USAB held a trials event to select US badminton athletes to compete in the Thomas Cup. Since Fogarty and his doubles partner, Schoppe, chose not to participate in the trials, they were not selected to represent the US in the Thomas Cup. Fogarty asserts that since he and Schoppe did not participate

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<sup>20</sup> The essence of this argument is that USAB should have compelled the BWF to follow BWF rules, as those rules were interpreted by Fogarty.

<sup>21</sup> Fogarty filed an Article IX Complaint against USAB based on this same argument on October 26, 2007, however, he never pursued his claim with the AAA.

in the Thomas Cup, they were precluded from garnering BWF World Ranking Points, and therefore their ability to make the US Olympic Team was lessened. Fogarty thus concludes that since USAB's actions do not conform to BWF rules, its actions are not in compliance with Section 220522(a)(14) of the Act.

VI. USAB's RESPONSE

40. USAB responds to Fogarty's claims as follows.

41. First, USAB asserts that Fogarty's complaint should be dismissed on procedural grounds. These include that Fogarty has failed to exhaust his administrative remedies, that Fogarty's claims were heard and decided in 2006, that Fogarty's claims constitute an Article IX Complaint and should have been brought under that provision of the USOC Bylaws, and that Fogarty's claims regarding the 2007 Pan American Games are moot.

42. Second, USAB asserts that BWF rules do not require that athletes participating in the Pan American Games be selected based on the BWF World Ranking list. USAB asserts that the BWF does not set forth standards for nomination to the Pan American Games, but defers that decision to the PABC. Further, it is the position of the USAB that the PABC, in turn, allows each country's National Olympic Committee the authority to determine how it wishes to select athletes to participate in the Pan American Games.

43. Third, USAB provides that USAB's 2008 Olympic Selection Procedures are entirely derivative of the BWF rules, as athlete selection to the Olympic Games are based on world rankings. USAB further states that the BWF World Ranking system is based on points earned from an athlete's ten best tournament results in the previous 12-



month period and can include, at most, points from one BWF team event. Also, USAB points out that athletes who are not selected to an event in which the US sends a team, such as the Thomas Cup, may still participate in other BWF tournaments and garner BWF World Ranking points through those tournaments. Thus, no athlete is precluded from earning BWF World Ranking points.

44. USAB contests Fogarty's assertion that USAB's 2007 Pan American Games Selection Procedures and 2008 Olympic Games Selection Procedures are more restrictive than that allowed by BWF, and so USAB is not in violation of Section 220522(a)(14) of the Act.

## VII. FOGARTY'S OUTSTANDING MOTIONS

45. On March 23, 2008, after the hearing was concluded, Fogarty submitted five motions for consideration by the Hearing Panel. These motions were all submitted without first requesting the permission of the Hearing Panel, as the Hearing Panel directed in its February 15, 2008 Order. The Hearing Panel rules on Fogarty's motions as follows.

### A. Motion for a New Hearing

46. Fogarty makes a Motion for a new hearing. This Motion is based on Fogarty's assertion that the hearing should have been stenographically recorded. The Motion is denied. The Hearing Panel in its February 15, 2008 Order provided that if a party wanted to have the hearing recorded by a stenographer, the party should notify the Hearing Panel by March 7, 2008. Fogarty made no request prior to the hearing to have a stenographer present, nor did he make any arrangement to have a stenographer present at

the hearing. Further, Fogarty was not prejudiced in his case by proceeding without a stenographer.

B. Motion to Continue the Hearing

47. Fogarty submits a Motion to continue the hearing so that he can provide further factual evidence and present additional legal argument. The Motion is denied. Fogarty was provided ample time to present his case on March 17, 2008. At the end of the hearing he did not indicate that the time allotted was insufficient.

C. Motion to Cross-Examine Dan Cloppas

48. Fogarty makes a Motion to cross-examine Dan Cloppas. The Motion is denied. During the hearing Fogarty was provided with an opportunity to cross-examine Cloppas, but he did not do so.

D. Motion to Provide Rebuttal Witnesses to the Testimony of Kelly Skinner

49. Fogarty makes a Motion to provide rebuttal witnesses to the testimony of Kelly Skinner. The Motion is denied. Skinner's direct testimony was presented by witness affidavit. USAB provided Fogarty with a copy of Skinner's affidavit on March 7, 2008. Fogarty knew what Skinner was going to testify about prior to the commencement of the hearing. Accordingly, Fogarty could have provided any rebuttal testimony that he wished at the time of the hearing. Additionally, Mr. Skinner was available for cross-examination and Fogarty cross-examined him at the hearing.

E. Motion for Extension of Time to Reframe Response

50. Fogarty submits a Motion for an extension of time so that he can reframe a response to the Hearing Panel to include "applicable statutes." The Motion is denied. In

Fogarty's pre-hearing brief he cited various PASO statutes and regulations that were not current. In the Hearing Panel's March 13, 2008 Request for Information it requested that Fogarty provide the Hearing Panel with PASO statutes and regulations in effect for the 2007 Pan American Games. Fogarty never complied with this request, instead stating that they should be provided by the USOC.<sup>22</sup> Fogarty had every opportunity at the time of the hearing to provide the Hearing Panel with argument as to the applicability of the PASO statutes and regulations upon which he was relying.

#### IX. USAB's MOTION TO DISMISS

51. As stated previously, USAB filed a Motion to Dismiss based on four grounds. It is the determination of the Hearing Panel that the Motion to Dismiss has merit, and that the Hearing Panel would grant the Motion, were it not for the following.

52. First, the USOC has already held a hearing on the merits of Fogarty's claims. Both USAB and Fogarty have provided testimony and documentary evidence. Further, both presented argument as to the merits of the claims. As such, the parties deserve a ruling on the merits.

53. Second, the issue that Fogarty raises in this proceeding has been raised by him previously on numerous occasions. Once and for all there must be a final resolution to Fogarty's continuing allegations that US badminton teams be selected based on the BWF World Ranking list.

54. Accordingly, the Hearing Panel has determined to render a ruling on the merits. However, so as to provide the parties with the Hearing Panel's reasoning as to the

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<sup>22</sup> The USOC has provided the Hearing Panel and Fogarty and USAB with copies of the PASO statutes and regulations in effect for the 2007 Pan American Games.

validity of USAB's Motion to Dismiss, the Panel will discuss each aspect of the Motion in turn.

A. Failure to Exhaust Administrative Remedies

55. First, USAB asserts that Fogarty has not exhausted his administrative remedies prior to commencing this Article VIII proceeding, as is required by Article VIII, Section 8.1E of the USOC Bylaws and Section 220527(b) of the Act.<sup>23</sup> Further, it is USAB's position that Fogarty has not shown that exhaustion of USAB's internal remedies would have caused unnecessary delay.

56. Fogarty responds that he filed a complaint with USAB on February 4, 2006, in which he raised his objections to the use of any mechanism other than the BWF World Ranking list in choosing athletes to represent the US in the 2007 Pan American Games and the 2008 Olympic Games.

57. USAB replies that although Fogarty made a filing with USAB on February 4, 2006, it was rejected by USAB's Legal Committee in that the filing was not properly filed. The Legal Committee, in a report that was provided to Fogarty, rejected Fogarty's filing stating that it contained a broad, aimless, unsupported accusation that required one to hypothesize as to the issues raised, that it did not set forth any facts, and that it did not set forth a requested remedy. The Legal Committee indicated that should Fogarty correct the deficiencies as outlined in the Committee's report, the matter could be re-filed and heard. Report of the Legal Grievance Committee in Response to the Filing by Matthew Fogarty on February 4, 2006, Received By the USAB Office and this

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<sup>23</sup> Fogarty is familiar with this requirement, as he previously filed an Article VIII Complaint against USAB that was dismissed for Fogarty's failure to exhaust his administrative remedies. *Fogarty v. USAB*, USOC Article VIII (Decision dated October 1, 2004).

Committee on February 6, 2006 (March 21, 2006). However, Fogarty never submitted a re-filed complaint with USAB.

58. The Hearing Panel makes no ruling on whether or not Fogarty's February 4 filing was adequate or not, as it is not necessary. Fogarty was provided with an opportunity by USAB to re-file his complaint and correct those deficiencies raised by USAB's Legal Committee. He chose not to do so. Had he done so, his complaint would have been heard by USAB. Fogarty can not use his own failure to act as means to subvert the exhaustion requirement.

59. Further, Fogarty filed his complaint on February 4, 2006. He did not file this Article VIII proceeding until over a year later, on May 21, 2007. Any delay in having this matter heard is Fogarty's own doing. Therefore, any claim by him that proceeding with USAB's grievance process would have caused an unreasonable delay is without merit.

B. Res Judicata/Collateral Estoppel

60. Second, USAB contends that the issue raised by Fogarty in this proceeding was heard and decided previously in two arbitration cases brought by Fogarty against the USAB. USAB cites the two cases already referred to in this Decision, *Fogarty v. USA Badminton*, Case No. AAA 30 190 01374 05 (Award dated January 27, 2006) and *Fogarty v. USA Badminton*, Case No. AAA 30 190 00308 03 (Award dated April 30, 2003). USAB states that the doctrines of res judicata and collateral estoppel bar Fogarty's claim in this proceeding.

61. Fogarty contends that the arbitration awards cited in the previous paragraph are not to be relied upon, as the arbitrators rendered their decisions on non-

applicable BWF rules and that the arbitrators did not properly analyze the issue raised by Fogarty in his complaints.

62. The Hearing Panel rejects Fogarty's assertion that the arbitration awards cited previously have no bearing on this case. Those cases considered the same issues raised by Fogarty in this Article VIII proceeding.

63. Rather, it appears to the Hearing Panel that it is Fogarty's intent to litigate this matter endlessly until he gets a ruling in his favor. At some point there must be an end to Fogarty's relentless re-litigation of the same issue. Fogarty's claim has twice been decided against him on the merits. Those decisions would serve as a barrier to having this matter heard anew by this Hearing Panel.

C. Improper Filing under Article VIII

64. Third, USAB contends that Fogarty's claim should be dismissed as it is improperly filed under Article VIII and should instead have been brought pursuant to Article IX of the USOC Bylaws. USAB asserts that the crux of Fogarty's complaint is that he has been denied his opportunity to participate in the 2007 Pan American Games and the 2008 Olympic Games by USAB and that Article IX proceedings are the proper mechanism to resolve athlete participation issues.

65. Fogarty responds that if USAB did not have selection procedures that were more restrictive than what is allowed by the BWF, then it would be in compliance with Section 220522(a)(14) of the Act, and he would have been named to the 2007 Pan American Games team and may be named to the 2008 Olympic Games team. Thus, this is in effect a compliance issue, and not a participation issue.

66. The Hearing Panel discussed this issue in its June 22, 2007 Decision dismissing Fogarty's May 21, 2007 Complaint. The Hearing Panel stated that Fogarty, in effect, was using this Article VIII proceeding as a mechanism to pursue his Article IX claims. The Hearing Panel has not changed its mind on this matter. Essentially these are Article IX Complaints disguised as Article VIII proceedings. Fogarty should have resolved his claims that he was being denied his opportunity to participate in the Pan American Games and the Olympic Games through the Article IX process, which would have allowed him to have them heard and decided before a AAA arbitrator, prior to the commencement of any competition relating to the selection of athletes for those Games.

D. Fogarty's Claims Regarding Pan American Games are Moot

67. Fourth, USAB asserts that Fogarty's claim regarding the 2007 Pan American Games is moot, as those Games are over, having occurred in Rio de Janeiro, Brazil on July 13-29, 2007. USAB argues that application of BWF rules to future Pan American Games is pure speculation, as those rules may change prior to the next Pan American Games, which will occur in 2011. Further, USAB's selection procedures for the 2011 Pan American Games have not yet been promulgated and most likely will change from those used for the 2007 Pan American Games.

68. Fogarty makes no direct response to this ground for dismissal, other than he is attempting to bring USAB into compliance with BWF rules.

69. The Hearing Panel agrees that any determination as to the 2007 Pan American Games is moot, and any attempt to deal with Fogarty's claim as it pertains to the 2011 Pan American Games would be pure speculation at this point. Further, this only reinforces the Hearing Panel's determination that this is essentially a participation matter

that should have been resolved prior to commencement of the 2007 Pan American Games through an Article IX proceeding.

X. ISSUE

70. The issue before the Hearing Panel is whether or not USAB is in compliance with Section 220522(a)(14) of the Act, which provides that an NGB shall not have “eligibility criteria related to amateur status or to the participation in the Olympic Games, the Paralympic Games, or the Pan-American Games that are more restrictive than those of the appropriate international sports federation.”

71. However, the underlying issue raised by Fogarty, and the one that must be discussed, is whether or not BWF rules mandate that entry into certain team competitions, including the Olympic Games, the Pan American Games, and BWF sanctioned team competitions, such as the Thomas Cup, be based solely on the BWF World Ranking list.

72. Put another way, did USAB deny Fogarty’s opportunity to participate in the 2007 Pan American Games and will he be denied his opportunity to participate in the 2008 Olympic Games because USAB employed selection procedures and a selection process that is in violation of BWF rules.

XI. ANALYSIS

73. Fogarty challenges USAB’s 2007 Pan American Selection Procedures and USAB’s actions relative to its 2008 Olympic Games Procedures on the grounds that in each case USAB has implemented a selection process that is more restrictive than allowed by the BWF. Therefore, Fogarty contends that USAB is in violation of Section 220522(a)(14) of the Act. The Hearing Panel will discuss each of Fogarty’s claims in turn.



A. 2007 Pan American Games Selection Procedures

74. As to the 2007 Pan American Games Selection Procedures, Fogarty makes two claims. His first is that USAB held a trials event to select athletes for the 2007 Pan American Games, which is in violation of BWF rules requiring athletes to be selected only according to the BWF World Ranking list.

75. Second, Fogarty claims that USAB in its 2007 Pan American Games Selection Procedures limits the number of badminton athletes it will send to the Pan American Games, and that this also is in violation of BWF rules, which have no such limit on the number of athletes who may participate from any country.

76. Since these two claims are intertwined they will be considered together.

77. As to both claims, Fogarty relies on Regulation 5.3 of the BWF General Competition Regulations. His position is that Regulation 5.3 dictates that selections to the Pan American Games Team must be based solely on the BWF World Ranking list.

78. Regulation 5.3 states as follows:

Players must be allowed to enter all events for which they are qualified and no restriction in this respect shall be permitted. In the event of a Member Association making entries on behalf of its players, it shall list such entries in order of playing strength.

79. Fogarty's position, simply stated, is that Regulation 5.3 governs the nomination of athletes to the Pan American Games, and that those nominations must be based on an athlete's "playing strength."

80. In making this argument, Fogarty contends that the reference in Regulation 5.3 to "playing strength" in fact means the BWF World Ranking list. He bases this contention on Appendix 6 to the BWF General Competition Regulations,

which defines World Ranking, and on Regulation 13.2 of the BWF General Competition Regulations which pertains to determining competition draws.

81. Section 1.1 of Appendix 6 to the BWF General Competition Regulations states that the “World Ranking is a list of players/pairs in order of playing strength.”

82. Regulation 13.2 of the BWF General Competition Regulations states as follows:

The World Ranking shall be used to determine the players/pairs whose entries can be accepted in the main draw, with the principles of Regulations 12.6.1 and 12.6.2 used to modify the World Ranking regardless of whether or not a pair has competed during the 12 months prior to the ranking period.

83. Thus, Fogarty concludes that USAB’s use of a trials process for the Pan American Games violates BWF’s rules, which require that athletes be selected only pursuant to BWF’s World Ranking list.

84. Further, Fogarty contends that a fundamental principle in badminton is that everyone is allowed to enter BWF tournaments, and therefore there should be no limit on the number of entries per country for the Pan American Games.

85. Fogarty again relies on Regulation 5.3 of the BWF General Competition Regulations for this proposition, reciting that portion of Regulation 5.3 that states, “[p]layers must be allowed to enter all events for which they are qualified and no restriction in this respect shall be permitted.”

86. Additionally, Fogarty relies on Regulation 5.7 of the BWF General Competition Regulations that states:

For any competitive event sanctioned by the BWF, a player shall not have his/her entry refused for reasons of race, religion or politics. Refusal of entries for any reason other than that there are too many entries to be

accommodated (Regulations 13.1 and 13.7) requires the specific written permission of the BWF.

87. Fogarty's position is that a player or doubles team that has a high enough ranking on the BWF World Ranking list must be entered into the Pan American Games by his or her National Olympic Committee ("NOC") and must be accepted by the Organizing Committee for the Pan American Games, regardless of any athlete limit placed on the US by PASO or the PABC.

88. To summarize, Fogarty contends, based on the above cited BWF rules, that (a) by using a trials process by USAB to select its athlete nominations to the 2007 Pan American Games Team and (b) by limiting the number of athlete entries it submits to participate in the 2007 Pan American Games (even though made in accordance with the athlete limits placed on the US by PASO and the PABC), USAB is in violation of BWF rules.

89. However, as USAB points out, Fogarty's argument fails for a number of reasons.

90. First, BWF has a specific rule dealing with competitive international multi-sport events, such as the Pan American Games, which provides that the organizer of the international multi-sport event shall determine how athletes are selected for participating in the event. That rule is Regulation 8.5 of the BWF General Competition Regulations.

91. Regulation 8.5 states as follows:

Notwithstanding the foregoing Regulations, in the case of any officially-recognized competitive multi-sport event in which Badminton is included, the qualifications for the representation of a Member association shall be in full accordance with the conditions laid down by such a multi-sport

international event, provided however that the above Regulations 8.2 to 8.4 are also not contravened.

92. Regulations 8.2, 8.3 and 8.4 of the BWF General Competition Regulations set forth minimum standards for athletes to be qualified to represent a member association in international competition. These Regulations pertain to membership and nationality requirements.<sup>24</sup>

93. Accordingly, BWF acknowledges in Regulation 8.5 that organizers of competitive international multi-sport events, such as the Pan American Games, have the authority to determine the selection criteria for those events. In the case of the Pan American Games, PASO is the organizer of that event and accordingly has the authority to determine the athlete qualifications for those events.<sup>25</sup>

94. PASO has delegated this authority to NOCs.

95. First, Article XXII of its Statutes states that:

Only the Members of PASO may enter competitors in the Pan American Games. The right of final acceptance of entries rests with the Executive Committee of PASO.

*PASO Statutes*, Article XXII Rights and Obligations of the Members of PASO at the Pan American Games, Paragraph 6 (adopted April 21 and 22, 2004). The Members of PASO

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<sup>24</sup> In the case of the Olympic and Pan American Games, it should be noted that the IOC and PASO have their own nationality requirements for participation in those Games. See *IOC Olympic Charter*, Chapter 5, Rule 42 and Bye-law to Rule 42 (July 7, 2007) and *PASO Statutes*, Article XXII, Paragraphs 4 and 5 (adopted April 21 and 22, 2004).

<sup>25</sup> This raises a basic question, which is who is supreme, an International Federation or PASO, in determining the rules and regulations regarding athlete participation in the Olympic and Pan American Games. Even if the BWF did not delegate authority over the Pan American Games to PASO, wouldn't PASO have the authority to determine athlete qualifications for those Games as it sees fit? PASO statutes provide that "[i]n case of a conflict between a National Federation, the National Olympic Committee and an International Federation, the Executive Committee of PASO, by proposal of its Technical Commission, may decide upon the entry of the athletes in the Pan American Games with all the obligations and prerogatives, assuring with this the protection and guarantee of the athletes' rights." *PASO Statutes*, Article XXII, Paragraph 10 (adopted April 21 and 22, 2004).

are the NOCs of the countries in the Americas. *PASO Statutes*, Article XI Membership, Paragraph 1 (adopted April 21 and 22, 2004).

96. Second, Article XXII of the PASO Statutes allows NOCs to decide which athletes to enter into the Pan American Games as proposed by their national sports federations.<sup>26</sup> Specifically, Article XXII states:

The Members of PASO shall constitute, organize and lead their respective sports delegations at the Pan American Games. They decide upon the entry of athletes proposed by their respective national federations.

*PASO Statutes*, Article XXII Rights and Obligations of the Members of PASO at the Pan American Games, Paragraph 1 (adopted April 21 and 22, 2004).

97. Thus, in accordance with BWF's own rules, USAB, as the national federation for badminton in the US, and in turn the USOC, as the NOC, has the ultimate right to determine how it will select athletes to the Pan American Games.

98. Further, prior to each Games, PASO requires that a technical manual for each sport be approved by PASO's Executive Committee and by that sport's International Federation and/or Pan American Sports Confederation. PASO Regulations of the Pan American Games, Section II, Program of the Pan American Games, Paragraph 10 (adopted June 24, 2005). PASO further requires that the technical manual be published by the Organizing Committee for the Pan American Games. *Id.*

99. The organizing committee for the 2007 Pan American Games was the Organizing Committee for the XV Pan American Games Rio 2007 ("Co-Rio").

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<sup>26</sup> National Federations are those organizations recognized in each country to govern a particular sport. In the case of the US, the NOC is the USOC and the national federation for badminton is USAB.

100. Section 4.4.2 of the Technical Manual for badminton, approved by the PASO Executive Committee and PABC for the 2007 Pan American Games and published by Co-Rio, provides that each NOC may develop its own selection procedures, stating:

The NOCs may only send to the XV Pan American Games Rio 2007 competitors who have qualified through their respective NOC's systems. Each NOC may develop its own procedure to select its competitors to participate in the Badminton competition; the only requirement is that all competitors to be registered must be eligible to participate in the XV Pan American Games Rio 2007.

101. This was also true in 2003. As Federico E. Valdez, President of PABC, explained in a letter dated May 29, 2003 to Peter Alkalay, Fogarty's attorney at the time:

National Olympic Committees (NOCs) in the Pan American zone are free to use whatever selection process they approve to select their 2003 Pan American Games national badminton teams. PAB was given the authority to determine the selection process guideline for the Pan American Games badminton competitions by PASO as defined in the PASO Pan American Games technical manual.

102. Second, the BWF has spoken on this issue. In an email communication from Neil Cameron, Chief Executive of the BWF, to Fogarty dated December 9, 2002, responding to Fogarty's 2003 claims that invitations to the 2003 Pan American Games should be based on the World Ranking list, Mr. Cameron stated:

The qualification [of athletes] for the Pan American Games is agreed [upon] between PASO and the Pan American Badminton Confederation. IBF delegates continental issues of this nature to its continental confederations.

103. Further, in a February 27, 2003 email communication again from Neal Cameron to Don Chew of the USAB, Mr. Cameron commented:

After further e-mails where [Fogarty] tried to say IBF had a role in the PABC regulations for the Pan Am Games, I concluded the exchange by saying this seemed to me clearly a matter for USAB and PABC, and not IBF.

104. Also, Federico E. Valdez, President of the PABC, in a May 29, 2003 letter to Peter Alkalay, Fogarty's legal counsel at the time, indicated that the PABC had "consulted with the International Badminton Federation," regarding Fogarty's claims that he should be invited to the 2003 Pan American Games based on the BWF World Ranking list. Additionally, Mr. Cameron in his May 29 letter stated that as a result of that "consultation," he understood that "IBF Chief Executive Neil Cameron has responded to [Fogarty's] incorrect interpretations of the IBF regulations." Mr. Valdez further stated:

The PABC Executive Committee agrees with [Cameron's] interpretation of the IBF regulations and reject[s] [Fogarty's] contention that IBF regulations somehow requires the IBF World Ranking to be used for all international badminton qualification process.

105. Thus, when presented with the issue, the BWF rejected Fogarty's contention that BWF rules required athletes competing in the Pan American Games to be selected based on the BWF World Ranking list. The BWF communicated that position both to Fogarty and to the PABC. If the BWF had any concern about the interpretation of its rules, or disagreed with the manner in which US badminton athletes were being selected to the 2003 Pan American Games, it would have voiced its objection. It did not.

106. Third, Fogarty's contention there can be no limit per country on the number of athletes who compete in multi-sport events, such as the Pan American Games, flies in the face of one the purposes of those Games, which is to have athlete representation from many countries. This athlete per country limit is necessary as there is a limit on the total number of athletes who can attend the Games. Otherwise, the number of athletes attending the Games would be unmanageable, both in terms of numbers and cost.

107. As stated by Neil M. Cameron, Chief Executive of the BWF in a letter to Don Chew, President of USAB, dated April 17, 2003:

In an event such as the Pan American Games, the organisers (sic), as well as their “agents”, the Panamerican (sic) Badminton Confederation, naturally want to ensure a wide spread of participating NOCs and hence have allocated a fixed number of places per NOC rather than simply accepting the highest ranked entries from all NOCs.

108. For the 2007 Pan American Games, the maximum number of badminton athletes was fixed at 88 (44 men and 44 women).<sup>27</sup> In order to meet the goal of having athlete representation from many different countries, and abide by the total athlete restriction of 88 athletes, PASO and the PABC limited the number of athletes that each country could send to the Games to a maximum of four men and four women.

109. Thus, USAB followed PASO and PABC rules when its selection procedures provided that it could only send, and would only send, four men and four women to the to the 2007 Pan American Games.

110. For the 2003 Pan American Games, the number of badminton athletes that each country could send to those Games was similarly limited.

111. As Federico Valdez, President of the PABC explained in his February 4, 2003 letter to USA Badminton, when responding to Fogarty’s 2003 claims regarding the 2003 Pan American Games:

Every NOC belonging to PASO is allowed to enter a maximum of 4 men and 4 women, a total of 8 athletes, for the Event of Badminton....This means that each NOC is free to decide which selection process they run in their own countries to select the Team that will represent them at Santo

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<sup>27</sup> The Technical Manual for the 2007 Pan American Games provided: “According to the quota established by PASO, there will be a maximum of 88 competitors (44 men and 44 women). Each NOC can register a maximum of four men and four women to participate, provided each has qualified in accordance with IBF and PABC requirements.” 2007 Badminton Technical Manual, XV Pan American Games Rio 2007, Rule 4.4.1 Maximum Number of Competitors.



Domingo. The IBF World Ranking is not being used by PABC to qualify players for [these] Games.”

112. Fogarty’s contention that USAB, in abiding by the athlete limits placed on it by PASO and PABC, is in violation of BWF General Competition Regulations 5.3 and 5.7 is without merit.

113. Fourth, the Hearing Panel is mindful that Fogarty’s claims relating to the 2007 Pan American Games are the same claims that he raised in 2003. Those claims were heard by an AAA arbitrator in 2003 pursuant to an Article IX proceeding and rejected. *Fogarty v. USA Badminton*, Case No. AAA 30 190 00308 03 (Award dated April 30, 2003). Fogarty has not presented any evidence or argument that would cause the Hearing Panel to question the arbitrator’s ruling in that case.

B. Olympic Games Selection Process

114. As stated previously, Fogarty’s arguments concerning the Olympic Games are somewhat different than his arguments concerning the Pan American Games.

115. USAB’s selection procedures for the Olympic Games utilizes BWF’s World Ranking list. Thus, Fogarty’s attack is not directed at the selection procedures themselves, but is directed at USAB’s implementation of those procedures. Fogarty points out that World Ranking points are accrued at World Championships. He further indicates that athletes accrue World Ranking points at team competitions, such as the Thomas Cup. As to the 2007 World Championships, the BWF sent invitations to athletes to attend based on the World Ranking list. However, Fogarty and his doubles partner were not invited. He asserts, however, that USAB should have compelled the BWF to invite him and his doubles partner (based on an argument that a US doubles team did not meet nationality requirements for representing the US), and by not doing so USAB failed

in its responsibilities of requiring the BWF to abide by its own rules. As to the 2007 Thomas Cup, USAB utilized a trials process to nominate athletes. Fogarty's contention is that this violates BWF rules, as it is his claim that those rules require USAB to nominate athletes to the Thomas Cup based on World Ranking points. Fogarty's argument then proceeds as follows. Since USAB did not compel BWF to invite Fogarty and his doubles partner to the 2007 World Championships and since USAB utilized a selection trials for the 2007 Thomas Cup, he did not compete at those competitions, and was not able to accrue BWF World Ranking points at those competitions. Therefore his ability to make the 2008 Olympic Team was lessened. Because of this, Fogarty claims that USAB's selection process is more restrictive than allowed under BWF rules.

116. First, as to Fogarty's claim regarding the World Championships, USAB was not involved in selecting athletes to that event. Contrary to Fogarty's claims, USAB could not compel the BWF to invite Fogarty to the World Championships. The BWF followed its rules concerning nationality requirements as it determined were applicable. If Fogarty disagreed with the BWF, he should have approached the BWF, instead of alleging misconduct on the part of USAB. The Hearing Panel disagrees with Fogarty that somehow USAB can be held accountable for the actions of the BWF. Therefore, Fogarty's claim regarding the World Championships is denied.

117. Second, as to Fogarty's claim relating to the Thomas Cup, it needs to be pointed out that Fogarty did not enter the trials process for the Thomas Cup. Rather than enter the trials and compete against other athletes in an effort to make the Thomas Cup Team, he instead determined to attack USAB's selection process.

118. The issue regarding the Thomas Cup is whether or not BWF rules allow USAB to utilize a trials competition to choose the US Thomas Cup Team. Fogarty's position is that selection to the Thomas Cup Team must be based solely on BWF World Ranking points. He again relies on BWF General Competition Regulation 5.3, cited previously.

119. Since Fogarty's interpretation of Regulation 5.3 was discussed in the Hearing Panel's analysis concerning Fogarty's claims concerning the Pan American Games, it will not be repeated here.

120. The Thomas Cup is a badminton competition for men players held every two years. It is a team event. The Thomas Cup has two stages, a continental competition and then a finals competition. Teams advance from their continental competitions to the finals. Each country that enters must send at least four contestants, but can not send more than 10 contestants. In the Thomas Cup, individuals compete in men's singles and men's doubles. A parallel competition is held for the women, designated the Uber Cup.<sup>28</sup>

121. Since the Thomas Cup is not a multi-sport event, it is not covered by BWF Regulation 8.5, as was the 2007 Pan American Games.

122. However, as USAB points out, Fogarty's argument still fails for a number of reasons.

123. First, a correct reading of Regulation 5.3 does not support Fogarty's position that members of the Thomas Cup Team must be selected based on the BWF World Ranking list. Rather, Regulation 5.3 merely requires that Member Associations,

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<sup>28</sup> See BWF Regulations for the 2008 Thomas and Uber Cups.

after selecting their entrants, list them based on playing strength for purposes of fixing draws.

124. This was explained by Neil Cameron, Chief Executive of the BWF, in his May 23 2003 letter to Peter Alkalay, Fogarty's attorney at the time. In that letter Mr. Cameron was responding to Fogarty's 2005 claims that invitations to the 2006 Thomas Cup must be based on the World Ranking list. In his letter Mr. Cameron stated:

The second sentence of this Regulation [5.3] mean[s] that entries must be listed in the order of appearance on the IBF World Ranking list. What is being stated is that, once the entries have been decided, they must be listed in order of strength. Some of our [Member] Associations enter players none of whom have world rankings, and sometimes their entries comprise some players with world rankings and some without. The sentence cannot be construed to mean that an Association must make entries in the order of the World Ranking list. The key word is "list". The entries must be listed in order of strength, not made....We make use of the order submitted by a Member Association when making its entries only when there is not a world ranking for the entry concerned.

Mr. Cameron went on to explain that this would be the case when making draws for unranked players.

125. Mr. Cameron concluded his discussion of this issue in his May 23 letter by stating:

There is nothing in the IBF Regulations that requires an Association to enter its highest-ranked players....Therefore, each Association is free to enter whomever it wishes using whatever system of selection is permissible under its own Rules.

126. Further, Mr. Cameron explained in his May 23 letter that:

The first sentence of this Regulation [5.3] was developed to prevent organizers who may have less court time than desirable from artificially saying players can only enter one or two events of the normal five (MS [men's singles], MS [women's singles], MD [mixed doubles], WD [women's doubles], XD [mixed doubles], rather than all three, if that is the player's wish.

127. Also, Punch Gunalon, BWF Executive Deputy President, in a letter dated January 3, 2006, directed to BWF Member Associations and Continental Confederations also reiterated that a Member Association may develop its own procedures for team events, such as the Thomas Cup. In that letter Mr. Gunalon stated:

Player Qualifications for Team Events To participate in all IBF team events each member association may develop its own procedures to select its team members for IBF team competition, providing that all players comply with C. Regs [General Competition Regulations] 8.2 and 5.1.<sup>29</sup> The IBF team events would include, but not limited to Sudirman Cup, Thomas Cup, Uber Cup, World Junior Team Championships, Continental Team Championships and Multi-Sports Events which contain team competition.

128. Second, Fogarty's claim is the same one that he litigated relating to the Thomas Cup in 2006. That claim was heard by an AAA arbitrator, who ruled against Fogarty. *Fogarty v. USA Badminton*, Case No. AAA 30 190 01374 05 (Award dated January 27, 2006). In selecting athletes for the 2006 Thomas Cup Team, USAB used a trials competition. Fogarty objected, claiming that USAB had to choose its Team based solely on the BWF World Ranking list. In analyzing Fogarty's claim, the arbitrator found that the phrase contained in BWF General Competition Regulation 5.3 stating that, "[p]layers must be permitted to enter all events for which they qualified," did not mean that players had to be chosen based on the BWF World Ranking list. The arbitrator concluded that there was "nothing wrong" with the actions of USAB in selecting US athletes to the Thomas Cup Team through a trials process. *Id* at 2.

129. The Hearing Panel agrees with the arbitrator in his ruling.

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<sup>29</sup> Regulations 8.2 and 5.1 pertain to membership and nationality requirements.

130. Further, since the Thomas Cup is a team event, it only makes sense that USAB would want to put forward the best team possible. How it selects athletes for US badminton teams is a decision that should be made by USAB, which has expertise in this area. Selecting athletes based on the BWF World Ranking list may be the best way to put together a competitive team, or it might not be. That decision is for USAB. In the case of the Thomas Cup, USAB determined that a trials competition was the best way to select its Thomas Cup Team. Fogarty desires to change this process for his own advantage. He had a chance to prove his merit by entering into the trials process, but he chose not to do so.

131. Third, as USAB points out, Fogarty is not restricted by USAB in his ability to accrue BWF World Ranking points. The BWF World Ranking system as used to determine qualification positions for the 2008 Olympic Games is based on points earned from an athlete's ten best tournament results in the previous 12-month period, and can include, at most points form one BWF team event. Appendix 6 (World Ranking System) to the BWF General Competition Regulations. See also, BWF Olympic Qualifying Regulations for Beijing 2008. Athletes who do not participate in a BWF team event, such as the Thomas Cup, may still participate in ten or more other BWF sanctioned tournaments to maximize their BWF World Ranking points for Olympic qualification. Whether or not an athlete represents the US in the Thomas Cup does not prevent that athlete from having the chance to qualify for the 2008 Olympic Games. Therefore, Fogarty's argument that by selecting Thomas Cup athletes through a trials process, USAB has implemented a selection process that is more restrictive than that allowed by the BWF is groundless.

## XII. AWARD

132. The Hearing Panel finds no merit in Fogarty's claim that USAB is not in compliance with Section 220522(a)(14) of the Act, which provides that an NGB shall not have "eligibility criteria related to amateur status or to the participation in the Olympic Games, the Paralympic Games, or the Pan-American Games that are more restrictive than those of the appropriate international sports federation."

133. Fogarty's Article VIII Complaints are denied in their entirety.

## XIII COSTS AND ATTORNEY FEES

134. USAB requests that the Hearing Panel order that all costs and attorney fees be borne by Fogarty in light of his "persistent, duplicative, and manipulative legal filings" that require USAB to spend money defending his constant claims, and which in turn take funding away from badminton athletes and programs.

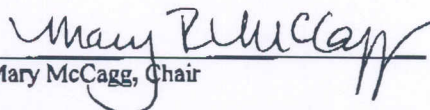
135. The Hearing Panel makes no determination on USAB's request at the present time. Rather, the Hearing Panel seeks additional information from the parties as to the authority and justification for awarding costs and attorney fees in an Article VIII proceeding. Accordingly, the Hearing Panel requests that the parties respond to the following questions:

- (a) Each party shall provide to the Hearing Panel its position on the authority of an Article VIII Hearing Panel to make an award of costs and attorney fees associated with an Article VIII proceeding.
- (b) Further, assuming that such authority exists, each party should discuss the basis or reasons for granting, or not granting, an award of costs and attorney fees in this matter. The parties should comment on the relevance of the outcome of this proceeding, as well as on the conduct and the financial resources of the parties.
- (c) Further, USAB has raised the issue of Fogarty's "persistent, duplicative, and manipulative legal filings." USAB should provide in

its response information pertaining to the actions Fogarty has filed relating to Olympic/amateur sport matters, the validity of those filings and whether the number and validity of filings should have any bearing on an award of costs and attorney fees against Fogarty in this proceeding.

- (d) If an award of costs and attorney fees were to be granted, USAB should indicate how such an award would be collected upon or otherwise enforced and the authority for such collection or enforcement. Fogarty may also provide a response on his position on this issue.
- (e) USAB shall provide to the Hearing Panel the amount of costs and attorney fees it is requesting with regard to this proceeding. The request should be accompanied by a statement documenting those costs and fees (the statement shall not be in such detail so as to disclose any attorney client privilege or work product of USB's attorneys).

136. USAB shall submit its response to the questions posed by the Hearing Panel by May 13, 2008. Fogarty may reply to USAB's response, and shall submit his response to the questions posed by the Hearing Panel by May 23, 2008.

  
Mary McCagg, Chair 4/28/08

Robert P. Latham, Panel Member  
Max Cobb, Panel Member  
Debbie Hesse, Panel Member  
Courtney Johnson, Panel Member

Signed this 28<sup>th</sup> day of April, 2008