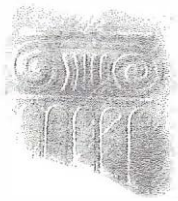

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2017/A/5127 **Bulgarian Weightlifting Federation (BWF) v. International Weightlifting Federation (IWF)**

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi Fumagalli, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Frans de Weger, Attorney-at-Law, Zeist, The Netherlands

Mr Martin Schimke, Professor and Attorney-at-Law, Dusseldorf, Germany

in the arbitration between

Bulgarian Weightlifting Federation (BWF), Sofia, Bulgaria

Represented by Mr Radostin Vasilev and Ms Iva Nikolova, Attorneys-at-Law, Vasilev Consulting, Sofia, Bulgaria and Mr Georgi Gradev, Attorney-at-Law with SILA Lawyers, Sofia, Bulgaria

Appellant

and

International Weightlifting Federation (IWF), Lausanne, Switzerland

Represented by Mr. Ross Wenzel and Mr. Nicolas Zbinden, Attorneys-at-law, Kellerhals Carrard, Lausanne, Switzerland

Respondent

I. PARTIES

1. The Bulgarian Weightlifting Federation ("BWF") is the member federation for Bulgaria of the International Weightlifting Federation and is responsible for the sport of weightlifting in Bulgaria. It has its seat in Sofia, Bulgaria.

2. The International Weightlifting Federation ("IWF") governs the sport of weightlifting worldwide. As such, the IWF has *inter alia* the responsibility to pursue all potential anti-doping rule violations within its jurisdiction according to the IWF Anti-Doping Policy (the "ADP"), adopted to implement IWF's responsibilities under the World Anti-Doping Code (the "WADC"). The IWF has its registered seat in Lausanne, Switzerland, and its secretariat in Budapest, Hungary.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in this award only to the submissions and evidence it considers necessary to explain its reasoning.

4. On 2 March 2015, 11 Bulgarian athletes were subject to out-of-competition doping controls at a training camp preparing for the European Championship in Georgia. The analyses of the samples provided by these athletes were reported to show the presence of "*3-hydroxystanozolol glucuronide*" ("Stanozolol"), a prohibited substance under the applicable list of prohibited substances and methods.

5. On 19 March 2015, as a result, these athletes were provisionally suspended from any weightlifting activity.

6. On 10 June 2015, the IWF Hearing Panel imposed an 18-month period of ineligibility on 4 of those athletes because their violation was a second one. The other 7 athletes were declared ineligible for 9 months. The IWF Hearing Panel found that the athletes could establish on a balance of probability that the presence of Stanozolol was the result of the use by the athletes of a contaminated food supplement, called Trybest, which had been given them by the BWF staff during a training camp. On a balance of probabilities, the athletes were found to bear No Significant Fault or Negligence because the product had been used for many years by the Bulgarian team and had never caused any problems at doping controls.

7. On 6 October 2015, the Court of Arbitration for Sport (the "CAS") confirmed in an award rendered in the arbitration proceedings CAS 2015/A/4129 (the "First Award") the decision of the IWF Hearing Panel.

8. On 9 November 2015, the President of the IWF sent a letter to the BWF (the "Letter of 9 November 2015"), informing it of the decision of the IWF to impose on BWF a fine in

the amount of USD 500,000 based on Article 12.3.1(b)(7) of the ADP because of the 11 anti-doping rule violations confirmed by the CAS in the First Award. The Letter of 9 November 2015 drew the BWF's attention to the fact that the fine was payable within 6 months from its receipt; that, in default of payment, the BWF would be suspended for 4 years from the date of default; and that until the fine was paid in full the BWF was suspended from all weightlifting activities within the IWF, including the participation in any IWF event. The letter continued "*Further to the above in line with the Special Anti-Doping Rules your Federation/National Olympic Committee ("NOC") shall not be permitted to enter competitors for the next ensuing Youth Olympic/Olympic Games. If such MF is permitted to compete in any Olympic Qualifying event prior to the next ensuing Youth Olympic/Olympic Games, the MF shall not secure any Olympic qualifying points in such event.*" The Letter of 9 November 2015, then, gave details of the account into which the fine had to be paid within 30 days and noted that during said period BWF athletes were eligible to compete in IWF events.

9. On 17/18 November 2015, the IWF Executive Board purported to confirm the decision on the fine of USD 500,000 of the IWF President contained in the Letter of 9 November 2015.

10. On 30 November 2015, the BWF filed an appeal with CAS against the Letter of 9 November 2015, on the basis that it is qualified as a final decision (CAS 2015/A/4319).

11. On 15 February 2016, the CAS issued its award in CAS 2015/A/4319 (the "Second Award"), setting aside the decision of the IWF President contained in the Letter of 9 November 2015 in the portion concerning the fine imposed on the BWF, but confirmed the ban on participation in the Youth Olympic and Olympic Games. The CAS found that the decision imposing the fine had been rendered by the wrong body within the IWF, a failure that could not be corrected by CAS. The CAS anticipated that, should the correct body, *i.e.* the IWF Executive Board, confirm the decision of the IWF President, the BWF would have to file a new appeal to CAS. As far as the ban imposed on the participation of BWF's athletes in the following Olympic Games was concerned, the CAS held that the ban had been adopted under Part C.1 of the Qualification System, was an automatic consequence of the number of violations of the ADP, and had been validly imposed.

12. By a letter dated 18 February 2016, the IWF President wrote to the members of the IWF Executive Board, circulating a voting sheet and inviting them to determine, *inter alia*, whether they wished to impose a fine of USD 500,000 on the BWF or suspend it for up to four years. The letter noted that nothing would prevent the BWF from appealing against the amount of the fine on the ground of proportionality. The IWF President recommended the imposition of the fine. The voting sheets annexed to the letter contained a *caveat* as follows: "*Deadline 25.02.16. Effective date for all decisions: 25.02.2016.*" The sheets contained a space for the voter's signature, but did not give any indication that the form required dating. Each voting sheet identified the member whose voting sheet it was.

13. Following this letter, 17 of the 21 members returned their voting sheets within the deadline. A number of them did not date their voting sheets and three did not sign them. One member voted by e-mail, withdrawing his previously completed voting sheet.

14. On 24 February 2016, the BWF filed a new appeal to CAS (CAS 2016/A/4460) to challenge the purported decision of 17/18 November 2015 of the IWF Executive Board

to confirm the fine of USD 500,000 (*see supra*).

15. On 29 February 2016, the IWF sent a letter to CAS asserting that the decision of the Executive Board had not yet been duly notified, thus no formal decision had been given, and that the appeal was therefore premature. This was confirmed in a letter of the IWF to the CAS of 11 March 2016. In this letter, the IWF argued that the IWF Executive Board in its November session only confirmed empowerment of the IWF President to adopt such decision, but did not confirm the IWF President's decision contained in the Letter of 9 November 2017. Since the CAS had set aside the decision of the IWF President imposing a fine, there was no decision in place for confirmation by the Executive Board in November 2015.

16. On 1 March 2016, the IWF notified a new decision of the Executive Board (the "Decision of 1 March 2016") to the BWF, purporting to re-impose the fine of USD 500,000.

17. On 22 March 2016, the BWF filed an appeal with CAS (CAS 2016/A/4511) to challenge the Decision of 1 March 2016.

18. On 27 January 2017, the CAS issued an award (the "Third Award") declaring invalid the Decision of 1 March 2016, including the fine of USD 500,000 imposed thereby, because no provision in the IWF system allowed for a decision to be adopted outside a meeting in person. At the same time, the CAS decided to refer the matter back to the IWF Executive Board for further evaluation and consideration. However, the Third Award contained the following "*Recommendation for an Adequate and Proportionate Sanction on the BWF*" in order to assist the IWF Executive Board in rendering a decision and bringing to an end a long-running dispute:

"*... the Panel considers that a suspension of the BWF from membership in the IWF by the IWF Executive Board for a period of one year starting from the date of the IWF Executive Board's decision would be an adequate and proportionate sanction based upon the failures* [of] *the BWF. The Panel reiterates that such decision is ultimately for the IWF Executive Board and its suggestion is merely made in the form of guidance to assist the parties in seeing this procedure to conclusion. Such suggestion is, of course, made without prejudice to any decision ultimately rendered by the IWF Executive Board and (in the event of any further appeal to the CAS from any such decision) would in no way be binding on any future CAS Panel which would be considering the case on the material and arguments placed before it and in the light of the circumstances at that time*".

19. In a letter dated 11 April 2017 the IWF President informed the BWF that the IWF Executive Board, at a meeting held in Bangkok on 2 April 2017, had adopted a decision (the "Challenged Decision") as follows:

"*a fine of USD 250,000 (that is two hundred and fifty thousand US Dollars) shall be paid by the Weightlifting Federation of Bulgaria to the IWF due to the 11 Anti-Doping Rule violations committed by FILEV Ivaylo, NAZIF Ferdi, MANEVA Milka, URUMOV Vladimir, MURADOV Asem, MARKOV Ivan, ENEV Stoyan, MINCHEV Dian, DEMIREV Demir, NHUEN Nadezhda-Mey and IVANOVA Maya in 2015*".

20. The Challenged Decision made reference to Article 12.3.1 of the ADP and indicated that:

"*having considered the circumstances of the case and based on the content of the recent*

Arbitral Award issued by the Court of Arbitration for Sport (CAS 2016/A/4511) in particular with the consideration of the principle of proportionality, the Board considers that the reduction of the USD 500,000 fine indicated in point 7) of Article 12.3.1 is appropriate and has decided to impose a fine of USD 250,000.

Please note that all fines under Article 12.3.1 shall be paid within 6 months of from the receipt of the IWF decision.

In case the BWF fails this deadline it shall be considered as suspended from all weightlifting activities within the IWF, including participation in any IWF Calendar Events, until the fine is settled in full. You shall proceed with the payment to the following account: ...".

21. The Challenged Decision was transmitted to the BWF by email. The BWF submits that it retrieved it only on 24 April 2017. Such submission is accepted by the IWF.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 11 May 2017, the BWF filed a statement of appeal against the IWF at the CAS with respect to the Challenged Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). In its statement of appeal, the Appellant nominated Mr Frans de Weger as arbitrator.

23. On 26 May 2017, the IWF appointed Prof. Martin Schimke as arbitrator.

24. On 9 June 2017, the BWF filed its appeal brief in accordance with Article R51 of the Code.

25. The appeal brief contained the following evidentiary requests:

"*BWF respectfully asks the Panel to order IWF (i) to produce a copy of the agenda for the EB meeting on 2 April 2017 along with the relevant tangible evidence proving that the very same agenda had been duly sent to the members of the EB before the meeting; (ii) to produce a signed list of attendance of the EB meeting on 2 April 2017; and (iii) to summon the 19 members enumerated in the Minutes ... in order to be cross-examined by BWF and to confirm (a) receipt of the agenda at stake and its contents, (b) that they were really present at the EB meeting in question ...; (c) that they have not been caught by surprise and have had the opportunity to get prepared for the debate, (d) that there really have been a discussion regarding BWF and the fine of USD 250,000 during the EB meeting on 2 April 2017 ..., and (e) that the IWF President did not take the Appealed Decision in camera ...*".

26. In a letter of 12 June 2017, the CAS Court Office, while transmitting to the Respondent the appeal brief, drew the IWF's attention to the Appellant's request for disclosure, and therefore set a deadline for a voluntary production or for the statement of the basis of its objection to the request.

27. On 19 June 2017, pursuant to Article R54 of the Code and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the Parties that the Panel appointed to hear this case was constituted as follows: Prof. Luigi Fumagalli,

President, Mr Frans de Weger and Prof. Martin Schimke, Arbitrators.

28. On 23 June 2017, the Respondent answered the Appellant's evidentiary requests, by producing copy of the agenda of the IWF Executive Board meeting of 2 April 2017, as sent on 10 February 2017 and updated on 29 March 2017, and, for the rest, noting what follows:

"*In respect of the signed list of attendance, the IWF has no such document. The minutes, which contain the list of attendance and were sent to all members of the EB, speak for themselves.*

As for the third element, it is an unusual and, in our submission, wholly inappropriate request. Whereas the Panel has the ex officio power to order the examination of witnesses, a party can only request the Panel to order the production of documents (see R44.3 and R57 of the CAS Code).

In any event, the allegations of the BWF contained in para. 59 of the Appeal Brief are defamatory and vexatious. There is no doubt that an EB meeting took place on 2 April 2017 and that the EB discussed the situation of the BWF. The nineteen members of the EB enumerated in the Minutes were present in Bangkok and came to the view that a fine of EUR 250'000 was the appropriate sanction to be imposed on the BWF. The undersigned counsel, who was in the room during the discussion and vote, can confirm it.

This is the further demonstrated by the fact that the Minutes of the EB meeting were sent to each and every member of the EB for comments .... One of them suggested some minor changes, which had nothing to do with the BWF issue .... These changes were then implemented in the final version of the Minutes ....

It is disappointing, to say the least, that the BWF saw fit to claim that the IWF President could have rendered this decision in camera and imply that he fabricated the Minutes of the EB, without any factual basis.

In view of the above, the IWF does not see why the 19 members of the EB should be "summoned" by the Panel. The evidence shows that the members of the EB were informed in advance that the CAS cases, including the case involving the BWF, would be discussed, the matter was effectively discussed by the EB members during their meeting of 2 April 2017 and the 19 EB members present in Bangkok rendered the decision subject to the present appeal. The BWF's request shall be rejected".

29. On 30 June 2017, the CAS Court Office informed the Parties that the Panel had considered the Appellant's request for the production of certain documents, as well as the Respondent's response thereto dated 23 June 2017, noting that the Respondent voluntarily produced the agenda of the EB meeting of 2 April 2017, as well as the Respondent's assertion that the no signed attendance list existed, and, therefore, that these first two requests were moot. At the same time, the parties were advised that the Appellant's request that the members of the EB be ordered to attend the hearing for examination (and cross-examination) was denied. The Appellant, however, was reminded that it had the possibility to directly secure the attendance at the hearing of any of those witnesses in accordance with Article R44.2 of the Code.

30. On 31 July 2017, within an extended deadline, the Respondent filed its answer to the appeal in accordance with Article R55 of the Code.

31. On 4 September 2017, the Parties were also informed that the Panel, who deemed a hearing necessary, intended to use a portion of the hearing for conciliation purposes in accordance with Article R56 of the Code. Therefore, the Parties were asked to ensure that their respective counsel/representatives had the necessary authority to enter into a settlement, if necessary.

32. On 9 October 2017, the CAS Court Office issued on behalf of the President of the Panel an order of procedure (the "Order of Procedure"), which was accepted and signed by the Parties.

33. On 13 October 2017, a hearing was held in Lausanne. The Panel was assisted by Mr Brent J. Nowicki, CAS Managing Counsel. The following persons attended the hearing for the Parties:

i.	for the Appellant:	Mr Radostin Vasilev and Ms Iva Nikolova, counsel, as well as (on the phone) Mr Georgi Gradev, counsel;
ii.	for the Respondent:	Ms Eva Nyifra, IWF legal counsel, Mr Ross Wenzel, Mr Nicolas Zbinden and Mr David Casserly, counsel.

34. At the opening of the hearing, both Parties confirmed that they had no objection to the appointment of the Panel. The Panel, then, explored with the parties the possibility of reaching a friendly settlement of a long lasting dispute. The Parties, however, indicated that, notwithstanding the efforts made, no agreement could be reached.

35. After pleadings by the counsel, at the conclusion of the hearing, the Parties expressly stated that their right to be heard and to be treated equally in the proceedings had been fully respected. The Panel, at the same time, invited the Parties to make an additional effort to find a settlement in the days following the hearing.

36. On 16 October 2017, the Respondent informed the Panel that in light of the "*sheer gulf between the parties' positions ... there is no reasonable prospect of this matter being settled*".

IV. THE POSITION OF THE PARTIES

37. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every submission advanced by the Parties. The Panel confirms, however, that it has carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

A. The Position of the BWF

38. In its request for relief, as specified in the appeal brief, the BWF asked the CAS:

"*Primary-ruling de novo*

1. To set aside and annul the entire decision passed on 2 April 2017 by the IWF Executive Board.

2. *To establish that BWF cannot be sanctioned based on Art. 12.3.1 ADP for the ADRVs committed by the 11 BWF athletes on 2 March 2015.*

Alternatively, only if the above in item no. 2 above is rejected

3. *To establish that BWF shall not be sanctioned based on Art. 12.3.1 ADP for the ADRVs committed by the 11 BWF athletes on 2 March 2015.*

Alternatively, only if the above in item no. 3 above is rejected

4. *To sanction BWF with a fine of not more than USD 45,826 based on Art. 12.3.1.b.7 ADP for the ADRVs committed by the 11 BWF athletes on 2 March 2015*

Alternatively, only if the above in item n. 4 above is rejected

5. *To sanction BWF with a suspension from participation in any IWF activities for a period of not more than six (6) months based on Art. 12.3.1.c ADP for the ADRVs committed by the 11 BWF athletes on 2 March 2015.*

In any event

6. *To order IWF to bear all the costs incurred with the present procedure.*

7. *To order IWF to pay BWF a contribution towards its legal and other costs, in an amount to be determined at the discretion of the Panel*".

39. In support of its requests, the BWF submitted, in its written pleadings as well as at the hearing, that a violation of "*natural justice*" was committed by the IWF Executive Board when it adopted the Challenged Decision, which is therefore "*procedurally flawed*" for the following reasons:

i. the right to be heard of the BWF was violated because the Challenged Decision was adopted without giving the BWF the possibility to file a statement of defence prior to it, notwithstanding the clear obligation contemplated by Article 3.9.2 of the IWF Constitution & By-laws (the "IWF Constitution"). The right to be heard has to be respected in every instance and it was not possible for the IWF to avoid hearing the BWF on the assumption that it had already expressed its position before the CAS in the cases that led to the Second Award and the Third Award. Such violation implies that the Challenged Decision should be considered "*completely void and of no effect at all*";

ii. the Challenged Decision was signed by the IWF President only. There is no clear confirmation of who participated in the meeting (failing a signed attendance list), and it is not clear whether the adoption of a decision in the case of the BWF was part of the agenda for the meeting. Therefore, in the absence of documents establishing the contrary, it could be held that the IWF President took the Appealed Decision without any discussion by the IWF Executive Board, or, alternatively, if there was a discussion, that there was no quorum at the meeting or that the question should not have been discussed, because it was not mentioned in the agenda. At the hearing, however, the ground based on the failure to circulate the agenda and specify the matters for discussion at the IWF Executive Board meeting of 2 April 2017 was withdrawn, in light of the documents provided by the IWF in the course of the arbitration;

iii. the "*fatal legal errors*" affecting the Challenged Decision exclude the possibility to cure it in the CAS proceedings.

40. The BWF, then, submitted that there were "*no grounds for a sanction*" and invoked the "*principle of concurrent offences*", to be applied bearing in mind the obvious link between the simultaneous anti-doping rule violations committed by the 11 athletes found positive following the doping control of 2 March 2015. In the opinion of the Appellant, in other words, there is not a plurality of violations, triggering the application of Article 12.3 ADP, but only one single violation, since the entire sequence of events shows that the adverse analytical findings were caused by the same product and the violations were committed simultaneously by all athletes. In addition, the IWF could not adopt the measure indicated by Article 12.3 ADP (which is not compulsory, as the use of the expression "*may*" proves), because it had not previously adopted a decision under Article 12.1 ADP, to which the disciplinary action allowed by Article 12.3 ADP is "*additional*".

41. Finally, the BWF contended that the sanction imposed by the Challenged Decision is in conflict with the "*principle of proportionality*", which should have been followed by the IWF Executive Board in the exercise of the discretion granted by Article 12.3 ADP. In the Appellant's opinion, the imposition of "*an additional sanction*" based on Article 12.3.1 ADP more than 2 years after the events which gave rise to the dispute, on an entity (the BWF) whose behaviour changed in the meantime, did not pursue a legitimate goal, was no longer necessary and imposed constraints no longer justified by an overall interest: if the sanction of the suspension, as recommended in the Third Award, had been correctly imposed since the beginning, it would have been completely served by now. Therefore, the Challenged Decision should be set aside in its entirety and no sanction should be imposed on the Appellant. In any case, the Panel is asked to "*step into the shoes*" of the IWF Executive Board and to replace the non-existent Challenged Decision with a new one, ruling *de novo*.

42. Alternatively, however, the Appellant submitted that under the same principle of proportionality, and taking into account comparable situations, the fine imposed should be reduced (without paying any deference to the Challenged Decision) to at least an amount of USD 45,826 (*i.e.*, USD 4,166 per athlete involved), to be further reduced taking in mind several mitigating circumstances, which include (i) the conduct of IWF *vis-à-vis* the BWF (which led to two CAS proceedings in which the IWF decisions were set aside), (ii) the violations of the right to be heard, (iii) the suspension imposed on the BWF athletes, and (iv) the limited financial resources of the BWF, which make it impossible for the BWF to pay a fine in a larger measure. Alternatively, as suggested at the hearing, and taking in consideration the foregoing, since the sanction of the suspension for 1 year is less severe than a fine of USD 250,000, a proper sanction would be the imposition of a suspension stayed on probation for a period of 2 or 3 years.

B. The Position of the IWF

43. In its answer the IWF requested the CAS to issue an award holding that:

"*I. The Appeal filed by the Bulgarian Weightlifting Federation is dismissed.*

II. The International Weightlifting Federation is granted an award for costs".

44. The Respondent submitted that, unlike what the BWF suggests, the members of the IWF Executive Board were fully aware (i) of the arbitral awards rendered by CAS, after hearing the BWF, in the previous cases, (ii) of the nature and the background of the violation at stake, as well as (iii) of the principle of proportionality to be applied. As a result, the IWF Executive Board imposed a proportionate sanction, taking into account the arguments put forward by BWF. It is therefore manifest that there was no breach of "*natural justice*".

45. At the same time, the IWF noted the following:

i. there is no question that the prerequisite of 9 violations set by Article 12.3.1 ADP has been met in this case, since 11 Bulgarian weightlifters committed an anti-doping rule violation within a calendar year: the application of Article 12.3.1 ADP is therefore triggered;

ii. the argument raised by the BWF on the basis of the "*concurrent offences*" doctrine is difficult to follow because the BWF failed to identify any rule providing for the application of this principle, and because, even assuming its existence, such principle would have the purpose of preventing a person from being sanctioned with a double penalty under two separate provisions for the same conduct. In this case, the BWF has not been charged with 11 violations, but only with one, *i.e.* a breach of Article 12.3.1 ADP. Therefore, the reference to this principle is odd;

iii. in any event, the IWF Executive Board took into account all circumstances of the case and decided that a sanction was appropriate;

iv. as the plain reading of Article 12.3.1 ADP makes clear, fines are considered less severe sanctions than a suspension, which can be imposed only in the most severe cases, when a mere financial penalty would be inadequate because it implies significant consequences for the suspended national federation and its athletes. In fact, in all cases of application of Article 13.2.1 ADP so far considered by the IWF, only a fine has been imposed. As a result, the decision of the IWF Executive Board to apply a fine, and not the more severe measure of a suspension, was appropriate;

v. also the amount of the fine was appropriate, as the IWF Executive Board decided to reduce the measure indicated by Article 13.2.1 ADP by half, taking into account the circumstances of the case, including the nature of the BWF's violation, the fact that the 11 anti-doping rule violations were held to be linked to the use of a contaminated supplement and the provision No Significant Fault or Negligence had been applied;

vi. the claim that the BWF has only limited financial resources is not supported by any evidence;

vii. it is therefore clear that the sanction imposed by the IWF Executive Board is neither "*evidently and grossly disproportionate*", or disproportionate at all, and must be upheld. With respect to the recommendations contained in the Third Award, the IWF considered that it was contrary to the spirit and meaning of the rule to apply in this case the sanction which is reserved for the most severe cases;

viii. the CAS Panel could not rule in the Second Award on the merits of the infringement because the BWF denied that possibility. As a result, the BWF cannot now claim

that if a sanction had been imposed at the time, it would have been entirely served because it caused the problem;

ix. Article 12.1 ADP deals with a completely different scenario, *i.e.* with national federations' non compliance with the ADP. Article 12.3, then, refers to a disciplinary action "*additional*" to that taken with respect to the individual athletes;

x. no rule allows the imposition of a suspension subject to probation, which in any case was never discussed or requested in these proceedings.

V. JURISDICTION

46. The jurisdiction of CAS is not disputed and was confirmed by the signature of the Order of Procedure. In addition, it is based on Article R47 of the Code and Article 13.6 ADP.

47. Article R47 of the Code provides as follows:

"*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body*".

48. As made clear by a consistent jurisprudence of CAS (*inter alia* CAS 2014/A/3775; CAS 2011/A/2436; CAS 2008/A/1513; CAS 2009/A/1919), based on the wording of Article R47 of the Code, three conditions are necessary for the jurisdiction to exist: (i) the parties must have agreed to the jurisdiction of CAS, (ii) there must be a decision of a federation, association or another sports-related body, and (iii) the internal remedies available to the appellant must have been exhausted prior to an appeal to the CAS.

49. As to the first point, the jurisdiction to hear a dispute concerning a decision (such as the Challenged Decision) adopted under Article 12.3.1 ADP derives from Article 13.6 ADP, which reads as follows:

"*13.6 Appeals from Decisions Pursuant to Article 12*

Decisions by IWF pursuant to Article 12 may be appealed exclusively to CAS by the Member Federation".

50. As to the second and third point, it is undisputed that the letter signed by the IWF on 11 April 2017 contained a decision pursuant to Article R47 of the Code, and that no remedies internal to the IWF are available to the BWF to appeal against the Challenged Decision.

51. The Panel, therefore, has jurisdiction over the Parties and the dispute.

VI. ADMISSIBILITY

52. The IWF agrees that the statement of appeal was filed by the BWF within the deadline set in Article 13.7.1 of the ADP. In addition, the statement of appeal complied with the requirements of Article R48 of the Code. The admissibility of the appeal is not challenged. Accordingly, the appeal is admissible.

VII. SCOPE OF THE PANEL'S REVIEW

53. According to Article R57 of the Code,

"*the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance...*".

VIII. APPLICABLE LAW

54. Article R58 of the Code provides as follows:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

55. The Panel finds that the applicable rules are the rules of IWF, in particular, the ADP.

56. IWF has its legal seat in Switzerland. Thus, the Panel holds that Swiss law applies on a subsidiary basis.

57. The provisions of the ADP which are relevant in this case are the following:

ARTICLE 12 SANCTIONS AND COSTS ASSESSED AGAINST SPORTING BODIES

12.1 The IWF Executive Board has the authority to withhold some or all funding or other non-financial support to Member Federations that are not in compliance with these Anti-Doping Rules. ...

12.3 IWF may elect to take additional disciplinary action against Member Federations with respect to recognition, the eligibility of its officials and Athletes to participate in IWF Calendar Events and fines based on the following:

12.3.1 Three or more violations of these Anti-Doping rules (other than the violations involving Articles 2.4 and 10.3) are committed by Athletes or other Persons affiliated with a Member Federation within a Calendar year in Testing conducted by IWF or Anti-Doping Organizations other than the Member Federation or its National Anti-Doping Organization.

In such event the IWF Executive Board will: ...

b) Fine the Member Federation as follows:

1) 3 violations 50,000 USD; In default of payment of the fine the Member Federation will be suspended for 1 year from the date of default.

2) 4 violations 100,000 USD; In default of payment of the fine the Member Federation will be suspended for 1 year from the date of default.

3) 5 violations 150,000 USD; In default of payment of the fine the Member Federation will be suspended for 2 years from the date of default.

4) 6 violations 200,000 USD; In default of payment of the fine the Member

Federation will be suspended for 2 years from the date of default.

5) *7 violations 250,000 USD; In default of payment of the fine the Member Federation will be suspended for 3 years from the date of default.*

6) *8 violations 300,000 USD; In default of payment of the fine the Member Federation will be suspended for 3 years from the date of default.*

7) *9 or more violations 500,000 USD; In default of payment of the fine the Member Federation will be suspended for 4 years from the date of default.*

c) *or suspend the Member Federation, from participation in any IWF activities for a period for up to four years in case of point 7 above.*

All the fines stated under 12.3.1 shall be paid within 6 months from the receipt of the IWF decision.

Until the fine is paid in full the Member Federation concerned is suspended from all weightlifting activities within the IWF including participation in any IWF Calendar Event.

IX. MERITS

58. The object of this arbitration is the Challenged Decision, which imposed on the BWF a fine of USD 250,000 on the basis of Article 12.3.1(b)(7) of the ADP, because more than 9 anti-doping rule violations had been committed by athletes affiliated to the BWF in a calendar year. The BWF disputes the Challenged Decision and submits that it was adopted in violation of principles of "*natural justice*", without the grounds allowing its imposition and in violation of the principle of proportionality. The IWF, on the other hand, requests the Panel to dismiss the appeal and to confirm the Challenged Decision, as it was properly adopted and it imposed a proportionate sanction.

59. As a result of the Parties' requests and submissions, there are three main issues that need to be addressed by this Panel:

i. was the Challenged Decision adopted in violation of "*natural justice*"?

ii. did the grounds for the adoption of the Challenged Decision exist?

iii. was the sanction imposed by the Challenged Decision proportionate?

60. The Panel will consider each of those issues separately and in sequence.

i. Was the Challenged Decision adopted in violation of "natural justice"?

61. The Panel notes that the first group of submissions, referred to by the Appellant in general terms to consist in violations of "*natural justice*", includes contentions regarding the alleged existence of procedural violations, which, in the Appellant's view, would fatally affect the Challenged Decision and should lead to its setting aside, with no sanction imposed. Those violations include the failure by the IWF to respect the BWF's right to be heard before the Challenged Decision was adopted and other flaws relating to the procedure for its adoption. This latter point, consisting in essence in the allegation that no proper meeting of the IWF Executive Board was held on 2 April 2017 to adopt the

Challenged Decision, was however withdrawn at the hearing, on the basis of the documents provided by the IWF during the arbitration, and was therefore no longer pursued by the Appellant. Consequently, also the evidentiary measure that the Appellant had requested (hearing of the members of the IWF Executive Board), already denied by the Panel, became definitively moot.

62. As a result, only one point concerning "*natural justice*" appears to remain outstanding: the violation of the BWF's right to be heard before the adoption of the Challenged Decision.

63. In its respect, the Panel has two observations.

64. The first is linked to the CAS power of review of the facts and the law under Article R57 of the Code. As it is well known, the Panel, on such basis, hears the case *de novo*: therefore, the Panel is not limited to a mere review of the legality of the Challenged Decision, but can issue a new decision on the basis of the applicable rules and considers for such purposes all new evidence and submissions brought by the parties. This implies that, even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129; CAS 98/211; CAS 2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). In fact, the virtue of an appeal system which allows for a full re-hearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "*fade to the periphery*" (CAS 98/211, citing Swiss doctrine and case law). In other words, as held in CAS 2008/A/1574, "*any allegation of denial of natural justice or any defect or procedural error even in violation of the principle of due process which may have occurred at first instance ... will be cured by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations*".

65. The Appellant has had (and used) the opportunity to bring its case before CAS, where all of the Appellant's fundamental rights have been duly respected. At the end of the hearing, the Appellant's counsel expressly confirmed that the Appellant had no objections in respect of his right to be heard and to be treated equally in the arbitration proceedings. Accordingly, even if any of the Appellant's rights had been infringed upon by the IWF – but without conceding that they had actually been infringed – the *de novo* proceedings before CAS would be deemed to have cured any such infringements.

66. The second is linked to the nature of the alleged violation. The Panel is in fact aware of some CAS precedents in which it was held that some "fundamental violations" cannot be cured by an appeal to CAS. This is not however the case of the Appellant. The CAS precedents, in fact, relate to anti-doping proceedings or to disputes in which the omitted procedural steps (*e.g.*, the conduct of the B sample analysis) cannot be replicated before CAS or in which the CAS hearing would not entirely allow the exercise of the rights disregarded by the lower body. In the case of the BWF, in fact, the Appellant could bring before this Panel all elements that it could have brought before the IWF Executive Board – and no effect appears to remain uncured by the CAS proceedings.

67. In light of the foregoing, the Panel is of the opinion that the Appellant's submissions based on the violation of "*natural justice*" do not need to be entertained.

ii. Did the grounds for the adoption of the Challenged Decision exist?

68. The above conclusion leaves it open for the Panel to consider whether the Challenged Decision was properly adopted, *i.e.* whether the substantive requirements for its adoption were met in the case of the BWF.

69. The Appellant disputes the existence of the grounds for the adoption of the measure contemplated by Article 12.3.1(b)(7) ADP under two points of view. The first relates to the fact that the 11 anti-doping rule violations taken as a basis for the measure were actually only one single violation, which does not allow any "additional" measure under Article 12.3.1(b)(7) ADP. The second concerns the failure of the IWF to adopt the measure indicated by Article 12.1 ADP: since this provision contemplates the "basic" measure available to the IWF against a national federation, the action "additional" to it mentioned by Article 12.3.1(b)(7) ADP was not available to the IWF because no "basic" measure had been adopted prior to the "additional" sanction.

70. The Panel does not agree with the Appellant's submissions.

71. With respect to the first point, the Panel notes that it cannot be disputed that in a calendar year 11 Bulgarian athletes tested positive to a prohibited substance and were separately found responsible for anti-doping rule violations. Each of those athletes were subject to disciplinary proceedings and their cases were even considered by CAS in the First Award: each of them received an individual sanction. In other words, 11 sanctions followed 11 anti-doping rule violations.

72. As a result, the condition stipulated by Article 12.3.1(b)(7) ADP is patently met, as its literal interpretation shows.

73. In that regard, the Panel notes that according to the jurisprudence of the Swiss Federal Tribunal (as recently confirmed in the decision of 29 June 2017 4_A600/2016, at consid. 3.3.4.1 and 3.3.4.2; but see also ATF 87 II 95 consid. 3; ATF 114 II 193, p. 197, consid. 5.a; decision of 3 May 2005, 7B.10/2005, consid. 2.3; decision of 25 February 2003, consid. 3.2), the interpretation of the statutes and rules of IWF, a large sport association with seat in Switzerland, starts from the literal meaning of the rule, which falls to be interpreted, but must show its true meaning, which is shown by an examination of the relation with other rules and the context, of the purpose sought and the interest protected, as well as of the intent of the legislator.

74. In this vein, the Panel notes further that the mentioned literal interpretation of Article 12.3.1 ADP appears to be in line also with the purpose sought by the rule: Article 12.3 ADP allows for an additional sanction against a member federation in the event a plurality of violations are committed by athletes affiliated to that federation in a calendar year, and adjusts the sanction depending on the number of violations. It therefore intends to create an incentive for a federation to better educate its athletes, in order to avoid a sanction which is greater the larger the number of violations: the trigger of the application of Article 12.3 ADP needs therefore only to be objective (the sheer number of violations), without further consideration of the "context" of the infringements. Otherwise, a large doping scheme involving a great number of athletes, based on the use of the same substance in the same context, would be considered more leniently, for the purposes of Article 12.3.1 ADP than the occurrence of a relatively small number of unrelated

violations.

75. The simple fact that those athletes tested positive to the same substance, ingested because of the use of the same food supplement in the same factual context, does not change this conclusion. The principle of "concurrent infringements" (as the Panel understands it) does not allow otherwise: it might apply to subject the same individual to a single sanction in the event his/her action infringes more that one rule (so that the plurality of violations is treated as a violation of a single provision to avoid double incriminations), but certainly does not allow the conclusion that the same violation by several athletes (whatever their number), if committed in the same context, is to be treated as only one violation.

76. With respect to the second point, the Panel remarks that Article 12.1 and Article 12.3 ADP have different scopes of application: the first provision, in fact, provides for a sanction (withholding of financial support) on the member federation which is not in compliance with the anti-doping rules set by the IWF, *i.e.* in the event of a violation directly committed by the national federation; the second provision, on the other hand, applies irrespective of violations committed by the national federation, and provides (as said) for the consequence on the federation of violations committed by its affiliates.

77. In this respect, therefore, the measure contemplated by Article 12.3 ADP is "additional" not to the action allowed by Article 12.1 ADP, but to the sanctions imposed on the athletes who actually committed the anti-doping rule violations which trigger its application.

78. As a result, the Panel concludes that the grounds for the adoption of the Challenged Decision existed. The Appellant's submissions based on their absence are to be dismissed.

iii. Was the sanction imposed by the Challenged Decision proportionate?

79. The third issue regards the proportionality of the sanction adopted by the IWF in the Challenged Decision. The Appellant submits that the fine of USD 250,000 is disproportionate (in light of the circumstances of the case) and that other measures would be more appropriate.

80. The Panel has three preliminary observations in this respect:

i. the principle of proportionality implies that there must be a reasonable balance between the kind of the misconduct and the sanction. To be observed, the principle of proportionality requires that (i) the measure taken by the governing body is capable of achieving the envisaged goal, (ii) the measure taken by the governing body is necessary to reach the envisaged goal, and (iii) the constraints which the affected person will suffer as a consequence of the measure are justified by the overall interest to achieve the envisaged goal. However,

ii. the fact that alternative measures (alone or in combination) might be possible, and even constitute proper sanctions in a case, does not mean *per se* that the sanction actually imposed is disproportionate. The fact therefore that in the Third Award the CAS Panel recommended, on the basis of the principle of proportionality, a measure different from the sanction imposed by the Challenged Decision does not mean that the Challenged Decision adopted a disproportionate sanction; and

ii. the task of a CAS Panel is not to rewrite the rules of a sports association, which the

association, in the exercise of its freedom, decided to adopt. As a result, this Panel cannot "legislate" (even in the name of the principle of proportionality) by creating mechanisms (such as "suspension on probation") or combination of sanctions (*e.g.*, "blending" a fine with a suspension, so that they are both kept to a minimum) which are not contemplated by the rules.

81. In light of the foregoing, this Panel does not find the sanction imposed on the BWF to be disproportionate, as it did not exceed what is reasonably required in the search of a justifiable aim (CAS 2005/C/976&986, §§ 139-140), *i.e.* create an incentive for a federation to better educate its athletes. In fact, a fine of USD 250,000 is certainly capable of achieving the envisaged goal and is necessary to reach the envisaged goal: a sanction having no practical effects (from a financial or sporting aspect), such as a nominal fine would not serve any meaningful purpose. The constraints suffered by the BWF as a consequence of the fine are justified by the overall interest to achieve the envisaged goal.

82. In that respect, the Panel notes that much emphasis was put by the Appellant on its limited financial means, and therefore of the unbearable consequences that the fine USD 250,000 would have for it. At the same time, however, the Panel remarks that in support of such contention no evidence was offered, neither in the submissions nor during the hearing. Therefore, no relevance can be given to such element.

83. In the same way, no relevance can be given to the passing of time: first, because a sanction is always imposed after a violation on a subject which may have changed its attitude meanwhile; second, because the BWF itself did not allow the CAS Panel to decide in the Second Award on the merits of the violation. If the BWF had authorized the CAS to rule on the matter, any sanction which would have been imposed might have been served by now. And the BWF, which prevented a decision at that time, cannot now invoke to its advantage the delay in the final adjudication.

84. On the other hand, the Panel notes that the IWF in adopting the Challenged Decision took into account the peculiarities of the case, including the circumstances in which the anti-doping rule violations which triggered the application of Article 12.3.1(b)(7) ADP were committed. As a result, it reduced the fine to half the measure set by the rule, with the declared purpose of finding a proportionate measure. This Panel will not interfere with this exercise of discretion. It just confirms its result. In this regard, this Panel notes and accepts the *dictum* in the award of 21 May 2010, CAS 2009/A/1870, at para. 125, under which "*the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4)*". However, such jurisprudence, confirmed in several other CAS awards, far from excluding or limiting the power of a CAS Panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), only means that a CAS Panel "*would not easily 'tinker' with a well-reasoned sanction, i.e. to substitute a sanction of 17 or 19 months' suspension for one of 18*" (award of 10 November 2011, CAS 2011/A/2518, § 10.7, with reference to CAS 2010/A/2283, § 14.36).

85. The Panel therefore concludes that the Appellant's submissions based on the violation of

the principle of proportionality are to be dismissed.

X. COSTS

86. Article 65.1 of the Code reads as follows:

This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the panel on the issue.

87. Article R65.2 of the Code provides as follows:

Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.-- without which CAS shall not proceed and the appeal shall be deemed withdrawn. [...]

88. Article R65.3 of the Code provides:

Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

89. The present arbitration procedure is therefore free, except for the CAS Court Office fee of CHF 1,000 paid by the Appellant, which is retained by the CAS.

90. In the present case, having taken into account all the circumstances, including the outcome of the proceedings and the conduct of the parties in the arbitration, the Panel holds that the Appellant shall pay a contribution towards the legal fees and other expenses incurred by the Respondent in connection with the proceedings in the measure of CHF 5,000 (five thousand Swiss Francs).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Bulgarian Weightlifting Federation on 22 March 2016 is dismissed.

2. The decision of the Executive Board of the International Weightlifting Federation adopted on 2 April 2017, including the fine of USD 250,000, is confirmed.

3. The award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the Bulgarian Weightlifting Federation, which is retained by the CAS.

4. The Bulgarian Weightlifting Federation shall pay CHF 5,000 (five thousand Swiss Francs) to the International Weightlifting Federation as a contribution towards the legal fees and other expenses it has incurred in connection with these arbitration proceedings.

5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 18 December 2017

THE COURT OF ARBITRATION FOR SPORT

Luigi Fumagalli
President of the Panel