Arbitration CAS 2011/A/2601 Chitchanok Pulsabsakul, Sukanya Srisurat, Boonatee Klakasikit v. International Weightlifting Federation (IWF), award of 12 November 2012 (operative part of 26 July 2012)

Panel: Prof. Peter Grilc (Slovenia), President; Mr Michele Bernasconi (Switzerland); Prof. Denis Oswald (Switzerland)

Weightlifting
Doping (methandienone)
Trust of young athletes in their coach and duty of care
Exception of no significant fault or negligence
Obligation of signatories of the WADA Code to accept its mandatory parts without substantive changes
Substantive change to Article 10 of the WADA Code
Inconsistency of an anti-doping rule of an international federation with the WADA Code

1. **In the scenario that the local coach gave a modified food supplement to the athletes without their knowledge, the element trust of the athletes would be a relevant category. The notion of trust is complex and does not relate only to the methodological approach towards the training and its performance. Especially in the case of young athletes it extends much broader to the areas far beyond of pure sport and inevitably includes trust in relation with health and nutrition. It may be assumed that the athletes trusted that the food supplement they consumed was not manipulated. However, notwithstanding the trust that young athletes have in the local coach, they cannot be considered as relieved of their elementary duties to check what substances are offered to them.**

2. **An athlete may benefit from a reduction of the sanction in accordance with Article 10.5.2 of the IWF Anti-Doping Policy (same as Article 10.5.2 of the WADA Code) where circumstances are truly exceptional. It follows that an athlete cannot exculpate himself/herself by simply stating that the container of the particular product taken by him/her did not specify that it contained a prohibited substance. Also, athletes who, despite their youth and a possibly lower educational or informational level concerning anti-doping, have been active in national and international sports for some years, must know, or must be expected to know, of the existence of anti-doping regulations. As such they are expected to apply at least a minimal degree of diligence and not simply follow the instructions of their coach and ingest any kind of substance.**

3. **Article 23.2.2 of the WADA Code expressly requires that Signatories accept the mandatory parts of the WADA Code without substantive changes. Sanctions are expressly defined as those mandatory provisions. Article 20.3.1 requires the international federation to adopt and implement anti-doping policies and rules which conform with the Code. The purpose of Article 23.2.2 WADA Code is to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the mandatory provisions of the WADA Code, including the sanctions in Article 10.**

4. A double period of ineligibility (four years) in comparison with the sanction for the same offence under the WADA Code (two years) constitutes a substantive change to Article 10 of the WADA Code. In addition to the mere duration aspect, a sanction of four years may substantially make more difficult for an athlete to continue his or her career once the period of ineligibility has expired. Therefore, not only the nature but also the effects of a four years sanction are substantially different.

5. The WADA Code is not a set of "*self executing rules*": for the WADA Code to be relevant it must be enacted and adopted by the rules of the relevant sport body. A federation that adopts its own anti-doping rules and further declares to consider correct and lawful only an interpretation and implementation of its own rules that are consistent with the WADA Code, also accepts that its own rules have to be consistent with the WADA Code.

1 FACTS

1.1 The Parties

1.1.1 Mrs. Chitchanok Pulsabsakul, Mrs. Sukanya Srisurat and Mrs. Boonatee Klakasikit (collectively referred to as "the Appellants" because the issues of the present case are essentially common to all of the Appellants) are young weightlifting athletes from Thailand and registered with the Thai Amateur Weightlifting Association ("TAWA"). Athlete Pulsabsakul was born in 1993 and was member of the Thai national weightlifting team competing at the 2011 World junior Championship held in Penang, Malaysia, in July 2011. Athletes Srisurat, born in 1995, and Klakasikit, born in 1994, were members of the Thai national weightlifting team competing at the 2011 Youth World Championship held in Lima, Peru, in May 2011.

1.1.2 The International Weightlifting Federation ("IWF" or "Respondent") is the international governing body for the sport of weightlifting. The IWF was founded in 1905 and is established and organised in accordance with Articles 60 et seq. of the Swiss Civil Code; it has its seat in Lausanne, Switzerland. It is recognised by the IOC.

1.2 Facts of the case

1.2.1 The facts relevant to this case were basically undisputed and are as set out below.

A. Participation in international competitions in Lima (Peru) and in Penang (Malaysia)

1.2.2 On 2 May 2011, athletes Klakasit and Srisurat were tested by TAWA. Their samples were sent to and analyzed by the Mahidol University Laboratory in Thailand, which is a WADA

accredited laboratory. Both athletes were tested at the 2011 Youth World Championship held in Lima, Peru, in accordance with the Anti-Doping Policy of the IWF (the "IWF ADP"). Athlete Srisurat was tested on 12 May 2011 while athlete Klakasikit was tested on 13 May 2011. The samples taken were sent to and analysed by the Doping Control Laboratory of the INRS Institut Armand-Frappier, i.e. the WADA accredited Montreal laboratory, in Canada.

1.2.3 The athlete Pulsabsakul was tested by TAWA on 20 June 2011. Her sample was sent to and analyzed by the Mahidol University Laboratory in Thailand. On 6 July 2011 she was tested at the World Championships in Penang, Malaysia, in accordance with the IWF ADP. The sample taken was sent to and analysed by the Institute for Biochemistry of the German Sports University in Cologne, Germany, a WADA accredited laboratory.

B. Adverse Analytical Finding

1.2.4 Each of the athletes returned an adverse analytical finding for the prohibited substance Methandienone in the doping test conducted by the IWF during the respective championships. The Appellants had all nominated whey protein supplements on their doping control forms as a substance they had taken orally during the 7 days preceding the testing. The Appellants accepted that the testing procedure had been properly carried out in accordance with the IWF ADP.

C. TAWA Investigation Committee

1.2.5 In light of the positive doping tests of the athletes Klakasit and Srisurat, on 19 July 2011, TAWA appointed an investigation committee, the TAWA Committee for Investigation and Imposing Sanctions on Athletes using prohibited Substances ("TAWA Investigation Committee").

D. IWF Doping hearing Panel Decision

1.2.6 On 3 and 4 September 2011, a hearing was held by the IWF Doping Hearing panel ("IWF Panel") in relation to the Appellants' adverse analytical findings. On 10 September 2011, the Panel imposed the sanctions. Pursuant to the provisions of Article 10.2 of the IWF ADP each of the three athletes was sanctioned by four years ineligibility. In the decision of 10 September 2011 the IWD Panel concluded that, in light of the fact that the testing procedure had been conducted in accordance with the relevant rules and that the laboratory had complied with the International Standards for Laboratories, it was comfortably satisfied that the Appellants had committed a violation of the IWF ADP, in particular of Article 2.1 of the IWF ADP. The Appellants did not contest these findings; however they each sought a reduction of the period of ineligibility under the IWF ADP. The Panel explained the provisions of Article 10.5.1 (no fault or negligence) and Article 10.5.2 (no significant fault or negligence) of the IWF ADP and explained that it had no power to eliminate or reduce the otherwise applicable sanction under the IWF ADP unless the Appellants could prove on the balance of probabilities how the prohibited substance had entered their systems.

1.2.7 The Decision of 10 September 2011 is the subject of the appeal in this CAS arbitration.

2 PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

2.1 Statement of Appeal, Appeal Brief and Answer to the Appeal

2.1.1 The Appellants filed their statement of appeal ("Statement of Appeal") on 17 October 2011.

2.1.2 On 15 December 2011, the Appellants filed their appeal brief ("Appeal Brief"; Statement of Appeal and Appeal Brief together "Appeal") including exhibits (A-5 to A-22) and the statement that they intended to call as witnesses and/or expert witnesses, the following persons: Ms. Pawina Thongsuk (Olympic gold medallist at the Olympic Games of Athens), Captain Aphinya Dettuywatt (the national coach of the Appellants), Mr. Um-On (provincial coach of the Appellants), Major General Intarat Yodbangtoey (president of TAWA), Dr. Tongtavuch Anukarahonta (Head of the Mahidol Laboratory) and Dr. Laurent Rivier (scientific consultant).

2.1.3 On 13 December 2011, the CAS Court Office informed the parties that the Panel for the present dispute was constituted as follows: Professor Peter Grilc as President and Mr. Michele Bernasconi and Professor Denis Oswald as arbitrators chosen by the parties.

2.1.4 On 23 January 2012, the Respondent filed the Answer to the Appeal (the "Answer") with Exhibits including the expert statement by Dr. Hans Geyer and 9 exhibits (101-111) and the statement that it intended to call as witnesses and/or expert witnesses, the following persons: Dr. Hans Geyer and Ms. Monika Ungar (IWF legal counsel).

2.1.5 On 26 January 2012, the CAS Court office invited the parties to inform the office whether they preferred a hearing to be held or whether the Panel should issue an award based on the parties' written submissions.

2.1.6 The Appellants informed the CAS Court office that they insisted on an oral hearing, while the Respondent did not request it since in its view the requirements of Article R57 of the Code of Sports-related Arbitration (the "Code") were met; the Respondent, however, did not object to a hearing being held, should the Panel consider such hearing to be necessary.

2.1.7 On 18 April 2012, the Panel issued an Order for Procedure setting out, among other things, the composition and the seat of the Panel, the language of the arbitration, and the law applicable to the merits of the dispute. The Order for Procedure was signed on behalf of the Appellants and the Respondent.

2.2 Hearing and post-hearing submissions of the parties

2.2.1 On 14 February 2012, the CAS informed the parties that the hearing would take place on 26 April 2012 in Lausanne. The parties were invited to confirm the attendance of witnesses and the manner in which they would be available to give evidence.

2.2.2 The hearing took place on 26 April 2012 in Lausanne. In addition to the Panel members assisted by Ms. Andrea Zimmermann of the CAS Court Office in Lausanne, the hearing was attended by Mr. Claude Ramoni and Mr. Jean-Marie Kiener, both representing the Appellants as counsel and co-counsel and Mr. Yvan Henzer and Ms. Monika Unger, representing the IWF. The parties and the panel were assisted by Ms. Sarocha Thongperm, interpreter provided by the Appellants.

2.2.3 The Panel heard oral opening statements by counsel for the parties and evidence from the following (expert) witnesses: Dr. Laurent Rivier (expert witness called by the Appellants), Dr. Hans Geyer (expert witness called by the Respondent), Dr. Tongtavuch Anukarahnonta (by conference call), Ms. Pawina Thongsuk (by conference call), Pahinya Dettuyawat (by conference call), Mr. Um-On (by conference call), Mr. Intarat Yodbangtoey (by conference call), the Appellants (as parties). The expert witnesses, witnesses and the Appellants were questioned firstly by the party, who called them, then by the opposing party, then cross-examined and finally questioned by the Panel.

2.2.4 Before the end of the hearing the Panel heard the parties' oral closing statements. In their presentation, the Appellants insisted their requests be accepted, while the Respondent insisted on dismissal of the Appeal in its entirety.

2.2.5 At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings nor to the formation of the Panel. Following these final statements, the President of the Panel declared the hearing closed.

2.2.6 With a post-hearing letter of 16 May 2012 the Panel asked the Parties for submissions to comment on two recent CAS awards, i.e. CAS 2011/A/2658 and CAS 2011/O/2422. The Appellants and the Respondent answered with letters dated 24 May 2012.

3 THE RELEVANT RULES OF CAS, IWF AND WADA

3.1 Code of Sports-Related Arbitration (2010 Edition)

R57 (Scope of Panel's Review, Hearing) *"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. Upon transfer of the file, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments. He may also request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Articles R44.2 and R44.3 shall apply.*

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise. If any of the parties is duly summoned yet fails to appear, the Panel may nevertheless proceed with the hearing".

R58 (Law applicable to the merits) *"The Panel shall decide the dispute according to the applicable regulations and 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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

3.2 IWF Rules

In accordance with Article R58 of the Code, the relevant provisions of the IWF rules and regulations which shall apply on the merits are as follows:

IWF ADP, effective as of 31 March 2009, particularly Articles 2.1, 10.2, 10.4, 10.5.2, and 10.6

Article 2 (ANTI-DOPING RULE VIOLATIONS)

"Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously".

Article 10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:

First violation: Four (4) years' Ineligibility".

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

"Where an Athlete or other Person can establish how a Specified Substanceentered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".

Article 10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.2 No Significant Fault or Negligence

"If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced".

Article 10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility

"If the IWF establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of six years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule".

3.3 WADA Rules

Following rules of the World Antidoping Code ("WADC" or "WADA Code"), effective as 1 January 2009

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: Two (2) years Ineligibility".

4 JURISDICTION

CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS is based on Article 13.2. 1 of the IWF ADP that states that the decision may be appealed exclusively to CAS in accordance with the provisions applicable before CAS. The jurisdiction of CAS, in fact, is not disputed by the parties and has been confirmed by the signing of the Order of Procedure.

5 ADMISSIBILITY

The statement of appeal was filed within the deadline set in the applicable IWF rules and the Appeal Brief was filed within the prescribed deadlines. No objections have been made against the admissibility of the appeal by the Respondent. The appeal of the three Appellants is, therefore, admissible.

6 POSITIONS OF THE PARTIES, WITNESSES AND EXPERTS TESTIMONIES

A. Appellants' Submissions

6.1 The main Appellant's submissions as from the Appeal Brief, the Hearing and the post-hearing letter of 24 May 2012 can be summarized as follows:

6.1.1 In respect of the background facts regarding the challenged decision during 2010 and 2011, each of the Appellants was a member of the Thai national weightlifting team and competed at both national and international events. They were subjet to doping control tests by the IWF and the TAWA.

6.1.2 The athletes Klakasikit and Srisurat were tested by TAWA on 2 May 2011. Their samples were sent to and analysed by the WADA accredited Mahidol laboratory and resulted in no adverse analytical finding. Both athletes competed internationally at the World Championships in Lima where they were tested on 12 May 2011 (Srisurat) and 13 May 2011 (Klakasikit). Both samples were sent to and analysed by the Doping Control Laboratory of the INRS Institut Armand-Frappier, i.e. the WADA accredited Montreal laboratory, in Canada. The athletes returned an adverse analytical finding for the prohibited substance Methandienone.

6.1.3 The athlete Pulsabsakul was tested by TAWA on 20 June 2011. Her samples were sent to and analysed by the WADA accredited Mahidol laboratory and resulted in no adverse analytical finding. The athlete competed internationally at the World Championships in Penang where she was tested on 6 July 2012. Her sample was sent to and analysed by the Institute for Biochemistry of the German Sports University in Cologne, Germany, a WADA accredited laboratory. The athlete returned an adverse analytical finding for the prohibited substance Methandienone.

6.1.4 The Appellants all accepted that the testing procedure had been properly carried out in accordance with the IWF ADP and they all had all nominated whey protein supplements on their Doping Control Form as a substance they had taken orally during the 7 days preceding the testing. In light of positive tests of the athletes Srisurat and Klakisikit, on 19 July 2011, TAWA appointed an investigation committee to review what had occured with the members of the national team (TAWA Investigation Committee).

6.1.5 During 2010 the Appellants attended a national camp under the care and control of the national women's coach, Ms. Dettuyawat; whilst under the supervision of Ms. Dettuyawat, they were provided with a product of the Musashi brand ISO 8, a whey protein supplement. The coach had this particular brand of product analysed by a forensic laboratory which had confirmed that there were no prohibited substances in the product. Ms. Dettuyawat provided the athletes with the supplements until departure from the national camp. They left the camp at the end of 2010, returned to their province and competed for their clubs.

6.1.6 From January to March 2011, all of the Appellants were at the Nakornsawan club, training together under the supervision of their coach, Mr. Um-On. They informed him of their use of the whey supplement during the national camp; however Mr. Um-On decided to supply the Appellants with another not tested product (the "modified Musashi"), i.e. a Standard Musashi product to which Mr. Um-On had added supplements he had received from a Chinese coach. Mr. Um-On did not have the supplements tested, however he specifically asked the Chinese coach what was in the supplements and was answered there would be no problems. Consequently, he administered the modified Musashi to the Appellants each day until they returned to the national camp in mid to late March 2011. The modified Musashi has subsequently been tested and was found to contain each of Methandienone, Stanozolol and Norethindrone. The director of the Mahidol Laboratory explained to the IWF Panel that the laboratory is a WADA accredited and uses precisely the same analytical procedures as the laboratories in Cologne and Montreal.

6.1.7 The athletes claim that the prohibited substance had entered their systems via the modified Musashi provided by the coach Um-On during their stay in the provincial club between January and March 2011. The IWF Panel considered it was impossible that the modified Musashi had caused the adverse analytical findings, given that the athletes had negative doping tests between the ingestion of the supplements and the positive results, and that Stanozolol and Norethindrome would also have been found in the relevant results if the modified Musashi was the source of the Methandienone. Consequently, the athletes had not demonstrated how the prohibited substance had entered the systems. In the circumstances, the IWF Panel considered not to be able to apply a reduction of the sanction.

6.1.8 In addition to the above and the facts found by the IWF Panel the Appellants submit several facts and evidence to prove how the prohibited substances entered their bodies and their degree of fault, among others copies of testimonies given to the TAWA Investigation Committee, profiles of the athletes, testimonies of the national coach Dettuyawat and the provincial coach Um-On, results of the TAWA conducted analyses of Musashi and modified Musashi, conclusion of the TAWA Investigation Committee that Mr. Um-On has been sanctioned with suspension of his duty as a coach for a period of four years. Finally the Appellants rely on the opinion of Dr. Laurent Rivier from 8 December 2011, which discusses the possibility that the presence of Methandienone in the athletes bodies was due to the ingestion of the modified Musashi provided to them by Mr. Um-On. They rely on the conclusion that such an occurence is possible, despite the fact that Methandienone was not detected by the Mahidol laboratory, and the additional prohibited substances present in the modified Musashi were not detected in the doping control tests which gave rise to the adverse analytical findings.

6.1.9 As to the merits, the Appellants concentrate on the inconsistency of the IWF ADP sanctions with the WADC and on the principle of proportionality.

6.1.10 As to the **Inconsistency of the IWF ADP sanctions with the WADC** the Appellants claim that they have been unlawfully sanctioned with a period of inelligibility of four years. Even if the IWF Panel had been satisfied of the manner in which the substance entered into the athletes' bodies and there was no significant fault or negligence on their part, in accordance with the IWF ADP this sanction should have been reduced to a minimum of two years only because such a minimum sanction for a first violation is inconsistent with the WADC and the Respondent's obligations. In this respect they rely on the preface of the IWF ADP as quoted: *"At the IWF Congress held on 31st March 2009 in Madrid, Spain the IWF accepted the revised (2009) World Anti-Doping Code (the "Code"). These Anti-Doping Rules are adopted and implemented in conformance with the IWF's responsibilities under the Code, and are in furtherance of the IWF's continuing efforts to eradicate doping in the sport of Weightlifting"*. and further *"When reviewing the facts and the law of a given case, all courts, arbitral tribunals and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that these rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport"*. Furthermore they rely on the commentary to Article 10.2 imposing the sanctions (*"Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short (e.g., artistic gymnastics) a two year Disqualification has a much more significant effect on the Athlete than in sports where careers are traditionally much longer (e.g., equestrian and shooting…). A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports"*).

6.1.11 In light of the above, the provision of Article 10.2. of the IWF ADP providing a minimum sanction of four years is inconsistent because the IWF ADP refers to the adoption of the

WADC which is based on the significance of a two-year sanction on the athlete and the need for harmonization of sanctions in all sports throughout the world. In this respect the Appellants rely on the responsibilites of the IWF under the WADC, especially from the point of view of Article 23.2.2 WADC allowing only non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.

6.1.12 The Appellants further rely on CAS jurisprudence, firstly on the CAS 2011/O/2422 Decision (at page 19) that *"… the purpose of Article 23.3.3 WADC is to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the WADC Articles that are mandatory, including sanctions in Article 10.the Regulation is a substantive change to Article 10 because the period of ineligibility now becomes 2 years …"*. They rely on the award CAS 2011/A/2658 where the panel ruled that the appellant *"… had agreed to limit (its) autonomy by accepting the WADA Code. In particular, Article 23.2.2. of the WADA Code, requires that its … do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions of the WADA Code, including its sanctions for doping …"*. They rely on several other parts and arguments from such award in support of conclusion that the sanction for the first doping offence as defined in IWF ADP lacks of compliance with the WADA Code.

6.1.13 They conclude that the IWF has adopted its own set of anti-doping rules and that these are both inconsistent with the WADA Code which has been adopted by the IWF and inconsistent in and of themselves. Such amendment to the WADC is a clear breach of the IWF's obligations as a signatory of the WADC and leads to the inconsistency with the IWF ADP raising the question of whether the applicable sanctions to be applied are those of IWF ADP or the anti-doping rules in the WADC which represent *"… the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport"*. In the light of these arguments the Appellants submit that the appropriate sanctions to apply are those contained in the WADC.

6.1.14 As to the **principle of proportionality** the Appellants submit that the principle of proportionality - in the present case that the sanction must not exceed that which is reasonably required - should be applied. The principle of proportionality is closely connected with the principle of autonomy, however relying on the decision CAS 2011/O/2422 (page 20) *"… the autonomy* (within the meaning of the principle of autonomy of the Swiss Associations; in the present case the IWF) *is not absolute"*. According to the CAS jurisprudence and academic opinions the principle of proportionality requires that (i) the individual sanction must be capable of achieving the envisaged goal, (ii) the individual sanction is necessary to reach the envisaged goal and no less intrusive restriction is equally suitable to achieve the aim and (iii) the constraints which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving the envisaged goal. In this respect they refer to the legal opinions of several academics concerning the WADC, concluding that the sanctioning scheme of the WADC and its use is acceptable, that a 2-year sanction for a first offence is acceptable andthat even a 4-year sanction is acceptable in cases with aggravating elements and where such sanction is not imposed automatically (ROUILLER C., Legal opinion 25 October 2005, pages 4, 27). The above brings to the conclusion that even a 4-year sanction is acceptable in cases with aggravating elements and where such sanction is not imposed automatically but at no point has a minimum 4-year

sanction for a first doping violation been considered as consistent with the principle of proportionality. Putting forward additional considerations from the other legal opinions it is clear that an automatic 4-year sanction for a first doping offence with no aggravating factors is a fundamental breach of the principle of proportionality. In conclusion, coupled with the inconsistency in the IWF ADP, the Appellants submit that the breach of the principle of proportionality renders the sanctions in the IWF ADP inapplicable.

6.1.15 As to the **no significant fault or negligence,** the Appellants claim that according to Article 10.5.2 of the IWF ADP they have proved that the substances entered their bodies through the ingestion of the modified Musashi whey protein provided by Mr. Um-On. In this respect they rely on the submissions as in paras 6.1.5 and 6.1.6 of this award (supra) and on several documents (as listed in paras 6.1.7 and 6.1.8 of this award, supra). They further rely on Dr. Rivier's opinion and his final conclusions that it is his *"… appreciation that the statement made by the IWF doping hearing panel in point 17* (cit. the decision, point 17: *"It therefore follows that the Adverse Analytical Finding reported by the Cologne Llaboratory could not have been caused by the substance supplied to the athletes by Mr. Um-On. Methandienone, the metabolites of which were found by the Cologne laboratory, must have entered the athlete's system between 20. June and 6. July 2011"*) *is wrong, bcause too restrictive by their conclusions in front of the actual fine knowledge of the cases… I can conclude: it is quite possible that the cause of the 3 Adverse Analytical findings is due only to the repeated ingestion of the modified (contaminated) Musashi whey protein in January – March 2011".*

6.1.16 Further the Appellants submit that the **balance of probabilities** as a relevant standard of proof in determining how a prohibited substance has entered the body is fulfilled and that the most probable explanation for the doping offence was the use of the modified Musashi whey protein. Accepting this, the IWF Panel conclusion that the most probable explanation for the presence of the substance was that the Appellants had ingested it after their initial tests with TAWA and prior to the respective world championships is less probable and based on less probable series of events (Para. 77 – 89 of the Appeal Brief).

6.1.17 As to the **degree of fault** the Appellants have not contested their positive findings, they are aware that they should be subject to sanction for the inadvertent use of substances, however they claim that they could not have done anything else reasonably or practically to avoid the positive test results among others for the following reasons: (i) they have been using the Musashi whey proetin at their national camp, (ii) TAWA exercised significant care in order to avoid the risk and performed tests of supplements bought by reliable manufacturer, (iii) they were familiar with the brand and the packaging and used only as such, (iv) they were not informed that Mr. Um-On had mixed the original Musashi with the Chinese supplements, (v) they are young, unexperienced and trusted their provincial coach (in this respect they rely on several CAS decisions as CAS 2010/A/2307, CAS 2008/A/1490, CAS 2005/A/958, CAS 2011/A/2403), (vi) additional tests would be disproportionate expensive for them, (vii) they were negligent only once and did not try to challenge the adverse analytical finding. The above facts shall allow the Appellants to be granted the defence of no significant fault or negligence.

6.1.18 Against the above background, the Appellants request primarily (i) the IWF decision from 10 September 2011 to be annulled and the sanctions of a four year period of inelegibility to be set aside; subsidiarily that (ii) the athlete Pulsabsakul is sanctioned with a reduced period of

inelegibility not exceeding one year, starting on 6 July 2011 and (iii) the athlete Srisurat is sanctioned with a reduced period of inelegibility not exceeding one year, starting on 12 May 2011 and (iii) the athlete Klakasikit is sanctioned with a reduced period of inelegibility not exceeding one year, starting on 13 May 2011 and finally, that (iv) the Respondent shall bear the costs of this arbitral proceeding and contribute an amount to the legal costs of the Appellants.

B. Respondent's Submissions

6.2 The main arguments of Respondent, as set out in its submissions (in particular in the Answer to the Appeal, those made at the Hearing and the post-hearing letter) can be summarized as follows:

6.2.1 As to the **compliance of IWF ADP with WADC** the Respondent relies on the fact that its antidoping rules have been submitted to and confirmed (letter of 14 April 2011) by WADA.

6.2.2 Weightlifting is a sport in which doping can significantly enhance the performances and the use of steroids is specifically sensitive in this sport. In Thailand, the situation is particularly critical. The IWF adopts a zero tolerance policy in steroids cases. Given their long term effects and impact on the performance of the athlete, the use of steroids may be considered as an aggravating circumstance, so the 4-year ban is justified and proportionate. Such a ban has a deterrent effect as well and is complaint with Article 10.6 WADC.

6.2.3 WADC is not self-executing. The signatories of WADC must implement its mandatory provisions in their anti-doping rules however not implementing the WADC does not render the WADC applicable by substitution, but may lead to sanction as provided in rule 23 of the Olympic Charter. Therefore the IWF ADP is applicable irrespective of its compliance or non-compliance with WADC.

6.2.4 As to the **proportionality of the sanction** there is no room for proportionality. According to CAS case law, CAS enforces a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by a disciplinary body of an association to set a sanction. A sanction may be reviewed only when it is grossly and evidently disproportionate to the offence. The issue is not to determine whether the sanction is proportionate or not, since the IWF ADP was bound to apply the IWF AD rules and the Appellants can only submit that Article 10.2 of the IWF ADP should be invalidated to the extent that it requires a sanction in excess of two years. However, relying on CAS jurisprudence (CAS 2001/A/330) even a life-time ban can be considered justifiable and proportionate in doping case.

6.2.5 Further, the Respondent claims that the Appellants bear the burden of demonstrating that Article 10.2 of the IWF ADP is partially void. Analyzing Articles 19(2) and 20 of the Swiss Code of Obligations, since the Appellants must establish that Article 10.2 is contrary to both Articles, the Respondent concludes that by adopting a rule which foresees a 4-year ban for a first anti-doping violation, the Respondent did not breach the fundamental values of the Swiss legal system (Para. 20-33 of the Answer).

6.2.6 As to the **origin of the prohibited substance** relying on CAS 2009/A/930 (at 5.9: *"… the balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred …"*) concerning the balance of probability and several exhibits filed by the Appellants (mainly testimonies, analyticial results, opinion of Dr. Rivier) as exhibits being individually analyzed by the Respondent, the Respondent claims that the evidence is not persuasive mainly for the following reasons. The (i) testimonies are not relevant, in several aspect they contradict to themselves, (ii) there is no direct evidence concerning the Chinese supplements, (iii) there is no chain of custody concerning the manipulation of supplements, (iv) the conclusions of Dr. Rivier are mostly speculative, (v) there are errors in calculation of quantities of the supplement. Further, the Respondent relies on the report of Dr. Geyer from the Cologne WADA accreditated laboratory confirming that the scenario proposed by the athletes is impossible to be verified in a scientific manner. There are also inconsistencies between the Appellants allegations that Musashi was contaminated with Methandienone, Stanozolol and Norethindrone and the findings of the Cologne laboratory where the analytical results did not show that the sample contained also the second and third of the above substances. Based on the balance of probabilities, the Appellants have not provided evidence making it more probable than not that they tested positive of Methadienone further to the ingestion of the allegedly modified Musashi provided by Mr. Um-On. The Appellants' scenario may be even excluded on the basis of the reanalysis. Consequently the Appellants have failed to demonstrate how the prohibited substance entered into their bodies, therefore the four-year ineligibility is applicable.

6.2.7 The Respondent is of the opinion that as to the **reduction of the sanction for no significant fault or negligence** the Appellants should not benefit from mitigating circumstances for several reasons. In this respect the Respondent relies on Articles 2.1.1, 10.5.1. and 10.5.2 of the IWF ADP. Circumstances enabling the reduction for no significant fault or evidence are not truly exceptional in the present case. Regarding nutritional supplements, CAS has been reluctant to accept a no significant fault or negligence in several cases. The Appellants are young (between 15 and 18 years old) but already experienced in the sports of weightlifting having been active for between 5 and 8 years, with several medals at national and international competitions. They were informed and educated on doping and notwithstanding that, they blindly trusted their coach without exercising the duty of care required to be able to refer to no significant fault or negligence.

6.2.8 As to the **awards CAS 2011/O/2422 and CAS 2011/A/2658**, the Respondent reiterates that the present case is a disciplinary case, the scope of the appeal is limited by the findings of the challenged decision and by the prayers for relief; therefore the panel has to determine whether the sanctions imposed by the IWF upon the three Appellants are appropriate or not. Contrary to the present case, both above quoted cases are not disciplinary cases and the object and the scope of those arbitrations were totally different from the case at hand. In CAS 2011/O/2422 it was accepted that the Osaka Rule was not in compliance with the WADA Code because the WADA Code was not incorporated in the Olympic Charter. The IOC could not adopt a rule which was in contradiction with its own Statutes. The IWF despite being a signatory of the WADA Code, did not incorporate the Code in the IWF Statutes and therefore by foreseeing a four-year ban departing from the WADA matrix the IWF did not act in contradiction with its own statutes. As to the award CAS 2011/A/2658,

it was confirmed that the Regulations of that sporting body were not compliant with the WADA Code. Therefore, the decision of the WADA Foundation Board of 21 November 2011, which declared that such sporting body was not WADA compliant, was confirmed. On the other hand, the same WADA Foundation Board confirmed that the IWF ADP was compliant and this decision was never challenged and is therefore final and binding. The Respondent submits that the object of the present case is different from the aforementioned cases; moreover, the supposed non-compliance of the IWF ADP with the WADA Code would not affect the validity of Article 10.2 of the IWF ADP.

6.2.9 Against the above, the Respondent requests that the appeal should be dismissed and that the IWF is granted an award on costs.

6.3 Hearing

6.3.1 At the hearing the representatives of the parties made opening statements which summarized the positions of the parties set out above.

6.3.2 Following the opening statements, the Appellants and the expert witnesses were heard and the hearing concentrated on the assumption that all athletes consumed "normal Musashi" during 2010 and that between January and March 2011 they took "modified Musashi". The athletes were first tested by the Bangkok laboratory on 2 May 2011 (Klakasikit, Srisurat) and on 20 June 2011 (Pulsabsakul). These tests resulted in no adverse analytical finding. Second tests were conducted by the Cologne and Montreal laboratories on 6 July 2011 (athlete Pulsabsakul), 13 May 2011 (athlete Klakasikit) and on 12 May 2011 (athlete Srisurat). All these tests resulted in adverse analytical finding. The B-samples confirmed the presence of Stanozolol and Norethindralone for the athlete Pulsabsakul and Methandienone for all three athletes. The testing of B-samples of athletes Klakasikit and Srisurat (25 August 2011) confirmed the results while athlete Pulsabsakul did not demand the testing of the B-sample.

6.3.3 The hearing focused on the question whether it is possible that the presence of prohibited substances in the athletes' bodies was due to the ingestion of the modified Musashi provided to them by Mr. Um-On as it derives from the opinion of Dr. Laurent Rivier from 8 December 2011. Since the IWF panel considered it impossible that the modified Musashi had caused the adverse analytical findings, given that the athletes had negative doping tests between the ingestion of the supplements and the positive results, and that Stanozolol and Norethindrome would also have been found in the relevant results if the modified Musashi was the source of the Methandienone, the central questions of the case are the following:

- firstly, is it possible that the alleged administering of the modified Musashi, which was administered to the Appellants by Mr. Um-On in the period from January to March 2011, could have resulted in adverse analytical findings for Methandienone, Stanozolol and Norethindrone when they were tested on 12 May 2011, on 13 May 2011 and on 6 July 2011;

- secondly, if the answer to the first question can be accepted as positive, is it possible that the TAWA tests performed by the WADA accredited laboratory of the Mahidol University Laboratory, have not shown the presence of the prohibited substances

while later tests performed by the Institute for Biochemistry of the German Sports University in Cologne and by the the Doping Control Laboratory of the INRS Institut Armand-Frappier from the Montreal Laboratory have shown the presence of the prohibited substances.

6.3.4 Dr. Laurent Rivier, specialist in medico-legal toxicology and doping (expert witness called by the Appellants), already delivered his written expert statement with the analysis of the intake of modified preparation, however at the time he was not in possession of the dosage and there were only some indications of the concentration of the substances. He even relativized the range of his written statement (prepared before he received relevant data which he is in possession now) and illustrated it with the approach based on the example of Cannabis. It is known that this substance stays a in the body for a very long time. It is also known that a part of its substances stay in the fat of the body and therefore even the urine is or might be negative. However, the substance still is not completely eliminated from the body for a couple of weeks and during the elimination from the body, the metabolite may still emerge in the urine indirectly. This is not the same situation as with Methandienone, however it can offer one of the explanation in the present case.

6.3.5 The data from the documentation, especially from the analysis reports of laboratories in Bangkok, Cologne and Montreal following Dr. Rivier show that it is possible that the amount which has been taken by the athletes during the relevant period of time is quite high, however Methandienone is not a therapeutic compound, therefore it is difficult to compare what is the normal dosage and the non-normal dosage but it is known from the literature and from the bodybuilding world that the dosage between 10 and 20 mg is considered to be what is used for achieving the best effect comparing to the side effects. Since it is not a therapeutical substance, its calculation may not be considered completely exact but what it can be found from the data is that the dosage was pretty high for a long period of time. As a consequence the body accumulates the substance but on the other hand the organism at the same time eliminated these compounds at a certain speed. The elimination of certain metabolites may be quick while that of others may be quite slow: the time for elimination depends on the quantity of substance which has been taken and this is a problem of farmacocinetic and farmacodynamic field. Dr. Rivier is of the opinion that certain compounds may be staying in the body for a very long time, approximately even for 4, 5 or 6 months. In the present case, the metabolites discovered in the bodies of the athletes remained in the body for a very long time. In answering the question why the analysis of the Bangkok laboratory was negative, the answer could be that the target metabolite was a fast eliminating metabolite compared to the metabolites discovered by the Montreal and Cologne laboratories; in other words, when analyzing urine sample the laboratory focuses on a certain metabolite. For the Methandienone there are 12 to 15 different metabolites. By using the DCMS technique the laboratory focuses on metabolites 4 or 5 which are considered to be a rather fast eliminating metabolites compared to metabolite number 7 which can be detected only by technique LCMS. The latter method would enable detection of metabolite number 7 for approximately 2,5 - 3 times longer. Metabolites 4 and 5 can be detected for 5 days after administering while number 7 can be detected roughly 15 days after. So if the laboratory applies more the LCMS method the analysis would show that the substance was taken much more early.

6.3.6 Under WADA regulations the limit for accuracy for Methandienone is 2 nanogram per ml; this value is the limit for accreditation of a certain laboratory by WADA, but still, as the witness understands, each laboratory is free to use the analytical approach depending on the available equipment, experience and the skill of the laboratory staff. It is possible that one laboratory uses different machines and different methods during a relevant period.

6.3.7 Dr. Hans Geyer (expert witness called by the Respondent) mostly confirmed Dr. Rivier's statements and provided for additional and deeper explanations. He fully agrees with Dr. Rivier under the assumption that the athletes have taken the Musashi modified whey protein. The high concentrations taken during a period of 2 or 2,5 months can lead to the positive results of Methandienone metabolites 4 for 3 to 5 months. Dr. Geyer presented several calculations upon the assumption that the athletes have taken the modified Musashi. Whey proteins are usually consumed in the amount of 20 to 30 grams per day, this amount being normal or medical acceptable for administration. The laboratory results show that the modified Musashi contained 1800 mg Methandienone per kg which is 1,8 mg/g. Taking into account that the athletes have normaly consumed 20 to 30 grams of whey proteins per day, they have taken 36 mg of Methandienone per day, which is at the same time confirming Dr. Rivier's statements, a really high concentration. The maximum therapeutic dosage of Methandienone for diseases is 5 mg, therefore they have taken every day a seven fold of the maximum therapeutic dosage which is far above any normal regime, dangerous and a crime for a young athlete. Coming back to the analytical issues, if the athletes have taken such a high concentration for a period of two and a half month, long-term metabolites are detected during very long time after the consumption, in the present case even in July after stopping the regime of consumption in the end of February or beginning of March.

6.3.8 As to the question why the Bangkok laboratory has not detected the metabolites, Dr. Geyer nearly agrees with Dr. Rivier. Both techniques, the LCMS or GCMS, have the same sensitivity and they enable the detection of long-term metabolites, but the detection time of long-term metabolites depends on the implementation of the long-term metabolites in the screening. The bottom line is that the sensitivity of both methods are comparable but it depends on the analytical (the screening) approach. It depends on the metabolite for which it is looked for, therefore if a specific metabolite has not been targeted, the approach would not enable to detect it. On the other hand if a specific metabolite has been targeted, both methods would enable the detection of short and long-term metabolites. The Cologne laboratory has communicated the long-term metabolites in 2006 in publications and at scientific conferences and as a consequence several laboratories applied the method, however there are also laboratories who did not. The long-term metabolites oriented methods enable very good results and detection of presence of very low amounts of Methandienone during a very long period of time. He is confident that both Montreal and Cologne laboratory applied the method, however he is not sure whether the method was applied by the Bangkok laboratory whose representatives were present at scientific meetings and know the literature, therefore they are aware of the analytical approaches concerning these metabolites.

6.3.9 Dr. **Tongtavuch Anukarahnonta**, the head of the Bangkok laboratory (expert witness called by the Respondent) explained that the Bangkok laboratory applies the GCMS technique and they did no find metabolites during their analysis. They usually target

metabolites 3, 4, 5, 6 and 7 and in May 2011 during the test of the athletes they targeted all above metabolites therefore none of the metabolites was excluded from the programming of the detection analysis. According to Dr. Anukarahnonta a possible explanation why the long-term metabolite 7 was not detected during the tests performed is, that this metabolite is shown in the analysis later than the others metabolites 4, 5, and 6.

6.3.10 Dr. Geyer offered another explanation: two different laboratories may use two different limits of detection: in the case of the Cologne laboratory this limit of detection is 0,5 nanogram per ml while the Bangkok laboratory explained that the limit of detection is definitely higher, however it was not able to present the exact number. The normal limit of detection is above 10% of the MRPL performance limits, therefore for the metabolite 7 it would be 10 nanogram per ml. This is much above the limit of detection of the Cologne laboratory however it still fulfills the minimum required because it is up to the laboratory to increase the standard. According to Dr. Geyer the standards of the Bangkok are despite far better (twice) then the minimum standard imposed by WADA. Dr. Geyer confirmed that such a difference can justify the fact that one laboratory detects certain metabolite and the other not.

6.3.11 To summarize, assumed that the scenario of the modified Musashi is correct, it is possible that in case the metabolite was analyzed by two laboratories one laboratory was able to detect the presence of metabolite of Methandienone and the other not. Therefore both expert witnesses Dr. Rivier and Dr. Geyer agree that two different laboratories may produce different analytical results however still both fulfill the WADA standards for accreditation. Dr. Geyer explained that initially he did not agree with the first part of Dr. Rivier's written statement because it was based on speculations but the documents received later also confirmed this part of Dr. Rivier's written statement. Further, Dr. Geyer agrees that it is possible that, despite the fact that the presence of metabolite was not detected during the first analysis in the Bangkok laboratory but was detected during the analyses either in Cologne or Montreal laboratories, the presence of metabolites discovered was a consequence of taking the modified Musashi and the substance was already in the body before the Bangkok analysis (2 May 2011) and that the presence was the result of consumption between January and March 2011. It is known from the studies that the excretion of long-term Methandienone metabolite is fluctuant (slowly falling levels from 0,5, 0,4, 0,3 0,2, 0,1 to the final 0) and not constant. Further the excretion levels are extremely low and therefore a laboratory with a level of detection of 2 or 3 can never detect the presence of long-term metabolites. This confirms the assumption that the substance was already in the body before the Bangkok analysis (2 May 2011) and that it was the result of application between January and March 2011.

6.3.12 As to the Toxicology Screening Report from 24 August 2011 Dr. Anukarahnonta explained that it was performed by the Ramathibodi Hospital Division of the Toxicology Department of Pathology which is a reputable and reliable laboratory. As to the concentrations of Methandienone both, Dr. Rivier and Dr. Geyer agree it was very high. Dr. Rivier does not consider the compound a therapeutical drug. 5 mg per day is standard, 20 mg per day is very high. Such a concentration causes long-term side effects, according to both experts growth of breast for men, problems with water retention, severe liver damages, reproductive possibilities problems, influence on cardiac system, immediate stop the growth of bones.

Even in the black market literature there are warnings that more than 10-20 mg per day for female is dangerous. In the present case young females took 36 mg per day. Methandienone is one of the most effective anabolic steroids. Methandienone and Stanozolol are most frequently taken in sports because of their efficiency.

6.3.13 As to the compatibility of the statement of the coach that he crushed 50 pills with the laboratory results concerning the concentrations and amounts of Methandienone, Dr. Geyer explained that his laboratory has a lot of experience and scientific results based on the research what is available on the Chinese and on the Thai market and which concentrations can be expected. The assumption is that the athletes took 20 mg of whey protein per day which is allowed. The amount for three athletes would be 60 mg per day. Under the assumption that a modified Musashi was taken for 60 days that would be the result of multiplication of 60 g by 60 days. That means that 3,6 kg of modified Musashi should have been available. Quantitative results showed that in 1 kg of the modified Musashi was about 1800 mg of Methandienone. That means that 3,6 kg modified Musashi contained 6400 mg Methandienone (1800 x 3,6). Mr. Um On said in the fist hearing that he crushed 50 tablets and added them to Musashi. The analyses (during 10 years) of the black market products originating especially from China and Thailand clearly show that they have never seen a product of which would be in tablets and would have more than 5 mg of Methandienone. That means to receive that concentration in 3,6 kg of modified Musashi, Mr. Um On should have crushed not 50 tablets but 1296 tablets of Methandienone. With 50 tablets he would never have reached the concentration he claims. This covers the coach's statement based on tablets. The other statement is not based on tablets but on other substances (powder). If he wanted to add powder he would have used only a spoon of the powder, not a half a kilo or half a box. Therefore both scenarios (statements) are unrealistic according to the knowledge of the Cologne laboratory and knowing the product on the relevant black markets. The realistic explanation would be that the coach used more than 1.000 tablets or a little spoon of pure Methandienone to prepare modified Musashi.

6.4 At the hearing the Appellants made some declarations, concerning *inter alia* their background, social status, results, career, testing history as well as the circumstances at and during the training camp and the training period in their regional club under the leadership of Mr. Um-On. They all accept the consequences of the offence, however they ask for the reduction of the period of ineligibilty.

6.5 Mr. Um-On explained that the modified Musashi was prepared exclusively by him without any knowledge of the Appellants. He obtained the substance for modification from the Chinese colleague as a gift to him and was told that it does not have any harmful effects. He mostly repeated his testimony of 22 August 2011 and explained that he has been suspended and banned from performing activities as a coach after the Appellants have been found positive.

6.6 The testimony of captain Aphinya Dettuyawatt, the national coach of the athletes corresponds to her testimony from 2 August 2011.

6.7 Post-hearing submissions of the parties

6.7.1 Upon request of the Panel of 16 May 2012 the Parties commented on two CAS awards, i.e. CAS 2011/A/2658 and CAS 2011/O/2422.

6.7.2 The Appellants' comments are already included supra in 6.1, mainly in 6.1.12 and those of the Respondent supra in 6.2, mainly in 6.2.8 of this award.

7 LEGAL ANALYSIS

7.1 The doping offences by the Appellants

7.1.1 The relevant dates of the doping offences are 12 May 2011 for the athlete Srisurat, 13 May 2011 for the athlete Klakasikit and 6 July 2012 for the athlete Pulsabsakul, i.e. the dates when their samples which were later found positive were taken at international competitions.

7.1.2 Article 2.1.1 of the IWF ADP states that … *"It is each Athlete's personal duty to ensure that no Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an antidoping violation under Article 2.1".*

7.1.3 In the present case, the Appellants acknowledged the presence of the banned substance, Methandienone, in the sample taken just during their participation at international championships on 12, 13 May and on 6 July 2011, respectively. Methandienone is an anabolic steroid that appears on the WADA 2011 Prohibited list under class S 1.1 Anabolic Androgenic Steroids.

7.1.4 The presence of the substance in the Appellants' bodies is not challenged. The Appellants furthermore admitted that the presence of the substance is a consequence of the consumption of the modified Musashi in the period from January to March 2011 when they were training in their local club under the supervision of the local coach Mr. Um-On. Since the administered substance contains the banned substance Methandienone and the Appellants did not challenge the positive finding, the doping offence for each Appellant is established.

7.2 Basic Conditions for an Elimination or Reduction of the Sanction Based on "No Fault or Negligence" or "No Significant Fault or Negligence"

7.2.1 Article 10.2 (**Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods**) of the IWF ADP provides that *"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: <u>First violation</u>: Four (4) years' Ineligibility".*

7.2.2 No Fault or Negligence is defined as: *"The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method" (*APPENDIX 1 to the IWF ADP - DEFINITIONS).

7.2.3 No Significant Fault or Negligence is defined as: *"The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping violation" (*APPENDIX 1 to the IWF ADP - DEFINITIONS).

7.2.4 These provisions must, however, be read in conjunction with **Article 2.2** (*Use* or *Attempted Use by an Athlete of a Prohibited Substance* or a Prohibited *Method): "**2.2.1** It is each Athlete's personal duty to ensure that no Controlled Substance enters into his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish and anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

***2.2.2** The success or failure of the Use or Attempted Use of a Prohibited Substance or a prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was used or attempted to be used for an anti-doping violation to be committed".*

7.2.5 In order to avoid the ineligibility sanction or to achieve a reduction of such sanction, the Appellants must establish that they did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that they had administered the Prohibited Substance Methandienone, or, respectively, they must establish that in view of the totality of the circumstances the degree of his negligence was so slight that a finding of "No Significant Fault or Negligence" is inevitable (CAS 2006/A/1025) . To this end, they must first establish how the Banned Substance entered their bodies.

7.3 How the prohibited Substance entered the bodies of the athletes

7.3.1 As already stated above, the Appellants admitted they have consumed Musashi, as it derives from (i) testimonies of the Appellants in the minutes of the meeting of the Committee for Investigation and Imposing Sanctions on Athletes using Prohibited Substances of TAWA dated 28 August 2011 (p. 2,3), (ii) the IWF Doping Hearing Panel Decision from 10 September 2011, (iii) written testimonies of the Athletes, all of them dated 2 August 2011, (iv) the Appeal Brief and confirmed by (v) the Appellants' testimonies at the hearing in the present case.

7.3.2 The witness Um-On on 22 August 2011, in his written testimony and confirmed by testimony at the hearing in the present case, testified that (i) he mixed Musashi with the chinese supplement provided him by Chinese coach Deng and (ii) gave such mixture, i.e. the modified Musashi, to the Athletes between January and mid March 2011.

7.3.3 The decision of the IWF Doping Hearing Panel is based on different findings and assumes that the adverse analytical findings demonstrate that Methandienone did not enter the system of the bodies of the athletes during the period between January and mid March when they were under the supervision of Mr. Um-On. The decision is based mainly on the fact

that there were no adverse analytical findings in respect of the analyses of samples taken between the end of March and the international competitions.

7.3.4 The written opinions of Dr. Rivier from 8 December 2011 and Dr. Geyer from 4 January 2012 differ in respect when the prohibited substance might have entered into the bodies of the athletes. Dr. Rivier concluded that *"… it is quite possible that the cause of the 3 Adverse Analytical findings is due only to the repeated ingestion of the modified (contaminated) Musashi whey protein in January – March 2011"* while Dr. Geyer concluded that *"… the statements and calculations made by Prof. Rivier are pure speculations because the quantitative results for stanozolol, norethindrone and methandienone in the "modified" Musashi whey proptein preparations are missing"*. However, at the hearing Dr. Geyer mostly confirmed Dr. Rivier's statements and provided for additional and deeper explanations. He fully agrees with Dr. Rivier under the assumption that the athletes have taken the Musashi modified whey protein. It is relevant that the high concentrations taken during a period of 2 or 2,5 months can lead to the positive results of Methandienone metabolites 4 for 3 to 5 months and presented several calculations upon the assumption that the athletes have taken the modified Musashi. The calculations he made and were presented at the hearing confirm Dr. Rivier's statements and the high dosage presumably being taken between January and mid March (a seven fold of the maximum therapeutic dosage which is far above any normal regime) enables that long-term metabolites are detected during very long time after the consumption, in the present case even in July after stopping the regime of consumption in the end of February or beginning of March.

7.3.5 Furthermore, the Panel follows the experts explanations - both experts nearly agree in this respect - as to the question, why the Bangkok laboratory has not detected the metabolites: (i) the LCMS or GCMS have the same sensitivity and they enable the detection of long-term metabolites, but the detection time of long-term metabolites depends on the implementation of the long-term metabolites in the screening; (ii) the sensitivity of both methods are comparable but it depends on the analytical (the screening) approach and on the metabolite for which it is looked for; (iii) if a specific metabolite has been targeted, both methods would enable the detection of short and long-term metabolites; the long-term metabolites oriented methods enable good results and detection of presence of very low amounts of Methandienone during a very long period of time; (iv) the experts are confident that the Montreal and Cologne laboratory applied the method, however after the testimony of the scientists from the Bangkok laboratory it was not clear whether the same method was applied for the TAWA testings. In this respect the panel follows the explanation of Dr. Geyer that different laboratories may use different limits of detection which is confirmed in the present case for the limits of detection of the Cologne and Bangkok laboratories. Such a difference can justify the fact that one laboratory detects certain metabolites and the other not. The experts agree that the scenario of the modified Musashi being taken by the athletes in the period January – mid March is possible. They further agree that two different laboratories may produce different analytical results despite they still both fulfill the WADA standards for accreditation. The initial disagreement among the experts has explicitly been removed since Dr. Geyer confirmed the disputed parts of Dr. Rivier's written statement.

7.3.6 On the basis of the above facts, the Panel is satisified that the source of the contamination was indeed the modified Musashi which entered into the bodies of the athletes after they were given that mixture by the local coach Mr. Um-On during the period between January

and mid March 2011. Accordingly, the Panel holds, that the Appellants have proved how the substance entered their system.

7.4 The question of no significant fault or negligence

7.4.1 Article 10.5.2 of the IWF ADP provides: "*If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced".*

7.4.2 The burden is on the Appellants to prove that they are not guilty of a doping offence. To this end, the Panel considered the written submissions of the Appellants, their testimony during the hearing, the testimony of the several witnesses brought forward by the Appellants a well as statements of their legal counsel during the hearing. The Appellants contend that they have not contested their positive findings, they are aware that they should be subject to sanction for the inadvertent use of substances. First, they claim that they could not have done anything else reasonably or practically to avoid the positive test results because they have been using the Musashi whey protein at their national camp; second, TAWA exercised significant care in order to avoid the risk and performed tests of supplements bought by reliable manufacturer; third, they were familiar with the brand and the packaging and used only as such; forth they were not informed that Mr. Um-On has mixed the original Musashi with the Chinese supplements; fifth, they are young, unexperienced and trusted their provincial coach; sixth, additional tests would be disproportionate expensive for them and finally they were negligent only once and did not try to challenge the adverse analytical finding.

7.4.3 As already pointed out, No Significant Fault or Negligence is defined as *"The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping violation".*

7.4.4 *Examination of Arguments for and against the application of Article 10.5.2 in Favour of the Appellants*

7.4.4.1 The witnesses brought by the Appellants presented several activities concerning educational efforts of TAWA in the area of competition and anti-doping in the period before the present case occurred. The Panel accepts the fact that the level of education of young athletes in Thailand concerning doping may, in some cases, be lower and not comparable with the level in other countries. Some athletes may come from the impoverished social surroundings and from parts of the country where access to information sources is difficult, so that they may not be able to do all necessary research and to *"leave no reasonable stone unturned"*. However, the Panel is of the view that Appellants are not so inexperienced; despite their youth, they are active in national and international sports for at least three years, they are not newcomers, therefore they know, or must be

expected to know, of the existence of anti-doping regulations. As such they would be expected to apply at least a minimal degree of diligence and not simply follow the instructions of their coach and ingest any kind of substance. The Panel concludes that although accepting a lower educational or informational level concerning anti-doping, this fact cannot be qualified as a special circumstance in the present case allowing a reduction of the sanction pursuant to Art. 10.5.2.

7.4.4.2 If the scenario that the local coach gave the modified Musashi to the athletes without their knowledge, the element trust of the athletes would be a relevant category. The notion of trust is complex and does not relate only to the methodological approach towards the training and its performance. Especially in the case of young athletes it extends much broader to the areas far beyond of pure sport and inevitably includes trust in relation with health and nutrition. So far, the Panel concludes for the purposes of assessing whether Art. 10.5.2 could be applied, that the Appellants relied on the advice, leadership and authority of the coach. It may be assumed that they trusted that the Musashi they consumed was not manipulated. However, the Panel takes the view that notwithstanding the trust that the Appellants had, or may have had, in the local coach, they cannot be considered as relieved of their elementary duties to check what substances were offered to them.

7.4.4.2.1 The **youth** of the athletes is not considered to be the criteria that would be per se accepted as a special circumstance relieving the Appellants within the meaning of Art. 10.5.2. However, even though the age of an athlete may be considered in the wider context of the exceptional circumstances of the case (cf. CAS 2011/A/2403, p. 11). As already said, the Appellants are young, but not non-experienced (experience once again to be considered in the context of the case: cf. CAS 2010/A/2307) and not completely uneducated in respect of anti-doping. The Panel is therefore of the view that the youth of the Appellants cannot be considered as a relevant factor in favour of the Appellants in the present case.

7.4.4.3 **Other arguments** brought forward by the Appellants or being capable of qualified as mitigating factors, such as no prior event of doping by the Appellants, no intent to improve results, no comparability to doping cases of athletes with the clear intention to cheat, that they could not have done anything else reasonably or practically to avoid the positive test results, that they were not informed that the coach has mixed the whey proteins with prohibited substances, that additional tests would be disproportionate expensive for them, cannot by the Panel be individually qualified as a special circumstance in the meaning of Article 10.5.2. in the present case. Of course, they may be considered when assessing a proper sanction of the Appellants.

7.4.4.4 The Panel comes therefore to the conclusion that the factors presented by the Appellants do not reach the threshold for a reduction of the sanction in accordance with Art. 10.5.2. Arguments, which prevent application of Article 10.5.2 in favour of the Appellants include that the Appellants (i) though young are all quite experienced athletes (or at least cannot be considered as completely inexperienced); (ii) were properly educated concerning the anti-doping; (iii) more or less blindly followed the coach without demonstrating at least reasonable doubt concerning the purity of supplements.

7.4.5 CAS case law is based on the standard that *the athlete may benefit from the exceptions* comparable to the IWF Article 10.5.2. (10.5.2. WADC) *where circumstances were truly exceptional* (CAS 2004/A/690, at 72; CAS 2006/A/1025, at 11.5.9; CAS 2009/A/1870, at 64, 111, 117, 118, 119). None of the circumstances in the present case qualify as truly exceptional following the criteria as set in CAS jurisprudence.

7.4.6 The athletes cannot be considered as bearing the circumstance which the standard that the athlete shows good faith efforts *"to leave no reasonable stone unturned"* (CAS 2009/A/1870 at 120; quoting CAS 2008/A/1489 & CAS 2008/A/1510, § 7.8) before ingesting. The standard is set in CAS 2009/A/1870 where the athlete *"… made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements"*. Despite relatively limited informational resources strongly and trusting the coach the Appellants in the present case did not demonstrate even a reasonable doubt concerning the supplements which were given to them. The standard as set in CAS jurisprudence (2001/A/317) stating that it certainly that *"… an athlete cannot exculpate himself/herself by simply stating that the container of the particular product taken by him/her did not specify that it contained a prohibited substance"* can be followed in the present case. In light of the above case law and argumentation, the Panel concludes that the Appellants cannot benefit from the "no significant fault or negligence" exception.

7.4.7 In the present case, the Appellants are therefore responsible for the presence of a prohibited substance in their bodies. Despite their youth and trust into the coach they cannot be considered unexperienced athletes. The Panel recognizes that, as has been stressed by the Appellants' counsel, the present case is significantly different from cases where the athletes intentionally cheated with the aim of improving their performance. The Panel may even accept that the Appellants did not consume prohibited substances intentionally and with the intention of improving their results. However, the Appellants did not show the care that can be expected from them. The circumstances of the present case are therefore not so that they would justify the Panel to conclude that Art. 10.5.2 would *"not provide a just and proportionate sanction"*, i.e. that there is a gap of the IWF ADP that must *"be filled by the Panel applying the overarching principle of justice and proportionality on which all systems of law, and the WADC itself, is based"*. Although the Panel may be willing to accept that the Appellants did not consume the prohibited substance with the aim of improving their performance and did not want to cheat, the Panel is satisfied that there are no sufficient reasons to apply Art. 10.5.2. ADP and to reduce the sanction for the first offence of the Appellants.

8 INCONSISTENCY OF THE IWF ADP SANCTIONS WITH THE WADA CODE

8.1 The Regulatory Background

8.1.1 The Appellants claim that they have been sanctioned with a period of ineligibility, i.e. four years, which is inconsistend and against the rules of the WADA Code. Also for this reason, it is argued, if Appellants shall be sanctioned, their sanction shall be reduced.

8.1.2 To analyse the arguments submitted by the Appellants, several provisions of the WADA Code are relevant: Article 10.2 WADA Code, entitled "Sanctions on Individuals" (10.2

Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods) reads:

"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
First violation: Two (2) years Ineligibility".

8.1.3 In Appendix One to the WADA Code, the definition of Ineligibility and of Disqualification refers to the definition of Consequences of Anti-Doping Rules Violations: An Athlete's or other Person's violation of an anti-doping rule may result in one or more of the following:

(a) Disqualification means the Athlete's results in a particular Competition or Event are invalidated, with all resulting Consequences including forfeiture of any medals, points and prizes; (b) Ineligibility means the Athlete or other Person is barred for a specified period of time from participating in any Competition or (c) Provisional Suspension means the Athlete or other Person is barred temporarily from participating in any Competition prior to the final decision at a hearing conducted under Article 8 (Right to a Fair Hearing).

8.1.4 Part Three of the WADA Code entitled »Roles and Responsibilities« contains Chapter 20 followed by further articles prescribing other Signatories' responsibilities. Article 20.3.1 (within the subchapter 20.3 Roles and Responsibilities of International Federations) provides that the International Federations are to *"To adopt and implement anti-doping policies and rules which conform with the Code"*. Article 20.3.2 further demands that *"To require as a condition of membership that the policies, rules and programs of National Federations are in compliance with the Code"*.

8.1.5 Part Four of the WADA Code entitled "Acceptance, Compliance, Modification & Interpretation" Article 23.2.1 provides that

"The Signatories shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility".

8.1.6 Article 23.2.2 of the WADA Code states that (among others)

"The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.): Article 1 (Definition of Doping), … Article 10 (Sanctions on Individuals), … Appendix 1 - Definitions. No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article".

8.2 Is the IWF ADP consistent with the WADA Code?

8.2.1 The Appellants submit that the IWF ADP represents a substantive change of the WADA Code.

8.2.2 Furthermore, such a substantial change contradicts the principle of harmonization of sanctions, because the difference of the standard sanction under Article 10.2. of the IWF ADP (four years) and the one foreseen by the WADA Code (two years) is substantial. Further such substantive change is not allowed by Article 23.2.2 of the WADA Code.

8.3 Is the IWF Regulation an impermissible substantive change?

8.3.1 The Panel wishes first to highlight recent CAS jurisprudence having as subject the antidoping rules being considered substantially different from the rules of the WADA Code. In CAS 2011/O/2422 Decision (at para 8.21) it was stated:

"… the WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law".

It is undisputed that the IWF is a signatory of the WADA Code within the meaning of Article 23.1.1 of the Code itself.

8.3.2 As a signatory of the WADA Code, the IWF is bound by contract being as an International federation an Anti-Doping Organization (Appendix 1: Definitions - Anti-Doping Organization*: "A Signatory that is responsible for adopting rules for initiating, implementing or enforcing any part of the Doping Control process. This includes, for example, … International Federations …"*) to comply with its terms. In accordance with Article 23, especially 23.2.2 *"… such organizations are required to follow all provisions of the WADA Code that are mandatory"* (CAS 2011/O/2422 para 8.22).

8.3.3 Indeed, the IWF introduced two provisions which might be considered as its unilateral reservations based on the principle of autonomy into the IWF ADP ((i) Article 17 IWF Compliance Reports to WADA; *"The IWF will report to WADA on the IWF's compliance with the Code every second year and shall explain reasons for any noncompliance";* (ii) Article 18 Amendment and Interpretation of Anti-doping rules - 18.2 *"Except as provided in Article 18.5, these Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes"*). However they may not be interpreted in such a way to prevail over the contractual obligation binding the IWF as a Signatory to the WADA Code.

8.3.4 Article 23.2.2. of the WADA Code expressly requires that Signatories accept the mandatory parts of the WADA Code without substantive changes. Sanctions are expressly defined as those mandatory provisions. Article 20.3.1 requires the international federation *"… to adopt and implement anti-doping policies and rules which conform with the Code".*

8.3.5 Article 23.2.2 further provides that *"… no additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article".*

8.3.6 As from the CAS 2011/O/2422 Decision (para 8.25) the purpose of Article 23.2.2 WADA Code is to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the mandatory provisions of the WADA Code, including the sanctions in Article 10. The Panel is satisfied that the IWF ADP is a substantive change to Article 10 of the WADA Code: the period of ineligibility following Article 10.2 of the IWF ADP is double (four years) in comparison with the sanction for the same offence under the WADA

Code (two years). The IWF ADP definitely change the effect of Article 10 WADA Code in a substantial manner. In addition to the mere duration aspect, one could even consider that a sanction of four years may substantially make more difficult for an athlete to continue his or her career once the period of ineligibility has expired. Therefore, one could even argue that not only the nature but also the effects of a four years sanction are substantially different.

8.3.7 However, this issue does not need to be resolved in the present proceedings. The Panel is satisfied that already for the difference of the duration of the standard sanction, the IWD ADP substantially change the mandatory sanction system set out in the WADA Code. Accordingly, the IWF ADP is not in compliance with the WADA Code.

8.4 What are the consequences of the non-compliance of the IWF ADP with the WADA Code?

8.4.1 As reported above, CAS had recently to decide whether rules prohibiting the participation of an athlete to the Olympic Games *in addition* to a period of ineligibility were in compliance with the WADA Code. By reading the CAS 2011/O/2422 decision one can see that the aim of the proceedings and of the agreement of the parties to submit their dispute was in essence to decide on the compliance of the so-called "Osaka rule" with the WADA Code. Other than in the present case, the issue of the consequences of any such non-compliance was to large extent undisputed. By reading the CAS 2011/A/2658 decision, it is possible to easily determine that also that case was different to the present. In fact, in that case WADA had already acted against one of its Signatories, a national sporting body, and applied the monitoring mechanisms foreseen in the WADA Code. Accordingly, other than in the present case, the CAS 2011/A/2658 case was the case of an appeal of a certain sporting body directed against a decision of WADA sanctioning a substantial change of the WADA Code system by a Signatory; in CAS 2011/A/2658 the CAS panel had not to decide itself whether to a non-compliance had to be granted a certain "automatic" effect: WADA in that case had already acted.

8.4.2 It is undisputed that the IWF is a signatory of the WADA Code within the meaning of Article 23.1.1 of the WADA Code itself. None of the parties has submitted that in the present case WADA had already made use of its monitoring power on the Respondent, in accordance with Article 20.7.2 WADA Code. In fact, the Panel has no reason to doubt that WADA is and will monitor the WADA Code compliance by the Respondent, so as it did versus the sporting body CAS 2011/A/2658. The fact that WADA did not take any measure against the Respondent yet shall not be used as an argument to question the importance of the fight against doping. Respondent asserted that WADA had confirmed the consistency of the IWF ADP with the WADA Code. Whether this is true or not, can be left open here. As towards the appellant in the CAS 2011/A/2658 WADA had changed its attitute, the same can happen towards IWF, at any moment.

8.4.3 The Panel assumes that the intervention of WADA vis-à-vis the appellant in CAS 2011/A/2658 was undoubtly made in the spirit of the WADA Code, i.e. (a) *"to protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes woirldwide"* and (b) *"to ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping"* (cf. the

definition of the purpose of the WADA Code in its Introductory section). Therefore, the probably temporary non-action of WADA vis-à-vis Respondent shall not be misinterpreted as a wish of WADA, or of Respondent itself, to jeopardize the purpose of the WADA Code.

8.4.4 The question in the present case is therefore a different one. As discussed at large by the parties during the hearing before the Panel, the issue at stake can be summarized as follows: is an antidoping rule or a sanction that substantially changes the system foreseen in the WADA Code invalid or null and void even before WADA has had the opportunity to use of its monitoring power?

8.4.5 In general, it is correct to say that normally the answer is a negative one: a "party A" cannot derive own rights against a "party B" if this "party B" has violated a contractual obligation with a "party C". Does this apply also to the present case, where the Appellants are the "party A", the Respondent the "party B" and WADA the "party C"? For the following reasons, the Panel is of the view that the situation in the present case is, indeed, different.

8.4.6 First, one has to consider that as mentioned above, Respondent in its own rules, states (i) to be aware of the crucial importance of harmonization of sanctions (cf. the Comment to Article 10.2 of the IWF ADP) and (ii) that its rules *"have been adopted pursuant to the applicable provisions of the WADA Code and shall be interpreted in a manner that is consistent with applicable provisions of the WADA Code"* (cf. Article 18.5 IWF ADP). Therefore, it is the Respondent itself that refers to another set of rules, the WADA Code, and attaches a very important and binding value to it. In such a situation, it is recognized under Swiss law that a "party A" may indeed derive some rights from a contract between two other parties if such contract is of a nature to have a protective effect on a third party party. Further, same considerations can be made, and are indeed made, when a set of rules is considered binding because of the direct, or indirect, membership of an athlete or a player in a sport body.

8.4.7 The Panel is satisfied that indeed the WADA Code is not a set of "self executing rules": as Respondent rightfully underlined, for the WADA Code to be relevant it must be enacted and adopted by the rules of the relevant sport body. However, Respondent has adopted the IWF ADP, it has further declared to consider correct and lawful only an interpretation and implementation of its own rules that are consistent with the WADA Code. By doing this, Respondent has accepted that its own rules had to be applied in an interlink, and consistent, with the WADA Code.

8.4.8 That only such an interpretation is correct is indirectly confirmed by the fact that the IFW ADP rules are in fact inconsistent already in themselves. So it is stated in the Comments to Article 10 IWF ADP that *"the basic sanction would be two [and not four!] years under Article 10.2"* and that *"[b]ased on No Significant Fault alone, the sanction could be reduced up to one-half of the two years. Based on Substantial Assistance alone, the sanction could be reduced up to three-quarters of the two years"*.

8.4.9 When analysing this inconsistency between Article 10.2 and the Comments the Panel considers appropriate to look at the last part of Article 18.5 of the IWF ADP rules where it is stated that *"[t]he comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules"*. It is therefore the Respondent

itself that acknowledges the importance of the rules as well as of the commentary text attached to them.

8.4.10 For the above reasons the Panel comes to the conclusion that a correct and consistent interpretation and application of Article 10.2 IWF ADP foresees a standard sanction of two years. To interpret and implement such rule in a different manner would not only violate the WADA Code, but be in contrast to the IWF ADP rules themselves.

8.4.11 The above conclusion makes unnecessary to determine whether a sanction of four years would be, when taking in consideration the specific circumstances of the case, appropriate and proportionate. Also left unsnawered can be the question whether a standard sanction of four years for a first anti-doping offence, lacking any aggravating circumstances, would be in violation of the substantive ordre public. Recent jurisprudence of the Swiss Tribunal Federal (Decision of 27 March 2012, case 4A_558/2011), admitted the violation of the substantive ordre public by a ban of an athlete for an undetermined time. Several remarks made by the Swiss Tribunal Federal could be used indeed to argue a breach of substantive public policy. However, in the present case this issue can, as mentioned above, be left open.

8.4.12 Therefore, the Panel is satisfied that the maximum period of ineligibility that can be imposed on the Appellants is of two years. The inconsistency not only between the IFW ADP and the WADA Code, but also within the IWD ADP themselves, does not make possible a different sanction.

8.4.13 The Panel does not have any doubt that Respondent is trying to pursue an effective fight against doping in the weightlifting sport. In fact, media reports of the past years show that in this discipline there may be important work to be completed. Similarly, one can also conceive that in this particular discipline the use of some substances may trigger particular success. However, as mentioned above, one of the two main purposes of the anti-doping fight is to protect fair the athletes. It is therefore the task of the Respondent to try to endeavour to establish the existence of aggravating circumstances there where the conditions of Article IWF ADP 10.6 are met and so to be able to request a sanction greater than two years.

8.4.14 However, in the present case, Respondent has not argued that the conditions of Article 10.6 were met by any of the Appellants. The Panel therefore does not see any reason to increase the standard sanction of two years.

8.4.15 Before the above background, after examination of all evidence and arguments submitted, the Panel is satisfied that the Appellants have clearly committed an anti-doping rule violation. The period of ineligibility to be imposed upon the Appellants is to be reduced from four (4) to two (2) years. This conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

9 COMMENCEMENT OF INELIGIBILITY PERIOD

9.1 The Appellants do not raise any claims regarding the commencement of ineligibility. As from the prayers for relief they request that the sanction should start (i) as for athlete Pulsabsakul on 6 July 2011 (ii), for the athlete Srisurat on 12 May 2011 and (iii) for the athlete Klakasikit on 13 May 2011. The above dates are the dates of collection of their samples which resulted in adverse analytical findings.

9.2 The Panel relies on Article 10.9.2 (Timely Admission) of the IWF ADP providing that *"Where the Athlete promptly … admits the anti-doping Rule violation after being confronted with the anti-doping violation by the IWF, the period of ineligibility may start as early as the date of Sample collection …".*

9.3 The Appellant did not request an anticipated commencement before the IWF tribunal not even in the present case. In accordance with the Rule R57 (Scope of Panel's Review, Hearing) of the Code *"The Panel shall have full power to review the facts and the law …"* the Panel considers Appellants' in other parts of the case persuasive and strong enough to apply Article 10.9.2.

9.4 The Appellants stopped competing when they were found positive and fairness requires the Panel to discount possible additional period until the IWF decision was issued. This approach is supported by CAS jurisprudence and the ambit of Article 10.9.2. Taking in consideration the duration of the procedure, the specific circumstances of this case and the behaviour of the Appellants, the Panel finds that the ineligibility period should start

- for athlete Pulsabsakul on 6 July 2011
- for athlete Srisurat on 12 May 2011
- for athlete Klakasikit on 13 May 2011.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by athletes Chitchanok Pulsabsakul, Bonnatee Srisurat and Sukanya Klakasikit on 17 October 2011 is partially upheld.

2. The IWF Doping Hearing Panel Decision of 10 September 2011 is amended as follows:
   - the athlete Chitchanok Pulsabsakul is declared ineligible for a period of two years, starting on 6 July 2011;

- the athlete Sukanya Srisurat is declared ineligible for a period of two years, starting on 12 May 2011;
- the athlete Boonatee Klakasikit is declared ineligible for a period of two years, starting on 13 May 2011.

3. The other items of the IWF Doping Hearing Panel Decision are confirmed.

4. (…).

5. (…).

6. All further and other claims for relief are dismissed.