



Arbitration CAS 2016/A/4511 Bulgarian Weightlifting Federation (BWF) v. International Weightlifting Federation (IWF), award of 27 January 2017

Panel: Prof. Michael Geistlinger (Austria), President; Mr James Robert Reid QC (United Kingdom); Mr Dirk-Reiner Martens (Germany)

Weightlifting

Disciplinary decision taken by the IWF Executive Board against a national federation

Validity of disciplinary sanctions taken by circular vote

Referral of the case back to the previous instance

Applicability of the principle ne bis in idem on disciplinary sanctions

- 1. None of the applicable IWF provisions mention the possibility for the IWF Executive Board to make a decision outside a meeting in person. This result of a systematic interpretation of the IWF Constitution and By-Laws cannot be healed by reference to general Swiss law. In case of absence of a statutory provision on a circular vote, only the written agreement of all members of the Executive Board empowered to vote can be held equal to a majority decision of an Executive Board meeting in person and thus be a valid decision. Furthermore, no evidence has demonstrated that circular votes on the IWF Executive Board level are a general practice accepted as legally binding and, thus, could be considered as customary law.**
- 2. Even if the CAS must be able to not only examine the formal aspects of the appealed decision but also, above all, to evaluate all facts and legal issues involved in the dispute, the panel's function is to review the propriety, in the broadest sense, of the decision of the decision maker; it is not to become the decision maker itself. Therefore, if the formulation of the request for relief does not allow the CAS panel to render the decision, the case may be referred back to the federation for a further attempt to reach a decision.**
- 3. The application of the principle of *ne bis in idem* on disciplinary sanctions imposed by an International Sports Federation seated in Switzerland requires identity of the object, identity of the parties and identity of the facts, or otherwise formulated, the effective purpose of the sanction must be the same (even if the underlying motivations are different), the sanction must be attributable to the same behaviour, and the sanction results in the same consequence.**

I. PARTIES

1. The Bulgarian Weightlifting Federation (“BWF”) is the national member for Bulgaria of the International Weightlifting Federation and responsible for the sport of weightlifting in Bulgaria. It has its seat in Sofia, Bulgaria.
2. The International Weightlifting Federation (“IWF”) governs the sport of weightlifting worldwide. It has its registered legal seat in Lausanne, Switzerland, and its secretariat in Budapest, Hungary.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. The BWF has a history of doped athletes. Since the adoption of the World Anti-Doping Code (“WADC”) in 2003, 34 Bulgarian weightlifters have been sanctioned. Since the first doping controls in 1976, the total number of Bulgarian weightlifters found to be doped is 59. In 2008, 12 Bulgarian athletes failed out-of-competition doping controls. Out of the 12 athletes, 11 athletes were tested during a training camp while preparing for the Beijing 2008 Olympic Games. Bulgaria then withdrew its weightlifting team.
5. On 2 March 2015, 11 Bulgarian athletes were subject to out-of-competition doping controls at a training camp preparing for the European Championship in Georgia.
6. On 19 March 2015, these athletes were provisionally suspended from any weightlifting activity because their samples contained “3-hydroxystanozolol glucuronide” (“stanozolol”). In the course of the investigations, it was established that the stanozolol resulted from a contaminated food supplement called Trybest.
7. On 10 June 2015, the IWF Hearing Panel imposed an 18-month period of ineligibility on 4 of those athletes because their violation was a second one. The other 7 athletes were declared ineligible for 9 months. The panel found that the athletes could establish on a balance of probability that the prohibited substance stanozolol was contained in Trybest, which was given to them by the BWF staff during a training camp. On a balance of probabilities, the athletes were found having No Significant Fault or Negligence because the substance had been used for many years in the Bulgarian team and never caused any problems at doping controls.

8. On 6 October 2015, the Court of Arbitration for Sport (the “CAS”) confirmed the decision of the IWF Hearing Panel (*see* CAS 2015/A/4129).
9. On 9 November 2015, the President of the IWF sent a letter to the BWF informing them of the decision of the IWF to impose on BWF a fine in the amount of USD 500,000 based on Article 12.3.1.7 of the IWF Anti-Doping Policy (“ADP”) because of the 11 anti-doping rule violations (“ADRVs”) confirmed by the CAS. The letter drew the BWF’s attention to the fact that the fine was payable within 6 months from receipt of the IWF decision; that in default of payment the BWF would be suspended for 4 years from the date of default; and that until the fine was paid in full BWF was suspended from all weightlifting activities within the IWF, including participation in any IWF event. The letter continued *“Further to the above in line with the Special Anti-Doping Rules your Federation/National Olympic Committee (“NOC”) shall not be permitted to enter competitors for the next ensuing Youth Olympic/Olympic Games. If such MF is permitted to compete in any Olympic Qualifying event prior to the next ensuing Youth Olympic/Olympic Games, the MF shall not secure any Olympic qualifying points in such event”*. The letter then gave details of the account into which the fine should be paid within 30 days of receipt of the letter and noted that during the 30-day period BWF athletes were eligible to compete in IWF events.
10. On 17/18 November 2015, the IWF Executive Board purported to confirm the decision on the fine of USD 500,000 of the IWF President.
11. On 30 November 2015, the BWF appealed the 9 November 2015 letter to the CAS on the basis that it qualified as a final decision. On 15 February 2016, the CAS issued its reasoned decision setting aside the decision of the IWF President dated 9 February 2015 concerning the fine, but confirmed the ban on participation in the Youth Olympic and Olympic Games. The CAS Sole Arbitrator found that the decision on the fine was rendered by the wrong body within the IWF, a failure that could not be corrected by CAS. There had to be a decision by the competent body within the IWF. The Sole Arbitrator anticipated that, should the correct body, the IWF Executive Board, confirm the decision of the IWF President, the BWF would have to file a new appeal to CAS (*see* CAS 2015/A/4319).
12. So far as the ban imposed on the BWF concerning athlete participation in the next Olympic Games was concerned, the Sole Arbitrator held that the ban had been imposed under Part C.1 of the Qualification System, was an automatic consequence of the number of violations of the Anti-Doping Rules, and had been validly imposed.
13. By a letter dated 18 February 2016, the IWF President wrote to the members of the IWF Executive Board circulating a voting sheet and inviting them to determine, *inter alia*, whether they wished to impose a fine of USD 500,000 on the BWF or suspend it for up to four years. The letter noted that nothing would prevent the BWF from appealing against the size of the fine on the ground of proportionality. The President recommended the imposition of the fine. The voting sheets annexed to the letter contained the caveat *“Deadline 25.02.16. Effective date for all decisions: 25.02.2016”*. The sheets contained a space for the voter’s signature but did not give any indication that the form required dating. Each voting sheet identified the member whose voting sheet it was.

14. 17 of the 21 members returned their voting sheets within the deadline. A number of them did not date their voting sheets and three did not sign them. One member voted by e-mail, withdrawing his previously completed voting sheet.
15. On 24 February 2016, the BWF appealed to the CAS against the purported 17/18 November 2015 decision of the IWF Executive Board to confirm the fine of USD 500,000 (see CAS 2016/A/4460).
16. On 29 February 2016, the IWF sent a letter to CAS asserting that the decision of the Executive Board had not yet been duly notified, thus no formal decision had been given and the appeal was therefore premature. This was confirmed by a letter of the IWF to the CAS of 11 March 2016. In this letter, the IWF argued that the IWF Executive Board in its November session only confirmed empowerment of the IWF President to adopt such decision, but it did not confirm the IWF President's decision. Since the CAS had set aside the decision of the IWF President imposing a fine, there was no decision in place for confirmation by the Executive Board in November 2015.
17. On 1 March 2016, the IWF notified a new decision of the Executive Board to the BWF, purporting to re-impose the fine of USD 500,000. Such decision is now the basis of this appeal.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 22 March 2016, the BWF filed its statement of appeal against the IWF decision with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). Within such statement of appeal, the Appellant requested a stay of the proceedings in accordance with Article R37 of the Code pending a decision in CAS 2016/A/4460. Such request for a stay was later withdrawn by the Appellant. The Appellant also nominated Mr. Marc Beaumont as arbitrator.
19. On 7 April 2016, the IWF proposed that the Panel already appointed in CAS 2016/A/4460 be also appointed for these proceedings.
20. On 15 April 2016, the BWF agreed to refer this appeal to the same panel as in case CAS 2016/A/4460.
21. On 3 May 2016, the BWF filed its appeal brief in accordance with Article R51 of the Code.
22. On 5 May 2016, the Appellant challenged one of the Panel members appointed in case CAS 2016/A/4460. Such arbitrator later recused himself from participating in this appeal.
23. On 30 June 2016, the CAS Court Office, on behalf of the Deputy President of the Appeals Arbitration Division constituted the Panel in this procedure as follows: Prof. Dr. Michael Geistlinger as President, His Honour James Robert Reid QC and Dr. Dirk-Reiner Martens as arbitrators.

24. By letter dated 6 July 2016, the BWF informed the CAS on its preference that no hearing be held and requested the Panel to address the issue of the admissibility of two exhibits submitted by the IWF.
25. On 7 July 2016, the IWF also agreed that no hearing be held and proposed the BWF be allowed to file observations on the two exhibits.
26. On 8 July 2016, the CAS informed the parties that the Panel was prepared to render a decision based on the parties' written submissions without a hearing in accordance with Article R57 of the Code. The BWF was granted a deadline of 10 days to file a submission in reply, which was to include its comments concerning the two exhibits. The BWF did not file a reply submission.
27. On 18 July 2016, the Counsel for the BWF informed the CAS that he no longer represented the BWF. On the same day, the CAS set a deadline of 3 days for the BWF to inform CAS whether it was securing new counsel. The BWF's silence was to be considered as indicating that it intended to proceed without counsel. No response was timely provided.
28. On 17 and 23 August 2016, the Respondent and the Appellant, respectively, signed the Order of Procedure.
29. On 2 September 2016, a new counsel allegedly representing the BWF wrote to CAS enclosing a power of attorney to act on behalf of the President of BWF (not BWF itself) in connection with these proceedings and asserting, *inter alia*, that the BWF was not aware of the 10-day time limit for submitting a reply and commenting on the two exhibits (nor was he aware of a right to request an extension of time for that purpose).
30. On 14 September 2016, the Panel, *inter alia*, required the BWF to produce a power of attorney establishing that the present attorney was authorised to act on behalf of the BWF and not only its President no later than 20 September 2016. The Panel also extended the time for the BWF to comment on the relevant exhibits to 25 September 2016.
31. On 14 September 2016, the counsel purporting to represent the BWF submitted an unchanged power of attorney, which the Panel found to be insufficient as proof that he represented the BWF.
32. On 23 September 2016, the President of BWF, not the purported attorney for the BWF, commented on the relevant exhibits and made some additional observations.

IV. SUBMISSIONS OF THE PARTIES

33. The BWF's submissions, in essence, may be summarized as follows:
 - The Sole Arbitrator in CAS 2015/A/4319 concluded that only the IWF Executive Board was competent to impose any of the sanctions on member federations provided for by Article 12.3.1 of the IWF ADP.

- The Sole Arbitrator in CAS 2015/A/4319 further found that a fine is not an automatic consequence of a certain number of anti-doping rule violations having been committed.
- In the submission of the BWF, the IWF had to choose between imposing a fine on the relevant member federation in accordance with Article 12.3.1.b or suspending the relevant member federation from participation in any IWF activities in accordance with Article 12.3.1.c of the IWF ADP.
- The competences of the IWF President are listed in the By-Law to Article 4.2.1 of the IWF Constitution. This provision does not entitle the President to represent the IWF Executive Board or to act on its behalf.
- The IWF Executive Board's sole jurisdiction derives from Article 3.9.1 of the IWF Constitution.
- The Sole Arbitrator concluded that the IWF President did not just communicate a decision of the IWF Executive Board, but actually rendered such decision himself. Thus, he set aside the decision.
- The Sole Arbitrator did not want to replace the IWF President's decision by a de novo decision of CAS, but rather required that the proper body inside the IWF decide on any fine on BWF.
- All these findings of the Sole Arbitrator have the effect of *res judicata* or, at any event, the IWF is prevented from submitting these arguments in the current proceedings because of the common law principle of estoppel.
- In its letters of 4 and 11 April 2016, the IWF changed its position regarding the legal nature of the letter of 1 March 2016 and called it no longer a notification of a decision, but "*the decision for imposition of the fine dated 1 March 2016*".
- The Executive Board of IWF had no power to make a decision without a meeting and in any event there was no evidence that a decision had been taken by a vote of the Executive Committee without a meeting. Not all Board members had participated and there was no evidence that those that did had all returned their voting sheets within the allotted time. In addition, some voting sheets were unsigned and could not properly be relied upon.
- In any event, the supposed vote could not be relied upon as the accompanying letter made it clear that the Executive Board was merely expected to rubberstamp the President's decision.
- The BWF raised various arguments why the IWF Executive Board could not be understood as having delegated its decision making power as to a fine on BWF to the IWF President.

- The BWF wondered why the IWF has not convened an Executive Board meeting as it did in the case of Azerbaijan. In April 2014, Azerbaijan was fined with USD 500,000 USD for the year 2013, but not suspended considering the organizational contributions of the Azerbaijan Federation to international weightlifting.
- The case of Azerbaijan shows clearly that the Executive Board should have chosen between two options, either imposing a fine or suspending the federation.
- The BWF was not given any opportunity to defend itself and be heard. The legal principles of due process and right to be heard were violated.
- As stated by the Sole Arbitrator, there was no meeting of the IWF Executive Board in the months before the November 2015 meeting.
- The next IWF Executive Board meeting took place in Rio on 13 March 2016. It could not have been convened in order to adopt the decision of 1 March 2016. The Rio meeting summary published on the IWF official website on 13 March 2016 does not contain any information regarding the imposition of a sanction on the BWF.
- Thus, the Appealed Decision was taken in breach of the IWF Constitution, namely Articles 4.2.1.1 and 3.9.1 of the By-laws, of Article 12 of the IWF ADP and of the Sole Arbitrator's conclusions in CAS 2015/A/4319.
- It was not possible for a fine to be imposed on the BWF once a ban for entering competitors to the Olympic Games in Rio 2016 has been imposed. With reference to CAS 2015/A/4319, Article 12.3.1.b.7 IWF ADP is an alternative to Article 12.3.1.c IWF ADP. The fine is based on the first provision, the ineligibility for the next Olympic Games on the second, as this also confirmed IWF in its Answer to the Appellant's Appeal Brief and at the hearing on 25 January 2016 in the case CAS 2015/A/4319. It means a *venire contra factum proprium*, that at that hearing, confronted with the arguments of the BWF, the IWF changed its opinion and declared that the "*ban was indeed based on par C.1 of the Qualification System*".
- The statement of the Sole Arbitrator in CAS 2015/A/4319, at para. 56, constitutes an *obiter dictum* and should not be followed by the Panel in the present case. The Sole Arbitrator's understanding was not part of the operative part of the award and was also not crucial for its understanding. The legal basis was irrelevant for the respective award because the result, i.e. the confirmation of the ban, would have been the same. Thus, it is not covered by *res judicata*. The Panel in the present case is free to make its own assessment of the precise legal basis.
- The ban on participating in the Olympic Games Rio 2016 is an extremely severe penalty and to combine it with the highest possible amount of a fine (500,000 USD) would be abusive and repressive. Such severe sanctions were not imposed in the most recent similar cases of Azerbaijan and Kazakhstan. Bulgaria was the first country in the history

of weightlifting to be punished with suspension from participation at the Olympic Games.

- By imposing such suspension from the Olympic Games under Article 12.3.1.c of the IWF ADP and later a fine based on Article 12.3.1.b.7, the IWF broke the IWF ADP, so that the second part of the Appealed Decision should be set aside.
- The principle *ne bis in idem* has been violated. With reference to the Valverde case before the Swiss Federal Tribunal (4-A_386/2010), the BWF points at the fact that the CAS has held that the principle should be applied, at least by analogy, in view of the severity of the disciplinary sanction imposed on the Appellant in that case. The BWF submits that the principle applies also in the present case. This follows also from the Sole Arbitrator's finding in CAS 2015/A/4319, at para. 71. Quoting from para. 73 of the award, BWF emphasizes that "*the BWF athletes are prevented from taking part in the Olympics because they are affiliated to a national federation that has been banned from entering athletes for the Olympic Games because it has not been able to fight doping within its organization effectively*". Even if in the previous CAS proceedings there was the issue whether the ban was the application of an eligibility rule or a sanction, the BWF argues applicability of the principle in the present case. The ban is a sanction because its primary purpose is to sanction doping failures. The same measure – seen from the athletes' point of view as an eligibility measure – can be seen as a sanction from BWF's point of view.
- According to CAS jurisprudence, the principle applies if identity of the object, identity of the parties, and identity of the facts are given. There is identity of the object because the ban, like the fine, was to sanction the BWF. There is identity of the parties. They are the IWF and the BWF. There is identity of the facts because the ban was imposed as a consequence of 9 ADRVs by Bulgarian athletes within the calendar year 2015. In addition, the ban sanctioned the failure of the BWF to combat doping within its organization effectively. The same reasons lie behind the fine. It is imposed because of exactly the same facts. Thus, the principle *ne bis in idem* is to be applied in the present case.
- After the ban was imposed in November 2015 based on this principle, the IWF Executive Board was not allowed to sanction the same ADRVs by imposing a fine on 1 March 2016.
- According to the Swiss Federal Tribunal in the Valverde case, the *ne bis in idem* principle is the corollary or negative aspect of the principle of *res judicata* and part of the Swiss procedural public policy within the meaning of Article 190(2)(e) PILA. Since the CAS award rendered is related to the same facts and to the same violation, the CAS award has *res judicata* effect.
- Whereas the IWF in the BWF's reading of the award CAS 2015/A/4319 had no choice on the basis of C.1 of the Qualification System but to impose a ban, it had a choice pursuant to Article 12.3 of the IWF ADP, but is prevented from imposing the fine by *res judicata*.

- The penalty is a violation of the principle of proportionality, which is largely recognized and constantly applied by CAS and, at the same time, is a core principle of the WADC. The amount of the fine is severely disproportionate to the offence committed. The IWF just considered the number of ADVRs in 2015, but did not take into consideration the degree of fault on the side of the athletes and federation, and the individual circumstances of the case.
- The BWF athletes received reduced sanctions because the origin of the prohibited substance was the contaminated supplement Trybest. The IWF hearing Panel, thus, found that there was No Significant Fault or Negligence on the athletes' part. The athletes and their entourage had reasons to believe that the supplement was safe. As a consequence, the IWF did not open any disciplinary proceedings against the BWF officials under Article 2.8 IWF ADP. All relevant BWF officials were present at the hearing and interrogated, but no sanctions were applied on them. It can, therefore, be taken as undisputed that the BWF has taken all necessary steps to ensure that the use of Trybest was safe, which was shown through more than 300 negative doping controls of BWF athletes while using Trybest.
- The BWF had the responsibility to protect the athletes' right to health by supplying them with the necessary vitamins, amino acids and minerals. This was done through Trybest.
- The BWF had no chance to test every single lot of Trybest in a WADA-accredited laboratory because according to Section 4.4 of Annex B to the International Standard for Laboratories, WADA accredited laboratories are only allowed to engage in analyzing commercial products in the context of a doping case investigation. Tests by other laboratories are not considered sufficiently reliable by WADA. The BWF, as a consequence, had no chance to avoid the accident.
- In the procedure before IWF, it was found that it was a mistake of the athletes not to indicate Trybest on the doping control form and it was risky to use 15 to 20 food supplements. Accordingly, BWF could be blamed only for not providing enough assistance and education to its athletes how to complete the doping control forms and that it provided so many food supplements to them. This could have been sanctioned properly by a 9-month suspension of the BWF from participation at any IWF activities pursuant to Article 12.3.1.c of the IWF ADP instead of a clearly disproportionate fine.
- The fine is disproportionate when compared to other recent decisions. In the case of 18 Azerbaijani athletes found guilty of intentional doping in 2013, the Azerbaijan Weightlifting Federation was fined for intentional doping with USD 500,000, as announced on 1 April 2015. The same happened to the Kazakhstan Federation in the same year, also for intentional doping. Thus, the IWF fine should be set aside
- The fine is null and void because it violates the personality right under Article 28 of the Swiss Civil Code ("CC"). The personality right includes the right to develop an economic activity. Pecuniary sanctions imposed on sports federations may infringe the

right to develop an economic activity, as was held by the Swiss Federal Tribunal in ATF 134 III 193.

- The BWF is a sports federation under the Bulgarian Law on Physical Education and Sport (“LPES”). Sporting activities are largely financed by the Bulgarian Ministry of Sport. The BWF was funded with roughly USD 600,000 for the year 2015. The BWF has no other financial sources. The amount of state subsidy was even reduced because of the number of suspended athletes. The fine imposed by IWF would inevitably lead to the end of BWF as a sports federation.
- The IWF did not provide justification for applying strict liability and failed to prove overriding interest in the understanding of Article 28 para. 2 CC. After the introduction of the fine system there was no decrease in the number of suspended athletes in the sport of weightlifting.
- There is no consent by the BWF which would make an infringement of Art 28 para. 2 CC lawful. The BWF could not influence the adoption of the IWF ADP being a document approved on the level of the IWF Executive Board and not the Congress. It can also not be assumed a consent simply by membership because the IWF clearly misused its dominant position.
- In the alternative, if the Panel accepts the decision of the IWF of 1 March 2016, the BWF asks for a reduction of the sum imposed as fine. With reference to CAS 2002/A/423, a fine must be considered by its legal nature as a penalty clause under Articles 160 – 163 CC.
- According to Article 163.3 CC, the court has discretion to reduce penalties that it considers excessive. In CAS 2002/A/423, the Panel held that “*the penalty should depend on the extent to which standards of conduct were violated by the supporters*”. Further to that, it must be proportionate to the seriousness of the offence committed. Since the Panel in the above case found that the Appellant had adopted adequate measures, the fine was reduced accordingly.
- It is not correct that the WADC has included the proportionality principle through action of Articles 10.4 and 10.5 with the consequence that there is no further space for application of this principle.
- The BWF refers to CAS 2006/A/1025 and to CAS 2005/A/830. In case of lack of a specific rule, general principles of law, including proportionality, apply. Article 12 WADC accepts that there may be sanctions on another sporting body, but does not provide for any details. Thus, there is in this case the lack of a rule.
- The fixed amount of fines in the IWF ADP is onerous compared to other federations, such as wrestling, judo, or boxing. These federations provide for 10 – 50 times less penalties as to the amount and also allow for exercising discretion between a lower and upper limit of fine to be imposed. The result of the application of the IWF ADP is that

there is no difference between intentional and other ADRVs. The federation concerned is strictly liable under Article 12 IWF ADP without any chance to avoid or reduce the amount of fine based on its and its officials' degree of fault. Even in a case of sabotage, the BWF would be required to pay.

- The Panel is therefore entitled to reduce the fine and should do so taking into account the following considerations: Other federations at a maximum apply a sanction of USD 100,000; the sport of weightlifting, not only in Bulgaria, has a bad reputation for a doping history; the amount imposed on BWF nearly equals its funding for one year. CAS should therefore set aside the amount imposed and replace it (applying CAS 2002/A/423) with a fine not higher than USD 100,000.

34. The BWF submits the following Prayers for Relief:

1. *Set aside the IWF decision for imposition of the fine on the BWF at the amount of USD 500,000 on the ground of its inapplicability in casu to the fact that the BWF has already been sanctioned with suspension from participation in the next Olympic Games in Rio, which is alternative sanction to the fine and cannot be applied together with the fine and this constitutes breach of the respective provisions of IWF ADP; or*
2. *Set aside the Appealed Decision on the basis of the principles of Ne Bis In Idem and Res Judicata; or*
3. *Set aside the IWF decision for being rendered solely by the IWF President in absence of any valid and lawful delegation of powers or any other evidence that such decision has been ever taken by the competent IWF Executive Board,*

Alternatively to points 1, 2, and 3 and only if the requests in points 1, 2, and 3 are not granted, and, also only in case the Panel for some reasons, finds that the Appealed decision was indeed taken by the IWF Executive Board, to:

4. *Set aside the appealed IWF decision on the ground that it was taken in breach of numerous provisions of the IWF Constitution and By-Laws and the applicable Swiss Law as well as that the decision contradicts the findings and the conclusions of the Sole Arbitrator in the CAS Award rendered in CAS 2015/A/4319 proceedings having res judicata effect and many fundamental principles of law recognized and constantly applied by the CAS;*
 - 4.1. *In such case the CAS should refer the case back to the first instance, i.e. the IWF Executive Board, for taking a new decision and provide it with procedural instructions that the IWF Executive Board must choose between the two sanctions and determine the amount of the fine or the period of suspension considering the principle of proportionality and must allow the BWF to defend itself by exercising effectively its right to be heard before the IWF Executive Board before the imposition of any sanction.*
 - 4.2. *Only in case the CAS finds that it has the power to decide the case de novo, to render a new decision, substituting the Appealed Decision, and impose a sanction on the BWF from participation in any activities for a period of maximum 9 months on the ground of the principle of proportionality;*

Alternatively to points 1, 2, 3, and 4 and only if the requests in the said points are not granted, to:

5. *Reduce the amount of the fine for being excessive and set it at maximum USD 100,000 on the ground of the Swiss Code of Obligations and/or the principle of proportionality;*
6. *To pronounce the award without costs on the ground of R65 of the CAS Code; and*
7. *To order contribution to the legal and other expenses of the Appellant related to the present procedure.*

35. The IWF's submissions, in essence, may be summarised as follows:

- The IWF's fine imposed on the BWF is fully justified. The IWF has the autonomy as a Swiss association to sanction the BWF without interference from a court.
- The IWF, being regulated by Articles 60 *et seq.* of the Swiss CC and benefitting from Article 23 of the Federal Constitution of the Swiss Confederation, has a significant amount of discretion in its organization. It may set its own rules and has a very wide degree of self-sufficiency and independence (see CAS 2011/A/2675, at para. 7.16 and the Swiss Federal Tribunal (ATF 134 III 193, c.4.4) for the value of the principle of autonomy of associations and for applying a certain restraint when a decision of an association is challenged). Any restriction must have a legal basis, if not in a federal act (significant restrictions), and must be justified by public interest.
- The IWF ADP was adopted properly and its implementation accepted by all members, including the BWF. There is no reason for deviating from the clear wording of Article 12.3.1 IWF ADP and enforcement of USD 500,000 on the BWF. The fine is justified by public interest, which is the fight against doping, and the BWF's argument based on Article 28 CC is of no avail. Thus, the Panel must confirm the fine as imposed.
- The Appealed Decision was imposed by the competent body. The IWF describes the procedure of its adoption.
- Given this decision, there is no need to discuss the question of delegation of power to the IWF President, raised by the BWF. The evidence submitted for this decision cannot be excluded because CAS has the duty to review the case *de novo*.
- The fine is compatible with the declared ineligibility of the BWF athletes for the next Olympic Games. The ineligibility, as agreed by the parties and found by the Sole Arbitrator in CAS 2015/A/4319, is not based on Article 12.3.1.c IWF ADP, but on part C.1 of the Qualification System. Thus, the Executive Board was allowed to impose a fine pursuant to Article 12.3.1.b of the IWF ADP. Besides, even if the Olympic Games are considered as an IWF event and included in the IWF Calendar, they belong to the authority of IOC. Thus, it is doubtful that Article 12.3.1 IWF ADP can be applied with respect to Olympic Games. Ineligibility for the Olympic Games cannot be construed as a "suspension" pursuant to Article 12.3.1.c IWF ADP. On balance, the IWF did not breach Article 12.3.1 IWF ADP by imposing a fine in addition to the ineligibility for the Olympic Games.

- The BWF's objection to *res judicata* is without merits because in CAS 2015/A/4319 the Sole Arbitrator could not and did not look into the lawfulness of the fine. There is no decision on the merits of the fine. The fine was annulled due to a procedural flaw. The IWF Executive Board, thus, was free to impose a fine. There is also no *ne bis in idem* by imposing a fine in addition with ineligibility for the Olympic Games. The principle refers to criminal law and its application on disciplinary law was left open by the Swiss Federal Tribunal in 4A_386/2010, in para. 9.3.1. Even, on the assumption the principle is to be applied, *quod non*, the IWF ADP in accordance with Article 10.10 WADC provides for multiple sanctions for the same ADRV. The ineligibility and the fine result from two different legal sources. The principle does not prevent the same behaviour from being sanctioned with different kind of consequences. A fine and ineligibility do not have the same object. Ineligibility aims at protection of the integrity of a competition, the fine at sanctioning a member for the conduct of its athletes.

- The Appealed Decision complies with BWF's personality rights under Article 28 Swiss CC. It is correct that a sanction affects the personality rights, in particular, the economic freedom and the image of the respective person. The interference is justified by the overriding interest of protecting the athletes' fundamental right to participate in doping free sport and to promote health, fairness and equality for athletes worldwide. This is supported by the UNESCO Convention against Doping in Sport, Article 10.10 WADC and case law of the Swiss Federal Tribunal (ATF 134 III 193, para. 4.6.3.2.2). IWF's interest in a doping-free sport is overriding BWF's mostly financial interests. Besides, BWF is bound by the IWF ADP as a member of IWF based on Article 3.3.2 IWF Constitution read together with Article 3.4.2 IWF Constitution. For the purposes of Article 28 CC, also consent of the BWF is, thus, being given as justification. The BWF never used its membership rights at the IWF to challenge the system of sanctions specified in the IWF ADP. It could have used its right to vote against during Congresses, but did not do so. To claim inapplicability is *venire contra factum proprium*.

- The amount of the fine is proportionate. There is a strict set of fines pending on the number of ADVRS committed by the Member Federation within one calendar year (see Article 12.3.1 IWF AD). Such system is quite common in a disciplinary or criminal context. The rule leaves no discretion to the IWF. The fine is imposed automatically. According to CAS case law (CAS 2004/A/690, at para. 86; CAS 2005/A/830, at para. 10.26 and 986, at para. 143), CAS interferes with a discretion of the competent body in application of its sanctioning power only when the sanction is evidently and grossly disproportionate to the offence. The IWF Executive Board had no discretion and the scale of sanctions provided by the IWF ADP follows from its autonomy to adopt such system. When adopting the IWF ADP, the IWF Executive Board was aware of the severity of the system of sanctions, but considered this as essential for an efficient fight against doping as a condition for further belonging to the Olympic family. There is no assessment of the individual circumstances of the case because the rationale of the provision is to punish the national federation, which bears responsibility for the action done by its athletes. The balance of sanction lies in the grades of sanctions themselves and reflects the principle of proportionality. A proper anti-doping education of its

athletes will lead to no case of doping at a Member Federation and no sanction accordingly. A system as strict as laid down by the IWF corresponds to the same approach of Articles 10.2.1 and 10.7 WADC and, besides, is commonly adopted.

- In the present case BWF, at best, has been very negligent by not educating its athletes, but it could also be that it wilfully and recklessly provided contaminated products to its athletes. In any event, the image of weightlifting has been severely harmed and such massive ADRVs in Bulgaria have already happened in 2008. The comparison with judo, boxing, and wrestling is irrelevant. Each federation is autonomous and free to adopt its own rules as confirmed by Article 12 WADC. A significant fine helps to deter and prevent doping. IWF cannot tolerate the long history of doping and repeated doping scandals arising in Bulgaria. BWF can only blame itself.
- Azerbaijan and Kazakhstan have accepted the same fines in the past and fully paid them. Other federations in application of Article 12.3.1 IWF ADP since 2013 were listed by IWF with USD 250,000 (Armenia and Uzbekistan in 2013), USD 150,000 (Ukraine, in 2013), USD 100,000 (Romania and Georgia in 2013, Albania, Iran, and Uzbekistan in 2014), and USD 50,000 (Russia in 2013 and Rumania in 2015). In all these cases, the fines were accepted. This shows the consensus behind Article 12.3.1 IWF ADP. BWF argues that the amount is nearly as much as the governmental support, but does not state whether it has other resources. Thus, the allegation is irrelevant. Besides, in the present case the IWF did not ask the BWF to refund the anti-doping procedure costs due according to Article 12.2 of the IWF ADP.
- There is no reason to reduce the fine because of Article 163 CO. This provision allows the parties freely to determine the amount of the penalty based on the principle of freedom of contract. But contracts once concluded are covered by the principle *pacta sunt servanda*. A judge can only intervene if the amount determined by the parties is so high that it exceeds any reasonable measure compatible with law and equity (Swiss Federal Tribunal ATF 114 II 264; JT 1989 I 74). The BWF did not establish that it objected to the adoption of the sanction system. There is no reason to deviate. The fine is not unreasonably excessive. It should not be reduced.
- The IWF did not abuse its dominant position. In Switzerland, antitrust issues are governed by the Swiss Federal Act on Cartels and other restraints of competition. With reference to *The Sports Law Review*, 2015, p. 196, like the rules of the game and other provisions, the regime of sanctions is usually excluded from scrutiny from an antitrust law perspective. The present case is a disciplinary case, the argument of abuse of dominant position thus irrelevant. Besides, being a member of the IWF, the BWF cannot seriously claim that it would suffer from a dominant position of the IWF. The IWF and BWF are not “competitors” on the same “market”.

36. IWF submits the following Prayers for Relief:

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

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

V. JURISDICTION

37. Article R47 of the Code provides as follows:

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

38. The jurisdiction of CAS, which is not disputed, derives from Articles 12.3.1.b.7 and 13.6 IWF ADP, which read as follows:

12.3.1

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

In such event the IWF Executive Board will:

[...]

b) Fine the Member Federation as follows:

[...]

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

[...]

13.6

Appeals from Decisions Pursuant to Article 12

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

39. Besides, the jurisdiction of CAS has been confirmed by the parties by signing the Order of Procedure.

40. The Panel, thus, finds that CAS has jurisdiction.

VI. ADMISSIBILITY

41. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

42. The IWF notified a new decision of the Executive Board to the BWF on 1 March 2016. This appeal was then lodged on 22 March 2016. It follows that this appeal was timely filed within the 21-day deadline set forth in Article R49 of the Code and is, therefore, admissible.

VII. APPLICABLE LAW

43. Article R58 of the Code provides as follows:

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.

44. The Panel finds that the applicable rules are the Constitution and By-Laws as well as other Rules of IWF, in particular, the IWF ADP.
45. IWF has its legal seat in Switzerland. Thus, the Panel holds that Swiss law applies on a subsidiary basis.

VIII. MERITS

46. According to the IWF, the decision of 1 March 2016 has the following background: Further to the award CAS 2015/A/4129, the IWF President sent a letter of 9 November 2015 to the BWF notifying it of the USD 500,000 sanction in accordance with Article 12.3.1 IWF ADP. This decision was nullified by CAS 2015/A/4319. In the reasoned award of 15 February 2016, the Sole Arbitrator found that the decision was rendered by the wrong body and should have been made by the IWF Executive Board. The fine was set aside for this procedural reason. The Sole Arbitrator was prevented from looking into the lawfulness of the fine by the BWF's objections. The CAS thus did not deal with the merits. The IWF Executive Board took a new decision to impose USD 500,000 on the BWF, which was notified to BWF on 1 March 2016.
47. The adoption of this IWF Executive Board decision, as described by the IWF, took place as follows: On 16 February 2016, the IWF President sent a circular letter to all members of the Executive Board, informed them of the case, and requested a vote on the disciplinary measures to be taken, including the fine. At the set deadline, 17 out of 21 members had voted, and 16 of them were in favour of imposing USD 500,000 and one only expressed the view that the Executive Board should grant the President the right to proceed in the case of multiple violations. The adoption, thus, happened with no contrary votes, by the competent body, through a circular vote, which in the opinion of IWF was fully acceptable under Swiss law.

A. Lack of a Valid Decision of the IWF Executive Board

48. The IWF Constitution provides for the following rules as to the decision-making by the IWF Executive Board:

...

4.2.4 The Executive Board must meet at least once a year.

4.2.5 The sittings of the Executive Board are not open to the public.

4.2.6 Attendance at the meetings is compulsory for its members. Members unable to attend the meeting must inform the IWF President prior to the meeting, and give adequate and acceptable reasons for their absence.

4.2.7 The Executive Board has the power to suspend any member of the Executive Board who, without adequate and acceptable reasons, has failed to attend two (2) consecutive Executive Board meetings, or four (4) Executive Board Meetings in aggregate.

4.2.8 Minutes of the meetings of the Executive Board are kept and copies must be sent to all Executive Board Members.

4.2.9 The Executive Board has the authority to adopt and modify the By-Laws, the Anti-Doping Policy and the Technical and Competition Rules & Regulations.

4.2.10 The Executive Board has the right to establish and appoint Commissions to attend to specific tasks, within its own powers.

4.2.11 The quorum required for the meetings and decisions of the Executive Board is the presence of half of the members plus one (1).

4.2.12 The Executive Board exercises all powers not reserved by the Constitution or by the By-Laws to another IWF body.

...

49. These provisions are supplemented by the following rules in the By-Laws:

BY-LAW TO 4.2 EXECUTIVE BOARD

1 The Executive Board decides on all matters concerning the sport of weightlifting and its organisation, including financial matters, in the best interest of the sport.

2 The proceedings of the meetings of the Executive Board are held in English.

Members must be able to participate in English or provide an interpreter at their own cost.

...

5 All decisions by the Executive Board must include the effective date.

...

10 The costs of participation in the meetings of Executive Board Members are covered as follows:

a) four (4) nights of accommodation and full board at meetings held in conjunction with IWF World Championships;

b) the flight ticket for the first two (2) meetings in a year shall be paid by the Executive Board Member / Member Federation nominating him/her. In case of further meetings an Economy Class flight ticket will be reimbursed.

...

BY-LAW TO 4.2.1.1 THE PRESIDENT

...

3 Presides over debates and keeps order at the Congress and at the meetings of the Executive Board according to the democratic principles.

...

5 Attends and chairs the Executive Board meetings. The President has the casting vote in the event of a tie.

...

50. On the Panel's reading, none of the above provisions mentions the possibility of decision-making authority by the IWF Executive Board outside a meeting in person. All relevant provisions deal exclusively with the modalities of a meeting of the IWF Executive Board in person.
51. A comparison of the above provisions concerning the IWF Executive Board meetings and the role of the IWF President at such meetings with the provisions in the By-Laws on the Anti-Doping Commission leads the Panel to conclude from a systematic interpretation of the IWF Constitution that decision-making on the IWF Executive Board level by circular vote is excluded. The relevant provisions on the Anti-Doping Commission read as follows:

BY-LAW TO 6.1.1 ANTI-DOPING COMMISSION

5 QUORUM, FREQUENCY, AND NOTICE OF MEETINGS

5.1 No meeting of the ADC may be held without a quorum being present either in person or electronically. A quorum consists of half of its members plus one (1) including the Chairperson.

5.2 The ADC will meet at least twice every calendar year on the occasion of the Junior and Senior IWF World Championships, or as otherwise directed by the IWF Executive Board. The majority of the Commission may request that a meeting be held at any other time.

5.3 Meetings of the ADC may be held in person, by electronic means, or by a combination of the two.

52. In the Panel's opinion, the comparison of the above sections shows that if the IWF Constitution had wanted to allow for decision-making by circular vote on the Executive Board level, it would have stated this explicitly as is the case for the Anti-Doping Commission By-Laws. The IWF Anti-Doping Commission can meet either in person or electronically or by a combination of both. The IWF Executive Board, however, can only meet in person. As a consequence, no valid decision on fining the BWF has been made by the IWF Executive Board. To this end, the IWF would need to (and perhaps should for future clarity) adopt a

provision in the IWF Constitution explicitly allowing for a circular vote on the Executive Board and ruling on the respective procedure.

53. This result of a systematic interpretation of the IWF Constitution and By-Laws cannot be healed by reference to general Swiss law.
54. According to Article 1.1.1 IWF Constitution, the IWF “*is a non for profit association founded in 1905 for an unlimited period of time and governed by Articles 60 et seq. of the Swiss Civil Code [CC] and by this Constitution*”.
55. Article 66 Swiss CC, dealing with decision-making of associations reads as follows:
 - 1 *Resolutions are passed by the general meeting.*
 - 2 *The written consent of all members to a proposal is equivalent to a resolution of the general meeting.*
56. Based on this core provision, the Swiss Federal Tribunal analysed the state of the Swiss legal literature as to the conditions for the admissibility of a circular vote where there was no specific provision in the constitution of an association providing for a circular vote and set a precedent by its decision 5C.67/2006.
57. In that case, the Swiss Federal Tribunal had to deal with a circular vote adopted by a body very comparable to the IWF Executive Board (“Meeting of Delegates” of the respective association), being not the supreme body of the association (“General Meeting” or Congress), but exercising legislative functions as the IWF Executive Board does by adoption of the IWF ADP and other rules. But even if the Executive Board had simply executive powers, in the opinion of the Swiss Federal Tribunal the same principles apply: In case of absence of a statutory provision on a circular vote, only the written agreement of all members of the Executive Board empowered to vote can be held equal to a majority decision of an Executive Board meeting in person and thus be a valid decision.
58. In the case at hand, the Panel, by systematic interpretation of the Constitution and By-Laws, finds that the IWF Constitution and By-Laws do not allow for a circular vote at the IWF Executive Board level. But even if this interpretation were wrong, *quod non*, the requirement of the Swiss Federal Tribunal to have a written agreement of all Executive Board members with voting power given is not fulfilled. By the set deadline, only 17 out of 21 voting members of the IWF Executive Board expressed their written agreement. This is not enough for a valid decision of an Executive Board by circular vote under general Swiss law.
59. The IWF did not provide the Panel with any argument or evidence that circular votes on the IWF Executive Board level are a general practice and accepted as legally binding and, thus, could be considered as customary law. The CAS dealt with customary law under Swiss law of associations in CAS 2008/A/1622, 1623 & 1624, at paras 33 - 35. In these cases, the CAS held that under Swiss association law, customary law can represent a valid set of rules of an association provided that (i) the applicable Regulations contain a loophole which may be supplemented by customary law, (ii) there is a constantly and consistently applied practice of

the association (*inveterata consuetudo*) and (iii) the members are convinced that such practice is legally binding (*opinio necessitatis*).

60. The Panel, apart from lacking any evidence as to the general practice and legal opinion (elements (ii) and (iii)), finds that the initial condition of a loophole in the IWF Constitution and By-Laws is not satisfied. The Constitution and By-laws contain rules on meetings of the IWF Executive Board, which only allow for meetings in person, and for the IWF Anti-Doping Commission, which allow for meetings in person, electronically or by both of them. Comparing these rules to each other entitles the Panel to conclude that if the IWF Constitution and By-Laws wanted to allow for circular votes on the Executive Board level, they would have addressed this in the same manner as they allowed for a circular vote on the level of the Anti-Doping Commission. Thus, there is no loophole permitting the admissibility of a circular vote for decision of the IWF Executive Board. The IWF Executive Board simply has not been empowered by the IWF Constitution and By-Laws to adopt its decisions by circular vote. A decision needs to be taken in a meeting in person.
61. The Panel, thus, rules that there is no valid decision by the IWF Executive Board imposing a fine of USD 500,000 on BWF in place.

B. Entitlement of the Panel to Impose a Fine on BWF

62. In CAS 2015/A/4319, at para. 51, the Sole Arbitrator, while acknowledging his competence to render a new decision based on the *de novo* competence of CAS, held that the fact that the wrong body within IWF has taken the decision was not a procedural flaw that should be cured by CAS.
63. In the case at hand, the correct body has now finally purported to act, but did this (irrespective of the severity of the contents of its decision) by a circular vote without having been empowered by the IWF Constitution or Swiss law to adopt a decision by circular vote.
64. The Panel reads in Mavromati and Reeb's book "*The Code of the Court of Arbitration for Sport*" at p 508, para II[B]14: "*The power of CAS Panels to go beyond the establishment of the legality of the previous decision and to issue an independent and free standing decision has been confirmed in numerous CAS cases. Accordingly, the CAS must be able to not only examine the formal aspects of the appealed decision but also, above all, to evaluate all facts and legal issues involved in the dispute*".
65. The Panel considers, however, also CAS OG 96/005, at paras 10 et seq, as confirmed by CAS 2010/A/2275, at paras 41 et seq: "*the Panel's function is to review the propriety, in the broadest sense, of the decision of the decision maker; it is not to become the decision maker itself. [...]*"
66. The Panel further takes note that the BWF has sought in its request for relief, *inter alia*, the setting aside of "*the IWF decision ... in absence of ... or any other evidence that such decision has been ever taken by the competent IWF Executive Board*" and only if alternatively if such request is not granted, the imposition of a penalty other than that purportedly imposed by the IWF Executive Board.

67. So while the Panel has an urge to step into the shoes of the IWF's Executive Board and replace the non-existent decision, it is constrained by the BWF's request for relief, and a legal inability to render such a decision.
68. The Panel, therefore, decides to remit the case back to the IWF Executive Board for a further attempt to reach a decision. Considering that the current proceedings are the fourth case in a row based on the same facts, even if one of these cases has been later withdrawn, the Panel finds it useful to provide the IWF with certain recommendations to assist the IWF Executive Board in rendering a decision and bringing finality to this long-running dispute.

C. Recommendation for an Adequate and Proportionate Sanction on the BWF

69. When considering whether to impose a fine on the BWF and, if so, the amount of the fine to be imposed which could be justified based on the IWF rules applied in conformity with Swiss law, the Panel first wants to emphasize the singularity of the facts and circumstances of the case at hand compared to all previous cases of fines on Member Federations documented by the IWF. There is no evidence that in any previous case in the history of the IWF a National Olympic Committee (NOC) has been prevented from presenting athletes for the NOC quota in the sport of weightlifting because of a ban on the relevant National Federation from entering its athletes in the Olympic Games as a consequence of a certain number of its athletes being found to be doped in the year before the Olympic Games. These circumstances differentiate the present case, in particular, from the Azerbaijani case analysed in CAS 2015/A/4319, at paras. 80 – 84, which happened shortly before the entry into force of the Qualification System for the Rio Olympic Games 2016 and came closest in time and substance to the case at hand.
70. The ban on entry of Bulgarian athletes in weightlifting for the Rio Olympic Games 2016 was qualified by the Sole Arbitrator in CAS 2015/A/4319, at para. 57, as an application of part C.1 of the Qualification System. The Sole Arbitrator did not determine whether the measure of a ban based on the Qualification System was a sanction or a measure to protect the integrity of the Olympic Games. The Sole Arbitrator rejected an argued violation of the principle of *ne bis in idem* because of non-identity of the parties before entering a debate of the nature of this measure.
71. The Panel refers the IWF Executive Board to the established CAS jurisprudence, recently confirmed by the Ad Hoc Division for the Rio Olympic Games 2016, that it is not the form, the place, or the wording, but the substance, which is decisive in qualifying a measure as a sanction or not (see e.g. CAS 2011/O/2422, at paras. 8.9 and 8.10; CAS 2011/A/2658, at paras. 5.51 and 5.62; confirmed by CAS OG 16/13, at paras. 7.20 – 7.22).
72. As one of the key driving forces for each member federation of an Olympic Sports Federation is to educate and prepare its best athletes for participation at the next Olympic Games, the ban on such member federation from presenting athletes for the respective NOC quota for Olympic Games because of a certain number of doped athletes in a calendar year is in substance a sanction. The measure has the primary objective of protecting the integrity of the Games, but by its very essence is a penalty measure against a federation having too many

doping cases among its athletes. It is one of the most severe sanctions that can be imposed on a member federation. Without being able to present athletes for participation at Olympic Games, a major part of the activity of a four-year preparatory period has lost its aim and purpose.

73. The Sole Arbitrator in CAS 2015/A/4319, at para. 59, has found that the wording of part C.1 of the Qualification System did not provide any discretion to the IWF on whether or not to impose such measure. The IWF was obliged to impose the measure once the condition of a specified number of doped athletes was met.
74. The IWF Executive Board, thus, should place the principle of *ne bis in idem* at the very beginning of its considerations. It should consider whether what is in issue is the imposition of a second sanction for exactly the same facts (nine doping cases in the BWF in the calendar year 2015) on the BWF and, if so, whether that is permissible. The situation is totally different from the discussion of the application of this principle in the case 2015/A/4319 because there one sanction (the periods of ineligibility) hit the athletes and the other (the purported fine) the BWF. In the case at hand, both sanctions (the ban on the presentation of athletes for the Olympic Games) and the imposition of a fine, hit the BWF.
75. As to the applicability of the principle of *ne bis in idem* on disciplinary sanctions under Swiss law in general, the Panel refers the IWF Executive Board to the discussion of the respective CAS jurisprudence by the Sole Arbitrator in CAS 2015/A/4319, at paras. 71 and 72. The application of the principle on disciplinary sanctions imposed by an International Sports Federation seated in Switzerland requires identity of the object, identity of the parties and identity of the facts, or as this has been formulated by CAS 2011/O/2422, at para. 60, the effective purpose of the sanction must be the same (even if the underlying motivations are different), the sanction must be attributable to the same behaviour, and the sanction results in the same consequence.
76. The Panel does not see an issue as to identity of the facts and parties. It is the same adjudicatory body (the IWF Executive Board), that is asked to impose a fine in addition to the Olympic Games ban. The situation is, however, to a certain degree comparable to the circumstances that had to be analysed by the Panel in CAS 2011/O/2422. The sanctions to be imposed are provided by two different set of rules. The Qualification System for the Olympic Games is by its legal nature an agreement between the IOC, holding all rights for the Olympic Games, and the IWF, being responsible for the administration or organization of the sport of weightlifting at the Olympic Games, whereas the IWF ADP, being the legal basis for the imposition of a fine, falls under the full authority of the IWF. Part C.1 of the Qualification System has been, however, drafted having regard to the respective provisions of the IWF ADP, streamlined for the Olympic Games.
77. The relevant parts of the IWF ADP to be considered by the IWF Executive Board read as follows:

ARTICLE 12 SANCTIONS AND COSTS ASSESSED AGAINST SPORTING BODIES

...

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

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

In such event the IWF Executive Board will:

...

b) Fine the Member Federation as follows:

- 1) 3 violations 50,000 USD; In default of payment of the fine the Member Federation will be suspended for 1 year from the date of default.
- 2) 4 violations 100,000 USD; In default of payment of the fine the Member Federation will be suspended for 1 year from the date of default.
- 3) 5 violations 150,000 USD; In default of payment of the fine the Member Federation will be suspended for 2 years from the date of default.
- 4) 6 violations 200,000 USD; In default of payment of the fine the Member Federation will be suspended for 2 years from the date of default.
- 5) 7 violations 250,000 USD; In default of payment of the fine the Member Federation will be suspended for 3 years from the date of default.
- 6) 8 violations 300,000 USD; In default of payment of the fine the Member Federation will be suspended for 3 years from the date of default.
- 7) 9 or more violations 500,000 USD; In default of payment of the fine the Member Federation will be suspended for 4 years from the date of default.

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

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

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

78. The relevant extract of Part C.1 of the Qualification System as quoted in CAS 2016/A/4319, at. para. 58, (without emphasis), reads as follows:

In accordance with the IWF Anti-Doping Policy (“ADP”) (12.3.1.G) if nine (9) or more violations of these Anti-Doping Rules (other than those under articles 2.4 and 10.3) are committed by Athletes or other Persons affiliated to a Member Federation (“MF”) within a Calendar year period in testing conducted by the IWF or

Anti-Doping Organizations other than the National or its National Anti-Doping Organization, then the IWF Executive Board may suspend that MF's membership for a period of up to four (4) years. In addition, such MF/National Olympic Committee ("NOC") shall not be permitted to enter competitors for the next ensuing Youth Olympic/Olympic Games. If such MF is permitted to compete in any Olympic Qualifying event prior to the next ensuing Youth Olympic/Olympic Games, the MF shall not secure any Olympic Qualifying points in such event.

79. The quoted part of the Olympic Qualification System expressly refers to Article 12.3.1.G IWF ADP, which according to the reasoning of CAS 2016/A/4319, at paras. 43 – 45, must be understood as Article 12.3.1.b.7 in the applicable edition of the IWF ADP, and adds a particular sanction just for the next ensuing Youth Olympic or Olympic Games in case of nine or more ADRVs at an IWF Member Federation within a calendar year. It may be argued that it provides, however, not for a fine, but the suspension of membership of that Member Federation for a period of up to four years, which the IWF Executive Board “may” impose and, in any event, the barring of that Member Federation from entering competitors for the next ensuing Youth Olympic or Olympic Games.
80. The Panel understands, that Article 12.3.1.b.7 and Article 12.3.1.c IWF ADP must be read together, meaning that in the event of 9 or more ADRVs within a Member Federation, the IWF Executive Board will fine the Member Federation or suspend the Member Federation from participation in any IWF activities for a period for up to four years, if the IWF Executive Board according to the Article 12.3 IWF ADP elects (“may”) to take such additional disciplinary action against a Member Federation.
81. From the angle of the “*ne bis in idem*” principle, the Panel, thus, sees no problem if a sanction system, even if based on two sets of rules – the Olympic Qualification System and the IWF ADP – follows the same logic laid down by one and the same regulatory body. Even if the IOC had to agree on the Olympic Qualification System, the sanctions in the event of 9 or more ADRVs within a Member Federation within a Calendar year, harmoniously fit to the sanction system laid down for such case by the IWF ADP.
82. In the view of the Panel, there is no inconsistency or duplication in the two sets of rules. If the IWF Executive Board chooses to do so (as it “may”), it may fine a member federation or suspend its membership for a period of up to 4 years. In the case of such a suspension, the member federation cannot put forward any athletes for entry to the Olympic Games or any other event classified as an IWF event for the duration of the suspension. This is because during the period of suspension it is not able to function as a member of the IWF and that is a prerequisite of entering athletes for IWF events. In the event that the IWF Executive Board does not see fit to take any action, or decides to take action by way only of a fine and not a suspension, or by imposing a suspension of less than four years for a period which does not include any Youth Olympics or Olympic Games as the case may be, then the automatic part of the penalty for an excessive number of positive tests kicks in and the member federation is unable to put forward any athletes for the next ensuing Youth Olympic or Olympic Games as the case may be. There is therefore no double jeopardy and no imposition of a second sanction. There is a single sanction which in every case includes ineligibility for the next Youth

Olympics or Olympic Games, and which may also include the other elements of a fine or suspension.

83. The logical corollary of holding the contrary and holding that the purported imposition of a fine and the ban from presenting athletes for the next following Olympics amounted to two separate penalties for the same offence would be that (had the original purported decision by the IWF President to impose a fine been valid) there could have been no bar to the BWF being permitted to enter competitors for the next following Olympics.
84. In practice, the IWF decision on the ban of the BWF for presenting athletes for the Rio Olympic Games 2016 was in legal effect from the date of the start of the qualification period according to the Olympic Qualification System because the decision of the IWF Executive Board did not allow the BWF to acquire any Qualifying points of its athletes in the qualification period. As confirmed by the Sole Arbitrator in CAS 2016/A/4319, at paras. 81 and 82, this period started on 19 June 2014.
85. *De facto*, one of the BWF's essential membership rights in the IWF, i.e. to have its athletes qualified for the next ensuing Olympic Games, was, thus, already suspended from 19 June 2014 until and including the Rio Olympic Games 2016, which ended on 21 August 2016, more than two years later. Considering the severity of this sanction, and taking account of the comparatively modest financial resources of the BWF, the Panel finds that it would be adequate and proportionate if the IWF Executive Board were to suspend the membership of the BWF in the IWF for a period of one year, starting from the date of its decision rather than imposing any financial penalty.
86. As for the adequacy and proportionality of such suspension period, the IWF Executive Board should consider that CAS in CAS 2015/A/4129, at para. 69, held that the BWF athletes who were found doped with the substance of stanozolol and became the source for the Appealed Decision in the present case could establish on the balance of probabilities, that the origin of this substance was the contaminated supplement Trybest and that the CAS Panel in that case considered were entitled to rely on the mitigation of No Significant Fault or Negligence.
87. The Panel in CAS 2015/A/4129, at paras. 69 – 73, considered as mitigating circumstances on the athletes' fault side, that they relied on the advice of the team doctor, who recommended the use of the supplement Trybest, which was in use within BWF for a long period of time and never had caused Adverse Analytical Findings before, and – with one exception – up to a certain degree more or less properly declared the ingredients of Trybest on the doping control forms.
88. In the opinion of this Panel, the advice of the team doctor clearly falls within the BWF's responsibility. Irrespective of this fact, the Panel does not see any wilful or reckless behaviour in the BWF's supply of its athletes with the supplement Trybest, which was in use for a considerable period of time and did not show any Adverse Analytical Findings in more than 300 doping controls before. The BWF certainly could not test every single lot of Trybest before its ingestion by its athletes.

89. On the other hand, the IWF Executive Board should take note that the BWF itself must accept the blame for not providing enough assistance and education to its athletes on how to complete the doping control forms and for having provided so many food supplements to them.
90. Based on the foregoing, the Panel considers that a suspension of the BWF from membership in the IWF by the IWF Executive Board for a period of one year starting from the date of the IWF Executive Board's decision would be an adequate and proportionate sanction based upon the failures the BWF. The Panel reiterates that such decision is ultimately for the IWF Executive Board and its suggestion is merely made in the form of guidance to assist the parties in seeing this procedure to conclusion. Such suggestion is, of course, made without prejudice to any decision ultimately rendered by the IWF Executive Board and (in the event of any further appeal to the CAS from any such decision) would in no way be binding on any future CAS Panel which would be considering the case on the material and arguments placed before it and in the light of the circumstances at that time.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Bulgarian Weightlifting Federation on 22 March 2016 is partially upheld.
2. The decision of the Executive Board of the International Weightlifting Federation communicated to the Bulgarian Weightlifting Federation by its President on 1 March 2016, including the fine of USD 500,000 imposed thereby, is declared invalid. The matter is referred back to the Executive Board for further evaluation and consideration.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.