



**Arbitration CAS 2011/A/2525 Harry Wiltshire v. International Triathlon Union (ITU), award of 13 December 2012**

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Mark Hovell (United Kingdom); Prof. Denis Oswald (Switzerland)

*Triathlon*

*Disciplinary sanction against an athlete*

*Competence of a federation's executive board to qualify an athlete's conduct*

*Determination of an "Unsportsmanlike conduct"*

*Probative value of conflicting testimonies*

*Proportionality of the disciplinary sanction*

1. The wording of the ITU's applicable rules makes clear that the federation's Executive Board (EB) is not bound by a call of a race referee in respect of the qualification of the conduct of an athlete where such call is not a "field of play" decision. According to the rules, in case of an unsportsmanlike behaviour of an athlete, the race referee may sanction such athlete during the race with a "disqualification" and "report" the incident after the race to the EB "for possible suspension". The word "possible" shows that the EB has the authority to make its own determination as to the qualification of the incident and has therefore the authority to qualify an athlete's conduct as a "repeated unsportsmanlike behaviour".
2. "Unsportsmanlike conduct" describes an offense which is not necessarily a breach of a specific rule of play, but violates the sport's generally accepted rules of "sportsmanship" and/or participant conduct. A behaviour can only be qualified as an "unsportsmanlike conduct", if such behaviour was intentional or at least grossly negligent. In this respect, based on a video footage and on written and oral evidence, an athlete who blocked and/or interfered with another athlete intentionally during a race in three distinctive incidents in order to slow the latter down violates the applicable rules with reference to "repeated unsportsmanlike conduct".
3. There is no reason to doubt the testimony of an independent race referee, despite the contrary statement of an athlete at the hearing. According to the Swiss doctrine, in case of conflicting statements of a credible and independent witness on the one hand and a party on the other hand, the probative value of the former clearly outweighs the latter.
4. The measure of a sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules, can be reviewed only when the sanction is evidently and grossly disproportionate to the offence. A suspension which is at the lower end of the possible range for the rule violation committed by an athlete is not evidently and grossly disproportionate.

Harry Wiltshire (the “Appellant”) is a British Triathlete who has represented Great Britain in triathlon competitions on numerous occasions.

The International Triathlon Union (the “Respondent”) is the world governing body of triathlon and has its registered seat in North Vancouver, Canada.

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

On 26 June 2011, the Appellant competed in the Pontevedra 2011 European Triathlon Championships.

The elite men race started at 7 pm with the swimming race (“the Race”) which consisted of 2 laps of 750 meters. The Athletes had to exit the water between the laps and run 50 meters before diving back in to the water.

The Spanish athlete Javier Gomez was number one in the Respondent’s world ranking. He was assigned with racing number 1. The Appellant had the racing number 36.

At the end of the first lap, the Appellant came out of the water in position 6 or 7 while Mr Javier Gomez was ranked 15 or 16.

Two Swim Technical Officials (“STO”) were watching the swim leg of the Race from two different boats. The Chief STO Alfonso Perez and a TV cameraman were on boat two, positioned between the first and second buoy.

In the second lap of the Race the Appellant was swimming slightly behind and right next to Mr Javier Gomez at the latter’s left side.

Most of the athletes were swimming very close to the bank of the river, while the Appellant and Mr Javier Gomez were swimming two to three meters to the right of the other athletes closer to the middle of the river. At one point the Appellant hit Mr Javier Gomez with a stroke of his right arm forcing the latter partly under water.

Mr Alfonso Perez saw the two athletes swimming closely together and asked the cameraman to film them. Mr Perez formed the impression that the Appellant was intentionally blocking Mr Javier Gomez from swimming to the other athletes closer to the bank of the river. Despite his impression Mr Alfonso Perez did not give a warning to the Appellant.

The Appellant's time for the swim section of the Race was 8 minutes 44 seconds for the first lap and 9 minutes 22 seconds for the second lap. Mr Javier Gomez time for the first lap was 8 minutes 50 seconds and 9 minutes 17 seconds for the second lap.

After the swim section of the Race Mr Alfonso Perez reported to the Race Referee, Mr Thanos Nikopolous, that the Appellant had blocked Mr Javier Gomez in an unsportsmanlike manner several times during the second lap of the Race. The Race Referee took the decision to disqualify the Appellant, pursuant to Articles 2.1.a.) (i), 3.3.a.) (i) and Appendix L (rules 6 and 7) of the ITU Competition Rules ("ITU CR").

Before the Appellant was informed about the disqualification he withdrew from the competition during the cycling race.

On 26 June 2011, the Respondent's Executive Board ("EB") received a request from the Spanish Triathlon Federation, asking the Respondent to investigate the incident at the Race involving the Appellant and their athlete, Javier Gomez.

On 29 June 2011, the ITU Secretary General, Ms Loreen Barnett, forwarded this request to the members of the EB and proposed the appointment of a panel to further investigate the incident and prepare a report for the attention of the EB.

The same day, the Race Referee sent a report to the EB communicating the disqualification of the Appellant after the Race. In this Report the Race Referee stated the following:

*"Athlete number 36 Harry Wiltshire/GBR was disqualified based on the call made by the Swim technical official Mr. Alfonso Perez (ESP) and myself. Both of us witnessed the incident in different parts of the swim course.*

*The rules infringed are:*

*2.1 a.) (i)*

*3.3 a.) (i)*

*Appendix L6.*

*Appendix L7.*

*The disqualification note was published on the notice board once reported, during the bike segment. Furthermore one official was at the athlete position in Transition 2 for personal notification of the penalty, but the athlete withdrew during the bike segment.*

*After the end of the race, BTF coach Mr. Malcolm Brown was informed about the disqualification and he was directed to the official notice board. He didn't express the willing of appealing to the Referee's call.*

*This report is submitted according to the rule 3.5 b.) (i).*

*TV footage is available, and has been submitted to ITU.*

*[...]"*

On 30 June 2011 the EB agreed to further investigate the incident and to appoint an ad-hoc panel (“EB Panel”) with three members.

On 1 July 2011 the British Triathlon Federation (“BTF”) was notified that the EB Panel would start further investigations in connection with the Appellant’s disqualification.

By email dated 4 July 2011 the Appellant asked for clarification and more information about the investigation.

On 5 July 2011 the ITU Secretary General responded to the questions raised by the Appellant.

The EB Panel heard Mr Javier Gomez in a skype interview on 6 July 2011. The following day the EB Panel heard the Appellant, also via skype conference.

On 10 July 2011 the EB Panel sent its recommendation and conclusion in respect of the incident at the Race to the EB stating inter alia the following:

*“3.2 Harry Wiltshire did target Javier Gomez and there were three distinct incidents of seriously aggressive, unsafe and unsportsmanlike conduct:*

- a) On the second lap, Wiltshire thrust his arm around Gomez’s neck and forced his head under the water;*
- b) On the second lap, as the athletes were swimming towards the swim exit, Wiltshire swam diagonally into Gomez from a position just ahead of him and pushed him away from the main pack towards the centre of the channel and away from the current;*
- c) At the swim exit, Wiltshire exited ahead of Gomez, waited for him, looked back for him, and then sat/stepped back on to his head and shoulder [...].”*

On 15 July 2011 the EB notified to the Appellant and the BTF a preliminary decision of the EB, according to which it voted in favour of a 12-month suspension of the Appellant. However, the EB granted the Appellant and the BTF another opportunity to provide more evidence and comments before a final decision.

The Appellant and the BTF sent their respective comments to the EB on 19 July 2011.

On 24 July 2011 the Respondent’s Executive Board issued a decision (“EB Decision”) finding that the Appellant

*“did violate IT Rule 3.4a) (i) with specific reference to repeated unsportsmanlike conduct”.*

The EB imposed on the Appellant a suspension of 6 months commencing on Sunday, 26 June 2011 (the “EB Decision”).

On 10 August 2011 the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS) pursuant to the Code of Sports-related Arbitration (the “Code”) to challenge the EB Decision. He nominated Mr Mark Andrew Hovell as arbitrator and submitted the following prayers for relief under paragraph 6:

- “(a) *An adjudication by CAS that the Appellant did not:*
- (i) *Violate the competition rules or,*
  - (ii) *Engage in unsportsmanlike conduct.*
- (b) *In the event of the Appellant succeeding under paragraph 6 a (ii) above, a declaration from CAS that the Respondent did not have the power to impose any suspension on the Appellant.*
- (c) *In any event, the sanction imposed was excessive and disproportionate to the behaviour cited, particularly given the absence of any disciplinary record of prior misconduct.*
- (d) *The procedures adopted at the time of the event and by the Respondent thereafter were unfair to the Appellant”.*

Under paragraph 12 the statement of appeal contained the following additional request:

*“The Appellant respectfully requests that the Respondent disclose:*

- (a) *All footage of all recordings made at the time of the event;*
- (b) *Interview Javier Gomez – <http://triathlon.org/files/afl/panel/gomez-interview-0407211.mov> - images not accessible;*
- (c) *Interview Harry Wiltshire- <http://triathlon.org/files/afl/panel/wiltshire-interview-0407211.mov> - images not accessible;*
- (d) *All internal documentation (including emails) relating to these matters;*
- (e) *Any other document or material relating to these matters”.*

By letter dated 11 August 2011 CAS notified the appeal to the Respondent inviting it, inter alia, to submit its position with regard to the Appellant’s request under paragraph 12 of the statement of appeal.

By letter dated 15 August 2011 the Appellant requested CAS to suspend the time limit for the Appellant to submit his appeal brief until the Respondent provided the material requested under paragraph 12 of the statement of appeal.

On 16 August 2011 the CAS Court Office informed the parties that the time limit for the Appellant to file his appeal brief had been suspended, pending resolution of the issue of the disclosure requested.

On 16 August 2011 the Respondent submitted to CAS that it fully accepted the right of the Appellant to appeal to CAS and was willing to disclose all the material requested by the Appellant in paragraph 12 of his statement of appeal.

On the same day the CAS Court Office granted the Appellant a time limit of 10 days from receipt of “*all internal documentation ...*” to be provided by the Respondent in the coming days to file his appeal brief.

On 23 August 2011 the Respondent nominated Prof Denis Oswald as arbitrator.

On 9 September 2011 the Respondent submitted a bundle of documents stating that these were all the documents the Appellant had requested.

On 12 September 2011 the CAS Court Office forwarded the documents submitted by the Respondent to the Appellant and granted the Appellant a time limit of 10 days from receipt of such letter to file his appeal brief.

On 13 September 2011 the CAS Court Office informed the parties of the formation of the Panel to be chaired by Mr. Dirk-Reiner Martens.

On 13 September 2011 the Appellant informed the CAS Court Office that the Respondent had failed to provide unedited footage of the event and the interviews given by the Appellant and Mr Javier Gomez.

On 22 September 2011 the Respondent submitted a USB-memory stick containing video footage of the Race and audio recordings of the skype interviews held by the EB Panel with the Appellant and Mr Javier Gomez about the alleged violation of the ITU CR by the Appellant.

On 23 September 2011, the Appellant commented on the material submitted by the Respondent stating that he did not consider that full disclosure of all relevant internal documentation had been provided and that he was in the process of compiling a list of documents that he considered the Respondent should have disclosed to him.

On the same day, the CAS Court Office requested the Appellant to provide the list of further documents and suspended the time-limit for the Appellant to file his appeal brief.

On 5 October 2011, the CAS Court Office informed the parties that it had not received any further communication from the Appellant in respect of the aforementioned list of further documents. Accordingly, on behalf of the President of the Panel, the Appellant was granted a deadline until 7 October 2011 to file his appeal brief.

On 5 October 2011 the Appellant filed his appeal brief seeking leave to file a perfected appeal brief, the Appellant's witness evidence, expert witness evidence, character witness evidence and case law references once full disclosure of internal documents had been provided by the Respondent. In a second letter of the same date the Appellant submitted a list of documents that he considered the Respondent should be in possession of and should have disclosed to him, including, inter alia, full unedited footage of the Race.

On 13 October 2011 the Respondent submitted that the video footage of the Race provided to CAS on the aforementioned USB-memory stick contained the full unedited footage of the event that was made available to Respondent.

On 25 October 2011, the Respondent submitted that it was represented by Carrard & Associés and requested to be granted a 10-day extension of the time limit to file its answer, i.e. until Monday 7 November 2011.

On 26 October 2011, the CAS Court Office communicated to the parties that (i) the Respondent was granted an extension of time until 1 November 2011 to file its answer; (ii) pursuant to Article R 57 of the CAS Code, the Respondent was directed to provide the CAS with a copy of the full case filed by 1 November 2011; and (iii) the Respondent was directed to address the outstanding requests for document production in its answer by 1 November 2011.

On 1 November 2011, the Respondent filed its answer to the Appellant's appeal accompanied by 17 exhibits including a report by the witness Alfonso Perez. The Respondent requested CAS to decide as follows:

- “(i) The Appeal filed by Mr Harry Wiltshire is dismissed.*
- “(ii) The International Triathlon Union is granted an Award for costs”.*

On 2 November 2011, the CAS Court Office informed the parties that in accordance with Article R56 of the Code

*“unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and the answer”.*

On 4 November 2011, the Appellant requested that he should be allowed to perfect his appeal brief and to provide details of the Appellant's witness evidence, because of *“the extraordinary behavior of the Respondent in continually delaying in providing full disclosure of the requested documents”.*

On 7 November 2011, the CAS Court Office communicated to the Parties that the Panel had decided to deny the Appellant's request to perfect his appeal brief on the grounds of lack of exceptional circumstances according to Article R56 of the Code. The Panel allowed the witnesses named by the Appellant in his letter dated 4 November 2011. The Panel also directed that the Appellant file witness statements for each of the intended witnesses by 8 November 2011.

On 7 November 2011 the Appellant submitted “witness statements” of the following persons: Mr Harry Wiltshire, Mr Robin Brew, Mr Malcolm Brown, Ms Kate Allenby and Dr. Patrick Wheeler.

On 9 November 2011 the Respondent submitted that the witness statement of Harry Wiltshire was not acceptable because

- Harry Wiltshire was a party of proceedings. Therefore, his testimony could not be accepted as evidence under Swiss law;
- the filing of the Appellants witness statement was an attempt to amend his appeal brief;
- the exhibits attached to the witness statements could not be accepted as part of the file, as they had been produced much too late.

The Respondent further submitted that the witness statement of Mr Robin Brew should not be considered by the Panel, as the Decision was a field of play decision, which *“cannot be revisited by a*

*private expert*". The Respondent also submitted that the witness statement by Mr Malcolm Brown was in essence an answer to the submissions filed by the Respondent and that the witness statement of Ms Kate Allenby was irrelevant. For these reasons the Respondent argued that these witness statements should not be considered by the Panel.

A hearing was held on 10 November 2011 at the CAS premises in Lausanne, Switzerland.

At the outset of the hearing, the Panel remarked in respect of the Respondent's objections raised in its 9 November 2011 submission that

- a) it was aware that the Appellant could only be heard as a party and not as a witness;
- b) it was going to decide on the admissibility of the Appellant's witness statements filed on 8 November 2011 in its decision;
- c) it will not take into consideration the exhibits attached to the Appellant's witness statements submitted on 8 November 2011 pursuant to Article R56 of the Code.

## LAW

### Jurisdiction of the CAS

1. CAS has jurisdiction to decide the present dispute between the parties.
2. The jurisdiction of CAS is not disputed by the parties and has been confirmed by the execution of the Order of Procedure by the parties. In addition, it is provided for in Article 12.2. c) of the ITU CR.

### Applicable Law

3. 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".*
4. The Panel finds that in this case the applicable regulations are all pertinent ITU rules and regulations. In view of the fact that the ITU has its seat in Vancouver (Canada) Canadian law shall apply on a subsidiary basis.
5. The ITU CR relevant in this arbitration are the following:

### **“3. Penalties**

#### **3.1 General Rules:**

- a) *Failure to comply with the ITU Competition Rules may result in an athlete being warned (verbally or given a “stop and go” time penalty), disqualified, suspended, or expelled;*
- b) *The nature of the rule violation will determine the resulting penalty.*
- c) *A suspension or an expulsion should be very rare, but will occur with very serious violations of either the ITU Competition Rules or the ITU Anti-Doping Rules.*
- d) *Reasons for Penalty: An athlete may be issued a warning (verbal or a “stop and go” time penalty) or disqualified for failing to abide by the ITU Competition Rules. All the infringements and penalties are listed in Appendix L.*

[...]

#### **3.2 Warnings:**

- a) *May be with or without time penalty (see appendix L for the list of infringements and penalties)*
- b) *It is not necessary for a Technical Official to give a warning prior to issuing a more serious penalty;*
- c) *The purpose of a warning is to alert an athlete about a possible rule violation and to promote a “proactive” attitude on the part of the officials. A time penalty is appropriate for minor infringements.*
- d) *Time penalties will be served in a designated Penalty Box or in the Transition Area.*

#### **3.3 Disqualification:**

- a) *General: (i) A disqualification is a penalty appropriate for severe rule violations, or dangerous or unsportsmanlike conduct.*
- b) *Assessment:*
  - (i) *If time and conditions permit, a Technical Official will assess a disqualification by:*
    - *Sounding a whistle or horn;*
    - *Showing a red card;*
    - *Calling (in English) the athlete’s number and saying “Disqualified”;*
    - *For safety reasons, a Technical Official may have to delay issuing a disqualification.*
  - (ii) *Alternatively the athletes may be informed about the penalties by displaying the athlete’s number on the white board posted at the post finish area.*
- c) *Procedure after Disqualification:*
  - (i) *An athlete may finish the race if a Technical Official calls a disqualification. A disqualified athlete may appeal the decision in accordance with the provisions of Appeals Procedure of the ITU Competition Rules.*

#### **3.4 Suspension**

- a) *General*

- (i) *Suspension is a penalty appropriate for fraudulent or very severe rule violation, or repeated dangerous or unsportsmanlike conduct;*
  - (ii) *A suspended athlete will not take part in ITU competitions or competitions sanctioned by NFs affiliated with ITU during a suspension period.*
- b) *Assessment:*
- (i) *The procedure is the same as the disqualification procedure. The athlete will be informed at the end of the race and a report will be sent to the ITU Executive Board for possible suspension.*
  - (ii) *Suspensions will be assessed by the ITU Executive Board, for a period of three (3) months to four (4) years, depending on the violation.*
- c) *Reasons for Suspension:*
- (i) *A list of infringements, which may result in a suspension, is described in Appendix L;*

[...]

## **10. Technical Officials:**

### **10.1. General:**

- a) *The duties of the Technical Officials are to conduct the Competition in accordance with the ITU Competition Rules.*

### **10.2. ITU Technical Officials:**

- a) *The official at all ITU races are:*
  - (i) *The ITU Technical Delegate (TD) ensures all aspects of the ITU Competition Rules and Operations Manuals are fulfilled;*
  - (ii) *The Assistant Technical Delegate (ATD) assists the TD with his/ her duties;*
  - (iii) *The Referee checks the certification of the Technical Officials and makes final judgments on the rule violations;*

[...]

## **12. Appeals:**

### **12.1 Appeal Jurisdiction:**

- a) *An appeal is a request for a review of a decision made by the Referee. A sample of the Appeal Form is available in Appendix C.*
- b) *Where ITU Competition Rules do not cover the incident, FINA, UCI, FIS and LAAF Rules will apply.*

### **12.2 Levels of Appeal:**

- a) *Level 1: A Representative of an NF or an athlete may appeal the decision of the Referee to the Competition Jury. Each appeal will be accompanied by a fee of \$50USD or equivalent. It will be refunded if the appeal is successful. If the appeal is denied, there will be no refund and the money will be retained by ITU. The time for an athlete or official team representative to file an appeal is no later than fifteen*

*(15) minutes after his or her finishing time or the posting of the infraction, whichever is later. However, the intention to write an appeal must be announced to the Referee within five (5) minutes of his/her finishing time or posting of the infraction. After this deadline, only protests following this process will be admitted. For team competitions, this time limit is related to the final team time.*

- b) Level 2: The decision of the Competition Jury may be appealed to the ITU Executive Board. Such an appeal must be received by the ITU President within 14 days of the decision of the Competition Jury.*
- c) Level 3: The decision of the ITU Executive Board may be appealed, as a final and last resort, to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, to the exclusion of any recourse to ordinary courts. Any decision taken by the said court (CAS) shall be without appeal and shall be binding on the parties concerned.*

[...]

**Appendix L: Penalties and Violations:**

**Rules**

[...]

5. Using unsportsmanlike behavior;

6. Blocking, charging, obstructing, or interfering the forward progress of another athlete;

7. Unfair contact. The fact that contact occurs between athletes does not constitute a violation. When several athletes are moving in a limited area, contact may occur. This incidental contact between athletes in equally favorable positions, is not a violation;

[...]”.

**Penalties**

[...]

DSQ and report to the EB for possible suspension

- Unintentionally: verbal warning

- Intentionally: DSQ

- Unintentionally: verbal warning

- Intentionally: DSQ

**Admissibility**

- 6. The Panel examined the question whether the Appellant’s prayers for relief in his appeal brief are inadmissible for lack of a legal interest. The Respondent is correct in submitting that as a rule, a motion for a declaratory judgment is inadmissible, if the claimant is in a position to ask for a “performance”.
- 7. On the other hand, prayers for relief are subject to interpretation by the Panel and the CAS has consistently repudiated any excessive formalism in respect of the prayers for relief and has allowed parties to modify their motions on the condition that the principle of equal treatment of the parties and their right to be heard is respected (cf. CAS 2009/A/1880 & 1881).

8. In the hearing and in the closing submissions the Appellant clarified that he requests the CAS to replace or alternatively annul the EB Decision. The Respondent based the arguments in its answer on the understanding that the Appellant requests an annulment of the EB Decision.
9. Despite the language in R56 of the Code (“... *unless the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests ... after the submission of the appeal brief and of the answer*”) the Panel is inclined to authorize by way of interpretation the clarification by the Appellant’s of his prayers for relief. After all, the Panel would not be in a position to make the declaratory statements requested without, in essence, annulling the contested Decision. Ultimately, the Panel does not have to make a final ruling on this question as – as will be shown below – it dismisses the appeal on the merits.
10. According to the Panel the EB Decision is not a “*field of play*” decision.
11. In numerous CAS decisions, it has been established that  
*“CAS does not review “field of play” decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game. An exception is nevertheless possible if such rules have been applied in bad faith”* (CAS 2001/A/354 and CAS 2001/A/355, emphasis added).
12. The Panel finds that the appealed EB Decision is not a “*field of play*” decision. This derives from the fact that the EB’s decision was not made on the “*field of play*”. Rather, the EB evaluated evidence (e.g. the video footage of the event), heard witnesses (in particular, Mr Javier Gomez) and the Appellant before imposing the suspension on the athlete.
13. The Panel notes that the decision to disqualify the Appellant imposed by the Race Referee was not challenged by the appeal at hand. The Panel therefore does not need to decide whether the CAS’ “*field of play*” decision doctrine would apply to the disqualification of the Appellant.
14. Finally, the statement of appeal was filed within the deadline set out in Article R47 of the Code. It further complies with the requirements of Article R48 of the Code.
15. Accordingly, the Appeal is admissible.

## Merits

16. According to Article R57 of the Code the Panel has “*full power to review the facts and the law*”. As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, which it is not confined to merely deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it is the mission of this Panel to make an independent determination as to whether the parties’ contentions are inherently correct rather than only to assess the correctness of the EB Decision (see CAS 2007/A/1394, para. 21).

17. With regard to the merits of this case, the Panel must address the following four main issues:
- a) Did the EB have the competence to sanction the Appellant with a six months suspension despite the fact that the disqualification by the Race Referee was based on a violation of Articles 2.1. a) (i), 3.3 a) (i) Appendix L6, L7 of the ITU CR (i.e. “*Blocking, charging, obstructing, or interfering the forward progress of an athlete*” and “*(U)nfair contact*”), and not on Appendix L5 of the ITU CR (“*using unsportsmanlike behaviour*”)?
  - b) Was the Appellant’s behaviour in the Race a “*repeated unsportsmanlike conduct*” within the meaning of Article 3.4. a) (i) of the ITU CR?
  - c) Was the suspension for six month imposed by the Respondent upon the Appellant “*excessive and disproportionate to the offending behaviour*”?
  - d) Did the Respondent commit any procedural violation, which leads to the appeal being successful?

A. *EB’s authority to qualify the Appellant’s conduct as unsportsmanlike and impose a suspension of the Appellant*

18. In the appealed EB Decision the EB reached the following conclusions:

“1. *There was sufficient evidence to conclude that Harry Wiltshire did violate ITU Competition Rule 3.4 a) (i) with specific reference to ‘repeated unsportsmanlike conduct’. In its capacity under ITU Competition Rule L.5 the ITU Executive Board has determined that a suspension is appropriate*”.

19. The Panel notes that the Race Referee’s report to the EB on the disqualification of the Appellant only mentioned an infringement of Articles 2.1. a) (i), 3.3 a) (i) Appendix L.6, L.7 ITU CR, which only provide for a disqualification as a possible sanction for an infringement, not for a suspension. The report does not make reference to Rule L.5 of Appendix L which provides for a suspension as a result of a violation.
20. Therefore, the Panel needs to decide whether the EB had the authority to find that the Appellant had violated Rule L.5 of Appendix L despite the different call by the Race Referee, or whether the EB was bound by a “*field of play*” decision by the Race Referee.
21. In the Panel’s majority view the EB’s authority to suspend an athlete – despite a different call by a Race Referee – is not expressly stipulated in Appendix L.5 to the ITU CR, on which the EB based its power to do so. Such rule reads as follows:

<b>Rules</b>	<b>Penalties</b>
<p>[...]</p> <p>5. <i>Using unsportsmanlike behavior;</i></p>	<p>[...]</p> <p><i>DSQ and report to the EB for possible suspension</i></p>

22. The wording of Rule L.5 of Appendix L to the ITU CR indicates that this rule addresses in the first place the Race Referees. It stipulates that in case of an unsportsmanlike behaviour of an athlete the Race Referee may sanction such athlete during the race with a “disqualification”, and

directs the Race Referee to “report” the incident after the race to the EB “for possible suspension”.

23. The Panel further notes that Article 10.2 a) (iii) ITU CR reads as follows:

*“The Referee [Race Referee] checks the certification of the Technical Officials and makes the final judgments on rule violations”.*

24. However, the majority of the Panel is of the opinion that the competence of the EB to suspend the Appellant despite the Race Referee’s failure to make reference to Rule L.5 of Appendix L to the ITU CR derives from Article 3.4 b) (ii) ITU CR, which reads as follows:

*“Suspensions will be assessed by the ITU Executive Board, for a period of three (3) months to four (4) years, depending on the violation”.*

25. Such finding is in line with a systematic interpretation of the ITU CR:

26. The ITU CR provide the following sanctions for a failure to comply with such rules: *Warning* (Article 3.2 of the ITU CR), *Disqualification* (Article 3.3 of the ITU CR), *Suspension* (Article 3.4 of the ITU CR) and *Expulsion* (Article 3.5 of the ITU CR).

27. The Panel notes that Article 10.1 a) ITU CR reads as follows:

*“The duties of the Technical Officials are to conduct the Competition in accordance with the ITU CR”.*

28. In the Panel’s opinion, such rule indicates that the Respondent’s Technical Officials are in charge of verifying during triathlon competitions whether the athletes act in accordance with the ITU CR. In case the Technical Officials observe a violation they have to report it to the Race Referee, who “*makes the final judgements on rule violation*” (Article 10.2 a) (iii) ITU CR).

29. Such interpretation is confirmed by Article 12.2 a) of the ITU CR, which stipulates the following:

*“A Representative of an NF or an athlete may appeal the decision of the Referee to the Competition Jury:*

*[...]*

*The Time for an athlete or official team representative to file an appeal is no later than fifteen (15) minutes after the race”.*

30. This rule shows that all decisions by Referees are “*field of play*” decisions, which can only be appealed within 15 minutes after the race.

31. In the Panel’s view, the nature of the aforementioned catalogue of sanctions indicates that only warnings and disqualifications can be qualified as *field of play* decisions to be issued by a Race Referee on site.

32. In contrast, suspensions and expulsions of athletes are not sanctions that are called on the field of play, but are usually left for a panel to decide after reviewing evidence and giving the accused athlete the right to be heard.

33. The understanding that suspensions of athletes are not under the authority of the Respondent's Race Referee is confirmed by Article 3.4 b) of the ITU CR, which reads as follows:

*"b) Assessment:*

*(i) The procedure is the same as the disqualification procedure. The athlete will be informed at the end of the race and a report will be sent to the ITU Executive Board for possible suspension.*

*(ii) Suspensions will be assessed by the ITU Executive Board, for a period of three (3) months to four (4) years, depending on the violation"* (emphasis added).

34. The Panel's majority finding is that this wording makes clear that the EB is not bound by a call of a Race Referee in respect of the qualification of the conduct of an athlete. According to Article 3.4 b) (i) of the ITU CR the Race Referee has to submit a report to the EB for a "possible" suspension. If according to the ITU CR the EB were bound by the Race Referee's qualification of an athlete's conduct as justifying a suspension, the duty to submit a report "for a possible suspension" would not make sense. In light of Article 3.4 b) (ii) of the ITU CR the word "possible" shows that the EB has the authority to make its own determination as to the qualification of the incident.

35. This interpretation was also confirmed by the testimony of the witness Thanos Nikopoulos, the Race Referee who disqualified the Appellant. Mr Nikopoulos testified that he submitted his report to the EB to determine whether the Appellant's conduct fulfilled the requirements for a suspension according to Article 3.4 of the ITU CR.

36. The Panel finds that this interpretation is also confirmed by Mr Nikopolous' written report in which he stated the following:

*"This report is submitted according to the rule 3.5. b.) (i)".*

37. According to Mr Nikopoulos' credible testimony he wanted to act in accordance with Article 3.3 b) (i) of the ITU CR and the inaccurate reference to "rule 3.5" was a typographical error.

38. In conclusion, the Panel finds that the EB had the authority to qualify the Appellant's conduct as "repeated unsportsmanlike behaviour".

#### *B. Violation of the ITU CR by the Appellant*

39. The Respondent based the suspension of the Appellant on Article 3.4 a) (i) of the ITU CR with specific reference to "repeated unsportsmanlike conduct". The Respondent submitted that this rule violation was evidenced by the following four incidents during the Race:

(a) The Appellant swam over Mr Gomez with full physical contact (DVD 1'.33" – 1'.36");

- (b) The Appellant hindered Mr Gomez to change his direction during the Race (DVD 1'53"-2'.37");
  - (c) The Appellant blocked Mr Gomez at the exit of the Race, by impeding the latter's route on the exit stairs;
  - (d) The Appellant pushed Mr Gomez in the transition area when the latter tried to overtake the Appellant.
40. "*Unsportsmanlike conduct*" describes an offense which is not necessarily a breach of a specific rule of play, but violates the sport's generally accepted rules of sportsmanship and/or participant conduct.
41. In the course of its evaluation of the witness statements the Panel did not take into account any legal considerations submitted in such statements. As the Panel finds that the EB decision is not a *field of play* decision, it sees no reason to disregard the witness statement of Mr Robin Brew. The question whether parts of the witness statements by Mr Malcolm Brown and Ms Kate Allenby should be disregarded by the Panel can be left open, as the Panel's decision in no way rests on such witness statements.
42. Based on the video footage and the written and oral evidence, the Panel holds that the Appellant violated Article 3.4 a) (i) of the ITU CR. This conclusion derives from the following evaluation of the evidence in respect of the Appellant's conduct during the Race:
- (a) The Appellant swam over Mr Gomez with full physical contact (DVD 1'.33"-1'.36")
43. Contrary to the Respondent's submission, in the Panel's view, there is no clear evidence that the Appellant swam *intentionally* over Mr Javier Gomez or even "*thrust his arm around Gomez's neck and forced his head under water*".
44. The Panel finds that a behaviour can only be qualified as an "*unsportsmanlike conduct*", if such behaviour was intentional or at least grossly negligent. The video footage (DVD 1'.33"-1'.36") does not prove that the Appellant was acting with intention. It shows that the Appellant was looking to his left side to breathe when he hit Gomez who was swimming at the Appellant's right side. Further, as the video footage shows, the Appellant looked at Mr Javier Gomez (Respondent's Exhibit 1) only after the physical contact shown in Respondent's Exhibit 2 had occurred.
45. The testimony of the expert witness, Mr Robert Brew, confirmed that contact as shown in the video footage (DVD 1'.33"-1'.36") happens frequently in triathlon swim races, particularly in the early phase of the race, immediately after the start. The Respondent's witnesses did not report having observed that the Appellant was acting intentionally in respect of such incident.

- b) The Appellant hindered Mr Gomez to change his direction during the Race (DVD 1 1'53"-2'.37")
46. The Panel is of the opinion that – in line with the testimony of Mr Alfonso Perez – the Appellant intentionally prevented Mr Javier Gomez from moving to the left side of the river towards the leading group of the other athletes.
47. The witness Alfonso Perez – STO for twelve years –, who was situated in a boat right next to the incident, testified that the Appellant blocked Mr Javier Gomez for a significant amount of time away from the other swimmers. He testified that he had noticed in the second lap of the Race that the Appellant and Mr Javier Gomez were swimming side by side close to the middle of the river, while the rest of the athletes were swimming close to the bank. According to Mr Perez, Mr Javier Gomez tried to move towards the leading group on his left side several times, while the Appellant was swimming very close on Mr Javier Gomez's left side. Mr Perez noticed that when Mr Gomez reduced his swimming speed in order to let the Appellant pass, the Appellant also reduced his speed and therefore hindered the Appellant to change his line. When Mr Gomez accelerated his speed in order to overtake the Appellant, the latter also accelerated his speed.
48. Mr Perez reported that finally, approximately 90 meters before the exit of the Race Mr Gomez stopped swimming and swam over the feet of the Appellant in order to change his direction. Thereafter, according to Mr Perez the Appellant – then swimming at Mr Gomez's right side – forced Mr Gomez to a line towards the rocks on the left side of the river.
49. This observation was confirmed by the testimony of Mr Nikopoulos. He testified that he observed from his position close to the exit of the Race two athletes who were swimming from the middle of the river through the whole group of the other athletes towards the rocks at the banks of the river.
50. Mr Perez reported that he had never seen such constant blocking/interfering in a triathlon swim race before.
51. The Panel is not willing to share the Appellant's contention that he only tried to draft off Mr Gomez. In his testimony Mr Brew confirmed the Appellant's contention but he had to base his witness statement on the video footage and was not – in contrast to the witnesses Perez and Nikopoulos – on site. The Panel agrees with Mr Brew that the video footage does not clearly show an intentional blocking of Mr Gomez by the Appellant. The Panel notes, however, that the camera perspective in the video footage is mostly concentrated on the Appellant and Mr Gomez and does not show the whole river. Therefore, it does not provide a full picture of the incident.
52. The Panel further notes that Mr Brew testified that the best position to draft off another athlete is 0.5 meters behind or on the side of the athlete. In contrast, as can be seen in the video footage the Appellant and Mr Gomez were swimming next to each other with almost constant physical contact.

53. Furthermore, the Panel does not share the Appellant's contention that he chose a line away from the leading group, because he believed that Mr Gomez would know the fastest line. In the skype hearing on 6 July 2011 Mr Gomez confirmed that the Appellant hindered him constantly from swimming towards the left of the river. Mr Gomez further confirmed that the line closer to the river bank was easier because of the current. This was also confirmed by the testimony of the Race Referee Thanos Nikopoulos who is also a former triathlete.
  54. If the Appellant's only intention had been to find the best line under the lead of Mr Gomez, it would not have made any sense for him to hinder Mr Gomez during the Race to take such line.
- c) The Appellant blocked Mr Gomez at the exit of the Race, by impeding the latter's route on the exit stairs:
55. The Panel also believes that the Appellant intentionally blocked Mr Gomez at the exit of the Race. While all other Athletes at the exit steps proceeded straight to the right on the fastest way to the transition area, the Appellant took a step to the left where Mr Gomez was situated right behind him. Mr Perez testified that by doing so the Appellant blocked Mr Gomez impeding the latter's route outside the water.
  56. In the Panel's view the video footage confirms that this blocking happened with the intent to hinder Mr Gomez from proceeding as fast as possible to the transition area. The video footage shows the Appellant taking a look to his left where Mr Gomez was exiting the water behind the Appellant right before taking the step to the left.
  57. In the Panel's opinion the blocking of Mr Gomez was not caused by an accidental stumbling of the Appellant, as the Appellant and Mr Brew submitted. The video footage does not show any stumbling of the Appellant causing his step to the left, which initiated the blocking of Mr Gomez. Even if the Appellant maintained some forward motion, the Panel felt there was a slowing down, which caused the collision.
  58. Ultimately, the Panel finds that the testimony of Mr Perez – who observed the incident on site – has been credible and cannot be put into question by an opinion of an expert who is – similarly to the Panel– confined to watching video footage.
- d) The Appellant pushed Mr Gomez in the transition area when the latter tried to overtake the Appellant.
59. Mr Nikopoulos reported that in the transition area the Appellant pushed Mr Gomez when he tried to overtake the Appellant. Mr Nikopoulos testified credibly that this pushing happened intentionally right in front of his position in the transition area.

60. The Panel sees no reason to doubt such testimony of an independent Race Referee, despite the contrary statement of the Appellant at the hearing. In case of conflicting statements of a credible and independent witness on the one hand and a party on the other hand, the probative value of the former clearly outweighs the latter (see also HABSCHIED W., *Droit Judiciaire Privé Suisse* (2d ed. 1981), 457; HALDY J., *La Nouvelle Procédure Civile Suisse* (2009), 55).
61. After evaluating all the evidence and the testimony of the witnesses the Panel is of the opinion that the Appellant blocked and/or interfered with Mr Gomez intentionally during the Race in three distinctive incidents in order to slow the latter down. Therefore, the Panel finds that the Appellant violated Article 3.4. a) (i) of the ITU CR with reference to “*repeated unsportsmanlike conduct*”.
62. The question whether the Appellant had been properly notified about his disqualification after the Race can be left open, as such notification is not a requirement for a suspension according to Article 3.4 a) (i) of the ITU CR. The disqualification itself was not challenged by the Appellant before CAS.
63. The Panel finds further that according to Article 3.2 of the ITU CR a warning was no prerequisite for the suspension imposed.
64. As a warning is not even a prerequisite for a sanction by a Technical Official it is all the more not a prerequisite for a suspension imposed by the EB.

C. *Proportionality of the sanction*

65. The Panel does not find that the six months suspension imposed on the Appellant is evidently and grossly disproportionate.
66. Pursuant to Article 3.4 b) (ii) of the ITU CR the EB had discretion to impose a suspension for a period of three months to four years.
67. CAS “*enforces a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by the disciplinary body of an association to set a sanction*” (cf. CAS 2006/A/1175, para. 90). This Panel confirms the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules, can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (cf. CAS 2004/A/690, para. 86; CAS 2005/A/830, para. 10.26; CAS 2005/C/976 & 986, para. 143).
68. Considering that the six months suspension is at the lower end of the possible range for the rule violation committed by the Appellant (three months to four years), the Panel does not find the sanction evidently and grossly disproportionate.
69. The Appellant’s argument that the sanction is disproportionate because his conduct as identified by the Technical Official takes place only over a period of around three and a half minutes with

only one physical contact must fail. Article 3.4 a) (i) ITU CR only requires a “*repeated unsportsmanlike conduct*”. This conduct can be realised in any timeframe.

70. Similarly, the Appellant’s argument that his behaviour did not cause an injury must also fail for the same reason. The fact that Mr Javier Gomez did not suffer an injury does not excuse the repeated behaviour by the Appellant. As mentioned above the sanction imposed is at the lower end of the range provided for in Article 3.4 b) (ii) of the ITU CR.

*D. Did the Respondent violate procedural rules?*

71. The Appellant considers the Respondent’s decision to be unlawful from a procedural point of view because it suffers from a number of serious procedural defects, and it violates fundamental procedural rights, particularly the right to be heard in person.
72. The question whether the Respondent violated procedural rules by, inter alia, interviewing the Appellant in a telephone conference and not in person thus giving him the opportunity to present his defence only in writing can be left unanswered in the present case.
73. Under Art. R57 of the Code, in appeals arbitration proceedings CAS has full power to review the facts and the law of the case. In other words, the Panel hears the case *de novo*, without being limited by the submissions and the evidence that was available to the Respondent. In such a case an alleged breach of procedural principles in the proceedings before the EB Panel cannot be invoked.
74. Accordingly, as the Appellant was granted the full right to be heard before CAS, any perceived procedural violations committed by a first instance body are effectively rendered redundant on appeal.

**Conclusion**

75. To sum up, the Panel finds that the Appellant violated Article 3.4. a) (i) of the ITU CR with reference to “*repeated unsportsmanlike conduct*” and that the EB had the competence to sanction the Appellant with a suspension.
76. The Panel finds that the suspension of six months is not evidently and grossly disproportionate and that it therefore needs to respect the EB’s discretion.
77. As a result, for all the above reasons, the Appeal is dismissed.

**The Court of Arbitration for Sport rules:**

1. The appeal filed on 10 August 2011 by Mr Harry Wiltshire against the decision issued on 24 July 2011 by the Executive Board of the International Triathlon Union is dismissed.
2. The decision issued on 24 July 2011 by the Executive Board of the International Triathlon Union is confirmed.
- (...)
5. All other motions or prayers for relief are dismissed.