



Arbitration CAS 2009/A/1783 Rob Woestenborghs v. International Triathlon Union (ITU), award of 14 October 2009

Panel: Mr Quentin Byrne-Sutton (Switzerland), President; Mr Guido De Croock (Belgium); Mr Richard McLaren (Canada)

Triathlon

Disqualification of a competitor

CAS jurisdiction regarding a field of play decision

Authority habilitated to take a field of play decision

Violation of the rules in the decision making process resulting in the invalidity of the disqualification

1. The Swiss Private International Law Act (PILact) contains no mandatory provisions that exclude the CAS from accepting jurisdiction to review field-of-play decisions, since the nature of field-of-play decisions does not prevent them from being arbitrable under article 177 of the PILact. Whether or not – and, if so, to what degree – the CAS has jurisdiction to review a field-of-play decision is not a question of arbitrability but depends on the scope of powers provided to the CAS under the arbitration agreement. As the final judging body, CAS has jurisdiction to review, among others, the legality of a federation’s executive board decisions and the correct application of the decision-making procedures defined in the rules. However, the CAS jurisprudence has upheld the concept, either expressly written into the sports regulation involved or implicit in its rationale, that field-of-play decisions are not subject to review, or at least only with a large degree of restraint. Thus, certain forms of behaviour or violations such as bad faith, corruption, fraud, arbitrariness and the breach of fundamental principles can be subject to review despite a field-of-play decision being involved.
2. The definition of what constitutes “field of play” must primarily be sought in the applicable sports regulations. A “Judgement Call” – term used for field of play decisions in the applicable rules – necessarily emanates from an official having directly observed and assessed events as a violation/incident. Judgement Calls are made by officials at ground level, in the field of play, and can only be appealed in a few cases. Therefore, under the rules, a competition jury has no authority to take a Judgement Call such as the disqualification of an athlete following an alleged incident on the field.
3. Because the authority making a field of play decision was improperly constituted and did not have in any event the authority under the applicable rules to make the decision it did, the federation’s decision which upheld the disqualification of the athlete decided by the said authority is erroneous and made in violation of the rules, with the result that it must be set aside as being invalid.

Mr Rob Woestenborghs (the Appellant or the “Athlete” or “Rob Woestenborghs”) is a professional athlete who competes internationally for Belgium in duathlon events.

The International Triathlon Union (ITU) (the Respondent, or “the ITU”) is the international federation and worldwide governing body for the sports of duathlon and triathlon.

On 25 September 2008, during the final preparations for the organization of the duathlon World Championships in Rimini, Italy, the Technical Delegate of the ITU, Mr Enrique Quesada, realized he was not going to be in a position to form a Competition Jury made up of 5 members as provided by the ITU Competition Rules (the “Competition Rules”) for the World Championship, since the number of persons with the required qualifications were not available and he depended on volunteers.

Consequently, the decision was made, with the approval of the Technical Committee, to form a Competition Jury (the “CJ” or “Jury”) with only 3 members, as is provided in the Competition Rules for World Cup events. The 3 members composing the Jury were: Ms Sarah Springman (UK); Mr Enrique Quesada (Spain) and Mr Emilio Di Toro (Italy).

On 27 September 2008, a pre-competition briefing by the organisers was held, in order to provide information to the coaches and the athletes; such meeting also being open to journalists who wished to attend.

According to Mr Enrique Quesada, the composition of the CJ with a reduced number of members was announced during the pre-competition briefing, as part of a slide presentation, and no objections were raised. However, Rob Woestenborghs declared that he had attended the full briefing session for competitors of his category and did not recall having received that information or seen any slides on the subject.

On 27 September 2008, Rob Woestenborghs took part in the duathlon World Championship, in the standard-distance event.

He crossed the finish line first but was disqualified a few hours after the race.

There is some uncertainty regarding exactly what happened during the race with respect to certain aspects of the incident that led to the disqualification.

However, the following basic facts are largely undisputed between the Appellant and the Respondent: A short distance into the first lap of the cycling leg of the race, i.e. quite soon after the transition from the running leg to the cycling leg, while several other racers were temporarily detached in the lead, Rob Woestenborghs and another Belgium competitor, Mr Jürgen Dereere, found themselves in a group of competitors chasing behind the race leaders. They were biking up a straight, wide road (made up of several lanes) along the seaside, and the wind was blowing landward from left to right with respect to the riders. The road in question was divided into two parts. The other side of the road (the side lining the sea) was reserved for the competitors who were still in the running leg of the event and were coming down the road in the opposite direction from those having begun the biking leg. Rob Woestenborghs was riding at the front of the chasing group when the incident occurred. Since

slipstreaming is allowed, Mr Dereere, who at that point in time was second in place in the group, was following behind Rob Woestenborghs. At a given moment, Rob Woestenborghs moved from right to left on the road and Mr Dereere's bicycle touched the back wheel of the lead bike and he lost his balance and fell.

Among the approximately 20 officials officiating during the event, none witnessed the incident.

After the race, Mr Dereere submitted to the Referee a "Race Protest Form" signalling Mr Woestenborghs as "protestee" and describing the alleged violation as follows: "*By purpose he let fell me down with his bike to go to the right to the left stop, go, stop, go etc... A lot of racers saw the accident and it was by purpose*". He named two witnesses, Mr Roger Roca Dalmau (Spain) and Mr Tiago Silva (Portugal).

One of the delegates of the French team, Mr Jacques Callerec, also submitted a "Race Protest Form", signalling Rob Woestenborghs as "protestee" in relation to the same incident. Mr Callerec stated therein that the persons involved were "*Rob Wostenborgh – and just behind D. Derobert/N. Capoferri*" and he described the alleged violation as follows: "*Rob Wostenborgh cross the road, dangerously, without reason. Just behind that, cyclers are fall (J. Dereere from Belgium)*". He named one witness, Mr Gerald Iacomo.

The Referee did not make any decision on the protests and merely transmitted them to the CJ, which was composed of the three persons mentioned above.

They held an internal meeting to decide how the CJ would proceed and conduct the hearing of the protests. During that internal meeting the members of the Jury did not envisage viewing a video of the race and decided that one of them, Ms Sarah Springman, should not take part in the subsequent deliberation and decision of the Jury because she was of the same nationality as the competitor in second place (Mr Paul Amey) who could gain the victory and gold medal in case of a disqualification of Rob Woestenborghs. They determined that she should nevertheless take part in the hearing and ask questions if necessary because her experience as a former athlete could help the process.

According to Mr Quesada's recollection, the CJ heard the protesters, the protestee and the witnesses separately and in the following order: Mr Dereere, Rob Woestenborghs, Mr Callerec, Mr Rocca and Mr Silva. The Jury had decided not to confront the various persons because of a rather tense situation in the finishing area. The Jury did not keep any notes of the declarations heard.

With respect to Mr Dereere's testimony in front of the CJ, Mr Quesada stated that Mr Dereere declared that Rob Woestenborghs had been stopping and starting and moving from side to side and had asked Mr Dereere to pass, with the result that they began arguing and finally Rob Woestenborghs pushed him and Mr Dereere fell down.

Rob Woestenborghs had gone to the doping-control station and was waiting there with his chaperone when he was notified by the CJ of the protests and was requested to appear before it.

Accompanied by his chaperone, Rob Woestenborghs thus went to be heard by the Jury.

Mr Quesada indicated to this Panel that the Jury did not give Rob Woestenborghs a copy of the protests at the time and had perhaps not read out loud the detail of Mr Dereere's protest but had summarized its main content. The Jury did not refer to the protest by Mr Callerac.

Rob Woestenborghs was asked a few questions but the Jury mainly listened to his version of the events. He explained that he was unclear what it was the Jury was questioning in the course of the race.

During the hearing in front of this Panel, Rob Woestenborghs was heard in the presence of Mr Quesada, who declared that, in substance, what Rob Woestenborghs told the Panel corresponded to what he declared to the Jury after the race.

Rob Woestenborghs' version is that he was at the front of the pack chasing the few racers leading the race about 1 km into the bicycling leg. Because this was just after the transition from the running, it was a strategic moment of the race and he was biking hard to break away from any competitors who might have had difficulties during or directly after the transition. Also, for tactical reasons linked to the wind conditions, he was close to the right-hand curb. After taking his turn in the lead for some while, he signalled with his elbow that he wished the competitor next in line to take the lead, and he began moving from right to left to allow the manoeuvre to take place smoothly in accordance with normal practice. Because no one began passing and he heard some shouting, he turned round and saw Mr Dereere, positioned slightly to the left, saying something in Dutch, which sounded like "*Damn, it will not happen again*". He shouted back that Mr Dereere should concentrate on the race and take the lead. By that time they were somewhere in the middle of the biking-side of the road. Since Rob Woestenborghs still wanted to ensure a breakaway from any competitors suffering from the transition, he accelerated straight ahead to keep going. At that point he felt some contact with his back wheel but did not actually see Mr Dereere lose balance and fall. He subsequently bore back to the right and then stayed in the lead of the pack for a certain distance, perhaps another kilometre. During the entire manoeuvre he never used his brakes but paused slightly upon feeling something make contact with his back wheel. There was no "stopping and starting" prior to the incident or any swerving. Apart from the contact that may have occurred between his back wheel and the front wheel of Mr Dereere, there was no form of physical contact between them. Rob Woestenborghs stated categorically that he had no intention to make Mr Dereere fall and that, despite them having had tensions and some out-of-competition disputes in the past, due to differences of opinion on how to approach races, they remained teammates who travelled and spent time together without being enemies. Rob Woestenborghs indicated that it had crossed his mind at the time of the incident and shouting during the race that Mr Dereere was perhaps nervous due to a crash he had suffered quite recently during another competition.

After being heard by the CJ, Rob Woestenborghs returned to the doping-control station with his chaperone. At that point, he did not feel at all worried that he might be disqualified since he believed he had nothing to reproach himself.

The CJ next heard Mr Callerac, the other protester, who indicated he had seen the incident while watching the race from the pavement on the seaside, i.e. from the side of the road opposite the bikers and looking across the runners' lanes. He stated having viewed what happened between the transition

point and where the incident occurred. He could not hear anything but suspected some form of verbal exchange and saw the group moving from side to side before the physical contact. He did not explain why he protested against one rider rather than the other or both, but declared his intent was to protest as a preventive measure against the behaviour he had seen. Mr Quesada told the Panel that he does not remember the Jury asking Mr Callerac anything about the witness he had named and that the witness was not heard.

Then the Jury heard Mr Roger Roca Delmau (Spain), a competitor and one of the witnesses named by Mr Dereere. Mr Roca Delmau stated that Mr Dereere and Rob Woestenborghs had been arguing since the transition, and that although he did not understand Belgium he felt it was not friendly words also because of the gestures. He recalled thinking that something was going to happen and that he would avoid being behind them. He did not actually see what type of contact caused the crash and could not say whether there was any intentional physical contact.

Rob Woestenborghs declared to the Panel that he was somewhat surprised to hear the account of Mr Roca Delmau's testimony because he thought Mr Roca Delmau was among the leaders of the race in front of the pack, i.e. that he was ahead when the incident occurred, and that the addition of the times for the running leg and for the transition in the results list tended to confirm this. However, he was not certain.

As the final person, the Jury heard Mr Tiago Silva (Portugal), the other witness named by Mr Dereere. Mr Silva was competing in the Under 23 category and was still in the running leg of the race when the incident occurred, meaning that he was in the lanes on the other side of the road from the bikers and heading in the opposite direction. He declared having seen the pack move from one side to another and having seen the Belgium racers quite close by. Nevertheless, he did not witness the incident and only heard the crash.

On the basis of the above declarations and testimonies alone, the two remaining members of the Competition Jury - Mr Quesada and Mr Emilio Di Toro - deliberated and determined that the protester, Mr Dereere, and Rob Woestenborghs should be disqualified for unsportsmanlike conduct and dangerous behaviour.

By that point, Rob Woestenborghs had finished the doping control and returned to the CJ to find out what had been decided.

The Jury told Rob Woestenborghs he was disqualified and he broke down in tears saying that it was not possible and that he could look for some witnesses to prove his version of the facts. The Jury accepted that he try to locate them.

Rob Woestenborghs declared that he then looked for witnesses in the finishing area but could not find any because too much time had lapsed since the end of the race and the majority of competitors had left and were back in the hotels. Furthermore, he had no mobile phone with him. He therefore went back to the Jury, explained the situation and asked if they could use the loudspeakers to page competitors who might still be around and/or call the hotel.

The Jury members said they would not do it but that instead they would look at the video images from the television recording of the race. At the hearing in front of this Panel, Mr Quesada explained that the CJ felt there were quite a number of people still around the finishing zone and that it was not the Jury's role to start paging competitors.

Rob Woestenborghs was confident that the video images would confirm his version of the facts.

Upon viewing the images, the Jury discovered that they were of no use in clarifying the circumstances of the incident because the recording only showed Mr Dereere as he was beginning to fall and only from a distance.

Mr Quesada confirmed to the Panel that because the video images did not help discern how the incident occurred, the Jury maintained its decision to disqualify Rob Woestenborghs based solely on the declarations and testimony heard.

The Jury communicated its final decision to Rob Woestenborghs orally without giving him a written copy, and then posted it.

The minutes of the CJ's decision rendered on 27 September 2008 read as follows:

"The Competition Jury met in Rimini on 27. 09. 2008 in order to decide on 3 protests received on time.

The Competition Jury was formed by Emilio Di Toro, Enrique Quesada and Sarah Springman. All the 3 members were appointed by the TD.

The Competition Jury composition was announced during the race briefings.

The 3 members of the Competition Jury Emilio Di Toro, Enrique Quesada and Sarah Springman attended the meeting.

The referred 3 protest were filed by

- 1. The athlete Damien Derobert*
- 2. The athlete Jurgen Dereere*
- 3. The representative from FFTRI Jacques Callarec*

[...]

Regarding the protests number 2 and 3, both against Rob Woestenborghs (first qualified) and pointing the same action, the Competition Jury decided to call the witness named in protest number 2, Roger Roca and Tiago Silva, to call Rob Woestenborghs, and to call both of the protesters. As well the images recorded by the TV were seen.

The Jury member Sarah Springman step out from the Jury when the decision process started, because she has the same nationality than the athlete qualified in the second place.

The TV images didn't show anything before the fall itself.

All the witnesses, including Rob and Jurgen, described the moment, and what happened previously in the same way, without any doubts. As consequence of all the hearing, the two members of the competition Jury were convinced that both Jurgen Dereere and Rob Woestenborgs conducts themselves in an unsportsmanlike manner and very dangerously for all the other athletes in the group.

The competition Jury decided that:

Athletes number 20 Rob Woestenborghs and athlete number 4 Jurgen Dereere are disqualified from the race because of the unsportsmanlike and dangerous behaviour in the lap 1 of the bicycle segment, which risked the safety of the competitors around them”.

On 30 September 2008, in an interview of Mr Dereere by the journalist Hans Cleemput published on the website <http://www.3athlon.be> and relating to the incident, Mr Dereere stated “*I am convinced that, in principle, Rob did not have the intention to deliberately make me fall*” (free translation of: “*Ik ben ervan overtuigd dat Rob in principe niet de intentie had om mij moedwillig te doen vallen*”).

On 7 October 2008, in an email addressed to Rob Woestenborghs, a French competitor named Mr Nicolas Capoferri, who finished 15th in Rimini, wrote the following message:

“... You know we didn’t sign anything and it was our federation who has taken the initiative to file the protest whereas we athletes have seen nothing! After the race, the trainer told us he signed on behalf of the federation and not for the athletes! For me you are the champion, you did an exceptional race and you deserve to get back the title officially, which in my view rightfully belongs to you”.

Free translation of:

“... Tu sais nous n’avons rien signé et c’est notre sélectionneur qui a pris l’initiative de poter (sic) réclamation alors que nous athlète (sic) n’avons rien vu ! Après la course, le sélectionneur nous a dit qu’il avait signé (sic) au nom de la fédé et pas pour les athlètes! Pour moi tu es le champion en titre, tu as réalisé une course exceptionnelle et tu mériterais de reprendre officiellement ce titre qui sel mi (sic) te reviens (sic) de droit”.

Mr Capoferri was one of the competitors mentioned in the protest by the French delegate Mr Callerac as being “*just behind*” Rob Woestenborghs at the time of the incident.

Rob Woestenborghs subsequently submitted a “Race Appeal Form”.

Then, on 10 October 2008, after having examined the legal situation with their counsel, Rob Woestenborghs and the Belgium Triathlon Federation filed appeals with the ITU Executive Board (the “EB”).

On 11 October 2008, Rob Woestenborghs and the Belgian Triathlon Federation received an e-mail from the Executive Director of the ITU stating:

“Dear Reinout, dear Rob,

Please be advised that we have received your Level 2 Appeal to the ITU Executive Board within the time limit of 14 days.

The matter will be dealt with at the next meeting of the ITU Executive Board on 26 November, 2008”.

During the course of November 2008, Rob Woestenborghs’ counsel enquired on several occasions with the ITU whether the EB could hear them at the scheduled meeting and also asked for a copy of the original protest.

On 22 November 2008, the Executive Director of the ITU responded the following:

“My apologies for not responding sooner, but I have been travelling on ITU business.

There is no need to be at the ITU Executive Board meeting next week, and it is not a public meeting.

The board will review the appeal and establish one of two things:

- 1. If they accept the appeal the results will be reinstated as prior to the decision of the Competition Jury*
- 2. If they do not accept the appeal the matter will be forwarded to our legal department to establish a review process for a later decision of the board”.*

At the end of November and in December 2008, Rob Woestenborghs’ counsel enquired on several occasions with the Executive Director of the ITU about the outcome of the appeal. She sent a reminder by fax on 7 January 2009, stating the following:

“...

Unless I’ve missed something, I didn’t receive any reply to my e-mail dd. 28.11.2008, dd. 16.12.2008 and my recollection dd. 30.12.2008.

Therefore, and up to now, I have not been informed about the fact that the appeal of my client, Rob Woestenborghs, has been accepted or not.

May I therefore kindly but urgently request to let me know the decision of the ITU Executive Board meeting of November 26th, 2008 so that my client- if needed – can give notice of appeal against the decision”.

On 19 January 2009, the ITU communicated the result of the appeal by means of a letter dated 17 January 2009 addressed to the Belgian Triathlon Federation:

“(…)

As a result of the review, the ITU Executive Board voted unanimously to uphold the decision by the Competition Jury and allow the decision to stand”.

During the hearing in front of this Panel, the ITU’s current President, Ms Marisol Casado, declared that the requests for appeal had been put on the agenda of the EB’s meeting to take place in Madrid on 26 November 2008 because it was a matter of importance. However, when the item came up during the meeting it was decided very quickly, i.e. without much discussion, that the EB lacked jurisdiction to review the CJ’s decision because it was deemed a judgement call. Consequently, the EB had no option but to confirm the Jury’s decision.

Ms Marisol recognized it was regrettable that the EB had taken so long to communicate its position. She explained that the delay was due to the transition phase resulting from her election as the new ITU President and to the imminence of the Christmas break. She indicated that the ITU did not have an in-house legal service.

Considering the EB’s decision to be ill founded and to have been made in violation of due process, Rob Woestenborghs filed an appeal with the CAS.

On 6 February 2009, Rob Woestenborghs filed his Statement of Appeal with the CAS against the decision taken on 26 November 2008 by the EB and notified to the Belgian Triathlon Federation on 19 January 2009.

In his Statement of Appeal, Rob Woestenborghs appointed Mr Guido De Croock, Judge, in Aalst-Moorsel, Belgium, as arbitrator.

On 19 February 2009, Rob Woestenborghs filed his Appeal Brief confirming his grounds for appeal and containing the following prayers for relief:

“Consequently, the Appellant respectfully requests that the CAS Panel decide that the ITU has not respected the Procedure as foreseen in the ITU Competition Rules and has not respected the Appellant’s right to defence and therefore declare the decision to disqualify the Appellant invalid.

Secondly, the Appellant respectfully requests that the CAS Panel consider this matter as a hearing de novo and upon hearing the evidence and witnesses decide that Mr Woestenborghs did not commit a violation of the ITU Competition Rules during his race at the 2009 Rimini Duathlon World Championship.

Finally, the Appellant respectfully requests that the CAS Panel declare the Appellant the winner of the Duathlon Race at the 2009 Rimini Duathlon World Championship with all associated advantages (medal, prize money, ...).

As the decisions of the Competition Jury and the ITU Executive Board weren’t motivated and the Appellant will hear for the first time the point of view from the ITU in their “statement of defence”, the Appellant preserves himself the right to prepare a written answer to this defence note if necessary”.

On 24 March 2009, the ITU filed a Motion to Dismiss, which contained the following prayers for relief:

“Given the foregoing, the Respondent respectfully requests that the Panel immediately dismiss this case, as the decision concerned was a field of play decision, and therefore not subject to review.

The whole without costs”.

On 7 May 2009, the ITU filed its Answer, confirming the prayers for relief contained in its Motion to Dismiss.

LAW

Applicable Law

1. Art. R58 of the Code provides that:

“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”.

2. Since both parties have invoked and relied on the 2008 ITU Competition Rules, the Panel shall, in accordance with the foregoing provision, apply those Rules as having been chosen by the parties.

Admissibility

3. Article L.2 of the ITU Competition Rules does not provide a deadline within which an appeal to the CAS must be made, however art. R49 of the CAS Code stipulates that:
“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 ...”.
4. It is uncontested that the Appellant did not receive notification of the EB’s challenged decision until 19 January 2009 and that the appeal to the CAS was filed on 6 February 2009.
5. Consequently, the appeal was filed within the prescribed time limit of 21 days, and, in application of the above rule, the appeal is deemed timely.

Jurisdiction of the CAS

6. In order to adequately address the motion to dismiss contained in the Respondent’s Answer, it is necessary to situate the basis upon which that motion is made and the legal nature thereof.
7. In essence, Respondent contends that the CAS lacks jurisdiction because the challenged decision of the EB deemed the CJ’s underlying decision to disqualify Rob Woestenborghs to be a field-of-play decision that could not be reviewed; and that in making their decisions, both the CJ and the EB correctly applied the Competition Rules.
8. This position of Respondent raises two preliminary questions in the context of this case.
9. First, did the EB, in fact, refuse to review the CJ’s underlying decision of disqualification, or did it accept the appeal and decide to uphold the Competition Jury’s decision on the merits?
10. Second, on what legal basis is the Respondent entitled to challenge the jurisdiction of the CAS to review the EB’s decision?
11. These two preliminary questions are now addressed in turn.

A. *The Nature of the EB's Decision*

12. The Appellant is arguing that although the Respondent is now characterizing the EB's decision as a refusal to review the CJ's underlying decision, the evidence on record demonstrates that the EB actually entertained the appeal and decided to uphold the CJ's decision on the merits. According to the Appellant, since the EB treated the CJ's decision as being appealable, the Respondent cannot contend today that it constituted a field-of-play decision immune to appeal.
13. The Panel finds that the evidence on record is somewhat ambiguous and unclear in that respect.
14. When Rob Woestenborghs and the Belgium Triathlon Federation filed their appeals to the EB in October 2008, the Executive Director, Loreen Barnett, began by acknowledging receipt of the appeals by email of 11 October 2008, in which she stated that the "*Level 2 Appeals to the ITU Executive Board*" had been received "*within the time limit of 14 days*". In a subsequent email of 28 November, she provided more detail by stating:

[...]

There is no need to be at the ITU Executive Board meeting next week, and it is not a public meeting.

The board will review the appeal and establish one of two things:

If they accept the appeal the results will be reinstated as prior to the decision of the Competition Jury

If they do not accept the appeal the matter will be forwarded to our legal department to establish a review process for a later decision of the board".
15. The combination of the two emails could tend to give the impression that the words "*accept the appeal*" and "*not accept the appeal*" related to the merits, and that the EB had the authority – in its capacity as "*Level 2*" instance under the Rules - to review the CJ's decision and reinstate Rob Woestenborghs as the winner of the Rimini World Championship.
16. It is not clear what was meant in the last sentence of the second email, stating that if the appeal were rejected a review process would be put in place by the legal department "*... for a later decision of the board*".
17. According to the declarations in front of this Panel of Ms Casado, the then treasurer and now President of ITU, the ITU has no legal department and there was no subsequent review process; the EB's delay in announcing its decision being due only to workload and to the Christmas break.
18. When finally communicated in a letter dated 17 January 2008, the formulation of the EB's decision could also give the impression that it had entertained the appeal. Indeed, the letter stated:

"Dear Mr. President,

In response to your fax dated 14 October, 2009 [sic] and received 16 January, 2009 please be advised that the ITU Executive Board met in Madrid at the time of the ITU congress in November 2008.

One of the items on the agenda was a review of the decision taken by the competition Jury at the 2009 [sic] Rimini Duathlon world Championships to disqualify two Belgian athletes.

As a result of the review, the ITU Executive Board voted unanimously to uphold the decision by the Competition Jury and allow the decision to stand”.

19. In that connection, during her examination by the Panel, Ms Casado declared that the appeal had been put on the EB’s agenda because it was deemed an important matter but that at the meeting this item was dealt with rapidly as the members immediately agreed that they could not review what was seen to be a field-of-play decision by the CJ.
20. The Panel does not doubt the sincerity of Ms Casado. However, Ms Casado gave the impression that her recollection of what had been discussed under this item at the EB meeting was somewhat vague, and that she did not necessarily comprehend whether the decision made was to entertain the appeal and reject it on the merits, or to reject it for lack of authority. In that relation, she was not comfortable to comment on what could be deemed a field-of-play decision under the Competition Rules and said that Mr Quesada would be more informed than her to answer questions of such type.
21. On the basis of the foregoing somewhat contradictory elements of evidence, it is difficult for the Panel to determine what the real intention of the EB was in making its decision.
22. That being said, the Panel finds that, in view of the content of the ITU’s written email communications to Rob Woestenborghs prior to the EB’s decision and the formulation of the 17 January 2009 letter announcing the decision, he could in good faith have believed that the EB had entertained the appeal and rejected it on the merits due to agreeing with the CJ’s decision of disqualification.
23. Furthermore, the Panel finds that the language used by the ITU in its emails and in its letter of January 2009, as well as the declarations of Ms Casado, tend to demonstrate that the EB was uncertain itself as to what process it was involved in.
24. As shall be examined below, the EB’s apparent perplexity is not surprising since the CJ’s decision-making process was in fact inconsistent with the procedures set out in Competition Rules.

B. The Legal Basis of the ITU’s Motion to Dismiss

25. In its motion to dismiss, the Respondent is requesting that the Panel immediately dismiss the case on the basis that: *“The Competition Jury made a field of play decision and this decision is neither reviewable nor appealable”.*
26. In that relation, it is not altogether clear whether the ITU considers that the CAS lacks jurisdiction to review the challenged decision, or that the CAS can entertain the appeal but must

exercise restraint in reviewing the challenged decision because the CJ allegedly made its decision in the field of play.

27. Consequently, the Panel shall begin by making certain clarifications as to the legal context within which it considers it must make its determination on the motion to dismiss.
28. As a starting point, the question arises whether chapter 12 of the Swiss Act on Private International Law (“PILact”) - which is the *lex arbitrii* governing this arbitration due to the CAS having its seat in Switzerland and this being an international arbitration - contains any mandatory rules which restrict the jurisdiction of the CAS in this case.
29. The Panel finds that the PILact contains no mandatory provisions that exclude the CAS from accepting jurisdiction to review field-of-play decisions, since the nature of field-of-play decisions does not prevent them from being arbitrable under article 177 of the PILact.
30. In other words, whether or not – and, if so, to what degree - the CAS has jurisdiction to review a field-of-play decision is not a question of arbitrability but depends on the scope of powers provided to the CAS under the arbitration agreement (see e.g. RIGOZZI A., *L’arbitrage international en matière de sport*, Bâle 2005, pp. 364ff, n° 709-711).
31. Given the consensual nature of arbitration and the parties’ resulting freedom under chapter 12 of the PILact to submit to international arbitration any disputes that are arbitrable, the Swiss federal tribunal’s case law on the non-judicial nature of field-of-play rules that has limited the review by Swiss national courts of field-of-play decisions, does not prevent parties who choose to do so from submitting to arbitration disputes concerning the application of field-of-play rules (see e.g. RIGOZZI A., *ibid.*, and n° 853-890).
32. Thus, it is the arbitration agreement that determines the scope of jurisdiction of the CAS to review field-of-play decisions, and in case of doubt or dispute as to the scope of such powers, the arbitration agreement must be construed on the basis of the principles applicable to the interpretation of arbitration agreements.
33. More specifically, in appellate cases in front of the CAS, in which its jurisdiction as an arbitral body derives from a combination of the provisions of the applicable sports regulations and of the CAS Code, it is a matter of construing the clauses therein that are attributive of jurisdiction together with any other clauses which explicitly or implicitly limit the scope of such jurisdiction.
34. For the above reasons, the Panel finds that the ITU’s motion to dismiss essentially raises a question of jurisdiction, which the Panel shall now address in light of the facts of the case.

C. *The Panel’s Finding as to its Jurisdiction*

35. Since it is undisputable that the Competition Rules attribute jurisdiction to the CAS as the “*Level 3*” appellate body, the Panel shall begin by examining the scope of such jurisdiction before

characterizing the nature of the appealed decision and thereupon determining whether the matter under appeal falls within that scope.

- a) The Scope of Jurisdiction of the CAS under the ITU Rules
36. The combination of arbitration clauses in the applicable Competition Rules and in the CAS Code gives the CAS broad jurisdiction and powers on appeal.
37. Article L.2 of the Competition Rules provides for the jurisdiction of CAS as follows:
“Level 3: The decision of 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”.
38. Subject to any limitations that derive from other provisions and/or the rationale of the Competition Rules, the foregoing rule provides the CAS with jurisdiction to review all decisions made at Level 2 by the EB.
39. Art. R47 of the CAS Code confirms such jurisdiction in the following terms:
“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 ... 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”.
40. The Panel finds that the CAS being attributed the authority, as the Level 3 and final body, to review all the decisions of the EB necessarily implies, within the rationale of article L.2, the power to review any violation of the Competition Rules or of principles upheld by such Rules which had the effect of tainting the EB’s decision, whether such violation occurred at a lower instance or at the level of the EB. Otherwise, the rationale behind having three levels of appeal and of instituting the CAS as the final level, which is to ensure maximum respect of the Competition Rules and of due process, would not be met.
41. This means that the CAS has jurisdiction to review, among others, the legality of the EB’s decisions and the correct application of the decision-making procedures defined in the Competition Rules.
42. Within this broad scope of jurisdiction provided to the CAS, the Panel’s powers are further defined in art. R57 of the CAS Code, whereby: *“The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance”.*
43. With respect to the scope of jurisdiction of CAS in this case, the question which remains is whether any specific provisions of the Competition Rules or the rationale behind certain provisions have the result of restricting the jurisdiction attributed to the CAS by the foregoing

rules, i.e. have the consequence of “retracting” certain issues from the scope of review of the CAS.

44. The ITU contends that such is the case for all field-of-play decisions which are entitled “*Judgement Calls*” under the Competition Rules because various provisions stipulate that judgement calls are not subject to any form of appeal.
45. At a conceptual level, before examining the provisions in question invoked by the Respondent, the Panel would like to point out that, within the limits of mandatory law applicable to associations in whatever jurisdiction they are based, it is of course possible *per se* for a sports body to decide that certain disputes such as those relating to decisions in the field of play are not subject to appeal or arbitration.
46. However, even if a limitation of such type is written into the regulations of the sports body, the question remains how that restriction fits with any general powers given to internal bodies and/or an external body such as the CAS to review the legality of a decision and any violations of the regulations. This is a matter of interpretation of the relationship between the respective provisions, i.e. between the rule providing an appellate body with general powers of review and those rules potentially restricting such authority in some manner.
47. The Panel understands the CAS case law concerning its jurisdiction to review field-of-play decisions to derive in essence from that tension between different sets of provisions within given sports regulations.
48. Indeed, while the CAS has upheld the concept, either expressly written into the sports regulation involved or implicit in its rationale, that field-of-play decisions are not subject to review, or at least only with a large degree of restraint, CAS Panels have also underlined in that connection that certain forms of behaviour or violations were nevertheless subject to review despite a field-of-play decision being involved.
49. Behaviour referred to in CAS case law as possibly justifying the review of field-of-play decisions includes bad faith, corruption, fraud, arbitrariness and the breach of fundamental principles (regarding the initial development of CAS case law in this area and its rationale, see e.g. KAUFMANN-KOHLER G., *Arbitration at the Olympics: Issues of Fast-Track Dispute Resolution and Sports Law*, 2001, pp. 25-27; RIGOZZI A., *op. cit.*, n° 853-890).
50. The Panel considers that in essence this CAS case law means that if a referee or an official involved in making a field-of-play decision does so not on the sole basis of her or his expert judgement but also in bad faith or in a corrupt, fraudulent or arbitrary manner, or in breach of fundamental rules, the reproachful behaviour constitutes an act that by its nature is subject to review under whatever provision has attributed jurisdiction to the CAS to review the legality of decisions taken under the sports regulation.
51. In situations of such type, the CAS is not encroaching on the powers reserved to the referee or official – as these were not exercised properly – but is reviewing the existence of some form of

behaviour/act (corrupt, fraudulent, arbitrary, etc.) that denatured the field-of-play decision and that the CAS has the jurisdiction to review under the powers attributed to it by the sports regulations in question.

52. The Panel shall now examine in light of the above whether the decisions invoked in this case by the ITU as being excluded from any review by the CAS can in fact be characterized as field-of-play decisions or judgement calls under the provisions of the Competition Rules.

b) The Characterization of the Challenged Decisions

53. It is clear from the scholarly opinion and case law relating to the field of play that the definition of what that notion covers is partly a matter of semantics, since, depending on context, a variety of expressions - such as “*technical rules*”, “*rules of the game*” or “*judgement calls*” - are used when discussing rules and decisions in the field of play.

54. That said, beyond the various expressions employed when referring to the field of play lies a true difficulty in circumscribing in a harmonized manner what reality lies behind the terms, since there are many different possible manners and criteria for defining what is a “*field-of-play*” rule or decision, not least because the boundaries of what is deemed field of play may legitimately vary from sport to sport and evolve over time.

55. Although it is not the role of this Panel to attempt such general task of delineation, it is useful to point out in the context of this case, that given each sports organization’s freedom (within the limits of mandatory law) to define what it deems field of play, and what rules and decisions in that area are excluded from review internally and/or by an external body (such as CAS), the definition of what constitutes “*field of play*” must primarily be sought in the applicable sports regulations.

56. The applicable sports regulations may not contain a clear definition of the field-of- play rules and decisions that are not subject to review. In such cases, it is for the arbitral tribunal, on the basis of its “*compétence-compétence*”, to interpret the regulations and to decide e.g. whether their rationale implicitly excludes certain rules and decisions from being reviewed and within what limits.

57. In the present case, and although in its submissions the ITU to a large degree used the term “*field of play*”, its Competition Rules actually employ a different term to qualify decisions which are in principle not open to appeal. Such decisions are qualified as “*Judgement Calls*”. In appendix D of the Competition Rules, the contours of a “*Judgement Call*” are defined as follows:

“Any assessment of events, circumstances or the race environment by a technical official or other official resulting in either:

(i) A determination by that official that a competitor is guilty of a breach of the rules or has gained an unfair advantage contrary to the rules; or

(ii) Any other determination by a technical official or other official that follows from an assessment of the course, the race conditions or the conduct of the race". For the avoidance of any doubt a judgement call includes, but is not limited to, a determination that a competitor is guilty of drafting, blocking or gaining an unfair advantage".

58. The Respondent contends that the CJ is an ITU official under the meaning of the above definition (because article J.1.1 of the Rules expressly lists the Jury as an "official"), and that as a result its determination as to the invoked violations by Rob Woestenborghs was a "Judgement Call" as defined therein; and that according to articles C.3 c) (i), K.2 a) and L.1 a) of the Competition Rules Judgement Calls cannot be appealed internally and, therefore, to the CAS.
59. Having carefully examined the Competition Rules, the Panel finds that the Respondent's interpretation of the Competition Rules is erroneous in several respects, and that, correctly construed in light of the Rules, the determination made by the Competition Jury cannot be characterized as a Judgement Call.
60. Although it is correct that the CJ is defined as an ITU official under article J.1.1 of the Competition Rules, it does not follow automatically that the Jury is among the officials entitled under the Rules to make Judgement Calls.
61. The Respondent has overlooked the fact that the provisions it relies on define a process whereby only officials who have directly observed an incident corresponding to a violation can make a Judgement Call as defined by the Rules, and even the Referee has no authority to review such Judgement Calls.
62. The foregoing stems from a combination of articles J.1.1 b), J.1.4, K.1 a), L.1 a) and L.2 a) of the Competition Rules.
63. Under the heading "Protests", i.e. in the section that defines protests, article K.1 a) stipulates that "... A competitor or an NF designate may file a protest with the Referee provided that the protest has not been previously observed by the official and ruled on by the Referee" (emphasis added) and article K.2 a) adds that "Protests cannot be made on judgement calls".
64. This system for Judgement Calls instituted by the Competition Rules is confirmed by the content of the "Race Protest Form" constituting Appendix B to the Rules, since the introductory sentence to Part 1 of the form provides that: "Judgment calls cannot be protested".
65. The system is also confirmed by the content of articles C.1 to C.7 of the Rules, defining disciplinary violations and sanctions, since under those provisions the officials who are officiating in the field of play and who observe violations have the duty and right to make an "Assessment" and to warn or disqualify the competitor on the spot (by sounding a whistle, showing a yellow or red card or saying "stop") or as soon as safely possible (articles C.2 c and C.3 b). It is noteworthy in that relation that the term "Assessment" used in articles C.2 and C.3 is also employed in the definition of a "Judgement Call" under Appendix D, which speaks of "Any assessment of events ..." by an official. In addition, article C.6 provides that Judgement Calls thus made by officials are not subject to appeal.

66. Thus, under the system instituted by the ITU Competition Rules, Judgement Calls may only be made by officials based on their observation/assessment in the field of play of a violation by a competitor, and the official submits her/his judgement to the Referee in order for the latter to formally record the related disciplinary sanction applied by the official on the basis of articles C.1 to C.7 of the Rules.
67. The appeals process defined in the Competition Rules also confirms the fact that the CJ cannot be involved in the decision-making process of a Judgement Call and cannot review one. Indeed, according to article L.1 a) of the Rules, Level 1 of appeal is to the CJ but it is not entitled to review Judgement Calls. In other words, Judgement Calls are made by officials at ground level, in the field of play, and cannot be appealed.
68. The Panel finds that these different provisions of the Competition Rules unambiguously institute a system whereby a Judgement Call necessarily emanates from an official having directly observed and assessed events as a violation/incident. A protest after the race may be filed by a competitor or a national federation but not in respect of a Judgement Call.
69. In addition, the system instituted by the Competition Rules is in keeping with the logic behind the doctrine that field-of-play decisions in principle cannot be reviewed - i.e. except if they are made in an illegal manner or in violation of the defined process or of fundamental rules - since it is commonly considered that field-of-play decisions are those made by expert officials/referees during the course of play and based upon a direct and personal observation of the incident in question (with or without the help of video, depending on the sport and the situation).
70. The Respondent itself, in its submissions in this arbitration, acknowledges as follows the logic behind such acceptance: *“Officials on the field of play are in the best position to observe and rule on infractions. Although their decision may not always be perfect, the nature of sport requires that these decisions not be subjected to review since a review panel unconnected to the event would never be able to possess elements the official had at the time of the decision”*.
71. For the above reasons, the Panel considers that the decision to disqualify Rob Woestenborghs made by the CJ certainly may not be characterized as a Judgement Call under the Competition Rules because (i) only officials assessing the incident in the field as provided in Rules C.1 to C.7 are habilitated to make such a call, (ii) the CJ therefore did not have the authority to pronounce a “Judgement Call” as defined by the Rules and, (iii) even if a Judgement Call had been made by an official in the field of play, it would not have been subject to a protest in front of the CJ. When it made its disqualification decision, the CJ was acting outside of its defined area of competence which is: *“... to determine, hear and rule on all appeals against decisions handed down through the Race Referee, including decisions on protests”*.
72. In addition, as already pointed out, independently from the characterization of a Judgement call under the Competition Rules, the circumstances in which the CJ made its decision are outside what would typically be deemed field of play, since according to the Respondent’s own

admission none of the members of the CJ (or any other official) observed the incident and the video was of no help in assessing it, meaning that the Jury's decision was based 100% on the declarations of the protestor, the protestee and various competitors without the incident having been witnessed in any manner by an official.

73. The Panel does not believe that the CJ acted in bad faith in purporting to make what it deemed a Judgement Call. Simply, it misinterpreted and misapplied the Competition Rules due to the little experience the ITU has had, according to declarations of Mr Quesada, with protests of the type underlying the decision.
 74. The Panel also considers it quite likely that it is because the Competition Jury incorrectly purported to make a Judgement Call in the first instance, whereas according to the Competition Rules it was not habilitated to do so, that the ITU Executive Board was confused about its subsequent role.
- c) The Jurisdiction of the CAS to Review the EB's Decision
75. Since, for the reasons examined above, the Panel considers the CJ's decision is not a Judgement Call as defined by the Competition Rules, there is nothing that prevents the CAS from reviewing the EB's decision that upheld it, providing the CAS has jurisdiction to generally review decisions by the EB.
 76. As discussed above, under article L.2 c) of the Competition Rules, that is undoubtedly the case.
 77. Consequently, the CAS has jurisdiction to determine whether the EB's challenged decision is invalid for the reasons invoked by the Appellant.

Merits

78. The Appellant has invoked a number of different procedural reasons for which it deems the EB's decision to be invalid.
79. As discussed in the section of this award addressing jurisdiction, the Panel already found that a serious violation of the Competition Rules took place in the decision-making process leading to the disqualification of Rob Woestenborghs because the CJ lacked the authority under the applicable rules to make the decision it did.
80. That violation of the Competition Rules is, in itself, a sufficient ground for the Panel to consider the EB's decision, which upheld the disqualification mistakenly decided by the CJ, to be invalid.
81. Consequently, the Panel would not need to examine the merits of any other causes of invalidity invoked by the Appellant.

82. Nevertheless, due to the possible relevance of such matter for the organization of future World Championships by the ITU, the Panel has also considered the Appellant's contention that the CJ was not composed in conformity with the Competition Rules and for that reason alone could not make valid decisions.
83. In such relation, the Panel finds that because the Competition Rules expressly provide, due to the importance of the World Championship, that the Competition Jury must be composed of five members (article J.1.3 of the Rules), there was no room for the ITU to adopt a different ad hoc rule on the basis of article A.5 of the Competition Rules, i.e. no lacuna to fill. It follows that the choice of the Technical Committee in Rimini to adopt a special ad hoc rule allowing a Jury of only three members to form the Competition Jury for the World Championship did not conform to the applicable rules. More specifically, that choice was not made in conformity with the first condition of article A.5 because the solution adopted was in direct conflict with the rule (article J.1.2) requiring five members for a World Championship.
84. Even if the ITU is a federation with limited resources that tries to do its best – this being the testimony of Mr Quesada that the Panel has no reason to doubt – because it is dealing with professional athletes whose careers and sponsorship are at stake, the ITU should at least have planned ahead and taken the organizational steps necessary to ensure that its own basic rules were respected, which meant among others, having enough officials present to form a full Jury in accordance with the Competition Rules. That was essential for ensuring the equality of treatment, fairness and due process, heralded by the ITU's own rules (article A.2).
85. For the above reasons, i.e. because the CJ was improperly constituted and did not have in any event the authority under the Competition Rules to make the decision it did, the Panel considers the EB's decision to uphold the disqualification of Rob Woestenborghs decided by the Competition Jury was erroneous and made in violation of the Competition Rules, with the result that it must be set aside as being invalid.
86. Furthermore, because no official entitled to make a Judgement Call under the Competition Rules ever made one in the first place, i.e. no official having observed and assessed the incident on the spot in accordance with article C.1 to C.7 of the Rules, there is no valid basis upon which an assessment could be made today by any instance within the ITU and no reason to refer the case back to the previous instance.
87. Given the Panel's above findings, it need not examine any of the other multiple breaches of process invoked by the Appellant and it shall admit the appeal and reinstate the results of the race without regard to the ruling of the CJ.

The Court of Arbitration for Sport rules:

1. The International Triathlon Union's Motion to Dismiss is rejected.
 2. The Panel has jurisdiction to entertain the appeal.
 3. The International Triathlon Union Executive Board's decision made on 26 November 2006 is set aside.
 4. The International Triathlon Union is ordered to cancel without delay the disqualification of Rob Woestenborghs from the 2008 Duathlon World Championship in Rimini, to reinstate him as the winner of the competition together with all the associated advantages (gold medal, points and prizes) and to modify the official classification accordingly.
- (...)
7. All other motions or prayers for relief are dismissed.