



Arbitration CAS 2012/A/2912 Koji Murofushi & Japanese Olympic Committee (JOC) v. International Olympic Committee (IOC), award of 11 June 2013 (operative part of 21 May 2013)

Panel: Prof. Ulrich Haas (Germany), President; Mr Jeffrey Benz (USA); Mr Hans Nater (Switzerland)

Athletics (hammer throw)

Disciplinary sanction against a candidate for the election to the IOC Athletes' Commission

Legal nature of a measure taken by a sport association against a candidate for elections

Legal basis of a disciplinary measure taken by a sport association

Inapplicability of res judicata, the prohibition of double jeopardy and the concept of estoppel to administrative measures

Prohibition to promote a candidature

Attribution of the breach to an athlete and not to its NOC

Proportionality of the sanction

- 1. In principle, the standards applicable to an administrative decision taken by a sporting body are different from the standards applicable to a disciplinary measure (sanction). In principle, under Swiss law, a sporting organisation has autonomy to decide how it wishes to compose one of its organs/commissions. It can exercise its discretion and autonomy by issuing rules to which both the candidates and the organisation are bound. The starting point for a qualification of the legal nature of the rules and the measures issued in this respect must be the language of the provisions that the organisation – by exercising its discretion and autonomy – has decided to enact. The fact that the heading of a rule is “sanctions”, that a scale of “sanction” is foreseen in the rule, that the rules are based on the principle of proportionality and the procedure in which the “sanction” is issued, is typical for a disciplinary measure. Therefore the measures based upon this rule are of a disciplinary nature as well.**
- 2. A disciplinary measure such as the withdrawal of a candidature shall have a legal basis. Logically, the withdrawal of a candidature is only possible as long as the addressee of the measure is still a “candidate”. It follows from the applicable regulations that the “election process” is only terminated once the results of the voting are announced. Therefore, if the withdrawal of a candidature takes place before the election process was terminated, an athlete is still a “candidate” and, in principle, the provision at stake is a sufficient legal basis for the withdrawal of the candidate decided by the organisation.**
- 3. Swiss law does not attribute *res judicata* effects to administrative decisions taken by organs of sports associations which necessarily lack the adversarial nature of a legal procedure and decision by a judicial body. Furthermore, the prohibition of double jeopardy and the concept of estoppel do not prevent an organ of a sport association from taking several incidents into account in making its decision against the author of such**

incidents if no sanction but rather orders to stop committing further incidents were issued against the latter before the decision was taken.

4. Any “promotion of candidature” is prohibited by the applicable rule. The rule makes it clear that not only the inducement to vote for a particular candidate, but also the promotion of the election process as such constitutes “promotion of the candidature”. The related broad interpretation of the term “promotion” finds support in the wording of applicable regulations, in the purpose of the rule as well as in CAS jurisprudence. Therefore, any action taken by a candidate that would help a voter to (better) remember the person that has submitted his candidature, be it voting instructions, campaigning or gifts constitutes a form of promotion.
5. Disciplinary measures of a sports association are designed, in principle, to sanction the individual behaviour of a person. The possibility to sanction a person for the behaviour of a third party is – at least under Swiss law – the exception to the rule. Although the rules of conduct applicable to campaigns for election to the organ of a sport association do not contain a specific rule according to which a breach committed by a NOC can be attributed to a candidate, the details of the election process are to be considered as a kind of “work in progress” to be interpreted not only in light of the applicable regulations, but also in light of the information letters issued by the sport association. In this respect, the letters make rather clear that if an NOC promotes a candidate this constitutes a breach of the rules that is attributable to the candidate and that may lead to the disqualification of the candidate. Therefore, there is no room to apply the principle of *contra proferentem* when interpreting the contents of the candidacy agreement entered into between the athlete and the sport association. Consequently, an athlete can not only be made accountable for breaches committed by him, but also for breaches committed by his NOC.
6. The withdrawal of a candidate having committed a series of breaches among which one can be qualified as serious i.e. the distribution of voting instructions, is proportionate and, thus “correct”.

I. THE PARTIES

1. Mr Koji Murofushi (hereinafter also referred to as “Mr Murofushi”, the “Athlete” or the “Candidate”) is an elite Japanese Hammer Thrower. He has won numerous titles in this discipline, amongst others the gold medal at the 2004 Athens Olympiad and the bronze medal at the 2012 London Olympiad. Furthermore, he enjoys an excellent reputation in the world of sports. He is a member of the Athletes’ Commission of the International Association of Athletics Federations, of the Athletes’ Committee of the JOC and the Athletes’ Committee of the Japanese Anti-Doping Agency (hereinafter referred to as “JADA”).

2. The Japanese Olympic Committee (hereinafter also referred to as “JOC” or the “Second Appellant”) is the National Olympic Committee for Japan.
3. Mr Murofushi and the JOC are jointly referred to as “the Appellants”.
4. The International Olympic Committee (hereinafter referred to as “IOC” or “Respondent”) is an association under Swiss law. The stated mission of the IOC is to promote Olympism throughout the world and to lead the Olympic Movement. The IOC supervises the organization of the Summer and Winter Olympic Games. The IOC has its registered seat in Lausanne, Switzerland.

II. THE RELEVANT FACTS

5. 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 discussion of law and merits that follows.
6. 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.
7. On 19 May 2011 the Respondent sent a letter to all NOCs informing them – *inter alia* – of the election relating to the IOC Athletes’ Commission (hereinafter referred to as the “Commission”) to be held during the XXX Olympiad, London 2012 (the “Election”). According thereto the Election would be held in accordance with paragraph 1 of the Bye-law to Rule 21 of the Olympic Charter (hereinafter referred to as the “OC”). In the letter, the Respondent also made reference to the “Regulations relating to the IOC Athletes’ Commission” and their Annexes (hereinafter referred to as the “Regulations”).
8. In accordance with Art. 3.4.4 of the Regulations, the campaigning for the Election is subject to the “Rules of Conduct Applicable to Campaigns for Election to the IOC Athletes’ Commission” (hereinafter referred to as the “RoC”). According to Art. 3.4.5 of the Regulations, the Election Committee is responsible – *inter alia* – for supervising the Election and ensuring compliance with the RoC, dealing with and issuing sanctions for all infringements and, if necessary, proposing measures and sanctions to the IOC Executive Board (hereinafter referred to as “EB”).
9. On 31 August 2011 the JOC nominated Mr Murofushi as its candidate to stand in the Election. Pursuant to Art. 3.4.2.b. of the Regulations, Mr Murofushi, as well as the President of the JOC and the Chairperson of the JOC’s Athletes Commission, signed a copy of the RoC, which was attached to the Candidature Proposal Form transmitted by the JOC to the IOC.

10. On 8 December 2011 the IOC Executive Board approved Mr Murofushi's candidature.
11. On 24 February 2012 the IOC provided further information to the Appellants regarding the election process (hereinafter referred to as the "24 February Letter"). The 24 February Letter reads – *inter alia* – as follows:
- [...]
- 1) *Before the Olympic Games: All forms of promotion and advertising by the candidates are prohibited, including but not limited to promotion on the candidate's personal website, or any other forms of social media.*
- 2) *All forms of promotion and advertising by third parties, including but not limited to NOCs, IFs, sponsors or any other person or institution, are also prohibited.*
- 3) *From the opening of the Olympic Village until the end of the election, candidates may promote their candidature. However, no form of promotion may be undertaken in or around the voting offices (exact rules will be established based on the final layout of the Olympic Village for each edition of the Games, and communicated to all candidates).*
- 4) *Candidates must respect the athletes at all times, and act with respect regarding all other candidates.*
- 5) *No form of material (such as t-shirt, caps, pictures, etc.) or financial inducement to vote for candidate or take part in the vote is permitted.*
- 6) *No press conferences will be held on the candidatures.*
- Please note that the Rules of conduct were created by the IOC Athletes' commission and approved by the IOC Executive Board. Any violation of the rules may lead to the disqualification of the candidate.*
- [...]"
12. The 24 February Letter stated at the end:
- [...]
- Please do not hesitate to contact Hannah Burns (hannah.burns@olympic.org) or Stéphanie Genoud-Cabessa (stephanie.genoud-cabessa@olympic.org) should you need any further information in this respect ..."*
13. With email dated 20 March 2012 Mr Watanabe of the JOC sent an email to Ms Genoud-Cabessa asking *inter alia*:
- "(...) We want to know whether NOC staffs, have day-pass, can pass the flyer in place of a candidate. Because our candidate is an active athlete, he don't have enough time to present himself (...)"*
14. Ms Genoud-Cabessa answered in her email dated 20 March 2012 *inter alia*:
- "(...) Please note that your candidate of your NOC cannot distribute this promotional leaflet. The IOC is responsible to print them and to distribute them.
Please do not hesitate to contact us again, should you have any further questions in this respect (...)"*
15. Mr Watanabe answered to this on the same day:

“(….) OK, I understood your answer.

I will tell this to our candidate.

Anyway, we will wait for your next guideline after final layout. (….)”.

16. On 19 June 2012, the IOC sent another (information) letter to all candidates (the “19 June Letter”) advising them – *inter alia* – as follows:

[…]

Rules of Conduct

We have attached the Rules of conduct for the election (please see Annex II), which were initially provided in our letter dated 24 February 2012. These rules were created by the IOC Athletes’ commission and approved by the IOC Executive Board. The objective of the rules is to ensure that the election process is fair. Please note that any breach of the rules may lead to your disqualification as a candidate.

[…]

“What you are permitted to do according to the rules:

You may speak with athletes (at competition venues, on training sites, in Olympic Villages, etc). However, please note that there are specific zones in the various Olympic Villages where you may not promote your candidature (e.g.: voting areas) [...].

“What you are not permitted to do according to the rules:

Neither you nor any third party may distribute the promotional leaflet produced by you/your NOC. The IOC will distribute all the leaflets in the various Olympic Villages, and will also make them available in the football cities on the scheduled voting days.

You may not post your promotional leaflet, nor may it appear on any website or be included in any document (newsletter, etc.)

You may not promote your candidature or be promoted (creation of a website, blogs, use of other media platforms, etc.) by any organisation, including an IF, NOC, sponsor etc”.

17. Furthermore, the 19 June Letter advised the candidates that the voting for the Athletes’ Commission at the XXX Olympiad would take place from 16 July 2012, that the results of the Election would be announced at 2 pm on 9 August 2012 and that an information meeting would be held for all candidates on 20 July at 4 pm (hereinafter referred to as the “20 July Meeting”). In respect to the 20 July Meeting the letter stated:

*“... The meeting will provide you with an opportunity to ask any questions you may have regarding your candidature. Please note that you or a representative of your NOC **must attend** this meeting ...”.*

18. On 17 July 2012, Ms Genoud-Cabessa sent an email to all candidates, providing further information regarding the election process. In particular a map was attached to the email, which outlined the areas according to sec. 3 of the RoC in which “no form of promotion” was permitted. The Dining Hall in the Olympic Village in London was identified on the map as such a “restricted area” for promotion.

19. At the 20 July Meeting Mr Murofushi was represented by Mr Hayashi, a member of the JOC delegation staff. At the meeting there was a question and answer session, in which – *inter alia* – questions were put to and answered by Ms Claudia Bokel, a member of the Commission.
20. Mr Murofushi arrived in London on 20 July 2012 and travelled on to a training camp organised by the Japanese Athletics Federation in the Midlands. Only on 23 July 2012 did Mr Murofushi arrive at the Olympic Village in London.
21. On 25 July 2012 a group of Japanese athletes came to the voting station at the Marriott Hotel in Glasgow. Subsequently, a copy of a Japanese language document (hereinafter referred to as the “Voting Instructions”) was found by a volunteer Election Assistant (Ron Speksnijder) at the voting booth.
22. On 25 July 2012 Mr Speksnijder sent an email to Ms Genoud-Cabessa and Ms Buchser which read – *inter alia* – as follows:

“(…) I just had 16 Japanese voters at my desk. They had a paper in their hand with some kind of instructions on it. As 2 of them left the paper at the table, I made a photo of the document. I do not know if something is wrong, but they all voted identical on the same people (…).”
23. The English translation of these Voting Instructions submitted by the Respondent reads *inter alia* as follows:

[…]

“Should [a Japanese candidate] be elected to the Commission, not only will the Japanese athletes have a direct voice with the IOC, but [said candidate] would also play a key role in Tokyo’s bidding campaign to host the 2020 Olympic and Paralympic Games.

Athlete Koji Murofushi (Athletics) is running as a candidate, representing Japan. *A total of four athletes representing four different sporting events will be selected in this election. This, we ask all members of the Japan Olympic Team to cast a vote for Mr Murofushi and help promote [his candidacy] to other athletes that you meet at the Olympic village or training facilities.*

Furthermore, the enclosed folding fans are a gift from the Japan Olympic Team to all international athletes, a token of appreciation for their support, through the spirit of sport, toward Japan’s recovery efforts resulting from the Great East Japan Earthquake of March last year. Please hand them out as you engage in the election campaign at the Olympic Village. Please understand that the gift item is not intended for the Japan Olympic Team.

[…]

- *Every athlete is entitled to four votes. One candidate from four different sports must be chosen. Mr Murofushi is an athlete in the sport of Athletics, so please select another three candidates from a sport other than Athletics, listed on the ballot.*

[…]

Athletes on the Japan Olympic Team are urged to participate in the voting process and cast a ballot for Mr Murofushi. ...”.

24. On 26 July 2012 Ms Genoud-Cabessa informed the Chairperson of the Election Committee, Ms DeFrantz, about the Voting Instructions.
25. On 26 July 2012 the Appellants received a letter (the “26 July Letter”) from the Chairperson of the Election Committee that read – *inter alia* – as follows:

“We have received a copy of the attached document, which was left behind at a voting booth. The Rules of Conduct prohibited candidates or any third party from producing such documents.

Since it encourages voting in your favour and this is a violation of the Rules of Conduct.

We therefore are demanding that you immediately cease the distribution of any documents and that you retrieve any remaining copies and provide them to Stephanie Genoud-Cabessa in the “IOC and Me” space in London Olympic Village.

Kindly acknowledge receipt of this letter and confirm that you have understood its content. Please do so by emailing Stephanie [...] by tonight 9 p.m. (London time)”.
26. Following receipt of the letter Mr Hayashi from the JOC met with Ms Genoud-Cabessa in the evening of 26 July 2012. At this meeting Mr Hayashi was informed by Ms Genoud-Cabessa that the use of the Voting Instructions was prohibited and that the remaining copies must be delivered to her by 2 pm the following day (27 July 2012).
27. In the morning of 27 July 2012 Ms Genoud-Cabessa sent an email to Mr Hayashi and Mr Murofushi stating that:

“This email is to confirm that further to Ms DeFrantz letter, we met last night to discuss and you confirmed that you will remove all copies of the documents you produced. You confirmed that you will not distribute any further documents in regards to Mr Murofushi’s candidature. ...”.
28. As requested by Ms Genoud-Cabessa, Mr Hayashi collected the remaining copies of the Voting Instructions and returned them to Ms Genoud-Cabessa at around lunchtime on 27 July 2012. On this occasion Ms Genoud-Cabessa informed Mr Hayashi that a Phone Wipe of Mr Murofushi had been found in a voting booth. She also made reference to a JADA anti-doping poster (the “JADA Poster”), which featured Mr Murofushi’s image and was on display in the JOC accommodation. Ms Genoud-Cabessa told Mr Hayashi that the use of those items was equally prohibited.
29. As instructed by Ms Genoud-Cabessa, Mr Hayashi collected the remaining Phone Wipes and handed the box (containing approximately 170 Phone Wipes) to Ms Genoud-Cabessa at around 2 pm on 27 July 2012. In addition Mr Hayashi made sure that the JADA Poster was removed.
30. On 28 July 2012 Mr Murofushi left the Olympic Village to train at a training site until 2 August 2012, when he returned to the Olympic Village in London.

31. Between 3 and 5 August 2012 Mr Murofushi competed in the Hammer Throw event.
32. On 7 August 2012 Mr Murofushi entered the Dining Hall in the Olympic Village. He carried with him an iPad. He was also wearing his (official) IOC candidate badge. He talked to athletes at different tables. While he was talking to the Athletes he was pointing at his iPad and displaying (official IOC) documents related to the Election on his iPad. The same documents were also posted in the Dining Hall and elsewhere in the Olympic Village to promote the election process. Mr Murofushi had been seen talking to various athletes – *inter alia* – by Kirsty Coventry (Candidate for Zimbabwe), Olivier Lenglet (the Director of International Relations of the French NOC), Camille Reinault (working at the French Embassy in London as the Deputy Attaché for the Olympic and Paralympic Games), Céline Moyat (Project Assistant in the Sports Department of the IOC and supervisor of the voting station in the Dining Hall) and Ron Speksnijder (a volunteer Election Assistant).
33. Ms Moyat of the IOC took a photo of Mr Murofushi whilst he was sitting at a table with his iPad talking to two Romanian athletes. Thereupon, she approached Mr Murofushi and informed him that he was neither allowed to promote his candidature in the Dining Hall nor to use the iPad to promote his candidature in the respective area.
34. Representatives of the French NOC and the Dutch NOC complained about Mr Murofushi's behaviour to Ms Moyat. A representative of the Dutch NOC sent an email to Ms Moyat on the morning of 8 August 2012 (the "Dutch Written Complaint") complaining about Mr Murofushi's behaviour. The email read – *inter alia* – as follows:

"(...) Yesterday our candidate Femke Dekker noticed that in the dining hall her colleague from Japan took his i-pad and approached athletes sitting and eating there with – we presume – the request to vote for him.

We do not consider this to be in line with the rules of conduct for the IOC Athletes' Commission Election, We believe the promotion of candidatures should be done respecting the principles of fair play and do not consider this fair play (...)"
35. At a press conference on 9 August 2012, Ms DeFrantz announced that the publication of the results of the Election would be delayed.
36. On the evening of 9 August 2012 the representatives of the Dutch, French and Zimbabwean NOCs met with representatives of the Election Committee. Some of the members of the Election Committee also met with Mr Murofushi at around 10:30 pm. Mr Murofushi was accompanied during that meeting by Mr Nakamori of the JOC. During this meeting, it was alleged that Mr Murofushi had violated the RoC. Mr Murofushi was presented with the box containing the Phone Wipes and the Voting Instructions. At the end of the meeting Mr Murofushi was invited to explain his position before the Election Committee at 8 am the following day.

37. In the night of the 9 August 2012 both Ms Coventry (the Candidate from Zimbabwe) and Mr Lenglet (the Director of International Relations of the French NOC) sent an email to Ms Burns of the IOC, complaining about Mr Murofushi campaigning with an iPad in the Dining Hall on 7 August 2012.
38. Ms Coventry's email reads as follows:
"(...) this is to confirm that I saw the Japanese candidate campaigning openly on a number of days in the Main Dining Hall but very blatantly on 7th August around 3pm (give or take an hour (...))."
39. Mr Lenglet's email reads as follows:
"(...) je vous confirme (...) avoir vu, aux alentours de 20h45, Monsieur Koji Murofushi, candidat à l'élection de la commission des athlètes du CIO, présenter sa candidature à des athlètes au cours de leur diner en circulant de table en table. A cet effet, le candidat utilisait une tablette sur laquelle figuraient les photos des différents candidats (...)."
40. On 10 August 2012 early in the morning Mr Murofushi and Mr Nakamori of the JOC attended the meeting before the Election Committee. At this meeting Mr Murofushi was faced with the incidents related to the use of the Phone Wipes, the Voting Instructions and the iPad in the Dining Hall. In addition, Mr Murofushi was informed that another Phone Wipe had been found in the Dining Hall after 27 July 2012.
41. On 11 August 2012 the Election Committee informed the EB about the incidents involving Mr Murofushi.
42. By decision dated 11 August 2012, the EB decided to withdraw Mr Murofushi's candidature for the Commission (hereinafter referred to as the "Decision"). The Decision reads – *inter alia* – as follows:
*"1. (...) Mr Koji Murofushi (hereinafter the "**Candidates**") were candidates for election during the Games of the XXX Olympiad in London to the IOC Athletes' Commission.*
*2. The athletes were accused of breaching the "Rules of Conduct Applicable to Campaigns for Election to the IOC Athletes' Commission" (hereinafter the "**Rules of Conduct**").*
*3. These accusations were studied in detail by the IOC Athletes' Commission Election Committee (hereinafter the "**Committee**").*
4. The Committee heard the Candidates, in the presence of their respective NOC representatives, as well as other witnesses, including representatives of other NOCs and IOC staff responsible for following up with regard to the election procedure. [...]
(...)

Mr Koji Murofushi:

7. The Committee took note that the Athlete, Mr Koji Murofushi, first breached the Rules of Conduct by distributing documents and gifts, contrary to such Rules of Conduct. The Committee sanctioned these breaches by giving him a confidential oral warning, as well as a confidential written warning on 26 July 2012.

8. The Committee subsequently took note that, despite these warnings, the Athlete, Mr Koji Murofushi, further breached the Rules of Conduct by campaigning in an area, and by using methods of campaigning, that were prohibited by such Rules of Conduct.

9. The Committee, after deliberating, considered that the accusations of breach of the Rules of Conduct by the Athletes were proven. The Committee noted that, while some of the breaches were not of a serious nature, other breaches were of a serious nature. Also, the Committee noted that breaches of the Rules of Conduct were committed after the Athletes had already been warned for committing earlier breaches.

10. The Committee stressed the fact that all the candidates to the IOC Athletes' Commission: (i) signed a copy of such Rules of Conduct stating that they had "read and approved" them; and (ii) that the Rules of Conduct were explained in detail to all the candidates to the IOC Athletes' Commission during a meeting dedicated to that effect.

11. The Committee considered as a matter of principle that, in order to be a candidate for the IOC Athletes' Commission, it is necessary to respect the applicable rules and, therefore, decided to recommend to the IOC Executive Board to withdraw the Athletes as candidates for election during the Games of the XXX Olympiad in London to the IOC Athletes' Commission.

12. The IOC Executive Board discussed these cases in great detail with representatives of the Committee and decided to approve the recommendation made by the Committee to withdraw the Athletes as candidates for the IOC Athletes' Commission.

CONSIDERING the above, and pursuant to the Olympic Charter, the Regulations Relating to the IOC Athletes' Commission, including Its Annex entitled "Rules of Conduct Applicable to Campaigns for Election to the IOC Athletes' Commission"

THE EXECUTIVE BOARD OF THE
INTERNATIONAL OLYMPIC COMMITTEE
DECIDES

I. To withdraw (...) Mr Koji Murofushi (Japan) as candidates for election during the Games of the XXX Olympiad in London to the IOC Athletes' Commission; and

II. This Decision shall enter into force immediately".

43. The results of the Election were released on the 11 August 2012. According thereto the following candidates had been elected to the Commission: Danka Bartekova, 2295 votes; James Tomkins, 1802 votes; Kirsty Coventry, 1797 votes and Tony Estanguet, 1779 votes.
44. On 11 August 2012, Mr Tsunekazu Takeda (the President of the JOC) sent a letter to the IOC – *inter alia* – requesting that the EB review its Decision.
45. By letter dated 12 August 2012, the IOC replied that the EB would maintain its Decision.

46. The IOC confirmed by email dated 30 November 2012 that 2368 votes had been registered in favour of Mr Murofushi during the Election.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

47. On 3 September 2012 the Appellants filed their Statement of Appeal in accordance with articles R47 et seq. of the Code of Sports-related Arbitration and Mediation Rules (hereinafter referred to as the “Code”) with the Court of Arbitration for Sport (hereinafter referred to as the “CAS”) against the Decision issued by the IOC. Furthermore, the Appellants nominated Mr Jeffrey Benz as arbitrator.
48. On 18 September 2012 the Respondent appointed Dr Hans Nater as arbitrator.
49. On 27 September 2012 the Parties notified the CAS that they jointly agreed to nominate Mr Ulrich Haas, Professor in Zurich, Switzerland, as President of the Panel.
50. Further to the parties’ agreements to extend the limit for the filing of the Appeal Brief, 4 October 2012 the Appellants filed their Appeal Brief.
51. By letter dated 5 November 2012, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof Ulrich Haas, President of the Panel; Mr Jeffrey Benz and Dr Hans Nater, arbitrators.
52. By letter dated 8 November 2012, the CAS Court Office informed the Parties that Mr Piotr Wójtowicz, attorney-at-law in Zurich, Switzerland, had been appointed *ad hoc* clerk in this matter.
53. Further to the parties’ agreements to extend the limit for the filing of the Answer, on 20 November 2012 the Respondent filed its Answer.
54. On 28 November 2012 the Parties informed the CAS Court Office that their preference was for a hearing to be held in this matter. Furthermore, the Parties requested a second round of written submissions and a telephone conference to be held with the Panel in order to discuss the procedural timetable as well as procedural matters.
55. On 31 December 2012 the Appellants filed their Second Submissions.
56. On 9 January 2013 the Parties and the Panel held a conference call. Following the conference call the Respondent waived its right to cross-examine the following witnesses: Andrea Luiza Ograzeaunu; Robert Ohashi; Edward Burke; Michael Mai; James Parker; Tore Gustafsson. In

addition, the Parties were invited by the President of the Panel to jointly prepare a hearing schedule.

57. On 25 January 2013 the Respondent filed its Second Submissions.
58. By letter dated 13 February 2013, the CAS Court Office, on behalf of the Panel, fixed the hearing date for 10 and 11 April 2013, and invited the Parties to provide the CAS Court Office with the names of all persons who would be attending the hearing. Further, it reminded the Appellants to advise the CAS Court Office which of the Respondent's witnesses they wished to cross-examine. Finally, it reminded the Parties to prepare a hearing schedule.
59. On 18 February 2013 the Panel issued an Order of Procedure with various directions for the Parties including a decision as to the limitation of witnesses and experts which the Parties had specified in their written submissions and requiring the Parties to jointly prepare and provide the CAS Court Office with a draft hearing schedule by 31 March 2013.
60. The Respondent signed the Order of Procedure on 20 February 2013. The Appellants did so on 25 February 2013. The Appellants, however, reserved the right to request that the award remain confidential as between the Parties.
61. On 19 March 2013 the Appellants filed a Request for Information with the CAS. Therein, the Appellants invited the Respondent to disclose whether or not any significant number of votes was registered for Mr Murofushi between 7.20pm on 7 August 2012 and by close of the voting at 2pm on 8 August 2012. The Appellants requested the Panel to order the disclosure of that information in the event that the Respondent would not provide the information sought voluntarily.
62. By letter of 20 March 2012 the CAS Court Office requested the Respondent to advise it whether the Respondent agreed to voluntarily disclose the information sought by the Appellants.
63. On 25 March 2013 the Respondent objected to provide the information requested and submitted that no person involved in the election procedure had access to detailed voting records and that the Appellants' request was ill-founded and should be dismissed.
64. On March 25 2013 the Appellants reiterated their request for disclosure.
65. By letter of 26 March 2013 the CAS Court Office requested the Respondent to advise the CAS Court Office by 3pm the following day, "*whether it is in a position to voluntarily provide the information sought, failing which, the Panel shall decide the issue*".
66. On 27 March 2013 Respondent stated that the information requested by the Appellants was not relevant to the case. Furthermore, the Respondent submitted that the Appellants' request raised serious issues regarding the confidentiality of the vote and that therefore, the voters' consent would be needed before disclosure of any information.

67. By letter of 27 March 2013 the CAS Court Office advised the Parties that the Panel would shortly rule on the Appellants' request for information.
68. On 27 March 2013 the Appellants submitted that their request for information was in line with the prerequisites of Art. R44.3 of the Code. Therefore, the Appellants requested the Panel to order the IOC to disclose, by way of an affidavit, the number of votes registered for Mr Murofushi between 7 August and 2pm on 8 August 2012. In the event that the IOC continued to refuse to disclose the information sought, the Appellants requested the Panel to draw adverse inferences from such refusal.
69. On 28 March 2013 the Respondent informed the Panel that it entirely disagreed with the contents of the Appellants' letter dated 27 March 2013, adding *"that Mr Murofushi was not disqualified "as a result of events on 7 August 2012" as claimed by the Appellants, but as a consequence of all violations of the applicable rules of conduct by both Appellants during the entire election period"*.
70. On 4 April 2013 the Appellants submitted the hearing schedule to the CAS Court Office.
71. The Respondent in its letter dated 4 April 2013 stated that it had no objection to the proposed timetable. Respondent submitted, however, that according to its understanding Mr Murofushi was a party and not a witness. Furthermore, Respondent asked for some flexibility when interrogating Mr Murofushi without having to necessarily wait for a specific time slot.
72. By letter dated 8 April 2012 the Panel addressed the Appellants' request for the production of documents, pursuant to Art. R44.3 of the CAS Code, as follows:

"(...) The parties are advised that having considered the Appellants' request, together with the Respondent's response thereto, the Panel does not consider that the document requested is necessary. Accordingly, the Appellants' requested is denied. However, the Panel reserves the right to reconsider this decision should it become necessary. In any event, the parties are advised that the Panel's reasons in this respect shall be set out in the Final Award.

Furthermore, the Panel has considered the parties' agreed hearing schedule (...).

Finally, in relation to §3.3 of the Appellants' letter dated 4 April 2013, the parties are reminded that it is up to each side to present its case and there will be no restriction on the Panel's free assessment of the evidence. While the Respondent has chosen not to cross-examine the evidence of the witnesses named at §3.1(a) – (f), it remains for the Panel to assess what weight to be given to such evidence".
73. On 8 April 2013 the Appellants submitted a – slightly – amended translation of the Voting Instructions. Respondent objected to the late filing of the translation.
74. A hearing was held on 10 and 11 April 2013 at the Château de Béthusy, Lausanne, Switzerland. The hearing was attended by the Panel who was assisted by Ms Louise Reilly, Managing Counsel and Head of Mediation to the CAS, and Mr Piotr Wójtowicz as *ad hoc*-clerk.

75. The Appellants were represented and assisted at the hearing by Mr Adam Lewis, barrister, Mr Mike Morgan, solicitor, Mr Antonio Rigozzi, attorney-at-law, Ms Charlotte Bhanja, solicitor;
- Mr Toshikazu Watanabe and Ms Yoko Nakaya (for the JOC);
 - Mr Murofushi, and
 - the interpreters, Ms Chizuko Muranaka Broinowski and Ms Tomoko Komura.

76. The Respondent was represented and assisted by
- Dr François Carrard, Me Sophie Roud, Mr Ross Wenzel, attorneys-at-law;
 - Mr André Sabbah, IOC Legal Counsel,
 - Mr Howard Stupp, Director of IOC Legal Department and

77. At the outset of the hearing, the Appellants declared that they did not wish to cross-examine Antonio Rossi, witness indicated by the IOC, on the ground of the irrelevance of his declarations. The Respondent declared that it did not wish to cross-examine Mr Gustaffson, witness indicated by the Appellants. While the Panel has considered all witness statements filed in these proceedings, only the following witnesses were heard by the Panel during the oral hearing:

Appellants' witnesses

- Yauhiro Nakamori
- Ko Hayashi
- Yosuke Fujiwara

Respondent's witnesses

- Donatella Minelli
- Kirsty Coventry
- Olivier Lenglet
- Camille Reinault
- Christophe de Kepper
- Stéphanie Genoud-Cabessa
- Céline Moyat
- Ron Speksnijder
- Hannah Burns

78. At the close of the hearing, the Parties confirmed that they were satisfied as to how the hearing and the proceedings were conducted and expressly acknowledged that their right to be heard and to be treated equally had been respected by the CAS in these arbitration proceedings.

IV. THE PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

79. The following outline of the Parties' position is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary, though the Panel has only noted the submissions it finds relevant to its decision.

A. *The Appellants' position*

80. In their Appeal Brief dated 4 October 2012 the Appellants requested:

- a) *The annulment of the IOC Executive Board's Decision dated 11 August 2012 to withdraw Koji Murofushi's candidature;*
- b) *An order that Koji Murofushi's candidature be treated as not having been withdrawn, with all the resulting consequences. If the withdrawal is unlawful, then it was void ab initio and it must inevitably be treated as not having occurred;*
- c) *An order that the votes registered for Mr Murofushi up to the close of voting in 8 August 2012 are valid and shall result in his election to the IOC Athletes' Commission in accordance with Article 3.4.3.(e) of the Regulations and with all resulting consequences. This is an inevitable consequence of the withdrawal being void and*
- d) *An order that the parties bear their own costs.*

81. In their written submissions the Appellants claimed that the Decision of the EB was an injustice, which resided in both the finding of a breach of the RoC and the sanction imposed. Furthermore, the Appellants argued that Mr Murofushi's right to be heard was violated throughout the first instance case, that the first instance proceedings were one-sided and based on selective information.

82. According to the Appellants, the Election process was subject – *inter alia* – to the RoC, which are set out at Annex II of the Regulations. The Appellants claim that:

- (i) the RoC are badly drafted, as they are inconsistent and unpredictable. According to Swiss association law, provisions of an association must meet the principles of *nullum crimen, nulla poena sine lege certa*. According thereto disciplinary rules must comply with the "*Bestimmtheitsgebot*" and be predictable. Provisions of an association should be interpreted according to "objective interpretation" by reference to the principle of trust ("*Vertrauensprinzip*"). Further, disciplinary proceedings must comply with the principle of good faith and the prohibition of the abuse of right as set out by Art. 2 of the Swiss Civil Code (hereinafter referred to as CC), which is related to *venire contra factum proprium*. Moreover, the sanction must be proportionate to the gravity of the offence and the fault or negligence of the offender. The general principles of law, *inter alia* legitimate expectation, the duty to act in good faith and estoppel are also applicable. Any lack of

clarity is to be resolved against the body which drafted the rules, ie must be interpreted *contra proferentem*;

- (ii) it is unclear from the Decision of the EB what Mr Murofushi is accused of. According to the Appellants the EB was precluded to base its Decision on the events relating to 26 and 27 July 2012, since those matters had already been finally dealt with by the IOC staff. If however, the EB could not take these matters into account when issuing its Decision, the CAS is also prevented from looking at these events. Therefore, the Appellants find that only the incidents that occurred on 7 August 2012 (and thereafter) can be looked at and examined whether or not they constitute a breach of the RoC and – in case this is to be answered in the affirmative – they warrant a sanction. The latter according to the Appellants must be assessed in light of the principle of proportionality, since it was for the first time that Mr Murofushi was the subject of a formal Section 7 procedure and Section 6 sanction according to the RoC;
- (iii) according to the Appellants, Mr Murofushi has not breached the prohibition of campaigning in a restricted area according to the RoC. Appellants claim that “*promotion of the candidature*”, i.e. “*campaigning in a prohibited area*”, means to explicitly advertise one’s candidature, i.e. saying: “*vote for me*”. This is, however, not what Mr Murofushi has done in the case at hand, because the latter has only explained the voting procedure to the other athletes and the importance of voting as such. Furthermore, the Appellants submit that there is nothing in the Regulations that prohibits the use of an iPad;
- (iv) Appellants claim that Ms Bokel at the 20 July Meeting acknowledged and explained that it was not forbidden for candidates to speak with other athletes in the Dining Hall. Furthermore, the IOC did not explain at that meeting that a candidate could not use an iPad;
- (v) Appellants claim that Mr Murofushi cannot be held liable for the (second) Phone Wipe, which was discovered after 27 July 2012, because Mr Murofushi did not distribute Phone Wipes after that date and all boxes with Phone Wipes had been handed over on that day to Ms Genoud-Cabessa. In any event the Phone Wipes were valueless mementoes that had nothing to do with Mr Murofushi’s candidature and, thus, cannot be considered as a means of promoting Mr Murofushi’s candidature;
- (vi) Appellants further submit that even if Mr Murofushi’s behaviour would constitute a breach of the RoC, Mr Murofushi cannot be held responsible for this because the RoC do not sufficiently define what constitutes prohibited behaviour. Furthermore, Mr Murofushi relied on Ms Bokel’s explanation given at the 20 July Meeting. In addition, the Appellant submits that Mr Murofushi was encouraged by IOC staff to promote voting among the athletes and to wear his candidate’s badge. When Mr Murofushi was speaking to the athletes in the Dining Hall he did so in plain sight of the IOC staff members and was not stopped by them. It follows from this that he was lead to believe that his behaviour was in conformity with the Regulations;
- (vii) the Appellants claim that – in any event – the sanction taken by the EB is disproportionate, because it was not capable of achieving the envisaged goal and was in fact inimical to the presumed objective of ensuring a valid and representative election.

Furthermore, the Appellants submit that the actions Mr Murofushi has been sanctioned for had no effect on the election result and that, therefore, the sanction must be qualified as excessive. Moreover, the Appellants submit that the sanction puts an indelible stain on Mr Murofushi's character. The sanction therefore amounts to an unlawful infringement of his personality right within the meaning of Article 28 (1) CC which cannot be justified by law, consent or any overriding public or private interest;

- (viii) according to the Appellants, the Decision must be qualified as a sanction, i.e. as a disciplinary measure. Any subject of a disciplinary measure is entitled to certain minimum rights ("droits de protection") that limit the autonomy of associations under Swiss law;
- (ix) regarding the events of 26 and 27 July, the Appellants' position is that the Election Committee had merely requested not to continue using the Voting Instructions and the Phone Wipes. By issuing these directions the IOC had finally disposed of these matters and decided not to issue a formal sanction under Section 6 of the RoC. Therefore, according to the Appellants the IOC was barred from taking these incidents into account when issuing its Decision at a later point in time. This follows from the principles of *res judicata*, *ne bis in idem* and *venire contra factum proprium*;
- (x) In any event, Mr Murofushi had nothing to do with the production or distribution of the Voting Instructions. Even if, therefore, the Voting Instruction would constitute a breach of the RoC, the latter could not be attributed to him. The JADA Poster was totally unrelated to the Election and cannot constitute a breach of the Regulations either. In any event, the JADA Poster was not considered to be an issue by the Election Committee or the EB. Finally, also the Phone Wipes do not constitute a breach, because they were wholly unrelated to the Election;
- (xi) Absent any specific rules, it is generally accepted that the association bears the burden of proof as to the existence of the offence and that such proof must be provided for to the comfortable satisfaction of the competent hearing body having in mind the seriousness of the allegation which is made.

B. The Respondent's position

83. In its answer dated 20 November 2012, the Respondent submitted to the CAS the following requests for relief:

- I. *Ruling that CAS dismisses the Appeal.*
- II. *Ordering that the Parties bear their own costs.*

84. In support of its requests the Respondent submits – *inter alia* – as follows:

- (i) The Respondent does not question the *de novo* authority of the Panel, however its position is that the Panel should adopt "*une certaine retenue*" when reviewing the Decision of the IOC, an association constituted under Swiss law. The Respondent justifies this by stating that the measure at stake here is similar to sanctions pertaining to the sporting result of a

competition, since both measures pursue a similar goal, i.e. to enforce a level playing field among the participants. It is, however, well established that the CAS applies a certain self-restraint when it comes to reviewing field-of-play decisions;

- (ii) the standard of proof to be applied in this case should be very close to a “balance of probabilities”. Mr Murofushi was heard by the Election Committee before the latter prepared its recommendation to the IOC Executive Board. Further, under Swiss law it is neither necessary nor customary for a candidate to be assisted by legal counsel at the stage of an electoral process. Therefore his right to be heard was not violated;
- (iii) according to the Respondent, the relevant rules governing the Election process are to be found in the OC, the Regulations and the RoC. The RoC were accepted and signed by Mr Murofushi, the President of the JOC and the Chairperson of the JOC’s Athletes’ Commission. The RoC provide specific rules regarding the campaigning for the Election. The RoC are a private regulation of a Swiss association and, therefore, according to the Respondent, its provisions are of a normative nature. Thus, they must be interpreted pursuant to the rules of interpretation which are applicable for legislative acts, i.e. primarily according to their literal meaning, where necessary, in light of the legislator’s goal, the background to and intention behind the legislation, and the other provisions contained in the applicable rules and regulations. In application of the above principles the RoC are sufficiently clear;
- (iv) the Respondent submits that the IOC based the Decision not only on the incident in the Dining Hall, but also on the events of 26 and 27 July. This follows from the wording of the Decision that states that Mr Murofushi “*first breached the Rules of Conduct by distributing documents and gifts*”. This is a clear reference to the Voting Instructions and the Phone Wipes. The EB was – according to the Respondent – not barred from taking these incidents into account. Section 6 of the RoC provides that “*any infraction [...] will be sanctioned*”. The language is not permissive, implying that each violation must be sanctioned. Moreover, the RoC state that “*cumulative infractions must be taken into consideration for the determination of the sanction*”. The further wording of the provision, “*In the event of a repeat infraction, or two different but consecutive infractions, the second sanction will automatically be more severe*”, evidences – according to the Respondent – that both cumulative and serial infractions will result in more severe sanctions. None of the earlier violations had been finally dealt with by the IOC. Thus, the IOC was not precluded when issuing its decision on 11 August 2012. Consequently, by virtue of its *de novo* authority, CAS is also not limited to the incidents related to 7 August 2013 when reviewing the facts of the case according to Art. R57 of the Code;
- (v) according to the Respondent, the candidates were sufficiently well informed as to what behaviour was permitted according to the applicable rules and what was not. The candidates had received the RoC and numerous information letters. In addition an information meeting had been held on 20 July 2012 (the 20 July Meeting);
- (vi) the Respondent claims that the Voting Instructions constitute a breach of the RoC, because they were intended to promote the candidature of Mr Murofushi. It clearly follows from the text of the Voting Instructions that they favour Mr Murofushi’s

candidature over the other candidates. Even if Mr Murofushi was not involved in the drafting and distribution of the Voting Instructions this behaviour must be imputed to him, because the purpose of this material was to promote his candidacy and, in addition, Mr Murofushi and the JOC acted as a team;

- (vii) the Respondent further submits that the distribution of the Phone Wipes before 27 July 2012 constituted a breach of the RoC. Mr Murofushi admitted that he gave the Phone Wipes to friends, fans volunteers and other persons he came into contact with (including athletes). The latter is also evidenced by the fact that a Phone Wipe had been found by a volunteer in the voting station. The Phone Wipes had the potential – according to the Respondent – to promote the election campaign of Mr Murofushi;
- (viii) according to the Respondent the use of the iPad in the Dining Hall constitutes a breach of the RoC. It follows from the RoC that solely the IOC was responsible for producing, distributing or displaying promotional materials in relation to the election process. This had been made clear to the candidates in the various information letters and also at the 20 July Meeting. The candidates were advised that their campaigning in the restricted area was strictly limited to wearing the official candidate's badge. Therefore, even if Mr Murofushi displayed Election-related material from the IOC's website on his iPad, this still constituted a breach of the RoC. The purpose of restricting campaigning and promotion in the Dining Area was to prevent athletes from being harassed while relaxing and eating. There was an imminent threat that this would occur, since the voting station was situated in the Dining Hall and, therefore, the latter would have constituted a perfect ground for campaigning. At the 20 July Meeting, the candidates were clearly informed that their campaigns should be restricted to talking to athletes outside of the restricted area. Mr Murofushi breached the RoC on 7 August 2012 when systemically moving from table to table talking to athletes he did not know, showing them the candidates' photos and promoting the election. According to the Respondent, it does not make a difference in light of the applicable rules whether a candidate is asking someone to vote as such or whether he asks the person to cast the vote for him;
- (ix) Respondent contests that Mr Murofushi was encouraged by the IOC staff to promote voting among the other athletes in the restricted area;
- (x) according to the Respondent the Appellants received both an oral and a written warning in respect of the breaches committed. A written warning was issued on 26 July 2012 and an oral warning on 27 July 2012. Nonetheless Mr. Murofushi continued to breach the RoC on 7 August 2012. Therefore, according to the Respondent the EB had no other choice than to withdraw Mr Murofushi's candidature. All candidates and the NOCs had been informed about and signed the RoC, which provide for consequences in case of breaches. Moreover, the violations committed had the potential to influence athletes and attract a significant number of additional votes. In light of the fact that the Appellants manifestly and repeatedly breached the RoC the withdrawal of Mr Murofushi's candidature was the only appropriate (as well as necessary, justified and proportionate and under no circumstances "*evidently and grossly disproportionate*") sanction provided for by the RoC;

- (xi) Respondent finally submits that in order to issue a sanction against Mr Murofushi it suffices that the latter objectively breached the applicable standards. Similar to those incidents where the effects of a sanction are limited to the playing field (eg disqualification of sporting results) no subjective element is needed on the part of the athlete/candidate concerned. No issue of “*droits de protection*” arise here. Furthermore, the Respondent contests that any personality right are infringed by the measure at stake.

V. JURISDICTION OF THE CAS, TIMELINESS OF THE APPEAL

85. The Appellants rely on Rule 61 of the Olympic Charter as granting them a right of appeal to the CAS. The jurisdiction of the CAS was not contested by the Respondent and was confirmed by the parties’ signing the Order of Procedure. Accordingly, the Panel is satisfied that it is competent to hear this dispute.
86. In addition, the Statement of Appeal is admissible, because it was filed within the deadline of Art. R49 of the Code.

VI. THE MANDATE OF THE PANEL

87. The mandate of the Panel follows from Art. R57 of the Code. According to Art. R57 of the Code the CAS has - in principle - unrestricted powers to look into the matter (facts and the law). CAS Panels in the past have accepted restrictions to Art. R57 of the Code, where the first instance was – in view of the very special circumstances of the case and in view of its technical expertise – in a better position to decide the matter (e.g. field of play decisions). The situation at hand is different. Furthermore, the Panel deems that – following the submissions of Appellants – a Panel cannot heal procedural mistakes of the first instance by claiming to act de novo and at the same interfere with the decision of the previous instance only where the measure of the sanction imposed by a disciplinary body in the exercise of its discretion allowed by the relevant rules is “evidently and grossly disproportionate”. The Panel finds that it can modify a prior decision – based on the first sentence of Art. R57 of the Code – if it finds that the latter is “erroneous”. The Panel is comforted in its view by the jurisprudence in CAS 2008/A/1718-1724 para 166.

“Based on the clear wording of Art. 60 par. 26 of the IAAF Rules as well as on Art. R57 of the Code, the Panel finds that in view of the specific circumstances of the case nothing supports the ARAF’s view on the scope of the Panel’s review. Not only can the Panel review the facts and the law contained in the Decisions but it can as well replace those Decisions if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an “erroneous” decision. The procedure before CAS is indeed an appeal procedure, which means that if the appeal is admissible, the whole case is transferred to CAS for a complete rehearing with full devolution power in favor of CAS. CAS is thus only limited by the requests of the parties (the so called “petita”).”

VII. APPLICABLE LAW

88. Art. R58 of the Code states in respect of the applicable law to the merits 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”.

89. In the light of the above the Panel considers the IOC rules and regulations to be the applicable regulations for the purposes of Article R58 of the Code, and that Swiss law applies subsidiarily. The provisions set in the IOC rules and regulations which are relevant in this arbitration include the following:

1. In the Olympic Charter:

Bye-law to Rule 21

1. The IOC Athletes' Commission:

An IOC Athletes' Commission shall be constituted, the majority of whose members shall be athletes elected by athletes participating in the Olympic Games. The election shall be held on the occasion of the Games of the Olympiad and the Olympic Winter Games in accordance with regulations adopted by the IOC Executive Board, in consultation with the Athletes' Commission, and communicated to the IFs and NOCs not later than one year prior to the Olympic Games at which such election is to be held. All regulations and procedures of the IOC Athletes' Commission shall be adopted by the IOC Executive Board after consulting of the IOC Athletes' Commission

2. In the Regulations Relating to the IOC Athletes' Commission:

3.4.2 Presentation and submission of candidatures

No later than 12 months before the Opening Ceremony of each edition of the Olympic Games, the IOC shall invite each NOC to present a candidate for election to the Commission.

To be admissible, the candidature proposal must include the following documents and be received by the IOC by the date set in the invitation:

a. A candidature form, duly signed by the candidate, the Chairperson of the NOC Athletes' Commission and the President of the NOC concerned;

b. The “Rules of Conduct Applicable to Campaigns for Election to the IOC Athletes' Commission” (Annex II) (“Rules of Conduct”) duly signed by the candidate, the Chairperson of the NOC Athletes' Commission and the President of the NOC.

(...)

3.4.4 Election campaign

The election campaign shall be conducted in accordance with the Rules of Conduct.

3.4.5 Election Committee

The Election Committee is responsible for the election, from the opening of the Olympic Village to the public announcement of the results.

(...)

The role of the Election Committee includes:

- a. Supervising the election procedure, including the counting of ballot papers, and certifying the results; and*
- b. Ensuring compliance with the “Rules of Conduct” once the Olympic Village opens, dealing with and issuing sanctions for all infringements and, if necessary, proposing measures and sanctions to the IOC Executive Board.*

3. In the Rules of Conduct Applicable to Campaigns for Election to the IOC Athletes’ Commission (RoC, Annex II to the Regulations):

Section 1 General Principles

The goal of the present Rules of Conduct is to ensure that each candidate has an equal opportunity to be elected.

They must be complied with strictly by the candidate and by the NOC putting forward his or her candidature.

The NOC is responsible for the candidate’s conduct.

Candidates may promote their candidature, with dignity and moderation, in compliance with the present Rules of Conduct, the Olympic Charter and the IOC Code of Ethics.

IOC members and IOC Athletes’ Commission members, except if he/she is the president of the candidate’s NOC, may under no circumstances endorse a candidate.

Section 3 Promotion of the Candidature during the Olympic Games

From the opening date of the Olympic Village, the Election Committee ensures compliance with the present Rules of Conduct.

From the opening of the Olympic Village until the end of the election, candidates may promote their candidatures. However, no form of promotion may be undertaken in or around the voting offices (exact rules will be established based on the final layout of the Olympic Village for each edition of the Games, and communicated to all candidates).

Candidates must respect the athletes at all times, and act with respect regarding all other candidates.

Candidates are responsible for producing, at their own expense, a document in black and white (one sheet printed on one side, A4 format) presenting their candidature. This document is submitted for IOC approval no later than two months before the opening of the Olympic Village. A decision will be made within 15 days after arrival of the document.

The IOC will send the candidates detailed instructions for submitting a video in which they can present their candidature. Candidates must strictly adhere to all instructions and submit their video, at their own expense, for IOC approval no later than two months prior to the opening of the Olympic Village. A decision will be made within 15 days of the IOC receiving the candidate’s video.

No other document, poster, sign, banner or gift may be distributed and/or displayed inside or outside the Olympic Village, including the NOC residential areas.

No form of material (such as t-shirt, caps, pictures, etc.) or financial inducement to vote for a candidate or take part in the vote is permitted.

No press conferences will be held on the candidatures.

Section 6 Sanctions

In the event of any infraction of the present Rules of Conduct, the following sanctions will be applied, depending on the severity and type of infraction; sanctions can be cumulative:

- a. A confidential warning*
- b. A public reprimand made at the chefs de mission meeting and displayed at the voting centres*
- c. Withdrawal of the candidature*
- d. Withdrawal of the candidate's right to stand for election at future Olympic Games*
- e. Withdrawal of the right of the NOC to submit a candidate at forthcoming editions of the Olympic Games.*

Cumulative infractions must be taken into consideration for the determination of the sanction.

In the event of a repeat infraction, or two different but consecutive infractions, the second sanction will automatically be more severe.

The Election Committee has the authority to impose sanctions a and b; the IOC Executive Board has the authority to impose sanctions c, d and e, upon the proposal of the Election Committee.

Section 7 Procedure

The candidate or NOC concerned by an infraction has the right to be heard, in writing or orally at his/her discretion, by the Election Committee or by any person the Committee designates to such effect.

If the right to be heard is exercised by means of a written document, this must be submitted within the deadline set by the Election Committee. If the right to be heard is exercised orally, the candidate or NOC may be accompanied by one person of his/her choice; a brief record of such hearing is produced, and a copy given to the candidate or NOC concerned.

The Chef de Mission of the NOC of the candidate concerned must be informed in all cases. He or she may be heard if the Committee deems it necessary.

Any sanction shall be the subject of a written and grounded decision. Decisions imposing sanctions b to e of Art. 6 are made public.

For any measure or sanction, the candidate concerned is informed before it is made public. The Chef de Mission of the candidate's NOC is also informed. This information may be communicated orally or by electronic mail. If the information is communicated orally, a brief record is established and a copy given to the candidate or NOC concerned.

VIII. PRELIMINARY ISSUES

90. [...].
91. [...].
92. The Appellants in their letter dated 19 March 2013 (as well as on 31 December 2012, 25 and 27 March 2013) filed a request for information with this Panel; the Appellants requested the Panel to order the Respondent to produce detailed voting records. The Respondent in its letter dated 25 March 2012 (and 27 March 2013) objected to the request for information filed by the Appellants. In its letter to the Parties dated 8 April 2013 the Panel denied the Appellants' request for information and advised the Parties that it would set out the reasons for its decision in the final award. According to Art. R44.3 of the CAS Code (which is also applicable in Appeals Arbitration Procedures) a *"party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant"*. The Panel deems that the information sought by the Appellants is not material for the outcome of this procedure and, thus, rejects the request for lack of relevance.
93. In its Answer the Respondent submitted that the Athlete was in breach of the RoC also because of the JADA Poster displaying the Athlete. In the hearing the Respondent dropped this argument and no longer pursued it. Therefore, the Panel need not to analyse this argument any longer.
94. The Respondent in the hearing amended its requests for relief. In case the Panel should come to the conclusion that the decision taken by the IOC Executive Board (hereinafter referred to as "EB") was issued in violation of the applicable laws and regulation, the Respondent on a subsidiary basis requests the Panel to annul the decision and refer the matter back to the IOC. The Appellants did not object to the Respondent's amendment of its prayers for relief.

IX. MERITS

95. The Decision of the EB can only be upheld if the latter is "correct". In order to be correct, the EB decision must comply with all formal/procedural requirements (see below A) and all substantive requirements (see below B).

A. *Formal/procedural requirements*

96. The Appellants allege that the EB breached procedural requirements (eg the right to be heard) when issuing its decision. The Panel does not need to enter into this matter and follows insofar the jurisprudence in CAS 2012/A/2913 para 87:

"Therefore even if a violation of the principle of due process, or of the right to be heard, occurred in the proceedings in respect of which the appeal is brought, it is cured, at least to the extent such violation did not irreparably impair the First Appellant's rights, by a full appeal to the CAS (CAS 94/129; CAS 98/211; CAS

2000/A/274; CAS 2000/A/281; CAS 2000/A/317; CAS 2002/A/378). *In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance “fade to the periphery” (CAS 98/211, citing Swiss doctrine and case law)”.*

97. The right to a *de novo* review, and the *de novo* review undertaken by this Panel, pursuant to Art. R57 of the Code thus cures any issues arising from any perceived prior procedural due process lapses.

B. Substantive requirements

1. *The legal standards applicable to the measure at hand*

98. The question which legal standards are to be applied in the case at hand depends on the nature of the decision taken by the EB. In principle, the standards applicable to an administrative decision by a sporting body are different from the standards applicable to a disciplinary measure (sanction).

a) The legal nature of the measure taken by the EB

99. In principle, under Swiss law, the IOC has autonomy to decide how it wishes to compose one of its organs/commissions. In the case at hand the IOC has exercised its discretion and autonomy by issuing rules to which both the candidates and the IOC are bound. The Panel finds that the starting point for a qualification of the legal nature of the rules and the measure issued on the basis of it must be the language of the provisions that the IOC – by exercising its discretion and autonomy – has decided to enact. When analysing the rules in question the better arguments speak in favour of qualifying them (as well as the measures based upon them) as disciplinary in nature:

- heading and wording in sec. 6 RoC (“sanction”);
- scale of “sanctions”. The fact that there is a scale of “sanction” is typical for a disciplinary measure;
- the fact that measures are based on the principle of proportionality, i.e. that they are to be applied “*depending on the severity and type of the infraction*” is typical for disciplinary measures;
- procedure in which the “sanction” is issued (cf. sec. 7 RoC: right to be heard before issuing the measure, notification of the decision to candidate/NOC before it is made public, etc.) is typical for a disciplinary measure.

- b) The legal standards applicable to sanctions
100. The legal standards applicable to a disciplinary measure are – according to Swiss law – as follows:
- a) is there a sufficient legal basis for the disciplinary measure in question? (cf. below 2);
 - b) if the previous question is answered in the affirmative, are the prerequisites to issue a sanction provided for in the respective rules fulfilled? (cf. below 3); and
 - c) if the previous question is answered in the affirmative, is the sanction issued in the case at hand proportionate? (cf. below 4).

2. *Is there a sufficient legal basis?*

101. With its letter dated 31 August 2011 the JOC nominated the Athlete as Japan's candidate to stand in the Election. The application that bears – inter alia – the signature of the Athlete and the JOC President makes explicit reference to the RoC. With its letter dated 8 December 2011 addressed to the NOCs the IOC approved the application of the Athlete and with its letter dated 24 February 2012 the IOC informed the Athlete that he had been “*selected as a candidate for the election*”. Thus, the Athlete and the IOC entered into an agreement (hereinafter referred to as “*Candidacy Agreement*”) according to which the Athlete was permitted to run as a candidate and under which the IOC would seat him if he succeeded in his candidacy in accordance with said agreement. However, it follows from the contents of this Candidacy Agreement that the right conferred on the Athlete by the IOC is somewhat limited, since the Athlete – in turn for being allowed to run as a candidate – must abide (*inter alia*) by the RoC.
102. The IOC has based its disciplinary measure on sec. 6 lit. c RoC. The question is, whether this provision covers the type of measure issued by the IOC in the case at hand. According to this provision the candidature can be “*withdrawn*” under certain conditions. Logically, a withdrawal of the candidature is only possible as long as the addressee of this measure is still a “*candidate*”. The question, therefore, is, whether the Athlete was still a “*candidate*” at the time when the IOC took the Decision on 11 August 2012. The Athlete can no longer be considered to be a “*candidate*”, once he is elected. The question, therefore, is whether the “*election process*” was terminated at the time when the IOC took its decision. If that was the case, the decision of the IOC would not qualify as a withdrawal of a “*candidature*”, but rather as an annulment of the election results. The latter, however, is not provided for in sec. 6 RoC. It follows from sec. 3.4.3 of the Regulations relating to the IOC Athletes' Commission that the “*election process*” is only terminated once the results of the voting are announced. In the case at hand, the withdrawal of the candidature took place before the election process was terminated and, thus, the Athlete was still a “*candidate*”. Hence, this Panel concludes that, in principle, sec. 6 lit. c RoC is a sufficient legal basis for the measure in question.

3. *Are the prerequisites of sec. 6 lit. c RoC fulfilled?*
- a) The factual basis of the IOC decision
103. The EB based its Decision to withdraw the Appellant's candidature on a variety of incidents (cf. para 7 seq. of the Decision), in particular on
- the presence of the Voting Instruction;
 - the distribution of the Phone Wipes and
 - on the fact that the Athlete allegedly was "campaigning" in the Dining Area on 7 August 2012.
104. Appellants claim that the EB was precluded from taking the incidents related to the Voting Instructions and the Phone Wipes into account when issuing the Decision, because these incidents had already been "*finally dealt with*" by the IOC. The Appellant bases its arguments on the principles of *res judicata*, prohibition of double jeopardy and estoppel.
105. *Res judicata* – at least under Swiss law – is a procedural concept that is known only in relation to court judgments and decisions of arbitral tribunals. The concept applies in a case in which there has been a final judgment that is no longer subject to appeal. The consequence thereof is that the matter cannot be raised again in the same or in another court. Thus, no court may reconsider the matter that has been finally disposed of in the previous court judgment. In particular Swiss law does not attribute *res judicata* effects to administrative decisions by organs of sports associations which necessarily lack the adversarial nature of a legal procedure and decision by a judicial body. Therefore, in the Panel's view the EB was not precluded from taking into account any of the above incidents when issuing its decision on the grounds of *res judicata*.
106. According to the prohibition of double jeopardy a person cannot be sanctioned twice for the same circumstances. In the Panel's view there is no room for this principle in the case at hand, since the Athlete was not sanctioned in relation to the Voting Instructions. The chairperson of the IOC Election Committee (Ms DeFrantz) sent the 26 July Letter to the Appellants. The letter states that the production and distribution of the Voting Instruction constitute a breach of the RoC. However, the letter does not contain any reference to a sanction within the meaning of sec. 6 RoC. It only states that the Appellants' "*immediately cease the distribution of any documents and that you retrieve any remaining copies ...*". The Panel considers that it is not only the wording of the letter, but also the procedure in which the letter was issued that speaks against qualifying the letter as a sanction. Sec. 7 RoC requires that a person must be given the right to be heard before issuing a sanction according to sec. 6. No such sec. 7 procedure took place before the letter was sent to the Appellants. The Panel, therefore, concludes that the letter is not a sanction but rather an order to stop further distribution of the Voting Instructions and that, therefore, the prohibition of double jeopardy did not prevent the EB from taking the incident related to the Voting Instructions into account in making its decision.

107. The same is true in relation to the incident related to the Phone Wipes. A Phone Wipe had been found on 27 July 2012 in the voting station. The Phone Wipe then was handed over to the IOC's Ms Genoud-Cabessa. Ms Genoud-Cabessa advised the JOC's Mr Hayashi orally on the same day that the distribution of the Phone Wipes constituted a breach of the RoC and requested that all remaining Phone Wipes should be turned over to the IOC. No further action was taken by Ms Genoud-Cabessa. She did not report the incident to anybody else at the time (e.g. the Election Committee). Her "order" to refrain from further distributing Phone Wipes and to turn over all remaining Phone Wipes to her does not constitute a "sanction" within the meaning of the RoC. This follows from the contents of said "measure" as well as from the fact that the latter was issued orally and by a person that in any event would not have been entitled to issue a sanction according to the RoC. The measure taken by Ms Genoud-Cabessa was of a simple administrative nature. If, however, no sanction had been issued for this (alleged) breach of the rules, the EB was not prevented (by the prohibition of double jeopardy) from taking this incident into account when issuing the Decision.
108. Estoppel is a legal concept known to a lot of jurisdictions – including Swiss law – according to which a person is precluded from asserting something to the contrary of that which has been established – in contemplation of the law – as the truth through his or her deed, acts or declaration either express or implied. This Panel finds that in the case at hand there is no room to apply the principle of estoppel. Neither the letter of Ms DeFrantz nor the "measure" taken by Ms Genoud-Cabessa implied that the IOC would be prevented from coming back on these incidents or that – as the Appellants put it – the matter had been finally dealt with. Nothing in the oral or written notice given by Ms DeFrantz or Ms Genoud-Cabessa justifies such a restrictive interpretation. This is all the more true in light of sec. 6 RoC that says that in "*the event of repeat infraction, or two different but consecutive infractions, the second sanction will automatically be more severe*".
109. To conclude therefore, the Panel finds that the EB was not prevented from looking at all three incidents when issuing its sanction.
- b) The distribution of the Voting Instructions (and the fans contained therein)
- aa) Does the distribution of the Voting Instructions constitute a breach of the RoC?
110. The Panel has no hesitation in holding that the distribution of the Voting Instructions constitutes a breach of the RoC. [...].
111. The Voting Instructions were not solely meant to explain the voting process to the Japanese athletes, but were also intended to promote the Athlete's candidature. This is evidenced by a series of facts, *inter alia* by the following:
- The JOC does not issue Voting Instructions for all Olympic Games. Instead, Mr Nakamori explained that no Voting Instructions were issued when there was no Japanese candidate for the Athletes' Commission;

- The language of the Voting Instruction provided *inter alia*; “[...] Thus, we ask all members of the Japan Olympic Team to cast a vote for Mr Murofushi and help promote [his candidacy] to other athletes that you meet at the Olympic Village or training facilities. [...] Please hand them out as you engage in the election campaign at the Olympic Village. [...] Athletes on the Japan Olympic Team are urged in the voting process and cast a ballot for Mr Murofushi. We also ask for your cooperation in helping promoting his candidacy to the world’s athletes around you at the Olympic Village”.
 - The design of the Voting Instructions, in particular the fact that the name of the Athlete was written in a different font than the other names in order to make him stand out from the rest of the candidates.
112. The Voting Instructions violate sec. 3 of the RoC according to which it is prohibited to distribute inside and outside the Olympic Village any “document”. Furthermore, the Voting Instructions violate the prohibition contained in sec. 3 of the RoC according to which “no form of material ... to vote for a candidate or take part in the vote is permitted”.
- bb) Can the breach be attributed to the Athlete?
113. The Panel, however, cannot stop its analysis by concluding that the Voting Instructions constitute a breach of the RoC. The decisive question is, whether this breach can be attributed to the Athlete.
- (1) Was the Athlete involved in designing or distributing the Voting Instructions?
114. The Panel would have no hesitation in attributing the breach to the Athlete if the latter was involved in the distribution or designing of the Voting Instructions. However, there is no evidence on file that the Athlete was involved in either. The Athlete submitted that he was not aware of the Voting Instructions until he received the letter of Ms DeFrantz on 26 July 2012. Also the JOC submitted that the Athlete did not have any knowledge of the Voting Instructions. This was supported by the the JOC’s witness Mr Hayashi. The latter said that the production and distribution of the Voting Instruction was solely organised by the JOC. He had been aware of the Voting Instructions from the very beginning because he handed them over to the respective team leaders in the Japanese delegation so that they could pass them along to the individual athletes in their sports. Mr Nakamori explained that the Voting Instructions were produced shortly before the Olympic Games in July 2012 when the Athlete had already left Japan to train at various training sites en route to the Olympic Games. Absent any evidence to the contrary, the Panel accepts the submission of the Appellants that the Athlete did not have any knowledge of the existence of the Voting Instructions prior to 26 July 2012.

(2) Can the behaviour of the JOC be attributed to the Athlete?

115. Disciplinary measures of a sports association are designed, in principle, to sanction the individual behaviour of a person. The possibility to sanction a person for the behaviour of a third party is – at least under Swiss law – the exception to the rule. It follows from this that absent any express provisions to the contrary, the faulty behaviour of a third party cannot be attributed to a person in the context of disciplinary sanctions (cf. SCHERRER, *Strafrechtliche und strafprozessuale Grundsätze bei Verbandssanktionen* in: FRITZWEILER, *Doping – Sanktionen, Beweise, Ansprüche*, Berne 2000, p. 125). Moreover, the legal literature in Swiss association law holds that provisions stipulating such wide-reaching obligations for a member must be incorporated at the level of statutes or annexes to these statutes (“principle of legality of associations”; *verbandsrechtliches Legalitätsprinzip*, cf. BK-ZGB/RIEMER, 1990, Art. 70 no. 186).
116. The RoC do not contain a specific rule according to which a breach committed by a NOC can be attributed to a candidate. The RoC explicitly state that “*The NOC is responsible for the Candidate’s conduct*”. The RoC, however, do not rule vice-versa. The Respondent submits that the attribution of a breach by a NOC to a candidate is implicitly contained in the RoC because otherwise a candidate could easily hide behind the activities of his or her NOC. Furthermore, the Respondent submits that the candidacy is a kind of joint venture between the Athlete and his NOC, i.e. that they act as a team or in concert. The latter is evidenced – according to the Respondent – inter alia by the fact that the candidacy for an athlete is submitted by the NOC, that the latter is posted in all correspondence with the IOC and that – as was the case e.g. at the 20 July Meeting – it acts occasionally as an agent or representative of the candidate. The Appellants on the contrary submit that the lack of clarity in the RoC must be interpreted in favour of Mr Murofushi, i.e. according to the principle of *contra proferentem*.
117. It is true that the RoC do not contain an explicit rule according to which a breach committed by a NOC can be attributed to a candidate. However, an interpretation of the rules according to which a candidate can be made responsible for the behaviour of his NOC is not impossible either. The question, therefore, is whether there is room in the case at hand to apply the principle of interpretation *contra proferentem*.
118. The purpose of the Candidacy Agreement was to cover the entire election process from the time of the acceptance of the candidature by the IOC until the publishing of the election results. This election process was not determined in all details already at the time when the JOC submitted the candidature of the Athlete. Nor was the entire process finally determined at the time the IOC accepted the candidature of the Athlete. It was, instead, clear to the Parties at the time of the execution of the Candidacy Agreement that the election process would be further refined and concretized with the actual election drawing closer. The details of the election process were, therefore, a kind of “work in progress”. To this end the IOC issued “information letters” and held meetings for the candidates the purpose of which was to provide the latter (as well as the NOCs) with additional information, clarifications and instructions concerning the election process. The Panel, therefore finds, that the contents of the Candidacy Agreement

must be interpreted not only in light of the RoC, but also in light of the information letters issued by the IOC and the discussions held at the (information) meetings for the candidates.

119. In light of the above, the Panel finds the 19 June Letter to be instructive. This letter states – *inter alia* – as follows:

‘Further to our letter of 24 February, we are pleased to send you some additional information regarding the IOC Athletes’ Commission election ...

[...]

Rules of Conduct

We have attached the Rules of Conduct for the election (please see Annex II), which were initially provided in our letter dated 24 February 2012 [...] The objective of these rules is to ensure that the election process is fair. Please note that any breach of the rules may lead to your disqualification as a candidate.

In addition, we are pleased to provide you with some additional information regarding the promotion of your candidature.

[...]

What you are not permitted to do according to the rules:

[...]

You may not promote your candidature or be promoted (creation of a website, blogs, use of other media platforms, etc.) by any organisation, including an IF, NOC, sponsor, etc.’.

120. In the view of the Panel the letter makes it rather clear that if an NOC promotes a candidate this constitutes a breach of the ROC that is attributable to the candidate and that may lead to the disqualification of the candidate. The question therefore is, whether the Athlete – despite the clear wording in the letter dated 19 June 2012 – can (still) rely upon the principle of interpretation *contra proferentem* in relation to the RoC. The Panel holds that this is not the case. Of course it would have been better if the IOC had provided this important piece of information / clarification at an earlier stage, i.e. when first publishing the RoC vis-à-vis the candidates. Nevertheless, the Panel finds that this piece of information was provided for the attention of the candidates with sufficient clarity, in a sufficiently prominent manner and well in advance of the Olympic Games. In the view of the Panel, it could, thus, be expected from a reasonable candidate (as well as, and in particular, from his NOC) to take knowledge and account of this information provided by the IOC. The Panel, therefore, concludes that in the case at hand there is no room to apply the principle of *contra proferentem* when interpreting the contents of the Candidacy Agreement. Consequently, the Athlete can not only be made accountable for breaches committed by him, but also for breaches committed by his NOC and that, therefore, the violation of the RoC committed by the JOC can be attributed to the Athlete.

c) The distribution of the Phone Wipes

121. It is contested between the Parties, whether the distribution of the Phone Wipes by the Athlete constitutes a violation of the RoC. The Athlete submits and admits that he produced the Phone Wipes and that he distributed them to fans, athletes and friends (cf. 1st Witness Statement of Mr Murofushi para 97). The rules in the RoC provide in sec. 3 that “*no ... gift may be distributed ... inside or outside the Olympic Village, including the NOC residential areas*”. The Athlete is of the view that the Phone Wipes do not constitute gifts, but mementoes or tokens that are distributed to people as a sign of respect, friendship and memorable moments to be shared. The distribution of such token and mementoes is – according to the Appellant – deeply enshrined in the Japanese culture and usual practice among athletes at the Olympic Games. Furthermore, the Athlete submits that the distribution of Phone Wipes was not related to the election process.
122. The Panel notes, that the provision in the RoC prohibits the “*distribution of gifts*”. It further notes that the RoC expressly state that the rules in the RoC must be “*strictly complied with by the candidate*” (cf. sec. 1 RoC). In addition, the Panel finds that the contents of the rules must be assessed and interpreted in an objective way, i.e. by taking into account the meaning of the wording, the principle of trust and in particular the purpose of the rules. Since the rules are designed to guarantee “*that each candidate has an equal opportunity to be elected*” (cf. sec. 1 RoC), the term “gift” must be interpreted independently from what might constitute a “gift” in the legal and cultural environment of the respective candidate. Furthermore, it appears to the Panel that the RoC put particular obligations and responsibilities on a candidate and that, therefore, what might constitute usual practice among other athletes is not necessarily exempted from qualifying as a breach under the RoC. In addition, the purpose of the prohibition to distribute gifts is to assure a level playing field in the Election and, thus, to prevent richer athletes (or athletes endorsed by rich NOCs) from having an advantage over other candidates with lesser financial means. In view of all of the above the Panel holds that the provision is to be interpreted rather strictly and that the threshold of what might constitute a gift should be set rather low.
123. Finally, the Panel holds that the distribution of the gift must (also) qualify as a “*promotion of the candidature*” in order to constitute a breach of the RoC. This follows from the wording in sec. 3 RoC which mentions the distribution of gifts in the same breath as the displaying of documents, posters, signs or banners. However, it suffices in the view of the Panel for this prerequisite to be fulfilled that the distribution of the “gift” might have a promotional character, i.e. has the potential of promoting the Athlete in the election process.
124. The Panel finds that a Phone Wipe has a potential of promoting the candidature of the Athlete. The Phone Wipe (in its original packaging) shows a picture of the Athlete and makes allusion to his (great) sporting achievements. Furthermore the Phone Wipe itself mentions the name, the discipline of the Athlete and the country that the Athlete is representing. All of this, of course, is important (and necessary) information for an athlete voting for a candidate for the Commission. In the hands of athletes, therefore, the Phone Wipe clearly has the potential of promoting the candidature of the Athlete. According to the Athlete’s own submission he distributed the Phone Wipe also to athletes. This is further backed by the fact that one of the

Phone Wipes was discovered in a voting station (and another one was found in the Dining Hall to which – in particular – athletes had access). To conclude, therefore, the Panel finds that the Phone Wipe constitutes a gift within the meaning of sec. 3 RoC and that, thus, the Athlete by distributing Phone Wipes breached the RoC.

d) The behaviour displayed by the Athlete in the Dining Hall

125. According to the RoC “*no form of promotion may be undertaken*” in certain areas. These areas were subsequently defined by the IOC and communicated to all candidates. The prohibited area for campaigning included – in particular – the Dining Hall of the Olympic Village. It is disputed between the Parties whether the behaviour of the Athlete displayed the evening of 7 August 2012 in the Dining Hall constituted “promotion” within the meaning of the RoC.

aa) The behaviour in question

126. The Athlete submits that in the early afternoon and during the evening of 7 August 2012 he tried to promote and encourage voting among the athletes in the dining area. According to his submissions he went from table to table to explain to the athletes (who were seated at the tables) the voting mechanism. While he was promoting the voting (and not his candidature) in the evening of 7 August 2012 he used an iPad to illustrate the voting process. The pictures displayed on the iPad were – according to the Athlete – from the official IOC website that were also displayed around the Dining Hall on posters. After he had explained the voting process to a couple of athletes during the evening of the 7 August 2012 he sat down at a table with two Romanian athletes he knew and talked to them.

127. The factual submissions of the Athlete are backed by the witnesses Ms Coventry, Mr Lenglet, Ms Reinauld, Mr. Speksnijder and Ms Moyat. Ms Coventry stated that she was in the Dining Hall in the early afternoon when she saw the Athlete. She had full view of him while she was seated at a table. She told the Panel that the Athlete was moving systematically from one table to the next one, that the conversations that occurred at the various tables had a repetitive character, i.e. that the Athlete stayed at the table only for a very short time talking to the people and pointing at his candidature badge. It was obvious to her that the Athlete did not know the athletes he was talking to. According to her there was no exchange of shaking hands, hugging or other signs of obvious friendship or personal relationship (e.g. sitting down with the athletes). Instead, she had the impression that the Athlete was not having a proper conversation with the other athletes. However, Ms Coventry also said that she could not hear what the Athlete was saying. Mr Lenglet, Ms Reinauld, Mr. Speksnijder witnessed the incident in the evening of 7 August 2012, however none of them could hear what Mr Murofushi was actually saying.

128. Mr Lenglet stated that he noticed the Athlete systematically passing from table to table talking to different athletes, pointing at his candidate’s badge and having an iPad in his hand, which he would show to the athletes. Mr Lenglet stated further that he saw the pictures of the candidates on the screen of the iPad. After having witnessed the incident, Mr Lenglet went to inform the

members of the IOC staff attending the voting station that evening and spoke with a woman from the IOC he believed was Ms Céline Moyat.

129. Ms Reinault stated that while she had dinner with Mr Lenglet, the Athlete was passing from table to table with an iPad, talking to the athletes. As she was sitting only a few meters away and having a full and clear view on the Athlete, she could see that the screen of the iPad was displaying a number of photos. She recognized that the photos were the ones of the candidates to the IOC Athletes' Commission. Each time the Athlete spoke to a group of athletes, Ms Reinault witnessed that the Athlete would point at a one of the photos on the screen. During the time she was watching the Athlete, the latter approached about four or five tables. According to Ms Reinault, the Athlete seemed not to know the athlete he approached. She had the impression that the Athlete approached the other athletes, that were apparently unknown to him, on his initiative and that he was moving systematically and rather quickly from one table to the next table.
130. Mr Speksnijder explained that he witnessed the Athlete campaigning in the Dining Hall for at least two minutes. Mr Speksnijder witnessed that the Athlete would pass from table to table (at least two different tables whilst he was watching), and then sat down with athletes at the last table. Mr Speksnijder also witnessed that the Athlete had a tablet computer with him which he would show to the athletes whilst speaking to them. However, Mr Speksnijder was unable to see what was displayed on the iPad.
131. Ms Moyat stated that after having been informed by Mr Lenglet, she left the voting station to look for Mr Murofushi. She eventually located him behind the Best Britain Food area. The Best Britain Food area was quite a large structure and around two metres in height. According to Ms Moyat, Mr Murofushi would not have been visible from the voting station. When she saw the Athlete the latter sitting at a table chatting with two other athletes. Ms Moyat went over towards the table and, before introducing herself or speaking to the Athlete, she took a photo with her mobile phone. Mr Murofushi had an iPad next to him on the table and Ms Moyat saw the (official) election poster displayed on it. Ms Moyat then introduced herself to the Athlete and told him that he was not allowed to promote his candidacy in the Dining Hall and that he was not allowed to use an iPad as a campaign tool. According to Ms Moyat, the Athlete did not argue with her. He only apologized and tried to explain to her that he was using the iPad only to inform the other athletes about the election process.

bb) Does the behaviour constitute promotion?

132. The Parties are in dispute whether the behaviour of the Athlete, in particular promoting the voting process qualifies as "promotion of his candidature" within the meaning of the RoC. The Panel follows a rather wide interpretation of that term. According thereto, campaigning is any act with the help of which a person is trying to attract attention from the voters. This broad interpretation is also backed by the purpose of the rule. The prohibition of campaigning in the dining area serves the purpose – primarily – to protect the privacy of the athlete. The dining area was the place for the athletes to eat, meet, socialise and relax. The purpose of the

prohibition of campaigning was to prevent athletes from being harassed or disturbed by campaigning in this comfort zone. The only way candidates were allowed to attract attention in the Dining Hall was by wearing the candidate's badge. Other forms of approaching athletes to gain their attention were prohibited by the applicable rules. Sec. 3 of the RoC makes it clear that "*no form of promotion may be undertaken*" in the restricted areas. In light of the above, the behaviour of the Athlete constitutes "promotion", because it is intrusive in relation to the athletes' sphere of privacy and attracts their attention which might again be favourable for the Athlete to stand out among his peers in the election process. This broad interpretation finds support also in the wording of sec. 3 RoC. According thereto no "*form of material ... to take part in the vote is permitted*". The rule, thus, makes it clear that not only the inducement to vote for a particular candidate, but also the promotion of the election process as such constitutes "promotion of the candidature". Finally this broad interpretation of the term "promotion" is also supported by the findings of the CAS Panel in CAS 2012/A/2913 para 25 according to which any action taken by a candidate that would help a voter to (better) remember the person that has submitted his candidature constitutes promotion or campaigning.

e) Fault?

133. In principle, where a person is to be held responsible for his or her own actions, a disciplinary sanction requires fault on his or her part. Even though sec. 6 does not state this explicitly, a sanction – according to Swiss Law – requires in these instances, in principle, that the person in question is at fault (SCHERRER/LUDWIG (Ed.) Sportrecht, 2nd ed. 2010, p. 303; BSK-ZGB-I/HEINI/SCHERRER, 4th ed. 2010, Art. 70 no. 21; HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrechts, 2009, no. 268).
134. The Athlete submits that he did not and could not know that distributing a Phone Wipe or promoting voting for the Athletes' Commission was prohibited. In principle, if a person does not know the contents of the applicable rules and regulations, the latter is at fault. It is the duty of a person to inform him or herself about the contents of the rules to which it has submitted. However, the Athlete invokes that the reason why he erred in relation to the contents of the rules lies with the IOC and that, therefore, he did not act negligently and cannot be sanctioned:
 - aa) The 20 July Meeting and the statements made by Ms Bokel
135. The Athlete submits that he was lead to believe due to the statements made in the 20 July Meeting that he was allowed to speak to athletes as long as he was not promoting his own candidature. In this context the Athlete refers in particular to a statement that was allegedly made by Ms Bokel in response to a question made by one of the candidates. It is disputed between the Parties what the contents of the statement of Ms Bokel was at the time. The Athlete submits that Ms Bokel allegedly said at the meeting that candidates could speak with athletes in the Dining Hall. The Respondent on the contrary alleges that Ms Bokel said that candidates could respond to questions of other athletes in the dining area, but that it was not permissible for a candidate to actively engage other athletes in a conversation about the election.

136. It was not possible for this Panel to determine what the exact wording of Ms Bokel's statement was. Appellants requested the Panel to draw negative inference from the fact that the IOC declined to call Ms Bokel as witness. The Panel notes that nothing prevented Appellants from calling Ms Bokel as a witness and that therefore there is no room for drawing adverse inference from the fact that she did not give testimony in these proceedings.
137. However, it appears to the Panel that – after having heard the witnesses – it is more probable that what Ms Bokel said is more in line with what Respondent submitted. The witnesses that recalled the statement of Ms Bokel were Mr Langlet, Ms Minelli, Ms Burns and Mr Hayashi. Mr Langlet stated in his witness statement as follows:
- “One Candidate present at the 20th July meeting asked whether candidates had to stay completely quiet if the question of the election was raised when they were eating in the dining room. Claudia Bokel answered that this was of course not realistic. Whereas candidates could answer a question put to them whilst they were eating, Claudia Bokel made very clear that candidates could not actively make efforts to talk about the election or promote themselves. She gave one or two obvious examples of what would not be permitted such as giving a speech. However, the candidates were not allowed to actively initiate election-related discussions or otherwise promote themselves in the dining room”.*
138. The contents of this statement were confirmed in the evidentiary procedure by Ms Minelli. Similarly to what Mr Langlet and Ms Minelli understood, Ms Hannah Burns stated that *“it was clarified that candidates would not be considered to have promoted their candidature in the Dining Hall (and breached the rules of conduct) by simply responding to a question about the election whilst having a meal”*. Only Mr Hayashi understood Ms Bokel's statement differently. He recalls her saying that candidates were *“allowed to speak with athletes as long as they did not promote their candidature”*. The Panel notes, however, that Mr Hayashi's command of English (i.e. the language in which Ms Bokel made her statement) was rather restricted.
139. Furthermore, the Panel notes that also according to Mr Hayashi it was obvious that the examples cited by Ms Bokel were not exhaustive. Therefore, it cannot be followed from Ms Bokel's statement that all behaviour other than putting up a performance or delivering a candidate's speech were allowed from the outset. Second, it appears to the Panel that Ms Bokel was not the only person who spoke at the meeting. The Panel has rather gathered the impression from the various witnesses that the question of what might constitute a breach of the RoC was addressed several times. Mr Antonio Rossi – e.g. – stated (in his witness statement) that in respect of the meeting *“I clearly understood that I was not permitted to distribute or display any material for the purpose of campaigning (except for the approved badge). Indeed it was clear to me that the candidates were not permitted to display even election material which had been produced or approved by the IOC, such as the election manual”*. This statement was also confirmed by Ms Minelli who also attended the meeting. Furthermore, Ms Genoud-Cabessa recalled saying at the meeting (while responding to a question put to her) that she recommended athletes not to speak at all to other athletes in relation to the election in the restricted area in order to avoid any problems. This statement by Ms Genoud-Cabessa was also recalled by Mr Rossi who stated in his witness statement that *“I remember that during the meeting, one of the candidates asked what form of campaigning was permitted. I recall*

that Stephanie Genoud-Cabessa answered the question by saying that candidates were only allowed to wear the approved name badge and, in non-restricted areas, to speak to athletes". This statement was also confirmed by Ms Minelli.

140. The Panel, therefore is not convinced on a balance of probabilities that the Athlete was lead to believe (by the 20 July Meeting) that his behaviour related to the distribution of the Phone Wipes and his activities related to 7 August 2012 were in conformity with the RoC.

bb) No encouragement to promote voting

141. The Athlete submits that he was encouraged to promote voting among the other athletes. The Athlete submitted in his witness statement the following:

"Some time between 5 and 6 August, the IOC staff (possibly volunteer staff – I cannot recall exactly) I spoke with told me that they had difficulties getting athletes to vote, particularly since the Opening Ceremony of the Olympic Games, and that they were not sure how to encourage them. We spoke briefly about ways in which we might be able to get more athletes to vote ... In any event, I told the IOC staff that I would also do my best to encourage athletes to vote and wished the IOC staff good luck with their task before leaving them".

142. The Respondent contests that any IOC staff encouraged the Athlete to promote voting in the Dining Hall, since this was – according to it – strictly forbidden. The Panel notes, that the Athlete's statement is rather vague. The Athlete does not submit that he discussed with the IOC staff the option of him promoting the voting process in the Dining Hall. Furthermore, even if one were to accept the correctness of the above statement, the latter cannot be qualified as a free pass to promote voting everywhere, i.e. also in the dining Area. The Panel, therefore, does not accept that due to this alleged conversation the Athlete was lead to believe that his behaviour displayed on 7 August 2012 was in line with the RoC.

cc) Violation of the principle of legal certainty

143. The Athlete further submits that a possible breach of the RoC concerning the alleged campaigning cannot be attributed to him because of the vagueness of the rules in the RoC. According to him the rules lack clarity and legal certainty and that therefore he was not at fault when he acted the way he did. The Panel is of the view that the rules in question are sufficiently clear. It feels itself comforted also when looking at CAS 2012/A/2913 para 104 where the Panel noted that *"it cannot be sensibly concluded ... that the Rules of Conduct were obscure ... Nor could it be said that the Rules could not be fully understood by the candidates ..."*. Furthermore, one has to take into account that the IOC worked together closely with the candidates and their NOCs to avoid legal uncertainty from the start of the candidacy process on 19 May 2011. This follows from the testimony of Ms Genoud-Cabessa. The IOC informed the candidates on a regular basis about their obligation in the context of their candidacy. In fact the JOC took advantage of this close cooperation by asking questions related to the voting process to the IOC (eg email exchange on 20 March 2012). The IOC sent – e.g. – the 24 February Letter to the NOCs and the candidates providing information on the voting process. Furthermore, it sent the 19 June

Letter explaining – *inter alia* – the obligations arising from the RoC. Both letters encouraged the addressees to contact the IOC in case of need of further information. On 17 July 2012 the IOC informed the candidates that it had received questions from a few candidates in relation to their obligations under the RoC that it would like to clarify and share with all other candidates. Finally, the candidates were invited to attend the 20 July Meeting in person or through a representative. The purpose of the meeting was again to clarify – *inter alia* – the obligations of the candidates under the RoC. It follows from all of the above that the IOC did not leave the candidates alone to figure out what their obligations under the applicable rules were. On the contrary, there was a close and fruitful interaction between the IOC and the NOCs and the individual candidates.

144. The Athlete could have asked on a number of occasions whether the incidents in question here would constitute a breach of the RoC. However, he decided not to do so. He could have done so also after 20 July 2012. According to his own statement he knew a number of people (staff or volunteers) at the voting station and would greet them every time when he entered the Dining Hall. Sometimes – the Athlete told the Panel – he would also stop and chat with them. At this stage he could have asked them whether he was allowed to distribute Phone Wipes or promote the voting process in the dining area. Again he chose not to do so. The Athlete even deemed it unnecessary to gather further information and clarification once he had been advised that he was (allegedly) in breach of the rules of the RoC. In view of all of the above the Panel holds that the Athlete cannot assign the blame for his breach of the rules to the IOC.

dd) IOC did not prevent (other) infractions

145. Appellants (in particular in the hearing) referred to the fact that the Australian candidate breached the rules by drawing attention to himself in the Dining Hall and not being prevented from doing so by the IOC. In this respect the Panel concurs with the reasoning in CAS 2012/A/2913 para 103:

“The allegation that other athletes may not have been sanctioned for violation of the Rules of Conduct does not assist the Appellants. It would show at most that other athletes should have been sanctioned and not that Mr Chu should not have been. The Panel adds that the evidence of other breaches was insubstantial. The photograph of the Australian candidate in the vicinity of a model kangaroo proved nothing in the absence of evidence that he deliberately posed together with it ...”.

146. The Candidate further submits that the fact that he was not prevented from acting as he did by the IOC staff lead him to believe that his actions were in conformity with the rules. The Panel need not enter into this matter because on a factual basis, it was impossible to clarify whether or not IOC staff (with the appropriate responsibilities) was able to see what the Candidate was doing in the Dining Hall.

4. *Proportionality*

147. The EB justified its decision at the time as follows:

“The Committee took note that the Athlete ... first breached the Rules of Conduct by distributing documents and gifts The Committee sanctioned the breaches by giving him a confidential oral warning, as well as a confidential written warning on 26 July 2012. The Committee subsequently took note that, despite these warnings, the Athlete ... further breached the Rules of Conduct by campaigning in an area, and by using methods of campaigning, that were prohibited by such Rules of Conduct. The Committee noted that, while some of the breaches were not of a serious nature, other breaches were of a serious nature ...”.

148. The EB itself noted in its decision that not all (alleged) “breaches” of the Athlete have the same weight but that some were of a serious and other not of a serious nature. The EB does not explicitly say which of the (alleged) breaches it considers to be “serious”. The question, thus, is whether the incidents that are to be considered here are of such “serious nature” that they warrant the withdrawal of the candidature.

a) The “seriousness” of the individual breaches

149. In assessing the seriousness of the breaches the Panel is not prepared to consider what effects the respective breaches had on the election results. It is rather the behaviour as such that is decisive for qualifying the breach as “serious” or “less serious”.

150. That the IOC regarded the distribution of the Voting Instructions as a “serious incident” can be followed from the fact that

- This incident was immediately reported to the Election Committee and that
- its chairperson immediately sent a written notice to the NOC and the Athlete advising them that this constituted a breach of the RoC.

151. Also in the view of the Panel the production and distribution of the Voting Instructions constitutes a serious breach of the RoC (attributable to the Athlete).

152. The reaction of the IOC in response to the distribution of the Phone Wipes was – in contrast – much more informal. The incident was not reported to the Election Committee straight away. Instead only oral instructions were given by Ms Genoud-Cabessa to Mr Hayashi (to be also forwarded to the Athlete). Also in the eyes of the Panel the incident related to the Phone Wipes constitutes – to use the language of the IOC – a less serious type of infraction of the RoC.

153. What weight must be attributed to the incident related to the “campaigning” on 7 August 2012 is open to question. Aspects that speak in favour of qualifying the incident as a rather “serious infraction” are that

- the Athlete promoted voting by talking to other athletes and displaying “official election material” from the website of the IOC on an iPad;

- the incident stirred more attention than the other alleged infractions, in particular among other candidates and prompted a series of protests;
- the incident – unlike the other incidents – prompted a charging letter by the IOC and a hearing before the Election Committee;
- the incident on 7 August 2012 was a “second infraction”.

154. Circumstances that might qualify the incident as “less serious” are e.g. that

- compared with the facts and circumstances established by the Panel in CAS 2012/A/2913 the promotion by the Athlete was less “pushy”. There is in fact no evidence on file that the Athlete actually asked other Athletes for their vote and actively promoted his candidature. Furthermore, in CAS 2012/A/2913 the athlete promoted his candidature actively (in pretty much the same manner) even after having being asked (in writing) to stop his activities.
- the Athlete promoted voting “only” on a single day, i.e. the 7 August 2012, and – according to the witness statements – he promoted the voting process only at a limited number of tables in the Dining Area.

155. The Panel finds that the incident related to 7 August 2012 is to be qualified somewhat in between the other two violations and, probably, a bit closer to a less serious violation than a more serious one.

b) Overall assessment of the combined breaches

156. The Athlete is responsible for a series of breaches. One of them must be qualified as a serious breach. Furthermore, the Athlete committed another (less serious) breach after having been warned and advised that he had to comply with the rules of conduct contained in the RoC. In view of all of the above the Panel finds that the sanction issued by the EB is proportionate and, thus “correct” within the above meaning. However, the Panel would like to stress that it would not have upheld the decision of the IOC, if the breach committed by the JOC was not attributable to the Athlete. The Panel wishes, therefore, to make it clear that the overriding reason why the Athlete’s candidacy was (correctly) withdrawn by the IOC lay with the conduct displayed by the JOC rather than with the Athlete.

5. *Conclusion*

157. In light of all of the above, the Panel concludes to uphold the Decision of the EB and in turn dismisses the appeal filed by the Appellants. Having said this, the Panel would like to add that – at least to a significant extent – the Candidate was a victim of an overzealous NOC and that his own actions were neither motivated by a desire to cheat nor can they be equated to dishonesty. His reputation and integrity as a sportsman, therefore, remains completely untarnished.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Koji Murofushi and the Japanese Olympic Committee against the decision taken by the Executive Board of the International Olympic Committee (IOC) on 11 August 2012 is dismissed.
2. The decision taken by the Executive Board of the International Olympic Committee (IOC) on 11 August 2012 is confirmed.
3. (...)
4. (...)
5. All other prayers for relief are dismissed.