

Why Is the Top Chinese Swimmer Not at the Tokyo Olympics?

How Sun Yang was Eliminated

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Primary players and acronyms:

FINA – Fédération Internationale de Natation (International Swimming Federation). Established 1908.

WADA – World Anti-Doping Agency. Established in 1999. Based in Montreal, Canada.

CAS – Court of Arbitration for Sport. Highest court for adjudicating international sport. Established in 1984. Based in Lausanne, Switzerland.

IDTM – International Doping and Test Management. Swedish company that merged with US based Drug Free Sports in September 2018.

ADRV – Anti-Doping Rule Violation. Official name for doping offense which leads to sanction (ineligibility) for some time.

ISTI – International Standards for Testing and Investigation. Initiated by WADA in 2004.

DCO – Doping Control Officer. Doping test team leader.

BCO – Blood Collection Officer. Medical staff who draws blood sample.

DCA – Doping Control Assistant. May act as “chaperone” to verify urine collection.

Introduction

Why is the all-time greatest Chinese swimmer Sun Yang not at the Tokyo Olympics? The short answer is that he has been banned from competitive swimming for four years by the Court of Arbitration for Sport (CAS). He has been banned for four years NOT for doping, but for a “doping rule violation”.

What lays behind this? What are the essential facts? Was the decision just or biased? This

article will review the case and offer suggestions to improve the process.

CAS Panel admission and decision

The Court of Arbitration for Sport decision about Sun Yang came very recently, in mid-June. At the very end of the [88-page decision](#), there is a crucial acknowledgment:

“The Panel considers it pertinent that there has been no allegation that the Athlete was doped on 4 September 2018. Indeed, given that Mr. Sun tested negative eight times in the prior two weeks, the likelihood that he would have tested positive, had the samples of 4-5 September 2018 been analyzed in Beijing, appears remote.”

Despite this acknowledgement, the CAS Panel decided that Sun Yang was guilty of an Anti-Doping Rule Violation (ADRV).

The controversial and aborted test

The controversy involves an aborted attempt to take blood and urine samples from Sun Yang on the night of Sept 4, 2018. Sun Yang arrived home late at night after travelling all day from Jakarta Indonesia where he had competed at the Asia Games. He was about to commence a one-month vacation.

A doping test team from the Swedish American company, International Doping Tests & Management (IDTM), met Sun Yang and said they wished to take an “out of competition” blood and urine sample. There was a female Doping Control Officer (DCO), a female Blood Collection Officer (BCO) and male Doping Control Assistant (DCA).

There are conflicting reports about what transpired over the next few hours, but these are essential facts:

- After seeing the Doping Control Assistant surreptitiously taking photographs of him, Sun Yang became suspicious and asked to see the authorization papers of the test team.
- The DCO did not have paper IDTM accreditation but did have an image on her cell phone. The BCO and DCA had no proof of authorization from IDTM. Nor did they have paperwork to authorize this specific out of competition test. All they had was a generic annual authorization for IDTM to do testing for the International Swimming Federation (FINA).
- Sun Yang consulted his doctor and Chinese swim team leader asking what to do. Both said the test should be stopped until the test team can provide proper documentation.
- The DCO consulted with her supervisor in Sweden. They then said to Sun Yang they could not leave the equipment behind. A member of Sun Yang’s group broke the container holding the blood vial so the IDTM team could leave with their equipment. The blood vial was preserved and is still under refrigeration at the doctor’s hospital.
- Over the next days, Sun Yang reported that the test was aborted because the test team lacked accreditation. The leader of the test team, the DCO, reported that Sun Yang had committed a “Refusal to Comply” with the test.

The FINA Doping Panel

The International Swimming Federation (FINA) convened a Doping Panel to examine the events and determine whether Sun Yang had committed a doping rule violation. They held the hearing and issued [their decision](#) in early January 2019. They determined that “Sun Yang has not committed an anti-doping rule violation” because the test team did not have the required accreditation documentation to take blood and urine samples from the athlete.

The FINA Doping Panel also faulted the test team leader for not making the athlete (Sun Yang) aware that she would consider this incident to be a “Failure to Comply” and thus a potential Anti-Doping Rule Violation (ADRV).

WADA and the Court of Arbitration for Sport (CAS)

For whatever reasons, the Canadian-based World Anti-Doping Agency (WADA) strongly objected to the FINA Doping Panel decision. They filed an appeal with the Court of Arbitration for Sport (CAS) against Sun Yang and FINA.

In November 2019, the first CAS Panel held a [public hearing](#) about the case. In February 2020, CAS issued their decision that Sun Yang DID commit a doping rule violation and was to be banned from swimming for eight years. Some western competitors and sports media [cheered](#) this decision. Others were more [objective](#) and thoughtful. The decision was criticized in articles [here](#) and [here](#).

Based on evidence revealed in the article, [“Why the Sun Yang Decision Should be Overturned”](#), Sun Yang’s attorneys won their appeal to the Swiss supreme court. There was compelling evidence the CAS Panel chairman was biased if not racist.

Although the CAS decision was annulled, WADA decided to continue. A new CAS panel was created.

The second CAS Panel had new members but all the same background. All three jurists were senior white western European men. Additionally, they all have strong ties to the United States. Although the second panelists claim they were not influenced by the decision of the first CAS panel, their decisions are essentially the same: they say Sun Yang is guilty of an Anti-Doping Rule Violation. With relaxed punishment requirements, he is now banned for 4 years, three months beginning February 2020.

FINA Doping Panel vs CAS panels

Why did the FINA doping panel conclude that Sun Yang did not commit an Anti-Doping Rule Violation (ADRV) while the Court of Arbitration for Sport (CAS) ruled that he did?

Here are the essential differences:

1) Was the test team legitimate?

CAS says they were, even though two of the three test team members had no proof that they were authorized by the test contractor, International Doping and Test Management (IDTM). CAS said that only the test team leader, the Doping Control Officer, needed proof of accreditation.

The CAS decision says, *“ISTI imposes a specific threshold for notification. The threshold*

seeks to ensure that an athlete understand that a demand for his samples is legitimate and duly authorized—all the while avoiding the imposition of unnecessarily burdensome administrative criteria or the creation of yet more opportunities for gamesmanship by bad actors. “

In contrast, FINA said that all members of a test team need to be trained, accredited, and have proof. *“FINA members (swimmers) must know with certainty under whose authority they are being tested and that every official attending at the sample collection session has been properly trained, appointed and authorized by the Sample Collection Agency.”*

Which is right? The ISTI is ambiguous and can be interpreted both ways. ISTI Annex H says, “Sample Collection Personnel requirements start with the development of the necessary competencies for Sample Collection Personnel and end with the provision of identifiable accreditation.” There was debate over whether “personnel” was singular or plural.

One thing is certain: the Doping Control Assistant was not properly trained. The controversy was sparked because he took personal photographs which is a significant violation of protocol and the athlete’s privacy.

2) Did the test team show adequate proof they were authorized to conduct the test?

CAS says yes; it was sufficient to show the annual authorization paper from FINA to IDTM, nothing more.

FINA said no; there needs to be more than an annual authorization. The test team must show evidence that they are authorized to carry out this specific mission.

Which is right? Again, the ISTI is ambiguous. It seems reasonable to require a test team entering a person’s personal space to show proof of the fact they have authorization to collect bodily fluid samples from that individual at that time. The test team must have a mandate to go to the Athlete’s residence and collect the samples. Why not show it to the athlete to confirm this is a legitimate intrusion?

3) Was the Blood Collection Officer (BCO) qualified to draw blood from the athlete?

CAS says yes, even though the Blood Collection Officer only had an old junior nurse certificate in her possession.

FINA said no. They explain, “What is certain is that she did not produce unequivocal evidence of her qualifications to draw blood from the athlete, as required in the ISTI.”

The ISTI clearly states the blood collection must meet local standards and regulatory requirements.

4) Did the Doping Control Officer warn the athlete that his actions could be considered a Refusal to Comply as required?

FINA says no. The DCO did not make that clear and to further complicate things, she signed a statement of events written by Sun Yang’s doctor.

“The ISTI is clear in Annex A 3.3.a) that the DCO must tell the Athlete, in a language he can understand, the consequences of a possible Failure to Comply. Explaining the risks

that certain conduct might lead to a violation is not sufficient. The DCO must go further and clearly articulate that she is treating the Athlete's conduct as a Failure to Comply and that the following consequences will apply."

CAS says the DCO warned the athlete sufficiently. They claim the DCO told the athlete the consequences of "Refusal to Comply".

CAS says, "Nothing in Annex A.3.3(a) requires a DCO, on the spot, to proclaim a definitive anti-doping rule violation. The Panel therefore has no hesitation in disavowing this artificially high threshold. It is enough for Sample Collection Personnel to tell an athlete, in language he can understand, the consequences of a possible failure to comply. As to whether an actual violation has occurred, this is for the Testing Authority to determine and prosecute; such a proclamation is not within any DCO's competence."

Which is right? One thing is clear: the ISTI wording is poor and misleading. All athletes know the consequence of a Refusal to Comply is an Anti-Doping Rule Violation. This is comparable to a policeman telling a civilian the consequences of a crime (you go to prison) instead of telling them they are being charged with a crime.

Under [ISTI regulations](#) 5.4.8 and 7.4.6, the DCO is supposed to document what happened. The DCO did not document the events as required. Promoting more confusion, she signed the statement by Sun Yang's doctor. If she was only signing the statement as a witness, it seems that should have been explicitly indicated.

Summary of Differences: FINA Doping Panel vs CAS Panel

In summary, the FINA doping panel emphasized that all test team members must be authorized.

In contrast, the CAS Panel advocated fewer requirements for a doping test team. Only the test team leader needs to have credentials and they do not have to show proof that their specific visit is authorized. The blood collection nurse does not need to prove she is qualified. CAS expressed preference to avoid "burdensome administrative criteria" and a concern for "gamesmanship by bad actors".

The WADA Guidelines regarding Blood Collection support the position of Sun Yang in various respects. Dismissing this, CAS says "Guidelines are recommendations, not law, and they do not alter the minimum requirements of the ISTI". They ignore the fact that [Blood Sample Collection Guidelines](#) have "ISTI" prominently printed on the cover.

Questions and Observations about this case

At the November 2019 [public hearing](#), Sun Yang said he thought there were "dark forces" behind the effort to ban him. He did not say much more, but the suggestion was clear enough. Having studied this case in some depth, I believe his concerns are warranted.

If there is a "bad actor" here, it might be the private test contractor, IDTM. At each step of the events, they seem to have provoked rather than resolved the dispute. They selected as DCO a person who Sun Yang had complained about when she was DCA on a previous test. They chose to go to Sun Yang's residence very late at night knowing he was returning from all day travel from Indonesia. They brought an improperly trained DCA who proceeded to surreptitiously take photographs. They declined to get a substitute DCA. They declined to

postpone the test until the next day. They falsely claimed they needed to take the test equipment. They did not tell Sun Yang that they would file a Refusal to Comply.

The DCO was a Chinese woman who lives abroad. She was a DCO for less than a year. Her supervisor in Sweden, Romanian Tudor Popa, had only nine months experience at the time of the incident. He is now Vice President of International Testing at IDTM.

For the past 30 months, WADA has pursued this case against Sun Yang at great cost in time and resources. It is fair to ask why they have done this. It is not as though Sun Yang was avoiding being tested or making a habit of objecting. He is one of the most tested athletes in the world, on average every two weeks. Nearly all tests have been performed without any problem at all. Logic would dictate that Sun Yang had no motive to take performance enhancing medications. At the Asia Games, where he was tested six times, he won four gold plus two silver medals. Also, he was about to start a one-month vacation and rest period from swimming. It was not like he was a struggling swimmer who might be tempted to get some little extra advantage.

Would WADA have pursued this case if the swimmer had been an American, British, Canadian, or Australian? It was a huge investment of time and resources. In the end, they “achieved” the elimination of the Chinese athlete even though he was not doped. What kind of achievement is that?

The bias of the first CAS panel was acknowledged by the Swiss Federal Court.

Was the second CAS panel any less biased? Their decision suggests no. At each critical point, they favor minimizing requirements for the test team contractor. They hint that an athlete who is concerned with the test integrity may be a “bad actor”. They critique the FINA Doping Panel decision as showing “leniency” towards Sun Yang and “stringency” toward the testing process.

The CAS panel considers that requiring each test team member to have identifiable credential would be “unnecessarily burdensome administrative criteria”. Making this a requirement might give “opportunities for gamesmanship by bad actors”.

It should be noted that WADA had a serious conflict of interest in this case. They were the expert witnesses while also being the appellant.

Suggestions to improve the process

The [World Anti-Doping Agency](#) has become an influential force in global sport. They say they are “impartial, objective, balanced and transparent.” They publicly ask for feedback.

Here are some suggestions considering the Sun Yang case:

- WADA documentation including the Guidelines and ISTI should be critically reviewed, and areas of ambiguity cleared up.
- A genuine mix of international athletes should review the requirements for a test team. Should it be confirmed that all members of a test team are trained, accredited, and have proof? Should it be confirmed that an “out of competition” test team intruding in an athlete’s personal space needs to show authorization for this mission?
- An athlete should be given a written warning if a test team is going to report a

potential “Refusal to Comply”. There should be a standard “Refusal to Comply” form. Such notices or warnings are standard in society. This simple measure would probably have avoided the entire costly controversy with Sun Yang.

- The composition of WADA should be more diverse to avoid appearing or in fact being biased.

Conclusion

The FINA Doping Panel was correct and Sun Yang should be competing in the Tokyo Olympics.

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