

SURFEIT v. TAIWAN, A CLAIM TOO AMBITIOUS? AN ASSESSMENT OF TAIWAN'S FIRST INVESTMENT TREATY CASE AND ITS IMPLICATIONS

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ABSTRACT

Being the first investment treaty arbitration claim against Taiwan, Surfeit v. Taiwan presents an unfamiliar challenge to the Taiwanese government. From the outset Surfeit v. Taiwan seems to be a continuation of Taishin and the Ministry of Finance's lasting dispute surrounding the controlling power over Chang-Hua Bank. The involvement of a foreign investor and a treaty-based arbitral claim, nevertheless, has made the matter more complicated. The importance of this case lies upon the fact that it challenges the financial sector and State-Owned Entity (hereinafter "SOE") related government measures under a new generation international investment agreement. The Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership (hereinafter "ASTEP"), which was the legal instrument that the claimant Surfeit based its claim on, contains various substantive and procedural safeguards to secure the contracting parties' right to regulate and to curtail the inconsistency of the investment treaty arbitration. The financial sector is precisely one of the sectors that ASTEP contracting parties tried to preserve more policy space through additional provisions. Yet, the "heavily garrisoned" financial sector related policy was still subject to a foreign investor's challenge. This case therefore provides a great chance to test the effectiveness of ASTEP's various designs aimed at fending off frivolous suits and safeguarding the host state's regulatory power. It also brings policy implications on International Investment Agreement (hereinafter "IIA") contracting parties' treaty drafting techniques in addressing frivolous suits. For the Taiwanese government, as a complex case that is related to SOE privatization, Surfeit v. Taiwan reminds the government that it should now take into account the foreign investor's challenge in its decision-making process.

This article will start with a legal analysis of Surfeit's claim and proposes that the ASTEP contracting parties should consider incorporating further procedural safeguard provisions into the treaty text. And the Taiwanese government should take this chance to develop its awareness of investor-state arbitration and techniques of managing international investment disputes.

KEYWORDS: *investor-state dispute settlement, ASTEP, reform of IIAs, procedural safeguards for host states*

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