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A Case Study on the Utilization of Umbrella Clauses in Investor-State Contract Disputes

- Focusing on the Cases of SGS v. Pakistan and SGS v. Philippines -

Oh, Won Suk*
Kim, Yong Il**

Ⅰ. Introduction

Over the last decade, the international investment law system has expanded dramatically, particularly through an extraordinary increase in the number of Bilateral Investment Treaties (BIT or BITs). This global expansion of BITs[1)]

* Professor of Sungkyunkwan University.
** Part-time Lecturer in Sungkyunkwan University.

1) The number of bilateral investment treaties between countries increased from slightly over 1,000 to more than 2,500 between 1995 and 2006, and recent trends show these

has been accompanied by the development of the International Center for the Settlement of Investment Disputes (ICSID), a forum under the auspices of the World Bank that allows for direct investor-state arbitrations, generally of claims arising out of alleged violations of BITs.

Today, globally total one hundred and forty-four States have adhered to the ICSID Convention, which means international investors from those States can bring claims directly against host-States for damages in cases of any breach of their investment contracts. In fact, during the past few years, the ICSID cases have drastically increased reaching over 120 cases pending as of late 2008.[2)]

Regarding international investment disputes one of most argued issue involves the umbrella clause which are commonly found in BITs and have become a regular feature of international investment agreements. The umbrella clauses are designed to impose a requirement on each Contracting State to observe all investment obligations entered into with investors from the other Contracting State and provide additional protection to investors by covering the comprehensive contractual obligations in investment agreements between host countries and foreign investors.

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agreements are broader in scope and contain progressively greater detail, a new UNCTAD report reveals. Geneva 6 July 2009 -- Despite the global financial and economic crisis, countries continue to rely on the conclusion of international investment agreements (IIAs) as a means of promoting foreign investment and attendant benefits, UNCTAD´s latest IIA (International Investment Agreement) Monitor reports. The first six months of 2009 saw the conclusion of 25 bilateral investment treaties (BITs) and six other international agreements with investment provisions - a development that further strengthens and expands the current international investment regime. This is line with the last year´s trend, when the network of IIAs continued to expand, with the number of newly concluded double taxation treaties (DTTs) (75) and other IIAs (16) exceeding those for 2007 (69 and 13, respectively). With 59 new agreements, the number of BITs concluded in 2008 also was significant. *See* 〈http://www.unctad.org/Templates/Webflyer.asp?docID=8270 & intItemID=2068&lang=1〉 (last visited Sep. 2, 2009).

2) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, ICSID also serves as a potential arbitration forum for non-signatory states. See ICSID Additional Facility Rules 〈http://www.worldbank.org/icsid/facility/AFR _English- final.pdf〉 (last visited Sep. 9, 2009).

In particular, two recent ICSID decisions, *Societe General de Surveillance S. A. v. Pakistan*[3] and *Societe General de Surveillance S. A. v. Philippines*,[4] have brought to the forefront the question of whether the umbrella clause applies to obligations arising under otherwise independent investment contracts between the investor and the host State. The significance of such an application is that the international arbitration tribunal organized under the BIT (the "BIT tribunal") would thereby have jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause.

In focusing on two SGS decisions, this article is to give some useful guidelines to Korean government and academia under currently prevailing environment of the Free Trade Agreements ("FTA") in Korea. For preparing this article, the present writers significantly rely on both existing scholarly writings on this topic and ICSID arbitration awards for international investment disputes including the awards of *SGS v. Pakistan*[5] and *SGS v. Philippines*.[6] Particularly, Robert E. Hudec's article of 2009, Matthew Wendlandt's article of 2008, and Jarrod Wong's article of 2006, all of which are referred to in the not have greatly contributed to inspiring the present work.[7]

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3) *Societe General de Surveillance S. A. v. Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/13 (2003), available at <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>. The Members of the Tribunal were Judge Florentino P. Feliciano (President), Andre Faures and J. Christopher Thomas.

4) *Societe General de Surveillance S. A. v. Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004), available at <http://www.worldbank.org/icsid/cases/SGS-decision.pdf>. The Members of the Tribunal were Ahmed S. El-Kosheri (President), James Crawford and Antonio Crivellaro.

5) ICSID Case No. ARB/01/13 (2003).

6) ICSID Case No. ARB/02/6 (2004).

7) Robert E. Hudec, Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties, 18 Minnesota Journal of International Law 1 (2009). Matthew Wendlandt, SGS V. PHILIPPINES AND THE ROLE OF ICSID TRIBUNALS IN INVESTOR-STATE CONTRACT DISPUTES, 43 Texas International Law Journal (Summer 2008). Jarrod Wong, Umbrella Clauses in Bilateral Investment Treaties: Breaches of Contract, Treaty Violations, and the Divide Between Developing and

The article proceeds as follows: Part Ⅱ examines the origins and effect of the Umbrella Clause. Part Ⅲ analyzes Declining and Accepting Jurisdiction Over contract Claims, namely Declining Jurisdiction over Contract Claims(*SGS v. Pakistan*) and Accepting Jurisdiction Over Contract Claims(*SGS v. Philippines*). Finally, the Ⅳ concludes this comment.

Ⅱ. The Origins of the Umbrella Clause

1. The Origins of the Umbrella Clause

The history of the Umbrella clause goes back to 1959 in the BIT between Germany and Pakistan,[8] which is appreciated as the first modern investment treaty.[9] Accounting to the German government's report to informed the German Parliament in 1959 on the effect of an umbrella clause: "The violation of such an obligation [of an investment agreement] accordingly will also amount to a violation of the international legal obligation contained in the present Treaty."[10]

Nowadays, the 'Umbrella Clause' is a treaty provision found in many BITs that requires each Contracting State to observe all investment obligations it

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Developed Countries in Foreign Investment Disputes, 14 George Mason Law Review (Fall 2006).

8) The 1959 Germany-Pakistan BIT would lay the foundation for the 1991 German Model BIT, Article 8(2) of which is an umbrella clause with substantially similar language. 1991 German Model Treaty on the Encouragement and Reciprocal protection of Investments, Sept. 1991, 11 ICSID REV.-FOREIGN INVESTMENT. L.J. (1996). at 221 and 226.

9) For a fuller treatment of the history of the umbrella clause, see Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, 20 ARB. Int'l. (2004), at 413-418.

10) Rudolf Dolzer & Christoph Schreuer, Principal of International Investment Law, OXFORD (2008), at 153-154. See, e.g., RUDOLF DOLZER & MARGARET STEVENS, BILATERAL INVESTMENT TREATIES (1995); U.N. Conference on Trade and Development ("UNCTAD"), Bilateral Investment Treaties, 1959-1999, Geneva, Switz., Dec. 2000, U.N. Doc UNCTAD/ITE/IIA/2; UNCTAD, Bilateral Investment Treaties In The Mid-1990s, Geneva, Switz., Nov. 1998, U.N. Doc. UNCTAD/ITE/IIT/7.

has assumed with respect to investors from the other Contracting State.[11] By this technique, the host State guarantees by treaty the specific undertakings which it has entered into by contract or otherwise with investors of the other contracting State, bringing those undertakings under the umbrella of protection of the treaty.[12]

Its purpose is to create an inter-state obligation to observe investment agreements that investors may enforce when the BIT confers a direct right of recourse to arbitration. More specifically, the history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum.[13]

The current British Model Treaty shows a typical umbrella clause, which states: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[14] We cannot find such clauses in the 2004 US Model Treaty, the French Model Treaty and the NAFTA Agreement. There is an estimation that about 1,000 treaties in force include umbrella clauses.[15]

However, the wording of umbrella clauses vary and are not entirely uniform. For example, Art. II(3) of the Treaty between the United States of America and the Kingdom of Morocco concerning the encouragement and reciprocal protection of investments of 29 May 1991 simply provides that "[e]ach Party shall observe any obligation it may have entered into with regard

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11) *See* Judith Gill et al., Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases, 21 J. Int'l. ARB., (2004), at 403 (finding that approximately 40% of a sample of BITs taken from INVESTMENT TREATIES contained umbrella clauses). An example of an umbrella clause is Article X of the Switzerland-Philippines BIT, which provides that "[e]ach Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

12) Campbell McLachlan QC *et al.,* International Investment Arbitration, OXFORD, (2008), at 92.

13) *See* Jarrod Wong., *op. cit.,* at 144.

14) The German Model Treaty provides similarly. Also see the Energy Charter Treaty Art. 10(1).

15) Rudolf Dolzer & Christoph Schreuer, op. cit., at 153.

to investments." The investment protection treaty concluded between France and Hong Kong in 1995 provides in more detail: "Without prejudice to the provisions of this Agreement, each Contracting Party shall observe any particular obligation it may have entered into with regard to investments of investors of the other Contracting Party, including provisions more favourable than those of this Agreement.[16]

In short, the sum of its history and the virtually uniform body of opinion concerning its interpretation points unambiguously to one conclusion: The umbrella clause applies to obligations arising under investor-State contracts so as to allow for their breach to be resolved as BIT violations. In spite of this background, however, the first two decisions to consider closely the umbrella clause, *SGS v. Pakistan* and *SGS v. Philippines*, arrived at interpretations that while inconsistent with one another, have the common effect of overturning that conclusion.[17]

2. Umbrella Clauses and Governing Law Clause

Here we question whether umbrella clauses may cause the change of governing law applicable between the investor and the State. The Tribunal in *SGS v. Pakistan* also had such question that the "transubstantiation of contract claims into BIT claims" may have effect that the contract was ipso jure transformed into an obligation under international law,[18] on base of views of many commentators recognizing the connection between the umbrella clause and internationalization clauses that subject a contract between a State and a private individual to international law.[19]

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16) *See* Art. III of the Agreement between the Government of Hong Kong and the Government of the Republic of France for the Reciprocal Promotion and Protection of Investments of 30 November 1995.

17) *See* Jarrod Wong, op. cit.,, at 150.

18) The idea that the umbrella clause "transforms" investor-State contracts into international obligations also lurks behind Prosper Weil's conceptualization of umbrella clauses. See Prosper Weil, Problèmes relatifs aux contracts passés entre un Etat et un particulier, 128 Recueil des Cours 95, 130 (1969-Ⅲ). at 130.

We see, however, umbrella clauses differ fundamentally from choice of law clauses and deny such change of the law governing an investor-State contrac t,[20] because umbrella clauses separately appear parallel to choice of law clauses in international investment treaties,[21] An umbrella clause by itself cannot determine the governing law under which an umbrella clause in the international treaty applies as a part of the governing law. In other words, while umbrella clauses operate as a base for the host State's international responsibility for breaches of its investment-related promises, the content of the obligation and the effect of the breach thereof are still to be determined by the law governing the promises. Umbrella clauses do nothing more than back up the contractual bargain struck between the parties and enable the investor to enforce the commitments accepted by the host State in the treaty-based forum. They do not, however, affect the content of the substantive obligations between investor and host State.[22]

Ⅲ. Declination and Acceptance of the Jurisdiction Clause over Contract Claims in Present Cases

1. Declination in SGS v. Pakistan

In *SGS v. Pakistan*, SGS contracted with the Pakistan in 1994 to provide "pre-shipment inspection" ("PSI") services with respect to certain goods destined for Pakistan.[23] Under the agreement (the "PSI Agreement"), SGS

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19) Thomas W. Wälde, The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases, 6 J. World Inv. & Trade 183 (2005) at 205.

20) See also Robert E. Hudec, *op. cit.,* at 60.

21) See, e.g., Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Protection and Promotion of Investments, U.K.-Arg., Dec. 11, 1990, entry into force Feb. 9, 1993 (containing an umbrella clause in Art. 2(2) and a choice of law clause for investor-State disputes in Art. 8(4)).

22) *See* Robert E. Hudec op. cit., at 61.

undertook to inspect goods imported into Pakistan with the objective of increasing custom revenues collection by ensuring that the goods were properly classified for customs purposes. Some years into the contract, however, Pakistan became dissatisfied with SGS's performance, and terminated the contract.

Thereafter, Pakistan initiated arbitration proceedings in Pakistan in accordance with Article 11 of the PSI Agreement alleging that SGS breached the PSI Agreement concluded in 1994 between SGS and Pakistan under which SGS undertook to inspect goods imported into Pakistan. The PSI Agreement included an provision that any dispute arising out of the PSI Agreement "shall be settled by arbitration in accordance with the Arbitration Act of Pakistan."

However, SGS also initiated separate proceedings by submitting a Request for Arbitration to ICSID,[24] alleging that Pakistan's conduct under the PSI Agreement violated its obligations under the Switzerland-Pakistan BIT, which the two countries had concluded in the interim in 1995.[25] In particular, SGS alleged that Pakistan violated standards for the treatment of investments, for example, Pakistan's requirements under Articles 4(1) and 4(2) respectively to "protect" and ensure the "fair and equitable" treatment of Swiss investments in Pakistan. Additionally, SGS claimed that Pakistan's liability for breaches of the PSI agreement because he had to be protected by the umbrella clause in the BIT (Article 11), which provided: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party."[26]

By this umbrella clause, SGS sought to bring its contractual claims within the scope of the BIT in order for the ICSID tribunal to decide purely contractual claims as well in line with expropriation and inequitable

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23) SGS v. Pakistan, ICSID Case No. ARB/01/13, *para.* 11.

24) *Id. paras.* 23-25. The higher Swiss courts upheld the result on the ground that Pakistan because it enjoyed sovereign immunity could not be sued in Swiss courts.

25) *See* Jarrod Wong, *op. cit.*, at 150. Rudolf Dolzer & Christoph Schreuer, *op. cit.*, at 157.

26) Switzerland-Pakistan BIT, art. 11. *See* Jarrod Wong, *op. cit.*, at 151.

treatments based on BIT, to which Pakistan objected alleging that the ICSID tribunal could not investigate such BIT claims before the Pakistani tribunal determines on the merit of whether there had been a breach of contract.[27]

However, the tribunal ultimately sided with Pakistan and decided it had no jurisdiction over contractual claims,[28] respecting the parties's autonomous choice as their method of dispute resolution by arbitration in Pakistan. Importantly the Tribunal then decided that the umbrella clause did not have the effect of elevating the contract claims to treaty claims. The Tribunal saw that, under general international law, a violation of a contract between a State with an investor of another State by itself could not amount to be a violation of international law. This view can prevent contractual commitments of the host State from infinite expansion. resulting in also avoiding negating the effect of the contractual submission clause.[29]

2. Acceptance of Jurisdiction in SGS v. Philippines

The contractual facts in *SGS v. Philippines* are similar to those in *SGS v. Pakistan.* in that the contract provided for SGS to render PSI services for Philippines, except for the title of the contract which was referred to as a CISS Agreement, where the CISS denotes the Philippines' comprehensive import supervision service.[30] In 2000, SGS discontinued to provide its services under the CISS Agreement and claimed against Philippines for money unpaid in breach of the contract, totaling approximately US $140 million plus interests. At last SGS initiated ICSID arbitration, where SGS alleged that the Philippines had breached Articles IV(1), IV(2), VI(1), and X(2) of the Switzerland-Philippines BIT.[31]

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27) *See* SGS v. Pakistan, ICSID Case No. ARB/01/13, *para.* 48.

28) Matthew Wendlandt, *op. cit.*, at 539.

29) Campbell McLachlan QC *et al., op. cit.*, at 112.

30) Article 12 of the CISS Agreement provided that: "The provisions of this Agreement shall be governed in all respects by and construed in accordance with the laws of the Philippines. All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila."

Accepting the view of the Tribunal of *SGS v Pakistan* as to the governing law of the contract, the Tribunal of *SGS v. Philippines* held that the extent of the parties contractual obligation is determined by reference to the terms of the contract,[32] because the validity of a contractual obligation was 'a matter for determination under the applicable law, normally the law of the host State'.[33]

The tribunal applied the *lex specialis* rule of treaty interpretation, which says that: "It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties'.[34] According to the Tribunal "[t]he basic principle in each case it that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision."[35] In this regard, a majority of the Tribunal understood that the general provisions of the BIT did not override the contractual jurisdiction clause. This means that a BIT should be seen as a framework "to support and supplement, not to override of replace, the actually negotiated investment arrangements made between the investor and the host State."[36]

The Tribunal understood that the Article 26 of the ICSID Convention by itself does not have, but needs more to have, the effect to create a ICSID arbitration agreement between the parties. The Article 26 "was intended as a rule of interpretation, not a mandatory rule."[37] Similarly, under the Article 25 of the ICSID Convention, the consent to ICSID arbitration "shall, unless otherwise stated, be . . . to the exclusion of any other remedy." In fact, SGS

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31) SGS v. Philippines, ICSID Case No. ARB/02/6, *paras.* 12-16. *see* also Articles IV(1), IV(2), VI(1), and X(2) of the Switzerland-Philippines BIT, para. 34.

32) SGS v Philippines(Jurisdiction) 8 ICSID, at 553(ICSID, 2004, El-Kosheri P, Crawford & Crivellaro).

33) *Id.*, at 550.

34) *Id.*, at 557-558.

35) *Id.*, at 557.

36) *Id.*, at 558.

37) *Id. para.* 146.

and the Philippines have agreed otherwise by agreeing to a clause in the CISS Agreement which provided for dispute resolution in the Philippine courts.[38] "If the investor were to choose an arbitration like ICSID, Article 25(1) would override the contract. If instead another arbitral institution were selected, the parties contractual obligations would be unaffected if that institution's rules had no 25(1) equivalent. For all of these reasons, the forum-selection clause remained intact and was given its full effect."[39]

3. Discussion

Let's go back to the question: Does the umbrella clause apply to all breaches of contract? It seems that the approach of *SGS v. Philippines* is eminently preferable to that of *SGS v. Pakistan.* The natural interpretation of a broadly-worded umbrella clause requires to include any contractual obligations. However though the BIT could be invoked by a mere breach of contract. the umbrella clause does not make superfluous or redundant other substantive standards of treatment such as fair and equitable treatment, "most-favored-nation" treatment, non-discriminating treatment, and protection from expropriation. Such substantive provisions of the BIT encompass standards that are not typically addressed in contracts.[40]

In sum, contrary to the decision in *SGS v. Pakistan,* the proper interpretation of the umbrella clause consistent with its unqualified language, history and prior commentary is that it extends to all breaches of investor-State contracts relating to investments.[41] The decision in *SGS v.*

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38) *See* Robert E. Hudec, *op. cit.*, at 68.

39) *See* Matthew Wendlandt, *op. cit.*, at 544-548.

40) *See* Christoph Schreuer, Travelling the BIT Route - Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 J. WORLD INVESTMENT & TRADE (2004), at 231 ("The BIT's substantive provisions deal with issues not normally covered in contracts. Therefore, extending the BIT's protection to investment contracts would not make the substance of a BIT superfluous.").

41) While commentary following the SGS decisions takes the Tribunal in SGS v. Pakistan to task for its decision in some detail, *see*, Stanimir A. Alexandrov, Breaches of Contract and Breaches of Treaty -The Jurisdiction of Treaty-based Arbitration Tribunals to

Pakistan has been widely criticized. The sharpest criticism came from the tribunal in *SGS v Philippines*,[42] but commentators also pointed to weak spot s.[43] The most vulnerable part of the decision concerns the lack of an effort to ground the method of interpretation in the accepted canons embodied in Article 31 of the Vienna Convention on the Law of Treaties.[44]

In practice of international investment contracting, the dispute resolution or the umbrella clauses of an investment treaty can go together, and the latter would exclude claims in contract per from the ICSID arbitration, which is specifically designed to provide an available forum where the host State has entered into direct contractual relations with a foreign investor. It depends on the States' willingness whether to extend the benefit of such arbitration to their respective investors, which can be achieved by including their consent in the treaties of the States to which the investors give their own consents by bringing its claim before ICSID. As the Tribunal in *SGS v Philippines* found, BITs can "give the ICSID Tribunal jurisdiction over a contract claim, which is subject to its governing law. Neither the formulation nor the background to umbrella clauses (insofar as it is known) indicates a contrary intention."[45]

Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines, 5 J. WORLD INVESTMENT & TRADE, (2004), at 569-572; *See* Christoph Schreuer, supra note 43, at 254-255; *See* Judith Gill et al., op. cit., (2004) (no discussion of the issue). But cf. Emmanuel Gaillard, Investment Treaty Arbitration and Jurisdiction Over Contract Claims-the SGS Cases Considered, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION, (Todd Weiler ed), (2005), at 344-345.

42) SGS v Philippines, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports (2005) at 518.

43) See SA Alexandrov, 'Breaches of Contract and Breaches of Treaty: The Jurisdiction of Treaty based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v Pakistan and SGS v Philippines' (2004) 5 Journal of World Investment and Trade at 555 and 569; C. Schreuse, 'Travelling the BIT-Route-Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 Journal of World Investment and Trade at, 231 and 253; T. Walde, 'The "Umbrella Clause" in Investment Arbitration-A Comment on Original Intentions and Recent Cases' (2005) 6 Journal of World Investment and Trade at 183 and 225.

44) Ibid.

45) Campbell McLachlan QC *et al., op. cit.*, at 115.

Ⅳ. Conclusion

The application and interpretation of umbrella clauses have posed significant problems for ICSID arbitral tribunals, causing to bring about incompatible and conflicting decisions. Inconsistencies have arisen with respect to the construction of umbrella clauses, the scope of commitments covered by them, the effect of the clauses on the jurisdiction of treaty-based tribunals, and their effects on the regulatory power of States regarding investor-State cooperation.

Above all, what has been unsettled since arbitral tribunals began applying umbrella clauses is their function and relation to customary international law, with its limited protection of investor-State contracts.

The *SGS v. Philippines* decision, while viewed favorably by many compared to the narrow umbrella clause read in *SGS v. Pakistan*, has been criticized for not deciding the merits in the underlying dispute between the parties.

In short, this article defends the result in *SGS v. Philippines* on two grounds. First, the consent of the parties, evidenced in the BIT, transfers a substantial amount of decision-making power to the ICSID tribunal. Requiring that a tribunal decide the merits of every claim over which it has jurisdiction ignores this consent. Second, the Philippines middle ground is the only way to respect both the integrity of the bilateral investment treaty and the contract between investor and host state. While such a result is not perfect, ICSID tribunals should not alter their approach in order to safeguard investors' expectations. ICSID jurisdiction over an investor's BIT claims and contract claims is all the certainty an investor can and should be able to expect in an inherently risky enterprise.[46]

Then, the latest, Korea signed the FTA with USA and EU, and plans to negotiate with Colombia and Peru. While contributing to activate various direct investments, FTAs however can operate as causes for more investment disputes. In order to cope with it, we hereby present some suggestion for

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46) *See* Matthew Wendlandt, *op. cit.*, at 559.

Korea: When the Korean government concludes a contract with foreign investors, it is necessary to look over the contract carefully. Companies should learn methods to reduce risks when investing in foreign countries. Academia should research ICSID arbitration cases to prevent investment disputes.

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ABSTRACT

A Case Study on the Utilization of Umbrella Clauses in Investor-State Contract Disputes

- Focusing on the Cases of SGS v. Pakistan and SGS v. Philippines -

Oh, Won Suk · Kim, Yong Il

The purpose of this article is to examine the Utilization of Umbrella Clauses in Investor-State Contract Disputes. To accomplish the purpose, this article analyzes the ICSID case of SGS v. Pakistan and SGS v. Philippines. Umbrella clauses have become a regular feature of international investment agreements and have been included to provide additional protection to investors by covering the contractual obligations in investment agreements between host countries and foreign investors. In particular, two recent ICSID decisions, SGS v. Pakistan and SGS v. Philippines, have brought to the forefront the question of whether the umbrella clause applies to obligations arising under otherwise independent investment contracts between the investor and the host State.

In focusing on the SGS decisions, this article will give some useful guidelines to Government and Academia under currently prevailing environment of the Free Trade Agreement("FTA") in Korea.

Key Words : Investor-State Disputes, Umbrella Clauses, International Investment Agreements, ICSID Decisions, Free Trade Agreement.