



PERMANENT MISSION OF THE REPUBLIC OF KOREA
GENEVA

Geneva, 7 August 2014

Dear Mr./Ms. Special Rapporteurs,

It is my pleasure to convey the enclosed response of the Government of the Republic of Korea to the questions which were raised in your joint letter dated 27 May 2014 concerning the POSCO project in India.

I hope that the attached response will help provide a further clarification on the issues which you raised with regards to the actions of Korean corporations abroad.

Please accept, Mr./Ms. Special Rapporteurs, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'CHOI Seok-yeung'.

CHOI, Seok-yeung
Ambassador, Permanent Representative

Enclosure : as stated.

Ms. Raquel Rolink, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Ms. Maria Magdalena Sepulveda Carmona, Special Rapporteur on extreme poverty and Human Rights

Mr. Oliver De Schutter, Special Rapporteur on the right to food

Mr. Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Ms. Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation

Palais des Nations
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The Government of the Republic of Korea's Response to the Second Communication from Special Procedures of the Human Rights Council on 27 May 2014, concerning the POSCO project in India

Q1. Request clarification with regard to access to the judicial system in the Republic of Korea for persons who seek judicial review of actions committed by Korean corporations acting outside of the Republic of Korea

○ With regard to the first written response of the Government, the Special Rapporteurs have inquired, with reference to the relevant case, whether a civil lawsuit can be brought to a court in Korea. When a Korean company carries out its business activities, there is a difference between establishing a local liaison office or field office and establishing a subsidiary company through overseas investment.

- The case cited by the Special Rapporteurs affirm the principle in Korean civil law that, as a general rule, where a Korean company has established a foreign subsidiary (or a joint corporation) through overseas investment, the parent company is not liable for a loss caused to a foreigner as a result of an illegal act of its subsidiary company since it had established a separate legal entity from that of the parent company in Korea; however, the case also acknowledged the exception that the parent company may be liable for the act of the subsidiary company if the former exercises material control over the latter.

○ When conducting business activities through local subsidiaries, the following legal theories can be relied upon in order to make a parent company liable:

① Denial of Corporate Personality Doctrine

- The doctrine acknowledges the liability of a natural person (Korean) or a parent company behind the local subsidiary by denying or disregarding its corporate personality under certain circumstances. This is the case even if the local subsidiary is financially solvent on its own.

- In order to make a parent company in Korea liable under the denial of corporate personality doctrine, a considerably rigorous standard is required as in the case cited by the Special Rapporteur.

- The Supreme Court held that when applying this legal doctrine, a complete control over the subsidiary company is required, to an extent that the subsidiary company loses its independent voice or existence and that the parent company manages the subsidiary company as part of its business activities; more specifically, there needs to be an objective evidence that property, practice and foreign business transactions are not clearly divided between them but rather combined. Also, subjective intention or purpose of abusing the corporation system, such as using corporate personality of subsidiary

company in order to avoid legal application on the parent company or an unlawful purpose of debt evasion, should be acknowledged.

② Joint liability for illegal acts

- Where it is confirmed that a parent company with its local subsidiary commits illegal act, they can be held jointly and severally liable (Civil Act, Art.760(1)). Even where it is impossible to ascertain which of the parties has caused the damages, both the parent company and the subsidiary company are jointly and severally liable (Civil Act Art.760(2)); illegal acts include aiding and abetting, thus instigators and accessories with actual illegal actor are jointly and severally liable (Art.760(3)).

③ Vicarious Liability

- A parent company in Korea can be vicariously liable for human rights violations by a local subsidiary company.

- For instance, in a case where an employee of a subsidiary company is also an affiliated employee of a parent company, the parent company can be held liable for damages done to a third person by the employee in the course of conducting business in the locality (Civil Act, Art.756). However, the parent company may avoid such liability if it can prove that it has exercised due care in the supervision of the undertaking.

④ Liability of a Person Who Instructs Another Person to Conduct Business

- Where a person instructs a local subsidiary to conduct business by using the influence of a parent company and that person had done so as a director of the parent company or under the name of a director, he/she may be liable for damage against the local subsidiary (Commercial Act, Art.401(2), Art.399).

- The Supreme Court had ruled that a person who instructs another person to conduct business includes a parent company, which is a holding company. (Supreme Court decision 2006. 8. 25. 2004Da26119).

○ If a company extends its business abroad in the form of a branch or liaison office and that office causes damage to a third person, that person may hold the parent company in Korea liable.

○ As explained in the first written response, in terms of the legal relation between a Korean company and a foreigner in a foreign country, where the seat of the company's main office is in Korea, a general underwriters agreement, employment contract and tort (illegal act) all fall within the jurisdiction of domestic courts in Korea.

- With regard to the governing law, the foreign law of a country where business activities are conducted principally becomes the governing law; however, in relation to "compulsory provisions of Korea" or "public order and good morals of Korea", the

application of the foreign law is ruled out and Korean law is applied instead, and the 'compulsory provisions' may include prohibitions under the Constitution of the Republic of Korea and international human rights law such as the principle of prohibiting forced labor.

○ Furthermore, article.32(4) of the Act on Private International Law, as a special regulation, stipulates that "in case a foreign law shall be applied, the right to claim compensation for damages caused by the tort shall not be recognized when the character of such right is not clearly for appropriate compensation for the injured party or when the scope of such right is substantially beyond the necessary extent of appropriate compensation for the injured party"; therefore a compensation for damages guaranteed by a foreign law, whose character or scope is not appropriate, can be excluded.

○ Accordingly, the case cited by the Special Rapporteur alone appears to be insufficient to comprehend a question of whether an injured party through overseas business activities can bring a civil claim before domestic courts in Korea; instead, the matter should be decided based upon a thorough examination of the form of incorporation and the character of actual damage caused. The present Korean legal system does not exclude the injured party through overseas business activities of a Korean company from bringing a remedial procedure of civil and criminal lawsuits.

Q2. How is the Republic of Korea able to ensure access to remedy for anyone affected by the actions of Korean corporations abroad?

○ In order to work on the implementation of OECD Guidelines for Multinational Enterprises, an office that serves as a national contact point (NCP) is run by the government. Its employees consist of civil servants from government ministries and experts from the private sector.

- If corporate activities by Korean companies in overseas violate the guidelines, complaints can be filed to the NCP in Korea.

- A committee which consists of NCP members and 2 external experts operates within a NCP to effectively mediate the filed complaints.

Q3. How does the Government of the Republic of Korea plan to require POSCO to live up to its responsibility to respect human rights throughout its operations?

○ The Korean NCP will provide training sessions to Korean companies operating overseas to ensure that their conduct is socially responsible.

- Documents regarding the OECD guidelines, meetings and training sessions will be offered to improve awareness about the guidelines.

- Corporations operating overseas will be continuously monitored, and will be advised to comply with the guidelines if they are responsible for any incidents that require arbitration.