ANNEXES TO THE EU DAG LETTER ON KOREA

ANNEX 1

Mr Karel De Gucht
Member of the European Commission
European Commission
B-1049 Brussels

Brussels, 13 January 2014

DB-REX/2014/D/109

Subject: Serious Violations of Chapter 13 of the EU-Korea FTA

Dear Commissioner:

The EU Domestic Advisory Group (DAG) set up under Chapter 13 of the EU-Korea Free Trade Agreement considered labour developments in Korea at their last meeting in December. As you know, the government of the Republic of Korea made several commitments to the EU under that Chapter concerning Sustainable Development. These commitments include, among others, "respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights" as set forth in the ILO Declaration on Fundamental Principles and Rights at Work as well as to "make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO" (Article 13.4.3).

In their discussion, the DAG took account of the Conclusions of the 2nd meeting of the Civil Society Forum under the EU-Korea Free Trade Agreement, Seoul, 12-13 September 2013, which had discussed at length an opinion on *Fundamental rights at work* adopted by the EU DAG in May 2013 (attached). This had been requested by the TSDC from both DAGs at the previous Civil Society Forum meeting in Brussels. Those Conclusions read i.a.:

On the issue of f*undamental rights at work*, the CSF:

- asks the Korean government to take the necessary measures and remove hindrances to enable the ratification of the remaining ILO Fundamental Conventions, namely Convention No 87 on Freedom of Association and Protection of the Right to Organise, Convention No. 98 on the Right to Organise and Collective Bargaining, Convention No. 29 on Forced Labour and Convention No 105 on the Abolition of Forced Labour that Korea has not yet ratified;
- is of the view that the promotion and consolidation of social dialogue will facilitate the creation of the enabling conditions for the ratification of these four Conventions in Korea and will also

contribute to ensure full implementation of the ILO Fundamental Conventions in both Korea and the EU;

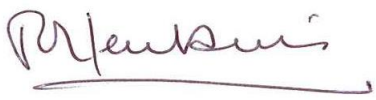
- recommends, as far as the issue of forced labour is concerned, changes in the imprisonment regime in Korea;
- urges both Korea and EU Member States to ensure full implementation of the ILO Fundamental Conventions which have already been ratified. The CSF requests to be informed on the cases of non-compliance of OECD Guidelines for Multinational Enterprises by Korean and EU multinationals;
- is of the view that full cooperation with the ILO will assist the progress towards the development of the necessary conditions for the ratification of the remaining four ILO Fundamental Conventions by Korea;
- has decided to continue its work in this domain.

The December DAG received reports of further cases of concern arising since the CSF meeting, which are detailed in the Annex to this letter. It is clear that the Korean Government, far from taking the views of the CSF into account and acting to fulfil its obligations, is further violating its undertakings as set down in the FTA.

We are deeply troubled by the Government's blatant disregard for international labour standards in practice, which it is bound to respect irrespective of ratification as a member of the ILO.[1] As explained in detail in the Annex, the Government is in fact engaging in a concerted attack on trade unions. Over the past year, the ILO has intervened repeatedly with the government to cease the violations, some of which are related to issues that have been under ILO supervision for years, but the government has ignored each of these entreaties. These same underlying legal concerns are also reflected in the 29 May 2013 EU DAG Opinion on labour standards in Korea.

The EU DAG believes that the Republic of Korea is in serious violation of its commitments under Article 13.4.3 of the FTA, notably the exercise of the right to freedom of association. We request that you invoke Article 13.14 and proceed to consultations, as these recent cases (and the matters raised in the DAG's Opinion) are very serious and require immediate attention. I look forward to hearing from you soon.

Yours sincerely,



Thomas Jenkins
Chair
EU-Korea Domestic Advisory Group

[1] We also note that the Republic of Korea has not ratified half of the fundamental conventions, namely ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, Convention No. 98 on the Right to Organise and Collective Bargaining, Convention 29 of Forced Labour or Convention 105 on the Abolition of Forced Labour. We are currently unaware of any effort by the government to ratify them.

ANNEX 2

A/HRC/32/36/Add.2

Advance Unedited Version

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Human Rights Council

Thirty-second session

Agenda item 3

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea*

Note by the Secretariat

The Special Rapporteur on the rights to freedom of peaceful assembly and of association undertook an official visit to the Republic of Korea from 20 to 29 January 2016 to assess the situation of freedoms of peaceful assembly and of association in the country, upon the Government's invitation.

I. Introduction

1. Pursuant to Human Rights Council resolutions 24/5, the Special Rapporteur on the rights to freedom of peaceful assembly and of association visited the Republic of Korea from 20 to 29 January 2016, at the invitation of the Government. The purpose of the visit was to assess the situation of the freedoms of peaceful assembly and of association in the country.

2. The Special Rapporteur met with representatives of the executive, legislative and judicial branches of Government in Seoul and Sejong as well as local authorities in Pohang. He also met with representatives of the National Human Rights Commission of Korea, representatives of international organisations and the diplomatic community, representatives of civil society organisations and the families of the victims of the Sewol Ferry Tragedy in Ansan. He particularly thanks the Government for facilitating the visit with Mr. Han Sang-gyun (Chair of the Korea Confederation of Trade Unions) at the Seoul Detention Center.

3. The Special Rapporteur appreciates the Government's excellent co-operation in the preparation of, and throughout the visit. The spirit of constructive dialogue that prevailed during all the meetings he had is commendable and particularly gratifying because this visit was the Special Rapporteur's first to Asia. The Special Rapporteur further appreciates the Government's efforts to provide him with a full and accurate picture of the laws and policies governing assembly and association rights in the Republic of Korea. He recognises the efforts put in responding in detail to all his requests for information.

4. The Republic of Korea currently holds the presidency of the Human Rights Council, a position that the Special Rapporteur believes the State will use to progressively advance the global human rights agenda. He recognises the support that the Republic of Korea has provided to key resolutions on the rights to freedom of peaceful assembly and of association and encourages the State to strengthen its co-operation and constructive engagement at this level even further.

5. The Republic of Korea maintains a standing invitation to the Council's special procedures mechanisms and has received several visits, including from the Special Rapporteurs on the situation of human rights defenders (A/HRC/25/55/Add.1) and on the promotion and protection of the right to freedom of opinion and expression (1995, E/CN.4/1996/39/Add.1, and 2010, A/HRC/17/27/Add.2 and Corr.1). This report builds on relevant aspects of their findings.

6. The Special Rapporteur is grateful to the many representatives of diverse civil society groups including youth, persons with disabilities, those from local communities, academia, professional associations to name a few, who availed time to meet with him and provided articulate and detailed accounts of their experiences.

7. The Special Rapporteur expresses his gratitude to the Representative of the United Nations High Commissioner for Refugees in the Republic of Korea and his team for their kind support in relation to some logistical aspects of the visit..

II. Background and context

8. The Republic of Korea has a proud history of protests and demonstrations that expressed opposition to past autocratic and corrupt leaders, galvanised society, induced societal change and hastened democratisation. During the visit, a variety of interlocutors agreed that the energy behind this collective mobilisation of citizens was instrumental in shifting the country from authoritarian rule to democracy.

9. South Korea emerged from the Korean War in the 1950s devastated and impoverished, but has made tremendous strides in developing practically every facet of national life. From a GDP per capita income that compared with poorer countries of Africa and Asia in the 1960s, South Korea's economy has grown rapidly, and in 2004 the country joined the Organisation for Economic Co-operation and Development (OECD). South Korea ranks 17th out of 188 countries in the human development index in 2014, although this is compromised by the relatively high inequality in the distribution of human development across the country. It received close to the best rankings in the assessment of freedoms, civil and political rights in 2015.[2] The Special Rapporteur commends the people and the government of South Korea for these impressive achievements, which they should rightly be proud of.

10. Civil Society in South Korea is diverse, motivated, energetic and vocal on a broad range of issues affecting society. The tradition of people coming together peacefully and taking to the streets or halls of power to speak their minds and effect change is inspiring and worthy of emulation elsewhere. In the Special Rapporteur's view, such a vibrant civil society sector should continue to be encouraged and facilitated because it bodes well for the country's progress. The government should look beyond the sometimes noisy and boisterous assemblies and focus on the expression of the needs and aspirations of the people as both a barometer of social tensions and a peaceful avenue for their release. Supressing opportunities for this mode of expression only opens up a less desirable avenue, one of violent resistance, an eventuality that would undermine everything that the Republic of Korea has achieved to date.

III. International legal framework

11. The Republic of Korea is party to nearly all key UN human rights instruments except the Convention on the protection of the rights of all migrant workers and members of their families and the Convention for the protection of all persons from enforced disappearance.[3] The State maintains its reservation to article 22 of the International Covenant on Civil and Political Rights (ICCPR), by which it subjects its compliance with the provision to local laws. The Human Rights Committee states in its General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant: 'reservations [should not] seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.'[4] States are required to ensure their domestic laws conform to international standards they ratify, not the other way around.

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[2] Freedom House ranks the Republic of Korea as Free in its Freedom in the World index, https://freedomhouse.org/report/freedom-world/2015/south-korea

[3] South Korea is yet to ratify several key optional protocols including to the International Covenant on Civil and Political Rights on the death penalty (CCPR-OP2-DP); Optional Protocol on the Convention Against Torture (CAT-OP) and optional protocols on individual complaints procedures for the International Covenant on Economic, Social and Cultural Rights (CESCR-OP), Convention on the Rights of the Child (CRC-OP-IC), and Convention on the Rights of Persons with Disabilities.

[4] Human Rights Committee, General Comment 24, UN Doc CCPR/C/21/Rev.1/Add.6 (1994), para 19.

12. Although a member of the International Labour Organisation (ILO) since 1991, South Korea has not ratified two key conventions: ILO Convention No. 87 Freedom of Association and Protection of the Right to Organise (1948) and No. 98 Right to Organise and Collective Bargaining (1949). The Special Rapporteur notes that in accordance with the ILO Declaration on Fundamental Principles and Rights at Work (1998) despite not having ratified the above conventions, the Republic of Korea still has an obligation to respect, promote and realise in good faith the fundamental rights contained in these instruments (OP 2).

13. The Special Rapporteur was gratified to hear from the Supreme Court that the judiciary takes a keen interest in the recommendations of international human rights bodies, regularly updating the court intranet in order to keep abreast of developments. He recalls the repeated references by authorities to decisions of the Constitutional and Supreme Court which articulate norms related to assembly and association. These norms are cited as the basis for authorities' actions. As such, the Special Rapporteur encourages judges to increasingly make reference and align their decisions to international human rights standards, including on the rights to freedom of peaceful assembly and of association in their rulings and judgments, in order to provide appropriate guidance to authorities.

14. The Special Rapporteur reminds that in principle, freedom to exercise a right is to be considered the rule and its restriction the exception. The primary responsibility of States is to ensure the enjoyment of the right rather than seek avenues for its restriction. These same standards also form the critical basis for identifying good practices and lessons to be learned from other jurisdictions. In a situation where more than one right converge, the perspective and approach by authorities should be to facilitate the exercise of both rights as far as possible, rather than privileging one set of rights over the others.

IV. Situation of the rights to freedom of peaceful assembly and of association

15. The Constitution of the Republic of Korea guarantees the rights to freedom of peaceful assembly and of association in article 21. More importantly, the provision explicitly prohibits the licensing of assembly and association (article 21(2)). The rights of workers to association, collective bargaining and collective action are similarly protected in article 33(1), with exceptions made for some public officials as stipulated by law.

16. Article 37 of the Constitution provides that rights may only be restricted when necessary for national security, the maintenance of law and order or for public welfare. Further, it states that restrictions may not infringe on any essential aspect of the freedom or right. The Special Rapporteur notes that any restrictions must strictly conform to international law.

17. Interlocutors from the government emphasised the precarious security situation because of the actions of North Korea. Indeed, North Korea's nuclear programme has been a source of concern and on several occasions the two Koreas, technically still at war, have exchanged heated words, interrupted joint activities and even engaged in military action. Successive administrations in

South Korea have taken somewhat different approaches to dealing with its northern neighbour. The Rapporteur was informed that the current administration is concerned not just by the nuclear threat that North Korea poses, but also by the repression of human rights of its population, issues which South Korea is committed to addressing through the United Nations framework.

18. The Special Rapporteur acknowledges that the Republic of Korea faces special challenges in view of the unsettled relationship with the North. Nevertheless, even in these circumstances human rights should not be sacrificed in the name of security concerns. The rights to freedom of peaceful assembly and of association must remain the rule and restrictions the exception (A/HRC/20/27, para. 16). Limitations to the rights for reasons of national security must conform to the principles of proportionality and necessity in a democratic society and be tailored to achieve the protective function – in this case to protect against a specific risk or threat to the nation's security, not just a general national interest or security concern. Limitations must also be the least intrusive instrument to achieve the objective sought.[5]

A. Freedom of peaceful assembly

1. Notification and peaceful assemblies

19. The Assemblies and Demonstrations Act (ADA), in line with the Constitution, prohibits authorities from requiring that peaceful assemblies be previously authorised. It does, however, require assembly organizers to submit a report notifying authorities of details of the proposed assembly in advance (art. 6(1)). Notification regimes for assemblies may be permitted under international law norms (A/HRC/20/27 para. 28). But such regimes – regardless of how they are labelled – may become de facto authorization requirements if notification is mandatory, particularly when they leave no room for spontaneous assemblies, which are also protected by international human rights law. In addition, notification regimes should not be burdensome or unduly bureaucratic (see para 26 below).

20. Article 1 of the ADA aims to guarantee 'the freedom of lawful assemblies and demonstrations (emphasis added) and [protect] citizens from unlawful demonstrations'. The notion of 'lawfulness' was raised by many interlocutors. The Korean National Police Agency (KNPA) informed the Special Rapporteur that lawful assemblies are those that do not contravene the laws of the Republic of Korea, such as non-violent assemblies and those that do not disrupt traffic. Assemblies that are not notified are unlawful, as are spontaneous assemblies. The police noted that a lawful assembly may turn into an unlawful assembly, for example when it is judged to have become violent. Assemblies deemed 'unlawful' may be banned and/or forcefully dispersed, with participants facing possible investigation and prosecution.

21. Using national laws as the determinant for 'lawfulness' in order to guarantee rights is problematic because it suggests that the right to peaceful assembly is granted by national law. Internationally recognised human rights are inherent lawful entitlements, requiring authorities' to take steps to respect and fulfil

[5] See Human Rights Committee, general comment No. 27, para. 14.

them. Their validity is not dependent on the discretion of lawmakers or of security agencies.

22. International human rights norms consider the 'peacefulness' of an assembly as the defining characteristic for protection under article 21 of the ICCPR. The peacefulness of an assembly should be presumed, and regard must be given to the intentions of the organizers and the manner in which the assembly is held (A/HRC/31/66 para 18). International law allows for dispersal of a peaceful assembly only in rare cases, i.e. when it incites discrimination, hostility or violence, in contravention of article 20 of the ICCPR.

23. Further, designating an assembly as unlawful because of the violent actions of a few and subsequently dispersing it fails to take into account that the right to freedom of peaceful assembly belongs to individuals. The rights of peaceful participants cannot be restricted because others are violent (A/HRC/31/66 para 20). As has been acknowledged by the Constitutional Court of South Korea, dispersal of an assembly is a measure of last resort because of its severe impact on the rights of peaceful participants.[6]

24. Even where assemblies are not peaceful, participants do not lose the protection of a number of other rights such as the rights to freedom of expression, association and belief; participation in the conduct of public affairs; bodily integrity, which includes the rights to security, to be free from cruel, inhuman or degrading treatment or punishment, and to life; dignity; privacy; and an effective remedy for all human rights violations (A/HRC/31/66 paras 8-9).

25. The Republic of Korea has a positive duty to facilitate the necessary conditions for the enjoyment of rights. This means that authorities should afford greater scope for the holding of gatherings and avoid undue restrictions. The view that protests and demonstrations are a nuisance and should thus be approached from a solely 'law and order' perspective, is incompatible with the needs of a democratic society. The disruption of ordinary life is to be expected, especially when assemblies attract large crowds, and must be tolerated if the right is not to be deprived of substance (A/HRC/31/66 para 32).

2. Bans on assemblies

26. Article 8 (1) of the ADA permits authorities to ban assemblies that do not comply with a list of requirements (arts 5(1), 10, 11 and 12). In practice, the use of these provisions affords broad discretion to authorities to allow or restrict the holding of assemblies, and in effect, amounts to an 'authorisation' of assemblies as opposed to notification (see para 19 above). Police reportedly exercise wide discretion in determining when to issue a ban on an assembly.

27. According to government statistics, the rate of issuing of ban notices is minimal. An average of 0.18% of notified assemblies between 2011 and 2015 were banned, although other interlocutors claimed the figure was higher. The restraint in issuing ban notices is commendable, but does not address the concern that in principle, pre-emptive banning of assemblies infringes on the

[6] Prohibition of Assembly in the Vicinity of Diplomatic Institutions [15-2(B) KCCR 41, 2000Hun-Ba67, etc.,(consolidated), October 30, 2003] para. 3(C)(3).

exercise of the right to freedom of peaceful assembly, and negates the authorities' obligations to facilitate this right.

28. The reasons that police rely on to ban or find assemblies unlawful, such as obstruction of traffic, disturbance of daily lives of citizens, high noise levels, and later notification of a simultaneous assembly, do not meet the criteria set out in article 21 of the ICCPR to justify limitations on assemblies. Only restrictions which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedom of others, and are lawful, necessary and proportionate to the aim pursued, may be applied (A/HRC/31/66 para 29). The wide discretion and powers to restrict assemblies have allegedly led to situations whereby for example, press conferences held by college students around the issue of comfort women, and also one organised by Mr. Kim Jung-soo protesting fraud, were deemed 'unlawful assemblies' because participants shouted slogans.

29. Article 8 (2) of the ADA permits police authorities to ban the latter-notified assembly when two or more assemblies with conflicting objectives are to take place at the same time and place. This creates room for abuse, as illustrated by the banning of an assembly by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in June 2015 because counter-demonstrators had lodged their notification earlier. It was alleged that the earlier notification was solely to prevent the LGBTI gathering. The Special Rapporteur emphasizes that States have an obligation to protect and facilitate simultaneous assemblies, including counter demonstrations.

30. Article 11 prohibits outdoor assemblies within a 100-meter radius of some key government and diplomatic locations, such as the Cheong Wa Dae (Presidential Palace), the National Assembly building, courts and diplomatic offices. The Special Rapporteur maintains that blanket bans on the location of peaceful assemblies intrinsically constitute disproportionate restrictions (A/HRC/23/39 para 63). Imposing bans on the time or location of assemblies as the rule and then allowing exceptions inverts the relationship between freedom and restrictions; it turns the right into a privilege (A/HRC/31/66 para 21). These bans also interfere with the ability to carry out assemblies within sight and sound of the intended audience.

3. Management of assemblies

31. The Special Rapporteur heard many testimonies and watched extensive publicly available video footage showing the use of water cannons and bus barricades by police at various protests. He was informed by the KNPA that police stopped using tear gas for protest management in 1999 and that since then, violent incidents in assemblies have decreased. The Special Rapporteur believes that, following the same logic, the use of water cannons (sometimes with capsaicin mixed in the water – which has similar effects as tear gas) and bus barricades triggers increased tensions. The way in which these tactics are used, coupled with massive deployment of force, is almost guaranteed to increase tension between police and protestors, who interpret these actions as unprovoked attacks. This kind of aggression begets more aggression.

32. Interlocutors from the KNPA explained that the water cannons are used as a last resort to disperse crowds where there is violence. Moreover, warnings are issued before using water cannons, so that participants can voluntarily disperse. There are also strict guidelines governing the use of water cannons.

33. Nonetheless, there remain serious problems with the use of water cannons, some of which the police acknowledged. First, the tactic is indiscriminate. It is difficult to use water cannons to isolate violent individuals in a mixed crowd. In footage made available to the Special Rapporteur, the water cannon was used against largely peaceful crowds. In certain cases, lone individuals were targeted, a use difficult to justify. Victims also testified to the personal injuries and property damages sustained due to the use of water cannons. The case of Mr. Baek Nam-gi is a tragic illustration of this. Mr Baek, a participant during the November 2015 'peoples rally', was knocked to the ground by a water cannon, resulting in serious injuries. He remains in a coma at the time of writing of this report. The police explained that the water cannon operator relies on a monitor with a relatively small screen inside the vehicle limiting the detail that the operator can see. This increases the chances that the water cannon will cause severe injury to protestors. Several interlocutors also testified that warnings about the impending use of the water cannon are difficult to hear because of the noise accompanying protests and demonstrations.

34. The use of water cannons was challenged in the Constitutional Court,[7] but unfortunately the Court's majority did not take the opportunity to determine whether their use infringed on the complainants' rights. Three dissenting judges however, found that the complainants' rights had been violated because of the lack of standards on the use of water cannons and the direct use of the cannons on the applicants without adequate justification. The Special Rapporteur regrets that the Court missed an opportunity to clarify standards for the use of water cannons.

35. The use of bus barricades is a serious concern for participants in demonstrations and protests. The video footage and photographs seen by the Special Rapporteur show an impressive line-up of hundreds of buses, parked bumper to bumper completely blocking off access to streets especially those that lead to Gwangwhamun Square and the Presidential Palace. In addition to forming a significant physical obstacle in the path of protestors, the rows of buses prevent participants from approaching their intended destination and interfere with participants' ability to assemble within sight and sound of their intended audience. The barricades are also used to isolate assembly participants from each other and the public, such as during the Sewol Ferry protests.

36. The KNPA explained that bus barricades are used in cases where there is a high risk of physical clashes between the police and demonstrators. It is not clear how this risk is assessed, and there is no proof that blocking off protest routes de-escalates tensions rather than increasing them.

37. The Special Rapporteur is unconvinced that these uses of bus barricades meet the necessity and proportionality requirements under article 21 of the ICCPR. Bus barricades are antithetical to authorities' obligation to facilitate

[7] Case on the Constitutionality of Using Water Cannon [26-1(B) KCCR 588, 2011Hun-Ma815, June 26, 2014]

assemblies. They are not used reactively to manage the conduct of participants, but rather pre-emptively to interfere with the right to freedom of peaceful assembly. This illustrates a prior intention to restrict the free flow of assemblies.

38. Further, the Special Rapporteur wishes to stress that policing assemblies is a demanding task that requires the utmost experience, training and skill. The use of relatively inexperienced conscripted youth on the frontlines of any protests is therefore ill-conceived and potentially dangerous to participants, police and the public. A central tenet of the State's obligations to facilitate and respect peaceful assembly rights is to ensure that those involved in protecting the exercise of the right both understand and execute their role in accordance with international human rights standards.

4. Investigation and penalisation

39. The Special Rapporteur learned of numerous actions by authorities in the aftermath of gatherings that create a chilling effect on the exercise of peaceful assembly rights. These included investigations and arrests of large numbers of participants, the indictment of hundreds of participants for the criminal offence of general obstruction of traffic, prosecution of assembly organisers for allegedly inciting violence and pursuing civil suits against them for compensation and damages. Organisers can also be held liable for damages caused by unlawful behaviour of others. This places an onerous and unreasonable responsibility on organisers (A/HRC/31/66 para 26).

40. The case of Mr Park Lae-goon exemplifies the intimidation and harassment that organisers of peaceful protests face. Mr. Park is a member of the Coalition 4.16, which consists of families and supporters of the Sewol Ferry Disaster victims. He was indicted on charges of organising an unlawful protest, destruction of public goods, general obstruction of traffic, defamation among other charges. The Seoul Central District Court on 22 January 2016 sentenced Mr. Park to three years imprisonment with four years probation and 160 hours of community service. He has appealed the decision.

41. Following the Korean Confederation of Trade Unions (KCTU) co-organised 'peoples rally' in November 2015, police reportedly began investigations of hundreds of KCTU members, some of whom have been charged. KCTU President Han Sang-gyun was charged with offences related to obstruction of public duty, injury to public officials, destruction of public goods, and obstruction of traffic among other charges. He is currently undergoing trial.

42. Charging assembly participants with certain criminal offenses, such as the general obstruction of traffic, de facto criminalises the right to peaceful assembly. Where large numbers of participants turn out, it is virtually impossible to keep roads entirely clear. Yet if individuals spill over onto the roads they may be charged with obstructing traffic. The choice to prosecute at all, and more so to charge participants with the serious offence of general obstruction of traffic, conveys a desire by authorities to discourage assemblies on roads. The Special Rapporteur reiterates that assemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic (A/HRC/20/27, para. 41).

43. Finally, redress for victims of excessive use of force by police is virtually impossible because of the difficulty of identifying individual police officers.

Police typically wear nametags on regular uniforms, but riot protection gear and outer jackets do not bear similar identification. The police expressed concerns about the privacy and security of officers' personal information were it to be displayed on nametags on protective uniforms. The Special Rapporteur emphasises that these concerns cannot be used to prevent the identification, and thus accountability, of officers managing assemblies. He notes that police officers in regular police uniforms wear nametags without similar privacy concerns. The police initially informed the Special Rapporteur that this will be corrected in the near future but they subsequently indicated that the issue was under careful consideration. He urges KNPA to correct this anomaly soon.

5. Groups in situation of vulnerability

44. The Special Rapporteur welcomes the diversity in participants – including women, youth, LGBTI persons, and persons with disabilities – at general protests and demonstrations. He was gratified that he received no complaints of sexual violence during these gatherings. Even so, he took note of the challenges that youth and persons with disabilities face in exercising their rights to peaceful assembly. Persons with disabilities are impeded from participating in assemblies by police immobilising or obstructing their assistive devices, sometimes physically removing them from assemblies against their will. School regulations and attitudes that young people and students are at risk of manipulation by adults prevent them from participating in assemblies.

45. The Special Rapporteur urges authorities to exercise great caution when interacting with disabled persons and their assistive devices, which are integral to their lives. Young persons are equally entitled to exercise their rights to freedom of peaceful assembly. As such, intimidation and punishment - including by school authorities - of minors and young people who express their views through organising or participating in peaceful protests such as the one related to history books, should be prohibited and sanctioned. Similarly, LGBTI persons should not feel intimidated by counter-demonstrators to take part in protests. Counter-demonstrations, while allowed to take place, should not dissuade participants of the other assemblies from exercising their right to freedom of peaceful assembly (A/HRC/20/27, para. 30). The police should play an active role in this regard.

6. Media and monitors

46. The media and assembly monitors play a crucial role in providing independent and objective information on the conduct and management of assemblies. The Special Rapporteur received complaints that journalists and observers feel targeted. Some monitors, like Ms. Ki Sun, were indicted for participating in an 'unlawful' protest. Others, such as Mr. Kim Young-guk said they were targeted by water cannons. When authorities facilitate and manage assemblies the instrumental role of journalists and observers must be recognised and taken into account.

B. Freedom of association

1. Associations

47. Individuals in South Korea may choose to associate under a variety of forms including non-profit voluntary organisations, non-profit private organisations, corporations and foundations. It is relatively easy to establish an association. However, acquiring certain competencies – for example legal personality and the ability to raise funds from the public – requires approval and supervision from authorities.

48. Article 32 of the Civil Act provides that associations and foundations that wish to acquire juridical – legal - personality must receive permission from competent authorities. The same act provides that legal personality may be cancelled when operations are outside the scope of the organization's purpose or when they violate conditions attached to the permission. The requirement to seek and receive permission is inherently problematic to the free exercise of the right to freedom of association, as it severely limits associations' ability to operate in the way they deem best. Further, vesting discretion to grant legal personality in authorities creates opportunities to deny unpopular groups this competence. The Special Rapporteur considers that a procedure whereby associations automatically gain legal personality upon establishment of the entity alleviates these problems and is as such most appropriate.

49. Even more troubling is that government departments can altogether avoid the responsibility of considering legal personality applications if they believe the organization's area of work does not fall within their competence. For example, the Beyond the Rainbow Foundation, a LGBTI association, was denied legal personality by the Ministry of Justice, ostensibly because the group works on a narrow issue of sexual minorities, whereas the Ministry claimed that it can only register groups who work on broader "general human rights" themes. The association 4.16 Sewol Families for Truth and A Safer Society faced a similar rejection of its legal personality application by the Ministry of Maritime Affairs and Fisheries, which claimed the group's proposed activities, such as truth-finding, had already been carried out by government agencies.

50. Both non-profit associations and their donors are eligible for tax exemptions in South Korea, which the Special Rapporteur finds commendable. However, article 4 of the Act on Collections and Use of Donations requires prior registration of fundraisers for all amounts over 10 million won (approx. 8,340 USD) and submission of a detailed collection and expenditure plan. Fundraisers are required to state prior to raising the funds, the target amount. This requirement is problematic because while one may specify a target amount for collection, there are no guarantees that collections will not fall below or exceed the amount. Raising amounts over 10 million won without prior registration contravenes the Act and is punishable. Indeed, authorities have reportedly rejected applications for registrations under the Act, such as for the Gangjeong Village and the Miryang Power Towers Opposition Committee. In the case of Gangjeong Village, Jeju Province authorities declined to register the association because it considered that the donations would support activities opposing government policy.

51. The Special Rapporteur acknowledges the necessity of transparency and accountability of associations' fundraising and spending, but notes that the key stakeholders in this respect are beneficiaries and funders, not the Government. Facilitating such transparency should not be overly burdensome or intrusive; nor should it provide occasion for the government to supervise and restrict organisations' operations.

52. An overarching concern to the Special Rapporteur was the lack of robust institutional engagement of the government with civil society. He was informed that the Ministry for Government Policy Co-ordination meets with the private sector four times a year and this is consistent with the Government's overall approach to incentivise economic growth and development. The Prime Minister's Advisory Committee for Civil Society Development, which is the Prime Minister's consultative body for issues concerning civil society, was not spoken of by civil society interlocutors – a sign perhaps of its lack of impact in achieving its role of engaging civil society participation in governance. The Special Rapporteur encourages the Government to see the connection between providing space for free, democratic engagement and economic growth. A good environment for civil society guarantees, almost without exception, a good business environment. Fostering a robust, vocal and critical civil society not only improves the health of democracy; it also furthers the Government's economic goals (A/70/266 para. 18).

2. Labour unions

53. The Special Rapporteur was informed at length about the serious challenges facing workers in the Republic of Korea. Key concerns included limitations placed on certain categories of individuals and workers to form and join unions, difficulties in organizing collective action, and actions by employers to weaken or destroy independent unions.

Legal framework

54. Article 33 of the Constitution of the Republic of Korea provides for the right to collective action, but limits these rights for public officials and defence industry workers. This position notably differs from article 22 of the ICCPR and article 8 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which recognises only that lawful restrictions may be made to the rights of members of the armed forces and police or State administration.

55. Teachers' and public officials' rights to freedom of association are regulated by the Act on the Establishment, Operation Etc. of Trade Unions for Teachers (AEOTUT) and the Act on the Establishment, Operation Etc. for Public Officials' Trade Unions (AEOPOTU) respectively. But not all categories of teachers or public officials are able to exercise their association rights. The Ministry of Employment and Labour in April 2015, reportedly declined to recognise the Korean Professors Trade Union because the AEOTUT does not include university lecturers as eligible to form and join trade unions.

56. These pieces of legislation explicitly prohibit teachers' trade unions (articles 3 and 8 AEOTUT) and public officials (articles 4 and 11 AEOPOTU) from engaging in any kind of political activity or industrial action respectively. The prohibition of teachers' unions from engaging in political activity was upheld by the Constitutional Court as justifiable. The Special Rapporteur is concerned

that this prohibition based on a largely vague notion - 'political activity' - imposes broad constraints on the ability of these categories of individuals to express themselves on a wide range of issues under the guise of maintaining 'political neutrality'.

57. The TULRAA states that non-workers may not be part of a union; dismissed workers in respect of whom the National Labour Relations Commission has made a review decision are also prohibited from trade union membership under other provisions of law. The Committee of Experts on Freedom of Association (CFA) of the ILO has since 1997 extensively considered the restrictions imposed on union membership of dismissed workers in South Korea. The Special Rapporteur endorses fully the recommendations of the Committee that the Government of the Republic of Korea should take the necessary measures to amend or repeal legal provisions that prohibit dismissed workers from being union members as being contrary to the principles of freedom of association.[8]

58. The CFA considers that 'depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice'.[9] The Special Rapporteur agrees with this position and considers the de-certification of the Korean Teachers and Education Workers Union (KTU) and the repeated denials of registration for Korean Government Employees Union (KGEU) to be an unjustifiable interference in these groups' rights to freedom of association. In the KTU case, approximately 60,000 teachers are denied their rights to freedom of association because of the inclusion of nine dismissed teachers. In KGEU's case, 10,000 public employees are prevented from exercising their rights because the union's constitution could potentially allow dismissed workers into its membership. The denial of recognition on this basis does not meet the requirements that restrictive measures should be proportionate and the least intrusive instrument to achieve the desired result.

59. The plight of KTU and KGEU illustrate also the unfortunate implications of the de facto authorisation procedure that underlies recognition of trade unions. This certification process, based solely on the issuance of a certificate by the Ministry of Employment and Labor, creates opportunities for arbitrary exercise of discretion by public officials. Requiring prior permission inherently constrains the right to freedom of association.

60. Certain categories of workers – including the self-employed, those whose remuneration is based on performance rather than an employment contract and those who are paid by clients rather than their employer – are considered to be engaged in 'special forms of work' or in 'disguised employment' relationships. Associations formed by these workers are not recognised as trade unions as defined by TULRAA. As such, any agreements made by these associations do not carry the binding force accorded to union collective bargaining agreements. Employers may refuse to adhere to these agreements. For example, the Special Rapporteur was informed about members of the Korean Public Service and Transport Workers' Union, Cargo Truckers Solidarity Division members whose

[8] Effect given to the recommendations of the committee and the Governing Body - Report No 371, March 2014 Case No 1865 (Korea, Republic of) - Complaint date: 14-DEC-95 - Follow-up para. 53.

[9] Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition (2006), para. 268.

employer, Pulmuone, refuses to recognise their agreements as binding. Similarly, employers have contested the recognition of the Korean Construction Workers Union for allegedly including in its membership 'independent contractors'. In today's dynamic and ever-changing economic environment, falling back on pedantic and dated interpretations of what constitutes "employment" constitutes a failure of imagination – both in terms of protecting workers' rights and in forging Korea's economy of the future.

61. The Special Rapporteur reiterates the position of the CFA that the right to freedom of association, including the right to form or join trade unions is guaranteed to all workers regardless of their occupation.[10] It is not Government's role to determine who can join trade unions.

Interference with independence and operations of unions

62. The plurality of trade unions at the enterprise level is a commendable reform by the Republic of Korea and in conformity with international human rights and labour standards. More needs to be done however, to ensure that all unions are independent, voluntary and equally able to represent the interests of their members.

63. The Special Rapporteur had occasion to meet with members of the Korean Metal Workers Union Valeo Local (KMWU Valeo Local) who have been engaged in a protracted struggle with the company Valeo Electrical Systems Korea (VESK). The local management of Valeo Electrical Systems Korea declined to meet with the Special Rapporteur during his visit. However, VESK did send high-level representatives to meet with the Special Rapporteur in May 2016.

64. According to the interlocutors who briefed the Special Rapporteur, VESK in 2009 through a number of actions began to contravene a collective bargaining agreement in place at the time. KMWU Valeo Local decided to engage in strike action in February 2010. VESK responded with a lockout of union members' and prevented officials from accessing their union office within the company's premises. By June 2010, a new union, Valeo Electrical Systems in Korea Trade Union (VESK Union), unaffiliated to KMWU, had been established. The creation of this union was allegedly a result of undue pressure on employees to leave KMWU Valeo Local. It was also claimed that in the course of these events, between March and May 2010, VESK engaged a labour relations consulting firm which allegedly provided advice on how to weaken the independent trade union.

65. KMWU Valeo Local challenged the establishment of the new union and its unaffiliated status in court. The Seoul District Court nullified the assembly that formed the union, a decision upheld by the Seoul High Court. On appeal by VESK Union, the Supreme Court reversed the decision of the High Court. It held that a branch of an industrial union should be able to change its organisational form if it carries out activities as an independent organisation, having independent regulations, and with an executive body, even if it is not necessarily incorporated or able to engage in collective bargaining.

[10] Ibid para. 216-217.

66. The Special Rapporteur is particularly struck by the events that led up to the formation of the VESK Union, in particular, the strike action by KMWU Local, the concerns by workers about losing their jobs and – as the Valeo representatives stated – management's support for the formation of VESK Union and their case in the Supreme Court. He is concerned that the Supreme Court's decision may be used by employers to interfere with union independence by encouraging the formation of management supported unions.

67. Labour groups have also accused Samsung Group of having a 'no union' management policy. They allege that Samsung repeatedly undermines employee unions through various means including surveillance, threats and undue pressure on members, disguised subcontracting to avoid selected employer responsibilities and dismissal of members, among other tactics. In a meeting with the Special Rapporteur, Samsung officials denied these claims stating that the choice to establish and join unions was solely that of employees. The Special Rapporteur cannot confirm or refute any of the claims against or for Samsung. He believes nevertheless, that given Samsung's size, standing and reputation in the Republic of Korea, the corporation could take a leadership role in promoting the right to freedom of association for employees and at the same time project a positive image as a corporation that cares about human rights. The Special Rapporteur notes similar complaints of attempts by Munwha Broadcasting Corporation to weaken unions by firing union leaders and workers following strike action and assigning union leaders demeaning jobs to demoralise them.

68. Article 8 of the ICESCR requires States to ensure everyone's right to form and join trade unions of their choice. This implies a positive obligations to take measures, as such, the Special Rapporteur stresses that the Government should not, as the Ministry of Labour has done, adopt a 'neutral' stance in relation to the formation and operation of trade unions. Any measures adopted should however, ensure the independence and autonomy of trade unions.

69. Employers allegedly use labour relations consultancy firms to obtain advice that facilitates the erosion of trade union rights. The firm Chang-jo Consulting was alleged to have played a central role in the events that led to the weakening of KMWU Valeo Local and establishment of the Valeo Electrical Systems Union. The firm was also involved in similar activities leading to the weakening of KMWU YPR Local trade union. A parliamentary investigation and public hearing in 2012 recommended that the Ministry of Labour investigate the activities of labour relations consulting companies, including Chang-jo Consulting. The Government subsequently revoked and cancelled the labour service company licence, the concerned labour attorney's licence and instituted criminal proceedings against Chang-jo Consulting. KMWU has instituted cases in court against the firm in relation to its role in promoting unfair labour practices.

The right to strike

70. Although the TULRAA provides for collective action including strikes, in practice the ability to exercise this right is severely constrained. As previously mentioned, teachers unions (article 8 AEOTUT) and public officials (article 11 AEOPOTU) are prohibited from engaging in industrial action. In addition, actions that stop, discontinue or obstruct the proper maintenance and operation

of ‘minimum services’ are not considered legitimate industrial actions (article 42-2 TULRAA). ‘Minimum services’ in this law are subject to determination by agreement of parties or alternatively by the Labour Relations Committee.

71. By contrast, the ILO recognises that workers providing ‘essential services’ – defined as ‘only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population’ - may be prohibited from engaging in strikes. This is a restricted category of workers. However, according to the ILO, States may prescribe a level of ‘minimum services’ in relation to public utilities that should be maintained in case of a strike.[11] The TULRAA falls short of these standards by banning outright a potentially discretionary range of services that may not constitute ‘essential services’ as strictly defined by the ILO.

72. Participating in strikes deemed to be illegal may result in criminal and/or civil liability against organisers and participants. The de facto discretion and power given to authorities to declare a strike legal or illegal is problematic as it typically belongs to a judicial authority to exercise such oversight. Regardless of the peacefulness of a strike, employers can sue unions and their members for substantial damages arising from these allegedly illegal strikes. These, together with provisional seizure of union assets and union members’ salaries and wages, effectively result in a chilling of trade union activity and weakening of unions. For example, in 2013-2014, the Korean Railway Workers Union went on strike. Of the seven union leaders who were arrested, four were indicted for ‘obstruction of business’ (article 314 of the Criminal Act) but acquitted. Nevertheless, Korean Railway has sued the union for damages worth KRW 16.2 billion.

73. Industrial action, particularly strike action, by its nature is designed to interrupt the normal operations of a business or employer in order to press for certain interests; they are inherently disruptive. Strikes should thus be adopted with a great deal of circumspection, but that does not mean they can be arbitrarily suppressed. Criminal and civil liability for loss of revenue or other damages arising from work stoppage negates the very core of the right to strike.

3. Political parties and associations pursuing political objectives

74. The Republic of Korea’s political scene has recently been dominated by the ruling Saenuri party, which held a majority in the National Assembly at the time of the Special Rapporteur’s visit. Parliamentary elections held in April 2016 saw the party lose this majority to the opposition party, Minjoo. Despite this dynamic shift in the parliamentary scene, entry into the political arena is tightly controlled. Political party formation is difficult, and groups expressing critical views of South Korea’s policies, such as those relating to reunification with North Korea or capitalism, find their freedom to express these views or organise and associate around them curtailed.

75. The Political Parties Act specifies onerous requirements in order to establish a political party. According to article 3 of the Act, a political party consists of a central party located in the capital, and city or ‘Do’ parties located in the

[11] General Survey (The ILO defines a ‘minimum service’ as one ‘which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear’ (para. 161).

metropolitan cities and 'Do'. A political party must have at least 5 city/Do parties, each with at least 1,000 members. Articles 5 and 6 require that a preparatory committee, composed of at least 200 people in the case of the central party and 100 people for the city and 'Do' party, organise the formation of the party. The preparatory committee has six months to fulfil all requirements to form the party. A registered party that does not maintain these requirements can have its registration revoked if it fails to correct the shortcomings within a given period (articles 35 and 44). Currently, political parties rely on members for their funds, although the Special Rapporteur was informed that from 2017 non-members will be allowed to contribute to parties. Further, in order to run for elections, candidates need to pay a deposit which is non-refundable if the candidate does not receive more than 10 percent of the total valid votes. Availability of funds therefore determines the number of candidates that a party can offer for election.

76. It is understandable that some of these requirements are directed at ensuring that parties have a national outlook, diversity in party membership and a strong link between the party and its membership base. Yet, the effect is to make it difficult to establish new, smaller and localised parties contrary to the National Election Commission's stated objective of encouraging the establishment of political parties. The Special Rapporteur has noted previously that a minimum number of individuals may be required to establish a political party, but this number should not be set at a level that would discourage people from engaging in associations (A/68/299, para. 31). The requirement to have a central party in the capital city and 5 city/Do parties is difficult to justify for individuals who want to engage in local politics. In addition, fixing a high number of founding members does not take into account a number of variables such as the membership strength of dominant parties, the population size of different cities and the resources available to smaller parties, all of which may prevent fledgling parties from increasing their membership numbers. These requirements favour existing parties and close the space for new parties.

77. The Special Rapporteur spoke with members of associations that are in favour of reunification with North Korea, but are critical of the Republic of Korea's reunification policy. He also met with groups that advocate socialism as an alternative to South Korea's capitalist economic policy. These groups spoke of suppression of their views and repression that includes surveillance, confiscation of written material, arrests, imprisonment and stigmatisation as being 'pro-enemy'. He was informed that article 7 of the National Security Act (NSA) – which prohibits praising, inciting or propagating the activities of anti-state organisations, acts of instigating or propagating a rebellion against the State or joining organisations that engage in these acts – was used as a basis to prosecute members of these organisations.

78. The Government of Korea emphasised that the Constitutional Court has declared the provision constitutional, judging the law to be clear as to what acts would be prohibited and to have a legitimate purpose. Further, the Government said, the provision is applied judiciously and the chances for arbitrary application were minimal.

79. This reasoning does not alleviate the Special Rapporteur's concern that the provision can be used to stifle political plurality and peaceful dissent. He is not convinced that the terms used in article 7 of the NSA are as clear as the

Constitutional Court pronounced them to be or that they cannot be interpreted broadly to target dissent. The NSA has been used by different regimes to silence critics despite the State's capacity to determine who is actually engaged in treason. Maintaining this provision of the law leaves open the possibility of its use in this repressive way again. He fully endorses the views of the Special Rapporteur on the situation of human rights defenders (A/HRC/25/55/Add.1, para. 32), the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27/Add.2 paras. 65-71), and the Human Rights Committee (CCPR/C/KOR/CO/4, paras. 48-49) on this issue.

80. The dissolution of the Unified Progressive Party (UPP) was a severe measure taken in 2014 by the Government and the courts that has profound effects on the rights of association, expression and participation in public life. The members of parliament from this party were stripped of their seats following dissolution of the party. The Special Rapporteur is concerned that the decision by the Constitutional Court was taken amidst disquieting circumstances. The status of the party as an outspoken critic of the Government, the controversy surrounding the evidence relied upon by the Government in its dissolution petition and the impact of dissolution on the association rights of numerous party members who were not directly implicated in any wrongdoing, encourages perceptions that the objective was to silence the political challenge that the party poses. The Government's prohibition of protests following the court decision only increases these concerns.

81. The Special Rapporteur urges careful consideration of the implications of dissolving a political party on the rights to association among other rights, and its potential impact of dialling back the democratic gains that South Korea has achieved. He believes that the strong democratic credentials that the South Korea possesses can withstand minority expressions of support for North Korea without resorting to such drastic retaliatory actions – actions that undermine South Korea's much needed efforts to find a peaceful solution to the peninsula's instability.

V. Sewol Ferry Disaster

82. The sinking of the Sewol ferry that took place on 16 April 2014, where over 300 people – mostly secondary school students – died is the most tragic event in South Korea's recent past. The Special Rapporteur was deeply honoured to visit the memorial for the victims in Ansan and to meet with some of the victims' families. He was particularly impressed by their courage and commitment not just to establish the truth surrounding this accident, but also to ensure that a similar tragedy does not recur.

83. The Special Rapporteur clearly understood that the victims' families are largely dissatisfied with the Government's responses to the tragedy. Although the Government has made efforts to investigate the accident, hold some of those involved accountable and provide compensation to the families, some of those closely affected feel that their calls for an independent inquiry into the tragedy have been ignored. This dissatisfaction is at the heart of the many protests and commemorative assemblies. In the Special Rapporteur's view, expressing such sentiments, no matter how unpopular, is exactly the purpose for which peaceful assembly rights should be facilitated and open communication channels

maintained. Preventing or obstructing people from expressing their grief and anger in reaction to such a tremendous loss creates opportunities for such sentiments to grow into something more insidious and potentially violent.

84. The Special Rapporteur was alarmed at the apparent politicisation of the Sewol ferry disaster. The yellow ribbon adopted by the victims' families as illustrative and supportive of their cause, appears now to be interpreted as an anti-government symbol. Equating demands for accountability and transparency - the hallmarks of rule of law – with attempts to undermine the Government per se, has no place in a democratic society. In his view, the Government's handling of the protests around the Sewol ferry disaster is emblematic of an approach that seeks to stifle expressions of dissatisfaction, leading to polarisation of an issue that should otherwise encourage solidarity and collaboration to address perceived shortcomings.

VI. National Human Rights Commission of Korea

85. The NHRCK was established in 2001 by the National Human Rights Commission Act and consists of 11 members, selected or nominated by the President, the National Assembly and the Chief Justice of the Supreme Court. As the national human rights institution, it investigates complaints, issues policy recommendations and conducts education campaigns. The NHRCK is currently accredited with 'A' status by the International Coordinating Committee of the National Institutions for the Promotion and Protection of Human Rights (ICC) (now known as the Global Alliance of National Human Rights Institutions GANHRI). The ICC deferred re-accreditation in 2015 over concerns that a clear, transparent and participatory selection and appointment process for commissioners is not included in relevant legislation and practice. Further, there were concerns that commissioners are not immune from legal liability for actions undertaken in good faith when acting in their official capacity.

86. These issues were echoed by civil society interlocutors as contributing to their perception that the NHRCK was ineffective. In their view, the NHRCK under its previous leadership was slow to react and reluctant to issue decisions or statements on urgent and politically sensitive cases of violations of human rights; lacked visibility when significant issues of human rights come to the fore; and failed to make timely decisions on complaints before it. For example, the Special Rapporteur was informed that 20 cases arising from the Sewol Ferry disaster filed with the NHRCK after the tragedy in April 2014 had not been decided a year later. Five of the cases were subsequently dismissed but the complainants were not notified of this. Civil society was also dissatisfied with the relationship between the sector and the NHRCK and considered the Commission's operations inaccessible and not transparent.

87. On behalf of the NHRCK, the Chairperson acknowledged awareness of these concerns and stated that the Commission was making efforts to improve communication with stakeholders and to strengthen diversity and its legal framework. The NHRCK has made 32 recommendations related to the rights to freedom of peaceful assembly; 16 have been accepted by the Government, six have received partial acceptance and five have not been accepted; two are still under review by Government. Unfortunately, the Commission's recommendations are not binding. In relation to simultaneous assemblies, the

NHRCK called for the removal of legal provisions that allow the banning of the later notified assembly due to abuse of this clause. The NHRCK also found that article 12 of the ADA, which allows banning of assemblies that may interrupt the flow of traffic, is inappropriate.

88. The Special Rapporteur is encouraged by the NHRCK's expressed commitment to earning the confidence of civil society in its ability to protect and promote human rights in South Korea. The role of an independent, effective and efficient national human rights institution in strengthening democracy cannot be overstated. Indeed the strongest indicator of the effectiveness and independence of a national human rights institution is the confidence that human rights defenders and civil society have in it. The principles of openness, accessibility, consultation and participation are also key tools which the Commission should embrace to improve its credibility with partners.

VII. Conclusion and recommendations

89. **The ability to exercise the rights to freedom of peaceful assembly and association provides an avenue through which members of society can express their views on a diverse range of issues, whether by turning out for demonstrations, engaging in strikes, joining associations or making donations to associations of their choice. The Special Rapporteur observed that while the Government is cognisant of the important role that assembly and association rights play, there is a tendency to tightly control expressions of dissent.**

90. **The Special Rapporteur found that government authorities clearly make efforts to observe the rule of law, which is commendable. Nevertheless, he is concerned at a series of inconsistencies and divergence from international human rights law standards of implementation of the law arising because:**

(i) the legal framework does not comply with international human rights law standards in a number of key areas;

(ii) the legal framework provides excessive discretion to authorities; and

(iii) while exercising this discretion, authorities do not pay sufficient attention to the obligations to respect, protect and facilitate assembly and association rights.

91. **The Special Rapporteur stresses that the significant democratic gains achieved by the Republic of Korea cannot be taken for granted. The democratic project requires constant maintenance and strengthening. Internal and external challenges brought about by changing economic and geopolitical conditions should be addressed, not in isolation, but as an integral part of the democratic function where agreement and dissent are equally welcomed.**

92. **The present report is offered in a spirit of constructive dialogue. The Special Rapporteur believes that South Korea is capable of providing leadership in the field of freedoms of peaceful assembly and of association. He remains at the disposal of the authorities in helping them achieve these goals.**

93. **The Special Rapporteur recommends the following:**

General recommendations

(a) **Recognise in law and in practice that the rights to freedom of peaceful assembly and of association are a legitimate means of expression regarding a diverse range of issues including social and political; and that it is incumbent on authorities to facilitate rather than to diminish the exercise of these rights.**

(b) **Ensure that the legal framework affecting the rights conforms to international human rights norms, including by providing an objective and detailed framework through which decisions restricting rights are made while ensuring that restrictions are the exception and not the rule. Limitations to the rights must be in furtherance of a legitimate aim, prescribed by law, proportionate to the aim pursued and necessary in a democratic society.**

(c) **Ratify outstanding key international human rights and labour treaties and remove the reservation to article 22 of the ICCPR.**

(d) **Ensure that victims of violations and abuses for the rights to freedom of peaceful assembly and of association have the right to effective remedies.**

Recommendations on the right to freedom of peaceful assembly

(a) **Amend the ADA and implementation of the law to:**

(i) **Ensure that at most a prior notification and not de facto authorisation regime regulates the exercise of the right to peaceful assembly;**

(ii) **Prevent blanket bans on times when and locations where assemblies can be held; and**

(iii) **Ensure that assemblies are presumed to be lawful in accordance with international human rights law standards.**

(b) **Review tactics used for the management of assemblies – including the use of water cannons and bus barricades - to ensure that they are not applied indiscriminately or against peaceful protestors, they do not result in escalation of tensions, and are directed at facilitating rather than preventing the exercise of assembly rights.**

(c) **Provide adequately trained and experienced police officers to manage assemblies and refrain from deploying conscripted youth for that purpose.**

(d) **Ensure that assembly participants are not investigated or held criminally or civilly liable for taking part in gatherings, and that the principle of individual liability for unlawful actions is upheld including in respect of assembly organisers.**

(e) **Ensure that the rights of all categories of assembly participants including persons with disabilities, youth, women, LGBT persons, monitors, media are upheld during the management of assemblies.**

Recommendation on the right to freedom of association

(a) **Ensure that the establishment of associations, including trade unions and political parties:**

(i) **is subject at most to a notification process;**

(ii) **is simple, expeditious, non-onerous with clear requirements, including as to the relevant responsible authority;**

(iii) **results in acquisition of legal personality; and**

(iv) **is not subject to overly intrusive and burdensome transparency and accountability requirements prior or subsequent to fund raising.**

(b) **Amend labour laws to reflect all workers' rights:**

(i) **to freedom of association including the ability to form or join trade unions;**

(ii) **to freely engage in collective action, including strikes;**

(iii) **to enforce collective agreements in conformity with international labour law standards; and**

(iv) **to freedom of expression including opinions that may be considered political.**

(c) **Implement as a matter of urgency recommendations issued by the CFA including in relation to the recognition of KTU and KGEU.**

(d) **Ensure that the laws and policies guiding the establishment of political parties encourage the formation of small parties and ensures a level playing field in terms of funding.**

Other recommendations

(a) **Abrogate article 7 of the National Security Act.**

(b) **Private sector companies such as Samsung and Valeo Electrical Systems Korea should commit to upholding the rights to freedom of association for workers and subscribe to the UN Global Compact and operationalize the UN Guiding Principles on Business and Human Rights Principles.**

(c) **The National Human Rights Commission of Korea should work with the Government to:**

(i) **implement the recommendations of the GANHRI and to earn the confidence of all stakeholders including civil society; and**

(ii) **implement recommendations related to the rights to freedom of peaceful assembly and of association.**

(d) **The Special Rapporteur calls on civil society to:**

(e) **Continue their advocacy and monitoring work in relation to the enjoyment of the rights to freedom of peaceful assembly and of association; and**

(f) **Follow up and monitor the implementation of the recommendations contained in the present report.**

ANNEX 3

Statement at the end of visit to the Republic of Korea by the United Nations Working Group on Business and Human Rights

Seoul, 1 June 2016

Introduction

In our capacity as members of the United Nations Working Group on Business and Human Rights, we have today ended our ten-day visit to the Republic of Korea. We are grateful to the Government of the Republic of Korea for its support for, and facilitation of, this visit. We take this as a sign of its willingness to show leadership in addressing business and human rights issues.

During our visit, we met with Government officials from the Office for Government Policy Coordination in the Prime Minister's Secretariat, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Strategy and Finance, the Ministry of Trade, Industry and Energy, the Ministry of Environment, and the Ministry of Employment and Labor, the Korea Corporate Governance Service, the Small and Medium Business Administration, Daejeon Metropolitan City and Ulsan Metropolitan City. We also met with representatives of the National Human Rights Commission of Korea (NHRCK) and of the Legislation and Judiciary Committee of the National Assembly, as well as with representatives of civil society organizations and victims groups, trade unions (the Korean Confederation of Trade Unions, the Korean Metal Workers Trade Union, the Korean Public and Transport Workers' Union, the Union of the Seoul Metropolitan Rapid Transit Corporation, and the Union of the Busan Transportation Corporation), the UN Global Compact Network Korea, and representatives of private business enterprises (POSCO Daewoo, Samsung Electronics, LG Electronics, Hyundai Motors, Hyundai Heavy Industry, and RB Korea formerly known as Oxy Reckitt Benckiser) and of State Owned Enterprises (SOEs) (Korea Electric Power Corporation, Korea Railroad Corporation, Korea Minting and Security Printing Corporation, and Korea National Oil Corporation).

We started our visit in Seoul and then went on to Gwacheon, Daejeon, Sejong, and Ulsan.
In our statement, we would like to outline some initial observations from our visit. Our official report to the 35th session of the Human Rights Council in June 2017 will include further observations and recommendations.

General Context

Over the past 35 years, South Korea has transitioned from being one of the world's poorest countries into the world's 12th largest economy and an important contributor to international development assistance. However, the country is currently facing an economic slow-down combined with a rise in relative poverty and inequality as well as youth unemployment and an ageing population.

In South Korea a number of large business corporations and conglomerates (chaebols) coexist alongside a large number of small and medium-sized companies (SMEs). Also, South Korean companies, both public and private, are increasingly investing and expanding their operations overseas.

General observations

We observed genuine commitment amongst Government officials and business enterprises to the implementation of the UN Guiding Principles. However, while some companies had a policy statement, it generally did not reflect a human rights due diligence approach. We also witnessed a need for greater coherence between different Government departments and public institutions working in this area. Furthermore, we heard from companies that they would like the Government to set out its expectations of business conduct related to business and human rights.

The growing attention being paid to the relationship between business and human rights has been facilitated by the work of the National Human Rights Commission of Korea to raise awareness about these issues. The Commission has, inter alia, usefully translated into Korean the UN Guiding Principles and the Working Group's guidance on national action plans on business and human rights and is promoting the development of a national action plan on business and human rights. These efforts are also being actively supported by the UN Global Compact Network in Korea.

We were also encouraged by what we observed as openness and genuine willingness amongst the Government and business representatives we met with to improve practice and policy in line with international best practice. In particular, we noted the commitment expressed by the Office for Government Policy Coordination in the Prime Minister's Secretariat to facilitate coordination and coherence amongst government agencies in this area.

During the visit a number of cases and allegations were drawn to our attention by civil society organizations, trade unions and victim groups. Several of these cases are well known to the South Korean public. The cases relate to issues such as abusive working conditions faced by workers who work for subcontractors; exposure to hazardous substances in the workplace; repression of union activity; and the outsourcing of operations with high human rights risks, including overseas.

Protecting against abuse in supply chains

From the information gathered and testimonies heard about cases of business-related human rights abuse, one key underlying concern and contributing factor was a failure to ensure adequate oversight of supply chains and a lack of willingness of some lead business enterprises to effectively assume responsibility to prevent or mitigate human rights impacts linked to their operations. The risk of adverse human rights impacts increases in the lower tiers of supply chains, and even more so when supply chains extend beyond national borders. The Government is fully aware of this, and some measures are being taken to improve the situation. However, much more needs to be done to address current gaps in legal and institutional frameworks to enhance protection against adverse human rights impacts throughout supply chains.

While steps have been taken by some companies to integrate human rights due diligence into their operations, we found that even the companies with a specific human rights policy did not acknowledge that their human rights responsibilities mean they need to follow their impacts through the entire supply chain. The approach should not be tier by tier, but impact by impact, prioritized by severity.

Some of the companies that we met with claimed that it was practically impossible for them to monitor the supply chains beyond their direct suppliers. Another company indicated that reports of human rights

abuse implicating one of its direct suppliers was none of its business. This is not a correct approach under the Guiding Principles.

All companies are expected to make it their business to avoid adverse human rights impacts linked to any part of their operations. The complexity of supply chains is no excuse for inaction. Large companies with complex supply chains are expected to identify and prioritise those areas where the risk of negative human rights impact is most significant. Companies are expected to establish grievance mechanisms to support the identification of adverse human rights impacts. Such mechanisms should be available to workers and individuals and communities who may be adversely impacted by business operations.
There is evidence of progressively good practice among some companies. The Korea Railroad Corporation stated its commitment and responsibility to exercise human rights due diligence beyond its first tier of direct suppliers. It said it conducts on-site visits to monitor compliance of first, second and third tier suppliers, and suppliers are obliged to notify any new sub-contracting arrangements. It also revealed that a hotline is available to workers of first, second and third tier suppliers.

Another concern relates to the way large corporations use sub-contractors for parts of their core operations. A 2014 study undertaken by the NHRCK on the conditions of industries with high risk of industrial injury found that many subcontracted workers experience worse working conditions and less safety information compared to directly employed workers.

A case in point is the shipyard in Ulsan operated by Hyundai Heavy Industries (HHI). We discussed this with HHI management and trade unions. The shipyard employs 55,000 workers, 30,000 of which work for subcontractors. 80 % of subcontracted workers are involved in production (and exposed to high health and safety risks), compared to only 20% of directly employed workers. The ship yard has experienced a high number of fatal work accidents (averaging 6 annually over the past 10 years, 71% amongst subcontracted workers). We were informed that 7 workers died in the first 5 months of 2016, of which 5 were subcontracted workers. The In-house Subcontractor Worker's Union in HHI (ISWU) alleges that HHI is "outsourcing risk". HHI attributes the higher number of fatal accidents amongst subcontracted workers to inexperience amongst subcontracted workers (with an average of 2 years of experience) as compared to HHI's directly employed workers (with an average of 18 years of experience). In order to improve health and safety conditions, HHI and other business operations with a high risk of industrial injury should find ways to improve oversight and incentivise subcontractors to improve safety conditions.

The relationship between SMEs and large companies

In the Republic of Korea large conglomerates make up less than 1% of business enterprises, while 3.42 million small and medium-sized companies (SMEs) account for more than 99%. SMEs account for 88% of employment, and about half of the SMEs supply large companies and chaebol-affiliated conglomerates.
A common concern in discussions with Government and civil society representatives was the asymmetrical and often non-transparent relationship between the large companies and their SME suppliers, where the big companies are able to set conditions and pressure SMEs competing for contracts to offer lower prices. There is also a marked difference in working condition, salary scales and benefits of employees of large companies compared to the majority of the SME workforce.
The Government has taken various measures to protect SMEs against unfair practices by large firms, including the Act on the Promotion of Collaborative Cooperation between Large Enterprises and Small-Medium Enterprises (enacted in 2006 and most recently amended in 2016). The Act aims to develop policies "to facilitate win-win cooperation between large enterprises and small-medium enterprises",

including related to exchanges of technology and human resources and narrowing the salary gap between large enterprises and SMEs (art. 4(2)). To incentivise larger corporations to provide greater support to SMEs, the Government has also created the "win-win cooperation index", whereby large enterprises are assessed annually by independent evaluators with awards for good practice. However, these initiatives currently do not explicitly include human rights due diligence. This is important and, as proposed by the NHRCK, criteria related to human rights should be added to the "win-win copperation index".

Avoiding business-related human rights abuse outside Korea

Some cases brought to our attention concerned the overseas activities of South Korean companies. We heard about the sourcing of cotton from Uzbekistan by the Korea Minting, Security Printing & ID Card Operating Co. (KOMSCO) through a joint local subsidiary in Uzbekistan, KOMSCO Daewoo (GKD); allegations of abusive labour conditions in garment factories in Myanmar wholly or jointly owned by South Korean companies; and land acquisition related to a natural gas project in Myanmar by POSCO Daewoo International.

As the business operations of South Korean companies are increasingly becoming transnational, more attention needs to be given to how South Korean companies exercise human rights due diligence to avoid causing human rights harm outside South Korea. It was clear from our discussions that this is an area which requires much more attention from companies and the Government.

Many Government and company representatives we met with recognized that it is important to step up action in this area. Companies should develop mechanisms to allow grievances to be brought to their attention early on to prevent harm from escalating. The Government should actively assist companies to identify, prevent and mitigate human rights risks related to their overseas activities. Embassies should assist in such efforts as they have an interest in preventing South Korean companies from having adverse human rights impacts on the local population. Some training has taken place, but no clear monitoring mechanism was described.

The Government and companies should explore ways to avoid human rights abuses related to companies' operations abroad and to facilitate access to remedy if harm occurs, in accordance with international standards and best practice.

Non-financial reporting

All of the companies we met with prepared annual sustainability reports. Several included a more or less explicit reference to human rights. Most indicated that they followed the Global Reporting Initiative (GRI) G4 guidelines, which include human rights criteria and make reference to the UN Guiding Principles on Business and Human Rights. However, they generally did not go into detail about steps taken to identify risks and prevent and remedy human rights harm. We strongly encourage companies to give more attention to these aspects.

We also encourage the Government to establish non-financial reporting requirements on human rights due diligence processes in line with the Guiding Principles and existing reporting standards. The Government could also use other existing mechanisms to promote responsible business conduct by companies e.g. the Korean Business Ethics Index (KoBEX), under the Ministry of Trade, Industry and Energy, which evaluates the ethical leadership of the CEO, equal employment at work, human resources

development, health and safety, and the "win-win cooperation index" to incentivize large companies to support SMEs. Human rights criteria could also be included in the periodic assessments and rankings of business practice. The human rights check list sent to 115 public companies and institutions developed by the NHRCK is another important tool. It could usefully be expanded to involve private companies.

Labour rights

Health and safety in the workplace was raised with us as an issue of particular concern during our visit. The Occupational Health and Safety Act makes several requirements on employers in respect of the provision of safe workplaces. However, from the information gathered during our visit, it was clear that more needs to be done to facilitate the reporting of incidents in the workplace so that all such incidents can be properly investigated and remediation and prevention measures put in place.

The burden of proof on those seeking compensation for industrial accidents is very high. Victims must provide, amongst other things, evidence of the presence of a risk factor and evidence of a high level of exposure. Victims must satisfy the burden of proof in order to receive any compensation from the Occupational National Insurance for injuries suffered from hazardous working conditions. It would be important to review the current legislation to bring it in line with international standards and to find a way to distribute the burden of proof more equally in cases where it is difficult for workers to prove wrongdoing/human rights abuse by an employer. In this regard, we note that one step in that direction has already been taken under the new Act on Liability for Environmental Damage and Relief Thereof.

We also heard concerns surrounding the freedom for trade unions to operate unhindered in certain business contexts. We heard reports about so called "yellow unions" set up by a company which do not meet international standards for freedom of association and collective bargaining. We are also concerned by reports of companies suing the trade union of a supplier where industrial action has been taken, and of wages being deducted from workers who go on strike to pay for the lost profits incurred following the industrial action. Workers should not have to meet the financial cost resulting from their legitimate defence of their employment rights and all companies should seek to understand the reasons for industrial action and adapt their management practices, rather than punishing protesters.

Migrant workers, including those in an irregular situation

One of the groups particularly at risk of business related human rights abuse is temporary migrant workers. Several features of the current system of the Employment Permit System (EPS) for migrant workers seem to contribute to a heightened risk of abuse. Through bilateral agreements with 15 countries in the region, South Korea invites migrant workers to come to the country for periods of three years with an ESP E-9 visa. While they are allowed to change employer up to three times during the three-year period, we are concerned that the system makes migrant workers vulnerable to abuse.

Finding themselves in an even more vulnerable situation are an estimated 214,000 unregistered migrants in South Korea, of which an estimated 49,300 became unregistered migrants with expired E-9 visa under the EPS. Even if unregistered migrants are allowed to remain in the country while any case concerning abusive labour practice or non-payment of salary is being processed, unregistered migrant workers will be particularly vulnerable to human rights abuse.

Situation of women

We observed a striking absence of women at a senior level in the companies we visited. When we asked for statistics relating to the number of women at senior levels of companies, this information was not available. According to an OECD 2016 survey, the employment rate of women stood at 54.9%, compared to 75.7% for men, and the World Economic Forum's *Global Gender Gap Report 2015*, ranked South Korea at 115. Main obstacles to the participation of women in the workforce relate to traditional gender roles in society, lack of access to child care, and a significant wage gap, which is the largest amongst OECD countries. A 2014 report produced by the NHRCK showed that 17.4% of female workers have been reported to receive wages that fall below the minimum wage.

While we heard about efforts to improve access to childcare, a more extensive or holistic approach to address discrimination against women would be needed, in line with recommendations to South Korea of the United Nations human rights treaty bodies and the 2012 Universal Period Review.

Quite apart from social and human rights considerations, it does not make good business sense to exclude half of the workforce. As was emphasised by UN Secretary General Ban Ki-moon in his keynote address to the Korea Leaders Summit 2015, convened by the UN Global Compact Network Korea, "*if you really want to see dynamic growth, put more women in charge.*" We echo the importance of businesses taking gender equality seriously and we consider that the South Korean economy and society has much to gain from a more balanced approach to gender representation at senior levels of all companies, large and small, and SOEs.

The State as an economic actor

Guiding Principle 4 provides that States should take "additional" steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, as well as by other entities such as export credit agencies that are seen as being closely associated with the State.

The Republic of Korea has more than 40 SOEs that perform important roles in the economy. We note that mechanisms are already in place through which the Government can oversee and promote ethical business practice amongst SOEs. However, more needs to be done to raise awareness about what is expected of these companies in terms of human rights due diligence in line with the UN Guiding Principles.

The Korean National Pension Fund (NPF) is the third largest pension fund in the world with a fund reserve of 524 trillion KRW. The NPF is a signatory to the UN Principles on Responsible Investment which means that it should incorporate environmental, social, and corporate governance (ESG) issues into investment analysis and decision-making processes, and seek appropriate disclosure on ESG issues by the entities in which it invests. We encourage the Government (in particular through the Ministry of Health and Welfare which has oversight of the NPF) to provide guidance with regard to the expectation that the NPF should apply a human rights due diligence approach across its investments.

The Export-Import Bank of Korea (Eximbank) as executor of the Korea Economic Development Co-operation Fund, conducts appraisals of loan requests, conclusion of loan agreements, disbursement of loans, and evaluates economic aid projects in developing countries. We heard reports of an absence of human rights safeguards and human rights impacts of projects for which loans have been made. We

encourage the Eximbank to develop environmental and social safeguards in line with international human rights standards through a transparent and consultative process.

We were pleased to hear that the Korea Exchange joined the Sustainable Stock Exchanges Initiative last year. The Korea Exchange uses the Dow Jones Sustainability Index Korea. RobecoSAM, along with the Korea Productivity Center, evaluates non-financial elements of 200 companies listed on the Korean Exchange. Since April 2016, the questionnaire sent to companies includes specific questions on human rights due diligence explicitly based on the UN Guiding Principles on Business and Human Rights.

Public procurement is handled by the Public Procurement Service. We learned that on 27 January 2016 the Partial Revision of Government Procurement Act was passed which enables the head of the Public Procurement Service to reflect social and environmental values, such as the environment, human rights, labour, fair trade, and consumer protection, in the procurement process in order to promote corporate social responsibility. However, there is no mandatory requirement for human rights and associated values to be considered as part of a procurement process. In order to entrench human rights in public procurement bidding processes, and promote policy coherence, we urge the Government to provide criteria for the evaluation of non-financial factors, and take steps to legally require disclosure of human rights and social and environmental factors during public procurement bidding processes so that performance in relation to those factors, and not just cost, determine which bidder wins the contract.

Access to remedy

We consider that the OECD National Contact Point (NCP) can play an important role in addressing cases of business-related human rights abuse in the operations of South Korean companies outside the country. As the Guiding Principles are incorporated into the OECD Guidelines for Multinational Enterprises chapter on human rights, the NCP also serves as a grievance mechanism for the Guiding Principles.

While the NCP has been subject to some recent positive reform, such as including in its work independent experts, and the Ministry for Environment and the Ministry of Employment and Labor, further progress, on the basis of international good practice, is needed. It is crucial that the NCP be both impartial, and perceived as such. The composition and location of the NCP needs to retain the confidence of all stakeholders, including civil society and trade unions. As per theCommentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, it is good practice for NCPs to “establish multi-stakeholder advisory or oversight bodies to assist NCPs in their tasks” and we suggest that setting up a multi-stakeholder advisory group would be useful for the NCP and would enable it to seriously engage with critical voices.

Under South Korean civil and criminal law, companies can be held liable for human rights abuse, including in cases of human rights abuse committed by a South Korean company abroad. To date, no company has been tried or found liable under civil law before national courts for human rights abuse related to its operations abroad. However, one such case has now been brought before Seoul Central District Court. A South Korean law firm, with the support of the Clinical Legal Education Center (CLEC) of Korea University School of Law, is representing 20 persons in a claim for compensation related to the purchase of land by POSCO Daewoo Corporation in 2010 for its activities in Myanmar. We look forward to the outcome of this case.

We consider that training about the Guiding Principles for the judiciary is essential to sensitise the judiciary and advance progress on the use of the Guiding Principles in cases concerning South Korean companies in the South Korean courts.

While operational grievance mechanisms are not meant to substitute for judicial mechanisms, in cases of serious human rights abuse, they can play an important role in providing access to remedy for individuals or communities who are adversely affected by a business enterprise. Similarly, they can provide a vital means for a company to become aware of matters within its business that it would otherwise not know about. Improved and enhanced grievance mechanisms need to be run by all companies operating in the country, and also by all South Korean companies operating overseas. This includes facilitating whistle-blower programmes, and developing a complaints handling process that is open to everyone involved, including workers in a companies' supply chain.

We recognise the important work undertaken on business and human rights issues by the NHRCK and consider that the mandate of the NHRCK could be usefully expanded to enable it to consider all business related human rights harms caused by private enterprises, not just issues relating to discrimination, as is currently the case.

National Action Plan

We see a need for improved coordination and dialogue on business and human rights issues. There is a need to improve coordination amongst Government agencies and to allow for multi-stakeholder dialogue, involving Government, business and civil society which would enable the voices of the most vulnerable to be heard. The development of a National Action Plan on business and human rights based on the Guiding Principles is an opportunity to strengthen coordination and policy coherence. As the Government considers the recommendation due to be made by the NHRCK to undertake a NAP, we would like to stress the importance of involving in the NAP process the agencies that deal directly with the public sector and private businesses. We encourage the Government to use the NAP guidance prepared by the Working Group. As the guidance document underlines, NAPs "need to be developed in inclusive and transparent processes. Interested stakeholders need to be allowed to participate in the development, and update, of the NAP and their views need to be taken into account. Information needs to be shared transparently at all stages of the process".

Closing

We have been encouraged to see that there is a political commitment to improve the situation with regard to business and human rights issues, and that many Government institutions and some businesses share this commitment. However, the implementation of the Guiding Principles has been limited to date and more needs to be done, both by the Government and businesses, private and public, to strengthen the protection against business-related human rights abuse at home and abroad.

All companies need to do human rights due diligence concerning their operations, including in relation to subsidiaries and suppliers overseas, so as to be able to both "know and show" that they are aware of the risks of adverse human rights impacts. Effective stakeholder engagement, especially with marginalised workers and members of affected communities, is vital. Steps must be taken to give victims of adverse business-related human rights impacts access to remedy and existing mechanisms, such as the NCP, should be strengthened. Justice delayed is justice denied and it is not acceptable for victims to have to wait for years for compensation to which they are entitled, either from companies or the

Government. It is imperative that proper health and safety standards are adhered to and effectively enforced. Similarly, when things go wrong, it must be made easier for workers to claim the occupational insurance to which they are entitled and companies need to take responsibility for adverse human rights impacts in their supply chains.

While the Working Group has ended its visit, we will continue to collect information over the coming months as we write our report to be presented to the Human Rights Council in June 2017. It will contain concrete recommendations for the Government and business enterprises, as well as other stakeholders. We hope these will be useful to efforts to protect against and address adverse impacts of business activities on human rights.

ANNEX 4

In 2016, the government attempted to move ahead with five bills, which concerned the extension of the term limit of fixed-term workers, the expansion of business categories in which labour dispatch is allowed, the reduction of the scope of the ordinary wage, the reduction of additional wages for extended working hours on weekends and holidays and requirements of a longer employment period for the entitlement of unemployment benefits from current 180 days to 270 days. These proposals violated the terms of a tripartite agreement which the Federation of Korean Trade Unions (FKTU), one of the two major labour confederations, had struck with the government. They thus declared the agreement void and began a full-scale strike. Unable to get the bills through Parliament once the FKTU went on strike, the government attempted to get much of the same things done through directives.

For example, on 28 March 2016, the government announced the *Plan for the Guidance on Improving Undue or Unreasonable Collective Agreements*, following previous Guidelines for Correcting Undue or Unreasonable Collective Agreement announced on April 15, 2015.[12] With this Plan, the government intervened in collective bargaining to revise and/or abolish provisions of collective agreements with regard to the union's right to consent to personnel and management matters (e.g. the consent of union for any changes in job of a member or executive member of the union, for any changes in one's job position including transfer, for any disciplinary action to be taken and for any business changes including M&A). It promoted this guidance on the basis that these provisions are “unreasonable” and that “unions exercise too much authority over human resources and management, making it harder for the employers to make managerial decision rapidly." Previously, the Supreme Court of Korea had acknowledged the legality of the provisions that the government is now labelling “unreasonable.”[13]

The Plan also defined as unlawful provisions of collective agreements those concerning facilities to incumbent and former union leaders and those which acknowledge the days during which the members of the negotiating committee are engaged in negotiations as working days. The government is determined to issue correction orders following a decision rendered at the National Labour Relations Commission if companies fail to comply with the revision and correction guidance on their own. In April 2016, local offices of Ministry of Employment and Labour sent out official letters entitled, “Recommendation for Autonomous Improvement of Collective Agreement” to all labour unions and companies. In this letter, they inform that the issues identified in the guidance must be corrected within 60 days from the start of the labour-management negotiations.

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[12] The ITUC, FKTU and KCTU filed a complaint with the CFA on this issue in October 2015, which was assigned Case No. 3138. The Government of Korea has yet to reply to the accusations in the complaint.

[13] 1. Union's consent for change in one's job position: "If the agreement provides that the employer shall obtain a prior consent or an approval of the labour union, or shall discuss with the union to reach an agreement before imposing a measure, then any measure taken without going through such process shall be in principle regarded as null and void." (Supreme Court Judgment No. 92-da-50263 dated July 13, 1993)

2. Union's consent for any disciplinary action: “If the employer's collective agreement stipulates that the employer shall reach an agreement with its union with regard to any measures or actions to be taken against an executive of the union, any disciplinary action taken without the consent of the union shall be in principle regarded as null and void.” (Supreme Court Judgment No. 94-da-46763 dated Mar. 28, 1995)

3. Collective agreement provisions limiting management prerogatives: “Even when a matter is part of the employer's management rights, labour and management may engage in collective bargaining at their discretion and conclude a collective agreement. The efficacy of such collective agreement is acknowledged unless it goes against compulsory laws or social order." (Supreme Court Judgment No. 20406 dated Mar. 27, 2014).

On 22 January 2016, the Ministry of Employment and Labour released the *Guidelines on Easing Regulations on Dismissal of Underperformers* and *Guidelines on Disadvantageous Changes in Employment Rules.* This reform broadens the causes for dismissal beyond the extent allowed in law, under which dismissal is allowed only in very limited circumstances, i.e. for causes for which the worker may be held liable. In addition, the Guidance provides procedures on how a dismissal of an underperformer could be deemed to be justified. Moreover, it advises that such procedures be included in the company's employment rules or collective agreements. As such, it gives an explicit direction to employers to make disadvantageous changes in employment rules and collective agreements. The government has held that the introduction of the performance-related salary and termination system does not require consent by the representative union or majority of employees at a given institution, a position which is inconsistent with Article 94 of the Labour Standards Act. In addition, the Ministry announced a system of penalties and rewards to pressure public institutions to implement the system, including promising incentive bonuses in 2017 for those institutions that introduced the system early in 2016, and a freeze in wages for all institutions who had not introduced the system by the end of the year.

Most recently, in September and October 2016, the government engaged in serious violations of freedom of association with railway workers, truck drivers and auto workers.

On 27 September, the Korean Railway Workers' Union (KRWU) and 15 union locals affiliated to the Korean Public Service and Transport Workers' Union (KPTU) began a national strike to stop the implementation of the performance-related pay and termination system. On the first day of the strike, the Ministry of Employment and Labour issued a statement declaring the KRWU's strike 'illegal'. The ILO has repeatedly called on Korea to refer such questions to an independent body, rather than to be decided by the Ministry. Subsequently, the government and the employer (Korail) proceeded to take legal action and disciplinary measures just as in previous railway strikes. As of 14 October, 19 KRWU leaders have been charged with obstruction of business and 9 of these individuals have been summoned by the police. Korail has suspended 177 unionists from their job (the first step in taking disciplinary actions) and filed a claim for damages lawsuit for KRW 14.3 billion against the KRWU. These actions are inconsistent with recommendations of the ILO Committee of Freedom of Association in relation to past rail strikes[14] and also with Korean jurisprudence.[15]

On 10 October the KPTU-Cargo Truckers' Solidarity Division (KPTU-TruckSol) began a national strike in relation to a government plan for deregulation of the trucking transport market. Before the strike started, the Ministry of Land Infrastructure and Transport and other government offices announced the following measures: cancellation of fuel subsidies for 6 months for all drivers who participate in the 'collective refusal of transport', suspension or cancellation of drivers licences for workers who participate in actions such as 'blocking traffic' or 'interfering with transport', and criminal and civil charges against unionists for 'the results of illegal collective action' (a reference to obstruction of business charges and damages suits). These measures are excessive in terms of Korean law. Suspension of fuel subsidies to drivers for not engaging in transport activities was found by the Supreme Court to be in violation of the Trucking Transport Business Act, Article 43.2 in August 2016.[16] Suspension or cancellation of drivers' licences for simply interfering with traffic or transport activities is inconsistent with Article 92.1 of the Road Traffic Act, which stipulates grounds for licence suspension or cancellation.

[14] CFA Case No. 2829, See Report No. 365 (November 2012).
[15] Supreme Court Judgement No. 2015-nu-191 (January 15, 2016); Supreme Court Judgement No. 2012-du-7547 (May 24, 2012)
[16] Supreme Court Judgement No. 2015-du-51132 (August 17, 2016).

As of 11 October the Ministry had begun procedures to suspend fuel subsidies against four drivers. Since the beginning of the strike, thousands of police have been stationed at protest areas and have used force to supress protests several times. As of 14 October, 54 drivers have been arrested (all but two have been released) and 6 injured. Despite previous ILO CFA recommendations to the government to take measures to guarantee fundamental labour rights for owner truck drivers, these workers continue to be denied the legal rights to association, collective bargaining and industrial action.[17]

With regard to the labour dispute between Hyundai Motor Company and the HMC Branch of Korean Metal Workers Union (KMWU), the government threatened to impose an 'Emergency Arbitration' when 100,000 members of the union struck after members rejected by a large margin the last proposal in wage bargaining on 28 September 2016 intending to repress any further strike action in the workplace. The ILO CFA has previously noted that the emergency arbitration provisions of the TULRAA (article 76-80) violate principle of freedom of association.18 They found that emergency arbitration can only be imposed by an independent body which has the confidence of all parties concerned and only in case in which strikes can be restricted in conformity with principle of freedom of association.

[17] CFA Case No. 2602, See Report No. 363 (March 2012).
[18] Case 1865, CFA Report No 346, June 2007, para 806(c)(iii).