

Initial Assessment of the Complaint Regarding
the OECD Guidelines for Multinational Enterprises

Complainants: Bahrain Watch, ADHRB (Americans for Democracy and Human Rights in Bahrain)

Defendant: Dae Kwang Chemical Corporation (“Dae Kwang”)

I. Background

1. Introduction

On November 27, 2013, Bahrain Watch and Americans for Democracy and Human Rights in Bahrain (hereafter ‘ADHRB’) submitted a complaint to the Korea National Contact Point (hereafter ‘Korea NCP’) stating that a South Korean company called Dae Kwang Chemical Corporation (hereafter ‘Dae Kwang’) violated the OECD Guidelines for Multinational Enterprises (hereafter ‘OECD Guidelines’) by exporting tear gas to the Government of the Kingdom of Bahrain (hereafter ‘Bahrain’).

According to the evidence (reports from The Bahrain Independent Commission of Inquiry and some other prominent human rights groups) and reported news, many demonstrations took place in Bahrain in February of 2011 after the ‘Arab Spring’, and the government of Bahrain has been suppressing such protests. A significant amount of tear gas was used to suppress the protests and many people died or suffered injuries in the process.

In particular, government security forces and police officers did not use the tear gas in a proper manner, but fired tear gas against civilians where excessive amounts of tear gas filled small, enclosed spaces such as homes, work place, funerals and mosques where religious rituals were taking place. This resulted in many deaths and serious injuries.

The tear gas that has been used in Bahrain since 2011 is the same product manufactured by Dae Kwang, and according to the official reply from the Korean National Police Agency ('KNPA') to Amnesty International Korea, Dae Kwang exported 225,000 canisters (150,000 DK-38S canisters, 75,000 rubber bullets) in 2011, and 1,321,680 canisters (1,099,680 DK-38S canisters, 25,000 KP-5 canisters, 25,000 DK-3 canisters, 172,000 rubber bullets) in 2012. (A total of 1,546,680 canisters were exported to Bahrain in 2 years)

In October of 2013, the Complainants requested a meeting with the South Korean embassy in London regarding the export of the tear gas, created the website, www.stoptheshipment.org, and sent over 187,000 emails to Ministry of Foreign Affairs ('MOFA'), the Korean Ministry of Science, ICT, and Future Planning, the DAPA and the Defendant. Also, in November of 2013, Lord Eric Avebury, Vice-Chair for the Parliamentary Human Rights Groups for the House of Lords of the United Kingdom, wrote to the President of the Republic of Korea urging her to take executive action to stop Daekwang's shipment of tear gas to Bahrain. Despite such numerous attempts, no response has been received by Complainants.

For these reasons, the Complainants, Bahrain Watch and ADHRB, have requested the Korea NCP to prevent Defendant from exporting all tear gas products (whether direct or through a third party) to Bahrain as it violates the OECD Guidelines since the use of the Defendant's tear gas by the government of Bahrain violates human rights.

2. Parties

1) Complainant

- Bahrain Watch is an independent research and advocacy organization that seeks to promote effective, transparent and accountable governance in Bahrain. The group focuses on research and advocacy on all forms of governance in Bahrain, including political reforms, economic development, and cyber security.
- ADHRB(Americans for Democracy and Human Rights in Bahrain) is a non-profit organization based in the United States of America. It is organized by Husain Abdulla, a Bahraini national and naturalized United States citizen who was stripped of his Bahraini citizenship by the Bahrain government after advocating for democratic reforms in the country.

2) Defendant

- Dae Kwang Chemical Corporation is a South Korean private corporation located in Gimhae,

Gyeongsangnamdo, established in 2001. It manufactures mainly tear gas for the use of dispersing protesters, but it also manufactures fireworks for stages, smokescreens for daytime events and flash bang grenades.

II. Complaint and Defendant's Answer

1. Complaint (November 27, 2013)

- The Defendant violated the OECD Guidelines as it is not seeking ways to prevent or mitigate adverse human rights impacts associated with its products, when so many civilians are being killed or injured by government's excessive and disproportionate use of tear gas.

- It is clear that the Defendant's shipment of tear gas to Bahrain was used in instances of human rights violations. Furthermore, future shipments of tear gas also pose a grave danger like the previous shipment, and should be banned in order to comply with the international law and the OECD Guidelines.

It is clear that any previous shipment of tear gas to Bahrain are highly likely to have been used in breach of the above human rights standards. As such, any contemplated future shipment also carries a grave risk of similar deployment and must therefore be prohibited under international law and in compliance with the OECD Guidelines. The Claimants thus ask the Ombudsman to require the Defendant to completely cease all exports of tear gas to Bahrain. The Claimants requested an immediate investigation into the practices of Dae

Kwang which have breached international human rights law and the OECD Guidelines, and that all exports be ceased pending the outcome of this investigation.

※Articles of OECD Guidelines that are purported to be violated

II. General Policies

Respect the internationally recognized human rights of those affected by their activities. (Complaint para. 43)

Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur. (Complaint para. 71)

IV. Human Rights

Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. (Complaint para. 71)

Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. (Complaint para. 6, 45)

Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts. (Complaint para. 69, 70)

2. Defendant's Answer to the Complaint (December 17, 2013)

- According to Chapter 1, Article 2(a) of the Rules for the Operation of the NCP for implementation of the OECD Guidelines “multinational enterprise” is defined as companies or corporate entities established in two or more countries and so linked that they may coordinate their operations in various ways, and Dae Kwang is a purely domestic company without any factories or offices in a foreign country and does not fall within the definition of multinational enterprises as stated in the OECD Guidelines; therefore, Dae Kwang is unrelated to the Complaint.

- The export of tear gas to Bahrain is a legitimate shipment based on a contract that was legitimately concluded through a trader, in accordance with the Bahraini government's international bid and WTO Free Trade regulations; it was a supply of products that met international standards, not lethal weapons. Furthermore, it is internationally certified that tear gas canisters are not lethal weapons and is commonly used to disperse protests in developed countries as well; they are not products that cause the loss of lives, and this can be sufficiently proven through experiments.

- If the loss of lives occurred during the suppression of protests in Bahrain, a complaint should have been filed with the authorities responsible for the suppression. However, Claimants have condemned a foreign company and interfered with the normal business activities of a company that legitimately supplied its products; therefore, Defendant must point out that there is a problem due to the misunderstanding of some groups.

3. Additional Submission by Complainant (January 10, 2014)

1) Regarding the statement by Dae Kwang that it is not a Multinational Enterprise

- The statement by Defendant that the OECD Guidelines are limited to multinational enterprises must be rejected. Paragraphs 4 and 6 of the 'Concepts and Principles' stipulates that the Guidelines apply to both multinational and domestic enterprises when necessary, regardless of the size of the company.

※ Concepts and Principles of the OECD Guidelines for Multinational Enterprises

Paragraph 4

A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. (Omitted)

Paragraph 5

The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.

Paragraph 6

Governments wish to encourage the widest possible observance of the *Guidelines*. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, governments adhering to the *Guidelines* nevertheless encourage them to observe the *Guidelines*' recommendations to the fullest extent possible.

- Also, if a company is able to export large quantities of products directly or through an agent, or has significant business relations overseas such as foreign investment, joint ventures or foreigner-invested company, it sufficiently falls within the definition of multinational enterprise.

2) Regarding the statement that the tear gas canisters were legitimately exported according to Korean law

- The Complaint does not raise the issue of whether the proposed tear gas export is in accordance with Korean Law, but that the export violates human rights and therefore, violates the OECD Guidelines. Further, a defendant does not need to violate domestic law to violate OECD Guidelines. Dae Kwang's statement that it falls outside the consideration of the NCP because the export is in accordance with Korean Law should be rejected.

3) Statement that human rights violations occurred due to 'unexpected accidents'

- The complainants have provided sufficient evidence in their complaint that human rights abuses have been conducted systematically and in a targeted manner using products either manufactured by the Defendant or similar to those manufactured by the Defendant. Complainants oppose exports of tear gas because the product has been used in an unlawful manner by Bahrain authorities to target civilians. Both the United States and the United Kingdom have previously suspended shipments of tear gas to Bahrain because of its disproportionate and improper use by security forces.

4) Statement that tear gas products are not lethal weapons

- The Complainants have provided 39 instances of death linked to tear gas in Bahrain both through inhalation and through direct body shots; therefore, Defendant's statement that tear gas products are not lethal weapons is groundless.

4. Additional Submission by Defendant (January 24, 2014)

- It is arbitrary to broadly interpret the OECD Guidelines to mean that it applies to both multinational and domestic enterprises. Rather, the Complainants disclosed inaccurate information prior to obtaining the permission or confirmation from Dae Kwang, and as a result Dae Kwang is suffering significant harm such as damaged image, suspension of export, etc.
- Tear gas is most often used to peacefully disperse protests all over the world, and this case should be resolved through the proper use of the products and through safety education by the government of Bahrain. If the use of tear gas is not possible, a greater harm is feared as it would lead to the use of lethal weapons instead.

III . Complaint proceedings

- 7 November: Complainants filed the complaint with Korea NCP through Amnesty

International Korea.

- 10 December: Korea NCP Secretariat sent complaint to Defendant, Dae Kwang
- 8 December: Defendant submitted its Answer to Korea NCP, and the Secretariat forwarded the Answer to Complainants on 31 December, 2013

- 10 January, 2014: Complainants presented additional written submission.
- 27 January 2014: Defendant presented additional written submission.

IV. Decision of NCP

The Commentary on the Implementation Procedures of the OECD Guidelines for Multilateral Enterprises stipulates that when the NCP conducts the initial assessment to determine whether the pending issue is entitled to a thorough evaluation it must determine whether the pending issue is bona fide and whether it is related to the implementation of the OECD Guidelines. Korea NCP considered the following points in such context.

1. Identity of the Parties and the stakes regarding the dispute

- Complainants, Bahrain Watch and ADHRB, are independent non-profit organizations that seek to promote effective, transparent and accountable governance in Bahrain.

Defendant, Dae Kwang, is a Korean company that manufactures tear gas products that were used in Bahrain, and it is clear that it is related to this case.

2. Importance and Authentication of pending dispute

- The human rights violation occurring in Bahrain is an important issue as there is a separate section on human rights in Paragraph 4 of the OECD Guidelines, and the evidence submitted by the Complainants support its statements.

3. Correlation between the Business Activity and the Reported Dispute

- Complainants state that there is a correlation between the manufacture and export of Dae Kwang's tear gas products and the human violations occurring in Bahrain. Also, Complainants state the OECD Guidelines should be applied to Dae Kwang because paragraph 5 of Chapter 1 (Concept and Principles) of the OECD Guidelines require that the same standard be applied to both multinational and domestic enterprises.
- This paragraph stipulates that each country should apply the same standard to both multinational and domestic enterprises within the territory of the country. Furthermore, it means that the government of Bahrain should treat both multinational companies and domestic companies within the territory of Bahrain in an indiscriminate manner. Dae Kwang is not a domestic company that is active in Bahrain. It is a domestic company of South Korea that is active within the territory of South Korea. Therefore, Dae Kwang is not a 'domestic enterprise' as stated in Chapter 1, paragraph 5 of the OECD Guidelines. Also, Dae Kwang does not operate any subsidiary company or branch within the territory of Bahrain, and is not a multinational enterprise. Therefore, since the OECD Guidelines cannot apply to Dae Kwang, there is no correlation between the activities of Defendant and the dispute.

4. Applicability of Legal Precedent, Applicable law and Procedure

- Although the OECD Guidelines do not define ‘human rights’, it is possible to refer to internationally recognized human rights law and international conventions of the UN, such as the Universal Declaration of Human Rights (UDHR), the International Covenant for Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

- With regard to the export of tear gas products, Article 9 of the Korean law on ‘Act on the Control of Firearms, Swords, Explosives, etc.’ can be applied, and according to a related court decision, 96Nu3036, the certification and authorization required under this law is merely a removal of a general prohibition so when an applicant fulfills the requirement of the law, authorization must be granted. Authorization cannot be denied for grounds that are beyond the grounds of restrictions set by the law.

- However, with regard to ‘applicable law’, the legal nature of the OECD standards must be reviewed. The legal nature of the OECD Guidelines encourages the voluntary observance, and therefore, such obligations cannot be forced upon. Further, caution should be taken not to interpret the Guidelines in the same way one would interpret certain provisions of international treaties or conventions.

5. Whether detailed review will further the Utility and Purpose of the OECD Guidelines

- Although there is no international convention that offers a decisive definition of multinational enterprises, but general principles of international law define multinational enterprise as an international company running business operations in multiple countries. The correct interpretation would mean a company that conducts business by maintaining manufacturing or sales facilities in multiple countries outside the territory of its country of origin.
- According to an official UN document, multinational enterprise is defined as ‘an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively’. Therefore, it is difficult to say that all companies manufacturing a product in its country of origin and simply exporting the goods overseas are multinational enterprises.
- The current OECD Guidelines also do not offer a detailed definition of multinational enterprise and only offer basic requirements, as stated in the text below.

A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership maybe private, State or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities

- It can be seen that the OECD text above requires that multinational enterprises, in principle, should be ‘companies existing in multiple countries that are mutually connected through ownership or stakes in the company’. Although it does not offer a specific standard found in domestic law, the text above infers that the OECD Guidelines apply where the company must fulfill the minimum requirement of simultaneously conducting manufacturing or sales operations in multiple countries outside the border of its country of origin.

In the case of Dae Kwang, overseas activity (activities of sales or manufacturing in Bahrain) by Dae Kwang is required at least, but no such activity is conducted by this company.

- Also, when Chapter 1, paragraph 5 of the OECD Guidelines state that multinational and domestic enterprises are subject to the same expectations in respect of their conduct, it is referring to the equal treatment of such enterprises within its own territory by the government of Bahrain. Dae Kwang is a domestic company of Korea that only operates its

business within the territory of Korea and therefore the OECD Guidelines do not apply to Dae Kwang.

- Therefore, it is difficult to conclude that a detailed review of the matter will further the purpose and utility of the OECD Guidelines that aims to promote the harmony between multinational enterprises and the host countries and promote the contribution of multinational enterprises to sustainable development.

V . Conclusion

- The Defendant, Dae Kwang, is not a multinational enterprise as defined by the OECD Guidelines no matter what standard is applied. It does not conduct any business operations overseas and cannot be judged as a multinational enterprise simply because it exports its products to another country when it does not have a single office or branch overseas. Furthermore, Dae Kwang is not a 'domestic company' operating within the territory of Bahrain as defined in Chapter 1, paragraph 5 of the OECD Guidelines. As such, the OECD Guidelines cannot be applied to the Defendant, and therefore, Korea NCP does not find it appropriate to continue with additional procedures.