

## **Initial Assessment of the Korean NCP for the OECD Guidelines for Multinational Enterprises**

### **Complaint from the Jalaur River for the People’s Movement, the People's Solidarity for Participatory Democracy and the Korean Transnational Corporations Watch regarding the Jalaur River Multi-Purpose Project II**

**January 18, 2019**

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#### **1. Introduction**

The OECD Guidelines for Multilateral Enterprises (hereinafter, “the Guidelines”) are a set of recommendations aimed at minimizing adverse impacts from the activities of multinational enterprises and strengthening the responsible conduct of their business.

To ensure the effectiveness of the Guidelines, the government of the Republic of Korea established the Korean National Contact Point (KNCP) to promote the Guidelines and deal with issues concerning their implementation in specific instances.

#### **2. Substance of the Specific Instance**

On October 24, 2018, the Jalaur River for the People’s Movement, the People's Solidarity for Participatory Democracy and the Korean Transnational Corporations Watch (hereinafter, “complainants”) submitted a Specific Instance with the KNCP regarding the Jalaur River Multi-Purpose Project against the Export-Import Bank of Korea (hereinafter “KEXIM”) and Daewoo Engineering and Construction Co., Ltd. (hereinafter “Daewoo E&C”) (collectively referred to as “Respondents”).

KEXIM and Daewoo E&C submitted their written responses to the KNCP on November 22, 2018, and the KNCP forwarded them to the complainants. Additional documents were submitted by the complainants on December 13, 2018, and the KNCP forwarded them to KEXIM and Daewoo E&C. Both Daewoo E&C and KEXIM responded with additional comments on December 9, 2018, and on January 9, 2019, respectively.

Meanwhile, the KNCP held separate meetings in person and interviews on December 19, 2018, and January 9, 2019, with the complainants who raised the issues and the two respondents.

< Compliant >

- The respondents were aware that the Philippine government violated the rights of indigenous people to their cultural heritage and did not observe a ‘Free, Prior and Informed Consent’ process. Nevertheless, the respondents did not pursue consultations or communication with the people who opposed the project.  
(Guideline Chapter II. General Policy A. 1, 2, 3, 5, 10, 11, 14, B. 2)
- Even though the risk of a potential earthquake is continuously being raised in the area planned for the construction of the dam, the respondents have not carried out a dialogue or a process of consultation with the local indigenous people.  
(Guideline VI. Environment 1. a, 1. c, 2. b)
- The respondents knew that the human rights of the indigenous people were being violated due to the Philippine government's lack of efforts to mitigate the risk of a potential earthquake, an involuntary resettlement plan, inadequate compensation for farmland and cemeteries and the violation of a Free, Prior and Informed Consent process, yet still willingly proceeded with this project.  
(Guideline IV. Human Right 1~6)

< Response from KEXIM >

- In accordance with the 2016 Annual Report on the Guidelines and the OECD Ex-Ante Guidance, the project in this specific instance does not fall under the Guidelines given that it is a state affair and is non-commercial in nature.
- The Philippine Court of Appeals ruled that a Free, Prior and Informed Consent process and the earthquake-resistant design have been observed, and the Philippine government devised measures to compensate the indigenous people.
- KEXIM advised the Philippine government to set up and supplemented measures to mitigate the environmental and social impacts. The Philippine government (National Irrigation Administration) made public related activities and documents available on its website and held various public hearings and briefings for the indigenous people.

< Response from Daewoo E&C >

- Daewoo E&C does not qualify as a party to this specific instance because the issues were raised prior to its signing of a contract with the Philippine government.

### 3. KNCP's Initial Assessment

The Guidelines state that *"In making an initial assessment ... the NCP will take into account:*

- *the identity of the party concerned and its interest in the matter.*
- *whether the issue is material and substantiated.*
- *whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.*
- *the relevance of applicable law and procedures, including court rulings.*
- *how similar issues have been, or are being, treated in other domestic or international proceedings.*
- *whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.*

Accordingly, the KNCP considered these factors based on the meetings with the parties and their submitted materials.

- 1) The identity of the party concerned and its interest in the matter

One of the complainants, the Jalaur River for the People's Movement (JRPM) is an NGO composed of residents of the lower Jalaur River in the Philippines. The People's Solidarity for Participatory Democracy (PSPD) and the Korean Transnational Corporations Watch (KTNC WATCH) are NGOs that monitor and check government agencies and businesses related to the environment, labor, and so on. In light of the above, these three NGOs have a direct interest in this specific instance.

KEXIM operates overseas subsidiaries in the United Kingdom, Indonesia and Vietnam and has 22 overseas representative offices in 20 countries. It is a public corporation that was established to enhance economic cooperation with foreign countries through the provision of financial support for export and import transactions, overseas investments projects and the development of overseas natural resources. KEXIM has a direct interest in this specific instance as it has provided public loans to the project concerned.

Daewoo E&C is a multinational enterprise with overseas subsidiaries and branches in China, Vietnam and the United States. Daewoo E&C has been granted the status of a constructor for this project since its conclusion of the contract in September 2018. However, as the issue in the submission came into existence before the contract, Daewoo E&C is not considered to be a concerned party in this specific

instance.

2) Whether the issue is material and substantiated

The complainants alleged that the respondents violated provisions of Chapter II General Policy, Chapter IV Human Rights and Chapter VI Environment of the Guidelines and submitted relevant evidence. Given that the respondents have responded to these allegations, the issue is considered to be material and substantiated.

3) Whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance

As the project concerned was able to be carried out due to a loan provided by KEXIM, there is a link between the enterprise's activities and the issues raised in the submission.

The complainants claimed that Daewoo E&C violated the Guidelines with regard to the issue prior to its participation in the project concerned. However, Daewoo E&C was not in a position to affect the problems that occurred before the conclusion of the construction contract. In this regard, there seems to be no link between the enterprise's activities and the issues raised by complaints.

4) The relevance of applicable law and procedures, including court rulings

Applicable laws and instruments to this specific instance include the Philippine 'Indigenous Peoples Rights Act', the 'UN Guiding Principles for Business and Human Rights' and the 'UN Declaration on the Rights of Indigenous Peoples'. Korea's Economic Development Cooperation Fund Act and guidelines on environmental impacts under the OECD Development Assistance Committee (DAC) are applicable to the Official Development Assistance (ODA) agency of Korea.

There has been a relevant ruling by the Philippine court, which is described below.

5) How similar issues have been, or are being, treated in other domestic or international proceedings.

Prior to submission of the complaint, a relevant ruling was made by the Philippine Court of Appeals regarding the project concerned. The Philippine Court ruled that the 'free, prior and informed consent' procedures were conducted for the indigenous people in accordance with the Indigenous Peoples Rights Act and found that a Filipino geologist's argument cited by the complainant regarding the risk of a potential earthquake was insufficient.

With regard to the scope and criteria for the applicability of the Guidelines to the respondent, the Swiss NCP stated that it should be established in a case-by-case analysis based on the commercial activities, independently of the legal form or business content of the entity. In practice, the Swiss NCP considered whether the activities of FIFA in specific instances in 2016 and 2017 were of a commercial nature or not for the purposes of the application of the Guidelines.

The Finnish NCP stated that the Guidelines were not applicable to a state's export guarantees, which are regulated nationally by special legislation and for which special arrangements exist within the OECD. The Dutch NCP found that the ADSB, a subsidiary of a multinational insurance enterprise, provided export credit insurance according to an agreement signed with the Dutch State, but that such an agreement did not preclude the Guideline's applicability to the ADSB.

6) Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

- Whether the Guidelines are applicable to KEXIM

The Guidelines do not provide a precise definition of the term "multinational enterprises". However, as stated in the 2016 Annual Report on the Guidelines, such a term should be considered on a case-by-case basis and several NCPs have examined the nature of the entity and its commercial activities in practice for the purposes of the application of the Guidelines.

The project funded by KEXIM is not an investment activity but a public project promoted by the Philippine government. As it is classified as a non-commercial project under the OECD Ex-Ante Guidance, such a concessional loan provision for the project is not considered to be an international investment or a commercial activity.

Therefore, as the Guidelines are not applicable to KEXIM, it is not appropriate to examine this specific issue with regard to KEXIM in light of the purposes of the Guidelines.

- Whether the consideration of the specific issue would contribute to the effectiveness of the Guidelines

The role of the KNCP is to contribute to the purposes and effectiveness of the Guidelines by offering a forum for discussions and assisting the parties concerned to address the issues raised in order to find solutions.

This project is a governmental project carried out by the Philippine government, and the business decisions in relation to the project are not up to the respondents but to the Philippine government. It is therefore not appropriate to hold the respondents ultimately responsible for violating the Guidelines in this specific instance.

Prior to this specific instance, the Philippine Court of Appeal confirmed that the project concerned was legitimately conducted by the Philippine government. Accordingly, the complainants lost the basis for their argument that the government's administrative actions were unlawful. In this respect, the KNCP makes it clear that the NCP is not a court and that the NCP may not review or interfere with the final decisions of other government agencies.

It is therefore unlikely that further examination of this specific instance would contribute to the purposes and effectiveness of the Guidelines which are aimed at harmonizing business activities with the government policies of the host country and enhancing the contribution of multinational enterprises to sustainable development.

#### **4. Conclusion**

In this specific instance, the complainants claimed that the respondents failed to observe the Guidelines under the assumption that the Philippine government's administrative actions were unlawful. However, government actions do not fall within the scope of the Guidelines and thus it is not appropriate to examine the alleged non-observance of the Guidelines as raised by the complainants.

The applicability of the Guidelines may depend on the nature of KEXIM's functions. The Guidelines may not be applicable to KEXIM as a loan provider to developing countries, but applicable to KEXIM as an export credit agency of a commercial nature. Regardless of whether or not the Guidelines are applicable, KEXIM continues to monitor compliance with the laws and regulations of the Philippines and international instruments by hiring experts on environmental and social impacts. In this respect, there is no need for the KNCP to offer good offices such as mediation.

Daewoo E&C is not considered to be a party in this specific instance because the issues in the submission were raised prior to its signing of a contract with the Philippine government. However, Daewoo E&c does have an interest in the future once it takes the role of a constructor under the contract. Daewoo E&C should thus endeavor to prevent or mitigate potential adverse impacts arising from the project concerned. For this purpose, the KNCP recommends that Daewoo E&C continuously monitor the situation and respond actively to any potential issues through dialogue and cooperation with relevant parties such as the Philippine government, NGOs and local communities.

Based on meetings with the parties and the submitted materials, the KNCP is of the view that the issues raised do not merit further consideration. The KNCP thus considers this specific instance to be closed.

Korean National Contact Point  
for the OECD Guidelines for Multinational Enterprises