

"ETIENNE LACROIX – ALSETEX IN BAHRAIN" – SPECIFIC INSTANCE

4 July 2016

Report from the French National Contact Point

The French NCP encourages Alsetex to expand and finalise its responsible business conduct policy

On 19 August 2015, the French National Contact Point (NCP) for the implementation of the OECD Guidelines for Multinational Enterprises received a specific instance referral from Americans for Democracy & Human Rights in Bahrain, an American NGO, concerning the export of security products to Bahrain by Alsetex, a French enterprise in the Etienne Lacroix Group. These products might have been used in 2011 during the crackdown on the Pearl Uprising, when the disproportionate use of tear gas was widely documented, and then again in February 2015 and February 2016.

States have the duty to protect human rights. Exports of these security products are strictly regulated by the EU and by France, which banned the export of tear gas to Bahrain in February 2011. In the process of its good offices, the NCP noted that Alsetex had complied with French export regulations and took certain due diligence measures with respect to its customers. At the end of its examination, the NCP found that Alsetex had not committed human rights violations in Bahrain. The NCP noted that Alsetex had put due diligence measures in place in a bid to identify, prevent and mitigate the risks associated with its products, but that it did not yet have a human rights policy, which is particularly important given its area of activity.

The May 2011 OECD Guidelines cited in the referral

Chapter II. General Policies: *Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.*

A. In this regard, enterprises should:

7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Chapter IV. Human Rights: *States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:*

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

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

3. 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.

4. Have a policy commitment to respect human rights.

5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

6. 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.

1. Overview of the referral

Americans for Democracy & Human Rights in Bahrain (ADHRB) is an American NGO, specialising in legal matters, that fosters awareness of and support for democracy and human rights in Bahrain and the Middle East. It is active in the international bodies of the United Nations, both in the US and in the Middle East. The referral is based on the May 2011 Guidelines. These do not apply to prior events, particularly to the period of February–March 2011, which is at the core of the referral.

The referral concerns human rights violations caused by the disproportionate use of tear gas by Bahraini security forces during the country's Pearl Uprising in February 2011. It relies on published reports¹ that have established that the use of tear gas during the protests led to the death of a number of individuals, children included, and to many injuries. According to ADHRB, products produced by Alsetex were used between 2011 and 2013. Based on some photographic evidence and an article that was published online in February 2015, ADHRB states that Alsetex products reappeared in February 2015 and February 2016. ADHRB questions Alsetex's respect for human rights and its due diligence as regards the export of its products to Bahrain and the risk that they will be re-exported by other business relationships to Bahrain. They also point out the company's lack of a human rights policy. ADHRB is requesting mediation from the NCP in order to put an end to exports to Bahrain, to ensure that the enterprise publishes or drafts a human rights policy, that it publishes or includes human rights due diligence in its dealings and that the Group, by establishing or collaborating with legitimate processes, remedies the adverse impacts that it may have caused or contributed to.

2. Procedure followed by the French National Contact Point

The NCP carries out the initial assessment of a referral within three months after having acknowledged receipt. If the assessment is positive, the NCP will analyse the referral and offer its good offices to the parties. It strives to complete its examination within twelve months of receipt of the referral (cf. Article 31 of the NCP Bylaws).

Admissibility and initial assessment: the NCP acknowledged receipt of the referral on 7 September 2015 and noted its formal admissibility. It finalised the initial assessment on 24 September 2015 and accepted the referral. It offered its good offices to the parties, which accepted them. The NCP then issued a statement announcing the admissibility of the referral on 5 November 2015, having previously sent it to the parties. The statement was published on 16 November 2015.

 **Statement on the admissibility and initial assessment of the referral²**

Analysis and good offices (November 2015 and April 2016): the NCP interviewed senior representatives from Alsetex and the Lacroix Group on 27 November 2015, and on 12 January 2016 it organised a videoconference in English from the Economic Department at the French Embassy in Washington. Given the confidential nature of the sector in question, the NCP asked ADHRB to sign a non-disclosure agreement. After this contact with the parties, the NCP offered mediation to discuss the enterprise's due diligence, which Alsetex refused.

Closure of the referral: the NCP Bylaws state that, "The NCP shall take care to avoid all interference with any judicial or administrative procedures underway in France and concerning the matters under review. If a referral is also the subject of a judicial or administrative procedure, the NCP shall pursue its examination only if its intervention provides real added value relative to those other procedures, arising in particular from the international dimension of the case" (Article 30). The NCP closed the referral in April 2016. On 22 June 2016, it adopted a draft statement by consensus, with the exception of one trade union organisation. The draft was then examined by both parties, who gave their consent, leading to the publication of a Report by the NCP³. The Report was adopted by the NCP on 4 July 2016 by consensus, with the exception of one trade union organisation, and then sent to the parties prior to publication.

¹ Bahrain Center for Human Rights BCHR, Human Rights Watch Bahrain, Report of the Bahrain Independent Commission of Inquiry, Bahrain Institute for Rights & Democracy BIRD, ADHRB, Physicians for Human Rights

² <http://www.tresor.economie.gouv.fr/File/418647> (FR) & <http://www.tresor.economie.gouv.fr/File/427519> (ENG)

³ Article 35 of the NCP Bylaws: At the conclusion of the consultation procedure, the NCP shall issue: a report, when parties have reached agreement on the issues raised. The report should at a minimum describe the issues raised, the procedures the NCP initiated in assisting the parties and when an agreement was reached.

Coordination of the NCPs: Three NCPs received similar referrals concerning Bahrain – South Korea (2013⁴), the UK (2013 and 2014⁵) and Brazil (2016⁶). The NCP held talks with the British and Brazilian NCPs, as well as with the OECD Secretariat.

3. Decision by the French National Contact Point

The NCP forged a constructive dialogue with both parties, during which the enterprise was fully cooperative and responded to the complainant's allegations. During its analysis, the NCP took into consideration the existence of the extremely strict procedures governing the sector in question, and responded to the various issues raised in the referral.

- **Administrative procedures governing the exports discussed in the referral**

The Council Common Position 2008/944/CFSP of 8 December 2008 defines common rules governing control of exports of military technology and equipment by EU Member States, based on a Common Military List of the European Union, which includes some types of tear gas, technically referred to as "riot control agents"⁷. Export authorisations are issued by Member States on the basis of eight criteria. These include respect for human rights in the country of final destination as well as respect by that country of international humanitarian law (criterion two), internal situation in the country of final destination (criterion three), preservation of regional peace, security and stability (criterion four) and the existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions (criterion seven)⁸. These criteria are also applicable to dual-use goods and technologies listed in Annex I of Council Regulation (EC) No 1334/2000 "where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country"⁹.

Council Regulation (EC) No 428/2009 of 5 May 2009 updates the Community system of controlling exports of dual-use goods¹⁰. In deciding whether or not to issue an export authorisation, Member States take into consideration "all relevant considerations including (c) considerations of national foreign and security policy, including those covered by Council Common Position 2008/944/CFSP of 8 December 2008" and (d) "considerations about intended end use and the risk of diversion"¹¹. Moreover, "a Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I¹² for reasons of public security or human rights considerations"¹³.

In France, the unauthorised export or transfer of defence items as well as certain services or technologies connected with those items is prohibited. The French government issues export authorisations for military equipment, ammunition and its components¹⁴, dual-use goods¹⁵ and explosive products for military use¹⁶. The "riot control agents" fall within these three categories. Starting in July 2014, the export of some of these items to any non-EU Member State is subject to the dual-use goods regime¹⁷. France banned the export of tear gas to Bahrain on 17 February 2011. In 2011, France signed the cross-regional statement on human rights in Bahrain,

⁴ Exportation of tear gas to Bahrain (Nov. 2013) <http://mneguidelines.oecd.org/database/instances/kr0011.htm>

⁵ Formula 1 <http://mneguidelines.oecd.org/database/instances/uk0042.htm> & Gamma International UK <http://mneguidelines.oecd.org/database/instances/uk0034.htm>

⁶ ADHRB "Brazilian Government Blocks Bahraini Tear Gas Probe" <http://www.adhrb.org/2015/12/8017/>

⁷ cf. Category ML7.d of the Common Military List of the European Union, adopted on 11 March 2013.

⁸ cf. Article 2 of Council Common Position 2008/944/CFSP of 8 December 2008.

⁹ cf. Article 6 of Council Common Position 2008/944/CFSP of 8 December 2008, which refers to the list of dual-use goods appended to Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

¹⁰ Council Regulation (EC) No 394/2006 of 27 February 2006 amending and updating Council Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology and Annex I: List of Dual-Use Items and Technology

¹¹ cf. Article 12 of Council Regulation (EC) No 428/2009 of 5 May 2009

¹² cf. List of Dual-Use Items, Annex I of Council Regulation (EC) No 428/2009

¹³ cf. Article 8 of Council Regulation (EC) No 428/2009 of 5 May 2009 and Article 5 of Council Regulation (EC) No 1334/2000

¹⁴ cf. Act 2011-702 of 22 June 2011 and its implementing legislation. The scheme, which was amended in 2014, is based on the issuing of export permits (cf. <http://www.ixarm.com>).

¹⁵ Decree no. 2001-1192 and Order of 13 December 2001

¹⁶ Order of 4 October 2007 concerning the formalities applicable to the manufacture, sale, import, export and transfer of explosive products.

¹⁷ cf. Order of 31 July 2004 concerning the export of tear gas and riot control agents to non-EU countries.

which was spearheaded by Switzerland. It has subsequently been updated on a yearly basis and submitted to the UN Human Rights Council at its meetings in June 2012¹⁸, June 2014¹⁹ and September 2015²⁰.

⇒ *The government authorises the export of products listed in the referral with the context of inter-ministerial processes, in which the assessment criteria explicitly take into account considerations concerning the final use of the products and protection of human rights. The NCP notes that Alsetex was in full compliance with French regulations. It concludes that, in the instant case, the French government, as part of its authorisation process, carried out the due diligence recommended by the OECD. By complying with the government's decisions, which the NCP has no mandate to evaluate, the enterprise was, ipso facto, in compliance with the requirements of responsible business conduct vis-à-vis human rights.*

- **Human rights violations in Bahrain**

Several sources have documented human rights violations in Bahrain in connection with law enforcement operations. According to the OECD Guidelines, States have the duty to protect human rights. The 2000 Guidelines stipulate that "*enterprises should respect the human rights of persons affected by their activities, in compliance with the international obligations and commitments of the government of their host country*". Since May 2011, the OECD recommends that enterprises "*seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship*", emphasising that "*this is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship*" (Article A12, Chapter II).

Alsetex manufactures and exports "riot control agents" – non-lethal resources to maintain order. Failure to comply with their conditions for use can lead to adverse impacts with regard to the OECD Guidelines. The NCP notes that Alsetex complied with the French government's export authorisations and has respected the embargo involving Bahrain since 17 February 2011. The responsibility for the inappropriate use of tear gas rests with the local security forces; the enterprise cannot be held accountable for human rights violations resulting from disproportionate use of tear gas that it might have delivered prior to February 2011.

⇒ *States have the duty to protect human rights. It is not within the NCP's mandate to decide on actions and decisions made by government authorities. By complying with the embargo put in place in 2011, Alsetex did not contribute to human rights violations in Bahrain.*

- **Alsetex's due diligence measures with respect to the risks inherent to its products**

Since May 2011, the Guidelines recommend that enterprises carry out risk-based due diligence (Article A10, Chapter II) and state that "*the nature and extent of due diligence, such as the specific steps to be taken, appropriate to a particular situation will be affected by factors such as the size of the enterprise, context of its operations, the specific recommendations in the Guidelines, and the severity of its adverse impacts*" (paragraph 15 of the Commentary on Chapter II).

Like the Lacroix Group, Alsetex is a mid-tier firm²¹ working a very specific sector. The NCP notes that Alsetex complies with export control procedures and the ban on exports to Bahrain, and that it is putting in place supplementary measures such as the possibility of requesting a non-re-export certificate, under the terms of which the final user pledges to the French State not to provide a third party with materials sold by Alsetex without prior authorisation from the French government. The enterprise also has anti-corruption due diligence procedures and

¹⁸ "With this in mind, we jointly express our concern over the human rights situation in Bahrain, both the violations that took place in February and March 2011 as well as the related ongoing ones." <http://www.norway-geneva.org/Humanrights/Statements/20th-session-of-the-Human-Rights-Council/Norwegian-statements---HRC-20/Joint-Statement-on-the-Human-Rights-Situation-in-Bahrain/>

¹⁹ <http://bahrainrights.org/en/node/6920>

²⁰ (...) "We urge the Government to ensure the right to peaceful assembly and to continue to issue clear instructions to the security forces to refrain from using excessive force against protesters, in accordance with international standards, and ensure their effective implementation. We also urge the Government to release all persons imprisoned solely for exercising their human rights" (...). "The joint statement has been delivered on behalf of: Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Chile, Costa Rica, Czech Republic, Denmark, Estonia, France, Germany, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay", 14 September 2015.

²¹ A mid-tier firm has between 251 and 5,000 employees. Its annual turnover does not exceed €1.5 billion, and its annual balance sheet total is less than €2 billion.

a system of audits and measures designed to know, inform and train its customers about its products and about law enforcement doctrine. It also offers training and technical support in the use of its products.

⇒ *As regards the specific situation raised in the referral, the NCP notes that the enterprise takes risk-based due diligence measures. It would be preferable if these could be formalised.*

- **Alsetex's human rights policy**

Since May 2011, the OECD recommends that enterprises have a policy commitment to respect human rights (Article 4, Chapter IV). The NCP notes that, in October 2015, following the filing of the referral, the Etienne Lacroix Group published a Code of Ethics²² that is applicable to its employees, including those employed by Alsetex. The Code includes commitments in terms of ethics, integrity, excellence, behaviour standards for staff, respect for fundamental rights and impartiality, particularly as regards supplier selection. Alsetex's website states that, in terms of export, the company's activities are completely subject to authorisation by an inter-ministerial commission, whose decision is final; the French government departments involved are the only ones authorised to provide full and timely answers²³. Alsetex has stated that, prior to the referral, it was in the process of drafting a policy for responsible business conduct (RBC), which it provided to the NCP and also to the complainant, who offered its comments to Alsetex. ADHRB suggested that Alsetex include in its contracts a clause stating that, in the case of re-exports that are not authorised by the French government, the customer must compensate the enterprise, which would use the compensation to fund actions to protect human rights.

⇒ *The NCP notes that Alsetex does not yet have a human rights policy, but that it is in the process of drafting a policy for responsible business conduct. It welcomes this initiative and calls on Alsetex to take into account both the OECD Guidelines and ADHRB's comments in order to enhance the content of the policy, and then to disseminate it.*

- **Conclusion**

The NCP encourages Alsetex to enhance its draft RBC policy in order to turn it into a due diligence plan that is adapted to the enterprise's area of activity. To this end, the NCP recommends that Alsetex:

- **Make it clear that Etienne Lacroix's Code of Ethics applies to Alsetex employees**
- **Include in its draft RBC policy** a declaration that it respects human rights based on the OECD Guidelines. The NCP recommends that Alsetex have the policy approved at the most senior level of the enterprise, and then make it publicly available and communicate it internally and externally to all personnel, business partners and other relevant parties²⁴.
- **Formalise its in-house due diligence procedures** based on the regulatory framework of export controls and additional measures by the enterprise as regards its business relationships, particularly in order to increase the traceability of its exports. The NCP recommends that Alsetex systematically considers the possibility of requesting a non-re-export certificate and of assessing the extent to which the customer has understood the recommended use parameters for its products. Should the customer repeatedly fail to fulfil its commitments to Alsetex, the enterprise should undertake to suspend or even terminate its business relationship with the customer, as recommended by the OECD²⁵.

The NCP would like to thank Alsetex and the Lacroix Group for their cooperation and transparency. It thanks ADHRB for its contribution to the work of the NCP. At the conclusion of the NCP's good offices, ADHRB thanked the NCP for its involvement and acknowledged the responses given by the enterprise, which allowed an agreement to be reached to close examination of the referral.

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²² <http://www.etienne-lacroix.com/qui-sommes-nous.php?rubrique=charte>

²³ <http://www.alsetex.fr/produit.php?nom=mogenerique&categorie=mo>

NB: website in English "Export requires the express authorization of an Inter-ministerial Commission, which has the sole power of decision" <http://www.alsetex.fr/produit.php?langue=en&categorie=mo&nom=mogenerique>

²⁴ cf. Paragraph 44 of the Commentary on Article 4 of Chapter IV, "Human Rights".

²⁵ cf. Paragraph 22 of the Commentary on Chapter II.