

**Final statement of the Dutch NCP on the
 “Complaint (dated 15 May 2006) on the violations of
 Pilipinas Shell Petroleum Corporation (PSPC), pursuant to
 the OECD Guidelines for Multinational Enterprises”**

July 14, 2009

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Issues of the complaint

On May 16, 2006, the Dutch NCP received a “Complaint on the violations of Pilipinas Shell Petroleum Corporation (PSPC), pursuant to the OECD Guidelines for Multinational Enterprises”. Complainants are: The Fenceline Community for Human Safety and Environmental Protection, a not-for-profit organization, based in Pandacan, City of Manila; Milieudefensie (Friends of the Earth Netherlands) and the (Netherlands-based) Friends of the Earth International. They allege that Pilipinas Shell Petroleum Corporation (PSPC), a Philippine subsidiary of Royal Dutch Shell, violated specific provisions of the Guidelines. Specifically when it continued operations of its oil facilities in Pandacan, Manila, it was in violation of a local ordinance (No. 8027) that existed at that time.

The issues raised in the complaint are:

- I. Manipulation of local government;
- II. Concealment of a. negotiations and b. environmental/health risks of activities;
- III. Lack of specific plans to mitigate the hazards at the oil depot.

Complainants allege that PSPC violated the following provisions of the Guidelines:

1. Chapter II, Sec. 5 and Sec. 11, on seeking exemptions not contemplated in the statutory and regulatory framework, and improper involvement in local political activities;
2. Chapter VI on bribery or undue advantage to obtain or retain business or other improper advantage;
3. Chapter III, Sec. 4(e) on disclosure of information on material foreseeable risk factors;
4. Chapter V, Sec. 2 on providing information on potential environmental, health and safety impacts of activities on employees and the affected communities; and
5. Chapter V, Sec. 5 and Sec. 6 on contingency plans for serious environmental and health damage, and adopting standards for environmental performance.

In their complaint, which was brought before the NCP, the notifiers called for the following:

“(…) Given the seriousness of PSPC/Shell’s alleged breaches to the OECD Guidelines, we request that PSPC/Shell:

- Comply with Ordinance No. 8027 by completely removing its oil depot from Pandacan and relocating it where it would not put the people’s health and safety at risk;

- Assume responsibility for the health problems of the people of Pandacan that were a result, partly or otherwise, of the maintenance of the oil depot therein;
- Assume complete responsibility for the contamination of the soil in Pandacan where its oil facilities are located;
- Actively monitor and improve the air quality around its facilities;
- Desist from engaging in deceptive campaigns to gain support for the retention of its facility;
- Desist from involvement in bribery and local political activities;
- Provide information to the public regarding the potential risks of its operations and involve the local community in decision-making;
- Improve and upgrade its equipment, and continuously enhance the training of its people in disaster preparedness and management, to respond to oil leakages and other accidents.”

After its decision on the admissibility of the complaint, in meetings with the notifiers, the NCP explained that its dealing with the complaint would selectively be a forward looking process. Taking the allegedly violated guidelines as a starting point, it would try to verify the facts and try to organize interaction between PSPC and the complainants, aimed at addressing the issues raised. The NCP made clear that it is not in a position to enforce compliance with local legislation nor can it press for notifiers’ specific demands with PSPC. The issues behind the demands can be put on the agenda of a mediatory attempt. The NCP also clarified that the mediation process is voluntary and it relies on the goodwill of parties to participate in the process.

Admissibility of the Complaint

On July 3, 2006 the NCP evaluated the complaint as admissible under the specific instance procedure of the OECD Guidelines for Multinational Enterprises. The existence of parallel (legal) procedures formed no argument for the NCP to abstain from involvement per se. The NCP was careful not to interfere with local governmental or legal procedures in the Philippines; the NCP, being a public body, fully respects the legal autonomy of other countries. However, the OECD Guidelines set out the OECD member states’ expectations of corporate conduct that is generally not regulated by legislation in a specific situation. Therefore, issues such as setting up and maintaining a proper dialogue with local stakeholders, can still be dealt with by an NCP, parallel to a local legal procedure.

The degree to which the complainants are representative of the stakeholders of the firm was not an issue in the assessment of the admissibility of the case. After all, the relevant issue for accepting a complaint for a specific instance procedure of the OECD Guidelines for Multinational Enterprises is whether the respondent company is in compliance with the guidelines, regardless of how many people filed or support the complaint.

Summary of facts

1. PSPC has maintained and operated an oil terminal in Pandacan since 1914. Chevron Philippines, Inc., previously 'Caltex' (Chevron) and Petron Corporation (Petron) also have oil terminals in the 36-hectare area of Pandacan, and have been operating there for decades as well. When the oil terminals were built, the area was sparsely populated. Pandacan is an old community. The Catholic church around which the old community developed was built in the 1730s and is in close proximity to the oil depot. Over the decades, Pandacan has become a highly densely occupied residential and commercial area, with houses and buildings sprouting up practically along the fence of the oil terminals.
2. In the aftermath of the terrorist attacks in the United States in 2001 and in light of the growing threats in the Philippines, the incumbent Mayor of Manila announced that the oil terminals posed a danger to the safety of Manila residents and urged the closure of these terminals. The City Council conducted several consultations, in which the results of a research by the National Center for Disease Prevention and Control of the Department of Health were put forward. It issued a report stating that the levels of aromatic hydrocarbons such as benzene in the depot area are elevated to a level deemed unsafe by the US EPA, although it could not be determined if the elevated levels were caused by the depot itself, the transport in and out of the depot or other reasons. During the hearings, the Fire Chief of Manila bore testimony to the Manila City Council, stating that PSPC operated in violation of a number of health and safety codes.
3. On the basis of the testimonies and consultations, on 28 November 2001, the Council passed Ordinance No. 8027, reclassifying the area of the oil terminals from 'industrial' to 'commercial'. As a consequence, the oil companies were ordered to cease operations of the oil terminals by 28 June 2002. The validity of the local business permits of the oil companies were shortened to 30 June 2002.
4. On 26 June 2002, two days prior to the deadline, the oil companies entered into a Memorandum of Understanding (MOU) with the Mayor and the Department of Energy (DOE), allowing the oil companies to continue operations, but on a scaled-down basis. The MOU was ratified twice by the City Council through resolutions, at first in July 2002

- and again in January 2003, each time with a definite period for continuing scaled-down operations. In the January 2003 resolution, the MOU was set to expire on April 30, 2003.
5. A complaint for graft and corruption was filed against the signatories of the MOU in August 2002 for non-enforcement of the Ordinance and executing the MOU that was contrary to the Ordinance. The complaint was dismissed without prejudice by the Ombudsman, who noted that the MOU was ratified by the same City Council that passed the Ordinance.
 6. In the meantime, on 4 December 2002, Social Justice Society (SJS), consisting of residents of Pandacan, filed a Petition for Mandamus before the Supreme Court to compel the Mayor to enforce the Ordinance.
 7. In March 2003, 40 out of 43 Barangay chiefs of the Pandacan area of Manila issued a Position Paper in support of retaining the oil terminals in Pandacan. Three Barangay chiefs did not sign the position paper. It was presented by PSPC to the City Council on 28 March 2003. The Position Paper contained, inter alia, requests for material assistance such as scholarships, employment, medical missions, and gift-giving during Christmas, Fiesta and other special occasions.
 8. Another complaint of violation of anti-graft and corruption laws was filed before the Ombudsman against the Barangay chiefs who signed the Position Paper. The Ombudsman dismissed the complaint and the subsequent motion for reconsideration. The Supreme Court affirmed the decision of the Ombudsman in appeal.
 9. On 25 April 2003, several days prior to the expiration of the MOU, PSPC filed a case before the Regional Trial Court (RTC) in Manila, to prohibit the Mayor from enforcing the Ordinance, claiming it was invalid. The other two oil companies filed similar separate cases. The trial courts issued injunctions swiftly and asked parties to maintain the status quo.
 10. In the meantime, PSPC started scaling down its operations, removed LPG storage and created a buffer zone around the Pandacan oil terminal. The buffer zone is now known as 'Green Zone' or 'Linear Park';
 11. On 16 May 2006, Fenceline Community and Friends of the Earth filed a complaint before the Dutch National Contact Point, alleging that Royal Dutch Shell, through its subsidiary, PSPC, had violated the OECD Guidelines for Multinational Enterprises.
 12. On 16 June 2006, the Council of Manila approved a new comprehensive zoning ordinance, Ordinance No. 8119, which reiterated the reclassification of Pandacan as a commercial area and ordered the oil terminals to terminate operations. The oil companies again sought the nullification of the Ordinance before the trial courts in Manila.
 13. On 7 March 2007, the Supreme Court issued a decision on the Mandamus case filed by Social Justice Society, in which the petitioners' claim was sustained, hence ordering the

Mayor of Manila to enforce Ordinance No. 8027. It was only after the Supreme Court issued this decision that the oil companies and the Department Of Energy sought to intervene in a motion for reconsideration, referring to the Court of the trial court cases and the new zoning ordinance.

14. After accepting the intervention/motion, the Supreme Court issued a Resolution on 13 February 2008, reiterating its earlier decision that Ordinance No. 8027 was a valid exercise of power to ensure the safety of the residents of Pandacan. In reference to the recent developments, the Court noted that the MOU had expired and that Ordinance No. 8119 was consistent with Ordinance No. 8027, although the latter was specific to Pandacan and should prevail with regard to deadlines and other details. The Court also overruled the injunctions issued earlier by the trial courts against the enforcement of Ordinance No. 8027. The Court, in considering the practical implications of an order for immediate implementation of the Ordinance and the cessation of operations of the oil terminals, required the oil companies to submit a relocation plan to the trial court in Manila within a non-extendible period of ninety (90) days.
15. On 27 February 2008, PSPC and its joint venture partners submitted a Motion for Reconsideration to the Supreme Court, explicitly stating that "*The Intervenors' questioning of the validity of Manila City Ordinance No. 8027 should not be construed as an abject refusal to relocate*"; it was meant as an objection against the authorizing effect of the Supreme Court Resolution on 'spot zoning' ordinances, that force the relocation of the oil industry, or any other industry on the "*caprices of local governments*".
16. On 13 May 2008, in compliance with the Supreme Court order, PSPC (with Chevron Philippines, Inc. (Chevron)) submitted a comprehensive relocation plan to the trial court in Manila. No action was taken by the court, pending resolution of the motion for reconsideration filed by the oil companies before the Supreme Court.
17. On 25 February 2009, the Regional Trial Court ordered PSPC and Chevron Philippines, Inc. (Chevron) to inform the Court as to the status of the implementation of their comprehensive plan and the relocation schedule for the transfer of the Pandacan Terminal within 15 days.
18. On 28 February 2009, the Supreme Court wrote a *finis* to the Pandacan Oil Depot case, in which it denied with finality the Motion for Reconsideration (dated 27 February 2008) of the three oil companies Chevron Philippines, Inc. (Chevron), Petron Corporation (Petron), and Pilipinas Shell Petroleum Corporation (Shell). The Court took judicial cognizance of the oil firms having begun with the orderly phase-out of the oil depots with the submission of the requisite plans and reports to the Manila Regional Trial Court.
19. On 14 May 2009, the Manila City Council approved a new Ordinance (7177), allowing the oil companies to stay at Pandacan and continue operating in Manila. This ordinance

supersedes Ordinance 8027, which was passed in 2001 and reclassified Pandacan as a commercial rather than an industrial area, and 2006's Ordinance 8119, which gave medium and heavy industries seven years to vacate the city. The ordinance met with opposition from a number of Pandacan and other Manila residents, including in the form of protests in front of the oil depot, a march to city hall led by church groups and statements by Catholic church leaders.

20. On 28 May 2009, the Mayor of Manila signed Ordinance No. 7177. He explicitly stated that before he reached the decision, he met with all the stakeholders, including businessmen and Manila residents. He said he received similar feedback, which all point to allowing oil depots and other business establishments that will be affected by Ordinance 8027 to remain in the capital city.

Evaluation of the complaint

The following issues are raised in the complaint:

- I. Manipulation of local government;
- II. Concealment of negotiations with government and environmental/health risks of activities;
- III. Lack of specific plans to mitigate the hazards at the oil depot.

I. Manipulation of local government

The allegation is anchored in the following sections of the Guidelines:

- Chapter II, Sec. 5 and Sec. 11, on seeking exemptions not contemplated in the statutory and regulatory framework, and improper involvement in local political activities;
- Chapter VI on bribery or undue advantage to obtain or retain business or other improper advantage.

After careful consideration of the evidence submitted, the NCP found that PSPC did communicate with officials of the City of Manila to seek deferment of the implementation of Ordinance No. 8027. The NCP notes that the dealings with the city officials were with the official participation of the Department of Energy and the two other affected oil companies, and that the results were reflected in official public acts (Resolutions of the City Council) that responded to the concerns of the energy sector as a whole. In this context, the NCP has neither the impression that PSPC was seeking improper exemption from the regulatory

framework in order to gain an unfair advantage or special favor, nor that the meetings were intended to improperly intervene in local politics.

Bribery and corruption are serious crimes and must be evaluated from a legal perspective. The notifiers have the burden of proving beyond a reasonable doubt that such actions occurred. The NCP notes that the accusations of bribery against public officials were considered and decided by the appropriate Philippine authorities. The NCP respects and defers to the findings of these Philippine authorities. The affidavits presented to the NCP, alleging PSPC's improper involvement in the preparation of the Position Paper which was issued on 28 March 2003, by Barangay Chief Executives of Pandacan, are not supported by other findings necessary for verification of these statements, despite all explicit opportunities given to complainants to submit corroborative evidence. The NCP notes that the Barangay Chief Executives requested assistance from the oil companies in that Position Paper, but that there was no evidence that PSPC made any promises to provide the requested assistance in exchange for the expression of support to retain the facility.

According to the NCP the custom of caring for one's neighbors and gift-giving has apparently been adapted to corporate behavior in the form of community programs, as part of corporate social responsibility. Based on documentary evidence submitted and interviews held with source persons identified by the parties, the NCP cannot conclude that PSPC's acts of gift-giving were intended to bribe or corrupt public officials in order to gain an improper advantage.

However, the NCP notes that there are misinterpretations within some sectors in the local communities in Pandacan about the purpose of PSPC's community programs and the reach of its benefits and beneficiaries, which fed allegations of bribery and improper conduct. From discussions with PSPC, the NCP learned that PSPC recognizes the possible adverse effects of dependency on community programs on effective and critical stakeholder engagement. Community support programs like these are also found in other countries and under different circumstances.

The NCP holds that PSPC has not been able to avoid the impression of having a secondary agenda in its contacts with the Barangays. Although there is no proof of compromising promises made to individual persons, under politicized circumstances 'community support' may be perceived by opponents as 'bribery' or 'undue involvement in local decision making'.

The NCP strongly recommends a dialogue between PSPC and its local stakeholders (not only its immediate fenceline communities) about transparent and undisputed

conduct. The outcome of this dialogue could guide PSPC in its future engagement with the community at Pandacan, both in its communication on Health, Safety and Environment (HSE) issues and in local community involvement and supportive initiatives. The NCP also recommends that PSPC urge the other two oil companies to coordinate their community relations programs, because the communities rightly see the oil depot operations and risks as a unit, regardless of the fact that there are three companies now operating in a joint-venture.

II. Concealment of negotiations with the government and environmental/health risks of activities

The allegations relate to the following provisions in the Guidelines:

- Chapter III, Sec. 4(e) on the obligation to disclose of information on material foreseeable risk factors;
- Chapter V, Sec. 2 on the obligation to provide information on potential environmental, health and safety impacts of activities on employees and the affected communities.

The NCP finds that for the years in which the alleged violations took place, there are no records of official findings of environmental or health violations by PSPC in its oil depot operations. With respect to environmental data about PSPC before 2003, the Asuncion report pointed to testimony that PSPC was found in violation of health and safety codes. However, no supporting evidence was presented to the NCP to confirm the truth or falsehood of statements made therein. NCP heard of reports that noxious gases were released from the oil depots, affecting residents across the Pasig River. However, in interviews, the NCP learned there were no scientific or official findings that the oil companies, PSPC in particular, were responsible. A study by the Department of Health showed that there are increased levels of certain aromatic hydrocarbons in the air, but it is unclear whether or to what extent this can be attributed to the operation of the oil depot.

As part of its validation mission in 2008, The NCP asked the Dienst Centraal Milieubeheer Rijnmond (DCMR Environmental Protection Agency (DCMR)) to visit PSPC to assist the NCP in its evaluation of general safety of the PSPC Facility and the environmental management of the PSPC Facility at the Pandacan depot. The DCMR has extensive expertise in the Rotterdam harbor which has a huge petroleum industry. The NCP did not receive permission to include the other part of the oil depot. The specific aims and results of this DCMR-survey are reproduced in the next paragraph of this statement.

With respect to PSPC's obligation to disclose to or inform the public of health, safety and environmental risks, and of contingency plans, the NCP notes that PSPC has made efforts thereto, through its website and through community information and capacity-building programs. However, it appears that the reach of the community information programs is limited to the three communities immediately adjacent to PSPC. **Given that other Pandacan communities are also potentially at risk, albeit possibly to a lesser extent, NCP strongly recommends that PSPC expand its information program and consultation to other potentially affected communities in Pandacan.** Moreover, the NCP takes the view that PSPC's communication with stakeholders had too much of an information-giving nature, instead of substantive consultations and discussions of risks and responses. Despite efforts of PSPC to communicate with the surrounding Barangay about the health and safety aspects of its activities in Pandacan, people living around the Pandacan site are understandably sensitive to information concerning their life and health. In as far these worries relate to PSPC's activities, there is a need for more dialogue. For this purpose, PSPC has already hired an independent Health Panel, in partnership with the University of the Philippines National Institute of Health, to provide "an external perspective on risk assessment, methodology, analysis and conclusions on environment related initiatives at the PSPC facilities in Pandacan." However, the community members interviewed were unaware of this, thereby suggesting a need for greater involvement of the community in the work of the Health Panel.

Many of the recommendations of the OECD Guidelines require only vaguely specified corporate action such as 'adequate and timely consultation' (Chapter V par.2 sub b.) without further appraisal of what constitutes *adequate* and *timely* consultation. When trying to match the actual actions of PSPC with what could be expected on the basis of the OECD Guidelines, one can either look at what constitutes (in this case) an adequate and timely consultation under the local circumstances, or from the perspective of the homeland. Companies may advocate local practice as the leading perspective, but this would not further the objective of the OECD Guidelines – good corporate conduct in a level playing field – at all. **Therefore, the NCP underlines that the OECD guidelines imply that the standard for communication with stakeholders should be derived from the practices and legal systems common to the home OECD countries, and not from local practices and legislation.**

III. Lack of specific plans to mitigate the hazards at the oil depot.

The allegation is made with respect to:

- Chapter V, Sec. 5 and Sec. 6 on contingency plans for serious environmental and health damage, and adopting standards for environmental performance.

The NCP notes that between 2003 and 2006 PSPC implemented a scaling down and restructuring of operations in Pandacan. PSPC showed the NCP what measures it had taken to ensure that the scale-down was in accordance with the company's worldwide environmental and safety standards, including the proper clean-up and disposal of toxic wastes.

Even though it is reassuring that the necessary scale-down and clean-up was implemented, the NCP cannot confirm that PSPC operated in accordance with the strictest environmental and safety standards prior to the clean-up. The NCP takes the view that, the adjustments were made not as a matter of good practice to apply the best level of health and safety measures in every country where the multinational in question is operating, as recommended in the OECD Guidelines. Instead, they were imposed by means of a City Council zoning ordinance that originated from fear for the environmental and safety hazards attributed to the oil depot. As mentioned before, for an OECD-country-based multinational it is not enough to simply comply with local law and permits; in specific instances, the OECD Guidelines should be taken as the more authoritative guide to proper conduct. As the commentary to the Guidelines states:" the basic premise of the Guidelines is that enterprises should act as soon as possible, in a pro-active way, to avoid, for instance, serious or irreversible environmental damages from their activities."

Furthermore, from interviews with notifiers and community members, it appears that people in the Pandacan community are not fully aware of the measures which have been taken during the scaling down, and for what reason. In fact, community members are generally unaware of specific plans to mitigate hazards or respond to emergencies brought about by oil depot operations.

With respect to the safety of the oil depot operations, the NCP determined that PSPC, in light of the concerns that led to the passing of Ordinance 8027 on 28 November 2001 in the City Council of Manila, made substantial adjustments to the installations and the lay-out of the Pandacan site. However, this does not dispel the actual safety concerns of the notifiers. For this reason, the NCP involved the DCMR in an assessment of the Pandacan oil depot in its current form and to determine whether it can be considered 'in accordance with internationally accepted health and safety-criteria'. This 'technical fact finding mission' was aimed at:

General

- Assisting the NCP in evaluation of (a) general safety of the Shell Facility and (b) environmental management of the Shell Facility.

Visual inspection of the Shell Facility

- Gathering information on the nature and quantities of the substances in storage.
- Making an inventory on site of the precautionary measures that are in place to reduce the risk of fire and explosions and to manage exposure and environmental emissions and to discuss these measures.
- Gaining insight into the safety management system, emergency control procedure, and the maintenance inspection system, including self-reporting on environmental performance.
- Gaining insight in the management of soil and the ground water environmental impact.

Assessment of the Shell Facility Design (desk study)

- Assessment of the information gathered with regard to the design and the applied measures with reference to API standards with an emphasis on:
 - storage tanks;
 - loading and unloading facilities – facilities such as tank pits to catch spillage;
 - provisions for firefighting.

The Making of Quantitative Risk Assessments and Comparison with Risk Standards (desk study)

- Statements by the DCMR including calculated risk contours from the quantitative risk assessment (QRA).
- Calculation of risks based on the information from PSPC. In the absence of international standards, current Dutch methodology will be used for these calculations. This methodology will be adjusted to local conditions wherever possible.
- Assessment of the risks in light of the prevailing norm in the Netherlands, the UK, Canada and Australia (in the absence of international guidelines) and, wherever possible, an assessment of the risks in light of local policies and international industry practices.

The DCMR concluded that, at the time of inspection (November 13, 14, 17 and 18, 2008):

- “The design, including of fire-fighting equipment, level of maintenance, good housekeeping and the operation, of the PSPC facility fulfills EU and USA standards.
- Adequate safety- and environmental management systems are in place.

- The emission of volatile organic components (especially benzene) into the atmosphere from the PSPC truck loading facility will be eliminated by a modern vapor-recovery-system due to start up in December 2008¹.
- The external risk of the PSPC facility is acceptable according to Dutch and other international standards.”

Although the NCP accepts the conclusions of the DCMR report (ordered by the NCP itself), it cannot form its own opinion on the outcome as it had no access to any supporting findings; the NCP accepted this limitation in the interest of progress in the mediation process.

Trucking

The DCMR conclusions indicate that the PSPC part of the oil depot as an already existing structure itself does not conflict with international safety standards, such as those applied in the Netherlands. However, according to the NCP, a newly designed oil depot with a concomitant amount of traffic similar to the Pandacan site would be inconceivable in the Netherlands under the present circumstances.

Although not mentioned in the complaint, the NCP finds the transportation of oil products of particular concern. Although PSPC has taken certain measures, the **NCP urges PSPC to continue addressing the issue of dangerous traffic in a pro-active way**. The safety of tankers on the road needs the continuous attention of PSPC and PDSI (Pandacan Depot Services Inc). The NCP holds the opinion that PSPC and its joint venture partners should actively involve people who live in the neighborhood. **The NCP urges PSPC to weigh the issue of dangerous traffic traveling through densely populated areas seriously in its decision making process for relocation.**

Relocation

The NCP has observed that the crux of the issues raised is the concern for health and safety. For a certain group of residents, relocation of the oil depot outside of Pandacan has become the major issue. To them the ultimate mitigating measure for health and security concerns is the removal of the oil depot operations. During its fact-finding mission in November 2008, the relocation process as a possible issue for mediation was put forward by the NCP from the beginning. For the notifiers, the inclusion of this issue is a pre-condition for any mediation. PSPC made specific statements before the Supreme Court that it will adhere to its

¹ This vapor-recovery-system is indeed operational, according to Shell.

statements before the Supreme Court that it will comply with the order to relocate (ref. Annex 1).

Although a large part of the discussions of the NCP with PSPC during the mission in November 2008 was devoted to exploring the numerous complexities of a possible relocation process, the NCP discovered to its surprise in May 2009 that PSPC did not consider the relocation process as a suitable topic for mediation. The NCP regrets this unexpected change of commitment from PSPC.

If PSPC had unequivocally declared before the Supreme Court that it has decided to relocate, its decision would have been the root of a clear, transparent and orderly relocation plan consistent with its obligations to adhere to the best behavioral standards of the OECD Guidelines.

The NCP takes the view that PSPC should communicate more proactively and openly with all its stakeholders about its motives, strategies and considerations, in order to strengthen the basis of mutual confidence between the enterprise and the society in which it operates. For the NCP, the primarily positive image of PSPC's pursuit of responsible business conduct has been blurred by an impression of opportunistic behavior in a continually changing political environment.

Information Exchange

With respect to sharing of information during the NCP process, the parties were understandably less candid with each other than with the NCP. The conditions imposed on the NCP by Shell on sharing information with the notifiers interfered with the NCP's ability to probe for possible mutually acceptable solutions. The stipulated condition, that the DCMR should only report its most general conclusions to the NCP, is an example of this. The NCP was surprised by (and regrets) PSPC's reluctance to share more information with its stakeholders. Transparency is the core of a dialogue with stakeholders regarding corporate social responsibility. In general, it is also in the long-term interest of the firm, because it helps generate public support for its activities. The NCP of course respects commercial interests and arrangements with joint venture partners, but is convinced that in similar cases in OECD countries much more information is shared with stakeholders. **The NCP is of the view that the high standards for disclosure of non-financial information, including environmental reporting, as encouraged by the OECD Guidelines have not been met in this specific instance.** In the Commentary on Chapter III, 'Disclosure', the guidelines explicitly state: "To improve public understanding of enterprises and their interaction with

society and the environment, enterprises should be transparent in their operations and responsive to the public's increasingly sophisticated demands for information". Furthermore, they also state that this disclosure may also cover information on the activities of subcontractors, suppliers or joint venture partners. Due to the confidentiality requirements of PSPC, it is now still impossible to say anything about the compliance of the entire oil depot with the standards that the DCMR applies to PSPC. It is a public duty of all oil depot operators to be as open as possible with its stakeholders in relation to health, safety and security matters.

Closing Remarks

- PSPC's joint venture (JV) partners were not addressed in this specific instance, whereas the OECD guidelines directly apply to one of them and are relevant to their conduct in the unresolved relocation issue. However, this does not dismiss PSPC's from its responsibility to act in accordance with the OECD guidelines, both individually and in cooperation with its joint venture partners. Based on Shell's 2008 Sustainability Report, the NCP knows that Shell acknowledges this responsibility: "In JVs we do not control, we do not have the power to set the standards. So instead, we encourage the JV to operate in line with our values. We expect the JV to apply business principles and an HSE commitment and policy materially equivalent to our own. We also share our experience in managing safety, environmental and social issues. This includes how we carry out integrated environmental and social impact assessments before beginning significant work on a project, and our approach to building transparent working relationships with external stakeholders. If a JV cannot work in line with our values, principles and standards in this area within a reasonable time, we review the relationship."
- Furthermore, the NCP emphasizes that it cannot judge the health and safety-situation of the entire oil depot. It urges PSPC to engage an independent DCMR-like study for the parts of the oil depot that were not involved in the present complaint.
- Finally, the NCP notes that the allegations of improper conduct by PSPC, with respect to its dealings with local officials, will continue for as long as the relocation issue is unresolved. The NCP believes that an initiative by PSPC, in close consultation with its stakeholders, to clarify and reiterate its plan to move out of Pandacan, as it has stated in public court documents, should be the backbone of a mediated agreement that eliminates the concerns expressed in the complaint.

Annex 1

The NCP process

The role of the NCP

The role of National Contact Points (NCP) is to further the effectiveness of the Guidelines. In accordance with the Procedural Guidance for the OECD Guidelines, the NCP made an initial assessment of whether the issues raised merit further examination. In doing so, the NCP took account of the following:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;
- 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.

On 3 July, 2006, the NCP decided that the complaint of 15 May 2006 is admissible as a specific instance, and, in a joint effort with notifiers and Shell/PSPC, will try to establish the facts and find a mutually agreeable solution. For this purpose, the NCP consulted these parties, sought advice from the relevant authorities and experts, consulted the British National Contact Point, looked at cases that have been dealt with by other NCPs,² and offered mediation, with the agreement of the parties involved.

Please note that ‘further reflections’ on dealing with this specific instance are presented by the NCP in Annex 2 of the Final Statement.

Global overview of the procedure

In the **second half of 2006**, the NCP held numerous bilateral discussions with Shell/PSPC and with complainants, in order to unravel the complexity of the issues submitted. Throughout the procedure, both parties put a lot of effort into providing the NCP with the requested information. Nevertheless, additional input appeared to be necessary.

According to the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, “enterprises are encouraged to observe the *Guidelines* wherever

² As published on the OECD website.

they operate, taking into account the particular circumstances of each host country. In the event *Guidelines*-related issues arise in a non-adhering country, NCPs will take steps to develop an understanding of the issues involved. While it may not always be practicable to obtain access to all pertinent information, or to bring all the parties involved together, the NCP may still be in a position to pursue enquiries and engage in other fact finding activities. Examples of such steps could include contacting the management of the firm in the home country, and, as appropriate, government officials in the non-adhering country”.

In the **first months of 2007**, after consulting the parties involved, the NCP prepared a fact-finding mission to Manila, including assistance by experts of the DCMR, which was paid for by the NCP. On **7 March 2007**, the Supreme Court of the Philippines announced a decision in favor of Social Justice Society and Mr Cabigao and Mr. Tumbokon, stating that Ordinance 8027 should be enforced and implemented. PSPC and the other two involved oil companies asked the Court to intervene and to reconsider the decision. Because PSPC wanted to avoid inappropriate parallel proceedings on the relocation of the oil depot, given the developments at the Supreme Court case, the NCP had to decide to postpone its visit to Manila. Pending the decision of the Supreme Court, the NCP procedure was put ‘on hold’ for more than six months.

In the meantime, the newly formed independent NCP took office. It applied a broader interpretation to the issue of ‘parallel proceedings’. On **28 November 2007**, the members of the recently reformed NCP (appointed 4 July 2007) met with representatives of both parties in order to get acquainted with one another and to discuss the ongoing standstill in the process. During this joint meeting, the NCP and parties involved decided, inter alia, that Shell/PSPC and notifying parties would inform the NCP on their opinions on two issues: firstly on the usefulness and added value to the NCP procedure of a mission to Manila by the NCP and two independent technical advisors while the case was still pending before the Supreme Court. Secondly they would express their views on a joint meeting between the NCP, PSPC and the local notifying partners during the mission, in which the facts and arguments stated in the notification and Shell/PSPC’s reaction would be discussed.

After receiving the reactions of both parties, the NCP drafted a ‘Terms of Reference’ for both parts of the mission to be planned and proposed to call on the services in Manila of Mr. La Viña, paid for by the NCP, for additional background information, research and identification of options for mediation, in preparation of the NCP visit. Mr. La Viña has a long record of objectivity and independence, and an outstanding reputation in mediation processes, in the Philippines and internationally. Both parties agreed to involve Mr. La Viña as an advisor to the NCP.

On **13 February 2008**, the Supreme Court ordered the implementation of Ordinance 8027 of the City of Manila, requiring PSPC, Chevron and Petron to relocate. The Supreme Court used strong language in the orders:

"We are also putting an end to the oil companies' determination to prolong their stay in Pandacan despite the objections of Manila's residents. As early as October 2001, the oil companies signed a MOA with the DOE obliging themselves to:

... undertake a comprehensive and comparative study ... [which] shall include the preparation of a Master Plan, whose aim is to determine the scope and timing of the feasible location of the Pandacan oil terminals and all associated facilities and infrastructure including government support essential for the relocation such as the necessary transportation infrastructure, land and right of way acquisition, resettlement of displaced residents and environmental and social acceptability which shall be based on mutual benefit of the Parties and the public.

Now that they are being compelled to discontinue their operations in the Pandacan Terminals, they cannot feign unreadiness considering that they had years to prepare for this eventuality.

Just the same, this Court is not about to provoke a crisis by ordering the immediate relocation of the Pandacan Terminals out of its present site. The enforcement of a decision of this Court, especially one with far-reaching consequences, should always be within the bounds of reason, in accordance with a comprehensive and well-coordinated plan, and within a time-frame that complies with the letter and spirit of our resolution. To this end, the oil companies have no choice but to obey the law."

PSPC and its joint venture partners recognized the importance of this relocation decision in the text of the Preliminary Statement to the Motion for Reconsideration that they submitted to the Supreme Court on **27 February 2008**, which reads:

"This Motion for reconsideration is not intended to delay the resolution of this case. Intervenor will submit to the Regional Trial Court of Manila – Branch 39 ("RTC"), a comprehensive plan and relocation schedule within the non-extendible period of ninety (90) days as ordered by this Honorable Court in its Resolution, without prejudice to the resolution of this Motion for Reconsideration.

Intervenors wish to state that they have never refused to leave Pandacan. Intervenors recognize that an indefinite and permanent stay in Pandacan is no longer possible given the current urban developments in the area. Still, and notwithstanding the best of intentions, finding an alternative site equaling the strategic location of Pandacan has proven to be impossible. To aid them in this endeavor, they precisely sought the help of the National Government through the Department of Energy (“DOE”). However, for lack of any viable site for relocation, despite diligent efforts to find one, the Intervenors have, in the meantime, been constrained to stay.

The Intervenors’ questioning the validity of Manila City Ordinance No. 8027 should not be construed as an abject refusal to relocate. ...”

On **14 March 2008**, Shell/PSPC wrote a letter to the NCP in which it states that following the 13 February 2008 ruling of the Supreme Court “PSPC [would] leave Pandacan” and that this meant that the “root issue of the OECD complaint [had] been dealt with”. Furthermore, it indicated that the four remaining issues (engagement and community programs; gift giving; evacuation and site safety: security and disclosure of confidential product information) should be discussed with the notifiers in a future oriented mediation process.

The NCP accepted this as an opportunity to move forward in dealing with the specific instance. In order to prepare for a first mediation meeting it called in the DCMR and Mr. La Viña to assist. Unfortunately, it proved difficult to reach agreement between notifiers and Shell/PSPC on the Terms of Reference for the assignments of the DCMR and Mr. La Viña. The parties appeared to have differing views on the scope, confidentiality and orientation (towards the past or future) of the surveys. In the meantime, the NCP nevertheless took responsibility for Mr. La Viña to commence his work as an advisor to the NCP.

On **17 April 2008**, based on a comparison of issues (to be) dealt with in the Philippine legal system and the issues put forward in the complaint, the NCP presented its preliminary conclusions on the Pandacan situation following the Supreme Court ruling. Shell/PSPC reacted, stating that, inter alia, an assessment of its Pandacan facilities would no longer be relevant now that the Supreme Court ruled that the oil depot had to be relocated. Besides, there was uncertainty about the role the Regional Trial Court would reserve for itself with respect to monitoring the required relocation plan. The NCP postponed its mission to Manila that was planned for the end of May.

On **29 July 2008**, the NCP arranged a joint video-conference with Shell/PSPC and notifiers to discuss the draft report and recommendations of Mr. La Viña. Taking into account the comments made by both parties, Mr. La Viña finalized his report to the NCP on **14 August, 2008**.

On **19 September 2008**, the NCP presented to both parties a comprehensive overview of the NCP process, resulting in a proposed agenda for a mediation mission from November 10 to 14. The reactions of both parties to this overview and agenda were critical and they urged the NCP to revalidate or verify some 'facts'. Although most of the disputed issues could theoretically be resolved during a mediation attempt, the mediation mission had to be postponed. The reason for this was the incompatibility of time schedules of the representatives of all parties involved. However, the NCP took advantage of the opportunity to conduct a fact-finding mission instead of a mediation mission during the period from **November 10 to 14** which had already been scheduled. During this mission the status of some possibly relevant, but disputed facts could be confirmed. Furthermore, the NCP hired the DCMR to visit Pilipinas Shell Petroleum Corporation for assistance in the evaluation of the general safety of the PSPC Facility and the environmental management of the PSPC Facility at the Pandacan depot. PSPC gladly cooperated, but also insisted that the DCMR and NCP sign quite restrictive confidentiality agreements.

During this mission, NCP members Mrs. J.F.G. Bunders and Mr. H. Mulder interviewed or spoke with:

- management and advisors to the management of PSPC;
- the independent Health Panel established by PSPC;
- local residents of Barangay 830, 833 and 834, and their captains;
- a member of the Manila City Council;
- representatives of the Fenceline Community;
- a representative of the Front to Oust the Oil Depot;
- a professor of the Polytechnic University of The Philippines.

No representative from Friends of the Earth was available during the mission.

All of the information derived from talks with PSPC employees and from the DCMR investigation was declared strictly confidential by PSPC, which NCP accepted, although this confidentiality was stricter than the confidentiality already prescribed in the procedural

guidance of the OECD guidelines for multinational enterprises. The NCP and the DCMR had signed separate confidentiality agreements for that purpose.

In order to prepare for a mediation attempt, the NCP paid special attention to issues that might arise between PSPC/PDSI and the notifiers concerning stakeholder engagement during the relocation process and monitoring of the relocation process.

On **18 December 2008**, the NCP received a letter from PSPC, in response to the NCP's request to come up with proposals for 'a way forward' in dealing with the specific instance under the OECD guidelines. The letter does not mention 'relocation' as a possible issue in the NCP process.

In light of the economic crisis, the Manila City Council started discussions **in early 2009** on a new Ordinance (7177), which would allow the oil companies to stay at Pandacan and continue operating in Manila. This ordinance superseded Ordinance 8027, which was passed in 2001 and reclassified Pandacan as a commercial instead of an industrial area, and Ordinance 8119 passed in 2006 which gave medium and heavy industries seven years to vacate the city.

In the meantime, the NCP prepared its draft evaluation of the complaint, to be shared with both parties in two parallel drafting rounds, in preparation of its final mediation mission, scheduled for 15 to 17 April. Unfortunately, there was some delay, due to uncertainty about the way in which the results of the DCMR investigation could be shared with the notifiers. On **9 March and 27 March 2009** the NCP arranged teleconferences with PSPC and the notifiers respectively, in which it shared its evaluation of the complaint in a point-by-point fashion, while covering all issues raised in the complaint.

PSPC prefers to reserve its reaction to the evaluation points until it receives the full text of the evaluation. In a letter dated **23 March 2009**, it calls (among other things) for parallel legal procedures as a reason for not being open to mediation on the topic of relocation.

On **2 April 2009**, the NCP received an elaborate and constructive written reaction to the evaluation from the notifiers. The notifiers remain open to potential mediation efforts by the NCP and believe that such efforts will have to focus largely on the relocation issue. Furthermore, the notifiers have many questions regarding the conclusions of the DCMR investigation.

On the same day, PSPC published an advertisement in several major daily newspapers in which it counters the view of some that the entire Pandacan oil depot is a safety and health threat to Manila residents, states that its own community survey shows overwhelming support for the depot's continued stay and expresses its willingness to listen and respond to stakeholders' questions.

On **14 April 2009**, during another teleconference with the NCP, PSPC confirmed that it considered relocation of the Pandacan depots as not being an appropriate topic for mediation. The NCP requested PSPC's cooperation in getting answers to the questions the notifiers had regarding the DCMR's conclusions. In a letter, PSPC confirmed its position with respect to relocation as a mediation topic but promised cooperation in answering the questions of the notifiers. The NCP asks PSPC to reconsider its position with respect to relocation as a topic for mediation. It called off its mediation mission to Manila.

On **17 April 2009**, the NCP received the notifiers' questions. The notifiers expressed their concern about PSPC's call for parallel legal procedures. With the help of the DCMR and PSPC, answers are provided on **28 April 2009**.

On **7 May 2009**, the NCP receives a letter from PSPC stating that:

- PSPC cooperated with the NCP over the past three years in trying to resolve the issues put forward by the notifiers;
- during the process, it made many clarifying comments and constructive suggestions to reach an orderly conclusion to the complaint;
- it nevertheless maintains that relocation of the Pandacan depot is not an appropriate proper topic for mediation between the NCP, notifiers and PSPC, for the following reasons:
 - local parallel proceedings and political activity on relocation;
 - any relocation activity would be commercially sensitive and PSPC is linked with its joint venture partners who are not involved in the NCP procedure;
 - a discussion of business decisions falls outside of the scope of the OECD guidelines;
- discussions within the NCP procedure should be restricted to the matters brought forward in the complaint and mentioned in the point-by-point draft evaluation:
 - Manipulation;
 - Concealment of negotiations with government and environmental and health risks of activities;

- Lack of specific plans to mitigate the hazards of the oil depot.

On **10 May 2009**, the NCP asked the notifiers whether they still see merit in a mediatory attempt by the NCP on issues mentioned in the point-to-point draft evaluation, if 'relocation' will not be part of the discussions.

On **13 May 2009**, the notifiers replied that they unfortunately see no value in further mediation efforts by the NCP if the issue of relocation will not even be discussed. They are disappointed that Shell/PSPC refuses to include the critical issue of relocation in the discussion and mediation that are part of the NCP procedure. They feel that the relocation issue is at the core of the problems raised in the complaint and that it cannot be separated from the other issues. Aside from this, they regret among other things the frequent and unjust call by PSPC for parallel proceedings and for confidentiality in relation to business information. The notifiers advise the NCP to prepare its final statement on the Pandacan case.

On **14 May 2009**, the NCP informed both parties that it unfortunately had to conclude that there is no scope left for its mediatory attempts. Furthermore, it explained the procedure by which it will prepare its final statement.

Annex 2

Further reflections

Field visit and independent assessment

The NCP's visit to Manila in November 2008 was crucial for a better understanding of the (political) environment in which PSPC operates and in which the people in the Barangays' neighboring the oil depot (including some of the complainants) live. Many living in the Barangays adjacent to PSPC expressed their interest in a prolonged stay of the oil depot, notwithstanding the associated potential risks. Unfortunately, due to PSPC's early call for 'parallel proceedings', it took a long time before a visit could take place. The primary goal of this visit was to establish the possibility of a mediation process. In this mission the NCP was assisted by the experts of DCMR, who made an independent assessment of the health and safety situation at the Pandacan oil depot, which was of invaluable importance. On certain important issues, this allowed the NCP to distinguish between facts and perceptions.

Proceedings parallel to the NCP process

It is important to avoid counterproductive interference of an NCP process by conducting parallel (legal) proceedings. If one of the parties claims that it will be negatively influenced in one way or another by the NCP process, it is its own responsibility to decide whether this influence is significant enough to halt the NCP process and refuse to consider progress by mediation. PSPC argued for 'parallel proceedings' on several occasions, which significantly delayed the progress of the case. The NCP feels that part of the explanation for PSPC's decision to argue for 'parallel proceedings' might be the difficulty of finding the right balance between policy standards and legal requirements for corporations and the legitimate rights of society. Statutory law is of a different nature than the OECD guidelines. The guidelines relate to the 'gentlemen's behavior', i.e. the decency, of PSPC, and not to enforceable obligations; they "provide voluntary principles and standards for responsible business conduct consistent with applicable laws". The NCP believes that PSPC has neglected to acknowledge the room for maneuver offered by a voluntary mediation process, as well as the potentially beneficial effects in legal court cases of actually engaging in such a process in a timely fashion (pro-actively).

The key benefit of a mediation process over a legal process is that less time is potentially invested in determining the absolute and objective nature of facts; it focuses on reaching a mutual beneficial agreement. In a mediation agreement it is not relevant whether a party

behaved culpably in the past (*ex tunc*). After all, it improves its behavior (*ex nunc*) and that is what counts. In many cases, a mediation approach saves face, time and money.

Including joint venture partners

Another obstacle to a successful mediation agreement seems to be the fact that the complaint was exclusively aimed at PSPC. The other joint venture partners were not addressed in this specific instance under the OECD guidelines. This probably reduced the willingness of and possibilities for PSPC to enter into far-reaching arrangements. After all, PSPC is commercially, operationally and legally intertwined with its joint venture partners. Not involving the other joint venture partners also interfered with the NCP's ability to do its job effectively, as the DCMR conclusions are now not determining the safety of the oil depot as a whole. The NCP urges notifiers of an alleged violation of the OECD guidelines for multinationals by a joint venture company to involve as many partners of the joint venture as possible. However, in order to be effective, such an inclusive approach requires active cooperation between NCP's from different countries, not to mention a specific instance involving a local joint venture partner in a country not adhering to the OECD Guidelines.

The role of the parent company

For Shell International, the decentralized commercial and legal responsibility of local subsidiaries is a crucial element of its business philosophy. Local management should feel responsible for solving local problems, without the comfort of a parent company that will intervene when things go seriously wrong. According to the NCP, this is justifiable from a more narrow management point of view, but when international governance standards require more than just compliance to local law there is a role to play for the parent company. In this specific instance, Shell International cannot ignore its own ultimate responsibility and accountability concerning local operations of subsidiaries. The NCP agrees with the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, who stated that "leadership from the top is essential", which means, according to the NCP, that the parent company of a multinational should actively promote pro-active observance by its subsidiaries of the spirit of the OECD guidelines for multinational enterprises.