Judith St. George
Chair, National Contact Point
125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

February 18, 2011

Re: FREDEMI's Comments on Draft Final Statement

Dear Ms. St. George:

We engaged in this process in December 2009 in good faith with the hope that the Canadian National Contact Point (NCP) would take the steps necessary to understand our concerns about the Marlin mine in Guatemala. That expectation has not been met. Instead, as this draft Final Statement demonstrates, the NCP has fundamentally misunderstood its own mandate and the situation on the ground. It is with great regret that we conclude that this process has not been worthwhile for any of the parties involved. We hope that the NCP takes our comments into consideration to better serve the needs of affected communities in the future.

Nonetheless, we appreciate the opportunity to comment on the draft Final Statement. Below we have included both general and specific comments on the draft.

General Comments

1. The NCP Fails to Fulfill its Mandate

The final statement should not just summarize the steps the NCP has taken to facilitate a dialogue. According to the Procedural Guidance to the OECD Guidelines for Multinational Enterprises, if the parties do not reach an agreement on the issues raised, the NCP will "issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines."[1] This makes it clear that the statement must address the implementation of the Guidelines. Final statements issued by other NCPs, such as those included in an annex to this response, confirm this interpretation by making specific findings regarding the implementation of the Guidelines. The Canadian NCP repeats this language in its draft Final Statement but changes its meaning by changing the punctuation. In the draft Final Statement the phrase "on the implementation of the Guidelines" refers to the recommendations and not the statement.

However, this draft Final Statement fails under either interpretation. The draft Final Statement makes it clear that the parties did not reach an agreement on the issues raised, but it does not address the implementation of the Guidelines in its analysis of the facts or in its recommendations. In fact, the only time the draft mentions the provisions of the Guidelines is when summarizing the complaint we submitted. In order to determine whether the Guidelines have been implemented in this case, the NCP would have had to consider all of the information that we and the company have provided over the last 14 months, in addition to undertaking its own investigation. But instead of using this information to

[1] PROCEDURAL GUIDANCE, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, at para. C(3).

inform its analysis and recommendations, the NCP explicitly stated that none of the studies, reports, or proceedings that it was made aware of "influenced" the performance of its mandate. Failure to address whether the Guidelines have been implemented adequately in this specific instance serves neither party. The assertions that we made are left unresolved. The NCP has not confirmed or denied them. The NCP has, in effect, abdicated its responsibilities.

If it were true that the mandate of the NCP is limited to facilitating dialogue, then it would follow that agreeing to dialogue would be one of the conditions for submitting a specific instance complaint or a factor in determining whether a complaint warrants further examination. However, neither the OECD Procedural Guidance nor the Canadian NCP's Terms of Reference require it. The Commentary to the OECD Guidelines lists the following factors in determining whether a complaint warrants further examination: 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.[2] It does not include an agreement to enter into dialogue. We made it clear in our original complaint, our meeting with the NCP on December 9, 2009 in Ottawa, and our subsequent communications that we did not want to engage in a dialogue with Goldcorp. At no time did the NCP indicate that our refusal to enter into a dialogue with Goldcorp would prevent it from assessing Goldcorp's implementation of the Guidelines.

2. Conditions for Dialogue

The draft Final Statement appears to fault the communities for declining its offer to facilitate a dialogue with Goldcorp. It goes so far as to say that "community members must be willing to engage with the company." There is no national or international obligation that requires communities to engage in a dialogue with a third party that proposes to adversely affect their land and natural resources. International law places the burden on the outside party to engage the community whose land or resources it seeks to develop. Refusal to engage in a dialogue with a third party is a clear indication that consent for the proposed development does not exist. We are acting within our rights to decide not to enter into a dialogue with the company. Any implication to the contrary is inappropriate.

Furthermore, dialogue is not always an appropriate mechanism for resolving disputes, especially where, as the NCP concedes here, the parties have "irreconcilable positions." We have always maintained a consistent position that we want the Marlin mine to close permanently. Goldcorp has made it clear that it will not stop operations at the mine unless and until the Government of Guatemala orders it to do so. Under these conditions, the NCP does not explain how the parties could bridge the divide and enter into a "constructive dialogue in good faith with a view to address the issues raised."

The NCP's reference to the recommendation by the Compliance Advisor Omdusman (CAO) of the International Finance Corporation that the parties engage in dialogue is incorrect and irrelevant. In its 2006 follow-up assessment, the CAO "found that conditions do not exist at this time to support a successful dialogue process between the community of Sipacapa, the government of Guatemala and the mine..."[3] Although we would agree with the underlying reasoning for that conclusion, the CAO's finding

[2] COMMENTARY ON THE IMPLEMENTATION PROCEDURES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, at para. 14.
[3] COMPLIANCE ADVISOR OMBUDSMAN OF THE INTERNATIONAL FINANCE CORPORATION, FOLLOW-UP ASSESSMENT, GUATEMALA (2006) at 3.

is specific to Sipacapa, a community that is politically and culturally distinct from San Miguel Ixtahuacán, where we live. The Marlin mine's impacts on San Miguel are significantly different in nature and scope than its impacts on Sipacapa. That the NCP conflates the two communities demonstrates its fundamental lack of understanding of the situation on the ground.

We reject the roundtable discussions convened by the Vice President and confirm that none of our members are participating. Indeed, there is no one representing community members opposing the mine in the dialogue process. Convening like-minded parties will not result in a resolution to the conflict. We would not consider participating in a dialogue table until the precautionary measures issued by the Inter-American Commission on Human Rights have been implemented.

3. Integrity of the NCP Process

The Canadian NCP process is not consistent with best practice for grievance mechanisms. In order for a grievance mechanism to function, it must be able to communicate with the affected communities that seek to use it. For that reason, the CAO, the World Bank Inspection Panel, the U.S. Overseas Private Investment Corporation, the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, and other NCPs communicate with complainants in a language that is understandable to them. Although we have had to specifically request them, Spanish translations of all relevant communications have been forthcoming, until now. The NCP's decision not to translate the entire draft Final Statement upon which we are asked to comment is indefensible. It gives an unfair advantage to Goldcorp, which can review and comment on the draft Final Statement in its entirety. An affected community should not have to bear the cost of translating the NCP's documents in order to participate in the process. By providing its own translation of the draft Final Statement, the NCP would also assure itself that its message is conveyed accurately. The following comments were prepared based on a Spanish translation of the entire draft Final Statement provided by the Center for International Environmental Law (CIEL). As you will see, the majority of our comments address information contained in the sections the NCP refused to translate.

Specific Comments

Although we believe the draft Final Statement is profoundly inadequate because it fails to assess whether the OECD Guidelines for Multinational Enterprises have been implemented adequately at the Marlin mine in Guatemala, the following are specific comments on the existing text organized by section.

1. Executive Summary

Second paragraph: "The notifiers indicated that they were seeking the closure of the mine and a statement from the NCP, and not requesting that the NCP facilitate access to alternative dispute resolution."

Third paragraph: "However, the notifiers ~~rejected~~declined the offer, consistent with their stated position."

Third paragraph: "The notifiers also ~~rejected~~declined the NCP's third offer of facilitated dialogue with~~out~~ more flexible confidentiality requirements and reiterated their request for a full investigation of the

facts, including a field visit to San Miguel Ixtahuacán, ~~to see the mine close~~ and for the NCP to issue a robust final statement."

2. Introduction to the OECD Guidelines for Multinational Enterprises

Third paragraph: "If the parties involved do not reach agreement on the issues raised, the NCP issues a statement, and makes~~, where appropriate,~~ recommendations as appropriate, on the implementation of the Guidelines."

3. Specific Instance

First paragraph: "On December 9, 2009, two members of ~~a Guatemalan non-governmental organization,~~ the Frente de Defensa San Miguelense (FREDEMI, The Front in Defense of San Miguel Ixtahuacán), a coalition of community organizations in San Miguel Ixtahuacán, Guatemala along with ~~a~~ representatives of the Washington, D.C.-based Centre for International Environmental Law (CIEL) (www.ciel.org), Amnesty International, MiningWatch Canada, and Breaking the Silence met with members of Canada's National Contact Point (NCP) in Ottawa, and delivered to the NCP a request for review in relation to the Marlin Mine in Guatemala that is operated by Goldcorp Inc."

4. The Marlin Mine

Second paragraph: "The Marlin Mine has been subject of numerous studies, inquiries and reports over the years. Some of these studies, inquiries and reports have been undertaken by civil society organizations, while others were ~~sponsored~~conducted by the company, international institutions or the Government of Guatemala."

Third paragraph: We recommend this entire paragraph be deleted. As described above, the complaint submitted to the CAO and the CAO's findings relate to a different community that is not involved in the present specific instance complaint.

Fourth paragraph: The resolution of the administrative process initiated by the Government of Guatemala to determine whether to suspend operations at the Marlin mine is not dependent on the site visit by the IACHR. The latest update from Goldcorp indicated that the Ministry of Mines will rule on suspension of the mine after it receives information from the mayors of San Miguel and Sipacapa. Thus, the relevant sentence should be amended as follows, "In ~~June~~September, the Government of Guatemala announced that it would initiate the administrative process to suspend operations at the mine~~, pending a site visit by the IACHR~~. By all accounts, ~~this visit has not yet taken place, and~~ no actions have been taken by the Government of Guatemala to close the mine."

Sixth paragraph: "On the basis of an eighteen-month study, the report found that Goldcorp had repeatedly failed to respect human rights in its operations at the Marlin mine and made a series of recommendations which Goldcorp initially responded to in June 2010."

5. Consideration of the Specific Instance

Second and third paragraph: "Accordingly, on March 23, 2010, the NCP Chair signed two letters informing the parties of the initial assessment of the NCP and offered the NCP's 'good offices' to

facilitate ~~a dialogue~~a meeting or series of meetings in Ottawa." Further, we ask that the NCP clarify whether the two letters to the parties were identical or nearly identical, or describe how they differed.

Sixth paragraph: "On March 25, 2010, the notifiers responded by asking the NCP if it would provide a Spanish translation of its letters. On April 23, 2010, the notifiers responded by ~~rejecting~~declining the NCP's second offer of facilitated dialogue."

Tenth paragraph: "On July 12, 2010, the notifiers responded and asked the NCP if it would provide a Spanish translation of its letter. On August 20, 2010, the notifiers replied by letter, again rejecting the possibility of a facilitated dialogue with Goldcorp."

Eleventh paragraph: "At this stage it became evident that the notifiers and Goldcorp had irreconcilable positions. While the notifiers wished the Marlin Mine to be closed and were unwilling to participate in any facilitated dialogue, Goldcorp refused to close the Marlin Mine but wished to remain open and participate in facilitated dialogue."

Twelfth paragraph: "During this conference call, the members of FREDEMI provided a number of testimonials about their experiences and concerns with the mine. In response to questions from the NCP, they repeated that they were not interested in participating in a dialogue with Goldcorp and they wanted the mine to close. During the call, the NCP informed the representatives that it was preparing a draft statement which would be forwarded for comments. The NCP was asked if it would be providing a Spanish translation of the entire draft statement so that community members could comment. The NCP replied in the negative but agreed to reconsider its decision. On December 13, 2010, the NCP notified FREDEMI that it would provide Spanish translations of the executive summary and recommendation sections only."

Fourteenth paragraph: Unless the NCP can cite the underlying legal authority for its assertion, the following sentence should be deleted, "At the same time, community members must be willing to engage with the company."

Fifteenth paragraph: The change in the mine's ownership has little to no bearing on the lack of trust among some communities. The mine has been a source of tension and conflict since its initial development in large part because of the lack of consent for the project. That tension has only grown over the subsequent years. "The NCP recognizes that~~, over the years,~~ the Marlin mine operations have ~~changed hands, and that this has contributed to the deepening of the lack of~~ generated social conflict and mistrust ~~among~~ between Goldcorp and some communities."

6. Recommendation

As we describe above, we believe that the mandate of the NCP requires it to issue recommendations that are related to the OECD Guidelines for Multinational Enterprises. Recommendations regarding dialogue are not sufficient to fulfill this mandate.

Conclusion

We would like to reiterate our complete dissatisfaction with the draft Final Statement. Our complaint was clear in its request that the NCP undertake an investigation into whether the OECD Guidelines were violated at the Marlin mine. Specifically, we asserted non-compliance with Paragraph 2 of the General

Policies of the MNE Guidelines, which would require Goldcorp to respect the rights of the people of San Miguel, "consistent with the host government's international obligations and commitments." The studies and reports which subsequently have been conducted by E-Tech International, Physicians for Human Rights and the University of Michigan, the University of Ghent, AsiEs, and On Common Ground, among others, substantiate our claims. The NCP's mandate clearly requires it to assess Goldcorp's implementation of the Guidelines. This draft Final Statement has failed to do so. In the end, we do not feel the NCP cares about us. Instead, the NCP has demonstrated, again, that this mechanism is not adequate or sufficient to address the concerns of communities affected by Canadian industry.

Please let us know if we can provide any additional information or clarification.

Sincerely,

FREDEMI

Annex
Examples of NCP Final Statements

Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises

Complaint from Survival International against Vedanta Resources plc

SUMMARY OF THE CONCLUSIONS

- **The UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) upholds Survival International's allegation that Vedanta Resources plc (Vedanta) has not complied with Chapter V(2)(b) of the Guidelines. The UK NCP concludes that Vedanta failed to put in place an adequate and timely consultation mechanism fully to engage the Dongria Kondh, an indigenous community who would be directly affected by the environmental and health and safety impact of its plans to construct a bauxite mine in the Niyamgiri Hills, Orissa, India.**
- **The UK NCP upholds Survival International's allegation that Vedanta has not complied with Chapter II(7) of the Guidelines. It concludes that Vedanta failed to engage the Dongria Kondh in adequate and timely consultations about the construction of the mine, or to use other mechanisms to assess the implications of its activities on the community such as an indigenous or human rights impact assessment. Vedanta therefore failed to develop and apply effective self-regulatory practices to foster a relationship of confidence and mutual trust between the company and an important constituent of the society in which it was operating.**
- **The UK NCP also upholds Survival International's allegation that Vedanta has not behaved consistently with Chapter II(2) of the Guidelines. The UK NCP concludes that Vedanta failed to engage the Dongria Kondh in adequate and timely consultations on the construction of the bauxite mine; it did not consider the impact of the construction of the mine on the rights and freedoms of the Dongria Kondh, or balance the impact against the need to promote the success of the company. For these reasons, Vedanta did not respect the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People.**

BACKGROUND

OECD Guidelines for Multinational Enterprises

1. The Guidelines comprise a set of voluntary principles and standards for responsible business conduct, in a variety of areas including disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation.

2. The Guidelines are not legally binding. However, OECD governments and a number of non OECD members are committed to encouraging multinational enterprises operating in or from their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country.

3. The Guidelines are implemented in adhering countries by National Contact Points (NCPs) which are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints that the Guidelines have been breached by multinational enterprises operating in or from their territories.

UK NCP complaint procedure

4. The UK NCP complaint process is broadly divided in three key stages:
(1) Initial Assessment - This consists of a desk based analysis of the complaint, the company's response and any additional information provided by the parties. The UK NCP will use this information to decide whether further consideration of a complaint is warranted;
(2) Conciliation/mediation/examination - If a case is accepted, the UK NCP will offer conciliation/mediation to both parties with the aim of reaching a settlement agreeable to both. Should conciliation/mediation fail to achieve a resolution or should the parties decline the offer then the UK NCP will examine the complaint in order to assess whether it is justified;
(3) Final Statement – If a mediated settlement has been reached, the UK NCP will publish a Final Statement with details of the agreement. If the UK NCP has examined the complaint, it will prepare and publish a Final Statement with a clear statement as to whether or not the Guidelines have been breached and recommendations to the company for future conduct, if necessary.

5. The complaints process, together with the UK NCP's Initial Assessments and Final Statements, is published on the UK NCP's website http://www.berr.gov.uk/nationalcontactpoint

DETAILS OF THE PARTIES INVOLVED

6. The complainant. Survival International is a UK based NGO which seeks to support tribal peoples worldwide through educational programmes, advocacy and campaigns to protect their rights. One of its stated objects is to promote for the public benefit the human rights of indigenous peoples established by United Nations covenants and declarations.

7. The company. Vedanta is a UK registered mining company operating directly or through subsidiaries in India, Zambia and Australia. Vedanta's activities focus on aluminium, copper, zinc, lead and iron mining. The company is listed in the FTSE 100. Vedanta has a controlling stake in a number of subsidiaries but only two are relevant to the complaint: Sterlite Industries (India) Limited (Sterlite Industries), based in Mumbai (Maharashtra) 59.9% of which is controlled by Vedanta; and Vedanta Aluminium Limited, based in Lanjigarh (Orissa), 70.5% of which is owned directly by Vedanta, and 29.5% of which is owned by Sterlite Industries.

8. Survival International's complaint focuses on the construction of a bauxite mine near Lanjigarh (Kalahandi and Rayagada Districts - Orissa - India). This project was originally proposed by Sterlite Industries on the basis of an existing agreement between Vedanta Aluminium Limited and Orissa Mining Corporation Limited, a company owned by the State of Orissa. Vedanta Aluminium Limited applied to the Supreme Court of India for clearance on the project. Following the Supreme Court of India's Order of 23 November 2007, Vedanta Aluminium Limited's application was dismissed but Sterlite Industries (and only Sterlite Industries) was granted leave to re-apply. In August 2008, the Supreme Court granted Sterlite Industries clearance for the use of forest land for bauxite mining subject to final approval from the Indian Ministry of Environment and Forests. Sterlite Industries therefore formally retains the lead on the Lanjigarh project. Neither Vedanta nor the complainant dispute that overall responsibility for the Lanjigarh project rests with Vedanta.

COMPLAINT FROM SURVIVAL INTERNATIONAL

9. On 19 December 2008, Survival International brought a complaint to the UK NCP in relation to the operations of Vedanta in the Niyamgiri Hills, situated in the State of Orissa (India).

10. Survival International made the following allegations in respect of Vedanta's planned construction of an open pit bauxite mine in the Niyamgiri Hills:

(a) Vedanta has failed to consult with an indigenous group affected by its operations, the Dongria Kondh , who live within 4 to 5 Km from the mine but revere as sacred the area on which the mine is being built, and depend for their livelihood on the area affected by the mine's operations. Survival International alleges that Vedanta has failed to consider the implications of its activities in respect of the Dongria Kondh. For example, it has not commissioned an indigenous rights impact assessment with the full participation and engagement of the Dongria Kondh, nor does it have a human rights or indigenous people policy. Survival International appears to have brought its complaint on behalf of the Dongria Kondh, as opposed to other local indigenous communities, because they are the community most vulnerable to the effects of the construction of the mine.

(b) As a result of the allegations summarised in paragraph 10(a), Vedanta has failed to respect India's international commitments under the United Nations (UN) International Covenant on Civil and Political Rights (Articles 2(1), 18, 27), the UN Convention on the Elimination of All Forms of Racial Discrimination (Articles 5(c), 5(d)(v), 5(e)), the Convention on Biological Diversity (Article 8(j)), and the UN Declaration on the Rights of Indigenous People (Articles 12, 18, 19 and 32).

(c) As a result of the allegations summarised in paragraph 10(a), Vedanta has breached India's domestic law, namely the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006.

11. Survival International alleged that Vedanta's conduct is contrary to the following provisions of the Guidelines:

"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. In this regard, enterprises should:
[…]
II(2): Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.
[…]
II(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.

Chapter V. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:

[…]
V(2) Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:
[…]
(b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation”.

RESPONSE FROM VEDANTA RESOURCES PLC

12. Vedanta set out its response in respect of the complaint from Survival International in two letters addressed to the UK NCP (dated 20 January and 13 February 2009). In these letters, Vedanta denied that it has breached the Guidelines and asked the UK NCP not to accept Survival International’s complaint on the basis of the following assertions:

a) Survival International has not provided evidence that it has the backing of the local community to bring this complaint. According to Vedanta, most of the local community supports the mine project.

b) The mine project has already been approved by the Supreme Court of India and by the State of Orissa (which is in joint venture with Sterlite Industries on this project). The Supreme Court of India already considered the impact of the project on the local community, including the consultation process, and also identified significant benefits for the local community as a result of the project.

c) Vedanta already ensures that its operations comply with corporate social responsibility standards and annually publishes a “Sustainable Development Report” to reflect its progress in this area. In respect of the mine project, Vedanta commissioned a comprehensive Environmental Impact Assessment from Tata AIG Risk Management Services Limited which concluded that the project will have a positive impact on the local community. Vedanta also stated that the Wildlife Institute of India confirmed that the Dongria Kondh do not inhabit the area of the future mine.

d) Vedanta consulted the local communities under the supervision of the local District Magistrates in June 2002 (in the district of Kalahandi) and February-March 2003 (in the two districts of Kalahandi and Rayagada). The company also explained that the State of Orissa conducted a separate consultation process with the local communities. Vedanta stated that the Supreme Court of India “was satisfied that the local communities (of which the Dongria Kondh are a part) had been consulted appropriately”. Vedanta also supported the re-settlement of those families displaced by its operations in the area, and is committed to its Integrated Village Development Programme.

UK NCP PROCESS

13. The UK NCP received the complaint from Survival International on 19 December 2008. On the same day, the UK NCP sent the complaint to Vedanta which responded on 20 January and on 13 February 2009.

14. The UK NCP met with Survival International on 27 January 2009 to discuss the complaint against Vedanta and explain the UK NCP’s complaint process. Vedanta was unable to meet the UK NCP within the allocated timeframe before the publication of the Initial Assessment on the complaint. Therefore, the UK NCP and Vedanta communicated by an exchange of e-mails and letters.

15. The UK NCP published its Initial Assessment of the complaint on 27 March 2009. The assessment is downloadable from the UK NCP's website http://www.berr.gov.uk/nationalcontactpoint.

16. On 6 April 2009, Vedanta declined the UK NCP's offer of conciliation/mediation. As a result, the UK NCP informed both parties on 9 April 2009 that it would move to an examination of the complaint. The UK NCP asked both parties to provide evidence to support their position in respect of the complaint by 8 May 2009. This deadline was extended at Vedanta's request. Survival International submitted a great deal of evidence in support of its allegations but Vedanta submitted no evidence in support of the claims made in its responses of 20 January and 13 February 2009, save for a copy of its 2008 Sustainable Development Report.

17. The UK NCP was disappointed by Vedanta's decision not to engage fully with the UK NCP's complaint process. The UK NCP was particularly disappointed with Vedanta's refusal to take up its offer of sponsored professional conciliation/mediation, and Vedanta's failure to provide any evidence during the examination stage to support its position in respect of the complaint.

18. The UK NCP invited evidence from other relevant UK Government Departments, business and trade union's organisations, and civil society, however none was provided.

UK NCP ANALYSIS

19. Most of the evidence in this case comes from the complainant. The UK NCP considered all the evidence submitted by Survival International and decided that it was appropriate to give greater weight to the independent sources in that evidence because they were more likely to provide an impartial view or account of events. The UK NCP considers that the evidence provided by Survival International together with evidence it collected through its own research was sufficient to make a determination on whether Vedanta breached the Guidelines.

Standing of Survival International as the complainant

20. The UK NCP's Initial Assessment of 27 March 2009 sets out its reasons for deciding that Survival International is an appropriate body to bring the complaint. It considers that there is no need to address this issue again in this Final Statement.

The Lanjigarh Project

21. Sterlite Industries commissioned Tata AIG Risk Management Services Ltd to carry out a Rapid Environmental Impact Assessment on the construction of the mine . According to the environmental impact assessment report, the Lanjigarh project includes the construction of an aluminium refinery, supported by a power plant, and of a nearby bauxite mine (situated approximately 5 km south of Lanjigarh) having approximately 73-75 million tons of mining reserve to ensure supply of raw material to the refinery at a competitive price for about 23-25 years of life of the project. According to Vedanta's preliminary results of 7 May 2009 , the refinery has been completed and is being operated at near rated capacity. The refinery's raw material is currently being sourced from Bharat Aluminium Company Ltd (BALCO) , based in Korba (Chhattisgarh – India). Vedanta owns 51% of the shares in BALCO. The UK NCP understands that work on the construction of the bauxite mine has not yet started but that Vedanta

expects to have the mine operational by mid 2010 . A bauxite mine's conveyor (to transport the bauxite from the Lanjigarh mine to the refinery) is also expected to be operational by mid 2010.

Do the Dongria Kondh inhabit the land affected by the mine and will the mine have an impact upon them?

22. The UK NCP focused its analysis exclusively on the Dongria Kondh because Survival International's complaint centres on this indigenous group. The complainant mentions other indigenous groups, such as the Kutia Kondh and the Desia Kondh, which may have been consulted about the construction of the refinery but focuses on the issue of whether the Dongria Kondh have ever been consulted about the construction of the bauxite mine.

23. There is substantial evidence from the Census of India 2001, academic research, the Wildlife Institute of India and the Central Empowered Committee indicating that the Dongria Kondh do inhabit the Niyamgiri Hills. Evidence from the Central Empowered Committee and Sterlite Industries' own environmental impact assessment suggests that the environment in which the Dongria Kondh live, and their traditional way of life, are going to be affected by the Lanjigarh mining project, and that the construction of the mine may involve displacement of local tribal people, of which the Dongria Kondh are a part.

24. According to the Census of India 2001, carried out by India's Office of the Registrar General and Census Commissioner (under India's Ministry of Home Affairs), the Kondh are one of the Scheduled Tribes of the State of Orissa . The Census of India 2001 also confirms that the Kondh (without specifying how many of them are Dongria) are the largest Scheduled Tribe in both the Districts of Kalahandi and Rayagada which are the districts mainly affected by the Lanjigarh project. The "Scheduled tribe atlas of India", published as part of the 2001 census, does state that the Dongria Kondh's population in Orissa, combined with the population of Primitive Tribal Groups in Orissa, is 1,140,374 , and that most Kondh across India are located in Orissa, particularly the former 1991 administrative divisions of Koraput (now split into Rayagada, Koraput, Malkangiri and Nabarangapur), and Kalahandi . However, these figures are drawn from the 1991 census and may not reflect the current populations of Dongria Kondh in the region.

25. An extensive study on the Dongria Kondh conducted in 2002 by a group of academics mainly based in Bhubaneswar (Orissa) also confirms that the Dongria Kondh inhabit the District of Rayagada, at the border with the Kalahandi District in an area roughly comprised within Muniguda (to the east) and Chatikona (to the south). According to a map included in the study, entitled "Project area Dongaria Kondh Development Agency", Dongria Kondh villages exist close to the border with the District of Kalahandi (towards Lanjigarh) within 6 miles (or less) of the proposed mine site .

26. According to the 2002 study, "Dongaria Kondh say that the environment of Niyamgiri Hill range dragged them to settle there" . The same study also states that the Dongria Kondh "never moved to the peaks of the mountains as such places are regarded as the abodes of Niyamraja's kin" and that "each village in the Dongaria habitat is located at the foot of a hill and named after an important hill" . The 2002 study also states that Niyamraja is regarded by the Dongria Kondh as God and ruler of the Niyamgiri Hills and the Dongria Kondh's first ancestor. These observations suggest that the Dongria Kondh do revere the Niyamgiri Hills, including the mine's proposed site, as sacred. They also suggest that Dongria Kondh villages are likely to have been built at the foot, rather than the top of the hills, which in turn suggests that, because of its high altitude, parts of the actual mine' site may not be

inhabited by the Dongria Kondh but that Dongria Kondh villages may be located at lower altitudes nearby.

27. The Wildlife Institute of India is an independent body based at Dehradun (India) since 1982 with a mandate to train government and non-government personnel, carry out research, and advise on matters of conservation and management of wildlife resources . The UK NCP received a copy of the Wildlife Institute of India' study on the proposed Lanjigarh mine from the complainant . The version of the study examined by the UK NCP is the version reproduced by the Environmental Protection Group (EPG) Orissa . In the version of the study examined by the UK NCP, the Wildlife Institute of India acknowledges that the Dongria Kondh inhabit the Niyamgiri Hills, that their economy is forest-based (as well as reliant on agriculture, labour, and animal husbandry), and that they are a "primitive and schedule tribe of the state" .

28. The Central Empowered Committee was established by the Supreme Court of India in 2002 with a broad task to monitor and ensure the compliance of the orders of the Supreme Court concerning the subject matter of forests and wildlife and other issues arising out of said orders . In its "Report in IA No. 1324 regarding the alumina refinery plant being set up by M/S Vedanta Alumina Limited at Lanjigarh in Kalahandi District, Orissa" of 21 September 2005, the Central Empowered Committee states that "[It is seen that] Dongaria Kandha tribe resides in Niyamgiri Hills. As per the applicants, they have unique culture, they worship Niyamgiri Hills, are dependent on it for their survival and that undertaking of mining at Niyamgiri Hills will result in extinction of the tribe" and that "The project is based on and is totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which is an important wildlife habitat, part of elephant corridor, a proposed wildlife sanctuary, having dense and virgin forest, residence of an endangered Dongaria Kandha tribe, a source of many rivers/rivulets" .

29. Sterlite Industries' own rapid environmental impact assessment acknowledges that Scheduled Castes and Tribes inhabit the study area (that is, an area within 10 Km from the mine) but it does not specify whether the Dongria Kondh are amongst these tribes. The assessment states that: "Kalahandi District has 17% SCs [Scheduled Castes] and 29% STs [Scheduled Tribes] against the State [of Orissa] average of 16% SCs and 22% STs. In case of Rayagada District, percentage of ST population is as high as 56% which indicates the complete domination of tribal population" .

30. The environmental impact assessment also acknowledges that the project would entail the displacement of some people and states that the "exact number [of displaced people] will be available after detailed enumeration" and that "Tribal localities are scattered in the hills in one to six-seven houses at place" . The assessment also acknowledges that tribes form about 47.9% of the total population of the area affected by the project (that is, an area within 10 Km of the project's site) and equally states the need for a "Resettlement and Rehabilitation Plan" to address any population displacement in compliance with Orissa's Resettlement and Rehabilitation Policy .

31. In its submission to the Central Empowered Committee before the Committee's September 2005 report referred above, the State of Orissa claims that the Dongria Kondh do reside in the Niyamgiri Hills but approximately 10 km away (in the District of Rayagada) from the Lanjigarh project' site and that, for this reason, the Dongria Kondh's traditional livelihood will not be affected by the mining activities. In a submission to the Supreme Court of India in response to the Central Empowered Committee's report of 21 September 2005, the State of Orissa again denies that the Dongria Kondh inhabit the Lanjigarh project' site in the District of Kalahandi because the Dongria Kondh live in other parts of the Niyamgiri Hills.

32. The UK NCP is unclear as to whether the State of Orissa' submissions are only focusing on the construction of the aluminium refinery but, in respect of the proposed site of the bauxite mine, there is no doubt that the project's affected area covers both the Districts of Kalahandi and Rayagada thus well within the Dongria Kondh's living space. The UK NCP also considers it unrealistic to regard the project's affected area as confined to the site of the mine or even to an area within 10 km from the mine, as if the mine could be built and exploited with no impact beyond this radius. The mere building of the mine and connecting roads for a venture of this magnitude would, by themselves, affect the communities living in the Niyamgiri Hills, including the Dongria Kondh, for several more miles around the mine. In addition, the UK NCP is concerned that the views of the State of Orissa may be influenced by the fact that the Orissa Mining Corporation Limited, a State of Orissa owned company, is in joint venture with Sterlite Industries on the construction of the bauxite mine in the Niyamgiri Hills. For these reasons, the UK NCP decided to give greater weight to the evidence from the Central Empowered Committee.

33. Vedanta itself appears to overlook or contradict itself on the issue of whether the Dongria Kondh inhabit the project affected area. In its response to the UK NCP dated 20 January 2009 the company states that "It should also be noted that the Wildlife Institute of India, at the direction of the MoEF [Ministry of Environment and Forests of India], independently ascertained and specifically confirmed that the Dongria Kondh do not inhabit the proposed mining site" . It then states in the same response that "As previously mentioned, the Court [Supreme Court of India] also examined the Public Consultation process carried out by the State Government officials and was satisfied that the local communities (of which the Dongria Kondh are a part) had been consulted appropriately" .

34. The UK NCP is unable to verify beyond doubt whether the area covered by the bauxite mine itself is permanently inhabited or only revered as a religious place by the Dongria Kondh although the 2002 study conducted by academics suggests that it is revered and may not be wholly inhabited and that the Dongria Kondh tend to live in the foot hills. The UK NCP also cannot make a determination on the exact distance of each Dongria Kondh's village from the bauxite mine (which is disputed by the parties). However, based on the evidence from the Census of India 2001, academic research, the Wildlife Institute of India and the Central Empowered Committee, the UK NCP believes it is tenable to conclude that the Dongria Kondh inhabit the Niyamgiri Hills and land affected by the Lanjigarh mine project.

Were the Dongria Kondh consulted?

35. The decision about the construction of a bauxite mine in the Niyamgiri Hills appears to have been taken by the company without adequate and timely consultation with the Dongria Kondh.

36. Sterlite Industries' August 2002 environmental impact assessment indicates that the decision to build the mine was taken purely on economic grounds, that is: the economic development of the region, the presence of large quantities of good quality bauxite, and an existing bauxite mining lease agreement between Sterlite Industries and Orissa Mining Corporation Limited. The report does not indicate that the views of any of the affected local communities have been considered as a factor in determining the location of the mine and adjacent structures, nor do alternative locations seem to have been considered in any detail.

37. Vedanta states in its letter to the UK NCP of 20 January 2009 that local communities were consulted in June 2002 and February-March 2003. There is evidence that these consultations have taken

place. However, the first consultation in June 2002 only covers the construction of the refinery. In the letter of 6 June 2002 from the Office of the District Collector of the District of Kalahandi to affected land owners of the proposed Lanjigarh aluminium refinery project, the District Collector gives notice of the land acquisition for the construction of the refinery in the Kalahandi District and also explains that displaced families would be compensated and resettled. The letter asks for any complaint to be sent in writing to the Office of the Revenue Inspector in Lanjigarh by 22 June 2002. The letter also informs the recipients that a public consultation would take place on 26 June 2002. It is unclear from the letter who the affected land owners are and whether the Dongria Kondh are amongst them.

38. The UK NCP also received evidence of a consultation with the local community in April 2009 on the expansion of the aluminium refinery. According to the proceedings of the public hearing , the meeting was attended by 400 people but only 117 signed the attendance sheet and 27 actually spoke. It is unclear how many representatives or members of the Dongria Kondh actually attended (or were aware of the meeting). According to Survival International, a member of the Dongria Kondh, Lodu Sikaka (identified as "Lada Majhi" in the meeting's minutes) did attend and spoke against the Lanjigarh project as a whole. Lada Majhi's statement is recorded in the minutes:
"Saluting the people present, he said about the Niyamgiri Hills. He said that the hill is their mother as they are depending on the hill for the livelihood. He questioned the authorities whether they can afford to pay 5 lakh rupees for each tree of lemon, turmeric, etc. He further claimed that the government should not compromise with the foreign company. Even if all accepts the Niyamgiri project but the villagers will never agree on that and they will never allow to operate "Niyam giri danagar (mine)"".

39. There is no evidence to suggest that the consultation on the construction of the refinery included consultation on the construction of the bauxite mine. As explained above, the Lanjigarh project includes the building of a power plant, a refinery and a bauxite mine. The UK NCP understands that the refinery and power plant are already operational. The refinery is currently using raw material brought in from other mines. Whilst the use of locally mined material may be more efficient and economical (because, for example, it may require less journeys by truck and shorter distances to cover), the UK NCP considers it reasonable to conclude that the operation of the refinery is not dependent on the construction of the bauxite mine in the Niyamgiri Hills, therefore consultation on one does not imply consultation on the other.

40. The consultations of February and March 2003 did cover the construction of the bauxite mine in the two Districts of Kalahandi and Rayagada. According to the proceedings of the public hearing in February 2003 , the meeting concluded, amongst other issues, that "The public in general supported the setting up of the industries and operation of mines" and that "Local people should be adequately trained and employment opportunity should be generated" but only 10 people, including the meeting's chair, signed the attendance sheet for this meeting and only 6 people actually commented during the meeting. According to the proceedings of the public hearing in March , the meeting concluded, amongst other issues, that the "local people in general supported the setting up of the mines except two nos NGOs" and that "the project proponent should take all preventive measures, so that surrounding environment should not affected and should contact vigorously with local people as well as local elected body". Notice of the March meeting was published in a local newspaper and about 30 people signed the "oral deliberators" sheet.

41. The February-March 2003 consultations covered the construction of the bauxite mine but appear, on the basis of the available evidence, to have been poorly attended. In addition, there is no evidence that the Dongria Kondh were aware or attended the public hearings. The poor attendance of

these meetings may have been due to the fact that notice of the meetings was, on the available evidence, only given in writing, in local newspapers and in English.

42. The UK NCP did not receive or find any evidence that shows that Vedanta had attempted to engage any of the local indigenous communities affected by the refinery or by the mine by, for example, taking into account that some members of the affected communities may have been illiterate and therefore unable to either read the notice or send written complaints. Vedanta's own 2002 environmental impact assessment states that literacy levels in Orissa are generally low (49.1%) and are even lower (19.7%) in the study area (that is, an area within 10 km from the proposed mine) . The "Scheduled tribe atlas of India" states that the literacy rate amongst Scheduled Tribes is: 37.37% in Orissa, between 30.01 and 45.00% in the District of Kalahandi, and between 12.91 and 30.00% in the District of Rayagada. The rural literacy rate (that is, the percentage of rural literates among Scheduled Tribes) is even lower: 36.13% in Orissa, between 30.01 and 40.00% in the District of Kalahandi, and between 12.63 and 30.00% in the District of Rayagada.

43. Taking into consideration the Dongria Kondh's traditional way of life and livelihood, Vedanta's own data and the Census of India 2001 data, it is reasonable to assume that many members of the Dongria Kondh, may not be able to read and write and that more accessible means of communication should have been used in order to engage them effectively.

44. The Guidelines state that enterprises should "engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation" (Chapter V(2)(b)). The UK NCP considers that Article 10 of the "Akwe: Kon Guidelines", produced by the Secretariat of the Convention on Biological Diversity in 2004 , provides a good indication of what constitutes an "adequate and timely" consultation with indigenous groups because it takes into account the specific needs of indigenous people like the Dongria Kondh and enables companies practically to take these needs into account when consulting indigenous groups.

45. Article 10 of the "Akwe: Kon Guidelines" states that:
"The proponent of a development proposal or the responsible government authority should engage in a process of notification and public consultation of intention to carry out a development. Such notification should use all normal public means of notification (print, electronic and personal media, including newspapers, radio, television, mailings, village/town meetings, etc.), take into account the situation of remote or isolated and largely nonliterate communities, and ensure that such notification and consultation take place in the language(s) of the communities and region that will be affected. Such notification should clearly identify the proponent, contain a brief summary of the proposal, the sites and communities likely to be affected, anticipated impacts (if any) on the conservation and sustainable use of biological diversity, as well as possible cultural and social impacts, arrangements for public consultation, contact details, key dates in the life of the project, including those regarding impact assessment procedures, and identify obligations under national and subnational laws as well subregional, regional and international agreements".

46. From the available evidence, it is tenable to conclude that Vedanta did not employ the Dongria Kondh language or means of communication other than written in the February-March 2003 consultations on the construction of the mine.

47. The Central Empowered Committee provides further indication of the lack of an adequate and timely consultation with the Dongria Kondh. The Committee stated that: "the alumina refinery project should have been allowed to be constructed only after carrying out in depth study about the effect of the proposed mining from Niyamgiri Hills on water regime, flora and fauna, soil erosion and on the Dongaria Kandha tribes residing at Niyamgiri Hills an d after careful assessment of the economic gains vis-à-vis environmental considerations […] In the instant case had a proper study been conducted before embarking on a project of this nature and magnitude involving massive investment, the objections to the project from environmental/ecological/forest angle would have become known in the beginning itself and in all probability the project would have been abandoned at this site" .

48. However, in its submission to the Supreme Court of India in response to the Central Empowered Committee's report of 21 September 2005, the State of Orissa rejects the conclusions of the Central Empowered Committee's report. In particular, it states that local communities, through village assemblies (called Gram Sabha) or their representatives (called Gram Panchayat), were consulted about the Lanjigarh refinery project and the consultation meetings were advertised on two leading local newspapers (and individual notices were issued to "land losers"), and captured in video recordings.

49. As explained above, the UK NCP only found evidence of two consultations on the construction of the mine in February and March 2003. However, neither of these consultations can be considered adequate for the reasons also explained above. The UK NCP has not found any evidence, either in documentary form or video recordings, that confirms that the Dongria Kondh were consulted in an adequate and timely manner and that their views had been collected and taken into account.

50. In its letter to the UK NCP of 20 January 2009, Vedanta states that it is in constant touch with the "Dongria Kondh Development Agency", a State of Orissa's sponsored body, to "actively associate itself in the process of development of the resources of the Dongria Kondh" . The UK NCP was unable to find, nor has it received any evidence from Vedanta, on the company's role in or engagement with this agency and whether the agency was used to consult the Dongria Kondh fully on the construction of the bauxite mine.

51. In the same letter to the UK NCP, Vedanta also suggests that the State of Orissa carried out a separate consultation with the local communities affected by the Lanjigarh project. The UK NCP was unable to find nor has received any evidence on the scope and outcome of this consultation process, other than the consultations carried out in June 2002, February-March 2003 and April 2009 examined above.

Did the Supreme Court of India deal with the issue of consultation with the local communities (of which the Dongria Kondh are part)?

52. Contrary to Vedanta's claims in its response to the UK NCP, the two rulings of the Supreme Court of India of 23 November 2007 and 8 August 2008 , referred in Vedanta's letters to the UK NCP, do not appear to have addressed the issue of whether local communities, of which the Dongria Kondh are part, have been adequately consulted on the Lanjigarh project by the company.

53. In the 2007 Order, the Supreme Court of India set out its rationale for dismissing Vedanta Aluminium Limited's application to use forest land for bauxite mining on the Niyamgiri Hills in Lanjigarh and it also suggested the conditions under which Sterlite Industries (and only Sterlite Industries) could re-submit an application to the Court. These conditions refer to Sterlite Industries' acceptance of a

comprehensive rehabilitation package which includes: the creation of a "Special Purposes Vehicle" jointly by the State of Orissa, Sterlite Industries and Orissa Mining Corporation Limited , which would report annually to the Central Empowered Committee and would oversee the implementation of the "Rehabilitation Package"; Sterlite Industries' contribution to a Wildlife Management Plan for the conservation and management of wildlife around Lanjigarh's bauxite mine; and Sterlite Industries' submission of a statement to the Central Empowered Committee listing, amongst others, the people who will lose their land as a result of the construction of the mine and who will need to be "observed on permanent basis".

54. The Court's Order also reproduces a number of suggestions made by the State of Orissa which include the establishment of a Rehabilitation Project for affected families based on the Orissa Rehabilitation and Resettlement Policy 2006 and the preparation of a comprehensive plan for the "development of tribals in the project impact area taking into consideration their requirements for health, education, communication, recreation, livelihood and cultural lifestyle". Finally, the Court weighs the principle of sustainable development with the need for economic development, and concludes that "courts are required to balance development needs with the protection of the environment and ecology […] Mining is an important revenue generating industry. However, we cannot allow our national assets to be placed into the hands of companies without proper mechanism in place and without ascertaining the credibility of the User Agency".

55. In the 2008 Order, the Supreme Court of India notes Sterlite Industries' acceptance of the rehabilitation package suggested in the 2007 Order and grants the company clearance for the use of forest land for bauxite mining on the Niyamgiri Hills in Lanjigarh, subject to final approval from India's Ministry of Environment and Forests.

56. Neither Order suggests that the Supreme Court of India ruled (or was asked to rule) specifically on the need to consult local and indigenous communities, of which the Dongria Kondh are part. The UK NCP is not aware of whether consultation with indigenous groups is mandatory under Indian law, however Chapter V(2)(b) of the Guidelines does recommend consultation with communities directly affected by a multinational enterprise's environmental, health and safety policies and their implementation. The UK Government expects UK registered companies operating abroad to abide by the standards set out in the Guidelines as well as to obey the host country's laws.

Did Vedanta make any assessment of the impact the construction of the mine would have on the Dongria Kondh?

57. The UK NCP did not find nor has received any evidence from the company that it carried out an assessment of the impact of the construction of the mine on the Dongria Kondh or any other indigenous community which might be affected, even without their participation. Sterlite Industries' environmental impact assessment does include an analysis of the "socio-economic environment" of the study area (a 10 km radius from the proposed mine) but does not address the impact of the mine on the Dongria Kondh.

Vedanta's alleged failure to respect India's international human rights commitments

58. Both India and the UK are parties to the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on

Biological Diversity. Indigenous rights have also been recognised in the UN Declaration on the Rights of Indigenous People adopted by the UN General Assembly on 13 September 2007.

59. Articles 2(1), 18, and 27 of the UN International Covenant on Civil and Political Rights respectively cover: non-discrimination in the enjoyment of civil and political rights, freedom of religion, and the rights of ethnic minorities. Articles 5(c), 5(d)(v), 5(e) of the UN Convention on the Elimination of All Forms of Racial Discrimination respectively cover: non-discrimination in the enjoyment of political rights, non-discrimination in the enjoyment of the right to own property, and non-discrimination in the enjoyment of economic, social and cultural rights. Article 8(j) of the Convention on Biological Diversity covers the protection of indigenous communities. Articles 12, 18, 19 and 32 of the UN Declaration on the Rights of Indigenous People respectively cover: indigenous groups' right to practice their religion and for protection of their religious sites, indigenous groups' right to participate in decision-making affecting their rights, consultation with indigenous groups, and indigenous groups' right to determine their development priorities and to consent to the exploitation of their land.

60. As explained above, Vedanta does not appear to have engaged the Dongria Kondh in adequate and timely consultations about the impact the construction of a bauxite mine in the Niyamgiri Hills would have on their enjoyment of the rights and freedoms described above. In addition, there is no evidence that Vedanta took any other measures to assess, either in its own 2002 environmental impact assessment or through other means, the impact of the proposed mine on the rights and freedoms described above. For these reasons, it is reasonable to conclude that the company did not take adequate steps to respect the rights and freedoms of those affected by its activities consistently with the international instruments of which India is a party, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on Biological Diversity.

61. By only considering the project's economic factors, Vedanta appears not to have balanced the need to promote the success of the company with the clear expectation set out in the Guidelines that companies should respect the human rights of the people affected by the company's economic activities consistent with the host government's international obligations and commitments. While the UK NCP acknowledges the difficulty of UK multinational companies, including Vedanta, to keep track of the international human rights obligations both of the UK and of the host countries in which they operate, companies should nonetheless establish a system that helps them assess and keep track of the human rights impact of their economic activities.

62. Vedanta also does not appear to have a concrete human rights policy or to have in place a mechanism for assessing the impact of its operations on human rights (and indigenous rights) in spite of its published commitments: "[Our people and community policies, which are applied across all of our group companies, are to:] Strive to actively enter into dialogue and engagement with our stakeholders […] Manage our businesses in a fair and equitable manner, meeting all our social responsibilities as a direct and indirect employer and respect the human rights of all of our stakeholders […] Align our activities with the principles in the Convention on the Rights of the Child of the United Nations and Convention 138 of the International Labour Organisation" .

Vedanta's alleged violation of India's domestic law

63. The UK NCP has not examined the alleged breach by Vedanta of India's law and regulations, namely the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act

2006. Although Chapter V(2)(b) of the Guidelines recommends that enterprises should engage in adequate and timely communication and consultation within the framework of laws and regulations in the countries in which they operate, Survival International did not demonstrate that the legislation in question placed any obligations on companies to consult with local communities affected by their activities. It is outside the UK NCP's remit to determine companies' violation of local law and regulations with no reference to the Guidelines.

CONCLUSIONS

64. Having examined the evidence, the UK NCP could not find any record of the views of the Dongria Kondh about the construction of the bauxite mine in the Niyamgiri Hills ever having been collected and/or taken into consideration by the company. Evidence from the Census of India 2001, academic research, the Wildlife Institute of India, and the Central Empowered Committee suggests that the Dongria Kondh inhabit and have a direct interest in the land affected by the bauxite mine. The Supreme Court of India did not rule (nor was it asked to rule) on the need to consult local indigenous communities.

65. The UK NCP upholds Survival International's allegation that Vedanta has not complied with Chapter V(2)(b) of the Guidelines. The project has an environmental and health and safety impact on the Dongria Kondh. Evidence from the Central Empowered Committee and Sterlite Industries' environmental impact assessment shows that the Lanjigarh mining project would affect the environment in the Niyamgiri Hills which are home to (and are revered as sacred by) the Dongria Kondh, and may cause the displacement of some local people, of which the Dongria Kondh are a part. The UK NCP concludes that Vedanta has not complied with the Guidelines because it has to date failed to put in place an adequate and timely consultation mechanism to engage fully the Dongria Kondh about the potential environmental and health and safety impact of the construction of the mine on them.

66. The UK NCP upholds Survival International's allegation that Vedanta failed to act consistently with Chapter II(7) of the Guidelines. It concludes that Vedanta failed to put in place any general human rights or indigenous rights policies or a mechanism, such as an indigenous (or human) rights impact assessment, to assess the impact of the construction of the mine on the Dongria Kondh. It also concludes that Vedanta failed to engage the Dongria Kondh in adequate and timely consultation about the construction of the mine. For these reasons, the company has so far failed to develop and apply an effective self-regulatory practice to foster a relationship of confidence and mutual trust between the company and the Dongria Kondh, a constituent of the society in which it operating.

67. The UK NCP also upholds Survival International's allegation that Vedanta has behaved inconsistently with Chapter II(2) of the Guidelines because: it failed to engage the Dongria Kondh in adequate and timely consultations on the impact that the construction of the bauxite mine would have on their recognised rights and freedoms; and it did not take any other measures to consider the impact of the construction of the mine on those rights and freedoms, or to balance the impact against the need to promote the success of the company. For these reasons, Vedanta has not respected the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People.

EXAMPLES OF GOOD PRACTICE BY THE COMPANY

68. The company's 2008 and the recently published 2009 Sustainable Development Reports are commendably based on the Global Reporting Initiative's (GRI) G3 Guidelines and on selected GRI indicators addressing economic performance, environmental performance, labour practices and decent work performance, human rights performance, society performance, and product responsibility performance.

69. The UK NCP noted with interest Vedanta's pilot scheme, mentioned in Vedanta's website , to encourage selected suppliers to respect human rights and the company's intention to roll out this scheme to all suppliers by 2012.

70. Equally noteworthy is Vedanta's decision to align its 2009 sustainable development report to the 10 principles of the UN Global Compact, and to the International Finance Corporation's Performance Standards on Social and Environmental Sustainability.

71. In its 2009 Preliminary Results, Vedanta confirmed its commitment to sustainable development focusing in particular on the areas of education, health, livelihood, agriculture and social forestry, and integrated village development.

RECOMMENDATIONS TO THE COMPANY AND FOLLOW UP

72. With the aim of assisting Vedanta in bringing its practices in line with the Guidelines, the UK NCP makes the following recommendations:

Recommendation 1

73. Vedanta should immediately and adequately engage with the Dongria Kondh seeking, in particular, the Dongria Kondh's views on the construction of the bauxite mine, access of the Dongria Kondh to the project affected area, ways to secure the Dongria Kondh's traditional livelihood, and exploring alternative arrangements (other than re-settlement) for the affected Dongria Kondh's families. The company should respect the outcome of the consultation process.

74. As a guide on how to pursue the consultation process, Vedanta should refer to the "Akwe: Kon Guidelines - Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities" , produced by the Secretariat of the Convention on Biological Diversity in 2004. At a minimum, the company is expected to advertise the consultation in a language and form that can be easily understood by the Dongria Kondh therefore ensuring the participation of the maximum number of Dongria Kondh (and their representatives) in the consultation.

Recommendation 2

75. Vedanta should include a human and indigenous rights impact assessment in its project management process. In doing so, Vedanta should pay particular attention to the creation of an adequate consultation process, prior to the finalisation and execution of a project, with indigenous groups potentially affected by the company's activities. This measure would minimise the risk of failure in balancing the host country and the UK international human rights obligations with the duty to

promote the success of the company. It is also essential that the human and indigenous rights impact assessment and consultation procedures do not remain a "paper policy" but are translated into concrete procedures and actions on the ground.

76. John Ruggie is the Special Representative of the Secretary General of the UN on the issue of human rights and transnational corporations and other business enterprises. In this capacity, John Ruggie is widely considered a leading authority on the issue of business and human rights and has provided good practical advice to companies on how to ensure that they respect human rights while engaging in economic activities. In April 2008, John Ruggie reported to the UN that, in order to ascertain whether they are respecting human rights, companies require "due diligence – a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights-related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities" .

77. In an April 2009 report to the UN, John Ruggie also stated: "What is the appropriate scope of a company's human rights due diligence process, the range of factors it needs to consider? Three are essential. The first is the country and local context in which the business activity takes place. This might include the country's human rights commitments and practices, the public sector's institutional capacity, ethnic tensions, migration patterns, the scarcity of critical resources like water, and so on. The second factor is what impacts the company's own activities may have within that context, in its capacity as producer, service provider, employer and neighbour, and understanding that its presence inevitably will change many pre-existing conditions. The third factor is whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-State actors, and State agents" .

78. To this effect, Vedanta should consider implementing John Ruggie's suggested key steps for a basic human rights due diligence process :

- Adopting a human rights policy which is not simply aspirational but practically implemented;
- Considering the human rights implications of projects before they begin and amend the projects accordingly to minimise/eliminate this impact;
- Mainstreaming the human rights policy throughout the company, its subsidiaries and supply chain;
- Monitoring and auditing the implementation of the human rights policy and company's overall human rights performance.

79. Further assistance on how to develop a practical human rights policy can be found on the UN website on business and human rights . The Akwe: Kon Guidelines, mentioned above, can be used as a point of reference for carrying out indigenous groups' impact assessments. As benchmarking, Vedanta may also consider the May 2008 "Position statement on mining and indigenous peoples" of the London based International Council on Mining and Metals which commits the Council's members to:
"Engaging and consulting with Indigenous Peoples in a fair, timely and culturally appropriate way throughout the project cycle. Engagement will be based on honest and open provision of information, and in a form that is accessible to Indigenous Peoples. Engagement will begin at the earliest possible stage of potential mining activities, prior to substantive on-the-ground exploration. Engagement, wherever possible, will be undertaken through traditional authorities within communities and with respect for traditional decision-making structures and processes.
[…]

Designing projects to avoid potentially significant adverse impacts of mining and related activities and where this is not practicable, minimising, managing and/or compensating fairly for impacts. Among other things, for example, special arrangements may need to be made to protect cultural property or sites of religious significance for Indigenous People.
[…]
Through implementation of all of the preceding actions, seek broad community support for new projects or activities. ICMM members recognize that, following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted".

80. To repeat, whichever self-regulatory practices Vedanta chooses to adopt in order to minimise the risk of further breaches of the Guidelines in the future, it is essential that these practices, particularly the human and indigenous rights impact assessments and the adequate and timely consultation with all the affected communities of a project, do not remain "paper statements" but are translated into concrete actions on the ground and lead to a change in the company's behaviour.

81. Both parties are asked to provide the UK NCP with an update by 29 December 2009 on the implementation of the UK NCP's recommendations listed in this Final Statement. The update should be sent to the UK NCP in writing to the following address:

UK National Contact Point for the OECD Guidelines for Multinational Enterprises
Department for Business, Innovation and Skills
Bay 4133
1, Victoria Street
London SW1H 0ET
United Kingdom
e-mail: uk.ncp@bis.gsi.gov.uk

82. The UK NCP will publish on its website a further statement reflecting the parties' responses.

25 September 2009

UK National Contact Point for the OECD Guidelines for Multinational Enterprises

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Netherlands National Contact Point
OECD GUIDELINES
for multinational enterprises

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 2008[1].
- 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 it 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 be 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 or 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. Intervenors 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. …"

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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.