

Final Statement of the Dutch NCP
on the specific instance raised by
Shehri-CBE concerning Makro-Habib Pakistan Limited,
raised on 9 October 2008.

February, 2010

Introduction

The OECD Guidelines for Multinational Enterprises are a set of recommendations to enterprises operating in and from the 30 OECD member states and 12 other countries adhering to these Guidelines.¹ They cover a broad range of issues such as social rights of employees, the environment and human rights.

All the 42 countries adhering to the Guidelines have established a National Contact Point (NCP) that promotes the Guidelines and deals with issues around their implementation in specific instances. The Guidelines are not legally binding, but NCPs may issue a statement concerning an enterprise's activities in a specific instance. In such statement an NCP can establish that the Guidelines are being violated and make recommendations on the correct implementation of the Guidelines. This grievance procedure is a non-legal, future oriented process aimed at resolving current issues in an amicable way.

Parties

The complainant

On 9 October 2008, the Dutch National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP) received a notification from the Pakistan based NGO Shehri – Citizens for a Better Environment.

The enterprise

The notification, or complaint, related to a newly established cash and carry store of Makro Habib Pakistan Limited (Makro-Habib) in Karachi. Makro-Habib in October 2008 was a joint venture between the Pakistani companies Thal Limited (55%) Agriauto Industries Limited (3.87%) and AuVitronics Limited (0.11%), all part of the Pakistani conglomerate House of Habib, and the non-Pakistani resident companies Robert Finance AG (17.42%) and SHV Interholding AG, the latter being a wholly owned subsidiary of Netherlands based SHV Holdings N.V. (23.6%). SHV

¹ OECD Declaration on International Investment and Multinational Enterprises, 27 June 2000, article I.

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Interholding A.G. initially held a 70% majority share in the Pakistani joint venture until April 2008.
²SHV Holdings N.V. is the majority owner of the Makro chain of cash and carry stores in Thailand and South America.

Complaint

Shehri-CBE alleged that Makro-Habib violated

- (1) local land law with its involvement in an illegal transfer of land
- (2) human rights of the citizens living in the vicinity of the Makro store, and
- (3) caused environmental degradation.

Ad 1.

Shehri-CBE's first statement is a legal question involving Pakistani land law and local spatial planning issues. In 2007, Makro-Habib built a new store on the so-called Webb-ground, of which Shehri-CBE alleged that this ground was the only playground for local children. A local citizen had filed suit at a local District Court, alleging that Makro-Habib was not entitled to use the Webb-ground for commercial purposes. Shehri-CBE was invited by the presiding judge to act as *amicus curiae*. During this case, the judge issued a temporary status quo order, of which Shehri-CBE in its notification to the NCP alleged that Makro-Habib had defied in multiple ways. Furthermore, Shehri-CBE stated that Makro-Habib had let a trail of land scams in Pakistan, similar to the case in Karachi.

Ad 2.

Shehri-CBE secondly alleged that Makro-Habib pollutes the environment with noise causing generators, used for power supply, and with a cess pool next to the store due to the absence of a drainage system. The generators would produce noise at a level above the allowed maximum level whilst being located in the near vicinity of a school. The cess pool would attract mosquitoes, so causing health risks, such as malaria and dengue fever.

Ad 3.

Thirdly, Shehri-CBE, combining the former two issues, stated that by depriving local children from their sole playground, and by causing environmental pollution, Makro-Habib violates the human rights of local people. These rights, according to Shehri-CBE, 'include the right to a clean healthy and unpolluted environment', whereby 'people living in urban areas are entitled to a people friendly built environment, to open spaces for recreation and fresh air, to playgrounds for children, (...), and to freedom from air and noise pollution (...)'.

The following provisions of the Guidelines are deemed to be relevant to the case:

- 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:

² Information from SHV Holdings NV.

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1. *Contribute to economic, social and environmental progress with a view to achieving sustainable development.*
2. *Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*
6. *Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*

- 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:

3. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.

Admissibility of the complaint

On 19 December 2008, the NCP declared that the specific instance merited further consideration. The Commentaries to the Guidelines provide for a set of characteristics of the specific instance that have to be taken into account when assessing its admissibility.³

The specific instance relating to Makro-Habib met the requirements *prima facie*. The issues raised at that time were relevant to the implementation of the Guidelines by a Dutch multinational. Shehri-CBE appeared to be a properly established and registered organisation, and the type of issue raised here seemed bona fide and fitted within the general area of interest of Shehri-CBE. Thirdly, the environmental and human rights concerns raised in this specific instance were considered material, substantiated and seemed *prima facie* in violation of the Guidelines.

The fact that the NCP concluded that the complaint merited further consideration cannot be considered a prejudgment on the alleged issues.

The enterprise's view

On 16 February, 2009, the NCP met with representatives of SHV Holdings in Amsterdam in preparation for mediation. Several days before the meeting, SHV Holdings NV sent the NCP a written reply to the allegations of Shehri-CBE. In its reply, which was accompanied by several documents, SHV Holdings denied all allegations, also incorrectly stating that the OECD Guidelines did not apply to SHV Holdings' activities in Pakistan based on the fact that Pakistan is not a member to the OECD nor an adhering country to the OECD Guidelines.

³ Paragraph 14, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

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On the legal proceedings SHV Holdings NV depicted that the lawsuit concerning the allegedly illegal conversion of the 'Webb ground' into commercial land had already been dismissed by the local Court, and handed over the Court decision to the NCP. SHV Holdings stated that "the 'Webb ground' was only used as a private playground until the mid-eighties, but had been degraded into a garbage dump in the years before it was acquired for building the Makro store". According to SHV Holding and its joint venture partners [quote] "the Webb Ground was under military land rules classified as 'A-2 land', and belonged to the Pakistan Army and was on lease to Karachi Grammar School for use of its students only. It was never a public play ground. The subject land remained vacant (when Karachi Grammar School lease expired) and became a garbage dump from 1982 until 2006 when it was taken on lease by Makro Habib from the Army Welfare Trust who acquired it in 2002 from the Pakistan Army. In 2002 the Pakistan Army following the rules and legal procedures changed the status of the land to commercial (B-3) and leased it to the Army Welfare Trust for 90 years. The approval was given by the President of Pakistan for the change in status and lease to AWT." [unquote]

As a foreign investor, SHV was confident that "any transaction with the Government of Pakistan and its institutions could be fully relied upon and leased the land from AWT in 2006."

Regarding the allegation on environmental pollution SHV Holdings noted that the environmental issues were of a temporary nature during the construction period. SHV Holdings was able to show recent pictures which displayed the generators, supplied with silencers, and a clear perimeter with no cess pools.

SHV Holdings also stated to the NCP that it had in the meantime transferred its last share in Makro-Habib to MKO Cash and Carry limited (a non-Pakistani resident company) as of December 2008, further to a sale agreement which had already been agreed upon in February 2008. SHV Holdings' withdrawal from the Pakistani market, according to SHV Holdings, was based on market conditions; the sale agreement, which was agreed upon in February 2008, would have had nothing to do with the complaint of Shehri-CBE. Due to this agreement and its execution, SHV Holdings no longer had any direct interest in the issues raised by Shehri-CBE, by which no substance for a future oriented, NCP led mediation process was left.

Based on this last statement, the NCP set to analyse whether involvement of the NCP was merited.

Request for additional information from Shehri-CBE

On 4 March, 2009, the NCP sent a letter to Notifier with some additional questions, stemming from the meeting with SHV Holdings. The key questions in this letter related to:

- (1) Shehri-CBE's motivations for filing a complaint about a legal issue which at that time had been dealt with, and whether it could explain in what way Makro-Habib had defied a court order and if perhaps the Court had so judged.
- (2) the NCP requested Shehri-CBE to substantiate its allegations against Makro-Habib with regards to other disputes relating to land use, and
- (3) to explain its motivation to raise the environmental issues of which SHV Holdings made plausible that these issues had already ceased to exist long before the NCP notification.

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- (4) Shehri-CBE was requested to give insights in the letters allegedly sent to SHV Holdings NV, because the latter denied having received such letters.
- (5) Lastly, Shehri-CBE was informed that SHV Holdings was no longer active in Pakistan and thus no longer involved in the exploitation of the Makro stores in Pakistan, due to having fully sold its share in Makro Habib Pakistan. If this proved to be the case, the NCP announced that it was planning on closing the specific instance procedure, now that an investment nexus was lacking and hence resolution of the issues was made impossible.

Shehri-CBE was requested to respond to this letter no later than 31 March 2009.

Reply Shehri-CBE including NCP's analysis

After being granted upon request an extra month for answering its letter of 4 March, the NCP received Shehri-CBE's detailed reply on 16 June.

On the legal dispute regarding the use of land

Shehri-CBE stated that, with regards to the legal issue, it had been unaware until the NCP's letter that the local Court had dismissed the case. Furthermore, Shehri-CBE alleged that Makro-Habib had violated a court order, but did not substantiate this legal issue with a Court decision confirming this. With regards to the allegations of Makro-Habib's involvement in similar land use conflicts, Shehri-CBE attached several newspaper articles stating such, but, again, was not able to provide the NCP with Court decisions confirming illegal transfers of land or other violations of Pakistani land and property law. Nonetheless the Netherlands' NCP does not consider itself to be in the position to judge whether Pakistani law has been violated.⁴

On the environmental issues

Shehri-CBE acknowledged that Makro-Habib addressed the environmental issues long before it filed the notification, but claims that Makro-Habib had done so only when the Court forced it to do so. However, with the former existence of a status-quo order, prohibiting Makro-Habib to alter the state of the Makro-store, the Court was requested by Makro-Habib to 'allow' the addressing of the environmental issues. The Court did so on 31 October 2007, whereby it should be noted that the status quo order had not been extended as of 9 October 2007. On 29 September 2009, after having visited the Makro store, the local government ordered Makro-Habib to further address the issues concerning noise and water drainage nuisances, and emissions. In its letter, Shehri-CBE requested the NCP once more to condemn SHV Holdings for the environmental issues in the light of

⁴ On the reopening of the lawsuit by the Pakistani Supreme Court; after the appearance of a column in the Pakistani newspaper Dawn on the legal dispute over the 'Webb ground' on which the Makro store was built, the Pakistani Supreme Court reopened *suo moto* the case mentioned here on page 2. The case involved multiple parties, including local and national government branches. SHV Holdings however was not involved as it had no longer an interest in the matter due to its divestment. After hearings were held in October 2009 the Supreme Court ruled in its judgment of 18 December 2009 that inter alia:

"the Government of Pakistan (acting in the name of the President) had no legal authority to grant leasehold rights in the said land to Army Welfare Trust" and "as a consequence the sub-lease dated 31.7.2006 in favour of Makro-Habib is also without lawful authority and is, hereby cancelled and set at naught" "Makro-Habib is allowed three months from the date of this judgment, to remove its structures and installations from the playground, restore it to the same condition as existed on the date of the sub-lease and hand over its vacant possession to the City District Government Karachi"

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the OECD Guidelines. As the environmental issues have nonetheless been addressed, the grounds for the complaint and mediation by the NCP seem unavailable.

Prior request for contact by Shehri-CBE

Further to the complaint, Shehri-CBE attached three letters to its reply. These letters were sent to the local manager of Makro-Habib, with cc to *inter alia* SHV Holdings in the Netherlands. In these letters Shehri-CBE points Makro-Habib at the alleged illegality of the construction of a Makro-store on the so-called Webb ground. SHV Holdings denied having received these letters. The managing director of Makro-Habib, to whom the letters⁵ were addressed, replied to Shehri-CBE by letter⁶ in which notice is made on a meeting between the two organisations on 27 February 2007. In this letter, the managing director explains Makro-Habib's legal position stemming from the due diligence process of its legal counsel.

Establishing the investment nexus: use of Makro name by Makro-Habib

Shehri-CBE raised its doubts with the NCP about SHV Holdings' true divestment of the Makro-Habib joint venture, as the Makro name was still being used in Pakistan. Shehri-CBE stated that this could still be a source of income for SHV Holdings, which, according to Shehri-CBE, would mean that the latter still bears responsibility for the activities of Makro-Habib. The NCP discussed the divestment in general and this issue in particular with SHV Holdings. SHV Holdings provided the NCP with the contract of sale⁷ that was concluded on 26 February, 2008, between SHV Holdings and House of Habib's affiliates in which the right on the use of the Makro name is stipulated as follows:

"5.3 License to use trademark

In terms of this Agreement, SHV Holdings, through Orkam Asia Trademark AG, a fully owned indirect subsidiary of SHV Holdings shall grant an indefinite, non transferable license and exclusive right in and for the benefit of the Company (i.e. Makro-Habib – NCP) for use of the trademark 'Makro', 'Aro', 'Savepak', 'Protec', 'Navigator', 'Toolmaster', 'Automaster' and 'Q-Biz' for a cash and carry business in Pakistan for a consideration of xxxx to be paid by the Company to SHV Holdings on the Closing Date. The Parties agree that the license shall be for an indefinite period commencing on the date of execution of this Agreement and shall be deemed to be immediately terminated upon HOH ceasing to be the majority shareholder of the Company."

It follows from this stipulation that SHV Holdings does not receive any further royalties or other payments due to Makro-Habib's license to use the Makro name and affiliated trademarks.

⁵ Shehri-CBE provided the NCP with three letters sent to Makro-Habib Pakistan Ltd. on 27 February, 9 July and 13 July 2007. In the letter of 27 February referral is made to a letter which was sent to Makro-Habib on 9 February 2007.

⁶ Letter of Makro-Habib of 1 March, 2007, provided to the NCP by Shehri-CBE

⁷ For the protection of sensitive business information and the rights of third parties not directly involved in the NCP procedure, i.e. House of Habib and affiliates, the NCP cannot share the entire contract with Shehri-CBE or other parties. However, the NCP was allowed by SHV Holdings and House of Habib to quote the above mentioned paragraph, which is the whole and only part dealing with the license to use the Makro name.

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Conclusions

The NCP considered the complaint brought by Shehri-CBE against Makro-Habib on various grounds. While investigating the complaint in preparation for mediation, the NCP found that SHV Holdings transferred its last share in the Makro Habib joint venture in December 2008. This resulted in a full withdrawal by SHV Holdings from the Pakistani market. Due to this withdrawal the enterprise lost the practical ability to influence implementation of the Guidelines. After examining the contract of sale and the annual report of SHV Holdings, the NCP has found no grounds to hold that SHV Holdings' withdrawal from Pakistan related to the NCP complaint of Shehri-CBE.

From the procedural guidance for NCPs and the 2003 Statement on the Investment nexus by the OECD Investment committee, it follows that the specific instance procedure was developed in the specific context of application of the OECD Guidelines in international investments by multinational enterprises. Having to conclude that the investment nexus has ceased to exist, the NCP found no basis to continue its mediation procedure.

Nevertheless, based on the information provided by parties it would seem that the grounds for the original claim have also been resolved as the Pakistani court has ruled in the matter of the use of land and the environmental issues had been addressed by the enterprise in an earlier stage.

Final remarks

In the course of this complaint procedure the Dutch NCP came across several issues which it would like to address in general.

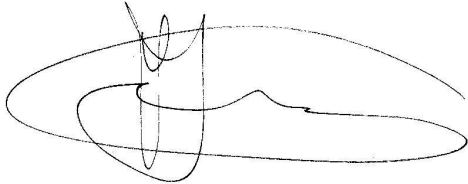
On the applicability of the OECD Guidelines, the NCP considers that the Guidelines are recommendations to all enterprises operating in and from all OECD member states and countries adhering to the Guidelines. Consequently, interest groups established in non-adhering countries are entitled to file complaints with the NCP of the home country of an enterprise.

The NCP strives for contributing to a good understanding and effective implementation of the Guidelines. As the specific instance procedure is a future orientated process it is imperative for an effective procedure if issues raised with an NCP are material during the time of notification and can be supported by sufficient information.

One of the areas where the NCP considers further cooperation is possible is in the matter of early dialogue between enterprises and their stakeholders. Here, the NCP would like to recommend enterprises to regularly carry out due diligence on legal, social and environmental impacts of their activities, as they have a duty to respect the human rights of and to do no harm to those individuals and groups that are affected by the activities of enterprises. This responsibility has been introduced in April 2008 by the UN Special Representative for Business and Human Rights,

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professor John Ruggie.⁸ Broad due diligence reports can form a solid basis for enterprises to engage in dialogue with their stakeholders and address possible concerns. To successfully address concerns, a dialogue that focuses on mutual interests and benefits seems the best way forward. This can also help to avoid costly legal proceedings. The involvement of an independent mediator – be that an NCP or another suitable person parties find acceptable – may increase the chances of an agreed solution.



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⁸ *"Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development - Protect, Respect and Remedy: a Framework for Business and Human Rights"*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Human Rights Council, April 2008. For more information on the UNSR's work please visit <http://www.business-humanrights.org/Home>.