Form to submit a specific instance to the Japanese NCP

November 2016

If you wish to submit a complaint to the Japanese NCP, please provide information requested in this form in writing and submit to the Japanese NCP by e-mail (jpn-ncp@mofa.go.jp).
<Reminder>

- When the Japanese NCP receives a complaint document, after checking whether all the information required is clearly provided, the Japanese NCP will send a receipt letter to you.
- The information provided to the Japanese NCP is to be shared with the enterprise involved and, whenever third countries are involved, with the other related NCP(s). Once a complaint document is submitted, it is considered that you have accepted above-mentioned information sharing policy of a specific instance. Therefore, if you do not wish to share specific information in the complaint with the parties involved, you should specify the corresponding parts with reasons (for example, if you do not want to share your identities with the parties involved, it is preferable that you send the edited version of the complaint with your identities struck out in addition to the original version).
- When you submit a specific instance to the Japanese NCP, please be aware that a) observance of the Guidelines by enterprises is voluntary and not legally enforceable, and that b) the NCP's role is to offer good offices to help the parties involved resolve the issues when the issues raised merit further examination after the initial assessment.

1 Information on complainant

(1) Name of the complainant and/or name of the representative of the complainants

Bernadette Maheandiran, Research and Legal Analyst, Market Forces

(2) Contact address

312 Smith Street, Collingwood, Victoria, Australia 3066

(3) Telephone, fax number and e-mail address

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(4) If you are submitting a complaint on behalf of others, explain your interest in this case and reason for submitting the complaint.

The complaint, or implementation of the specific instances, requires the NCP to "offer a forum for discussion and assist the business community, worker organisations, other non-governmental organisations, and other interested parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law."[1]

Market Forces is an affiliate project of Friends of the Earth Australia (FoEA), an Australian non-governmental organisation. Our interest in this matter stems from FoEA's mission and Market Forces' organizational mandate: FoEA advocates "for a world where environmental protection, social justice and economic welfare for all people, go hand in hand."

[1] OECD Guidelines for Multinational Enterprises, *OECD,* (2011), online: http://www.oecd.org/daf/inv/mne/48004323.pdf, pg. 72.

FoEA, through its local, national and international networks, works with communities to communicate, raise awareness about and take action on environmental issues, and put forward alternatives such as the use of renewable resources. As an affiliate program of FoEA, Market Forces advocates for environmentally sustainable behaviour from the finance sector, both in Australia and internationally.

Market Forces is supportive of local community organisations in Vietnam which seek to prevent the environmental degradation and loss of livelihood that results from the expansion of coal-fired power in those countries. Due to security concerns on the ground and fear of retaliation, these Vietnamese community organisations are often not able to raise these issues themselves. However, through our close collaboration with these organisations, we are able to communicate the information and concerns about the impacts of these coal-fired power projects (referred to below) to the financial institutions around the world that are seeking to or are already financing these projects. We engage with these financial institutions in order to ensure they have a more complete perspective of the environmental and social issues faced by communities impacted by proposed projects.

We submit this complaint as the conduct of specific lenders to proposed and financed projects (referred to below) breaches the OECD Guidelines for Multinational Enterprises (OECD Guidelines).

2 Information on the multinational enterprise involved

(1) Name of the enterprise

Mitsubishi UFJ Financial Group, Inc. (MUFG)

(2) Location of the enterprise (country and address)

7-1, Marunouchi 2-Chome, Chiyoda-ku, Tokyo, Japan

(3) Contact information (Contact person, telephone and/or fax number, e-mail address, as detailed as possible)

President & Group CEO: Nobuyuki Hirano
c.c: Corporate Communications Division, Planning Department Senior Manager, Mr. Mitsuru Miyasaka - mitsuru_miyasaka@mufg.jp

Tel: 81 3-5432-7324

(4) Reasons why the complainant considers the enterprise as a multinational enterprise

MUFG operates in multiple countries, including Japan and Vietnam. As stated on MUFG's website, MUFG is a global business: "As a member of one of the largest and most stable financial institutions in the world, with operations in more than 50 countries, our cross-border expertise is both broad and deep."

3 Detailed description of complaint

(1) Detailed description of issues which the complainant deems the enterprise's non-adherence to the Guidelines

The issues outlined in the specific instance relate to four different coal-fired power projects in which MUFG is involved: Nghi Son 2, Nam Dinh 1, Van Phong 1 and Vung Ang 2. Please note that Nghi Son 2 is a project that has already been financed while Nam Dinh 1, Van Phong 1 and Vung Ang 2 have not yet reached financial close.

Where MUFG has already provided a loan to a coal-fired power project, in the case of Nghi Son 2, we allege that MUFG facilitated the harms listed below by financing the project. Nghi Son 2 is a project that involves risks that MUFG should have been aware of, had they conducted adequate due diligence. We also advised them about some of the concerns noted below in correspondence on 13 March 2018 and on 22 May 2018.

Where MUFG is considering financing a project, as in the case of Nam Dinh 1, Van Phong 1 and Vung Ang 2, it is important to recognize that the bank is still linked to harms from the project. MUFG, as a potential lender, has the obligation to leverage its relationship with the sponsor to seek disclosure and ensure that human rights violations and environmental harms do not occur. If the sponsor failed to do so, MUFG would no longer be able to consider financing the project, as committing to financing such a project would be a breach of the OECD Guidelines.

The following section will describe the issues with the projects and what MUFG ought to have done to address these issues. The following section (section 2) will detail how these issues and the lack of response from MUFG breach the Guidelines.

1. Nghi Son 2

Nghi Son 2 is a 2 x 600 MW coal-fired power station located in Tĩnh Gia district, Thanh Hoa province in Vietnam, sponsored by Korea Electric Power Company and Marubeni Corporation. This project uses supercritical technology and has an anticipated average emissions intensity of 860-880g CO_2/kWh.

This project reached financial close on 13 April 2018. Construction commenced end of July 2018.[2] Nghi Son 2 is scheduled to be completed in July 2022.[3] MUFG provided project finance to Nghi Son 2. The total debt was US$1,869 million. The contribution of Mizuho, MUFG and SMBC was as follows:

Mizuho – US$99.3 million
MUFG – US$132.4 million
SMBC – US$132.4 million[4]

Standard Chartered Bank, one of the banks previously linked to financing this plant, stated in March 2018 that they were reviewing their involvement in this project after being alerted to the project's high greenhouse gas intensity. At the time of financial close Standard Chartered was no longer part of the syndicate.

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[2] *Pulse News,* 'Doosan Heavy Industries begins construction of thermal power plant in Vietnam', (26 July 2018), online: https://pulsenews.co.kr/view.php?year=2018&no=469625

[3] Doanh Doanh, Vietnam Economic Times, 'Construction of Nghi Son 2 Thermal Power Plant to get underway', (25 July 2018), online: http://vneconomictimes.com/article/business/construction-of-nghi-son-2-thermal-power-plant-to-get-underway

[4] Minerva Lau, *Project Finance International*, 'Nghi Son 2 IPP Loan signs, finally' (18 April 2018).

The project raises several concerns which MUFG should have addressed:

a. No public consultation took place or public consultation was categorically inadequate: The Environmental Social Impact Assessment (ESIA), dated February 2015, was made available by the Japan Bank for International Cooperation (JBIC) on 7 February 2018. It did not contain any evidence that the public was consulted on the project.

Since the release of the ESIA, Vietnamese community organisations have visited the location around Nghi Son 2 (May 2018) and the communities in the area report that they were not consulted. If it is claimed that consultation was conducted, it would be imperative to know when this consultation occurred, precisely who was consulted (and their position within the local communities), and what information was provided on the project to those consulted.

MUFG was advised of the lack of consultation by letter on 13 March 2018 and 22 May 2018. To our knowledge, MUFG has not exerted leverage on the project sponsor to conduct consultations, nor conducted independent consultations itself.

b. The ESIA appears to violate Vietnamese law: Article 21 of the Vietnamese *Law on Environmental Protection 2014*, No 55/2014/QH13, states that project owners are obliged to consult communities that are directly affected. As noted above, the ESIA provides no evidence that such consultation with project-affected communities took place.

Further, section 20 of the Vietnamese *Law on Environmental Protection 2014* states that project owners must repeat the ESIA where the project is not executed within 24 months of the date of the approval of the EIA. The ESIA is dated February 2015, more than three years prior to financial close and the commencement of construction.

MUFG was advised of the potential violations of law by letter on 13 March 2018. To our knowledge, it has not exerted leverage on the project sponsor to repeat the ESIA or to conduct further consultations, nor to conduct independent consultations.

c. Nghi Son 2 is highly polluting: Based on the ESIA, Greenpeace's coal and energy expert produced an estimate of Nghi Son 2's emissions intensity. The project's emissions intensity is estimated at 860-880g CO_2/kWh – an unacceptably high level by international standards. For comparison, the OECD Understanding on Export Credits for Coal-Fired Electricity Generation (Sector Understanding) excludes export finance for all coal-fired power projects in Vietnam, other than those that use ultrasupercritical technology or with emissions lower than 750g CO_2/kWh.[5] Nghi Son 2's estimated emissions intensity is even higher than the benchmarks of the Sector Understanding for plants which use supercritical technology (between 750 and 850 g CO_2/kWh).[6] Japan is a party to the Sector Understanding. While this standard does not apply to private banks, as noted below, MUFG explicitly adopts the standards in its coal policy.

[5] OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation, *OECD*, (27 November 2015), online: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/PG(2015)9/FINAL&docLanguage=En.

[6] *Ibid.*

Greenpeace's coal and energy expert stated that: "The planned coal-fired power plant would generate twice as much CO2 per every unit of power generated as the average generating plant in Vietnam."

Standard Chartered Bank is understood to have withdrawn from Nghi Son 2 at least in part because it did not comply with its policy requiring emissions intensities lower than 830g CO2/kWh.[7]

The air pollution that would result from Nghi Son 2 will cost people their lives. Already, Vietnam has experienced a significant rise in air pollution due to coal, responsible for 4,300 premature deaths in 2011.[8] That number is estimated by researchers at Harvard University to rise almost five-fold to 19,220 excess deaths in 2030 based on all plants that are currently planned or under construction.[9]

MUFG was advised of the unacceptable emissions intensities by letter on 13 March 2018. To our knowledge, MUFG has not exerted leverage on the project sponsor to mitigate the anticipated emissions from Nghi Son 2.

d. The ESIA does not take into account the cumulative impacts of the other projects in the area: Within a few kilometers of Nghi Son 2, there is already an established coal-fired power station, Nghi Son 1, as well as the Nghi Son oil refinery and petrochemical project. These other projects are not considered in the context of Nghi Son 2's emissions, nor the strain that Nghi Son 2 may place on other critical resources such as water.

MUFG was advised of the need for an assessment of the cumulative impacts by letter on 13 March 2018. MUFG would also have had access to the ESIA and been able to determine that a cumulative impact assessment would be necessary. To our knowledge, MUFG has not exerted leverage on the project sponsor to assess the cumulative impacts, nor has MUFG conducted an independent assessment.

e. The project raises serious health and livelihood issues for local communities: Vietnamese community organisations working in the area recently reported that local communities have experienced serious health and livelihood concerns as a result of the Nghi Son 1 coal-fired power project, which is already in operation. The concerns relayed to us via the Vietnamese community organisations include the following:

- The area residents are heavily affected by dust and smoke from the Nghi Son 1 coal-fired plant.

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[7] Standard Chartered Bank, one of the banks previously linked to financing this plant, stated that it was reviewing its involvement in Nghi Son 2 in March 2018. See David Fogarty, *The Straits Times.* 'Setting tougher limits on coal financing', (12 March 2018), online: https://www.straitstimes.com/business/setting-tougher-limits-on-coal-financing.
It is understood that the bank withdrew from the deal as it did not feature in the list of commercial lenders. See also: Robin Hicks, *Eco-Business*, '1,200 megawatt Vietnam coal plant gets funding, but Standard Chartered pulls out over climate policy conflict', (19 April 2018) online: http://www.eco-business.com/news/1200-megawatt-vietnam-coal-plant-gets-funding-but-standard-chartered-pulls-out-over-climate-policy-conflict/.

[8] Shannon Koplitz, Daniel Jacob, Melissa Sulprizio, Lauri Myllyvirta, and Colleen Reid, "Burden of disease from rising coal emissions in Asia", *Environ. Sci. Technol.*, 2017, 51 (3), pp 1467–1476, online: https://pubs.acs.org/doi/abs/10.1021/acs.est.6b03731.

[9] *Ibid.*

- People who were relocated to the resettlement area report loss of livelihoods, such as salt production and onshore fishing, and have to travel great distances, including going to other provinces, to access new jobs and schooling.
- Compensation is insufficient to construct housing in the resettlement area.

In general, the residents' life after resettlement is reportedly worse than it was prior to resettlement.

All of these issues will undoubtedly be exacerbated by the development of Nghi Son 2.

There is also particular concern around fishing communities in Nghi Son 2. These communities would be impacted by a lack of access to the port area to fish, as well as potential discharge from the coal plant affecting fisheries. In addition to the environmental concerns, we have been informed by Vietnamese NGOs that these communities also face enhanced scrutiny from police and other local authorities. Whenever community members gather, local police disperse these meetings. Routine activities on the part of community members, such as going to the hospital, are followed up by police investigations. We have been advised that the community members feel intimidated by this conduct.

Nghi Son 2 is an inherently high-risk project, in part because of the type of project (a large scale coal-fired power project anticipated to operate for several decades), but also because the consultation process at the outset was so flawed. As such, MUFG should have known that human rights issues would arise and should have a plan in place with the project sponsor to prevent any abuses. To our knowledge, MUFG has failed to conduct ongoing, robust due diligence in order to ensure that there are no human rights violations of project-affected communities.

f. The ESIA fails to include an analysis of potential alternatives to the project: No alternatives analysis, referring to a consideration of alternative fuel or energy sources, was completed in the ESIA.

Alternatives exist to coal-fired power technology – prospects for solar and wind are improving significantly in Vietnam. The government's recent circular confirms a feed-in tariff of US$0.0935 per kWh for a 20-year term for both grid-connected and rooftop solar photovoltaic power projects, applicable to projects achieving commercial operation before June 30, 2019.[10]

The ESIA did not even contain an analysis of alternative coal technologies, such as the use of ultrasupercritical technology which would theoretically achieve a lower emissions intensity.

MUFG was advised of the lack of assessment of potential alternatives by letter on 13 March 2018. MUFG would also have had access to the ESIA and been able to determine an assessment of potential alternatives would be necessary. To our knowledge, MUFG has not exerted leverage on the project sponsor to assess the potential alternatives, nor has MUFG conducted an independent assessment.

[10] Circular No. 16/2017/TT-BCT ("Circular 16"), online: https://thuvienphapluat.vn/van-ban/Thuong-mai/Circular-16-2017-TT-BCT-project-development-model-Power-Purchase-Agreements-solar-power-projects-362037.aspx.

2. Vung Ang 2

Vung Ang 2 is a proposed 2 x 600MW coal-fired power station in Kỳ Lợi commune, Kỳ Anh district, Hà Tĩnh province in Vietnam. The technology type of this project is unknown, as the current ESIA for this project has not been made publicly available. The project sponsors are One Energy Ventures (a 50:50 joint venture between Hong Kong-based CLP Holdings and Diamond Generating Asia, a subsidiary of Japan's Mitsubishi Corporation) and Refrigeration Electrical Engineering Corp (REEC).[11]

The investment agreement for this power station was signed in January 2017.[12] This project has yet to be financed, but the syndicate of banks financing the loan is reported to involve MUFG, Mizuho and SMBC.[13] We understand that these banks have not signed loan agreements but are only considering financing these projects.

The Ministry of Planning and Investment (MPI) has criticized the project, indicating that:

(1) there is a disconnect between the land area stipulated by the government for use in the project and the land area referred to in the project proposal; (2) The ESIA was approved in 2015, but contrary to section 20 of the Vietnamese *Law on Environmental Protection 2014* a new ESIA has not been conducted; and (3) the project sponsor has not mobilized sufficient capital to implement the project.[14]

However, owing to the date that the project was approved, it is unclear whether the Ministry of Industry and Trade will be addressing these serious issues identified by MPI, including conducting a new ESIA to replace the outdated one.

Given this criticism by the MPI, MUFG's continued consideration of this project without a further ESIA being conducted represents a failure of due diligence. To our knowledge, MUFG has not exercised its leverage on the project sponsor to repeat the ESIA.

3. Van Phong 1

Van Phong 1 is a proposed 2 x 660MW coal-fired power project in Ninh Phước commune, Ninh Hòa township, Khánh Hòa province in Vietnam. The project sponsor is Sumitomo Corporation. The funding is anticipated to involve SMBC, MUFG and Mizuho and SMBC is providing financial advisory services.[15] We understand that these banks have not signed loan agreements but are only considering financing these projects.

The ESIA for this project is has not been made publicly available contrary to international best practice, although we understand that the ESIA was completed in March 2018. The project is expected to use supercritical technology.

[11] Minerva Lau, *Project Finance International*, 'Nghi Son 2 IPP Loan signs, finally' (18 April 2018).

[12] *Global Data Point*, 'Vietnam's MOIT Investment Agreement signed BOT project in Vung Ang Thermal Power Plant 2'. (20 January 2017).

[13] Mia Tahara-Stubbs, *IJGlobal*, 'Banks mandated on Vietnam Vung Ang 2 coal-fired' (23 January 2017).

[14] Nguoi lao dong, "Bộ KH-ĐT không đồng ý cấp giấy chứng nhận đầu tư BOT Nhiệt điện Vũng Áng II", (5 July 2018), online: https://nld.com.vn/kinh-te/bo-kh-dt-khong-dong-y-cap-giay-chung-nhan-dau-tu-bot-nhiet-dien-vung-ang-ii-20180705110419243.htm.

[15] Minerva Lau, Project Finance International, 'Van Phong IPP into due diligence' (22 June 2018).

The communities in area have expressed concern to Vietnamese community organisations about mitigating coal ash and the potential impact of discharge of cooling water on the fish in the bay. The Vietnamese community organisations report that while the communities on the site of coal-fired power station have been resettled, there has been little thought about alternative livelihoods for farmers (whose main income is from farming bean, garlic and onion) and nearshore fisherfolk. The reallocated land is not as suitable for farming and does not have close access to water for fishing, hence these communities will lose their main source of income and sustenance.

MUFG was informed about these concerns by letter dated 20 July 2018. To our knowledge, MUFG has not exerted leverage on the project sponsor to address these human rights concerns, nor has MUFG conducted an independent assessment of the project.

4. Nam Dinh 1

Nam Dinh 1 is a proposed 2 x 600MW coal-fired power project in Hải Hậu district, Nam Định province in Vietnam. The sponsors are ACWA Power from Saudi Arabia and Taekwang Power from South Korea.[16]

The investment agreement for this power station was signed in January 2017.[17] The syndicate of banks is expected to include Mizuho and MUFG.[18] We understand that these banks have not signed loan agreements but are only considering financing these projects.

Owing to the fact that the ESIA for this project is not publicly available, we do not know what technology the project will be using. However, we understand from conversations with Vietnamese community groups that Nam Dinh 1 reportedly had its ESIA approved in 2012. As noted above, section 20 of the Vietnamese *Law on Environmental Protection 2014* states that project owners must repeat the ESIA where the project is not executed within 24 months of the date of the approval of the ESIA. To our knowledge, it has been over six years since the ESIA was approved. This ESIA is therefore now technically invalid and needs to be repeated.

We understand from community interviews conducted by Vietnamese community organisations that only the local authority and headpersons of 19 villages in the community were consulted. This can hardly be considered sufficient for a community which in 2016 had a population of 294,219.[19] Further, there are no details available about what information was given to these headpersons regarding the benefits of the project and the potential risks that must be mitigated, and whether other opportunities were given for others to become informed and provide input into the project.

Given the date of the ESIA and the concerns with public consultation, MUFG's continued consideration of this project without a further ESIA or additional consultation being conducted represent a failure of due diligence. To our knowledge, MUFG has not sought that the ESIA

[16] Mia Tahara-Stubbs, *IJGlobal*, 'Vietnam issues investment registration certificate for Nam Dinh 1 coal-fired' (4 July 2017).
[17] *Ibid.*
[18] *Ibid.*
[19] Tran Quang Chieu, Tinh Nam Dinh, 'Lịch sử phát triển huyện Hải Hậu', online: https://namdinh.gov.vn/ubndnamdinh/4/469/2251/71677/gioi-thieu-nam-dinh/lich-su-phat-trien-huyen-hai-hau.aspx

be repeated or that additional consultation be completed.

(2) Descriptions on how the issues described above are in breach of the Guidelines (please specify relevant articles and chapters)

(for example: A material used in the production process of Enterprise A is hazardous and may cause an adverse impact to the residents and the environment, therefore Enterprise A breaches article 4 of VI. Environment)

This section will consist of a discussion of the following:

A. the application of the OECD Guidelines to banks financing projects; and
B. the breaches of the OECD Guidelines by MUFG.

Please note we have included analysis of the Equator Principles, "a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence and monitoring to support responsible risk decision-making." We have done so because MUFG is an Equator Principles Financial Institution. Other international instruments such as the International Finance Corporation (IFC) Performance Standards or the Guiding Principles on Business and Human Rights (GPs) are detailed for illustrative purposes only.

A. The OECD Guidelines apply to banks financing projects

The OECD Guidelines indicate that all multinational corporations are responsible for conducting their business in accordance with the Guidelines.

As indicated by John Ruggie, former UN Secretary-General's Special Representative for Business and Human Rights, "...financial institutions are no different from any other kind of business enterprise in that human rights harm may be linked to their products or services through a business relationship."[20] Other NCPs have stated that financial institutions can be held accountable for financing corporations or projects which result in adverse impacts. For example, in 2014, Friends of the Earth filed a complaint against Rabobank about their palm oil financing which led to a commitment by Rabobank in 2016 to modify its complaints procedure.[21] In 2013, the Dutch NCP held that a Dutch pension fund and the Norwegian government pension fund could be held accountable under the OECD Guidelines for their shareholdings in companies which contribute to human rights harms.[22]

The nature of this responsibility is informed by other international instruments. The Guiding Principles on Business and Human Rights (GPs) provide that the responsibility to protect human rights requires that companies (GP 13):

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[20] Working Party on Responsible Business Conduct, 'Authoritative Statements on the UN Guidelines Principles on Busines and Human Rights,' *OECD,* (5 December 2013), A letter from Former UN Secretary-General's Special Representative for Business and Human Rights, Professor Ruggie, dated 22 October 2013, pg. 3.

[21] Final Statement Friends of the Earth / Milieudefensie – Rabobank, *Dutch National Contact Point,* (15 January 2016), online: https://www.oecdguidelines.nl/documents/publication/2016/1/15/fs-foe-milieudefensie-rabobank.

[22] Human rights breaches related to manufacturing of iron in India, *OECD Responsible Business Conduct*, (9 October 2012), online: https://mneguidelines.oecd.org/database/instances/nl0023.htm.

(a) Avoid **causing or contributing to adverse human rights impacts** through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are **directly linked to their operations**, products or services by their business relationships, even if they have not contributed to those impacts.[23]

At the outset, it is important to note that MUFG, as a bank providing project finance or providing project financial advisory services to these projects, **contributes to** the adverse impacts associated with these coal-fired power projects discussed above. As stated by the UN Office of the High Commissioner for Human Rights, "a bank may not facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks."[24]

Without the finance provided, these coal-fired power projects would not be constructed. The lenders to the project can exercise influence over elements of the project in return for providing finance. Therefore, lenders have control to limit the impacts that result from a project. As such, lenders are required to address such impacts where they occur.[25]

Therefore, MUFG would have a high degree of corresponding responsibility to exercise leverage to prevent and mitigate these adverse impacts of the coal-fired power projects detailed above.[26]

In order to ensure that multinational enterprises of any kind, including banks, manage adverse human rights impacts, they must conduct due diligence.[27] We assert that MUFG has failed in conducting due diligence in the areas of **stakeholder engagement, ongoing disclosure obligations, environmental impacts, and other human rights impacts** and in so doing, have breached the OECD Guidelines and the OECD Due Diligence Guidance for Responsible Business Conduct (Guidance).

1. Stakeholder engagement

The following OECD Guidelines have been breached:

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[23] Guiding Principles on Business and Human Rights, principle 13, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[24] OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, *OHCHR,* online: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf, pg. 8.

[25] Even if MUFG's activities fall into the level of direct linkage, cases involving project finance advisory or project financing have a high degree of proximity to the harm that results from the projects. See also the Thun Group of Banks, Paper On The Implications Of UN Guiding Principles 13b & 17 In A Corporate And Investment Banking Context, (December 2017) online: https://www.business-humanrights.org/sites/default/files/documents/2017_12_Thun%20Group%20of%20Banks_Paper_UNGPs%2013b%20and%2017.pdf, pg. 9.

[26] *Ibid.*

[27] OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, *OHCHR,* online: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

Principle II. General Policies, A14 states that enterprises should:

'Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.'

Principle II. General Policies, B2 provides that enterprises should:

'Engage in or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management while ensuring that these initiatives take due account of their social and economic effects on developing countries and of existing internationally recognised standards.'

As the Thun Group of Banks has stated, even where a bank is merely 'directly linked' to adverse impacts (rather than 'contributing to' those impacts), a bank's responsibility includes recommending to or requiring that its client "hires a qualified independent consultant, implements a human rights policy, develops action plans, improves engagement with local communities and establishes an effective grievance mechanism, provides progress reports or enhances public disclosure."[28]

The OECD Guidance states that stakeholder engagement is one of the essential characteristics and components of due diligence,[29] rendering a lack of or deficient engagement with stakeholders a due diligence failure. The Guidance describes meaningful stakeholder engagement as characterized by two-way communication, sharing information in a timely fashion with all stakeholders, prior to project approval (at the time of the ESIA) as well as during project activities; and sharing information in a way that is physically accessible and understandable to all parties.[30]

As noted above, in the case of Nghi Son 2, there is no evidence that either the project sponsor or MUFG has engaged with relevant stakeholders. In fact, as noted above, many of the communities in Nghi Son 2 have reported that they were not consulted, including the fishing community which is now disputing the port clearance. Even if public engagement did take place at the time of the ESIA in 2015, there is an absence of information about what documents were provided and whether the information contained in such documents would have been comprehensible to the local communities. In any event, with the local communities has not been on an ongoing basis, no progress reports have been provided on the project and the community is not aware of any effective grievance mechanism if there are impacts resulting from the project.

MUFG was advised about the lack of stakeholder engagement in the case of Nghi Son 2 in letters dated 13 March and 22 May 2018. Had MUFG conducted adequate due diligence, it would have discovered that there has been an ongoing lack of stakeholder engagement. MUFG has thus failed in its duty to ensure that project affected communities are engaged by

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[28] Thun Group Of Banks, Paper On The Implications Of UN Guiding Principles 13b & 17 In A Corporate And Investment Banking Context, (December 2017) online: https://www.business-humanrights.org/sites/default/files/documents/2017_12_Thun%20Group%20of%20Banks_Paper_UNGPs%2013b%20and%2017.pdf.

[29] OECD Due Diligence Guidance For Responsible Business Conduct, OECD, online: https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, pg. 18 and Question 9 of the Annex.

[30] *Ibid.,* Section 2.2(h) and Question 9 of the Annex.

exercising its leverage on the sponsor to undertake such engagement.

In the case of Nam Dinh 1, the stakeholder engagement which occurred with 19 individuals in 2012 was insufficient. Stakeholder engagement must be with a broad audience and persons who are truly representative of the community.

Had MUFG conducted adequate due diligence on Nam Dinh 1, it would have discovered that there has been an ongoing lack of stakeholder engagement. MUFG has thus failed in its duty to ensure that project affected communities are engaged by exercising its leverage on the sponsor to undertake such engagement.

Overall, in its conduct in respect of Nghi Son 2 and Nam Dinh 1, MUFG has breached the OECD Guidelines related to stakeholder engagement.

2. Ongoing disclosure

The OECD Guidelines state at Principle III. Disclosure 3.

"Enterprises are encouraged to communicate additional information that could include: a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines; b) policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply; c) its performance in relation to these statements and codes; d) information on internal audit, risk management and legal compliance systems; e) information on relationships with workers and other stakeholders."

The Guidance provides that "Due diligence involves ongoing communication."[31] Multinational enterprises must therefore disclose the results of their due diligence checks, such as any human rights or environmental impacts. Information disclosed should be "sufficient to demonstrate the adequacy of an enterprise's response to impacts."[32] The Equator Principles also require that its member financial institutions conduct an independent review of applicable assessment documentation.[33] MUFG is a member organisation of the Equator Principles, however there is no evidence that MUFG conducted such an independent review of Nghi Son 2, nor is there evidence of any action by MUFG to use its leverage to push for improved disclosure practices by its client.

The commentary to the Guidelines provides that this information would include emissions which would result from the project, information about water use and information about resettlement and livelihood impacts.[34] MUFG did not provide this information on Nghi Son 2.

The ESIAs and information about emissions and other impacts are presently not available on Van Phong 1 and Nam Dinh 1. For example, Equator Principle 5 requires that

[31] *Ibid.*, Pg. 19.

[32] *Ibid.*, pg. 19 and Question 46 of the Annex.

[33] Equator Principles, Equator Principle 7, (June 2013) online: http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

[34] OECD Guidelines for Multinational Enterprises, *OECD,* (2011), online: http://www.oecd.org/daf/inv/mne/48004323.pdf, Pg 29.

assessment documentation be readily available to project-affected communities.[35]

Vietnam’s laws do not require that environmental impact assessments be made publicly available, but this should not be determinative in assessing the obligations of MUFG and its client as multinational enterprises. Not allowing the project-affected communities access to information about potential impacts and alternatives to the project is contrary to Equator Principle 3, which clearly indicates that financial institutions cannot hide behind poor regulatory frameworks in the countries in which they operate[36]. While Vietnam does not require disclosure of environmental impact assessments, in "non-designated" countries such as Vietnam, the assessment process for project finance must comply with the International Finance Corporation's Performance Standard 1, which requires the project sponsor provide affected communities with access to relevant information on: “(iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process...."[37] As a member of the Equator Principles, MUFG should be making this information available.

Without the ESIAs, it is impossible for communities to make informed decisions about the projects. Even when this information was directly sought by Market Forces by letter dated 22 May 2018, MUFG did not provide any of the information requested, claiming client confidentiality.

The Guidance recognises that non-disclosure based on commercial confidentiality should be an exception to normal disclosure, rather than the rule. Social and environmental assessments are not typically considered “commercially sensitive” data that would be subject to a confidentiality requirement. To meet their responsibility to respect the human rights to life and health, MUFG may disclose the results of environmental testing without confidentiality concerns.[38] In the alternative, MUFG could use its leverage to urge the sponsor to disclose this document, and then refuse to finance the project if the sponsor refuses to improve disclosure, as required by the OECD Guidelines.[39]

MUFG has thus failed to ensure that project affected communities have sufficient disclosure to make informed decisions about projects by failing to disclose vital information about projects, results of environmental testing and its due diligence checks, and has also failed in its duty to exercise its leverage on the sponsor to undertake such disclosure.

3. Environmental impacts

The OECD Guidelines state at Principle VI. Environment 2.

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[35] Equator Principles, Equator Principle 5, (June 2013) online: http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf.

[36] *Ibid.,* Equator Principle 3.

[37] International Finance Corporation, Performance Standard 1, online: https://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES.

[38] OECD Due Diligence Guidance For Responsible Business Conduct, OECD, online: https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, Question 47 of the Annex.

[39] This would even be required where there is a direct linkage. OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, *OHCHR,* online: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf.

Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights [multinationals must]:

a) provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and

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.

The OECD Guidelines also state at Principle VI. Environment 4:

Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.

As noted above, Nghi Son 2 is a significantly polluting project. The project undermines commitments made by Japan in the OECD Sector Understanding, which excludes export finance for all coal-fired power projects in Vietnam, other than those that use ultrasupercritical technology or with emissions lower than 750g CO_2/kWh.

Greenpeace's expert has noted that the anticipated CO_2 emissions intensities of the project would generate twice as much CO_2 per every unit of power generated as the average electricity generating plant in Vietnam. MUFG was made aware about the environmental impacts of Nghi Son 2 by letter dated 13 March 2018. Nevertheless, the bank still went ahead to fund this project. There is no evidence that they took any steps to influence their client to disclose additional environmental information or to implement additional mitigation measures that would reduce the project's emissions. In so doing, they failed to meet their obligations under this Guideline.

As noted above, UN Office of the High Commissioner for Human Rights stated that "a bank may not facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks."[40] Similarly, IFC Performance Standard 3 states that corporations should "consider alternatives and implement technically and financially feasible and cost-effective options to reduce project-related GHG emissions during the design and operation of the project."[41] To our knowledge, MUFG has not made any efforts to ensure the project sponsors mitigate the emissions from this project. In the absence of further information from MUFG suggesting otherwise, it is reasonable to expect no such efforts have been made to mitigate the

[40] OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, *OHCHR,* online: https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf, pg. 8.

[41] International Finance Corporation, Performance Standard 3, online: https://www.ifc.org/wps/wcm/connect/25356f8049a78eeeb804faa8c6a8312a/PS3_English_2012.pdf?MOD=AJPERES, pg. 2.

emissions from Nghi Son 2. In failing to exercise leverage on the project sponsor to mitigate impacts of emissions, MUFG has failed to prevent or minimize environmental damage under the Guidelines.

There is no evidence that MUFG or the project sponsor of Nghi Son 2 examined the cumulative impacts of the project, in light of Nghi Son 1, the other coal-fired power project, or other industries in the vicinity. This type of analysis is required by international standards, such as the IFC Performance Standards.[42]

There is also no evidence that MUFG sought to assess potential alternatives to Nghi Son 2, as required by the Equator Principles. The Equator Principles requires that all projects with expected annual emissions above 100,000 tonnes of CO_2 equivalent to conduct an alternatives analysis.[43]

MUFG has failed to exercise its leverage to ensure the project sponsor assessed the cumulative impacts of or potential alternatives to Nghi Son 2, and failed to conduct its own independent assessment.

4. Other Human Rights Impacts

Principle IV of the OECD Guidelines requires that the corporation comply with local laws. As noted above, Nghi Son 2 likely falls afoul of Article 21 of the Vietnamese *Law on Environmental Protection 2014*, which states that project owners are obliged to consult communities that are directly affected by the project. MUFG should have known of this failure to adhere to basic provisions of Vietnamese law and should have pushed its client to improve consultations.

Nam Dinh 1 also violates Section 20 of the *Law on Environmental Protection* which states that project owners must repeat the ESIA where the project is not executed within 24 months of the date of the approval of the ESIA. It has been over six years since the ESIA was approved.

Section 2 of Principle IV of the OECD Guidelines states that corporations should:

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

Additionally, Section 3 of Principle IV of the OECD Guidelines states that corporations should:

"seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts."

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[42] International Finance Corporation, Performance Standard 1, online: https://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES, pg. 3.

[43] Equator Principles, Equator Principle 5, (June 2013) online: http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf, Principle 2 and Annex A.

At present, Nghi Son 2 will have significant livelihood impacts for the fishing communities in the area, specifically breaching the right to livelihood enshrined in Section 11 of the International Covenant on Economic, Social and Cultural Rights.[44] IFC Performance Standard 5, as an example, provides that where 'economic displacement' occurs, a livelihood restoration plan should be created to ensure that these affected individuals are compensated, in a "transparent, consistent and equitable manner."[45] In the case of Nghi Son 2, such a plan has not been created. Communities affected by the project have also been intimidated.

The right to a healthy environment is enshrined in Section 12 of the International Covenant on Economic, Social and Cultural Rights. As noted above, there are also serious potential health impacts which will result from the Nghi Son 2 coal-fired power project.[46] MUFG has not exerted its leverage on its client to take these human rights impacts into account, adequately investigate and identify them, or make a plan to mitigate them.
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(3) Background of the issues raised (such as past and present circumstances of the issues and reason(s) why the complainant decided to submit a complaint to the Japanese NCP)

Market Forces and other groups advised MUFG about the procedural concerns and the environmental and other human rights impacts regarding Nghi Son 2 by letter on 13 March 2018. After the project was funded, Market Forces contacted MUFG on 22 May 2018, to request information about consultation at the time of the ESIA, the content of the communication provided to the project-affected communities, ongoing consultation, whether an independent review was conducted and what alternatives to the project were considered and disclosure of the Vung Ang 2, and Nam Dinh 1 ESIA. Market Forces and other groups also contacted MUFG by letter on 20 July seeking information about Van Phong 1. However, MUFG has not provided Market Forces with any of this information, citing client confidentiality. As noted above, the OECD Guidance indicates that client confidentiality should be the exception rather than the rule, and MUFG should not be able to rely on confidentiality to keep from providing key information to project-affected communities, especially that which affects their lives, health and livelihoods.

MUFG recently changed its coal policy on 15 May 2018 to indicate that that it would only finance ultrasupercritical coal-fired power projects or more advanced technologies. The policy refers to the OECD Sector Understanding which only allows funding for ultrasupercritical projects in Vietnam, as signed by Japan. It is unclear how this would affect Nam Dinh 1 or Vung Ang 2, two of the prospective projects MUFG is involved in, as we are not aware of the technology type of these power projects owing to the absence of publicly available ESIAs. Therefore, we are unsure whether Vung Ang 2 or Nam Dinh 1 complies with this new policy. However, past information indicates that Van Phong 1 is supercritical and would not comply with this policy, therefore MUFG should have ruled out financing this

[44] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, online: http://www.refworld.org/docid/3ae6b36c0.html.
[45] International Finance Corporation, Performance Standard 5, online: https://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES, pg. 8.
[46] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, online: http://www.refworld.org/docid/3ae6b36c0.html.

project.

(4) Expected outcomes complainant wishes to achieve through the NCP procedure (requests to the enterprise involved)

(for example: Through the NCP procedure, we (the complainants) want to have meetings with Enterprise A and request them to adopt cost-effective measures to prevent or minimize damages caused by the material used for production.)

Identify your demands of the enterprise (e.g. change policies or specific practices, prevent harm, remediate adverse impacts, etc.).

We ask that MUFG:

- engage in a dialogue with Market Forces through the specific instance process;
- provide stakeholders with key project information such as the Nam Dinh 1 and Van Phong 1 ESIA, or in the alternative, use its leverage to urge the sponsor to disclose the ESIA for the projects;
- use their leverage to ensure that the project sponsor to consult with rights holders and stakeholders in any projects in which it is involved;
- conduct an independent review of human rights and other environmental impacts in respect of Nghi Son 2;
- review its lending to Nghi Son 2 in light of significant environmental and human rights impacts;
- confirm that its policy excludes projects to which the bank is presently linked to finance such as Nam Dinh 1, Van Phong 1 and Vung Ang 2, and clarifies its intentions with regards to these projects; and,
- change its policy to exclude lending to any coal-fired power projects in Vietnam, given the environmental impacts and given the significant alternatives to the coal in the form of renewables.

We also request that the National Contact Point provide recommendations on the implementation of the OECD Guidelines as it pertains to this specific instance.

4 Attachments of relevant documents supporting the complaints, where applicable. (If the original documents are written in languages other than Japanese and English, translation in Japanese or English should be attached.)

(1) Text of relevant laws and regulations of the country where the issues occurred

1. Vietnamese *Law on Environmental Protection 2014,* No 55/2014/QH13 (document attached)
2. OECD Sector Understanding on Export Credits for Coal-Fired Electricity Generation, online: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/PG(2015)9/FINAL&docLanguage=En
3. International Finance Corporation’s Performance Standards, online: https://www.ifc.org/wps/wcm/connect/3be1a68049a78dc8b7e4f7a8c6a8312a/PS1_English_2012.pdf?MOD=AJPERES
4. Equator Principles; online: http://equator-principles.com/wp-

content/uploads/2017/03/equator_principles_III.pdf.
5. 2011 Guiding Principles on Business and Human Rights, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
6. International Covenant on Economic, Social and Cultural Rights, online: http://www.refworld.org/docid/3ae6b36c0.html.

(2) If the specific instance is also dealt with by other domestic or international proceedings, documents on the identity of the country or organization conducting the parallel procedure, the issues raised, the status of the procedure and its future prospects.

There are no parallel proceedings in Vietnam, Japan or elsewhere that would impact on the specific instance.