

INDUSTRY, CLIMATE CHANGE, AND HUMAN RIGHTS: ASSESSING TWO CASES BEFORE NATIONAL POINTS OF CONTACT FOR THE OECD GUIDELINES

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How does private industry relate to climate change, human rights, and law? What is the role of the OECD Guidelines in shaping business actions concerning climate law and human rights law? In this article, I explore these questions by focusing on two significant cases, Development YES – Open-Pit Mines NO v. Group PZU S.A. and Market Forces v. SMBC, MUFG, and Mizuho. In doing so, I suggest that the existing limits of current procedure and National Contact Points (NCPs), which carry out the proceedings on the part of the OECD, are the voluntary nature of mediation dialogues, the ability to opt out of future dialogues if no agreement has been reached, and the lack of a binding enforcement mechanism for companies. The utility of NCPs and the OECD Guidelines, however, can be found in ability of notifiers to file claims that raise points of possible violations, the demarcated process for trying to resolve concerns, including the ability to provide mediation and hold multiple dialogues if necessary, and the possibility to bring awareness to concerns raised. Future considerations should also focus on the decentralized nature of NCPs and how localized powers could potentially assist or hinder the protection of rights.

I. INTRODUCTION

How does private industry relate to climate change, human rights, and law? What is the role of the OECD Guidelines in shaping business actions concerning climate law and human rights law? In this article, I explore these questions by focusing on two significant cases, *Development YES – Open-Pit Mines NO v. Group PZU S.A.* and *Market Forces v. SMBC, MUFG, and Mizuho*.

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I begin by providing background on the OECD Guidelines and their legally relevance as they relate to National Contact Points, businesses, and notifying parties. Following this, I outline details of *Development YES – Open-Pit Mines NO v. Group PZU S.A.*, which involves the financing of mining projects in Poland by of the country’s largest financial institutions and insurance companies. I then discuss *Market Forces v. SMBC, MUFG and Mizuho*, which concerns the financing of coal power plants in Vietnam by Japanese financial institutions. Finally, I consider the claims, arguments, and outcomes of these two cases and situate them in relation to existing literature.

I argue that NCPs are simultaneously more useful than much of the existing work has suggested but weaker than much of the current work on the other side of the debate has contended. While NCPs should not be ignored as legal bodies with limited practical purpose for addressing concerns of human rights violations related to climate change as they relate to private industry, the existing mechanisms in place are unable to establish clear, proactive enforcement for upholding these rights and addressing violations which may arise. In particular, the decentralized nature of NCPs means that the application of OECD Guidelines may support understandings of localized nuanced while concurrently limiting uniform stringency in the application of oversight mechanisms to claims of Guidelines violations.

II. OECD GUIDELINES AND NATIONAL CONTACT POINTS

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) were created as the first international legal instrument “to integrate respect for human rights as a corporate responsibility.”¹ They were designed to align with the UN’s Guiding Principles on Business and Human Rights.² The OECD Guidelines were adopted in 1976 and are unique in that they require OECD member countries, and non-OECD countries which adhere to the OECD Guidelines, to ensure multi-national enterprises (MNEs) operating in or from these countries operate under the standards of the guideline.³ These OECD

1. OECD, RESPONSIBLE BUSINESS CONDUCT AND THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS 1 (2018), <http://mneguidelines.oecd.org/Responsible-business-conduct-and-human-rights.pdf>.

2. *Id.*

3. Kinnari Bhatt & Gamze Erden Türkelli, *OECD National Contact Points as Sites of Effective Remedy: New Expressions of the Role and Rule of Law within Market Globalization?*, 6 BUS & HUM. RTS. J. 423–448, 424 (2021).

Guidelines constitute the only comprehensive instrument of corporate responsibility adopted by international states.⁴

Through the OECD Guidelines, National Contact Points for Responsible Business Conduct (NCPs) are a tool established to promote respect for human rights in global supply chains. NCPs are tasked with advancing the effectiveness of the OECD Guidelines through promotional activities, mediation, and conciliation to resolve instances of alleged non-observance of the OECD Guidelines.⁵

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) require all OECD members and adhering governments to establish a functioning National Contact Point (NCP), which is a government-supported office whose primary role is to support the effective application of the OECD Guidelines.⁶ While the OECD Guidelines are not legally binding on companies, they, and their oversight and enforcement by NCPs, are legally binding on signatory governments.

III. CASE 1: DEVELOPMENT YES – OPEN-PIT MINES NO V. GROUP PZU S.A.

On August 6, 2018, Development YES – Open–Pit Mines NO (RT-ON) filed a complaint against Group PZU S.A. (PZU) at the Polish NCP.⁷ The complaint concerned the insurance company PZU and the indirect environmental impact of its activities and lack of sufficient disclosure in this area in its non-financial report (NFR) for 2017.⁸

Development YES, the notifier, is a grassroots non-governmental foundation based in Poland that was established to work primarily on

4. See Jernej Letnar Černic, *Corporate Responsibility Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises*, 4 HANSE L. R. 71, 71 (2008) [hereinafter ‘OECD Guidelines’] (“The Organization for Economic Cooperation and Development’s Guidelines for Multinational Enterprises are the only corporate responsibility instrument formally adopted by state governments.”).

5. See *How do NCPs handle cases?* OECD, <https://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm> (“The OECD maintains a roster of dispute resolution professionals to assist NCPs in the handling of specific instances under the OECD Guidelines for Multinational Enterprises. Specific instances are a non-judicial grievance process whereby the NCP contributes to the resolution of issues of alleged non-observance of the Guidelines by companies.”).

6. *National Contact Points (NCPs)*, OECD WATCH (2023), <https://www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/>.

7. See *Development YES – Open-Pit Mines NO v. Group PZU S.A., Complaint filed to Polish NCP*, (Aug. 6, 2018), <https://www.oecdwatch.org/complaint/development-yes-open-pit-mines-no-vs-group-pzu-s-a/>.

8. *Id.*

anti-coal and anti-lignite activism.⁹ The foundation is composed mainly of representatives from “anti-open-pit mines” associations, local authorities from threatened areas, and other non-governmental organizations. It is based in the city of Legnica, Poland.¹⁰ PZU, the company, is a publicly traded insurance company with headquarters in Warsaw, Poland. It is the largest insurance company in Poland in terms of market share and the oldest insurance company in the country.¹¹

Development YES alleged that PZU did not fulfill its obligations to conduct complete reporting and ensure transparency as it related to the environmental impacts of its work on mining activities in Poland.¹² In their complaint, Development YES sought mediation from the Polish NCP in order to reach an agreement that would lead to improvements in PZU’s non-financial reporting of environmental impacts on future projects.¹³ Development YES argued that PZU had violated Chapters II, III, IV, VI, and VIII of the OECD Guidelines.¹⁴

In response, on September 17, 2018, the PZU argued that the allegations made by Development YES were unjustified, relying on the following claims.¹⁵ First, it had included environmental oversight in the strategic document of the company for the years 2016 to 2020, and joined ecological projects seeking to minimize potential adverse environmental impacts of its activities.¹⁶

Second, the company was limited in its ability to exercise impact on the business strategies of its clients, including their activities for environmental protection. PZU services are restricted to insurance and reinsurance.¹⁷ Since the activities of PZU towards its business clients “take the form of only recommendations concerning insurance risk

9. See Development YES – Open-Pit Mines NO [DY-OPMN], “*Who We Are*,” (2023), <https://rt-on.pl/en/foundation/who-we-are>.

10. *Id.*

11. *About the Company*, PZU, <https://pzu.ee/en/pzu/about/>.

12. OECD Watch, *Development YES – Open-Pit Mines NO vs. Group PZU S.A.*, (August 6, 2018).

13. See *Id.*, ¶¶ 4, 7-8 (on the non-financial reporting of environmental impacts on future projects).

14. See *Id.*, ¶¶ 3 and 7 (on the violation of Chapters II, III, IV and VIII of the OECD Guidelines).

15. See Poland National Contact Point for the Organization for Economic Co-Operation and Development [OECD], *Final Statement of alleged non-observance of the OECD Guidelines for Multinational Enterprises*, at 4, (July 26, 2019) (describing the company’s response to the Polish National Contact Point and the notifier company).

16. See *Id.* (stating that the company highlighted in its response to the Polish National Contact Point its efforts to minimize its activities’ potential adverse environmental impacts).

17. *Id.*

and must not extend beyond the competencies specified by law for the insurance holding,” they do not hold responsibility for further environmental impacts of their clients.¹⁸

Starting from 2017, PZU was required to prepare non-financial statements in accordance with the Accounting Act under Directive 2014/95/EU of the European Union and included in Polish law.¹⁹ They contended that “the statement for 2017 contains reliable and complete information, including information on environmental matters” and that “the non-financial statements should concentrate more on the environmental impacts of its activities rather than on the activities of its clients.”²⁰

Lastly, the company argued that it analyzed its activities impact on human rights, did not conceal information on protecting consumer rights, and since 2012 had been part of the RESPECT Index at the Warsaw Stock Exchange, which is Central and Eastern Europe’s first social responsibility index.²¹

On November 8, 2018, the Polish NCP completed an initial assessment of the case.²² The Polish NCP decided not to publicize the wording of the initial assessment and to only direct proceedings and the NPC assessments to the parties of the case.²³ In response to this decision, OECD Watch argued that, for the sake of transparency, this decision should not become a rule and should instead only be used in exceptional cases, on a temporary basis, and by agreement of both parties.²⁴

The Polish NCP proposed to the Parties that it would offer its “good offices”, the stage in which NCPs offer consensual, non-adversarial dispute resolution procedures with active support from the NCP. On January 18, 2019, a meeting with representatives for both parties

18. *Id.*

19. *Id.* See generally The Accounting Act [Accounting Act] Sept. 29, 1994 (Pol) (establishes standards for principles and procedures regarding auditing financial statements by regulatory auditors); see also Directive 2014/95, 2014 O.J. (L330) 1 (EU), disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

20. Polish OECD NCP Final Statement of alleged non-observance of the OECD Guidelines for Multinational Enterprises, Warsaw, 26 July 2019, at 4.

21. *Id.* at 5.

22. See Information of the OECD NCP concerning notification of an alleged breach of the OECD Guidelines for Multinational Enterprises, Warsaw, 18th of December 2018.

23. *Id.*

24. See OECD Watch, *supra* note 12 (stating OECD Watch’s position in favor of transparency).

was organized.²⁵ After an exchange of positions between the parties, and with the support of the NCP, an agreement between Development YES and PZU was reached on April 17, 2019.²⁶

On May 27, 2019, the Polish NCP submitted the draft final statement to the parties, which was accepted by both parties on July 26, 2019. In its final statement, the NCP recommended that PZU comport with the expectations of, and its commitments reached with Development YES.²⁷ Specifically, the Polish NCP suggested they implement policies regarding respect for human rights, environmental protection, and conducting relevant disclosures in future non-financial statements.²⁸

IV. CASE 2: MARKET FORCES V. SMBC, MUFG AND MIZUHO

On September 18, 2018, Market Forces, an affiliate project of Friends of the Earth Australia, filed three identical specific instances against Sumitomo Mitsui Banking Corporation (SMBC), Mitsubishi UFJ Financial Group (MUFG) and Mizuho Financial Group (Mizuho) at the Japanese NCP.²⁹ The complaint pertained to Japanese banks funding coal-fired power plants in Vietnam. In Japan, the Ministry of Foreign Affairs, the Ministry of Health, Labour and Welfare, and the Ministry of Economy, Trade and Industry jointly constitute the NCP for Japan, which promotes activities to disseminate the Guidelines and handles issues raised based on the Guidelines.³⁰ Mizuho, SMBC, and MUFG currently finance the Nghi Son 2 coal-fired power project, and are considering financing the Vung Ang 2 coal-fired power project and the Van Phong 1 coal-fired power project in the Socialist Republic of Vietnam. Moreover, Mizuho and MUFG are considering financing the Nam Dinh 1 coal-fired power project in the same country.³¹

The notifier made three specific complaints regarding the financing projects of the businesses. First, they argued that these companies had exercised their leverage on these projects to support coal-fired

25. *Id.*

26. *Id.* See, e.g., Polish Organisation for Economic Co-operation and Development [OECD] National Contact Point, *Final Statement of alleged non-observance of the OECD Guidelines for Multinational Enterprises*, (July 26, 2019), <https://www.gov.pl/attachment/f96f9925-b274-499c-9495-cf503464f1d5>.

27. *Id.*, at 9.

28. *Id.*, at 1-2.

29. See *Market Forces v. Mizuho*, *Complaint filed to Japanese NCP*, (Sept. 18, 2018); *Market Forces v. MUFG*, *Complaint filed to Japanese NCP*, (Sept. 18, 2018); *Market Forces v. SMBC*, *Complaint filed to Japanese NCP*, (Sept. 18, 2018).

30. See *id.* for complaints.

31. *Id.*, at 4.

power stations that impacted communities who had not been adequately consulted and had their views taken into account.³² Second, the project-affected communities were unable to make informed decisions about projects since there was inadequate disclosure of information. This included failure to respond to requests to provide information about “environmental, livelihood, or health impacts” on these community members and lack of access to environmental and social impact assessments.³³ Third, and finally, the notifier argued that these companies did not “assess, prevent, or minimi[z]e environmental damage and impacts to human rights” such as the right to livelihood and the right to a healthy environment.³⁴

On February 21, 2020, the Japanese NCP agreed to carry out an initial assessment and examine the issues raised by Market Forces.³⁵ The NCP, however, refused to assess issues concerning Vung Ang 2 and the Nam Dinh 1 projects, as no loan agreements by the companies involved were found to be substantiated.³⁶ The NCP subsequently conducted interviews and determined that mediation would be conducted with consent from the negotiator and the companies.³⁷

During the mediation, the parties did not reach an agreement concerning the issues yet decided to proceed with the final statement.³⁸ The companies refused to disclose specific project information, including due diligence reports on the basis of client confidentiality. They stated that their due diligence and loan approval process complied with the Equator Principles, which establish “a framework for financial institutions to identify, manage, and assess their environmental and social risks.”³⁹ Additionally, it was emphasized by the companies that they were engaged in these projects as lenders and did not have direct involvement with the projects, that they had limited leverage as their loan amount comprised less than half of the total loan amount.⁴⁰

32. *Id.*, at 4-6.

33. *Id.*

34. *Id.*, at 6-9.

35. Japanese National Contact Point for the Organisation for Economic Co-operation and Development [OECD], *Final Statement on a Specific Instance Involving Mizuho Financial Group, Inc., Sumitomo Mitsui Banking Corporation and Mitsubishi UFJ Financial Group, Inc. in Relation to the OECD Guidelines for Multinational Enterprises*, at 3 (Jan. 15, 2021), [hereinafter Market Forces Final Statement 2021], <https://www.oecdwatch.org/complaint/market-forces-v-smbc-mufg-and-mizuho/>.

36. *Id.* at 4-5.

37. *Id.* at 5.

38. *Id.* at 7.

39. *Id.* at 6.

40. *Id.*

A dialogue between the two parties was, however, later held online on July 15, 2020.⁴¹ On January 15, 2021, the Japanese NCP issued a final statement on the proceedings. They concluded that there was no agreement of the parties to solve issues.⁴² The Japanese NCP noted that it was expected that the companies involved would “respect the OECD Guidelines, conduct due diligence in accordance with the Equator Principles, and continue their policy of engagement towards future Equator Principles’ provisions” as requested by the notifier.⁴³

V. COMPARING OUTCOMES AND CONSIDERATIONS

In considering these two major cases relating to the relationship between businesses, climate change, and human rights, what can be understood from these outcomes and what do these outcomes tell us about prospective application to future legal understandings? In the first case, *Development YES – Open-Pit Mines NO v. Group PZU S.A.*, we observe that the allegations of violations to the OECD Guidelines were clearly outlined, there was agreement to dialogue, and a meeting between the two sides, mediated by the NCP. These events can be viewed as useful steps to addressing concerns raised by the notifier. However, it should also be noted that there was a lack of transparency on the part of the NCP itself during the mediation by deciding to not publicly release proceedings. This was noted by the OECD Watch body as a practice that should not become the rule.

In the second case, *Market Forces v. FMBC, MUFG and Mizuho*, we see an outcome that is broadly comparable. The notifier, Market Forces, made allegations against three Japanese companies for violating OECD Guidelines regarding climate change and human rights. The Japanese NCP initiated proceedings, where a subsequent mediation dialogue occurred. However, this first dialogue did not result in an agreement between the two sides or plans for a second meeting.

Scholars have generally characterized the role and powers of the OECD NCPs as meaningful in mediating disputes over rights violations in industry.⁴⁴ For example, Patrick Simon Perillo has stated that the OECD Guidelines and NCPs serve as a mechanism that remain

41. *Id.* at 5.

42. *Id.*

43. *Id.*

44. See, e.g., Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 NORDIC J. INT'L L. 89, 111 (2015) (discussing the contribution of NCPs in incentivizing parties to participate in procedures aiming to seek a consensual agreement).

relevant, valuable, and indispensable.⁴⁵ Perillo argues that NCPs can use the flexibilities afforded to them by the Implementation Procedures of the OECD Guidelines to strengthen corporate accountability and improve access to remedy.⁴⁶ However, Perillo also notes that, “as the field matures and progresses, it is important that certain flexibilities give way to further uniformity and coherence in (1) the standards and principles used (hence, a need for a legally binding instrument), and (2) the mechanism being utili[z]ed or established”.⁴⁷ NCP cases have steadily increased through the years despite the challenges, limitations, and criticisms that have confronted these bodies.⁴⁸

It should be understood that NCPs hold limited legal power. Lawyers and scholars should not view future cases before NCPs in the same way as cases before traditional domestic and international courts. It is clear that these bodies cannot provide leverage in legal proceedings to the extent judges and juries are able. The existing limitations of these bodies are then 1) the voluntary nature of mediation dialogues; 2) the ability to opt out of future dialogues if no agreement has been reached; and 3) the lack of a binding enforcement mechanism for companies. The limited ability for NCPs to ensure that agreements are reached between the two parties means that significant time can be spent without arriving at concrete decisions. This can be restrictive in providing tangible action on addressing human rights concerns relating to corporate contributions to environmental and climate damage. The outcome of both cases discussed is evidence of this weakness.

In contrast to the limits of these bodies, NCPs and the OECD Guidelines do provide some oversight and a developing standardized system seeking to achieve resolution on complaints relating to alleged human rights violations relating to corporate contributions to environmental and climate damage. While such powers may be insufficient to truly address broader legal issues at the intersection of industry, climate change, and human rights, the system should not be wholly dismissed.

NCPs and the OECD Guidelines allow notifiers to file claims which are able to clearly raise potential environmental or human rights violations by companies. These processes require official statements, as well as having a clearly demarcated process for trying to resolve concerns. NCPs are able to provide mediation, and hold multiple dialogues, if necessary, while the OECD Watch holds oversight over

45. Patrick Simon Perillo, *The Role of the OECD Guidelines for Multinational Enterprises and the National Contact Points in Shaping the Future of Corporate Accountability*, 24(1-2) INT'L CMTY. L. R. 36, 39 (2022).

46. *Id.* at 55.

47. *Id.* at 55.

48. *Id.* at 39.

NCPs. This can also bring awareness to concerns raised and practices which violate protections of human rights and the environment, both publicly and internally within companies.

Future considerations should focus on the decentralized nature of NCPs.

While the OECD does have oversight over these bodies, the NCPs have localized power over who is part of these bodies, how mediation is conducted, and the application of OECD Guidelines in the proceedings and final statement. This largely decentralized approach may promote understandings of localized concerns which can vary from one country to another. However, this may also limit uniform stringency in the application of oversight mechanisms to claims of Guidelines violations. Subsequent work should continue to consider how allegations of OECD Guidelines violations of climate change and human rights are raised by notifiers, considered by companies, and mediated by NCPs.