



## 2022 PROPOSED REVISIONS TO NATIONAL CONTACT POINT PROCEDURES AGAIN FALL SHORT OF NECESSARY REFORMS

RESPONSE BY MININGWATCH CANADA AND OECD WATCH TO  
PROPOSED REVISIONS OF NCP PROCEDURES  
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### Contents:

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**Background** – A history of NCP ineffectiveness and deepening harm to notifiers

**Feedback** – On necessary governance reforms

**Feedback** – On 2022 Proposed Specific Instance (complaints) procedures reforms

**Appendix A** – History of concern raised about NCP ineffectiveness and harm to notifiers since its creation in 2000

**Appendix B** – MiningWatch Canada’s history of engagement with Canada’s National Contact Point through Specific Instances

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### **Background – A history of NCP ineffectiveness and deepening harm to notifiers**

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Since 2005, MiningWatch Canada has been involved in seven Specific Instance cases involving Canadian mining companies as an advisor or notifier (see Appendix A). Over twenty years MiningWatch has also provided written or oral comments whenever the NCP has provided a consultation opportunity. As noted in our submission to the NCP’s Peer Review in 2018,<sup>1</sup> MiningWatch’s active involvement in these Specific Instance cases leads us to conclude that the NCP’s procedures and practices have failed to address the fundamentally unequal power relationship between notifiers and corporations. Rather, the practices of the Canadian NCP have

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<sup>1</sup> MiningWatch Canada. 2018. [Peer Review of the Canadian National Contact Point on the OECD Guidelines for Multinational Enterprises](#). Submitted January 23.

often exacerbated the effects of this power imbalance. Among other concerns, the requirements of proof placed on notifiers in order to have a complaint accepted for mediation have been too high, cases have too often been dismissed on dubious and non-transparent grounds, and public statements made by the NCP in regard to Specific Instances have been unnecessarily harmful to the interests of notifiers and those harmed by the activities of Canadian multinational enterprises.

Our concerns, particularly with respect to the NCP's failure to meet the OECD Guidelines' principles of impartiality, predictability, equitability, transparency and accountability, culminated in the NCP's mishandling of the complaint Bruno Manser Fonds (BMF) vs. Sakto (January 2016-May 2018), which remains deeply troubling as the notifier continues to suffer the consequences of the NCP's mishandling of this case and refusal to take action to remedy the harm it has done.

In relation to that complaint, among other steps, the NCP requested Canada's Canadian Department of Justice (DoJ) to send letters to BMF and to OECD Watch demanding that each civil society organisation "remove the Draft Initial Assessment [regarding the case] from its website and any other publicly accessible forum and cease and desist from any further replication of the Draft Initial Assessment." MiningWatch received a similar demand from the NCP directly. Additionally, without any justification, the NCP removed, after ten months, information it had posted on its website that discussed "Sakto involving a Member of Parliament during the confidential NCP assessment process; (...) Sakto's aggressive challenge of the NCP's jurisdiction; (...) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice...." The NCP's new public statement on the case, posted in May 2018, blames only the notifier BMF for the dismissal of the case.

After trying repeatedly to address the issues of this case and the ongoing harm to the notifier with the NCP directly, to no avail, in 2021 [MiningWatch supported OECD Watch](#) in filing a [Substantiated Submission](#) with the OECD Investment Committee regarding this case. The Substantiated Submission remains under review. The harm caused to the notifier by the NCP's mishandling of this case remains unaddressed, bringing into question the NCP's adherence to the principle of accountability.

Finally, calls for reform of Canada's NCP, created in 2000, are long-standing (see Appendix B) from, among others, a parliamentary committee in 2005, to the UN Working Group on Business and Human Rights in 2017, to stakeholders and peers during the [NCP's Peer Review in 2019](#).

Given this history, and the fact that the NCP is currently under review by the OECD Investment Committee, we hoped the NCP's proposed revisions would indicate a serious improvement in proposed practice going forward. We note the addition of a case tracker as a positive change. We think grouping the procedures under the main stages of the process will improve ease-of-use and look forward to seeing the new intake form that will be published on the NCP website to streamline and facilitate the submission of Requests for Review. We look forward to a mediator roster that reflects a wider variety of expertise and a more inclusive approach to the mediation process.

However, as we set out below, the NCP’s current proposed procedural revisions again fall far short of what is required. They fall short of recommendations made by the [peer reviewers in 2019](#) and fall short of best practice among NCPs in other countries, such as The Netherlands and Australia. The NCP peer reviewers in 2019 and the UN Working Group on Business and Human Rights’ in its 2017 [country report on Canada](#), among others, have pointed to needed governance reforms for the NCP, in part to address ongoing lack of confidence of civil society in the National Contact Point. As even good procedures on paper without good governance can lead to bad outcomes we start with a discussion of needed governance reforms.

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### **Feedback – Failure to address necessary governance reforms**

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We note that the procedural reforms proposed by the NCP fail to address long-standing and much needed governance reforms. In relation to the NCP’s institutional arrangement and governance, we are concerned that the entire handling of complaints is in the control of the NCP committee – eight member departments, chaired by Global Affairs Canada’s trade division, with Natural Resources Canada as the vice-chair, the NCP Secretariat, and members of an ad hoc Working Group created to examine specific instances, the members of which are also members of the NCP committee.

There is no independent or multistakeholder oversight over the NCP process. Given the NCP’s disappointing track record leading up to the mishandling of the Sakto case, NCP governance should no longer be “business as usual.”

The NCPs of Australia, Denmark, Lithuania, The Netherlands and Norway all have independent governance structures; i.e. structures involving an independent expert panel, or a roster of individual experts that handle complaints (as in the case of Australia).

**We recommend that the Canadian NCP adopt the Dutch model of an independent expert panel for its governance structure.** We believe an independent panel structure would ensure broad expertise in the handling of complaints as well as independence from pressures of being housed within a government ministry – particularly a trade and economics ministry – and being advised primarily by civil servants in other ministries. The NCP secretariat could still benefit from links to the economic ministry for work on promoting the Guidelines to companies, while preserving the independence of the expert panel for complaint handling, thereby better safeguarding the actual, and appearance of, impartiality by the NCP.

In addition to adopting an independent panel structure, **we also recommend that the NCP should establish an Oversight Body involving representation of all stakeholder groups that is empowered to make public advice to the NCP in regard to governance and Specific Instance procedures, and adjudicate on procedural and substantive appeals of Specific Instance cases.** This Oversight Body should be specific to the NCP and not shared with other entities such as was once proposed for the now moribund Multi-stakeholder Advisory Body.

In our [submission to the NCP of October 7, 2020](#), we also note that the NCP has ignored repeated requests **to include civil society organizations among its “social partners,”** along with business and labour, as modelled by the OECD Working Party on Responsible Business Conduct, which recognizes three stakeholders: OECD Watch, Business at OECD (BIAC) and the Trade Union Advisory Committee (TUAC). The ongoing exclusion of civil society from the NCP’s social partners is an indicator of the troubled relationship that the NCP has with Canadian civil society – one that the NCP again seems uncompelled to repair. **The social partners should be allowed, with appropriate confidentiality agreements and conflict of interest rules, to be informed on the details of each specific instance and consulted for advice regarding each instance.**

Additionally:

- **The NCP’s annual budget and spending streams should be made transparent and should be sufficient to ensure the NCP’s full ability to promote the Guidelines to all stakeholder groups and handle specific instances efficiently and effectively.**
- **There should be public reporting by the Government of Canada on the NCPs performance.**
- **The NCP should also commit to undertaking a periodic, three year review of its institutional arrangement and governance, information and promotion activities, and specific instance handling procedures and performance.**

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## **Feedback – 2022 Proposed Specific Instance (complaints) procedures reforms**

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See initial and partial feedback below. We are also requesting a meeting to discuss our feedback with the NCP.

### **2. Principles**

2.2 The NCP aims to support the participation of disadvantaged or vulnerable groups in NCP processes and will make best endeavours to sensitively manage barriers including those related to: language and literacy, cultural constraints, and difficulty accessing equal representation. **The rules of procedure should clarify what the NCP will offer if there is difficulty in accessing equal representation.** For example, the NCP should require that companies not involve legal counsel in complaints to encourage more solutions-driven and less liability-avoiding outcomes. The NCP may offer to connect complainants to civil society entities that may have capacity to support them. The NCP may provide mediation training or other such support to disadvantaged complainants. All are practices employed by NCPs attracting greater confidence of civil society. See also 4.7 below.

### **4. Initial Assessment**

4.5 The notifier and respondent both accept that the progress of the specific instance review process be reported in the case tracker on the NCP website. **Lack of acceptance by the company should not stop the NCP from carrying out the IA.** The rules of procedure should also clarify that

if the IA finds grounds to continue, the NCP will proceed with the complaint even without participation of the company, and apply its commitment to seek consequences against the company for poor faith engagement in the specific instance process.

4.7 Where a request for review does not contain the information necessary to conduct an initial assessment, the Secretariat will work with the notifier to explain what additional material is required. Incomplete requests for review will be considered invalid if notifiers are unable to provide the required information within a reasonable timeframe. **The NCP should ensure a low evidentiary threshold at the initial assessment phase, keeping in mind that this is a non-judicial mechanism that does not enable complainants to compel documents held by the company, and that for many disadvantaged and vulnerable groups, evidence is often not in the form of documents.**

4.8 As part of the initial assessment, the Secretariat will forward a copy of the request for review to the MNE in question with ~~an invitation~~ **a request** to reply to the allegations. The NCP will take the reply of the MNE into account when carrying out its initial assessment. **The rules of procedure should clarify that the MNEs' responses will be shared with the notifier, and further that any information not shared between the parties will not be taken into account by the NCP. The rules of procedure should also clarify that the NCP will proceed with consideration of the complaint even if the company decides not to reply to the allegations and/or otherwise engage in the specific instance process.**

4.9 Parties to a specific instance review process are to forward all relevant and supporting documentation to the Secretariat in one or several messages within ten (10) business days from the day the NCP seeks additional information. Beyond this timeframe, the NCP may decide that additional documentation in relation to the review will not be taken into consideration. **In general this time-frame is too short for most notifiers, as notifiers may need translation, may be dealing with power outages, may live far from internet access, may need to connect with a diverse and distant community group in order to determine how to respond, etc. At least 20 days should be given, and the rules of procedure should state that extensions will be allowed under acceptable circumstances.**

4.11 The Secretariat may also review open source information and consult relevant government departments (members of the NCP Committee) and other NCPs who have knowledge or an interest in the issue(s). **The rules of procedure should clarify that the NCP will disclose who and what information it consulted. This is important to promote transparency of the NCP's approach and to avoid perceptions of bias. The rules of procedure should also clarify that the NCP may ask the parties for recommendations on whom the NCP should talk to, to strengthen its understanding of the relevant issues.**

4.12 The Secretariat will then proceed to draft the initial assessment with the information at hand and consult the working group to determine whether the issue is raised in good faith and relevant to the implementation of the Guidelines and if ~~they merit~~ **it merits** further examination. In this context, the six (6) admissibility criteria outlined in the OECD Procedural Guidance will be taken into account:

- a) the identity of the party concerned and its interest in the matter;

- b) whether the issue is *material and substantiated*;
- c) whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
- d) the relevance of applicable law and procedures, including court rulings;
- e) how a similar issue has been, or is being, treated in other domestic or international fora;
- f) whether the consideration of the specific instance would contribute to the purposes and effectiveness of the Guidelines.

This section should be explicit that when performing an initial assessment, in line with Section I.C.3.c) of the Procedural Guidance, the Canadian NCP should consider whether accepting the case could contribute to the purposes and effectiveness of the Guidelines even in cases in which a party declines or would likely decline good offices, and where facilitated dialogue would likely be unsuccessful.

4.13 The Secretariat will interpret *material and substantiated* to mean that the issue is related to the application of the OECD Guidelines, and is plausible. ~~The criteria for substantiated is to have a reasonable number of facts~~ [Note MiningWatch was assisted in our final claim to the NCP by a lawyer, to no avail, who noted that he needed less evidence up front than we had amassed to file a claim in court. We never saw what the company had provided to refute our evidence, which included video evidence.] ~~to substantiate the allegations. Considering the review process cannot be founded on assumptions,~~ a request for review will be considered to be *material and substantiated* when:

- The allegations raised relate to the Chapters of the Guidelines.
- There is **a plausible link** between the issue raised, the context in which the allegations have taken place, and the respondent's activities. ~~Given the NCP's poor track record in accepting cases, we would want that opinion made by an independent body.~~
- The supporting ~~documentation~~ evidence relates to the allegations. ~~The rules of procedure should not focus on documentation, as evidence available to complainants is often in the form of personal testimony (interviews), or other non-documentary forms.~~
- The allegations brought forward are clearly described, explaining what actions are in breach of the Guidelines, why they are considered as such, and when and where the breach (es) occurred.

4.14 The Secretariat will then seek the NCP Committee approval on the recommendation made by the working group to either offer good offices, or not. The Secretariat will then share the initial assessment with the parties before it is published on the NCP website. The initial assessment is that of the NCP and it is at the NCP's discretion to modify it or not **during the initial assessment period.** However, if the conclusions of the **draft** initial assessment ~~must~~ **will** be changed, the parties will be informed of the reason(s) for the change and will be given the opportunity to comment on the new conclusion before the initial assessment is published. ~~The rules of procedure should state that in principle initial assessments will not be changed once they have already been published. In rare circumstances where they may be changed there needs to be a complete, and transparent public justification provided.~~



4.18 Acceptance or rejection of a specific instance is not an assessment of whether the MNE's actions are consistent with the OECD Guidelines nor is it a ruling on the merits of the issue raised by the notifier(s). **The NCP should note that it has failed to follow this rule in past cases.**

## 5. Good Offices

5.4 The Secretariat may facilitate the dialogue or use external mediation or facilitation services. If external services are used, the NCP will cover the costs and may observe the mediation or facilitated dialogue sessions **if agreeable to both parties.**

5.5 Information and views provided during good offices will be treated as confidential **unless they are already in the public sphere (including through the complaint filing itself). Information and views provided by the parties belong to the parties and cannot become confidential because they were shared in the process.** With the support of the Secretariat or mediator, the parties will reach, at the beginning of the process, a common understanding on what is considered confidential information. Expectations around communication with the media and the public should be clarified from the outset as well. - **The NCP needs to clarify its rules on confidentiality up front The NCP should state a clear approach favoring transparency. See OECD Watch's guidance on this – the only material that should be confidential is legitimate business secrets and personally-identifying information for security reasons.**

### **NEED TO INSERT NEW SECTION ON INVESTIGATION OF CLAIMS WHERE GOOD OFFICES ARE REJECTED BY A PARTY**

If the NCP offers good offices that are rejected by either party, the rules of procedure should clarify that the NCP will proceed to examine the specific instance based on the evidence available to it and to issue a determination on the allegations of non-adherence to the Guidelines and recommendations to the parties. The NCP should not allow a companies' refusal to engage in good offices to unilaterally cause the termination of the specific instance procedure and potential for a determination on the company's adherence to the Guidelines. Further, the NCP should be aware that some notifiers prefer not to mediate – for security or lack of trust reasons – but are still interested in engaging in the specific instance process. This too is not grounds for the NCP to close the complaint; the NCP should proceed with investigation into the issues and claims of Guidelines breach raised.

## 6. Final Statement

6.2 If the NCP closes the specific instance review process **on grounds that it determines the claim does not meet the admissibility criteria,** without offering its good offices, the initial assessment will be published as the final statement, and will describe, at a minimum, the issue(s) raised and the reasons for the NCP's decision; the final statement may include recommendations to the parties.

**NEW SUB-SECTION (or a subsection to replace the text of 6.5 below):** If a party refused to engage in the specific instance process after being offered good offices, and the NCP therefore proceeded to investigate the claims raised, the NCP will issue a final statement that is separate from the initial assessment. The final statement will describe, at a minimum, the issue(s) raised, the reasons the NCP offered good offices, the response by both parties to that offer, the

proceedings of the NCP’s further investigation into the claims, the NCP’s determination of whether the enterprise failed to adhere to the Guidelines in each specific claim raised, and recommendations to the parties.

6.5 When a party is unwilling to engage in the process or participate in good faith, it will be noted in the final statement. **In line with this, the final statement in the Sakto case must be amended back to the June 2017 version in which Sakto’s unwillingness and lack of good faith participation was recorded.**

**NEW SUB-SECTION:** If both parties have accepted good offices, then when both parties agree to conclude good offices (either because an agreement has been reached or both parties have decided the process is no longer beneficial to them), the NCP will issue a final statement that will describe, at a minimum, the issue(s) raised, the reasons the NCP offered good offices, the response by both parties to that offer, the proceedings of good offices, the nature of any agreement reached or the reasons agreement was not reached, the nature of any perceived breaches of good faith occurring during the specific instance proceedings, the NCP’s determination of whether the enterprise failed to adhere to the Guidelines in each specific claim raised, and recommendations to the parties.

4.15 6.6 The Secretariat will share a draft of the final statement with the parties for comment. The **draft** final statement is that of the NCP and it is within the NCP’s discretion to decide whether to change the draft final statement in response to comments from the parties. However, should a **draft** final statement be changed or replaced, the parties will be informed of the reason(s) for the change or the replacement, and will be given the opportunity to comment on the new version before it is published. The **draft** final statement will include an explanation as to why the change or replacement was necessary. **The rules of procedure should state that in principle final statements will not be changed once they have been published. In rare circumstances where they may be changed there needs to be a complete, and transparent public justification provided.**

## 8. Service Standards

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<b>Initial Assessment (IA)</b>	<b>3 months (approximately 66 business days)</b>	
<b>Action</b>		<b>Day</b>
Secretariat acknowledges receipt of request for review		5
Notifier provides additional information if requested <b>Is this provided to the company?</b>		10

Ten days is not enough time for a notifier to respond. There may be translation issues, connectivity issues, need to travel and need to consult with those harmed or relevant organizations. This should be 30 days.



Secretariat notifies the respondent	1
Respondent provides its input within 10 days <b>Is this provided to the notifier?</b>	10
Secretariat seeks clarifications from the parties if necessary	5
Parties provide clarifications if required	5

**Is this shared? Notifiers may need significantly more than 5 days to respond for reasons above.**

## 9. Participating in good faith

9.1 The NCP expects all parties to a specific instance review process to participate in good faith during the entire process. Good faith behaviour in this context includes responding in a timely fashion, maintaining confidentiality, not misrepresenting the process, not threatening or taking reprisals against parties involved in the process, and genuinely engaging in the process with a view to finding a solution to the issue raised. ~~Behaviours such as breaching confidentiality or issuing threats, on the part of either party, will lead to the NCP putting an end to the process.~~ **Note - It is not necessarily helpful for the NCP to respond to a breach of good faith by putting an end to the process; that could be the precise result a company intends by engaging in the poor faith activity. Instead, if the NCP or a party perceives any activities as representing poor faith, the matter should be discussed with the working group and social party so that a decision can be made that best ensures contribution to the purposes and effectiveness of the Guidelines. Even if good offices cannot be offered because of bad faith activity, the NCP should continue to investigate the case and report findings.**

9.2 ~~Undertaking public campaigning during the good offices process is not allowed. The failure to abide by the agreement reached under 5.5 should be sufficient cause for the Secretariat or mediator to suspend or, as appropriate, terminate the process.~~ **NOTE Public campaigning by a notifier's community or organization may be the only way to influence a company's ongoing human rights abuses or environmental harm. Further, public campaigning extends beyond the filing of the complaint itself, and it is unreasonable for the NCP to prohibit all campaigning on the underlying issue. It would also be unfair to prohibit notifiers from engaging in a core activity of campaigning while companies are allowed to continue *their* own core activity that is causing harm to the community. A better approach to campaigning is for the NCP to urge parties to ensure campaigning does not divulge any material confidential under the process.**

9.4 While participation in the NCP mechanism is voluntary, actions or decisions by either party that do not reflect participation in good faith in an specific instance review process will be made public in the final statement. **NOTE - In order to remedy harm done to the notifier the NCP should apply this principal to the Sakto case and reinstate its 2017 final statement that exposed the bad faith practices of Sakto, which were removed from the 2018 Final Statement.**

9.5 If Canadian companies do not participate in the NCP process **despite the NCP's offer of good offices**, or if the NCP determines that they do not engage in good faith or constructively in the process, the NCP ~~could~~ **will** recommend the trade measure be applied and will note it in the final statement. **NOTE - It is important that the trade measure be applied in each such case; this should not be optional.**

## 10. Privacy, confidentiality, transparency

- 10.4 When a request for review qualifies for consideration as a specific instance, the Secretariat shares all ~~relevant~~ information it receives from one party with the other party, ~~excluding personally-identifying information when sensitive for security reasons, and legitimate business secrets. including personal information on a need to know basis to allow parties to express their views.~~ Such information will be shared as soon as it is received by the NCP.
- 10.8 Information and views provided during the course of the good offices period will be treated as confidential, unless it is already in the public sphere (including through the complaint filing itself). Information that a notifier brings into the good offices procedure whether a document or a viewpoint cannot become confidential during or after the process. It remains up to the notifier to share that viewpoint or document public at any time.

## 11. Withdrawal of Specific Instances

- 11.1 Notifiers may request to withdraw their specific instance in writing to the Secretariat. If this occurs, the NCP will consult the respondent and close the case. Withdrawn specific instances will be published on the NCP website unless there are sufficient grounds to withhold such information from publication. The NCP will still submit a final statement in accordance with section 6.

NOTE – There are several issues not addressed in the proposed procedures that need to be addressed, and are addressed in other NCP's procedures (see Dutch or Australian NCPs for example).

- NEED A SECTION ON ADDRESSING (POTENTIAL) CONFLICT OF INTEREST BETWEEN THE NCP AND THE PARTIES
- NEED A SECTION ON HOW THE NCP WILL DEAL WITH UNDUE PRESSURE BY EITHER PARTY ON THE NCP
- NEED A SECTION ON HOW THE NCP WILL ADDRESS THREATS TO EITHER PARTY BY THE OTHER PARTY OR BY ITS ALLEGED AFFILIATES (REPRISALS, RETALIATION, HARM TO DEFENDERS)
- NEED A SECTION ON TRANSPARENCY – SETTING CLEAR, LIMITED GROUNDS FOR CONFIDENTIALITY BASED ON OECD WATCH'S GUIDANCE
- NEED A SECTION ON HOW PROCEDURAL AND SUBSTANTIVE APPEALS CAN BE FILED

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## **Appendix A – Cases in which MiningWatch has been a notifier (\*) or significant advisor**

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- **2005(\*)** – MiningWatch Canada, Friends of the Earth Canada, and DECOIN in regard to Ascendant Copper Corporation in Ecuador
- **2005** – Rights and Accountability in Development (RAID)-UK and Congolese human rights organisations Action contre l’impunité pour les droits humains (ACIDH) and Association africaine de défense des droits de l’homme section du Katanga (ASADHO Katanga), in regard to Anvil in the Democratic Republic of the Congo. Supported by Entraide Missionnaire, MiningWatch Canada, Regroupement pour la responsabilité sociale des entreprises, and Africa Files
- **2010** – Oyu Tolgoi Watch (OT Watch) in regard to Ivanhoe Mines Ltd. and Rio Tinto International Holdings’ Oyu Tolgoi project in Mongolia, supported by MiningWatch Canada and RAID-UK
- **2011(\*)** – Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and MiningWatch Canada (MWC) regarding Barrick Gold’s Porgera Joint Venture mine in Papua New Guinea
- **2012(\*)** – United Mongolian Movement of Rivers and Lakes (UMMRL), Oyu Tolgoi Watch (OT Watch), and MiningWatch Canada in regard to Centerra Gold Inc. in Mongolia
- **2012(\*)** – Sindicato Nacional de Trabajadores Mineros, Metalurgicos, Siderurgicos y Similares de la Republica Mexicana (SNTMMSSRM), Local 309 of the SNTMMSSRM Proyecto de Derechos Economicos Sociales y Culturales, A.C., Canadian Labour Congress, and MiningWatch Canada in regard to Excellon Resources in Mexico
- **2013(\*)** – International Federation for Human Rights (FIDH), the Ecumenical Human Rights Commission of Ecuador (CEDHU), and MiningWatch Canada on behalf of a group of nine affected people in regard to Corriente Resources’ Mirador Mine in Ecuador

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## **Appendix B – A long history of concern raised about NCP ineffectiveness and harm to notifiers since its creation in 2000**

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**2005** - In 2005, the parliamentary [Standing Committee on Foreign Affairs and International Trade](#) observed that “the government must clarify, formalize and strengthen the rules and the mandate of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and increase the resources available to the NCP to enable it **to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies** found to be acting in violation of the OECD Guidelines. [emphasis added]”

**2007** - In 2007, noting the failure of the NCP to adequately address complaints against Canadian extractive companies, particularly in regard to fact-finding and investigations “in line with the approach utilized by several other OECD countries” (p.22) civil society and industry participants on a Government of Canada’s [Advisory Group](#) aligned “on the need for an ombudsman to be established”(p.23). “The Advisory Group was strongly of the view that the ombudsman model discussed in the recommendation [namely “an independent ombudsman office, mandated to provide advisory, fact-finding and reporting functions”] was the best way to advance CSR compliance in the extractive sector” (p.23).

**2016** - In 2016, OECD Watch, MiningWatch Canada and Above Ground issued a [report](#) on the 15<sup>th</sup> anniversary of Canada’s NCP listing the NCP’s continued failings, namely that “The NCP lacks independence; The NCP is opaque; The process involves unjustified delays; The NCP applies a high threshold for accepting complaints; The NCP does not make findings on whether companies have breached the Guidelines; The government penalty for companies that don’t participate has proven to be ineffective in promoting compliance with the OECD Guidelines for Multinational Enterprises; The process rarely concludes with an agreement or recommendations and there are no effective follow-up procedures in place; In over fifteen years of existence, the NCP has consistently failed to provide notifiers with effective remedy.”

**2017** - Even after receiving the 2015 report, the NCP did not take steps to implement the reforms recommended regarding its independence, failure to engage in fact-finding, failure to ensure a timely and transparent process for complaints, failure to issue determinations of non-compliance by companies, and failure to engage in meaningful follow-up. The NCP’s ongoing failure to reform itself may have led the UN Working Group on Business and Human Rights’ to note in its 2017 [country report on Canada](#) that the NCP still “was perceived by stakeholders as potentially **not fully independent given that it was within a ministry that was responsible for promoting overseas trade and investment.** Stakeholders also noted that the National Contact Point had no external advisory or oversight body. (...) it was highlighted to the Working Group that the lack of confidence of civil society in the National Contact Point was apparent, which might have limited the number of cases brought before it.”

**2019** - In 2019, the [OECD NCPs’ Peer Review](#) of the Canadian NCP found that: “The NCP has been making various efforts to respond to learnings and improve its functioning in recent years. Despite these efforts, there is a lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders. Rebuilding this trust and ensuring continued coherence on RBC across the government of Canada will be central to ensuring the effectiveness of the NCP going forward.” The peer review highlighted concerns raised about the Sakto case in particular, but situated the failures in a broader context, noting that “[s]ome stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCPs application of the initial assessment criteria was onerous. In this respect stakeholders referenced various cases not accepted for further examination at the initial assessment stage for reasons they believed to be outside the scope of the initial assessment criteria.” The peer reviewers also found that: “A lack of formal involvement of social partners and external stakeholders in the NCP’s governance arrangements contributes to the perception of lack impartiality with respect to the

NCP.” Civil society is not among the NCP’s social partners, and despite numerous requests that this be changed, the NCP has to date not created a formal role for civil society partners.

**2021** - In 2021 [MiningWatch supported OECD Watch](#) in filing a [Substantiated Submission](#) with the OECD Investment Committee regarding the case of Bruno Manser Fonds vs. Sakto. The Substantiated Submission is only the second globally filed against an NCP. It maintains that the Canadian NCP’s handling of the complaint from 2016 to 2018 was highly irregular in ways contrary to the OECD Guidelines’ “guiding principles for specific instances” and core criteria for NCPs, and was prejudicial to the civil society notifier in ways that continue to harm the notifier. The case remains under review.