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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

Cancels & replaces the same document of 9 September 2022

**Response by the Investment Committee to the substantiated submission by OECD
Watch regarding the Canadian National Contact Point for Responsible Business
Conduct**

5 September 2022

This document is the response of the OECD Investment Committee to the substantiated submission filed on 22 September 2021 by OECD Watch with the Chairs of the Investment Committee and the Working Party on Responsible Business Conduct (WPRBC), based on Section II.2. b) and d) of the Procedural Guidance of the Decision of the Council on the OECD Guidelines for Multinational Enterprises.

In its substantiated submission, OECD Watch requests the Investment Committee to assess whether the National Contact Point for Responsible Business Conduct of Canada has fulfilled its responsibilities in a specific instance handled between 2016 and 2018, and to make recommendations as appropriate.

The draft response of the Investment Committee to the submission was prepared by the OECD Secretariat and approved by the WPRBC at its meeting of 27 April 2022.

In accordance with the Procedure for Considering Substantiated Submissions regarding National Contact Points, the draft response was shared with the Canadian NCP and OECD Watch on 29 April 2022 for final comments. A revised version was approved by the WPRBC on 16 August 2022,

The Investment Committee approved and declassified the final response on 5 September 2022.

Please note this document is only available in pdf.

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1. Introduction

1. Paragraph II.2 b) and d) of the Procedural Guidance of the Decision of the Council on the OECD Guidelines for Multinational Enterprises¹ (the Procedural Guidance), provides that ‘[t]he [Investment] Committee will, with a view to enhancing the effectiveness of the Guidelines and to fostering functional equivalence of the NCPs:[...] consider a substantiated submission by an adhering country, an advisory body, or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances’ and ‘make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines.’ On 22 September 2021, the Chairs of the Investment Committee and the Working Party on Responsible Business Conduct received a substantiated submission from OECD Watch (the Substantiated Submission) regarding the Canadian National Contact Point (the Canadian NCP or the NCP). This document contains the response by the Investment Committee to the Substantiated Submission.

2. This response was prepared in accordance with the Procedure for Considering Substantiated Submissions regarding National Contact Points developed in 2019 by the Investment Committee. It is structured as follows: Section 2. contains a summary of the procedure undertaken to respond to the Substantiated Submission; Section 3. contains a brief summary of the specific instance to which the Substantiated Submission relates; Section 4. contains a summary of the Substantiated Submission and the issues raised by OECD Watch; Section 5. contains a summary of the response by the Canadian NCP to the Substantiated Submission; Section 6. contains findings and recommendations of the Investment Committee; and Section 7. recapitulates the conclusions of the Investment Committee and makes a final recommendation. The Substantiated Submission is provided in Annex A. The written response from the Canadian NCP is provided in Annex B.

¹ OECD, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, see: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0307>

2. Summary of the procedure

3. As indicated above, the response has been prepared by the Secretariat in consultation with the WPRBC Bureau in accordance with the Procedure for Considering Substantiated Submissions regarding National Contact Points developed in 2019 by the Investment Committee. The following steps were followed:

1. On 11 October 2021, the Chair of the Investment Committee wrote to Investment Committee delegates to inform them of the submission and the process to be followed, and requested the WPRBC to prepare a draft response. On 13 October 2021, the Chair of the WPRBC also informed WPRBC delegates.
2. On 15 October 2021, the OECD Secretariat had a call with the Canadian NCP to explain the procedure and invited it to submit a written response within eight weeks;
3. On 15 October 2021, the OECD Secretariat had a call with OECD Watch to explain the procedure;
4. On 7 December 2021, the Canadian NCP shared its written response dated 2 December with the OECD Secretariat and the Chairs of the IC and the WPRBC (see Annex B);
5. On 20 December 2021, the Chairs of the Investment Committee and of the WPRBC shared the Canadian NCP's written response with the Investment Committee and the WPRBC;
6. On the same day, the OECD Secretariat shared the Canadian NCP's written response with OECD Watch;
7. On 9 February 2022, the Secretariat held a virtual meeting with the Canadian NCP to seek its views;
8. On 18 February 2022, the Secretariat held a virtual meeting with OECD Watch to seek its views;
9. On 8 April 2022, the Secretariat consulted with the WPRBC Bureau on the draft response;
10. On 11 April 2022, the Secretariat shared the draft response with the Canadian NCP to address any factual errors.
11. On 27 April 2022, the WPRBC approved the draft response with minor edits.
12. On 29 April 2022, the approved draft response was shared with OECD Watch and the Canadian NCP for any final comments.
13. On 10 May 2022, the Canadian NCP confirmed it had no comment on the draft response.
14. On 11 May 2022, OECD Watch submitted comments to the Secretariat.
15. On 29 June 2022, the Secretariat consulted with the WPRBC Bureau on the implementation of the comments received.
16. On 16 August 2022, the WPRBC approved a revised draft response partly implementing OECD Watch's comments by written procedure.
17. On 5 September 2022, the Investment Committee approved and declassified this final response.

3. Summary of the Specific Instance at the basis of the Substantiated Submission

4. On 11 January 2016, a specific instance was submitted to the Canadian NCP by Bruno Manser Fund (BMF) (the Notifier), an NGO based in Basel, Switzerland, against the Canada-based Sakto Group (the Company). The Notifier alleged non-observance of Chapter III of the OECD Guidelines for Multinational Enterprises² relating to disclosure requirements by the Company.

5. On 25 October 2016, the NCP shared a draft initial assessment (the Draft Initial Assessment) with the parties, which concluded that the issues merited further examination and offered good offices to the parties. The Notifier accepted the good offices on 31 October 2016. The Company submitted comments on the Draft Initial Assessment.

6. On 21 March 2017, the NCP shared a draft final statement (the Draft Final Statement) with the parties in which the NCP decided not to accept the case that did not include reasons for the change in the NCP's conclusions following initial assessment. On 3 April 2017, the Notifier made the Draft Final Statement public, along with the Draft Initial Assessment to expose the change of stance of the NCP.

7. On 11 July 2017, the NCP published a final statement (the First Final Statement) deciding not to accept the case. The First Final Statement contained more detail than the Draft Final Statement that was shared on 21 March 2017.

8. On 11 May 2018, the Canadian NCP replaced the First Final Statement with [another final statement](#) that is less detailed than the initial statement (the Second Final Statement). On the same day, the Canadian Department of Justice sent a cease and desist letter to the Notifier and OECD Watch to demand that they cease the publication of the Draft Initial Assessment on their website and any other publicly accessible forum and desist from any further publication thereof.

9. According to OECD Watch, the Company is currently pursuing a defamation suit against the Notifier before Swiss domestic courts where the Notifier is established, and may be relying on the NCP's conclusions, including the Second Final Statement, in its filings.

² OECD, *Declaration on International OECD Legal Instruments Investment and Multinational Enterprises*, [OECD/LEGAL/0144](#), Annex 1, see: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144>

4. Summary of issues raised in the Substantiated Submission

10. In the Substantiated Submission, OECD Watch ‘asserts that the Canadian National Contact Point (NCP) has failed to fulfil its responsibilities with regard to its handling of the complaint Bruno Manser Fonds vs. Sakto’ and that the ‘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 prejudicial to the civil society notifier.’

1. Guiding principles for the handling of specific instances

Impartiality

11. OECD Watch states that:

- ‘The NCP’s impartiality (*sic*) towards the parties is most obvious in the two Final Statements the NCP published, first in July 2017 and then in May 2018. The July 2017 first Final Statement attempts to put blame on both Sakto and BMF for the rejection by the NCP of the case. However, it is clear, even from the incomplete information provided, that BMF had agreed to mediation and that mediation was made impossible, for reasons outside of BMF’s control, by pressure put on the NCP by Sakto, its lawyers, and its political contacts, causing the case to be rejected. Yet in the NCP’s second published Final Statement of May 2018, the NCP removed all mention of the transgressive behaviour by Sakto during the process [...].’
- The above ‘shows damaging partiality that has continued to harm BMF in its work and engagements with regard to Sakto. [...] Sakto is [...] pursuing a defamation claim against BMF in Swiss court. Sakto’s filings use the NCP’s conclusions in the case, including in its May 2018 second Final Statement, in such a way as to undermine the credibility of BMF.’
- ‘The NCP’s regrettable lack of transparency over the rationale for its shifts in decision [...] gives a perception of lack of impartiality and equitability by the NCP [...].’

Predictability

12. OECD Watch states that:

- ‘The Canadian NCP failed to meet the complaint handling principle of predictability by changing its rules of procedure in the middle of the complaint and failing to implement its rules completely. The NCP’s deviations resulted in an extremely unpredictable complaint process.’
 - ‘The NCP [...] issued the new May 2018 second Final Statement the following spring 2018, retroactively applying the new rules and making the process completely unpredictable to the parties.’

- ‘The Canadian NCP [...] failed to apply its new rules of procedure, and meet the complaint-handling process outlined in the Procedural Guidance, by issuing two Final Statements for the same complaint.’
- ‘The NCP published each of its two Final Statements without consultation of BMF, and published the May 2018 second Final Statement without even informing BMF of the impending publication.’
- ‘The Canadian NCP breached the Procedural Guidance’s guiding principle of predictability when it failed to apply its new rules of procedure as regards consequences for MNEs that do not engage in good faith in the specific instance process.’
- ‘The Canadian NCP [...] failed to apply its new rules of procedure as regards appropriate timeframes for the stages of complaint handling.’
- ‘[W]hen the NCP provided the parties its draft Final Statement, the NCP announced it was closing the case without providing any of the information it had said [in its October 2016 draft Initial Assessment] would be in the Final Statement [...]. And while much of this information was indeed included in the July 2017 first Final Statement, the May 2018 second Final Statement removed it all again.’

Equitability

13. OECD Watch states that:

- ‘Because the NCP was not transparent regarding its interactions with the parties, the notifier does not know how many times the NCP met with the company, or its representatives, in relation to the complaint.’
- ‘[T]he May 2018 second Final Statement inequitably describes only alleged procedural breaches by BMF, without mentioning procedural breaches of Sakto already made public in the NCP’s July 2017 first Final Statement. The NCP’s continued chastising of one party for its actions [in the Second Final Statement], while letting the other party completely off the hook for its own, is blatantly inequitable towards the parties.’

14. During its 18 February 2022 call with the OECD Secretariat, OECD Watch clarified that its position is that it ‘is inaccurate and inconsistent with the core NCP criterion of equitability and equal treatment of the parties that the Canadian NCP continues to portray its dismissal of the complaint as though it hinged on *the notifier’s* breach of confidentiality.’

Compatibility with the Guidelines

15. OECD Watch states that:

- ‘Taken together, the NCP’s failures to meet the guiding principles for specific instances described above and the core criteria [...] demonstrate the complaint was not handled in a manner compatible with the Guidelines.’

16. During its 18 February 2022 call with the OECD Secretariat, OECD Watch also stated that handling of the case was not compatible with para. I.C.3.c) of the Procedural Guidance, as the Canadian NCP’s statements did not provide reasons why, even though good offices were prevented from taking place due to the parties’ entrenched positions and sustained enmity, the issues did not merit further examination.

2. Core criteria for functional equivalence

Transparency

17. OECD Watch states that:

- 'The Canadian NCP breached the Procedural Guidance's core criteria of transparency when it failed to preemptively announce and explain the reasons for its various shifts in stance regarding the admissibility (and rationales therefor) of the complaint.'
- 'The Canadian NCP breached the Procedural Guidance's core criteria of transparency when it failed to be public about its contacts with parties during the complaint.'
- 'The NCP's request that the Canadian DoJ pressure NGOs to remove from their websites copies of the October 2016 draft Initial Assessment that help explain BMF's whistleblower action represent a breach of the core criteria of transparency.'
- 'The Canadian NCP's revised rules of procedure [...] also cause the NCP to breach the core criteria of transparency, because they are not in line with the Procedural Guidance's expectations on transparency.'

Accountability

18. OECD Watch states that:

- 'The Canadian NCP's lack of transparency [...] have made it very difficult to hold the NCP accountable for the deeply flawed procedures in this troubled case.'
- 'The NCP's handling of the complaint has also made the NCP unaccountable as a mechanism for hearing and fairly considering the claims raised by the notifier in the complaint.'

3. Stakeholder confidence in the NCP

19. OECD Watch states:

- 'The Canadian NCP's failure to act impartially, predictably, equitably, transparently, and accountably in the handling of the complaint against Saktó [...] have caused it to lose the trust of Canadian and international stakeholders.'

4. Requests of OECD Watch to the Investment Committee and the Canadian NCP

20. As a result of the foregoing, OECD Watch makes the following requests to the Investment Committee:

- 'Issue (itself or via the WPRBC) a statement acknowledging and condemning the occurrence of undue legal and political pressure by MNEs against NCPs and related government offices in relation to complaints and advising states adherent to the Guidelines and their NCPs to respond impartially and equitably to such pressure;
- Issue guidance to states adherent to the Guidelines to help them ensure their NCPs respond impartially, equitably, and accountably to undue pressure by MNEs, with focus on minimizing harm to notifiers;
- Confirm that the Canadian NCP did not fulfill its responsibilities under the Guidelines by failing to meet the OECD Guidelines' core criteria of transparency and accountability and the complaint handling guiding principles of impartiality, predictability, equitability, and compatibility with the Guidelines;

- Issue a recommendation to the Canadian NCP to take the steps identified below to rectify the harm done to the notifier BMF in this complaint; and
 - Issue a recommendation to the Canadian NCP to implement the reforms outlined below to bring the Canadian NCP's performance and procedures into line with the OECD Guidelines' core criteria of transparency and accountability and the complaint handling principles of impartiality, predictability, equitability, and compatibility with the Guidelines.'
21. Additionally, OECD Watch makes the following requests to the Canadian NCP:
- 'Take the following steps to rectify the harm done to the notifier BMF:
 - Issue an apology to BMF for its impartial (*sic*) and inequitable handling of the complaint;
 - Publicly explain the role that legal action by Sakto's lawyers and political pressure in support of Sakto played in the NCP's decision making, including its withdrawal of its first Final Statement and issuance of a second, and its request that the DoJ seek to silence BMF and OECD Watch by forcing them to remove documents that were essential to the accountability, transparency, and legitimacy of the Canadian NCP and broader NCP system, in line with the OECD Guidelines' Procedural Guidance; and
 - Publish a new Final Statement that documents the true and full course of events, namely by acknowledging that: the issues raised in the Request for Review were considered material and substantiated and merited further examination; the NCP sought in the draft Initial Assessment to offer good offices for the purposes of dialogue facilitation; the company disagreed with the NCP's assessment and was unwilling to participate in the process; the company used several means of contact to pressure the NCP; the NCP dropped the complaint; and the NCP over time removed from public view the complete rationales for which it dropped the complaint. The Final Statement should also recommend the "withdrawal or denial of trade advocacy support and future EDC financial support" to Sakto as appropriate under the NCP's procedural rules.
 - Implement reforms long demanded of the NCP:
 - Adopt an independent structure as modelled in various forms by the Norwegian, Dutch, Danish, Australian, and Lithuanian NCPs;
 - Invite civil society representatives to serve alongside business and union representatives as the NCP's social partners and invite social partners or other representatives of stakeholders to advise on the handling of specific instances;
 - Revise its rules of procedure to:
 - Improve transparency over the complaint-handling process, including in all final statements as to whether or not the company has cooperated with the NCP in good faith;
 - Ensure investigation and analysis of claims even when a company refuses to engage in the process;
 - Ensure issuance of determinations in all final statements as to whether and how the company at issue breached the OECD Guidelines;
 - Ensure follow-up monitoring for all complaints;
 - Set policies to anticipate and mitigate threats – including in the form of strategic lawsuits against public participation (SLAPPs) – to notifiers and other human rights defenders connected to complaints; and
 - Establish a process for procedural review/appeal of complaints believed by either party to have been mishandled under the NCP's own rules.'

5. Summary of the Canadian NCP's response to the Substantiated Submission

22. The Canadian NCP issued a formal response to the Substantiated Submission in a letter dated 2 December 2021 and addressed on 7 December 2021 to the Chairs of the Investment Committee and of the WPRBC. In its response, the NCP stated:

- 'The Canadian NCP welcomes the opportunity to engage with this process, [...] whereby the measures taken to address substantiated submissions "are all intended to ensure an optimal functioning of NCPs and their functional equivalence".'
- 'At the time of the Initial Assessment, the NCP had reason to believe that an offer of good offices could present an opportunity for constructive engagement between the two parties. However, the Notifier and the Company were very entrenched in their positions and the sustained enmity – including in public fora – led the NCP to revise this conclusion. Further confirming this assessment was the fact that, although the Canadian NCP had sought a commitment of confidentiality from both parties, the Notifier released the draft Initial Assessment in a press conference on April 3, 2017.'
- 'On July 11, 2017, Canada's NCP issued a detailed Final Statement and closed the specific instance. However, the NCP later decided that a detailed narrative was not appropriate in the circumstances, as there had not been an offer of good offices. As such, on May 11, 2018, the Final Statement was revised – without changing the conclusion [...].'
- 'While the Canadian NCP stands by the ultimate outcome of this specific instance, it reviewed the elements of OECD Watch's substantiated submission, and concedes that the NCP's handling of this case did not always adhere to best practices.'
- 'The Government of Canada remains committed to the Canadian NCP and to the OECD Guidelines for Multinational Enterprises. [...] Canada has a balanced approach to RBC, which includes prevention, legislation in critical areas and access to remedy that is bolstered by clear consequences for those companies that do not engage in good faith.'
- 'Canada's NCP is committed to work with all stakeholders in strengthening the mechanism and promoting RBC by Canadian companies. [...] Canada is addressing its procedural and governance review of the NCP to better align with the OECD core criteria for functional equivalence [...] of the NCPs, aiming at providing engagement, accessibility, transparency and accountability.'
- 'As part of this commitment, we welcome the Investment Committee's recommendations stemming from this substantiated submission as Canada strives to improve the effectiveness of its NCP.'

6. Response of the Investment Committee

23. The findings and recommendations below are provided in line with the Guidelines and the Procedural Guidance.

24. These findings and recommendations are related to the Canadian NCP's handling of the abovementioned specific instance from January 2016 to May 2018 and are not intended as general commentary on the current practices of the Canadian NCP.

25. This response takes into account that the Canadian NCP has indicated during its 9 February 2022 meeting with the Secretariat that it did not dispute the presentation of the facts in the Substantiated Submission. The Canadian NCP however also indicated that it had also not been able to retrace all steps taken by the NCP in the context of this specific instance due to the passage of time and the fact that none of the officials that handled the case remain at the NCP.

1. In the context of handling the specific instance, certain actions of the Canadian NCP lacked transparency and limited its accountability

Reasons for the NCP's decisions

26. The Procedural Guidance (Section I.C.3.a) states that “[a]t the conclusion of the procedures and after consultation with the parties involved, [the NCP will] make the results of the procedures publicly available, taking into account the need to protect sensitive business and other stakeholder information, by issuing: [...] a statement when the NCP decides that the issues raised do not merit further consideration. The statement should at a minimum describe the issues raised and the reasons for the NCP's decision.” The Commentary to the Procedural Guidance (para. 9) further states that ‘as a general principle, the activities of the NCP will be transparent.’

27. OECD Watch states that ‘the NCP failed to maintain transparency over the various reversals in its stance and the reasons therefor.’ The reversals of stance referred to by OECD Watch relate to two actions by the NCP:

1. After sending the parties the Draft Initial Assessment in which it concluded that the case should be accepted, it reversed its conclusion and finally decided not to accept it; and
2. After publishing a detailed First Final Statement, it replaced this statement with the Second Final Statement.

28. With regard to the first action above, OECD Watch stated, and the NCP did not contest, that the change of conclusion took place after several months during which the NCP had received extensive comments from the Company on its Draft Initial Assessment, and engaged with the Company thereon, without sharing details of the Company's comments or of the exchanges with the Company with the Notifier. The draft of the First Final Statement did not provide reasons for the NCP's decision not to accept

the case. It was shared with the parties, who could comment on it. The published version of the First Final Statement does in turn contain extensive details about the reasons for no longer accepting the case, drawing on conduct of both parties that made it clear to the NCP that neither party was sufficiently committed to engage in a constructive dialogue. Such conduct included aggressive communication with the NCP by both parties, the breach of confidentiality by the Notifier through the public release of the draft initial assessment and Draft Final Statement, but also actions by the Company, including the aggressive challenge of the NCP's jurisdiction and attempts at engaging Canadian political figures in the confidential initial assessment process.

29. With regard to the second action above, OECD Watch states, and the NCP did not contest, that the replacement of the First Final Statement was done without informing or consulting the Notifier. OECD Watch also states, and the NCP did not contest, that the reasons for the replacement were not shared by the NCP with the Notifier. The Second Final Statement contains significantly less detailed reasons for the NCP's decision not to accept the case, and is also substantively different. The First Final Statement referred to the conduct of *both* the Notifier and the Company and recommended that the 'Company's actions during the NCP review process be taken into account by the Government of Canada Trade Commissioner Service.' The Second Final Statement only refers to the conduct of the Notifier and no longer contains such recommendation regarding the Company.

30. The Investment Committee notes that the reasons stated by the Canadian NCP in its written response for replacing the First Final Statement (i.e. 'that a detailed narrative was not appropriate in the circumstances, as there had not been an offer of good offices [...] without changing the conclusion that an offer of good offices to the parties would not contribute to the purposes and effectiveness of the Guidelines') do not fully account for the substantive changes that can be observed between the First and the Second Final Statement, as these changes go beyond reducing the level of detail in the narrative.

31. Moreover, with regard to the NCP's choice of a less rather than more detailed narrative in the Second Final Statement, Section I.C.3.a) of the Procedural Guidance should be interpreted in light of the core criterion of transparency. In that regard, when drafting a final statement after deciding not to accept a case, NCPs have identified as good practice to include an overview of the issues raised, the company's response and the process followed, as well as a clear and comprehensive reasoning in support of their decision.³

***Recommendation:** When deciding not to accept a case, the Canadian NCP should include an overview of the issues raised and process followed in its statement, as well as clear and comprehensive reasoning in support of its decision, taking into account the need to protect sensitive business and other stakeholder information.*

32. There may be valid reasons for changing the conclusions of an initial assessment or replacing a statement. However, the Procedural Guidance contains no provision for changing the conclusions of an initial assessment or replacing final statement, and such decisions have been exceptional and taken as last resort in the practice of NCPs. With regard to the case at hand, such actions were also not covered by the Canadian NCP's Rules of Procedure.

***Recommendation:** The Canadian NCP should, even in exceptional circumstances leading it to decide that it must change the conclusions of an initial assessment or replace a statement, seek to uphold the principle of transparency and follow its Rules of Procedure. This should entail: informing and consulting the parties about these decisions; giving an overview of the substance of the exchanges it had with each of the parties (taking into account the need to protect sensitive business and other stakeholder information); giving parties an opportunity to comment on the draft new statement; providing clear and comprehensive reasons*

³ The Investment Committee notes that the Template for Initial Assessment developed by the NCP Network in 2021 contains useful guidance in this regard.

in its (draft) statements for the conclusions reached; and disclosing in the final statement that a replacement took place and why.⁴

Accountability and stakeholder confidence

33. The Commentary to the Procedural Guidance (para. 9) states that '[t]ransparency is an important criterion with respect to its contribution to the accountability of the NCP and in gaining the confidence of the general public. Thus, as a general principle, the activities of the NCP will be transparent.'

34. The case at hand was characterised by a severe breakdown of trust, reflected in the way the Notifier sought to publicise the change in the NCP's conclusion following initial assessment, and the way in which the NCP sought to maintain confidentiality through a cease and desist letter from the Department of Justice. Consequently, the Substantiated Submission notes that the NCP has lost the confidence of part of its stakeholders. Such loss of confidence following the case at hand had already been raised in the context of the peer review of the Canadian NCP.⁵

35. By observing the principle of transparency as above, communicating proactively with the Notifier about its decisions of an exceptional nature, and allowing scrutiny into these decisions, the NCP would have better observed the principle of accountability and could have avoided undermining the confidence of its stakeholders.

36. The Investment Committee notes and welcomes Canada's procedural and governance review of the NCP, and the commitment shared by the NCP in its written response (Annex B) to work with stakeholders towards improvement. These are opportunities for the NCP, in consultation with its stakeholders, to improve the transparency of its procedure for the handling of specific instances, including in exceptional circumstances that are not reflected in the Procedural Guidance or the NCP's Rules of Procedure.

Recommendation: In the context of its procedural and governance review and in consultation with its stakeholders, the Canadian NCP should make concrete commitments to transparency and proactive communication with case parties that enable accountability and stakeholder confidence, including in exceptional circumstances.

2. In certain steps of the specific instance process, the Canadian NCP did not ensure a fully equitable process and contributed towards a perception of a lack of impartiality

37. The Commentary to the Procedural Guidance states that 'NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure.' (para. 22).

38. In the case at hand, OECD Watch stated, and the NCP did not contest, that the NCP had received extensive comments from the Company on the Draft Initial Assessment and had engaged with the Company in that respect. OECD Watch also stated, and the NCP did not contest, that the NCP did not

⁴ In this regard, the Investment Committee also refers to recommendation 3.4. of the peer review of the Canadian NCP. See OECD (2019), *OECD Guidelines for Multinational Enterprises – National Contact Point Peer Reviews: Canada*, <https://mneguidelines.oecd.org/ncppeerreviews.htm>.

⁵ See OECD (2019), *OECD Guidelines for Multinational Enterprises – National Contact Point Peer Reviews: Canada*, <https://mneguidelines.oecd.org/ncppeerreviews.htm>, p. 26.

communicate the content of these exchanges with the Notifier, and declined their requests in this regard. Subsequently, the NCP changed the conclusions of the Draft Initial Assessment.

39. Good practice among the network of NCPs generally includes that NCPs will seek to share submissions by a party and substantive exchanges with that party with the other party. NCPs may however decide to maintain a degree of confidentiality over such information as they must 'take appropriate steps to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance' (Procedural Guidance, Section I.C.4). The current Rules of Procedure of the Canadian NCP (para. 13.1) reflect these principles: '[...] the NCP will generally share all relevant information that it receives from one party(ies) with the other party(ies). However, the NCP may determine not to share certain information that it receives if it has been requested with corresponding rationale.'⁶

40. As already recommended by the Investment Committee,⁷ NCPs should seek to share the information shared by one party with the other party as fully as possible and, when deciding to withhold information from one party for reasons covered by the Procedural Guidance, they should consider measures to provide that party with a summary or redacted version of that information, and should give reasons for withholding the information. Consequently, NCPs should not base fundamental aspects of their decisions on information not available to both parties.

41. Without drawing any inference as to what if any influence the NCP's engagement with the Company might have had on its decision to change the conclusion of the Draft Initial Assessment or to replace the First Final Statement, sharing at least the overall substance of its exchanges with the Company with the Notifier, and providing reasons based on the Procedural Guidance in the event it were not able to share the information in its entirety, would have supported the principle of equitability.

42. Relatedly, the NCP contributed towards a perception of a lack of impartiality by not sharing information received from the Company with the Notifier before making decisions unfavourable to them (changing the conclusion of the initial assessment) and favourable to the Company (no longer recommending that the Company's conduct be taken into account should it approach the Trade Commissioner Service). As stated by OECD Watch, such perception was compounded by the pressure that the Company had placed on the NCP and that had been documented in the First Final Statement.

Recommendation: According to the principle of equitability and in order to avoid creating perceptions of a lack of impartiality, the Canadian NCP should communicate any information shared by one party with the NCP to the other party, unless there are reasons not to do so covered by the Procedural Guidance. In such cases, the Canadian NCP should consider measures to provide redacted or summary versions of such information and state the reasons that prevent full disclosure. In general, the NCP should not base fundamental aspects of its decisions on information not available to both parties.

⁶ 'Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises' (2017) https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a11

⁷ Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point, p. 9.

3. The handling of the specific instance by the Canadian NCP lacked predictability in some respects

Replacement of the First Final Statement and indicative timelines

43. The Commentary to the Procedural Guidance (para. 22) states: 'NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.' Good practice in this regard includes publishing clear rules of procedure (which 42 NCPs out of 50 have done, including the Canadian NCP⁸) and following them.

44. The NCP's Rules of Procedure do not provide for the possibility to replace a final statement, and OECD Watch states, and the NCP did not contest, that the NCP did not announce its intention to replace the First Final Statement or share a draft of the Second Final Statement. As indicated above, in exceptional circumstances there may be valid reasons for an NCP to replace a statement, or generally to consider actions not covered by its Rules of Procedures,⁹ but NCPs should be aware that this may negatively affect the predictability of the process. The Investment Committee refers to its recommendations above regarding the principle of transparency as ways to alleviate the negative impacts of such decisions on predictability.

45. The Commentary to the Procedural Guidance (para. 40 1., emphasis in original) states: '*Initial assessment and decision whether to offer good offices to assist the parties*: NCPs should seek to conclude an initial assessment within three months, although additional time might be needed in order to collect information necessary for an informed decision.'

46. In the case at hand, the initial assessment took over 18 months until the First Final Statement instead of an indicative three, and over 27 months until the Second Final Statement. There are many situations that require extending the indicative timelines, such as time needed for fact-finding, the complexity of the issues, difficulties to communicate with the parties, or the need to coordinate with other NCPs.¹⁰ The Investment Committee also recognises that, in many cases, delays are due to the parties themselves and not imputable to NCPs. Predictability requires that, in such situations, the NCP communicate with the parties on the reasons for such delays, and provide them with alternative expected timelines,¹¹ which OECD Watch states, and the NCP did not contest, was not consistently done in this case.

Recommendation: *When considering actions not provided for in its Rules of Procedure in exceptional circumstances, the Canadian NCP should inform the parties in advance and consult with them with a view to ensuring predictability of the ensuing process. Likewise, when extensions to the indicative timelines are needed, the Canadian NCP should communicate with the parties on the reasons for the delays and provide them with alternative expected timelines.*

⁸ OECD (2021), *Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity*, <https://www.oecd.org/daf/inv/mne/annualreportsontheguidelines.htm>, p. 30.

⁹ See also Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point, pp. 6-7.

¹⁰ OECD (2020), *National Contact Points for Responsible Business Conduct -- Providing access to remedy: 20 years and the road ahead*, p. 32.

¹¹ See also Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point, p. 8.

Publication of new Rules of Procedure

47. OECD Watch states that '[t]he NCP [...] issued the new May 2018 second Final Statement the following spring 2018, retroactively applying the new rules [of procedure] and making the process completely unpredictable to the parties.'

48. The NCP issued revised Rules of Procedure in December 2017,¹² i.e. between the publication of the First and the Second Final Statement. The Second Final Statement only makes reference to the new Rules of Procedure. Amendments to the Rules of Procedure notably included a revised section on Confidentiality and Transparency (Section 13), and on Participating in Good Faith (Section 14).

49. Good practice in the NCP network includes providing transitional arrangements for pending cases when an NCP issues new Rules of Procedure. However in the case at hand it is not clear that the reference to the NCP's new Rules of Procedure in the Second Final Statement affected the predictability of the process, notably as OECD Watch did not demonstrate how the change in the Rules or Procedures and the reference to them in the Second Final Statement have as such affected the process or the outcome of the specific instance.

Change of stance regarding the recommendation that consequences apply to the Company in the Second Final Statement

50. OECD Watch states that '[t]he Canadian NCP breached the Procedural Guidance's guiding principle of predictability when it failed to apply its new rules of procedure as regards consequences for MNEs that do not engage in good faith in the specific instance process.'

51. The December 2017 Rules of Procedure of the Canadian NCP state: '14.4 If Canadian companies do not participate in the NCP process, or if the NCP determines that they do not engage in good faith and constructively in the process, the NCP will recommend denial or withdrawal of Government of Canada trade advocacy support and will mention it in the Final Statement.' The Second Final Statement does not make such a recommendation, as opposed to the First Final Statement.

52. The Investment Committee notes that the Second Final Statement does not contain a finding by the NCP that the Company did not 'participate in the NCP process' or 'engage in good faith and constructively.' The Investment Committee recalls in this regard that its response cannot 'reach conclusions on the conduct of individual enterprises nor question the findings and statements made by the NCP (other than interpretations of the Guidelines).'¹³

53. However, as indicated above, the unannounced and unexplained change of stance of the NCP in this regard in the Second Final Statement was unpredictable.

Consultation of the parties on draft statements

54. OECD Watch states that '[t]he NCP published each of its two Final Statements without consultation of BMF, and published the May 2018 second Final Statement without even informing BMF of the impending publication.'

¹² See 'Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises' (2017) https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a11

¹³ Procedure for Considering Substantiated Submissions regarding National Contact Points developed in 2019 by the Investment Committee. , para. 18. See also Council Decision on the OECD Guidelines for Multinational Enterprises, para. II.4. and Commentary to the Procedural Guidance, para. 44.

55. The Procedural Guidance (Section I.C.3., emphasis added) states that '[a]t the conclusion of the procedures and *after consultation with the parties involved*, make the results of the procedures publicly available.' Additionally, the Commentary to the Procedural Guidance (para. 36) states that '[t]he NCP should provide an opportunity for the parties to comment on a draft statement. However, the statement is that of the NCP and it is within the NCP's discretion to decide whether to change the draft statement in response to comments from the parties.'

56. OECD Watch states that the NCP did consult the parties on the draft First Final Statement. To the extent that the outcome remains the same, the fact that the content of the First and Second Final Statements differs from the draft shared with the parties cannot be regarded as unpredictable, as parties that submit comments will expect that changes be made to the draft statement at the discretion of the NCP.

57. However, as indicated above, the unannounced and unexplained replacement of the First Final Statement was unpredictable.

4. Some aspects of the handling of the specific instance by the Canadian NCP were not fully compatible with the Procedural Guidance

58. The Procedural Guidance provides that in performing an initial assessment, NCPs should assess 'whether the *issues raised* merit further examination' (Section I.C.1.) and in particular 'whether the *consideration of the specific issue* would contribute to the purposes and effectiveness of the Guidelines (Commentary to the Procedural Guidance, para. 25, 6th bullet, emphasis added).

59. In its Second Final Statement, the reason given by the NCP for not accepting the case is that '*an offer of good offices to the parties (i.e. dialogue facilitation)* would not contribute to the purposes and effectiveness of the Guidelines' (emphasis added).¹⁴

60. However, the Procedural Guidance does not provide that the NCP should determine whether *offering facilitated dialogue* could contribute to the purposes and effectiveness of the Guidelines, but rather whether *considering the issues* could lead to such result. In practice, there are various ways in which an NCP can consider issues raised in a specific instance, one being facilitated dialogue, another being, if dialogue is impossible, to examine the issues raised and make recommendations, as made clear in Section I.C.3.c) of the Procedural Guidance. The Commentary to the Procedural Guidance (para. 35, emphasis added) further notes in this regard that '[i]f the parties involved fail to reach agreement on the issues raised or *if the NCP finds that one or more of the parties to the specific instance is unwilling to engage or to participate in good faith*, the NCP will issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines'.

61. Should decisions to accept a specific instance be based solely on the chances of success of facilitated dialogue, any refusal to engage by a company would lead to a negative initial assessment and would deprive NCPs of opportunities to further the effectiveness of the Guidelines, e.g. through recommendations.¹⁵

Recommendation: *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 case a party declines or would likely decline good offices, or where facilitated dialogue would likely be unsuccessful.*

¹⁴ Canadian NCP, Final Statement Bruno Manser Fund (BMF) and Sakto Corporation et. al. (Sakto) May 11, 2018, p. 2.

¹⁵ See also OECD (2019), *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, OECD Guidelines for Multinational Enterprises, p. 12.

7. Conclusions and Final Recommendation

62. The Investment Committee finds that:

1. In the context of handling the specific instance, certain actions of the Canadian NCP lacked transparency and limited its accountability;
2. In certain steps of the specific instance process, the Canadian NCP did not ensure a fully equitable process and contributed towards a perception of a lack of impartiality;
3. The handling of the specific instance by the Canadian NCP lacked predictability in some respects;
4. Some aspects of the handling of the specific instance by the Canadian NCP were not fully compatible with the Procedural Guidance.

63. The Investment Committee welcomes the current processes put in place by the Canadian NCP to work with stakeholders towards improvements that would address the issues raised by OECD Watch in relation to this specific instance. It encourages the Canadian NCP and its stakeholders to continue these efforts with a view to delivering improvements without delay.

64. The Investment Committee also notes with concern the reports by OECD Watch that the Notifier is facing hardship that may result from this specific instance and the way it was handled. While it is not the role of the Investment Committee to ascertain the reality or the causes of such hardship, it can also not ignore these reports. It refers in this regard to the Statement of the Working Party on Responsible Business Conduct of 13 March 2020 regarding alleged incidents of undue pressure on those submitting cases to National Contact Points for Responsible Business Conduct.¹⁶

Recommendation: The Canadian NCP should follow up with the parties to seek clarity regarding OECD Watch's reports and take any appropriate measure within its mandate to mitigate the adverse effects, if any, of this specific instance.

¹⁶ Available at <https://www.oecd.org/industry/inv/mne/working-party-on-rbc-statement-march-2020.htm>

Annex A. Substantiated Submission from OECD Watch

**Substantiated Submission to the OECD Investment Committee concerning
the Canadian NCP's handling of the complaint Bruno Manser Fonds vs. Sakto**

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Subject

Canadian NCP's failure to fulfil its procedural responsibilities with regard to its handling of the specific instance Bruno Manser Fonds vs. Sakto

Date

22 September 2021

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1 Executive summary

In this substantiated submission, OECD Watch asserts that the Canadian National Contact Point (NCP) has failed to fulfil its responsibilities with regard to its handling of the complaint [Bruno Manser Fonds vs. Sakto](#).

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 prejudicial to the civil society notifier. After receiving the complaint in January 2016, the NCP issued a draft Initial Assessment in October 2016 proposing to accept the complaint and determining that the claims were material and substantiated. Though the notifier agreed to enter good offices, in March 2017, the NCP reversed stance without explanation and shared with parties a draft Final Statement proposing to reject the complaint without any justification for the reversal of the decision. After repeatedly requesting and receiving no justification for the changed stance, and concerned the NCP had faced undue pressure from the company, the notifier blew the whistle by publishing the conflicting draft statements in April 2017. The NCP responded by publishing in July 2017 a public Final Statement explaining detailed reasons for the complaint's rejection, including that both the notifier and company had allegedly breached confidentiality expectations and that the company had allegedly asserted serious pressure on the NCP, including via a Member of Parliament. We do not know the contents of Sakto's correspondence with the NCP, but because the only logical reason for the correspondence would be to seek rejection of the complaint, which is also what actually happened, we will assume for the remainder of the complaint that this was the intent of the pressure.¹ Adding to the unpredictability of the process, the NCP inexplicably issued a second Final Statement in May 2018, ten months after the first statement had been public on the NCP's website, that retracted the July 2017 Final Statement and removed all mention of the company's aggressive behaviour, instead implying only that the complaint was dismissed because of the notifier's whistleblowing activity.

This submission asserts that through its handling of this complaint, the Canadian NCP breached the OECD Guidelines' guiding principles for handling of specific instances of impartiality, predictability, equitability, and compatibility with the Guidelines, as well as two of the Guidelines' core criteria for NCPs, transparency and accountability. OECD Watch argues these breaches constitute a failure by the NCP to fulfill its responsibilities to ensure a fair and effective processing of the complaint, to the detriment of the notifier. The Canadian NCP's failures to fulfill its responsibilities under the Guidelines has damaged the credibility and legitimacy of, as well international stakeholders' confidence in, the Canadian NCP and the entire OECD NCP system.

Following repeated bilateral attempts by the notifier, Canadian civil society, and OECD Watch with the Canadian NCP directly to secure the Canadian NCP's redress of its mishandling of the BMF vs. Sakto complaint, OECD Watch now invokes the procedure outlined in paragraphs II.2.b and II.2.d of the Implementation Procedures of the OECD Guidelines to present the matter to the Investment Committee. We respectfully request the Investment Committee to consider this substantiated submission and make recommendations to improve the functioning of the Canadian NCP to bring it into line with the OECD Guidelines' Procedural Guidance, in particular the core criteria and guiding principles

¹ In correspondence to OECD Watch dated 18 May 2018, Sakto has asserted, among other things, that it is incorrect that "Sakto inappropriately pressured the Canadian Government in order to conceal 'the inside role the corporation had in getting the case dropped'".

for handling specific instances. We also ask the Investment Committee or Working Party on Responsible Business Conduct (WPRBC) to make a statement condemning undue corporate pressure on NCPs and issue guidance to governments on how to ensure their NCPs respond impartially to pressure from corporations. We appreciate the engagement of the Canadian NCP in seeking to address our concerns and have confidence that it will work to address them. We make this filing in good faith that, with support of the Investment Committee and WPRBC, we can work together with the Canadian NCP to achieve a constructive resolution of the concerns we raise.

Part 2 of this submission establishes the Committee's jurisdiction to address this submission. Part 3 sets out the facts of the NCP's handling of the complaint in greater detail. Part 4 explains the NCP's failures to meet the OECD Guidelines guiding principles for complaint handling and core criteria. Part 5 outlines how the Canadian NCP has failed to retain the confidence of civil society stakeholders. Part 6 clarifies OECD Watch's requests of the Investment Committee and the Canadian NCP to acknowledge and condemn undue pressure by corporations on NCPs to reject complaints, clarify expectations for how NCPs should respond to such pressure from corporations, confirm OECD Watch's assertions regarding the NCP's failures to fulfil its responsibilities in the complaint, resolve the harms caused BMF by the NCP's irregular and partial handling of complaint, and strengthen the NCP to improve its functioning and raise stakeholder confidence moving forward. Part 7 offers a brief conclusion.

2 Investment Committee's jurisdiction to consider this submission

The Procedural Guidance of the OECD Guidelines asserts² that the OECD Investment Committee "will, with a view to enhancing the effectiveness of the Guidelines and to fostering the functional equivalence of NCPs:

- b. Consider a substantiated submission by an adhering country, an advisory body or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances; [and]
- d. Make recommendations, as necessary, to improve the functioning of NCPs and the effective implementation of the Guidelines."

This submission by OECD Watch under Procedural Guidance II.b asserts that the Canadian NCP has failed to fulfil its responsibilities with regard to its handling of the complaint [Bruno Manser Fonds vs. Sakto](#). OECD Watch respectfully requests under Procedural Guidance II.d that the Investment Committee make recommendations to help the Canadian NCP and all NCPs respond transparently and impartially to pressure from corporations and fulfill their responsibilities under the Guidelines.

3 Summary of the Canadian NCP's handling of the BMF vs. Sakto complaint

On 2 January 2016, Swiss-based non-governmental organisation (NGO) Bruno Manser Fonds (BMF) submitted a specific instance under the OECD Guidelines for Multinational Enterprises (Guidelines) to the Canadian National Contact Point (NCP) (registered as received by the NCP on 11 January 2016) against the Ottawa-based Sakto group of companies titled "[Complaint against the Sakto Group, Ottawa](#)." The [Bruno Manser Fonds](#) is a tax-exempt charity working with indigenous rainforest communities from Sarawak in Malaysian Borneo since 1992. Its aims include creating transparency in

² OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, II.2 (b-d).

the global timber trade, combatting corruption, and recovering stolen assets to their country of origin. According to BMF's specific instance, the Sakto group of companies holds real estate, assets and investments in various countries, including Canada, the United States, Australia, the United Kingdom, and Malaysia. The Sakto Corporation was co-founded by Jamilah Taib Murray, daughter of Sarawak Governor and former Chief Minister Abdul Taib Mahmud of Malaysia.

BMF's specific instance alleged that the Sakto group of companies breached the OECD Guidelines' disclosure requirements under Chapter III of the 2011 edition. Given close connections to the Taib family, BMF asserted that the Sakto group of companies should not only disclose financial results, but also sources of funding, in order to rule out suspicions that the group of companies may be involved in laundering the proceeds of corruption from Malaysia. BMF further requested disclosure of beneficial owners, detailed information on activities, finances, group structures and intra-group relations, governance, related party transactions, and accounting standards and auditors. Other NCPs consulted in relation to the complaint were those of Australia, the United States of America, and the United Kingdom.

On 26 October 2016, the Canadian NCP provided the parties with a [draft Initial Assessment](#) ("October 2016 draft Initial Assessment"). This document finds that "the issues raised in the RfR [Request for Review] are material to the Guidelines and substantiated (...). Consequently, the NCP now offers the Notifier, and the Canadian companies included in the RfR, access to consensual and non-adversarial dialogue facilitation to assist the parties in exploring and developing options aimed at finding resolution to the identified issues" (p.1). The October 2016 draft Initial Assessment includes detailed responses to four concerns raised in submissions made by legal counsel for the President of Ottawa-based Sakto Corporation and director for other companies in the Sakto group of companies listed in the Specific Instance (pp. 4-6). The NCP concluded: "[i]t is the view of the NCP that consideration of the issues raised in the RfR could contribute to a more fulsome discussion and examination of the expectations surrounding the disclosure of information by firms, including privately owned ones" and noted that "[t]his Initial Assessment will be included, in part or in full, in the Final Statement at the closure of this process" (p. 7).

On 31 October 2016 BMF approved the text of the October 2016 draft Initial Assessment and agreed to proceed to mediation. But mediation did not proceed.

On 29 November 2016, the NCP informed BMF that the NCP had received extensive commentary from Sakto's legal counsel, which they were in the process of reviewing.

On 2 December 2016, BMF requested that the NCP give BMF access to the commentary by Sakto's legal counsel on the October 2016 draft Initial Assessment and that BMF "be given the opportunity to submit its own legal opinion should the NCP consider to make any changes to the draft Initial Assessment." This request was denied and BMF was not given any opportunity, despite its requests, to respond to any submissions made by Sakto. On 3 February 2017, BMF requested a short in-person meeting with the NCP for an update while a Swiss-based representative would be in the Ottawa, Canada. This request was also denied.

Then, on 21 March 2017, the NCP provided the parties a brief [draft Final Statement](#) (note: no longer an Initial Assessment) ("March 2017 draft Final Statement") stating without explanation that offering mediation would "not contribute to the purposes and effectiveness of the Guidelines" and closing the

case. Contrary to the NCP's commitment in the October 2016 draft Initial Assessment, content from that draft Initial Assessment was not incorporated in the March 2017 draft Final Statement. That same day of 21 March 2017, BMF reports that it had a phone conversation with the NCP in which the NCP said it had engaged intensively with Sakto during the prior months, a revelation concerning to the notifier given that its own previous requests for explanations and meetings had been denied.

On 23 March 2017³ BMF sought an explanation and a meeting with the NCP and requested that the draft Initial Assessment be published along with the proposed Final Statement. BMF also asked that, given BMF's own consent to mediation, the NCP state it was closing the complaint because of a lack of good faith engagement by Sakto.

By 30 March 2017, BMF issued invitations to a press conference at which it intended to blow the whistle on the conflicting draft statements to raise attention and concern over why the NCP had changed its stance. The Canadian NCP was made aware of this intended conference.⁴

Then, in a media release on 3 April 2017, BMF revealed the changed position of the Canadian NCP, which it noted occurred after intervention of the company's attorney.⁵ Because the change in the Canadian NCP's stance did not appear to result from independent analysis of complaint facts and because the NCP never opened an investigation into the merits of the complaint, BMF expressed concern in its statement that Canadian officials were bowing to corporate pressure.

On 5 April 2017, BMF sent a correspondence⁶ to the Canadian NCP again explaining its concerns regarding the reversal in stance and asking for the full October 2016 draft Initial Assessment to be published by the NCP as announced in the NCP's e-mail dated 26 October 2016.

On 26 May 2017 the NCP responded⁷ to BMF's various correspondence of late March 2017 and early April 2017 declining the request for a meeting and informing BMF that its requests concerning the October 2016 draft Initial Assessment and access to documentation provided by the Sakto legal counsel would be provided in the Final Statement, and that BMF would be given an opportunity to do a factual check on the draft Final Statement. But BMF was not given that opportunity nor otherwise consulted on such a statement prior to the NCP's publication of one on 11 July 2017.

On 11 July 2017, the NCP published a [Final Statement](#) ("July 2017 first Final Statement") closing the complaint. It chastised BMF for sharing the substance of the draft Initial Assessment via its April release, but also revealed the legal and political pressure the Sakto group of companies had placed on the NCP, including "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..." (p. 7). The Canadian NCP's July 2017 first Final Statement confirmed BMF's suspicion that the NCP had received undue pressure from the company.

³ Non-public correspondence, available upon request.

⁴ On 30 March 2017, the Canadian NCP informed BMF it did not give permission to BMF to publish the draft statements. Non-public correspondence, available upon request.

⁵ BMF, Press release, "Canadian trade ministry bows to Malaysian tycoon over OECD standards," 3 April 2017, available at: https://www.oecdwatch.org/wp-content/uploads/sites/8/dlm_uploads/2021/03/bmf_2017_04_03_canadian_trade_ministry_OECD.pdf.

⁶ Non-public correspondence, available upon request.

⁷ Non-public correspondence, available upon request.

The Canadian NCP's July 2017 first Final Statement noted in one place that the "specific instance process was ultimately derailed by the Notifier's decision to breach confidentiality with the issuance of public statements and confidential documentation...prior to the completion of the process and the release of the NCP's Final Statement." This statement cannot be true, as the Canadian NCP had already proposed in its March 2017 draft Final Statement to reject the complaint, *before* BMF chose to blow the whistle on the NCP's change in stance in April 2017. The NCP's March 2017 decision to close the complaint must have been based on factors *other than* BMF's release in April 2017 of information from the two draft statements.

The July 2017 first Final Statement remained on the Canadian NCP's website for nearly one year until 11 May 2018 when, again unexpectedly and without explanation or consultation with BMF, the NCP removed its own Final Statement on this case from its website and replaced it with a brief [new Final Statement](#) ("May 2018 second Final Statement"). The new, May 2018 second Final Statement makes no more mention of the pressure exerted on the NCP by Sakto, but does mention what the NCP calls a breach of confidentiality by BMF, and implies this is the sole reason for rejecting the complaint. The May 2018 second Final Statement also explicitly states that the October 2016 draft Initial Assessment "does not reflect the opinion or contain conclusions of the NCP."

Also on 11 May 2018, the Canadian Department of Justice (DoJ) sent [letters](#) to BMF and to OECD Watch at the request of the Canadian NCP demanding that these civil society organisations "remove the Draft Initial Assessment from its website and any other publicly accessible forum and cease and desist from any further replication of the Draft Initial Assessment." The NCP has declined to explain what led it to take this unprecedented action. However, this action by the NCP and DoJ is referenced in subsequent letters of 18 May 2018 from Sakto Corporation's legal counsel to MiningWatch Canada and OECD Watch specifically mentioning their publication of the "the NCP's 'initial draft assessment'" in a joint news release, which Sakto's counsel requested the organizations "...remove [it] from your website, and other sites that you control, immediately."⁸

On 11 May 2018, BMF requested an explanation from the NCP for its unilateral revision of the July 2017 first Final Statement.⁹ BMF also requested that the NCP put the amendment of the Final Statement on hold until BMF had consulted its legal counsel. The NCP did not reply to this email.

On 16 May 2018, BMF's legal counsel required¹⁰ a full explanation from the NCP for the replacement of the July 2017 first Final Statement with the May 2017 second Final Statement, including details of any communications between the NCP and Sakto regarding the replacement. BMF also sought to know the basis for the NCP's claim that the October 2016 draft Initial Assessment was confidential, and the law, regulation, statute or other authority the NCP relied on in its request that BMF and OECD Watch cease and desist from publication of that draft Initial Assessment. The NCP also did not reply to this email.

4 Canadian NCP's failures to meet the Guidelines requirements with regard to its handling of the Sakto specific instance

⁸ Non-Public correspondence, available upon request.

⁹ Non-public correspondence, available upon request.

¹⁰ Non-public correspondence, available upon request.

4.1 Canadian NCP's failure to meet the OECD Guidelines' Guiding Principles for Specific Instances

The OECD Guidelines' Procedural Guidance sets out "Guiding Principles for Specific Instances."¹¹ The Guidance explains that NCPs should deal with specific instances in a manner that is impartial, predictable, equitable, and compatible with the Guidelines. Through its handling of the Sakto case, the Canadian NCP breached all four of these principles.

4.1.1 NCP's failure to meet the guiding principle of impartiality

The most damaging effect of the NCP's handling of the Sakto case has been on the notifier, BMF, primarily because the NCP's treatment of the parties represented a breach of the guiding principle of impartiality. The NCP's impartiality towards the parties is most obvious in the two Final Statements the NCP published, first in July 2017 and then in May 2018. The July 2017 first Final Statement attempts to put blame on both Sakto and BMF for the rejection by the NCP of the case. However, it is clear, even from the incomplete information provided, that BMF had agreed to mediation and that mediation was made impossible, for reasons outside of BMF's control, by pressure put on the NCP by Sakto, its lawyers, and its political contacts, causing the case to be rejected. Yet in the NCP's second published Final Statement of May 2018, the NCP removed *all* mention of the transgressive behaviour by Sakto during the process – behaviour that had previously led the NCP to recommend consequences from the Canada Trade Commissioner Service (TCS) should Sakto seek to access trade advocacy support. However, the alleged breach of confidentiality of the notifier BMF, based on the NCP's revised rules of procedure (see further below), was again mentioned and now implied to be the only reason for the rejection of the case.

The NCP's ultimate pinning of the reasons for rejection on conduct of the notifier alone, while erasing all references to the behaviour of Sakto in the proceedings that contributed to the NCP's feeling good offices would not benefit the parties, shows damaging partiality that has continued to harm BMF in its work and engagements with regard to Sakto. On a public website about BMF's claims against it, Sakto explains the rejection of the specific instance by citing¹² only the NCP's May 2018 second Final Statement, which, as detailed above, gives an incomplete and biased rationale for the NCP's rejection, mentioning only BMF's whistleblowing activity. Sakto is also pursuing a defamation claim against BMF in Swiss court. Sakto's filings use the NCP's conclusions in the case, including in its May 2018 second Final Statement, in such a way as to undermine the credibility of BMF. The Canadian NCP has allowed its statement and itself to be used to support retaliation against an NGO.

Further, the NCP's regrettable lack of transparency over the rationale for its shifts in decision, discussed below, gives a perception of lack of impartiality and equitability by the NCP and allows speculation by the media and civil society on why the NCP felt inclined to change its Final Statement to so clearly benefit the corporate party.¹³

¹¹ OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, p. 81-82.

¹² The Facts Matter website, page no <https://www.thefactsmatter.ca/bmfs-global-attacks.html>.

¹³ See, e.g., Timothy Wilson, RICOCHET, "Political interference may have helped scuttle investigation of Canadian corporation," 21 March 2019, available at: <https://ricochet.media/en/2553/political-interference-may-have-helped-scuttle-investigation-of-canadian-corporation>.

4.1.2 NCP's failure to meet the guiding principle of predictability

The Canadian NCP failed to meet the complaint handling principle of predictability by changing its rules of procedure in the middle of the complaint and failing to implement its rules completely. The NCP's deviations resulted in an extremely unpredictable complaint process.

4.1.2.1 NCP changed its rules of procedure in the middle of the ongoing specific instance

The Canadian NCP breached the Procedural Guidance's principle of predictability when it revised its rules of procedure abruptly and unpredictably on 13 December 2017 after the case was concluded for the first time in July 2017, and before continuing to handle the complaint. The rules were changed without public process or consultation, and without consultation or agreement amongst the parties to the specific instance either to "grandfather" the complaint in under the old rules or to apply the new rules. The NCP then issued the new May 2018 second Final Statement the following spring 2018, retroactively applying the new rules and making the process completely unpredictable to the parties.

4.1.2.2 NCP failed to implement its revised rules of procedure on process for final statements

The Canadian NCP breached the Procedural Guidance's guiding principle of predictability when it failed to apply its new rules of procedure, and meet the complaint-handling process outlined in the Procedural Guidance, by issuing two Final Statements for the same complaint.

The OECD Guidelines' Procedural Guidance, as well as the Canadian NCP's rules of procedure, set out an expectation that NCPs will publish just one Final Statement per complaint. The NCP breached this by issuing two. Needless to say, the NCP's unannounced publication of a second Final Statement, almost a year after its first had been posted publicly on its own website, was unexpected and unpredictable for the complainants.

Further, the NCP's current rules of procedure explain that the NCP will make the results of the complaint handling process publicly available "after consultation with the parties involved." The NCP published each of its two Final Statements without consultation of BMF, and published the May 2018 second Final Statement without even informing BMF of the impending publication. The lack of consultation was unpredictable and unfair to the complainant.

4.1.2.3 NCP failed to implement its revised rules of procedure on consequences

The Canadian NCP breached the Procedural Guidance's guiding principle of predictability when it failed to apply its new rules of procedure as regards consequences for MNEs that do not engage in good faith in the specific instance process. OECD Watch appreciates the Canadian NCP's policy commitment to seeking adverse consequences for multinational enterprises that do not participate in the NCP process or do not engage in good faith and constructively in the process. This is a tool OECD Watch encourages other NCPs to adopt to bring more accountability to the specific instance process. Yet OECD Watch was disappointed that the NCP reversed position in its May 2018 second Final Statement by removing a recommendation of consequences for Sakto, despite the company's own failure, admitted publicly by the NCP in its July 2017 first Final Statement, to engage in good faith in the complaint procedure.

The Canadian NCP's July 2017 first Final Statement, which revealed the pressure Sakto had placed on the NCP, appropriately also included a recommendation that consequences be applied to Sakto as a result of its behavior during the complaint: "Should Sakto approach the Government of Canada Trade

Commissioner Service (TCS) in future to access trade advocacy support, the NCP recommends that the company's actions during this NCP review process be taken into account by the TCS."¹⁴

The NCPs' commitment to apply consequences to multinationals was also reflected in the Canadian NCP's revised rules of procedure (December 2017). Under 12.5, the NCP states that "If the NCP determines that parties do not engage in good faith, consequences can be applied and will be reflected in the Final Statement." Section 14 further states: "14.4: If Canadian companies do not participate in the NCP process, or if the NCP determines that they do not engage in good faith and constructively in the process, the NCP will recommend denial or withdrawal of Government of Canada trade advocacy support and will mention it in the Final Statement. 14.5: Non-participation or the lack of good faith participation will also be taken into account in the Corporate Social Responsibility-related evaluation and due diligence conducted by the Government of Canada's financing crown corporation, Export Development Canada, in its consideration of the availability of financing or other support."

When the NCP withdrew its July 2017 first Final Statement after ten months and replaced it with another in May 2018, even under the new rules of procedure, that second statement should have recommended consequences for Sakto for the poor faith behavior the Canadian government had itself revealed. But the Canadian NCP did not follow its rules of procedure and instead removed the recommendation of consequences against Sakto.

4.1.2.4 NCP failed to implement its revised rules of procedure on time periods for complaint stages

The Canadian NCP breached the Procedural Guidance's guiding principle of predictability when it failed to apply its new rules of procedure as regards appropriate timeframes for the stages of complaint handling. Under the OECD Guidelines as well as the Canadian NCP's rules of procedure (4.1), the indicative time frame for the completion of the Initial Assessment phase for complaints is three months, and 12 months for the completion of the whole process. In contrast, with respect to the BMF vs. Sakto complaint, the Canadian NCP took (from the date of filing) eight months to issue its October 2016 draft Initial Assessment, 15 months to issue its March 2017 draft Final Statement, 18 months to issue its July 2017 first Final Statement, and 28 months to issue its May 2018 second Final Statement.

Reasonable delays may occur in complaints. When they do, OECD Watch considers that the NCP should mitigate them by informing the parties in a timely matter, explaining transparently the reasons for the delay, and immediately setting a new appropriate deadline or timeline for completion of the process stage at hand. The Canadian NCP did not take these steps, leaving its timeline unpredictable to the complainants.

4.1.2.5 NCP failed to publicize in its Final Statement information it committed to publicize

Finally, the Canadian NCP breached the Procedural Guidance's guiding principle of predictability when it failed to publicize in its Final Statement information it committed to publicize. In its October 2016 draft Initial Assessment, the NCP asserted that if either of the parties were unwilling to participate in the dialogue process, the NCP would prepare a Final Statement that would note: "a) that the issues raised in the Request for Review are material and substantiated, and merit further examination; b) the offer by the NCP of its good offices for the purposes of dialogue facilitation; and c) the unwillingness to

¹⁴ The July 2017 Final Statement also stated, regarding BMF: "Given the behaviour of BMF with respect to confidentiality in this case, should it file a request for review with the Canadian NCP in future, it would have to demonstrate that it is committed to honour, in good faith, the confidentiality undertaking of the Canadian NCP process before the NCP would consider the request for review."

participate in the process by the concerned party or parties.”¹⁵ However, on 21 March 2017 when the NCP provided the parties its draft Final Statement, the NCP announced it was closing the case without providing any of the information it had said would be in the Final Statement if one or both parties refused to participate in dialogue. And while much of this information was indeed included in the July 2017 first Final Statement, the May 2018 second Final Statement removed it all again.

4.1.3 NCP’s failure to meet the guiding principle of equitability

The Canadian NCP breached the Procedural Guidance’s guiding principle of equitability through several measures. The NCP’s repeated reversals regarding its stance on admitting the complaint and its grounds for rejection strongly suggest that the NCP was responding to and meeting demands made by Sakto and its representatives or advocates, even if this meant harming BMF’s interests. Because the NCP was not transparent regarding its interactions with the parties, the notifier does not know how many times the NCP met with the company, or its representatives, in relation to the complaint. Meanwhile, the Canadian NCP declined repeated requests from the notifier to meet and to give clarification regarding the NCP’s shifting positions and unpredictable procedures. Further, as described in the section on impartiality above, the May 2018 second Final Statement inequitably describes only alleged procedural breaches by BMF, without mentioning procedural breaches of Sakto already made public in the NCP’s July 2017 first Final Statement. The NCP’s continued chastising of one party for its actions, while letting the other party completely off the hook for its own, is blatantly inequitable towards the parties.

4.1.4 NCP’s failure to meet the Guiding Principle of compatibility with the Guidelines

Taken together, the NCP’s failures to meet the guiding principles for specific instances described above and the core criteria described below demonstrate the complaint was not handled in a manner compatible with the Guidelines. The Guidelines emphasize impartial review of business conduct, predictable procedures, equitable treatment of and consultation with stakeholders, disclosure of material information, and accountability to promoting responsible business conduct. The NCP’s partial, unpredictable, non-transparent, and unaccountable handling of the complaint was not in compliance with the standards and principles set out in the Guidelines.

4.2 Canadian NCP’s failures to meet OECD Guidelines’ core criteria for NCPs

The OECD Guidelines’ Procedural Guidance sets out four “Core Criteria for Functional Equivalence in the Activities of NCPs.”¹⁶ The Guidance calls on NCPs to meet the criteria of visibility, accessibility, transparency, and accountability. Through its handling of the Sakto case and its approach to confidentiality in its revised rules of procedure, the Canadian NCP breached the core criteria of transparency and accountability.

4.2.1 NCP’s failure to meet the core criteria of transparency

The OECD Guidelines expect NCPs to act with transparency, describing transparency as a “principle” necessary to ensure accountability and gain public trust. Further, the Canadian NCP’s rules of procedure regarding transparency state: “13.2. Transparency is recognized as a core criteria and general principle

¹⁵ Canadian NCP, Draft Initial Assessment in BMF vs. Sakto complaint, 25 October 2016, p. 7, para. 35.

¹⁶ OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, p. 79.

for the conduct of NCPs in their dealings with the public.” Despite the Guidance’s requirement that the NCP act with transparency, throughout the BMF vs. Sakto complaint, the NCP failed to maintain transparency over the various reversals in its stance and the reasons therefore. The NCP’s revised rules of procedure also do not meet the OECD Guidelines’ expectations on transparency during complaints.

4.2.1.1 NCP failed to act transparently regarding its evolving stance on the BMF vs. Sakto complaint

The Canadian NCP breached the Procedural Guidance’s core criteria of transparency when it failed to preemptively announce and explain the reasons for its various shifts in stance regarding the admissibility (and rationales therefore) of the complaint.

The Canadian NCP was not transparent on its change in stance between preparation of its October 2016 draft Initial Assessment proposing to accept the complaint and its provision to parties of its March 2017 draft Final Statement proposing to reject the complaint. During those five months, the notifier BMF contacted the NCP to understand what concerns Sakto had raised over the October 2016 draft Initial Assessment and why the NCP’s process was subsequently delayed, but the NCP did not share Sakto’s concerns with BMF. In late December, the NCP told the notifier that the case was complex and that it needed all information at hand to handle it.¹⁷ It was not until four months after publication of its draft Final Statement in March 2017 that the NCP published its July 2017 first Final Statement explaining some of the legal and political pressure it had been subjected to by Sakto.

Next, the NCP was not transparent regarding its decision, ten months after posting its July 2017 first Final Statement that made those pressures by Sakto public, to replace that Final Statement with the May 2018 second Final Statement removing all mention of the pressure.

Finally, the actual May 2018 second Final Statement itself is not transparent, in contrast with the July 2017 first Final Statement, on the analysis the NCP had done to initially propose acceptance of the complaint, nor its various reasons for rejecting the complaint.

Repeated requests for transparency over the following questions have gone unanswered: Why did the NCP reverse its position from acceptance of the case for mediation in the draft Initial Assessment of October 2016 to dismissal of the case in the draft Final Statement of March 2017?; Why did the NCP remove its own published Final Statement of July 2017 to replace it in May of 2018 with a statement that no longer mentions Sakto’s transgressions in the NCP process?; Why does the new Final Statement still mention the NCP’s grievance with BMF for exposing the procedural problems in this case, but not its concern over the pressure Sakto exerted on the Canadian government?; Why did the NCP request the Canadian Department of Justice to demand that two non-governmental organizations remove information from their websites, even after the NCP process in the Sakto case was closed?; What role did political pressure, including from a Canadian Member of Parliament, play in the NCP’s handling of the case?; What role did legal pressure from Sakto’s representatives play in the NCP’s handling of this case?

4.2.1.2 NCP failed to act transparently regarding its contacts with both parties to the BMF vs. Sakto complaint

The Canadian NCP breached the Procedural Guidance’s core criteria of transparency when it failed to be public about its contacts with parties during the complaint. As mentioned above, the NCP failed to

¹⁷ Non-public correspondence, available upon request.

maintain transparency in regard to the frequency and nature of contacts it was having with the parties – including indirect contact with Sakto via its legal counsel and a Member of Parliament – during the complaint. Meanwhile, the July 2017 first Final Statement suggests additional contacts or at least indirect contacts were had with the company or its advocates. The NCP’s lack of transparency has jeopardized the perception of the NCP’s equitability and impartiality towards both parties.

4.2.1.3 NCP actively sought to silence civil society seeking to hold it accountable to the Guidelines’ Guiding Principles and Core Criteria

The Canadian NCP has also quite egregiously breached the Procedural Guidance’s core criteria of transparency by attempting to silence civil society organisations that were trying to be transparent regarding unexplained and concerning changes in the NCP’s stance on the complaint and to hold the NCP to the principle of accountability. In particular, the NCP’s request that the Canadian DoJ pressure NGOs to remove from their websites copies of the October 2016 draft Initial Assessment that help explain BFM’s whistleblower action represent a breach of the core criteria of transparency.

4.2.1.4 NCP’s revised rules of procedure do not meet the Guidelines’ expectations on transparency

The Canadian NCP’s revised rules of procedure – which as described above appear to have been revised in response to the chain of events in the BMF vs. Sakto complaint – also cause the NCP to breach the core criteria of transparency, because they are not in line with the Procedural Guidance’s expectations on transparency.

The Procedural Guidance prioritizes transparency for NCPs. An exception is made for the mediation process itself after the NCP has offered its “good offices” in which case “appropriate steps to establish confidentiality of the proceedings” will be taken. The Guidelines also state that as a default “[o]utcomes will be transparent unless preserving confidentiality is in the best interests of effective implementation of the Guidelines.”¹⁸

The Canadian NCP’s prior rules of procedure (in place at the time BMF filed the complaint), sub-section 13.2 asserted that “...there are specific circumstances where confidentiality is important. While the initial assessment and facilitated dialogue phases of the process are underway, confidentiality of the proceedings will be maintained.” In contrast, in its *revised* rules of procedure (revised December 2017 after publication of the July 2017 first Final Statement), a sub-section was added: “3.8 While the case is ongoing, confidentiality of the proceedings will be maintained.” Additionally, in sub-section 13.2 the text was changed to “there are specific circumstances where confidentiality is important. Confidentiality of the proceedings will be maintained *during the entire NCP process* [emphasis added].” This new requirement of confidentiality during the entire NCP process breaches the expectations on confidentiality during the good offices phase as set out in the OECD Guidelines Procedural Guidance. Further, the new text under subsection 13.2, brought in after the July 2017 first Final Statement was made public, introduces ambiguity, since the “entire NCP process” now could be argued to be open-ended, never allowing disclosure of the process at all, as in this case the NCP issued a new public Final Statement 10 months after its first was issued.

Additionally, in section 13 the following explicit text was added: “Dissemination of NCP documents by a party such as the NCP Initial Assessment or draft versions of the Final Statement may be considered a confidentiality breach.” Further, in the new rules of procedure the NCP added an entirely new section,

¹⁸ OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, p. 79.

“14. Participating in Good Faith,” with five subsections that repeat and further elaborate on the requirement for confidentiality throughout the proceedings and explicitly reference NCP documents such as the Initial Assessment or draft Final Statement that may not be made public “during the proceedings.” These mid-case changes, explicitly commanding confidentiality throughout the entire procedure and explicitly referencing documents that may not be made public during the proceedings, were *not* in the rules of procedure when the complaint was filed, and the changes appear to have been made in direct response to developments specific to the Sakto case. The fact the NCP changed its rules to explicitly require confidentiality throughout the entire process is tacit admittance that the initial rules were, at very least, ambiguous to a reasonable notifier as to what might be published to expose contradiction in the NCP’s proceedings after an initial assessment period had ended and once a draft Final Statement had been issued.

4.2.2 NCP’s failure to meet the core criteria of accountability

The OECD Guidelines recognize the relationship between transparency and accountability:

“Transparency is an important criterion with respect to its contribution to the accountability of the NCP.”¹⁹

The Canadian NCP’s lack of transparency, indeed its concrete efforts to remove information from the public sphere – not just by removing and replacing its own published Final Statement in May 2018, but also through its request that the Canadian DoJ pressure NGOs to remove copies of the October 2016 draft Initial Assessment from their websites – have made it very difficult to hold the NCP accountable for the deeply flawed procedures in this troubled case. That lack of transparency has also made it difficult to hold other parties who played a role accountable, for example, the unnamed Member of Parliament mentioned in the NCP’s now removed Final Statement of July 2017, “Sakto involving a Member of Parliament during the confidential NCP assessment process,” or the Government of Canada’s Deputy Minister of Justice to whom the NCP wrote that “Sakto’s legal counsel” made submissions.

The NCP’s handling of the complaint has also made the NCP unaccountable as a mechanism for hearing and fairly considering the claims raised by the notifier in the complaint. To be accountable to stakeholders, an NCP should offer a fair hearing to claims of business conduct plausibly in breach of the Guidelines. The NCP’s unpredictable procedures, apparent partiality and inequity to the detriment of the notifier, and ultimate dismissal of the complaint without meaningful consideration of the claims raised, left the notifier no path to the hearing of its claims of Guidelines breach in Canada against a Canadian multinational.

In its July 2017 first Final Statement, the Canadian NCP asserts that BMF’s 3 April 2017 release of the draft Initial Assessment and draft Final Statement represented a breach of good faith.²⁰ In the perspective of the notifier and of OECD Watch, it was the NCP’s reversal in stance, made without explanation or consultation with the notifier, paired with its admissions of engagement with the corporate party while refusing to engage with BMF, leaving its reasons for rejection open to speculation (later confirmed) of undue pressure by the company, that was the first breach of faith. Throughout the initial assessment, BMF respected the confidentiality expectations of the NCP out of good faith that the NCP would follow its own rules predictably to make an impartial decision. When, with its March 2017

¹⁹ OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, p. 79.

²⁰ The July 2017 first Final Statement asserts that actions of both parties, not just BMF, displayed an absence of good faith.

draft Final Statement, the NCP first breached its own commitment to be a predictable, impartial, equitable, transparent, and accountable forum to help resolve specific instances, BMF revealed the two statements in order to blow the whistle on the NCP's breach. The subsequent, highly irregular actions of the NCP to hide the explanations it gave in its once-public June 2017 first Final Statement, and to seek to silence civil society playing their rightful monitoring role, further breached BMF's trust.

OECD Watch shares most NCPs' view that confidentiality is a very important element in all NCP complaints. The purpose of confidentiality is to protect the safety of the parties, legitimate business secrets, and the space for dialogue. The purpose of confidentiality is not to hide an NCP's own mishandling of a case – or worse, undue pressure an NCP has faced from any party during the complaint process.

5 Canadian NCP's failure to retain the confidence of civil society

The OECD Guidelines' Procedural Guidance demands that "NCP leadership should be such that it retains the confidence of social partners and other stakeholders."²¹ Unfortunately, the Canadian NCP's failure to act impartially, predictably, equitable, transparently, and accountably in the handling of the complaint against Sakto, along with its overall failure to implement reforms long recommended by civil society, the UN Working Group on Business and Human Rights, and NCP peers, have caused it to lose the trust of Canadian and international stakeholders.

As a key stakeholder of the Canadian NCP, Canadian civil society organizations have engaged constructively with the NCP over many years, recently most notably by publishing a report²² in 2016 identifying areas for improvement in the NCP's structure and functioning, and by participating extensively in the Canadian NCP's 2019 peer review. Yet the Canadian NCP has failed meaningfully and fully to address civil society's recommendations. In regard to its handling of the BMF vs. Sakto complaint, the actions of the NCP that were most concerning to civil society have been the NCP's active steps to threaten and harm members of civil society. Specifically, the NCP's refusal to redraft the May 2018 second Final Statement that inequitably portrays actions of notifier alone as the reason for the complaint's rejection – a statement that has, as noted above, been used by the company Sakto in its own publicity and litigation to undermine the notifier BMF – and its request that the Canadian DOJ issue cease and desist letters to civil society organisations appropriately playing their essential watchdog role, have deeply affected civil society's confidence in the NCP.

The lack of stakeholder confidence in the NCP was highlighted by the UN Working Group on Business and Human Rights' 2017 country report on Canada and cited as a potential reason for the limited number of cases brought before the NCP. The UN Working Group's report recommended that the NCP "try to regain the trust of civil society in its utility as a provider of remedies," as well as take on other reforms also long urged by civil society, such as to "make the National Contact Point more independent

²¹ OECD, OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance, p. 80.

²² MiningWatch Canada, Above Ground, and OECD Watch, "'Canada is Back.' But still far behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises," November 2016, available at: https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

and vest it with adequate resources to discharge its mandate... include findings about breaches of the OECD Guidelines in final statements, [and] improve transparency in its functioning.”²³

The lack of stakeholder confidence in the Canadian NCP was also observed by the NCP’s peer reviewers in 2019. The peer reviewers asserted: “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.”²⁴ One of the finding of the reviewers was that “A lack of formal involvement of social partners and external stakeholders in the NCP’s governance arrangements contributes to the perception of lack of impartiality with respect to the NCP.”²⁵ Unlike business and labour counterparts, civil society is not included among the NCP’s official social partners, and despite numerous requests that this be changed, the NCP has to date failed to establish this formal role for civil society. These failings have also contributed to civil society’s lack of confidence in the NCP itself.

6 Requested actions

OECD Watch and its members have attempted to resolve the concerns raised in this submission with the Canadian NCP directly, seeking clarity on why the complaint was dismissed. OECD Watch has requested an apology from the NCP and reinstatement of the original July 2017 Final Statement, or an edit of the May 2018 Final Statement that includes reflection on Sakto’s transgressive conduct. OECD Watch has also urged the NCP’s follow-through on the “withdrawal or denial of trade advocacy support and future EDC financial support” to Sakto, as per its mandate in the case of “a company that does not cooperate with the NCP in good faith.” The Canadian NCP’s un-transparent, unpredictable, partial and inequitable behaviour in this complaint has been harmful to the notifier and further weakens confidence in the NCP itself, as well as the system as a whole. Of particular concern regarding the NCP system as a whole, the Canadian NCP’s handling of admitted pressure by the company in the complaint should not be allowed to set a harmful precedent within the system. To the extent that other NCPs also face pressure from companies to reject complaints NCPs initially deem “material to the Guidelines and substantiated,” we submit that the Investment Committee would do all NCPs a service by clarifying how NCPs should respond to such pressure in an equitable and impartial manner.

OECD Watch appreciates the willingness of the Canadian NCP to meet several times over the past years regarding our concerns and we believe the NCP is committed to working to address the concerns raised. To date, these meetings have not resulted in steps that would prevent Sakto from using the NCP’s statements to harm to BMF, nor in reforms of the NCP that would help the NCP regain stakeholder confidence. We file this substantiated submission because we in good faith believe that, with support of the Investment Committee and WPRBC, we can work together with the Canadian NCP – and the NCPs as a whole – to achieve a constructive resolution of the concerns we raise.

To address the concerns in this complaint, OECD Watch respectfully makes the following requests:

²³ UN Working Group on Business & Human Rights, “Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada,” A/HRC/38/48/Add.1, available at: <https://undocs.org/A/HRC/38/48/Add.1>.

²⁴ 2019 report of the peer review of the National Contact Point of Canada, Summary and Key Findings, available at: <https://www.international.gc.ca/trade-commerce/ncp-pcn/pr-report-2019-rapport-ep.aspx?lang=eng>.

²⁵ 2019 report of the peer review of the National Contact Point of Canada, Finding 1.2, available at: <https://www.international.gc.ca/trade-commerce/ncp-pcn/pr-report-2019-rapport-ep.aspx?lang=eng>.

6.1 Requests of the Investment Committee

OECD Watch requests that the Investment Committee:

- Issue (itself or via the WPRBC) a statement acknowledging and condemning the occurrence of undue legal and political pressure by MNEs against NCPs and related government offices in relation to complaints and advising states adherent to the Guidelines and their NCPs to respond impartially and equitably to such pressure;
- Issue guidance to states adherent to the Guidelines to help them ensure their NCPs respond impartiality, equitability, and accountably to undue pressure by MNEs, with focus on minimizing harm to notifiers;
- Confirm that the Canadian NCP did not fulfill its responsibilities under the Guidelines by failing to meet the OECD Guidelines' core criteria of transparency and accountability and the complaint handling guiding principles of impartiality, predictability, equitability, and compatibility with the Guidelines;
- Issue a recommendation to the Canadian NCP to take the steps identified below to rectify the harm done to the notifier BMF in this complaint; and
- Issue a recommendation to the Canadian NCP to implement the reforms outlined below to bring the Canadian NCP's performance and procedures into line with the OECD Guidelines' core criteria of transparency and accountability and the complaint handling principles of impartiality, predictability, equitability, and compatibility with the Guidelines.

6.2 Requests of the Canadian NCP

OECD Watch requests that the Canadian NCP:

- Take the following steps to rectify the harm done to the notifier BMF:
 - Issue an apology to BMF for its impartial and inequitable handling of the complaint;
 - Publicly explain the role that legal action by Sakto's lawyers and political pressure in support of Sakto played in the NCP's decision making, including its withdrawal of its first Final Statement and issuance of a second, and its request that the DoJ seek to silence BMF and OECD Watch by forcing them to remove documents that were essential to the accountability, transparency, and legitimacy of the Canadian NCP and broader NCP system, in line with the OECD Guidelines' Procedural Guidance; and
 - Publish a new Final Statement that documents the true and full course of events, namely by acknowledging that: the issues raised in the Request for Review were considered material and substantiated and merited further examination; the NCP sought in the draft Initial Assessment to offer good offices for the purposes of dialogue facilitation; the company disagreed with the NCP's assessment and was unwilling to participate in the process; the company used several means of contact to pressure the NCP; the NCP dropped the complaint; and the NCP over time removed from public view the complete rationales for which it dropped the complaint. The Final Statement should also recommend the "withdrawal or denial of trade advocacy support and future EDC financial support" to Sakto as appropriate under the NCP's procedural rules.
- Implement reforms long demanded of the NCP:
 - Adopt an independent structure as modeled in various forms by the Norwegian, Dutch, Danish, Australian, and Lithuanian NCPs;
 - Invite civil society representatives to serve alongside business and union representatives as the NCP's social partners and invite social partners or other representatives of stakeholders to advise on the handling of specific instances;
 - Revise its rules of procedure to:

- Improve transparency over the complaint-handling process, including in all final statements as to whether or not the company has cooperated with the NCP in good faith;
- Ensure investigation and analysis of claims even when a company refuses to engage in the process;
- Ensure issuance of determinations in all final statements as to whether and how the company at issue breached the OECD Guidelines;
- Ensure follow-up monitoring for all complaints;
- Set policies to anticipate and mitigate threats – including in the form of strategic lawsuits against public participation (SLAPPs) – to notifiers and other human rights defenders connected to complaints; and
- Establish a process for procedural review/appeal of complaints believed by either party to have been mishandled under the NCP’s own rules.

7 Conclusion

In conclusion, OECD Watch contends that the Canadian NCP has not fulfilled its responsibilities with regard to its handling of the specific instance Bruno Manser Fonds vs. Sakto. The NCP’s non-fulfilment of its responsibilities is exhibited by its breach the OECD Guidelines’ guiding principles for specific instance handling of impartiality, predictability, equitability, and compatibility with the Guidelines, and core criteria for NCPs of transparency and accountability. These breaches, paired with the NCP’s ongoing inability to reform weaknesses and gaps in its structure, practices, and rules of procedure identified by civil society, governmental, and independent entities alike, prevent it from maintaining trust of stakeholders and hamper it from fulfilling its responsibility effectively to promote responsible business conduct. Following repeated and unsuccessful direct attempts by OECD Watch to encourage the NCP to address its mishandling of the BMF vs. Sakto complaint and, more broadly, reform itself to win confidence of stakeholders, OECD Watch asks the Investment Committee to assist in achieving a resolution to the issues raised here.

8 Annex: Timeline

Timeline of salient moments in Canadian NCP’s handling of BMF vs. Sakto complaint

2016

2 January 2016	Complaint filed by BMF to the Canadian NCP.
11 January 2016	Canadian NCP acknowledges receipt of complaint.
25 October 2016	<u>Canadian NCP issues draft Initial Assessment (“October 2016 draft Initial Assessment”)</u> proposing to accept complaint.
31 October 2016	BMF approves October 2016 draft Initial Assessment and agrees to mediation.
29 November 2016	Canadian NCP informs BMF that the NCP has received extensive commentary from Sakto's legal counsel, which it is in the process of reviewing.

2 December 2016	BMF requests access to the commentary from Sakto (which request is never met by the NCP).
2017	
21 March 2017	<u>Canadian NCP issues brief draft Final Statement (“March 2017 draft Final Statement”)</u> proposing to reject complaint without explanation.
23 March 2017	BMF seeks an explanation for the reversal in position between the October 2016 draft Initial Assessment proposing to accept the complaint and the March 2017 draft Final Statement proposing to reject it.
By 30 March 2017	BMF issues invitations to a press event at which it plans to blow the whistle on the Canadian NCP’s reversal in position. Canadian NCP is made aware of press event.
3 April 2017	BMF issues media release blowing the whistle on Canadian NCP’s reversal in position.
5 April 2017	BMF corresponds with the NCP reemphasizing its concerns.
26 May 2017	NCP responds by email to BMF’s 23 March and 5 April letters and BMF’s 31 March email correspondence over the planned press event.
11 July 2017	<u>Canadian NCP publishes first Final Statement (“July 2017 first Final Statement”)</u> chastising both parties for breaches of confidentiality expectations of the NCP and also revealing legal and political pressure Sakto had placed on the NCP.
2018	
11 May 2018	Without prior communication or consultation with BMF, <u>Canadian NCP removes the public July 2017 first Final Statement from its website and replaces it with the public May 2018 second Final Statement</u> that makes no more mention of the pressure exerted on the NCP by Sakto, but still mentions what the NCP calls a breach of confidentiality by BMF, implying this is the sole reason for the NCP’s rejection of the complaint.
11 May 2018	Canadian Department of Justice sends, at the request of the Canadian NCP, letters to BMF and OECD Watch demanding each civil society organisation “remove the Draft Initial Assessment from its website and any other publicly accessible forum and cease and desist from any further replication of the Draft Initial Assessment.”
11 May 2018	BMF requests an explanation from the Canadian NCP for its unilateral revision of the July 2017 first Final Statement. Canadian NCP gives no explanation.
16 May 2018	BMF reiterates demand for an explanation from the Canadian NCP for its unilateral revision of the July 2017 first Final Statement and the legal grounds for the cease and desist letters sent by the Canadian DoJ. Canadian NCP gives no explanation.

Annex B. Response from the Canadian NCP

December 2, 2021

Mr. Manfred Schekulin, Chair, OECD Investment Committee
Organisation for Economic Development Co-operation and Development (OECD)
2 rue André-Pascal
76775 Paris CEDEX 16, France

Dr. Christine Kaufmann, Chair of the OECD Working Party on Responsible Business Conduct
Organisation for Economic Development Co-operation and Development (OECD)
2 rue André-Pascal
76775 Paris CEDEX 16, France

Dear Chair Schekulin,

Dear Chair Kaufmann,

Thank you for the opportunity, conveyed in an email dated October 15, 2021, for the Canadian National Contact Point (NCP) to respond to the substantiated submission filed by OECD Watch on September 22, 2021, concerning the handling of the specific instance, Bruno Manser Fonds vs. Saktó.

The Canadian NCP welcomes the opportunity to engage with this process, guided by principles noted in the OECD document “Addressing issues relating to the functioning and performance of NCPs” [DAF/INV/RBC(2015)1], whereby the measures taken to address substantiated submissions, “are all intended to ensure an optimal functioning of NCPs and their functional equivalence”.

The OECD Watch substantiated submission asserts that Canada’s NCP has failed to meet the OECD Guidelines’ Guiding Principles for Specific Instances and is asking the Investment Committee and the National Contact Point to take specific actions to redress the alleged mishandling of this case.

The Canadian NCP notes that the Bruno Manser vs. Saktó Request for Review was submitted in January 2016 and that, further to an exchange with both parties and further research, it sought the comments of the parties on the draft Initial Assessment communicated in October 2016. At the time of the Initial Assessment, the NCP had reason to believe that an offer of good offices could present an opportunity for constructive engagement between the two parties. However, the Notifier and the Company were very entrenched in their positions and the sustained enmity – including in public fora - led the NCP to revise this conclusion. Further confirming this assessment was the fact that, although the Canadian NCP had sought a commitment of confidentiality from both parties, the Notifier released the draft Initial Assessment in a press conference on April 3, 2017.

On July 11, 2017, Canada’s NCP issued a detailed Final Statement and closed the specific instance. However, the NCP later decided that a detailed narrative was not appropriate in the circumstances, as there had not been an offer of good offices. As such, on May 11, 2018, the Final Statement was revised - without changing the conclusion that an offer of good offices to the parties would not contribute to the purposes and effectiveness of the Guidelines.

While the Canadian NCP stands by the ultimate outcome of this specific instance, it reviewed the elements of OECD Watch's substantiated submission, and concedes that the NCP's handling of this case did not always adhere to best practices. Accordingly, the Canadian NCP considers that this substantiated submission is an opportunity to enhance the efficacy of its NCP process.

The Government of Canada remains committed to the Canadian NCP and to the OECD Guidelines for Multinational Enterprises. More broadly, responsible business conduct is at the nexus of many priorities for Canada such as the respect for human rights, taking action on climate change, inclusive trade, upholding the rights of Indigenous peoples and amplifying our feminist international assistance policy. Canada has a balanced approach to RBC, which includes prevention, legislation in critical areas and access to remedy that is bolstered by clear consequences for those companies that do not engage in good faith.

Canada's NCP is committed to work with all stakeholders in strengthening the mechanism and promoting RBC by Canadian companies. The recommendations formulated in the OECD Peer Review of the Canadian NCP have been analysed and the Canadian NCP is working with OECD Watch and Canadian stakeholders to adopt improvements.

Canada is addressing its procedural and governance review of the NCP to better align with the OECD core criteria for functional equivalence of the NCPs, aiming at providing engagement, accessibility, transparency and accountability. Specifically, the NCP is examining critically how its procedures create incentives and disincentives and how leveraging these can bring about more meaningful engagement by all stakeholders (e.g. campaigning policy, earlier publication of case materials, streamlining in the case intake and review process, etc.).

This work is underway and the Government of Canada will engage in and welcomes further dialogue with OECD Watch and other relevant stakeholders in the coming months, in order to help enhance the functioning of the Canadian NCP through procedural and governance improvements.

As part of this commitment, we welcome the Investment Committee's recommendations stemming from this substantiated submission as Canada strives to improve the effectiveness of its NCP.

Sincerely,

Moran,
Christine

Digitally signed by
Moran, Christine
Date: 2021.12.06
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Chris Moran,
Chair, Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises

cc.

- Allan Jorgensen, Head of the OECD Centre for Responsible Business Conduct, Directorate for Financial and Enterprise Affairs



NATIONAL CONTACT POINT
CANADA
POINT DE CONTACT NATIONAL

- Nicolas Hachez, Manager, National Contact Points Coordination, OECD Centre for Responsible Business Conduct
- Madeleine Chenette, Ambassador, Permanent Delegation of Canada to the Organisation for Economic Development Co-operation and Development (OECD)