Canada's National Contact Point:
Long Overdue for an Overhaul

Prepared in the context of 2020-2021 NCP consultations

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Rationale for Overhaul: Loss of Public Trust

In 2018, the UN Working Group on Business and Human Rights issued a report on its mission to Canada regarding human rights, transnational corporations and other business enterprises. The UN Working Group noted that "*it was highlighted to the Working Group that the lack of confidence of civil society in the National Contact Point was apparent, which might have limited the number of cases brought before it*."

In 2019, the OECD released its peer review report regarding Canada's National Contact Point. The peer review team found that "*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*."

Social partners

MiningWatch has engaged with the Canadian NCP since its inception and is disappointed to note that the NCP has ignored repeated requests to include civil society organizations among its "social partners," along with business and labour, as modelled by the OECD Working Party on Responsible Business Conduct, which recognizes the three institutional stakeholders: OECD Watch, Business at OECD

(BIAC) and the Trade Union Advisory Committee (TUAC). The ongoing exclusion of civil society from the NCP's social partners is an indicator of the troubled relationship that the NCP has with Canadian civil society – one that the NCP has not felt compelled to repair in a timely fashion.

Handling of Specific Instances

Since 2005, MiningWatch Canada has been involved in seven Specific Instance cases involving Canadian mining companies as an advisor or notifier (see Appendix). MiningWatch also participated in the NCP's peer review in 2018.[1] Our active involvement in these Specific Instance cases leads us to conclude, along with others, that the NCP does not acknowledge and address the unequal power relationship between notifiers and corporations. Rather, the practices of the Canadian NCP have exacerbated the effects of this power imbalance. For example, the requirements, or standard of proof, placed on notifiers in order to have a complaint accepted for mediation have been too high, cases have too often been dismissed on dubious and non-transparent grounds, and public statements made by the NCP in regard to Specific Instances have been unnecessarily harmful to the interests of notifiers and those harmed by the activities of Canadian multinational enterprises. We provide examples of these and other concerns in our 2018 submission for the Peer Review,[2] as well as in our 2016 publication with Above Ground and OECD Watch.[3] We discuss these and other procedural concerns further below.

The Sakto case

The handling of the Sakto case (January 2016-May 2018) by the NCP remains deeply troubling.[4] The NCP's second version of a final statement (May 2018), which remains on the NCP web site, implies actions by the notifier caused the offer of good services for mediation, made in the draft initial assessment (October 2016), to be withdrawn. The first published final statement (July 2017) was far more transparent about the legal and political pressure being brought to bear on the NCP by the Sakto Group and its representatives: "*Sakto involving a Member of Parliament during the confidential NCP assessment process; (...) Sakto's aggressive challenge of the NCP's jurisdiction; (...) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice….*" The highly unusual retraction, after a year, of the NCP's initial final statement – without clarification – and the removal of all mention of troubling actions by the Sakto Group and it representatives, leaves the notifier alone to carry the burden of fault for having made public, early in 2017, the problematic handling of this case by the NCP. Sakto has since cited in court documents the one-sided final statement of the NCP as evidence that the notifier's claims against Sakto were unwarranted and its conduct inappropriate. To date, the NCP seems content to allow this inequitable and unbalanced summary of the case to stand as its final statement, thereby continuing harm to the notifier.

Un-consulted changes to the Procedures Guide

In December of 2017 the Procedures Guide for filing complaints with the Canadian NCP was amended abruptly without any prior public consultation. The revised Procedures Guide[5] includes significant new text on the issues of confidentiality, campaigning and good faith participation. For example, the new

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[1] MiningWatch Canada. 2018. *Peer Review of the Canadian National Contact Point on the OECD Guidelines for Multinational Enterprises*. Submitted January 23.
[2] *Ibid*.
[3] OECD Watch, Above Ground and MiningWatch Canada, November 2016. "Canada is back." But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises.
[4] For more on this issue see: *Statement from OECD Watch and MiningWatch Canada regarding the Canadian NCP's improper handling of the OECD Guidelines specific instance Bruno Manser Fonds vs Sakto Group*. July 26, 2018.
[5] http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncppcn/procedures_guide_de_procedure.aspx?lang=eng#a1

Procedures say: "Confidentiality of the proceedings will be maintained during the entire NCP process. It is understood that proceedings include the facts and arguments brought forward by the parties. Dissemination of NCP documents by a party such as the NCP initial assessment ... may be considered a confidentiality breach." These changes appear to be a defensive reaction to criticism of the NCP's handling of the Sakto case.[6] We do not believe these changes and additions conform to the OECD Guidelines' Procedural Guidance, but rather constitute a profound lack of understanding of the NCPs role in regard to equitability and balancing unequal power relations. They also do not conform to best practice among NCPs. MiningWatch, as well as OECD Watch of which MiningWatch is a member, recognises the need for confidentiality over the documents and dialogue exchanged once a complaint is accepted for mediation. MiningWatch also recognises the need for confidentiality over personally-identifying information of either party and legitimate (narrowly-interpreted) business secrets. The Canadian NCP should retain confidentiality for these elements of a complaint *only*, otherwise prioritising transparency for all else: the complaint text and existence of the complaint; the basic procedural steps of the complaint; the initial assessment and final statement; and any other materials the parties agree should be made public.

The Canadian NCP's new section on "good faith" also incorrectly blurs the issues of campaigning and confidentiality. The section states under 14.2 that: "[u]ndertaking public campaigns related to a case during the proceedings (…) may constitute a confidentiality breach." Under 14.1 the NCP notes that: [b]ehaviours such as breaching confidentiality (…) will lead to the NCP putting an end to the process." And under 12.5 there is new sanctioning language that says, without clarification, that "[i]f the NCP determines that parties do not engage in good faith, consequences can be applied and will be reflected in the Final Statement." The Canadian NCP's merging of confidentiality with campaigning is misguided. The OECD Guidelines' Procedural Guidance makes no reference to campaigns or campaigning. Indeed, it prioritises *transparency*, not confidentiality, as one of the four core criteria for NCPs. The good faith provisions of the Procedural Guidance require that complainants engage in the NCP process with a view to finding a solution. There is no conflict between complainants meeting the good faith requirements of the OECD Guidelines' Procedural Guidance while campaigning to protect values under review in the Specific Instance.[7] Notifiers can and regularly do (for example, during court cases) campaign without revealing any confidential information. Moreover, they campaign in order to find a solution to the issues: the campaign helps draw attention to the conduct they feel is inappropriate and encourage, through public pressure, the company to engage meaningfully in the otherwise voluntary NCP complaint process. Without campaigning, some companies may have little incentive to engage, so by allowing campaigning that respects confidential information, the NCP can help right a structural power imbalance between the parties.

Our experience engaging with the NCP over many years has caused us to lose trust in the ability of the Canadian NCP to carry out its function as a grievance mechanism in an independent, professional, equitable and unbiased manner. It is our view that the Canadian NCP's legitimacy is currently questionable and that significant changes need to be made if this office is to regain the trust, not only of MiningWatch Canada, but also of many other CSOs in Canada and abroad.

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[6] The Procedures Guide used to say: "[w]hile the initial assessment and facilitated dialogue phases of the process are underway, confidentiality of the proceedings will be maintained." It now says: "Confidentiality of the proceedings will be maintained during the entire NCP process." Note that the notifier in the Sakto case went public early in 2017 with serious concerns about the NCP's process, only **after** being issued with a draft Final Assessment that constituted a complete and unexplained reversal of the NCPs draft Initial Assessment. Under this section of the Guide, as it existed early in 2017, this was not a breach of confidentiality. Under the revised Procedures it is.

[7] Note that while a restriction on campaigning would prohibit notifiers from raising concern about ongoing harm suffered by project-affected peoples or workers, the company is not expected to halt the activities under dispute while the Specific Instance is underway. This imbalance in applicability to notifiers versus companies contributes to the NCP's reputation for partiality towards companies.

Necessary Governance Reforms

In its 2018 report, the UN Working Group on Business and Human Rights noted that: "*The National Contact Point, which is chaired by a senior representative of Global Affairs Canada, the Director General of the Trade Commissioner Service — Operations, was perceived by stakeholders as potentially not fully independent given that it was within a ministry that was responsible for promoting overseas trade and investment. Stakeholders also noted that the National Contact Point had no external advisory or oversight body.*"

The 2019 OECD peer review report found that: *"[s]takeholders also noted that a lack of formal involvement of external stakeholders in the NCP's governance arrangements may have contributed to the perception of a lack of impartiality with respect to the NCP and signalled support for a formal advisory body to the NCP. (…) To address concerns about a perceived conflict of interest between promoting trade objectives and human rights goals, the Canadian government should make the NCP more independent, including by introducing a multi-stakeholder component. The NCP should also be vested with adequate resources to discharge its mandate."* The peer reviewers also noted that "there are no formal reporting requirements within the government on the activities of the NCP" (p. 5).

MiningWatch makes the following recommendations:

- The NCPs of Australia, Denmark, Lithuania, The Netherlands and Norway all have independent governance structures; i.e. structures involving an independent expert panel or individual expert (in the case of Australia). We recommend that the Canadian NCP adopt the Dutch model of an independent expert panel for its governance structure. We believe an independent panel structure would ensure broad expertise in the handling of complaints as well as independence from pressures within a ministry – particularly a trade and economics ministry – that might favor the companies' perspective in handling complaints. The NCP secretariat could still benefit from links to the economic ministry for work on promoting the Guidelines to companies, while preserving the independence of the expert panel for complaint handling.
- In addition to adopting an independent panel structure, the NCP should establish an Oversight Body that is empowered to make public advice to the NCP in regard to governance and Specific Instance procedures, and adjudicate on procedural and substantive appeals of Specific Instance cases. This Oversight Body should be specific to the NCP and not shared with other entities such as the moribund Multi-stakeholder Advisory Body.
- Further, the NCP should expand the current group of social partners to include civil society organizations. The social partners should be allowed, with appropriate confidentiality agreements and conflict of interest rules, to be informed on the details of each specific instances and consulted for advice regarding each instance.
- Make the NCP's annual budget and spending streams transparent.
- Ensure public reporting by the Government of Canada on the NCPs performance.

Necessary Specific Instance (complaints) procedures reforms

The 2019 OECD peer review report found, in regard to Specific Instance, or complaints, procedures that: "*stakeholders see the process as lacking in transparency, predictability and impartiality. Some of the recent changes to the NCP procedures have further underscored this perception. For example, some*

stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCP's application of the initial assessment criteria was onerous. Several civil society and trade union stakeholders raised concerns about the NCP's campaigning policy and noted that revising it would be necessary to build trust and encourage certain stakeholders to utilise the specific instance mechanism. Some submitters of specific instances noted that language in some initial assessments by the NCP undermined the position of the submitter by implying there was no breach of the Guidelines by the company or that the claims raised in a submission were without merit."

In its 2017 statement at the end of visit to Canada the UN Working Group on Business and Human Rights noted: "*We believe that a number of steps should be taken to enhance the NCP's effectiveness in providing access to adequate remedies. (…)The NCP should include findings about any breach of the OECD Guidelines in final statements, improve transparency in its functioning, and try to regain trust of civil society about its utility as a remedy provider.*"[8]

MiningWatch makes the following recommendations:

- The NCP should publish Initial Assessments – as many other NCPs do.
- Campaigning should not be prohibited during any part of a Specific Instance process, including mediation. There are cases where campaigning contributed to a positive outcome of the case by encouraging companies to come to the mediation table and engage in good faith.[9] As long as campaigns do not breach confidentiality rules, notifiers should be allowed to campaign during the complaint to draw attention to ongoing, or anticipated, harm.
- Make the rules of substantiation and evidentiary thresholds clearer and less onerous on notifiers. While corporations are often assisted by lawyers in Specific Instances, notifiers rarely are. The rules should reflect the fact that this is not a judicial proceeding and that in most cases mediated dialogue is a positive outcome for notifiers who have requested it and for the companies involved in a Specific Instance. Substantiation rules should be applied with the goal of accepting for dialogue all complaints that state a claim plausible under the Guidelines with a plausible link to the named company.[10]
- Language used in a decision not to accept a specific instance for mediation, at the Initial Assessment phase, should in no way imply a determination on the merits of the issues raised in the submission, particularly in cases where the NCP has not conducted an independent arm's length investigation, and should not in any way impugn the reputation or actions or motives of the notifier.
- The NCP should ensure that parallel proceedings are not an impediment to a Specific Instance proceeding. Its rules of procedure should state that parallel proceedings do not represent a bar to consideration by the NCP. Further, in handling complaints, the NCP should meet the OECD Guidelines requirement that it only reject complaints subject to parallel proceedings where the complaint will not contribute to resolution of the issues and cause "serious harm" to one party or another.[11]

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[8] OHCHR (June 2017) Statement at the end of visit to Canada by the United Nations Working Group on Business and Human. Retrieved December 2017 from the OHCHR website: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E

[9] See: https://www.oecdwatch.org/2017/12/03/six-secrets-to-success-analysis-of-key-success-factors-for-remedy-in-the-case-of-drc-workers-vs-heineken-at-the-dutch-ncp/

[10] See the Australian NCP's rules of procedures on this: section 4.11: https://ausncp.gov.au/sites/default/files/2019-09/2019_AusNCP_Complaint_Procedures.pdf

[11] See Procedural Guidance, para. 26: http://www.oecd.org/daf/inv/mne/48004323.pdf.

- Confidentiality should never extend to information, data, or knowledge the notifiers themselves bring to the Specific Instance either prior to or during mediation, or receive access to outside the mediation proceedings. Confidentiality should apply narrowly to information brought to the proceedings by either party for the sake of the proceedings and that would not otherwise be, or become, available to the parties. Confidentiality should not apply to the fact that the notifiers are participating in a Specific Instance or a mediation, unless requested by the notifiers for reasons of safety and security.
- If in doubt, the NCP should conduct independent fact finding on specific instances filed with them. Independent fact finding is not fact finding by Canadian missions as these are not unbiased or independent - they have a mandate to promote and protect the interests of Canadian corporations operating overseas. Independent fact-finding should be conducted by arms-length experts or teams of experts, as other NCPs (for example the Norwegian, Dutch and UK) have done.
- Mediators should be external to government. There can be a roster, or mediators can be sought for their expertise in relation to the issues at hand and the particulars (geographic, demographic or otherwise) of the Specific Instance. The mediator chosen should be acceptable to both parties.
- In every final assessment, the NCP should make a determination of fact about whether the guidelines were breached. Other NCPs, such as the Dutch NCP, are modelling this.
- The rules of procedure should create a review process whereby notifiers may appeal their complaint to an independent body, based on procedural or substantive grounds.
- The rules of procedure should explain in detail how Canada can and will protect notifiers from retribution for filing a Specific Instance. If reference is made to Voices at Risk, there should be specific information provided on how provisions in Voices at Risk will be carried out and how they will protect notifiers from retribution for filing a Specific Instance, for example by proactively asking complainants whether they face risks and how they prefer to be communicated with, whether they want to keep their identify (including organization's name) hidden from the company for security reasons, or by relocating the mediation to a safe setting or country, or seeking collaboration with defenders' rights organizations, such as Front Line Defenders, if needed to support a complainant.[12]
- Timelines should be met unless there is a substantiated reason why this was not possible. If timelines are repeatedly breached by the corporation in question, the option of sanctioning the company by recommending the withholding/withdrawal of Government of Canada financial and political support should be brought to bear.
- The rules of procedure should set out that the NCP will follow-up and monitor whether commitments made by companies in the Specific Instance process have been carried out.
- The rules of procedure should set out that the NCP will recommend the withholding/withdrawal of Government of Canada financial and political support in cases of: 1) company refusal to engage in the Specific Instance process, or in mediation, 2) company failure to implement recommendations made in the NCPs final statement, or to carry out commitments made during the Specific Instance process or through mediation.

[12] See also: https://www.oecdwatch.org/2019/06/10/use-with-caution-the-role-of-the-oecd-national-contact-points-in-protecting-human-rights-defenders/

Appendix - MiningWatch Canada's engagement with Canada's National Contact Point

The cases in which MiningWatch has been a notifier (*) or significant advisor are:

- 2005(*) – MiningWatch Canada, Friends of the Earth Canada, and DECOIN in regard to Ascendant Copper Corporation in Ecuador

- 2005 – Rights and Accountability in Development (RAID)-UK and Congolese human rights organisations Action contre l'impunité pour les droits humains (ACIDH) and Association africaine de défense des droits de l'homme section du Katanga (ASADHO Katanga), in regard to Anvil in the Democractic Republic of the Congo. Supported by Entraide Missionnaire, MiningWatch Canada, Regroupement pour la responsabilité sociale des entreprises, and Africa Files

- 2010 – Oyu Tolgoi Watch (OT Watch) in regard to Ivanhoe Mines Ltd. and Rio Tinto International Holdings' Oyu Tolgoi project in Mongolia, supported by MiningWatch Canada and RAID-UK.

- 2011(*) – Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and MiningWatch Canada (MWC) regarding Barrick Gold's Porgera Joint Venture mine in Papua New Guinea

- 2012(*) – United Mongolian Movement of Rivers and Lakes (UMMRL), Oyu Tolgoi Watch (OT Watch), and MiningWatch Canada in regard to Centerra Gold Inc. in Mongolia

- 2012(*) – Sindicato Nacional de Trabajadores Mineros, Metalurgicos, Siderurgicos y Similares de la Republica Mexicana (SNTMMSSRM), Local 309 of the SNTMMSSRM Proyecto de Derechos Economicos Sociales y Culturales, A.C., Canadian Labour Congress, and MiningWatch Canada in regard to Excellon Resources in Mexico

- 2013(*) – International Federation for Human Rights (FIDH), the Ecumenical Human Rights Commission of Ecuador (CEDHU), and MiningWatch Canada on behalf of a group of nine affected people in regard to Corriente Resources' Mirador Mine in Ecuador