

Canada's National Contact Point - Final Statement

Bruno Manser Fund (BMF) and Sakto Corporation et. al. (Sakto)

11 July, 2017

Summary

1. On January 11, 2016, the Canadian National Contact Point (the "NCP"), for the OECD Guidelines for Multinational Enterprises (the "Guidelines"), received from the Bruno Manser Fund (BMF) (the "Notifier"), a Switzerland-based non-governmental organization, a Request for Review (RfR) entitled "*Complaint against the Sakto Group, Ottawa*" related to the disclosure provisions in the Guidelines.
2. National Contact Points are a voluntary, non-judicial dialogue facilitation mechanism. The Canadian NCP has managed the process according to the OECD Procedural Guidance and its own procedures that are publicly available and which were communicated to parties.
3. The NCP conducted an initial assessment as per its procedures and considered offering a facilitated dialogue for both parties to discuss the disclosure issues raised by the Notifier and to try to reach a constructive outcome. At the time, the NCP had reason to believe that it could offer a forum for constructive engagement between two parties with a longstanding and adversarial history.
4. However, actions by parties during the confidential NCP process, including communication to third parties about the case, breaching confidentiality and challenging the NCP's jurisdiction, indicated, in the NCP's view, an absence of the requisite level of good faith and willingness needed from parties to engage in a constructive dialogue and to make an effective and appropriate use of the tax-payer funded NCP facilitation process. The NCP has therefore regrettably decided that it would not make an offer of facilitated dialogue to the parties and thus closes the case.
5. The OECD Guidelines are the most complete and authoritative set of global standards on how to run a business responsibly. The Canadian NCP expects all companies to implement the OECD Guidelines on responsible business conduct. Consistent with its mandate to promote the Guidelines, the NCP recommends that Sakto implement the OECD Guidelines for Multinational Enterprises, which includes the chapter on disclosure.
6. 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.
7. 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.

The Request for Review

8. The RfR alleges that the “Sakto Group” does not voluntarily apply the disclosure provisions of the OECD Guidelines (Chapter III: Disclosure, paragraphs 2 and 4, pages 27 and 28 of the 2011 edition). The RfR also alleges that the “Sakto Group” comprises eleven (11) Canadian companies and eighteen (18) subsidiaries/related parties in seven (7) different jurisdictions outside of Canada (the United States, United Kingdom, Australia, Malaysia, British Virgin Islands, Hong Kong, and Jersey). In the RfR, the Notifier requests that the “Sakto Group” disclose financial information on the companies’ beneficial ownership, group structure, intra-group relations, activities, governance, related party transactions and accounting standards and auditors.

The Role and Mandate of Canada’s NCP

9. National Contact Points are a voluntary, non-judicial dialogue facilitation mechanism. Established through countries’ adherence to the *OECD Declaration on International Investment and Multinational Enterprises*, they are mandated to further the effectiveness of the Guidelines. They do this by: (a) raising awareness of the Guidelines with stakeholders, and promoting their adoption and incorporation, by companies, in their management policies and day-to-day operations; (b) responding to enquiries about the Guidelines from stakeholders; and (c) when appropriate, offering a forum for constructive dialogue between the parties, aimed at helping them discuss concerns and work towards reaching a mutual agreement for the resolution of the specific issues that have been brought forward.
10. The process to be followed by the NCP, in responding to requests dealing with specific issues, is described in the [Procedural Guidance to the OECD Guidelines](#) (section C, page 72 of the 2011 edition), and further explained in the [Canadian NCP’s own Procedures Guide](#).
11. The process established by the OECD requires an NCP to conduct an initial assessment of the request for review, submitted by a notifier, about a company’s activities in relation to the Guidelines. In doing so, and in determining whether to offer a facilitated dialogue or mediation to the complainants and the company in question, the NCP takes into account, while not limited to, the factors outlined below (paragraph 25, page 83 of the 2011 edition of the Guidelines):
 - *the identity of the party concerned and its interest in the matter;*
 - *whether the issues are material and substantiated;*
 - *whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance;*
 - *the relevance of applicable law and procedures, including court rulings;*
 - *how similar issues have been, or are being, treated in other domestic or international proceedings; and,*

- *whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.*
12. In this context, the Canadian NCP takes into account:
- the specific information provided by the notifier;
 - the information provided voluntarily by the company, at the beginning of the process or further to requests from the NCP;
 - any supplemental information offered in response to questions from the NCP that may arise during the initial assessment undertaken by the NCP;
 - any information generated by the NCP's own investigation of facts or research; and
 - any other factor that could be related to previous cases (e.g. confidentiality breach).
13. After considering the information available, the NCP will decide as to whether or not the issues raised in, and information provided in relation to, the case provide the basis for a constructive dialogue between the parties on possible resolution of the issues raised. Consistent with its procedures, where this decision is positive, the NCP will offer a facilitated dialogue or mediation to parties. If alternatively, the NCP concludes that the case does not establish a basis for a facilitated dialogue, the NCP will not offer to facilitate such a dialogue. The publication of a final statement closing the review process follows, consistent with the NCP's procedures.
14. When the Canadian NCP makes an offer of dialogue facilitation, it does so with the expectation that if the parties voluntarily agree to participate, they are making a commitment to engage constructively. The NCP's objective in offering to facilitate a dialogue is to: (a) assist the parties in establishing a full understanding of the principles set out in the Guidelines and the issues raised by the Notifier, and (b) provide a neutral forum for parties to discuss resolution of the issues identified in the RfR, including, where appropriate, the development of a mutually agreed path forward. This may include an agreement on measures or actions to be taken as a means of remediation. It is the Canadian NCP's view that the potential success of the NCP's review process will be influenced by the degree to which: (1) both parties are representing their positions in good faith; (2) both parties are committed to engaging constructively with the other party and the NCP; (3) both parties respect the terms established by the NCP for the review process, in particular, the terms relating to maintaining confidentiality during the proceedings; and (4) the remedy being sought by the Notifier, from the company, is reasonably within the operational control and ability of the company to deliver or influence (in the context of its business operations and/or relationships with other relevant businesses or entities).
15. The issue of maintaining confidentiality throughout the review process warrants a special focus, in particular when dialogue or mediation are the goal. As described in widely available literature on the issue, "*the paramount purpose of introducing confidentiality into mediation practice is in its creating and preserving a sense of security for the parties during settlement discussions, but in a way that eventually encourages mutual disclosure of private information and opinion in order to generate the possibility of settlement.*" [Footnote 1](#) As part of its stated procedures for undertaking a review, the Canadian NCP seeks the agreement of both parties to maintain full confidentiality while the review process is underway. The NCP ascribes to the same philosophy described above – that proceeding

under confidentiality offers the best environment for establishing trust and, by extension, assisting both parties to engage openly and confidentially with the aim of reaching a mutual agreement. In addition, consistent with the Canadian NCP's procedures, undertaking public advocacy campaigns related to a case during the proceedings is considered a confidentiality breach.

16. It is also important to note that the process outlined by the OECD Guidelines does not require the NCP to render a finding of a "breach" of the Guidelines, either at the initial assessment stage or as part of a final statement. The OECD Guidelines do not require an NCP to prosecute or adjudicate issues raised under this process, nor to render a judgement against a company or to recommend or provide compensation in relation to a claim. In this context, the NCP conducts its own research and investigation of facts and related information during the assessment stage. The Canadian NCP can and does research publicly available information and if needed, make follow up requests to the parties and contact Canadian embassies on the ground. Consistent with the OECD Procedural guidance, the Canadian NCP will also contact other NCPs where there is a direct connection to the Canadian NCP case, or where another NCP may be in a position to offer advice based on their own case management experience. As a non-judicial, voluntary dialogue facilitation mechanism, the Canadian NCP does not have a judicial-type mandate, and is, for example, not mandated to *compel* a company, or a notifier, to submit documentation to the NCP. The OECD Guidelines also do not require NCPs to share information they receive from one party with the other party. That said, while the Canadian NCP is not required to determine a "breach" of the Guidelines, it can, at its sole and entire discretion, make a determination on whether conduct is inconsistent with the Guidelines, just like it also can, at its sole and entire discretion, recommend the use of the sanction related to the provision of Government of Canada's trade advocacy services. These are tools that can act as important incentives for generating good faith collaboration with the NCP review process.
17. As per the NCP Procedures Guide (Section 14), the Canadian NCP seeks to obtain the agreement of parties to share all relevant information that it receives from one party, with the other party. That said, the NCP may also determine that it cannot share certain information that it receives where, for example, the NCP has been asked by the submitting party to not share all or part of the information submitted (and where the party has provided an appropriate justification); if the NCP establishes that there is a risk to the safety and security of individual persons associated with the review; or if doing so would otherwise be in breach of a law. Generally speaking, Canada's access to information legislation balances the legal right of public access to records held by the Government with parallel legal obligations to consult on and/or withhold information where permitted under the act (e.g., when the information has been provided by a third party or otherwise legally qualifies for protection from release). To ensure that this legal framework is respected, the Canadian NCP formally seeks the agreement of parties to share what they provide to the NCP as a condition for any subsequent release. In all cases the NCP proactively encourages both parties to consent to full information disclosure because it fulfils the OECD guidance on procedural transparency and because it has the potential to expand each party's understanding of the issues under discussion. A willingness to share information also signals, to the NCP, the degree to which the parties to the review have made a commitment to constructive engagement.

18. In dealing with a particular review, the NCP must also manage the dual objective of respecting a party's request for confidentiality (and thereby building a platform for their committed constructive engagement in the process) and maximizing the transparency underpinning the NCP's decisions and recommendations. Giving balanced consideration to both parties, and the overarching legal and legislative requirements, the NCP seeks to remain objective and neutral throughout the process, to promote an environment of cooperation, and by extension, to set the stage for facilitating a successful dialogue between the parties.
19. The final step of an NCP request for review, regardless of whether facilitated dialogue is offered or takes place, is the issuance of a Final Statement. Pursuant to the transparency criteria guiding NCP operations, the NCP is required by both the Procedural Guidance provisions of the OECD Guidelines (section C, paragraph 3, page 73), and the Canadian NCP Procedures Guide (sections 3.4 and 11.8), to make the results of its process publicly available. Specifically, these provisions require the Canadian NCP to issue a public Final Statement at the end of its proceedings.

The Process for this Specific Instance

20. The Canadian NCP met with each party at the beginning of the process and explained the nature of the NCP review process and procedures to both parties. Per Canada's NCP's standard procedures, and with the permission of the Notifier, the RfR and the attached documentation provided to the NCP by the Notifier were shared with Saktó. The Notifier subsequently provided additional information to the NCP, but asked that this material *not* be shared with the company. The company also subsequently provided submissions to the NCP, in response to the material provided and shared by the Notifier, and also requested that its communications with the NCP, as well as its documentation, *not* be shared with the Notifier. Consistent with its own procedures highlighted in the previous section, the Canadian NCP accepted the justifications provided by each party in their respective requests to maintain the confidentiality of certain documentation and correspondence with the NCP.
21. As noted earlier, where an RfR involves companies that have operations established in, or linked to, other countries that adhere to the Guidelines, it is standard OECD practice for NCPs to collaborate. Given that the RfR identified companies based in the US, UK, and Australia, the Canadian NCP, as lead NCP, consulted with the US, UK and Australian NCPs in this specific instance. The Canadian NCP also consulted informally with the Chair of the Norwegian NCP on issues related to Guidelines interpretation, another opportunity allowed in the OECD Procedural Guidance.

NCP Assessment and Conclusions

22. As part of its due diligence process, the Canadian NCP has considered the information provided in the RfR with respect to the "Saktó Group" of companies in the context of the description of multinational enterprises included in paragraph 4 of Chapter I - Concept and Principles - of the Guidelines. The NCP took into account the sum of the information before it, including the information obtained from both parties, and its consultations with

the Norwegian, US, UK and Australian NCPs. The Canadian NCP concluded that the grouping of Canadian companies identified by the Notifier have economic activities and business links of an international nature and ties with companies in at least one foreign jurisdiction, and therefore fall within the intended scope of interpretation of the term “multinational”, as found in paragraph 4 of Chapter I of the Guidelines referred to above.

23. During the initial assessment phase, the NCP considered the information available and came to a preliminary view that a facilitated dialogue between officers of Sakto and the BMF could provide a beneficial opportunity for an exchange of views between the parties on the issue of disclosure raised in the RfR in relation to the OECD Guidelines. The NCP’s preliminary conclusion supporting an offer to facilitate a dialogue was based, in part, on the premise that the NCP could potentially offer a new forum for constructive engagement between two parties with a longstanding and adversarial history. At the time, the NCP had reason to believe that its offer would be positively received. In accordance with its procedures, on October 26, 2016, the NCP shared its *draft* initial assessment with both parties for feedback. The Notifier indicated a willingness to accept an offer of facilitated dialogue. However, the dynamic that developed subsequently brought additional insight and information to light that the NCP also felt compelled to consider in its assessment and decision making process. The nature and substance of this dynamic engagement process led the NCP to ultimately reconsider its initial decision to offer a facilitated dialogue. The key reasons behind this change in perspective are described more fully below.
24. During the period of consultations with parties on the draft initial assessment and on the draft final statement, and as the process of engagement with both parties (or their representatives) subsequently evolved, it became clear to the NCP that, given its mandate as a non-judicial grievance mechanism, it did not have the requisite commitment of either party to engage in a constructive dialogue. In the NCP’s view, the objectives and outcomes being sought by both parties were incompatible with the goals of a facilitated dialogue process. As recalled in the previous section, and according to the Guidelines, NCPs are expected to consider a number of factors, including whether an offer of dialogue or mediation could make a positive contribution to the resolution of the issues raised. This process envisages the good will of the parties to build trust, to be open, to communicate respectfully with each other and the NCP, and to engage constructively in identifying potential avenues for resolution. Absent that trust and good will, it is the NCP’s view that there is little chance that the consideration of the disclosure issues raised in this request for review would contribute to either a resolution between the parties or the furtherance of the principles set out in the Guidelines. This later point is also a key objective of an NCP process.
25. It is also important to mention that the NCP sought the views of both parties on the *first draft* of the Final Statement, which was shared with parties on March 21, 2017. Regrettably, the Notifier, BMF, chose to release the NCP confidential draft documents through a public press release on April 3, 2017, prior to the conclusion of the NCP review process, breaching the Canadian NCP’s confidentiality procedures outlined on its web site and previously explained to the parties.
26. It is the NCP’s view that the actions of the parties during the confidential NCP review process contributed to a situation that nullified the potential for a good faith engagement facilitated through an offer of the NCP’s support. In reaching this conclusion, the NCP

took into account the following: a) the long standing and adversarial history of dispute between BMF and Sakto; b) the aggressive communications by both parties with the Canadian NCP during the review process; c) Sakto involving a Member of Parliament during the confidential NCP assessment process; d) BMF inappropriately sharing confidential information with Canadian and foreign NGOs about the ongoing NCP process; e) Sakto's aggressive challenge of the NCP's jurisdiction; f) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice ; g) legal counsel for both parties making submissions discussing sensitive information on the case to the OECD Secretariat ; h) the public release by BMF of the confidential draft NCP initial assessment and first draft of the NCP Final Statement; and i) BMF holding a news conference in Ottawa on March 30, 2017 and issuing news releases on April 3 and April 5, 2017 divulging the confidential draft NCP conclusions prior to the conclusion of the NCP review process, a breach of the Notifier's undertaking to the NCP to maintain confidentiality during the process.

27. These actions occurred after the draft initial assessment was shared, with the parties, in confidence, within the NCP's confidentiality procedures, and the NCP took them into account in its ongoing deliberations on, and drafting of, the final statement. These actions contributed to the NCP's conclusion that there was a clear misalignment between the expectations and objectives of the parties and the mandated role of the NCP's engagement mechanism and that the factors relevant to a successful dialogue referred to in paragraph 14 could not be met. The NCP believes that in this case, the sum of the actions taken by the parties is indicative of a collective absence of the requisite level of good faith needed to: (a) support efforts to achieve a constructive outcome; and (b) make effective use of the Canadian tax-payer funded, dialogue-based NCP facilitation process, in the way, and for the purpose for which it was designed.
28. The Canadian NCP is of the view, and regrets, that this specific instance process was ultimately derailed by the Notifier's decision to breach confidentiality with the issuance of public statements and confidential documentation, condemning the NCP process, prior to the completion of the process and the release of the NCP's Final Statement. The April 3, 2017 news release by the Notifier indicates that "*the Bruno Manser Fund requested the Canadian government to compel Sakto to disclose its shareholders, beneficial owners, internal group structure and all relevant financial information*". The same news release further states that "*the Bruno Manser Fund urges the Canadian authorities to open a criminal investigation against Sakto and the Taib family.*" It is the NCP's opinion that these public statements reveal a misuse of the NCP process to seek actions clearly outside the mandate granted to the NCP by the OECD Guidelines. In the NCP's view, the confidentiality breach, accompanied by the significant involvement, during the review process, of legal counsels representing both parties, was contrary to the spirit and intent of the NCP system as a whole. A key criteria that the Canadian NCP is bound to consider in reaching its decision, as per the OECD Procedural Guidance (paragraph 25, page 83 of the 2011 edition of the Guidelines) is whether "*the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines*". It is the considered view of the Canadian NCP that this objective cannot be met in these circumstances.
29. The Canadian NCP has therefore concluded that it will not make an offer of facilitated dialogue to the parties in this specific instance and thus closes this case.

30. The Canadian NCP conducted its assessment and due diligence in the most expeditious manner possible given the circumstances. The timeline followed by the NCP sought to balance the needs of all parties, granting an appropriate amount of time to each of the parties to the request to provide their views, while also allowing the NCP sufficient time to duly consider the submissions received from the parties. Given the history and context of the issues raised, the NCP took the time to evaluate whether it was possible to create an environment conducive to trust building and dialogue. The NCP viewed this effort as central to establishing the potential for a constructive dialogue between the parties. Contrary to statements made by the parties, it is the NCP's view that the NCP procedure has been fair and effective throughout the process.
31. The Canadian NCP views its Final Statement as an important opportunity to clarify the intended purpose and objective of the NCP dialogue facilitation mechanism: it is a non-judicial grievance process, where parties are invited to participate, in a non-adversarial and respectful way, in a review mechanism aimed at offering a neutral forum for an exchange of views and a resolution of issues raised in the context of the OECD Guidelines. The NCP is not a tribunal or an enforcement body.
32. The OECD Guidelines are the most complete and authoritative set of global standards on how to run a business responsibly. The Government of Canada and the Canadian NCP expect all companies to implement the OECD Guidelines on responsible business conduct.
33. Consistent with its mandate to promote the Guidelines, the NCP recommends that Sakto implement the OECD Guidelines for Multinational Enterprises, which includes the chapter on disclosure.
34. 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.
35. Given the behaviour of BMF with respect to confidentiality in this case, should it file another 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.
36. With the publication of this Final Statement, the Canadian NCP considers this specific instance to be closed.

Footnotes

Footnote 1

Confidentiality, a guide for mediators: CEDR, 31 Jan 2013; <https://www.cedr.com>

Date Modified:

2017-07-13

Note: Final Statement can be found here: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng