



**Peer Review of the Canadian National Contact Point
on the OECD Guidelines for Multinational Enterprises**

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STAKEHOLDER QUESTIONNAIRE

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MiningWatch Canada¹ (MiningWatch) was established in 1999. MiningWatch is a national organization supported by environmental, social justice, Indigenous and labour organisations from across the country. It addresses the urgent need for a co-ordinated public interest response to the threats to public health, to the environment, and to community and indigenous rights posed by irresponsible mineral policies and practices in Canada and by Canadian companies operating around the world.

MiningWatch has participated on the Coordinating Committee of OECD Watch since 2015.

Note – MiningWatch was asked to submit a general questionnaire, as well as to participate in a review of the Porgera Specific Instance (2011), in which we were a notifier. This questionnaire answers general questions.

Under section B. (Specific Instances) we discuss the Porgera case in more detail. Separately, but related to the Porgera case, we submit a joint letter from the human rights clinics at Columbia and Harvard Universities prepared for this NCP peer review in regard to the Porgera case.

Finally, we attach (below) Appendix I that provides further detail regarding specific concerns related to the Canadian NCPs handling of ten Specific Instance cases.

¹ <https://miningwatch.ca/>

MiningWatch Canada Brief

Introduction

MiningWatch has actively engaged the Canadian NCP since its inception and has been involved in Specific Instance cases regarding mining as an advisor or notifier since 2005.

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

- 2005(*) - Mining Watch Canada, Friends of the Earth Canada and DECOIN in regard to Ascendant Copper Corporation in Ecuador
- 2005 – Rights and Accountability in Development (RAID)– UK and Congolese human rights organisations Action contre l'impunité pour les droits humains (ACIDH) and Association africaine de défense des droits de l'homme section du Katanga (ASADHO Katanga), in regard to Anvil in the Democratic Republic of the Congo. Supported by Entraide Missionnaire, MiningWatch Canada, Regroupement pour la responsabilité sociale des entreprises, and Africafiles
- 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 Mining Watch 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

Our active involvement in these Specific Instance cases leads us to conclude that the NCP too often dismisses cases on dubious and non-transparent grounds, and that 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 (MNEs). Our experience has caused us to lose trust in the ability of the Canadian NCP to carry out its function as a grievance mechanism in a professional, equitable and unbiased manner. We detail these concerns, and others, in this submission and provide recommendations.

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 gain the trust, not only of MiningWatch Canada, but also of many other CSOs and trade unions in Canada and abroad.

Summary of Some Key Issues

In 2016, MiningWatch worked with Above Ground and OECD Watch to review the Canadian NCP's performance in five cases involving "allegations of human rights violations and/or environmental harm associated with the extractive sector."² Three of these cases were ones in which MiningWatch was a notifier or significant advisor. Our review found that:

the NCP lacks independence; the NCP is opaque; the process involved unjustified delays; the NCP applies a high threshold for accepting complaints; the NCP does not make findings on whether companies have breached the Guidelines; the government penalty for companies that don't participate has proven to be ineffective in promoting compliance with the OECD Guidelines for Multinational Enterprises; the process rarely concludes with an agreement or recommendations and there are no effective follow-up procedures in place; and in over fifteen years of existence, the NCP has consistently failed to provide complainants with effective remedy.³

In all the cases in which MiningWatch has been involved, a defining issue has been the power imbalance between notifiers and the companies. NCPs must acknowledge this unequal power relationship and take steps to address it. The practices of the Canadian NCP do not address the power imbalance, and in many ways have exacerbated its affects.

For example, companies commonly hand the work involved in handling a Specific Instance case over to lawyers. Notifiers rarely have legal support as it is unaffordable and as *pro bono* legal support is difficult to obtain for non-judicial cases. The Canadian NCP can help level the playing field, by providing greater transparency in the process. The Canadian NCP can ensure that notifiers know the claims made in submissions by the company so that notifiers can respond adequately. The NCP also can be more transparent in regard to seeking clarifications and information from the notifiers, in order to give the notifiers a fair chance to respond and further substantiate their claim (see Appendix I cases A3-6). Currently, the NCPs engagement with most notifiers is best characterized as opaque, leaving them at a disadvantage and exacerbating the power imbalance. Additionally, when the NCP dismisses a case the language used in doing so too often leaves the impression that the claims made by the notifiers were not founded, even when that was not established in the process. This is another example of a way in which the NCP exacerbates already unequal power relations in favour of the company (see cases under Appendix I B).

Furthermore, the evidentiary thresholds the NCP maintains as a non-judicial body that may, at best, offer dialogue facilitation, are far too high. See in this regard Appendix I A-4 for the dismayed reaction from a trial lawyer, working with MiningWatch on a Specific Instance, in response to the NCPs overly high evidentiary threshold.

In 2017, the inadequacies of Canada's NCP were recognized by the UN Working Group on Business and Human Rights. In an end-of-visit statement, following their mission to Canada, the working group members noted that:

² 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. Retrieved January 2018 from the MiningWatch website: https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf

³ *Ibid.*

Canada has a number of mechanisms such as courts, human rights commissions/tribunals, the National Contact Point (NCP), and the CSR Counsellor to provide remedies for business-related human rights abuses. Nevertheless, we found evidence of the victims of human rights abuses continuing to struggle in seeking adequate and timely remedies against Canadian businesses.⁴

The UN Working Group notes the problem of lack of access to remedy in discussing the Canadian NCP; an issue also identified in MiningWatch's co-authored report discussed above⁵ and by OECD Watch,⁶ in regard to the Canadian NCP and other NCPs. Significantly, none of the mining-affected communities at the heart of Specific Instances on which MiningWatch has worked, either as a co-notifier or as an advisor, have received relief from the harms highlighted in the Specific Instances as a result of the NCP process. In fact, in all of the cases in which MiningWatch has been involved, harm that was brought to light in the Specific Instance has continued and in many cases worsened. The opportunity to intervene and possibly mitigate or prevent harm has been missed in each of these cases.

The UN Working Group points to the need to “regain trust of civil society”:

We believe that a number of steps should be taken to enhance the NCP's effectiveness in providing access to adequate remedies. 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 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. The upcoming peer review of the NCP is an opportunity to address some of these concerns. [Emphasis added]⁷

The UN Working Group members identify issues that need to be addressed to regain trust: the need for the NCP to be more independent; the need for a multi-stakeholder oversight body over the NCP; the need for the NCP to make findings of fact in regard to breaches of the Guidelines.

Good Faith?

Finally, the UN Working Group members point to the current peer review process as an opportunity to address long-standing concerns with Canada's NCP.

⁴ 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>

⁵ 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. Retrieved January 2018 from the MiningWatch website:

https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf

⁶ See: Daniel, C., J. Wilde Ramsing, K.M.G Genovese, V. Sandjojo. 2015. “Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct.” OECD Watch https://www.oecdwatch.org/publications-en/Publication_4201.

⁷ 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>

Unfortunately the lead-up to this peer review does not provide confidence that the Canadian NCP is ready to respond positively to years of complaints about its handling of Specific Instance cases. The questionnaires for this peer review were not sent out to stakeholders until January 3, with a due date of January 23. This is significantly less time that has been allotted to stakeholders in other peer reviews, such as the recent review in the US where stakeholder were given months to respond. This raises questions about how seriously the NCP is taking this process, and how much value it places on stakeholder feedback.

Furthermore, the NCP made last minute changes to its web site in December 2017, without consulting unions or civil society. Among the changes are revisions to its Procedures Guide⁸ that include significant new text on the issues of confidentiality, campaigning and good faith participation. These changes appear to be, at least in part, a defensive reaction to recent criticism of the NCP's handling of the Sakto case⁹ (see Appendix I A6; B3).

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, including in regard to equitability and balancing unequal power relations,¹⁰ and to best practice of NCPs. In the NCP's new section on "good faith" the NCP 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 OECD Guidelines' Procedural Guidance makes no reference to campaigns or campaigning. Rather, based on the *confidentiality rules* it is clear that complainants should not reveal the names of individuals involved in a Specific Instance in their campaigns, nor information provided during the provision of good offices/conciliation/mediation proceedings. The *good faith* provisions of the Procedural Guidance further require that complainants engage in the NCP process with a view to finding a solution. There is no inherent conflict, however, between complainants meeting the *good faith* requirements of the OECD Guidelines' Procedural Guidance and engaging in a campaign.

Appendix I - Examples that illustrate some systemic concerns with the handling of Specific Instances by the Canadian NCP

In addition to the issues raised above, and in order to illustrate the concerns raised, we refer to Appendix I to this document. Appendix I discusses ten Specific Instance cases that have been

⁸ http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a1

⁹ Whereas 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 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. Now it would be.

¹⁰ Note that while this restriction would bind the notifiers from raising concern about ongoing harm suffered by project-affected peoples or workers, the company would not be expected to halt operations while the specific instance is underway.

handled by the Canadian NCP. These cases illustrate the following issues:

- A high level of rejection of cases on dubious and, or, non-transparent grounds
- NCP narrative and language used in dismissing complaints that harms victims and notifiers
- Delays allowed by the NCP that harm victims' and notifiers' interests
- Abuse of confidentiality provisions that is allowed by the NCP to the detriment of victims and notifiers
- Sanctions for companies that "don't engage or don't engage in good faith" fall short
- NCP abdicates responsibility by allowing the NCP of another country to conduct a poor review of a case and to stand by its deficient recommendations

Summary of Key Recommendations

1. Structure

- Create a multi-party Steering Board, to which the NCP is accountable, which has a broad mandate including reviewing its own Terms of Reference, revising the NCP's procedures and handling appeals. This Board must be tasked uniquely with advising the NCP and cannot be part of any other multi-stakeholder bodies tasked with advising on wider issues regarding responsible business conduct
- Include CSOs as "social partners" in addition to unions and business

2. Procedures and Threshold¹¹

- Take steps to improve compliance with procedures in the handling of specific cases, giving special attention to meeting procedural timelines.
- Review procedures and common practices surrounding threshold with the aim of improving accessibility and transparency.
- In the handling of Specific Instances, apply a low threshold so that Specific Instances are not unfairly rejected, and where cases are rejected, make clear that this does not imply that a complaint is unfounded or that the Guidelines were not breached.
- The NCP's online form for filing Specific Instances should be consistent with that of other NCPs.
- The online form for filing Specific Instances should be made available in French and English, as well as other languages, including Spanish, to ensure its accessibility to international parties.

3. Consequences

- Review the use of the power to apply consequences for non-participation of companies in the NCP process and extend these consequences to other areas of non-compliance, including the failure of companies to implement NCP recommendations.
- Increase transparency in regard to the use of the power to apply consequences and improve communication of its use with other government departments and agencies, both federal and provincial.
- Provide clarity on process in cases in which a company later agrees to participate in the NCP process, after consequences have been applied.

4. Accessibility, Participation of Parties and Campaigning

¹¹ Specific recommendations regarding parallel proceedings and campaigning are addressed below.

- Provide support (financial and other) to parties to ensure a balance of power and fair participation by all. This should include providing resources for interpretation and travel, and making use of technologies such as video-conferences.
 - Information, including the upcoming online forum, should be translated into languages most commonly used by parties who access the NCP's resources, including Spanish.
 - Permit notifiers to file Specific Instances in languages other than English and French.
 - Consistently respect the Guidelines and always allow for campaigning and don't reject cases on the basis of the existence of parallel proceedings.
 - Update procedures to clearly indicate that stakeholders are allowed to engage in campaigning and to have parallel proceedings while participating in the NCP process.
5. Transparency and Confidentiality
- Limit confidentiality restrictions to information received in the mediation process/offer of good offices and increase transparency more generally.
 - All decisions made by the NCP should be based on information that has been shared with both parties, other than information which has to be kept confidential (e.g. the names of workers/whistleblowers).
 - All initial assessments should be made public and published online (on what timeframe?).
6. Fact-finding, determinations and remedy
- Powers and resources for examinations should be increased to allow for independent fact-finding, to enable the NCP to make determinations as to whether there has been a breach of the Guidelines, and to offer remedy to victims.
 - A wider threshold should be used for the acceptance of evidence (documents and testimony).
7. Follow-up
- Follow-up measures should be enhanced, including increasing engagement with stakeholders and increasing transparency of such measures.
 - Consequences should be applied to parties who have failed to implement recommendations at the time of follow-up.
8. Promotion of Guidelines
- Move beyond promoting the existence of the Guidelines and the Canadian NCP, to improving the understanding of the rights, standards and principles of the Guidelines. This should include training on human rights, including trade union rights, which are generally poorly understood.
 - Do not promote the Canadian NCPs Specific Instance procedures until they have been made less hazardous to the interests of notifiers and those harmed by the activities of Canadian MNEs.

Adherent governments have to set up a National Contact Point (NCP) tasked with furthering the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and providing a mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the Guidelines.¹²

¹² Please see Part II of the booklet on the Guidelines for key provisions on core criteria and functioning of NCPs www.oecd.org/daf/inv/mne/48004323.pdf.

Core criteria

NCPs are expected to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.

1. How do you assess the NCP's performance on achieving each of the four core criteria of visibility, accessibility, transparency and accountability? For example:

- a. Are stakeholders sufficiently aware of the NCP and its functions?

No. There is a need to move beyond promoting the existence of the Guidelines, and the Canadian NCP, to improving the understanding of the rights of those affected by Canadian MNEs, and the standards and principles of the Guidelines. This should include training on human rights, including trade union rights, which are generally poorly understood.

Stakeholders also need to better understand the limitations and risks inherent in participation in the current NCP Specific Instance process.

NOTE – As long as the NCP Specific Instance process is as hazardous to the interests of notifiers and those who allege harm by the activities of Canadian MNEs, it should not be promoted until the NCP has implemented the recommendations made here.

- b. Are the means used by the NCP to promote the Guidelines appropriate? Please explain.

No. There is a need to move beyond promoting the existence of the Guidelines and the Canadian NCP, to improving the understanding of the rights, standards and principles of the Guidelines. This should include training on human rights, including trade union rights, which are generally poorly understood.

Stakeholders also need to better understand the limitations and risks inherent in participation in the current NCP Specific Instance process.

- c. Are the NCP facilities easily accessible to stakeholders? If not, how can the NCP be more accessible?

No. Canada's NCP publishes key documents on its website in English and French, including information about the guidelines, information about the procedures and how to file a Specific Instance, annual reports, information about the NCP structure, terms of reference and social partners, and, as of December 2017, some information about Specific Instances. Despite recent efforts to update the NCP website, there are still a number of barriers to ensuring that resources are accessible. These include barriers related to language, threshold, transparency, finances, and campaigning.

Regarding language barriers to the NCP's accessibility - although information is provided in French and English and the NCP Secretariat has indicated that it will be creating an online form where parties submit file a Specific Instance, this information and process remains inaccessible to those with little or no understanding of French or English, which is the case for many parties impacted by Canadian MNEs overseas. It is recommended that such information, including the online form should be translated into languages most commonly used by parties who access the NCP's resources, including Spanish.

Regarding threshold barriers to the NCP's accessibility – Trade unions and CSOs, both Canadian and international, have expressed concern that the threshold for filing a Specific Instance and accessing the “good offices” of the NCP is too high and that the NCP has applied criteria beyond those set out in the procedural guidance of the OECD Guidelines. This has prevented too many Specific Instances from moving forward and, in turn, prevented victims from accessing remedy (see Appendix I A. for examples). Concerns about the threshold extend beyond the NCP's published procedures to its common practices. It is important to understand just how damaging a NCP's rejection of a Specific Instance can be to the notifiers and the workers and/or communities they represent. When a Specific Instance is rejected because the NCP has applied too high a threshold, or criteria beyond those set out in the procedural guidance of the OECD Guidelines, and the NCP decision is put in the public domain, this sends the false message that the complaint has no basis. In such cases – far from providing access to remedy – the NCP process serves to weaken the position of those seeking redress for corporate abuses. It is recommended that the NCP take steps to improve its compliance with OECD Procedural Guidance. Furthermore, the NCP should review its procedures and common practices surrounding threshold with the aim to improve its accessibility and transparency to all parties. It is essential that the NCP accepts and assesses all cases on their merits in line with the low threshold set out in the Procedural Guidance and if it rejects cases it is explicit that this does not imply that a complaint is not founded or that the Guidelines were not breached.

It is recommended that the NCP review its procedures and common practices surrounding threshold with the aim of improving its accessibility and transparency to all parties. It is essential that the NCP accepts and assesses all cases on their merits in line with the low threshold set out in the Procedural Guidance and if it rejects cases the NCP should make clear that this does not imply that a complaint is not founded or that the Guidelines were not breached.

Furthermore, the NCP should revisit the cases it discusses on its web site and add clarifications that the rejection of cases does not imply that a complaint is not founded or that the Guidelines were not breached.

Regarding transparency barriers to the NCP's accessibility - although it is recognized that the confidentiality of some parties, especially in cases where complainants could be put at risk, is of utmost importance, in many cases confidentiality has taken precedence over transparency. Since transparency is intimately related to confidence in the NCP and in turn to accessibility, this lack of transparency has rendered the NCP process inaccessible to some parties.

It is recommended that the NCP limits confidentiality restrictions to information provided in confidence in the mediation process/offer of good offices and increases transparency generally in Specific Instances. More specifically, it is recommended that all decisions made by the NCP should be based on information that has been shared with both parties and all initial assessments should be made public and published online. Doing so would strengthen the NCP process and allow for greater participation of social partners and other stakeholders who may be able to contribute to a positive resolution of the case. Furthermore, increasing transparency may increase the level of confidence that CSOs and trade unions have in the NCP process, which is currently very low.

Regarding financial barriers to the NCP's accessibility - some CSOs and local communities outside of Canada have expressed concerns with the financial costs

associated with filing a Specific Instance and participating in the subsequent process, rendering it inaccessible to them.

It is recommended that the NCP provide support (financial and other) to parties to ensure a balance of power and fair participation by all. This can include providing resources for interpretation and travel, and making use of technologies such as video-conferences.

Regarding campaigning barriers to the NCP's accessibility - Notifiers must be permitted to engage in campaigns, including public facing campaigns, or other parallel proceedings to ensure that the NCP process is accessible to all stakeholders, including CSOs and trade unions. Not only is this crucial to ensuring the process is accessible to all stakeholders, but it is also essential to ensuring that the NCP process is not used by companies to block campaigning by notifiers and those they represent during critical periods of time. It is important to note that in most cases where Specific Instances have been brought to the NCP, companies have not stopped the practices that are under consideration and are alleged to be causing harm. In these situations, the NCP process can actually be enabling of that harm if it stops victims and their supporters from engaging in public campaigns as harm is being done. Canada's NCP has not shown consistency in this regard, allowing campaigning in some cases, but not in others.

It is recommended that the NCP consistently respect the Guidelines and always allow for campaigning and parallel proceedings. In line with this, it is recommended that the NCP revise its currently posted procedures to clearly indicate that stakeholders are allowed to engage in campaigning and parallel proceedings while participating in the NCP process.

Barriers to the NCPs accessibility were confirmed in a recent visit to Canada by the UN Working Group on Business and Human Rights. Their end-of-visit statement following the mission referenced Canada's NCP and CSR Counsellor and stated that,

“we found evidence of the victims of human rights abuses continuing to struggle in seeking adequate and timely remedies against Canadian businesses. We therefore recommend the federal government to work with the provincial governments to strengthen access to both judicial and non-judicial remedial mechanisms”¹³

d. Does the NCP respond to legitimate requests for information in a timely manner?

No. CSOs have expressed concern that the NCP does not always meet timelines. In many cases it is delays imposed by corporations and accommodated by the NCP that cause the delays. See Appendix I C.

e. Does the NCP provide relevant information, e.g. on NCP activities and functions, in national languages?

Information is provided in French and English, but this information remains inaccessible to those with little or no understanding of French or English, which is the case for many parties impacted by Canadian MNEs overseas. It is recommended that relevant information, including the online form that will be created in 2018, should be translated

¹³ 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>

into French and English, as well as languages most commonly used by parties who access the NCP's resources, such as Spanish.

f. Do you consider the NCP adequately reports on its activities?

No. Although the NCP publishes annual reports, these often lack detail. Similarly, assessments of Specific Instances (initial and final) are often lacking detail and sufficient explanations of decisions. This was the case with the Bruno Manser Fund/Sakto instance (see Appendix I A6; B3). In the year leading up to its peer review, Canada's NCP has begun updating its website and in December 2017 added a repository of Specific Instances. However cases such as Centerra Gold Inc. in Mongolia (2012) still have only two paragraphs in terms of description. See Appendix I for more information on this case.

2. In your view, how can the NCP improve its performance on each of the core criteria?

Accessibility: As indicated in response to question 1(c):

- Information, including the upcoming online form, should be translated into languages most commonly used by parties who access the NCP's resources, including Spanish.
- The NCP should review and amend its procedures and common practices surrounding threshold with the aim of improving its accessibility and transparency. It is also recommended that the NCP make very clear that declining to offer its good offices (dialogue) because the complaint is not substantiated does not imply that a complaint is not founded or that the guidelines have not been breached.
- The NCP should limit confidentiality restrictions to confidential information provided in the mediation process/offer of good offices and increase transparency more generally.
- All decisions made by the NCP should be based on information that has been shared with both parties and all initial assessments should be made public and published online.
- The NCP should provide support (financial and other) to parties to ensure a balance of power and fair participation by all. This should include providing resources for interpretation and travel, and making use of technologies such as video-conferences.
- The NCP should consistently respect the Guidelines, always allow campaigning, and not reject cases on the basis of the existence of parallel proceedings. In line with this, it is recommended that the NCP revise its procedures to clearly indicate that stakeholders are allowed to engage in campaigning and to have parallel proceedings while participating in the NCP process.

Transparency:

- The NCP should publish more details on Specific Instances and initial assessments on the newly created section of the website.
- The NCP should limit confidentiality restrictions to confidential information provided in the mediation process/offer of good offices.

Visibility:

- The NCP has recently shared a promotional plan for 2018 with its social partners and some stakeholders, MiningWatch did not receive this information.

Accountability:

- As is outlined below in the section “Institutional arrangements,” the structure of Canada’s NCP opens the door to potential conflicts of interest and the lack of engagement with stakeholders and social partners impedes the NCP from functioning in accordance with its core criteria of accountability.

It is recommended that the NCP create a multi-party Steering Board, to which the NCP is accountable, which has a broad mandate including reviewing its own Terms of Reference, revising the NCP’s procedures and handling appeals.

3. In your view, what are the most significant challenges faced by NCP in terms of achieving the core criteria?

As outlined in more detail throughout this submission, the most significant challenges faced by the NCP in terms of achieving the core criteria are:

- Structural (bias, conflict of interest, lack of independence and lack of engagement with stakeholders, especially CSOs)
- Procedures and threshold (Failure to respect timelines, too high or arbitrary and inconsistent thresholds)
- Consequences (Need for coordination with other departments and agencies, need for greater clarity and transparency (for example around longer term implications of sanctions), should be extended to a company’s failure to implement recommendations)
- Accessibility and Participation of parties (resources, language, campaigning and parallel proceedings, loss of trust)
- Transparency and confidentiality (the NCP’s new procedural guidelines)
- Fact-finding, determination and remedy (lack thereof)
- Follow-up (lack of a practice of following-up on recommendations, ensuring implementation, sanctioning lack of implementation)

Institutional arrangements

4. Do you consider that the current structure enables the NCP to meet the core criteria of visibility, accessibility, transparency and accountability? Please elaborate.

The structure of Canada’s NCP raises concern about potential conflicts of interest. Lack of engagement with stakeholders and social partners impedes the NCP from functioning in accordance with its core criteria of transparency and accountability. As it is housed within GAC, and GAC has a mandate to promote corporate Canada abroad (under an “economic diplomacy” policy of the Government of Canada) the NCP is perceived as partial to trade interests. It is recommended that the NCP create a multi-stakeholder Steering Board to which the NCP is accountable, which has a broad mandate including reviewing its own Terms of Reference, revising the NCP’s procedures and handling appeals.

As an interdepartmental committee composed of federal government departments, Canada’s NCP is chaired by a Director General level representative of Global Affairs Canada (GAC) and the NCP Secretariat function is also provided by GAC. Permanent Members of the Committee are: Environment and Climate Change Canada (ECCC),

Employment and Social Development (ECD), Finance Canada, GAC, Aboriginal Affairs and Northern Development (INAC), Innovation, Science and Economic Development Canada (ISED) and Natural Resources Canada (NRCan). The NCP's terms of reference do not indicate how decisions are made amongst the members of the NCP, nor whether all members are involved in the handling of Specific Instance complaints.

Canada's NCP structure includes three social partners that represent the Canadian affiliates of the OECD Social Partners - the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC): the Canadian Social Partners are the Canadian Chamber of Commerce (CCC), the Canadian Labour Congress (CLC), and the Confédération des syndicats nationaux (CSN). There are no CSO partners. There are no Terms of Reference for the participation of the social partners in the NCP; nor is their role within the NCP clearly understood.

There is concern that, lacking appropriate multi-stakeholder oversight, the placement (Secretariat and Chair) of the NCP within GAC creates the risk of conflict of interest due to the fact that one of GAC's core functions is to promote international trade. This conflict of interest has been especially problematic in cases involving Canada's extractive sector, as is outlined in the CSO report "*Canada is back." But still far behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises*."¹⁴

Alongside these concerns raised by Canadian CSOs and trade unions, the end-of-visit-statement issued by the UN Working Group on Business and Human Rights following a country visit to Canada in 2017 also raised concern about the low level of trust in the NCP by CSOs in Canada.¹⁵

The NCP not only fails to organize regular and consistent meetings with its social partners, but it also fails to consult with them on key developments and to provide them with timely information on the progress of Specific Instances.

The most recent (December 2017) version of the NCP Procedures was produced without any input from the social partners and while the most recent meeting of the NCP's social partners took place on December 19 2017, but meeting prior to that took place in April 2016 - 1 year and 8 months apart.

It is recommended that the NCP appoint a Steering Board with a formal structure that includes both an advisory and oversight role that has formal decision-making authority with respect to the NCP's governance structure (similar to the UK-model on paper).

The Steering Board would provide an additional layer of accountability, legitimacy, and impartiality. The Steering Board (SB), to which the NCP would be accountable, should have a broad mandate including reviewing its own Terms of Reference, revising the NCP's procedures, and handling appeals. The SB should be sufficiently resourced to ensure its effectiveness and to ensure that participation is accessible to all stakeholder

¹⁴ 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. Retrieved December 2017 from the AboveGround website: <http://aboveground.ngo/wp-content/uploads/2017/01/Canada-is-back-report-web.pdf>

¹⁵ 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>

representatives. It is recommended that Canada's NCP's SB be modelled to include responsibilities similar to those outlined in the UK SB's Terms of Reference.

5. What are the advantages and disadvantages of the NCP's structure?

The main advantage to being structured as an interdepartmental committee is the ability to access a range of expertise and perspectives from different government departments and agencies. The disadvantages are outlined in response to question #4.

6. Do you consider that the current arrangements are adequate to avoid potential conflict of interest in the functioning of the NCP (e.g. between attracting foreign investors, promoting the interest of domestic enterprises abroad versus those of relevant stakeholders, etc., and promoting observance of the Guidelines)?

No. As outlined in response to question #4, the current arrangements are not adequate to avoid bias and potential conflicts of interests in the functions of the NCP.

7. Do you consider that the NCP's structure enables it to carry out its functions in an impartial manner? Please elaborate.

No. As outlined in response to question #4, the NCP's structure does not enable it to carry out its functions in an impartial manner.

8. Do you consider that the NCP adequately reaches out to or takes into account the views of stakeholders?

No. As outlined in question #4, the NCP does not adequately reach out to, or take into account, the views of stakeholders.

Main functions and activities of NCPs

A) Information and promotional activities

9. Do you consider that the communication tools or avenues being used by the NCP (website, brochures, leaflets, participation in public events, etc.) are adequate? Please elaborate.

The NCP has recently (December 2017) updated its website and has indicated to social partners that in 2018 it may introduce an online form for bringing forward Specific Instances. Canada's NCP has taken steps to increase its promotional activities in the year prior to this peer review.

Until very recently (December 2017), the NCP did not provide a clear overview of Specific Instances it has handled.¹⁶ This not only presented many challenges for CSO's who wished to better understand the process, but it also impeded the NCP's overall transparency. Unfortunately, the information regarding Specific Instances is still very minimal in many cases (see for example two paragraphs on the 2012 Centerra in Mongolia case) and not comparable as different types and levels of information is

¹⁶ Email exchange between Above Ground, MiningWatch Canada and Ms. Francine Nofle, then-Canadian National Contact Point, 13 July, 2016.

provided on the various cases. The Specific Instance information appears to have been hastily put up in December 2017 in preparation for this peer review. The Centerra case mentioned above, for example, remains in the wrong location, although this was brought to the NCPs attention.

10. What other communications tool would be useful for raising awareness of the Guidelines?

The online form should be made available in French and English, as well as other languages, including Spanish, to ensure its accessibility to international parties.

11. Do you consider that the Guidelines are sufficiently known and used by enterprises and integrated into their decision-making processes? Please elaborate.

No. Although the Guidelines are used by a small minority of enterprises who already have CSR processes in place, the vast majority of enterprises have not integrated the Guidelines into their decision-making processes. This is especially the case with SMEs.

12. Do you consider that the Guidelines are sufficiently known by key stakeholders (business, trade unions and civil society organisations)? Please elaborate. How can the NCP and stakeholders further cooperate in raising understanding of the value of the Guidelines with businesses?

No. While the Guidelines are known by a limited circle of stakeholders – mainly those already working on the corporate accountability agenda – much more needs to be done by Canada's NCP to increase awareness among potentially affected stakeholders and SMEs.

NOTE – As long as the NCP Specific Instance process is as hazardous to the interests of notifiers and those who allege harm by the activities of Canadian MNEs, it should not be promoted until the NCP has implemented the recommendations made here.

B) Specific Instances

According to the Procedural Guidance, NCPs are expected to contribute to the resolution of issues that arise relating to implementation of the Guidelines in Specific Instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.

Consideration of a Specific Instance may involve three stages (initial assessment of the merits of a Specific Instance, the provision of good offices such as mediation or conciliation, and the conclusion of the procedures, including the publication of the main results). As a general principle, NCPs should strive, to the extent possible, to conclude the procedure within 12 months from the receipt of the Specific Instance with the publication of the results at the end of the procedure. Sensitive business and stakeholder information should be protected.

13. How do you assess the NCP performance in handling the Specific Instances in a manner that is consistent with the guiding principles (impartial, predictable, equitable and compatible with the Guidelines)? For example,

- a. Does the NCP adequately inform stakeholders on how to raise Specific Instances?
 - b. Does the NCP deal with Specific Instance in an efficient and timely manner?
No. Too many cases run over the set deadlines the NCP promotes and in too many of these cases the extensions are the result of delays introduced by the MNEs, and tolerated by the NCP. (See Appendix I C.) I suggest changing the posted deadlines to more accurately reflect reality.
 - c. Does the NCP act in an impartial manner in the resolution of Specific Instances?
No. See issues raised and cases presented in Appendix I
 - d. Does the NCP provide clear and publicly available information on its role in the resolution of Specific Instances?
No. The NCP changes its Procedures Guide for Specific Instances without consulting social partners or stakeholders – most recently in December 2017. Previous versions disappear so that there is no transparency on the changes that have been made. In the Sakto case (see Appendix I B.3), the guidelines were changed while the case was ongoing leading to unpredictability for the notifiers.
 - e. How does the NCP ensure that parties engage in the process in a fair and equitable manner?
No. See Appendix I for issues in this regard and case examples.
In the vast majority of cases, parties have not engaged in the process in a fair and equitable manner. One major challenge facing Canada's NCP in handling Specific Instances is companies refusing to participate in NCP-supported mediation, or delaying the process. This has presented significant barriers and, in far too many cases, has stalled the process or ended it altogether. Since 2014 the Canadian NCP has been empowered to apply consequences (e.g. removal of government support) to a company that refuses to participate in the NCP process or fails to act in good faith. Still, there are concerns over the application and effectiveness of this power, specifically whether it is being used in all appropriate circumstances and whether there is sufficient communication with other departments or provincial governments to ensure consistency in the application of such consequences (see Appendix I E). Furthermore, although the NCP can use these powers if a company refuses to participate, there is no such consequence if a company fails to implement the recommendations presented in the case's final report. In order to increase the accountability of the NCP, it is recommended that the NCP review its use of the power to apply consequences for non-participation and extend these consequences to other areas of non-compliance, including the failure to implement recommendations.
 - f. How does the NCP balance the need for transparency with confidentiality of Specific Instance proceedings and sensitive business information?
Not well. See examples in Appendix I, particularly the Porgera and Sakto cases.
 - g. If the NCP has received no or very few submissions for Specific Instances – what can explain this?
14. What are the most significant challenges facing the NCP in fulfilling its mandate?
Lack of independence from trade/economic agendas of the government; lack of tools/resources/will to enforce recommendations to companies or sanction companies that do not provide remedy where needed; lack of transparency; lack of care and consideration concerning power imbalances between notifiers and MNEs and how to address these, rather than exacerbate them, through actions of the NCP. Etc. (See this questionnaire and the Appendix I for other issues that have been raised.

15. Are there opportunities to improve NCP's performance under each of criteria for handling Specific Instances?

See recommendations above (p.7)

16. If you have been involved in an NCP Specific Instance (a "case"), please provide feedback on your experience. Please use the above questions to guide you in providing feedback.

MiningWatch Canada has been a notifier in the following cases:

- 2005 - Mining Watch Canada, Friends of the Earth Canada and DECOIN in regard to Ascendant Copper Corporation in Ecuador
- **2011** - Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and Mining Watch 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

MiningWatch Canada has been a significant advisor in the following cases:

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

A number of these cases (date **bold/underlined**) are discussed in more detail in Appendix I below.

Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and Mining Watch Canada (MWC) regarding Barrick Gold's Porgera Joint Venture mine in Papua New Guinea. March 1, 2011.¹⁷

MiningWatch was a notifier, together with Mr. Jethro Tulin, executive of an indigenous grass roots human rights organization, Akali Tange Association, and Mr. Mark Tony Ekepa, Chairman of the Porgera Special Mine Lease (SML) Landowners Association (PLOA). PLOA is a Porgera-based organization that was established to represent the interests of traditional landowners living within the Special Mine Lease (SML) area of the Porgera Joint Venture (PJV) mine.

Background – The case involved three main areas of concern

1) Sustainable development - The OECD Guidelines provide that Barrick/PJV has a responsibility to “*contribute to economic, social and environmental progress with a view to achieving sustainable development*”¹⁸ and should “*conduct their activities in a manner contributing to the wider goal of sustainable development.*”¹⁹

The Specific Instance demonstrated that the operations of Barrick/PJV have harmed the economic and social progress of indigenous Ipili communities living within Barrick/PJV's Special Mine Lease (SML) area as a result of the untenable living conditions brought about by, among other things, requisitioning of critical land and water resources, severe environmental contamination of land and water, and the disruption of social life, cultural traditions and sacred sites.

2) Human rights - The OECD Guidelines provide that Barrick/PJV has a responsibility to: “*respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.*”²⁰

The Specific Instance demonstrated that the operations of Barrick/PJV have not respected the human rights of local men and women as they have been subjected to excess use of force and violent acts such as rape, gang rape, assault, and killings perpetrated against them by the mine's security forces (private and public). It also maintained that Barrick/PJV has not respected the human rights of villagers living in its Special Mine Lease Area with respect to forced evictions and house burnings by PNG police known as mobile units in Operation Ipili '09. Human rights abuses have been perpetrated by both Barrick's private security forces and by PNG police that operate at the mine under a Memorandum of Agreement between the mine and the PNG state. Under this agreement the mine houses these police, feeds them and pays them.

3) Environment - With respect to the environment, the OECD Guidelines provide that Barrick/PJV has a responsibility to: “*take due account of the need to protect the environment, public health and safety.*”²¹

¹⁷ For a full copy of the Specific Instance text see:

https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf

¹⁸ Section II. General Policies. Paragraph 1.

¹⁹ Section V. Environment. Preamble.

²⁰ Section II. General Policies. Paragraph 2.

²¹ Section V. Environment. Preamble.

The Specific Instance maintained that Barrick/PJV are not meeting OECD Guidelines under Section V on the environment in the operations of the PJV mine with grave environmental consequences, and related consequences for human safety and human health. In particular decades of uncontained disposal of mine tailings and waste rock into valleys and watersheds around the mine have caused grave environmental impacts and health consequences for the local population.

For details, substantiation and references please see the Specific Instance at: https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf

The OECD Guideline sections to which we made specific reference are:

- II. General Policies - Paragraph 1 states that enterprises should, *“contribute to economic, social and environmental progress with a view to achieving sustainable development.”*
- II. General Policies - Paragraph 2 states that enterprises should, *“respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”*
- II. General Policies – Paragraph 5 states that enterprises should *“refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.”*
- II. General Policies - Paragraph 6 states that enterprises should *“support and uphold good governance principles and develop and apply good corporate governance practices.”*
- II. General Policies – Paragraph 7 states that enterprises should *“develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.”*
- II. General Policies – Paragraph 8 states that enterprises should *“promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.”*
- II. General Policies – Paragraph 11 states that enterprises should *“abstain from any improper involvement in local activities.”*
- III. Disclosure – Paragraph 1 states that enterprises should *“ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance.”*
- III. Disclosure – Paragraph 5 states that *“enterprises are encouraged to communicate additional information that could include: (...) information on social, ethical, and environmental policies of the enterprise and other codes of conduct to which the company subscribes (...) and its performance in relation to these statements....”*
- V. Environment – The Preamble states that *“enterprises should...protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development....”*

- V. Environment – Paragraph 1.a. follows the preamble and 1. Together they state that *“enterprises should: Establish and maintain a system of environmental management appropriate to the enterprise, including; a) collection and evaluation of adequate and timely information regarding the environmental, health and safety impacts of their activities.”*
- V. Environment – Paragraph 2.a. states that enterprises should *“provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance....”*
- V. Environment – Paragraph 4 states that enterprises should *“[c]onsistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.”*

The Notifiers made the following recommendations for remedy:

Sustainable development

Remedies sought:

- In accordance with the wishes of the majority of residents of the Special Mine Lease area, in line with recommendations set out in the URS report of 2007, in line with international standards and norms, and in order to bring Barrick/PJV into compliance with OECD Guidelines, we recommend that Barrick/PJV resettle all SML landowners and their family members and relatives living in the SML area according to international best practice guidelines and taking into consideration recommendations in the URS report of June 14, 2007.
- In accordance with PEAK’s [Porgera Environmental Assessment Committee] constitution and with OECD guidance on disclosure we recommend that Barrick/PJV post the URS report to the PEAK web site. Barrick/PJV should also make the full URS report available to Special Mine Lease area residents through the Porgera Landowners Association and other relevant local community organizations.

Human Rights

Remedies sought:

- Provide compensation to past and present victims (or their surviving family members) of abuse by PJV security forces. As Placer Dome’s successor in liability, Barrick/PJV should provide fair compensation for all human rights abuses committed by PJV personnel since the commencement of mining operations in 1989.
- Investigate all allegations of abuse and fire and report to the proper authorities those responsible.
- Disclose publicly any and all agreements PJV has with the Government of Papua New Guinea or local authorities with respect to security arrangements at the Porgera Joint Venture mine.

- Publicly encourage the government of Papua New Guinea to release the findings of its 2006 Commission of Inquiry into violence at the PJV mine site.
- Make public the report on rape in Porgera “by a prominent anthropologist” that Barrick/PJV has recently commissioned.²²
- Make public the recently commissioned report by a consultant on “improving the channels available to community members to complain about alleged abuses.”²³

The following recommendations are made in the Human Rights Watch report. We support these recommendations and hope to follow up on progress made in regard to these recommendations.²⁴

- Create safe and easily accessible channels that community members, including women, can use to complain about abuse by Porgera Joint Venture (PJV) employees according to best international practice;
- Improve public outreach to explain complaints mechanisms and acceptable conduct by PJV personnel;
- Implement more rigorous monitoring of PJV security personnel;
- Install a new tracking mechanism and control center to allow for closer monitoring of all active APD personnel in the field;
- Expand a network of infrared security cameras to allow visual monitoring of APD personnel on remote parts of the mine’s waste dumps;
- Install cameras on all APD vehicles to help prevent abuses from taking place in or near the cars;
- Improve channels that whistleblowers can use to safely and anonymously report any abuses by their colleagues at the Porgera mine;
- Make public the results of Barrick’s ongoing investigation into allegations of rape and other abuses by PJV security personnel including any disciplinary action that results. This investigation should include complaints going back to before Barrick took over the PJV mine;
- Ensure that trainings for APD personnel and mobile police squads on human rights principles and the Voluntary Principles include specific sections on prevention and response to sexual harassment and violence;
- Increase recruitment, training, and support of female security personnel, particularly in supervisory roles, among the security staff patrolling the waste dumps and among those staffing the mine’s on-site detention facility;
- Monitor and make public the number and nature of complaints received through grievance mechanisms at Porgera, the time required to resolve each case, and their outcomes;
- Ensure that newly established “women’s liaison” office is provided with adequate training, staff, financial resources, and institutional support.

Environment

Remedies Sought:

- Barrick/PJV should make available all past and future environmental monitoring reports and environmental and health studies that PJV has commissioned on the state of the river system that is affected by tailings from the PJV mine and the on the health of nearby communities.

²² Human Rights Watch. 2011. *Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera*

Gold Mine. February 1. PP. 69. <http://www.hrw.org/node/95776>

²³ *Ibid.*

²⁴ *Ibid.*

- Barrick/PJV should make public the 2007 study commissioned by Barrick/PJV to examine alternatives to riverine disposal of mine waste.
- Barrick/PJV should take concrete steps to move away from riverine disposal of mine waste by building engineered impoundments to contain all waste rock and tailings from the PJV mine, according to international best practice guidelines for tailings and waste rock impoundments and to assure no future contamination of surface or ground water. Alternatively PJV/Barrick should consider shipping ore off-site for processing.
- Barrick/PJV should prepare and make public a closure plan for the PJV mine that includes a progressive rehabilitation program for the entire length of the river system that is affected by mine waste from the PJV mine. Remediation of the river system should begin immediately.
- Barrick/PJV should provide regular health assessments for populations living in proximity to the waste flows from the PJV mine and provide health care for any health impacts that may reasonably be linked to contact with waste flows from the mine.
- Barrick/PJV should ensure the provision of clean water for all inhabitants of the Special Mine Lease Area and the nearby towns of Porgera, and Paiam.
- Barrick/PJV should make public any monitoring data regarding air emissions from its processing plants. If these emissions are not being monitored, Barrick/PJV should start a monitoring program.

Process - The handling of the case

Feedback is provided based on the questions posed under question 13 above.

a. Does the NCP deal with Specific Instance in an efficient and timely manner?

No. The NCP did not meet the deadlines it has set for itself (Stage 1 – From Receipt of the Specific Instance to the Initial Assessment (indicative timeframe: 3 months; Stage 2 – From the Initial Assessment to the conclusion of the facilitated dialogue or mediation (indicative timeframe: 6 months; Stage 3 – Drafting and publication of the Final Statement (indicative timeframe: 3 months).

The Specific Instance complaint was filed on March 1, 2011. It took the NCP 5 months (until August 19, 2011) to share its initial assessment with the notifiers. It took another 9 ½ months before a mediator was chosen. The length of this delay was largely due to Barrick continuously missing deadlines the NCP set. After a long and careful vetting process there were two choices left for mediator in January 2012. The NCP gave the parties until January 27 to make a choice. The notifiers made their choice within the deadline. But Barrick kept extending the deadline, with the acceptance of the NCP, until June 5, 2012. The first of two face to face mediation sessions finally took place in November 2012.

These delays had consequences as one of the issues the notifiers had raised was the need for remedy for villagers, men and women, harmed by excess use of force by private and public mine security. The notifiers wanted to discuss this with Barrick, but Barrick was not consulting the notifiers. In the time period that Barrick was drawing out the process of choosing a mediator and then the process of settling on a mediation agreement, the company was finalizing a framework document for a narrowly scoped remedy program - just for victims of sexual violence by private mine security. There were many flaws with the design of this program, as set out in the remedy framework agreement, (and subsequently with its implementation). By the time the parties started the mediation the remedy program was already starting to process women

through the mechanism and our attempts to raise concerns - for example regarding the narrow scope and design of the remedy framework agreement and the requirement that the women sign legal waivers in return for inequitable remedy – were brushed aside as coming too late.

The remedy framework design (as well as the implementation of the short term remedy program) have been critiqued since then by independent human rights experts at Harvard and Columbia universities. They have also noted the loss of potential in the fact that the company did not consult with the notifiers in advance.²⁵ The 119 women who went through the remedy mechanism have launched a complaint with the UN Working Group on Business and Human Rights, in 2017, in regard to their experience in, and the outcomes of, the remedy process.²⁶

b. Does the NCP act in an impartial manner in the resolution of Specific Instances?

No. We believe the NCP's tolerance for the delays Barrick caused in the process leading up to the first face to face meeting, as well subsequent issues that arose during the mediation (see d. below) and the language used by the NCP to address these issues in the NCP's final statement all indicate a bias in favour of the company.

d. How does the NCP ensure that parties engage in the process in a fair and equitable manner?

We do not believe that the NCP achieved this goal in the Porgera case. See e. below.

e. How does the NCP balance the need for transparency with confidentiality of Specific Instance proceedings and sensitive business information?

We do not believe the NCP handled the issue of confidentiality well, to our detriment. In the initial assessment the NCP said of the mediation that “*the NCP will proceed to draft the terms of reference for such a meeting which will include asking both parties to agree to maintain the confidentiality of information shared during the proceedings*” [emphasis added]. Our mediation agreement conforms to this NCP position explicitly noting that information to be kept confidential does not include “*information and documents already in the public domain.*”²⁷

We received a copy of the remedy framework document for Barrick's proposed remedy program for victims of sexual violence, from a source *outside* the NCP process and *prior* to the first mediation session. The information in the remedy framework document raised very serious concerns for us for the women who were already accessing the program. In January, 2013, MiningWatch Canada and two other organizations who were advising on the Specific Instance, U.K.-based Rights and Accountability in Development (RAID) and U.S.-based EarthRights International (ERI), issued a press release and associated brief ²⁸ to detail collective concerns of the Notifiers and advisors regarding provisions in Barrick's remedy framework document.

²⁵ See for example Knuckey, S. and E. Jenkin, “Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?” The International Journal of Human Rights, Volume 19, no. 6 (20 August 2015), at p.801-827; Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, “Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned” (2015), online: IHRC <http://hrp.law.harvard.edu>

²⁶ See Video Message from Porgera Women to UN Forum on Business and Human Rights 2016. <https://miningwatch.ca/blog/2016/11/16/video-message-porgera-women-un-forum-business-and-human-rights> ; see complaint launched by the 119 women to the UN Working Group on Business and Human Rights. https://miningwatch.ca/sites/default/files/porgera_women_to_unwg_2016_no_names_0.pdf .

²⁷ Copy with author.

²⁸ 30 January 2013. Rape Victims Must Sign Away Rights to Get Remedy from Barrick. <https://miningwatch.ca/news/2013/1/30/rape-victims-must-sign-away-rights-get-remedy-barrick>

Issuing this press release was done only after consultation with the mediator and did not breach any provisions in the mediation agreement.

Following the publication of the press release, Barrick made removal of the press release and background document from MiningWatch's website a condition for the company's continued participation in the process. This was an unreasonable demand given the conditions of the mediation agreement. Rather than remove the documents, given the urgent need to call attention to potentially serious repercussions for women who were accessing the remedy program, and in order to salvage the mediation process, MiningWatch Canada, RAID and ERI agreed, under protest, to leave the mediation.

Fellow notifiers, Mr. Ekepa and Mr. Tulin, considered leaving the mediation as well, but in consultation with MiningWatch, RAID and ERI agreed to remain in the process in case progress could be made on other issue areas. However, Barrick's unreasonable demands for the removal of MWC, RAID and ERI meant that the Papua New Guinea notifiers were deprived of critical support in the second, and final, mediation and in the follow up period. Particularly in the follow up regarding the final agreement, MiningWatch, ERI and RAID were not able to provide support.

In its write up of this issue, in the NCP's final statement, the NCP did not provide clarity, and transparency, but rather left the issues around accusations by Barrick of a breach of confidentiality unresolved by stating: *Although the mediation agreement made reference to the maintenance of confidentiality, there were allegations of breach of confidentiality during the process. As noted with the terms of reference for the mediation process, the NCP made clear its expectations that all Parties will respect the confidentiality of the mediation process in order to maintain the spirit and intent of good will that underpins the dialogue and to maximise the possibility of a successful outcome. Fortunately the mediation was not derailed, although the incident raised questions and concerns about this trust building exercise, the process, and the next steps.* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-ncn/statement-declaration.aspx?lang=eng>

The fact that the NCP did not intervene with Barrick when the company imposed unreasonable demands on MiningWatch Canada, ERI and RAID, with potentially negative consequences for victims of sexual violence by mine security, and for the Papua New Guinea notifiers, as well as the NCP's non-transparent references to allegations of a breach of confidentiality in its final public statement, raise concerns that the NCP has not handled the issue of confidentiality well in this case.

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Apart from the questions posed in this questionnaire, we wish to convey the following:

- 1) A positive aspect of the Specific Instance process was that the notifiers were provided with an independent mediator. The mediator was very good. The NCP should in all cases ensure that mediation is provided by an independent mediator.
- 2) An unfortunate part of the process was that only the costs of the mediator were covered, not the costs associated with travel to the mediation site in Australia. These expenses alone meant that the notifiers could not have afforded more than two face to face meetings.

Outcomes – have the issues raised in the Specific Instance been addressed?

The NCP summarized the conclusion of the two face two face meetings in this way:

The Mediator organized two face-to-face meetings and a number of conference calls among the Parties. During the face-to-face session that was held in Sydney, Australia, on April 10-11, 2013, the Parties addressed a number of issues which resulted in an “Agreed Action Items” list, subsequently finalised and dated 24 May, 2013.

The Agreed Action Items list covered multiple topics, including:

- 1. Sustainable Development/Re-settlement;*
- 2. Potable Water;*
- 3. Licence and other conditions on the mine in relation to environmental or health matters;*
- 4. Airborne emission monitoring;*
- 5. Health Risk Assessments;*
- 6. Information about future mine operations;*
- 7. Grievance Mechanism;*
- 8. Remedial Framework for Violence Against Women (VAW);*
- 9. Existing commitments (from November face-to-face session) in relation to security issues; and*
- 10. Timeframes*

The specific elements of the Agreed Action Items list are confidential to the Parties of the agreement.

The Agreed Action Items list between the Parties touched on many of the issues and recommendations raised in the Request for Review. However, some of the Parties felt there are outstanding matters which were not addressed by the mediation process despite the attempts of the mediator, as not all Parties were willing to discuss all issues during the dialogue. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx?lang=eng>

The PNG Notifiers note that most of the items in the agreement were not followed up on by Barrick/PJV and the conditions that led to the filing of the Specific Instance complaint remain dire and have further deteriorated in some cases. Based on field assessment made by MiningWatch, the most recent in December 2017, the following conditions prevail.

Sustainable Development/Re-settlement –

Barrick/PJV has still not relocated the landowners and their families who continue to live all around the mine and its toxic waste flows. As before, the mine carries out ongoing limited relocations of people as the ground underneath their houses becomes “geo-technically unstable” or is needed for the mines own purposes. But these people just end up squeezed onto the remaining steep land around the mine. This is not the resettlement the indigenous people of Porgera desperately need. Conditions continue to be extremely hazardous and unhealthy. Porgerans have lost the land they need to sustain themselves with food and their water ways are contaminated so they now have to buy food and water. The waste flows have become their source of income as the people seek to eke out a living from the gold they can still get from the waste that is all around them.

Porgerans are living in an ongoing humanitarian crisis. In 2017 alone, a young boy (15 years) was run over and killed by one of the mine’s loader trucks as he sought gold in the unfenced-off waste dump that borders his village. Another boy of about 13 drowned in the fluid waste on another waste dump near his village.

Potable water

The mine, PVJ, has built a reservoir in the mountains and pipes in water for its own purposes and for its drinking water. The mine knows we have lost our access to fresh water that used to be all around us. So the mine hands out plastic barrels and says we should rely on rain water. But people are wary of the water in these barrels as they frequently see red debris collected in the bottom and as the air around the mine is also contaminated from the processing plant that emits bad smells and spews clouds into the air 24 hours a day. They wonder why they cannot have clean water from the reservoir like the mine has. Their worry about the water is itself a health concern. This situation has not changed.

Health Risk Assessments

Health concerns related to the waste flows, and contamination of water and air, remain high, causing stress that is itself a health concern. Trust in Barrick's handling of health concerns remains low. This year a dump of toxic chemical waste from the mine affected a couple of hundred people.²⁹ The company handed out antibiotics and other medicines but, as most of our people cannot read, they could not take the medicines as prescribed.

Information about future mine operations

Lack of timely information remains a major concern. For example, Porgerans do not know what the closure plan is for this mine, a serious concern not only for the landowners at the mine site, but also for all the people downstream who are affected by the uncontained mine tailings and waste rock flows.

Grievance Mechanism

The mine's grievance mechanism is very difficult for Porgerans to access and when they do manage to lodge complaints about serious human rights concerns, such as killings or rapes, these complaints commonly are not acted upon for years. The case of the boy killed by the mine's heavy equipment in October 2017 is a good example. A complaint was filed by the family but the mine has yet to respond.

Remedial Framework for Violence against Women

We have discussed above the problems with the short-term mechanism Barrick put in place for women who alleged sexual violence by private mine security. The remedy framework for this mechanism was itself problematic, in part because it demanded that the women sign legal waivers in return for remedy, the remedy offered was not equitable, and the victims were not consulted in the design of the program. The implementation of the remedy program introduced new problems. These flaws in the remedy mechanism, and the human rights repercussions for the women, have been thoroughly publicized by human rights experts at Harvard and Columbia universities and by MiningWatch Canada and EarthRights International. The 119 women themselves have filed a complaint with the UN Working Group on Business and Human Rights and have raised the issue with Barrick at the company's AGM³⁰ in 2017. One of the flaws of the short term program was the fact that many women were never aware of it while it was going on and missed out on the opportunity to access the mechanism altogether. Given the ongoing concerns with rape by mine personnel and by police working at the mine under an MOU with the PNG state, and the lack of accessibility and effectiveness of the grievance office, a better and more permanent complaints mechanism should be put in place based on consultation with the landowners and other local organizations.

²⁹ Chemical Exposure at Porgera Mine Anawe Waste Site, Papua New Guinea.

<https://miningwatch.ca/blog/2017/8/20/chemical-exposure-porgera-mine-anawe-waste-site-papua-new-guinea>

³⁰ Background: Indigenous Ipili Women Speak Out at Barrick AGM 2017.

<https://miningwatch.ca/blog/2017/4/25/background-indigenous-ipili-women-speak-out-barrick-agm-2017>

Other unaddressed issues

- In the Specific Instance complaint the notifiers raised human rights concerns related to house burnings and forced evictions in Wingima village that had occurred in 2009. These events have continued in the ensuing years with great regularity, including in 2017.³¹ While in Porgera in December 2017, MiningWatch was told that not only police mobile units are involved but also the mine's own private security.
- The mine continues to dump its mine tailings into the river system that flows from the mountains of Porgera to the sea 800 kilometres below. There is still no tailings impoundment. This has been going on for 25 years. It is hard to imagine how the environmental impacts will ever be mitigated.

C) Reporting

NCPs report annually to the Investment Committee on the nature and the results of their activities, including their implementation activities in Specific Instances. This information is included in the Annual Report on the OECD Guidelines for Multinational Enterprises. Most NCPs make their annual reports publicly available.

17. Does the NCP sufficiently report on its promotion and implementation activities? Please elaborate.

Canada's NCP has produced annual reports since 2011 and has published its annual reports from 2011-2016 on its newly updated website. These annual reports include details on its promotional and implementation activities.

18. Are reports on the functioning of the NCP, including on the handling of Specific Instances, easily available to all stakeholders? Please elaborate.

Until December 2017, information on the handling of Specific Instances was not made available to all stakeholders. In fact, in 2016, when MiningWatch and Above Ground requested information from the NCP on its handling of Specific Instances, the Canadian NCP did not respond to questions we had prepared and instead referred us to the websites and case database of OECD Watch and the OECD.³²

A summary of Specific Instances (pre-2011) have been very recently added to the NCP website, although there is concern that these very short summaries of Specific Instances do not accurately reflect the case's process or the outcomes of these cases. For Specific Instance cases post-2011, more information is published on the website (with the exception of Centerra 2012). However, CSOs and trade unions express concern that the statements and narratives provided by the NCP do not accurately or completely reflect the process of the Specific Instances, including such things as reasons for delays, evidence that was

³¹ Village Houses Burnt Down – Again – at Barrick Mine in Papua New Guinea; Violence Against Local Men and Women Continues Unabated. <https://miningwatch.ca/news/2017/3/28/village-houses-burnt-down-again-barrick-mine-papua-new-guinea-violence-against-local>

³² Email exchange between Above Ground, MiningWatch Canada and Ms. Francine Nofle, then-Canadian National Contact Point, 13 July, 2016.

provided by notifiers and dismissed by the NCP, whether guidelines were breached. Information about Specific Instances that are published on the website only include cases where Canada's NCP acted as the lead NCP and not where it acted as a supporting NCP.

It is recommended that the NCP publish both Final and Initial Assessments on its website. It is also recommended that the NCP gather and fully incorporate input from all parties engaged in the Specific Instances to ensure the accuracy of the Final Statements.

To the extent current narratives or statements from the NCP are not clear about the fact that a case that was dismissed does not mean the issues raised were not founded or that guidelines were not breached, this should be made clear on the web site.

D) Contribution to the proactive agenda

The introduction of the “proactive agenda” is one of the major innovations found in the revised Procedural Guidance. Under the proactive agenda, the OECD Investment Committee is expected, in cooperation with NCPs and stakeholders, to support the positive contributions that enterprises can make and assist them identify and respond to risks of adverse impacts associated with particular products, regions, sectors or industries with a view of helping them observe the Guidelines³³.

(Note from Canadian NCP: the “Proactive agenda” is in practice the OECD work to develop due diligence guidance for the various sectors: conflict minerals, agricultural supply chains, stakeholder engagement in the extractive sector, garment and footwear sector, institutional investors...)

19. How do you assess the NCP's role in contributing to and promoting the proactive agenda under the Guidelines?

We sometimes have insight into this through our participation on the coordinating committee of OECD Watch.

20. Does the NCP provide information to stakeholders about ongoing projects under the proactive agenda, and does it seek stakeholder inputs?

Not to our knowledge. If it does we do not receive this information.

21. Does the NCP promote the outcomes of these processes?

Not to our knowledge. If it does we do not receive this information.

³³ See information on projects related to the proactive agenda on the OECD website : <http://mneguidelines.oecd.org/implementation>

Appendix I – Examples that illustrate some systemic concerns with the handling of Specific Instances (complaints)* by the Canadian NCP

Cases discussed:

- 2002/2003 – The Canadian Labour Congress (CLC) in regard to Ivanhoe Mines Ltd. in Burma
- 2004/2005 - Communications Energy and Paper Workers Union of Canada (CEP) in regard to UPM Kymmene in Canada
- 2005 - The International Textile, Garment and Leather Workers Federation (ITGLWF) in regard to the Bata Shoe Company's subsidiary in Sri Lanka
- 2010 - Oyu Tolgoi Watch (OT Watch) in regard to Ivanhoe Mines Ltd. and Rio Tinto International Holdings' Oyu Tolgoi project
- 2011 - Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and Mining Watch 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.
- 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 regarding labour violations by the Canadian mining company Excellon Resources, operating 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
- 2014 - Canada Tibet Committee (CTC), on behalf of a group of affected communities regarding China Gold International Resources Corp. Ltd. (China Gold)
- 2017 - Bruno Manser Fund (BMF) in regard to Sakto Corporation et al. (Sakto)

Issues Highlighted

- A. High level of rejection of cases on dubious and, or, non-transparent grounds**
- B. NCP narrative and language used in dismissing complaints harms victims and notifiers**
- C. NCP allows delays that harm victims' and notifiers' interests**
- D. NCP allows confidentiality provisions to be abused to the detriment of victims and notifiers**
- E. Sanctions for parties that "don't engage or don't engage in good faith" fall short**
- F. NCP abdicates responsibility by allowing the NCP of another country to conduct a poor review of a case and to stand by its deficient recommendations**

* Note that while the Canadian NCP uses the term "Request for Review" to refer to complaints received, the OECD Guidelines' term is "Specific Instance" and that term is used here (although "Request for Review" will be found in quotes from the NCP).

A. High level of rejection of cases on dubious and, or, non-transparent grounds

One of the two core functions the NCP identifies for itself is to offer a forum for discussion for the resolution of issues related to implementation of the OECD Guidelines.

The NCP also offers a forum for discussion and assists the business community, employee organisations and other concerned parties, to contribute to the resolution of issues that arise relating to the implementation of the Guidelines in Specific Instances through dialogue-facilitation.
http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng&menu_id=1&menu=R

However, the NCP rejects, on dubious and, or, non-transparent grounds, far too many cases in which notifiers are seeking exactly the services the NCP says it offers.

Examples –

* Note - With respect to the first two cases below, when the OECD Guidelines were revised, in 2011, the issue of “parallel procedures” was addressed and cases may no longer be dismissed on the basis of parallel procedures.

1. 2004/2005 - Communications Energy and Paper Workers Union of Canada (CEP) in regard to UPM Kymmene in Canada.

Summary – In 2004 CEP³⁴ submitted a Specific Instance to Canada’s NCP regarding the operations of UPM Kymmene in New Brunswick, Canada, alleging that the company violated the Guideline’s recommendations in the Employment and Industrial Relations chapter. The NCP rejected the case on the grounds that, as labour issues fall under provincial jurisdiction, the notifier should seek remedies available in the province’s labour regulatory regime, which could provide a procedure to address the issues raised.

UPM Kymmene, based in Helsinki Finland, owned a pulp and paper mill in Miramichi, New Brunswick. In September 2004 UPM Kymmene announced the closure of the pulp and paper mill, which would leave 400 workers without employment. Between the time of the announcement of the closure and when the Specific Instance was provided to the NCP, the company:

- Refused to share substantial information with the union about the mill’s closure;
- Refused to constructively deal with workplace grievances on other matters;
- Refused to negotiate the renewal of the collective agreement;
- Refused to cooperate with the union, the community and the government of New Brunswick about alternatives to the closure;
- Hired security personnel to monitor the comings and goings of workers;
- Suspended union officers, including the local union president and vice president, for performing duties as union leaders;
- Failed to respect the OECD Guidelines more generally on issues of social responsibility; and

³⁴ In 2012 CEP and the Canadian Auto Workers (CAW) merged to form Unifor.

- Failed to abide by reforestation commitments and faced complaints in relation to maintaining minimum environmental standards.

In November 2004, CEP submitted a Specific Instance to Canada's NCP. By June 2005, CEP still had not received a reply, not even a simple acknowledgment of receipt of the complaint. At this point CEP brought forward concerns with the NCP process to the Trade Union Advisory Council (TUAC) to the OECD. Following this correspondence, on June 6th 2005, CEP received a one-line email from Canada's NCP stating it will forward CEP's Specific Instance to the appropriate division. On June 26, 2005, the notifier received a message indirectly through TUAC stating the NCP would communicate its decision on the case "imminently." After more than 7 months passed, the NCP concluded that "it would be inappropriate for us to get involved," basing this decision on the reasoning that remedies had already been sought by the parties under applicable labour laws (parallel proceedings).

This case reflects concerns made in this submission regarding procedures (timeliness/delays, threshold for accepting cases/parallel proceedings) and a lack of transparency.

Threshold for accepting cases/parallel proceedings (procedures): The NCP rejected this case on the grounds of parallel proceedings. As stated in correspondence from Canada's NCP,

"Our review included a close examination of the role played by the Province of New Brunswick with respect to the resolution of labour relations disputes... the Province has jurisdiction over labour issues within its boundaries. It is our understanding that there are provincial labour laws and remedies in place that provide recourse for disputing parties and that, indeed, such recourse has been, and continues to be, taken by the CEP local union and UPM Kymmene. We have concluded, therefore, that the NCP would have very little value to add to the resolution process and that it would be inappropriate for us to get involved when provincial remedies are available and being pursued."

This response reflects our concerns, raised in this submission, that in practice Canada's NCP holds too high of a threshold for offering its good offices, and it supports our subsequent recommendations that the NCP should: 1) review its procedures and common practices surrounding threshold with the aim of improving its accessibility to all parties; and 2) consistently respect guidelines and always allow for campaigning and parallel proceedings.

As written by a representation of CEP regarding the rejection of the case:

"Effectively, the Canadian NCP has consigned the entire labour relations sections of the Guidelines to the shredder. The argument that labour relations is under provincial jurisdiction and therefore that the OECD guidelines cannot be discussed in relation to them make one wonder why Canada signed them in the first place... It should be noted that in other areas where the question of provincial versus federal jurisdiction exists, the federal government has asserted its right to sign international treaties that bind the provinces. The Kyoto Accord comes to mind. So the argument that Canada signed the OECD Guidelines without meaning for them to apply to the provinces is weak, to say the least... Granted that the OECD Guidelines do not give the NCPs judicial powers, neither do they require the NCPs to do NOTHING. That decision was reached by the Canadian government and it's NCP."

2. 2005 - The International Textile, Garment and Leather Workers Federation (ITGLWF) in regard to the Bata Shoe Company's subsidiary in Sri Lanka

Summary – On January 25, 2005 the ITGLWF submitted a Specific Instance to Canada's NCP regarding the operations of the Bata Shoe Company's subsidiary in Sri Lanka. The Specific Instance alleged that the company violated the Guideline's recommendations in the Employment and Industrial Relations chapter. After meeting with the union, the company, and Canada's mission in Sri-Lanka, during which the mission informed the NCP that the local office of the Department of Labour was undergoing a parallel proceeding, the NCP decided that dialogue in an alternative forum would be inappropriate and sent a letter to both parties in November 2005 informing them of this decision.

The Bata Shoe Company, headquartered in Toronto, Canada, had a subsidiary, Bata Shoe Co. of Ceylon Ltd., which operated a plant in Ratmalana, Sri Lanka. On behalf of the Commercial and Industrial Workers' Union of Sri Lanka, the ITGLWF submitted a Specific Instance alleging that, through its handling of a labour dispute with its employees, the company had violated the recommendation in the Employment and Industrial Relations chapter on the Guidelines. The case concerned 600 workers of the Bata plant in Ratmalana, Sri Lanka who were terminated after taking collective action following the dismissal by the management of the branch president of the CIWU and the retrenchment of 146 workers. The ITGLWF alleged that behaviour of the Bata Shoe Company was in violation of provisions of the Guidelines' Employment and Industrial Relations chapter in the following areas:

- 1. a) *respect the right of their employees to be represented by trade unions... and engage in constructive negotiations... with a view to reaching agreements on employment conditions...*
 - Management bypassed the union when submitting its application to the Commissioner General of Labour for the retrenchment of 146 employees, representing a breach of a long-standing collective bargaining process;
 - The company made the accusation, on unfounded grounds, that union members were responsible for setting fire to the Katubeda warehouse;
 - The company embarked on court action against the leadership of the union at the early stage of the dispute, which showed a willingness to undermine the union's actions and to prevent workers from organising at the plant level;
 - The company made a renewed attempt, at the late stage of the industrial dispute, to undermine workers' collective action by issuing individual reinstatement letters, which bypassed the bargaining process and ignored the workers' representatives' statements on this issue. This was a violation of the Guideline's recommendations to: 1) *Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment;* and 2) *Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.*
 - The latter provision was also violated through the dismissal of the branch president of the union who was dismissed for having raised the issue of the mismanagement of workers' money; and
 - The company consistently tried to hide from workers' any knowledge of the restructuring process that was underway at the factory and didn't disclose information to their representatives, showing the management's lack of respect for workers and their representatives and its failure to comply with the Guidelines.

This case reflects concerns made in this submission regarding procedures (timeliness/delays, threshold for accepting cases/parallel proceedings) and a lack of transparency.

Threshold for accepting cases/parallel proceedings (procedures): The NCP rejected this case on the grounds of parallel proceedings. As stated on the NCP's website, the NCP decided to reject the case based on the fact that a process was underway, which was being led by the local office of the Department of Labour. This process included bringing the company and local union together to sign a Memorandum of Understanding with agreed final decisions and settlements. In light of this, and due to the fact that by this point (see below regarding delays) the employees has returned to work, the NCP decided that dialogue in an alternative forum would be inappropriate and sent a letter to both parties in November 2005 informing them of this decision.

This response reflects our concerns raised in this submission that in practice Canada's NCP holds too high of a threshold for offering its good offices/ facilitating dialogue, and supports our subsequent recommendations that the NCP should: 1) Review its procedures and common practices surrounding threshold with the aim of improving its accessibility to all parties; and 2) Consistently respect the Guidelines and always allow for campaigning and parallel proceedings.

3. 2010 - Oyu Tolgoi Watch (OT Watch) in regard to Ivanhoe Mines Ltd. and Rio Tinto International Holdings' Oyu Tolgoi project.

Summary – The notifiers, supported by MiningWatch Canada and RAID (UK), raised and substantiated concerns regarding the environmental and sustainable development impacts of the proposed Oyu Tolgoi project in the Gobi desert, particularly in regard to water quality and availability. The NCP rejected the notifiers request, for provision of the NCPs good offices to help the parties resolve the issues through facilitated dialogue, on dubious and **insufficiently transparent** grounds.

The Mongolian civil society groups behind the complaint provided documentation to support their concern regarding key shortcomings in the project's environmental impact assessment and regarding the absence of necessary water studies. The complainants referenced Ivanhoe's Technical and Economic Feasibility Study (2009) a World Bank-funded regional environmental assessment (2010), the Mongolian government's recommendation that the company undertake additional studies regarding water use, among other sources.³⁵ These sources supported the notifiers concerns that the project may: dramatically reduce the quality and availability of water resources (including through the diversion of rivers); threaten Mongolia's wildlife and biodiversity; and limit the availability of pasture land on which the country's traditional nomadic population depends for its survival. The complaint also raised concerns about the impact that the transportation of project materials would have on a protected area.

The Canadian NCP determined that:

1) It "found the environmental assessments to be complete and of a high quality."
http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/mining_project-Oyu_Tolgoi-projet_minier.aspx?lang=eng

2) "It is not practical or realistic to expect these extensive and complex matters that involve many parties and entities to be adequately addressed or resolved by dialogue between NGOs and companies

³⁵ 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*. Retrieved January 2018 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf

on a case-by-case basis.” http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/mining_project-Oyu_Tolgoi-projet_minier.aspx?lang=eng

The NCP’s pronouncement on the high quality of the EIA constitutes an unusual “finding of fact” by the Canadian NCP and is contradicted by a US Government opinion and an opinion by the IFC.³⁶ The second reason for dismissing the case raises questions about whether the NCP stands behind its own mandate to provide good offices to help the parties resolve issues through facilitated dialogue. It also raises questions about whether the NCP is transparent enough to stakeholders about the NCP’s lack of willingness to facilitate cases involving “extensive and complex matters that involve many parties and entities.”

Given the NCPs second ground for rejecting the case, it is seemingly contradictory that the NCP closed the case by stating that “in the future”: “[i]f the parties are interested and willing to engage in a facilitated dialogue, the NCP would be pleased to offer its services and assist in facilitating such a dialogue. Should both parties agree to seek the NCP’s assistance in that regard, the NCP would be willing to examine opportunities and the most effective manner in which to offer this service outside of the Specific Instance process.” http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/mining_project-Oyu_Tolgoi-projet_minier.aspx?lang=eng

As the notifiers never ceased expressing their interest in the NCP’s assistance in a facilitated dialogue, it can only be surmised that Ivanhoe was not willing to participate, leading to the case being dismissed, but there is no transparency on this point.³⁷

4. 2012 - United Mongolian Movement of Rivers and Lakes (UMMRL), Oyu Tolgoi Watch (OT Watch), and MiningWatch Canada in regard to Centerra Gold Inc.

Summary – The notifiers sought the assistance of a lawyer to ensure that the information provided to substantiate the claims made would meet a high standard. The Specific Instance covered five primary areas of concern. The NCP applied a review framework that considered whether the notifiers concerns were “material” and “substantiated.” The NCP rejected the notifiers request for provision of the NCPs good offices to help the parties resolve the issues through facilitated dialogue. The NCP found that none of the issues raised by the Notifiers, three of which were deemed material, were substantiated. The NCPs grounds for these findings were dubious, relying largely on counter statements made by the company. As none of the substantiating material provided by the notifiers was made public, **the NCPs**

³⁶ “First, the United States believes the ESIA has gaps in critically important information, particularly related to the operations phase of the project and mine closure. Specifically, the Boards of the IFC and EBRD are being asked to make a decision on this project without seeing the agreed commitments contained in the forthcoming Operations Phase Environmental Management Plans.” Source: “United States Position: Mongolia – Oyu Tolgoi Mining Project,” online: US Department of the Treasury <https://www.treasury.gov> Quoted in 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*. Retrieved December 2017 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf. See also a letter from the IFC to Oyu Tolgoi Watch of 10 March 2011, noting that senior lenders were “still undertaking due diligence” in regard to “the water and human rights issues that you [Oyu Tolgoi Watch] raise.” See Catherine Coumans, “Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms,” UBC Law Review, Volume 45, Number 3 (October 2012), at pp.685-686.

³⁷ For more on this case see: “Canada is back.” *But Still Far Behind: An Assessment of Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises*. Retrieved December 2017 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf

findings are also not transparent. The public narrative provided by the NCP on this case consists of two paragraphs (accessed on January 9, 2017) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/closed-fermer.aspx?lang=eng#eight>

The Specific Instance raised five issues, including: mining on prohibited land; violating national law; seeking exemptions from national law; contamination of water sources; not providing the public with adequate and timely information on the actual and potential environmental, health and safety hazards and impacts of the company's activities.

On one issue the NCP decided it could not determine whether the issue raised was material, but nonetheless decided it was unsubstantiated and on one issue the NCP decided the issue was not material or substantiated. On three issues the NCP found the concerns raised material, but not substantiated. In each of these cases the NCPs determination was based on statements made by the company - "Centerra contends," "The company has indicated," "The company states" - not on independent investigation by the NCP.

For example, the notifiers provided visual evidence (video and photographs) to show that the company was operating in an area after the date it had received a letter from the Minister of Mineral Resources and Energy stating that operations should not proceed in that area. The issue was deemed "material" by the NCP but dismissed as "unsubstantiated" solely by referring to the company's assertion that it was not operating in that area on the dates in question.

Concern raised by the notifiers that the company's operations, such as deforestation, digging and the use of explosives, had caused water contamination was deemed "material," and the NCP acknowledged the fact of the contamination. But the NCP dismissed the concern as "unsubstantiated" because the company indicated there had been prior alluvial mining in the area causing the NCP to state there was uncertainty about the company's role in the contamination.

While not providing a forum for discussion to contribute to the resolution of issues, as sought by the notifiers, the NCP nonetheless made a series of recommendations to the company with direct relevance to the specific issues and concerns raised by the notifiers. There is no indication whether the NCP followed up on whether these recommendations were carried out.

With regard to the evidentiary threshold the NCP appeared to employ, the lawyer the notifiers' brought in to help ensure that the substantiation of the issues raised was reasonable made the following observation at the conclusion of the case (see box).

It is critical to remember that the OECD guidelines process ... is not an adversarial proceeding, is not a judicial proceeding, and cannot result in any kind of order (let alone a binding judgment) requiring anyone to do anything. Instead it is aimed at determining whether a disputed matter comes within certain enumerated categories of issues, and would be appropriate for dialogue with the hope of reaching a negotiated solution. This is a very low bar, and for these reasons alone, the burden and standard of proof of the underlying facts should be very dramatically lower than in a judicial setting.

I've been a litigator for nearly forty years, and have worked on cases in dozens of countries. The burden and standard of proof imposed by the Canadian NCP in this matter was basically no different than what

a judge in a “most developed” country such as the U.S. would require in order to conclusively establish facts in civil litigation. While I disagree wholeheartedly with the NCP’s evaluation of the “evidence” we presented (even under a judicial standard, I believe we established by a preponderance of the evidence the truth and accuracy of what we claimed), that’s not the issue. The issue is whether we presented in good faith enough material supporting our claims to merit discussion with the other side under the auspices of the NCP. The answer to that question is a resounding yes.

[Emphasis in original] Senior legal advisor to the notifiers

5. 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

Summary – This Specific Instance was submitted on July 25, 2013, by the 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 (the Notifiers). The Notifiers “raised a number of distinct issues, alleging that the Company was not observing the following provisions of the OECD Guidelines with respect to four broad areas: a) Human rights; b) Lack of meaningful consultations; c) Due diligence and local policies; and, d) Environmental impacts.”³⁸ The notifiers’ alleged “that the Mirador project led to the forced displacement of a dozen families from their homes and land, including through violent eviction. They argue that the project violated local people’s property rights and the right to freedom of movement. The complaint further argues that legal provisions governing prior consultation in Ecuador were breached, as was the right of indigenous peoples to free, prior and informed consent regarding the use of their lands and territories.”³⁹

In its Initial Assessment, with which the NCP closed the case without offering facilitated dialogue as requested by the notifiers, the NCP detailed a number of concerns raised by the notifiers, which the NCP says were unsubstantiated or “inadequately substantiated.” For example, the NCP notes: “*Finally, the Notifiers raised concerns over poor working conditions. However, they failed to provide substantive information on the company’s labour policy that would substantiate those concerns.*”⁴⁰ However, the notifiers point out that in this example, and others, the NCP never got back to the notifiers to request clarification or more information.

Furthermore, the NCP based its decision to close the case at the Initial Assessment phase, in part on the stated lack of willingness of the company to participate in dialogue, as indicated by the company before the merits of the case had been established by the NCP. The Canadian NCP notes: “*Considering that Corriente Resources is incorporated in Canada, the NCP explained in its outreach to the company that should the initial assessment find merit to the Request for Review, the goal of the NCP process is to engage the Parties in dialogue-facilitation. Corriente Resources outlined in its response to the NCP that it*

³⁸ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/initial-assessment-evaluation-initiale.aspx?lang=eng>

³⁹ 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*. Retrieved January 2018 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

⁴⁰ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/initial-assessment-evaluation-initiale.aspx?lang=eng>

would decline engagement in dialogue facilitation with the Notifiers under the auspices of the Canadian NCP.”⁴¹ In closing the case the NCP noted: “based on the NCP’s review of the documentation provided by the Notifiers and the Company, and the NCP’s subsequent analysis, the NCP does not find the Specific Instance to merit further examination. Furthermore, in light of the Company’s position that it does not wish to engage in dialogue facilitation, the NCP finds that it is unable to proceed further.”⁴²

6. 2017 - Bruno Manser Fund (BMF) in regard to Sakto Corporation et al. (Sakto)

Summary – The NCP received this Specific Instance on January 11, 2016. More than nine months later, the NCP provided a detailed draft initial assessment that was supportive of facilitated dialogue (October 26, 2016). Subsequently the NCP rejected the case in its draft final statement (March 21, 2017) without explaining its reversal to the notifier. The grounds for the reversal were completely **non-transparent**. The text of a later final assessment (July 11, 2017), following public protest, and the narrative description of the case on the NCP web site provides more detail, but now contains misleading content that deepens harm in regard to the notifier (see B. below for more on this). The draft final statement did not include the draft initial assessment in part or in full, as the NCP had indicated would be the case: *This Initial Assessment will be included in part, or in full, in the Canadian NCP’s Final Statement, and will be published on the NCP website at the closure of the process.* The draft initial assessment was not published on the NCP web site.

The NCP’s draft initial assessment, based on more than nine months of review and interaction with the parties, noted that: *The NCP’s Initial Assessment is the following: (a) the Guidelines apply to the grouping of Canadian companies listed in the RfR [Specific Instance]; (b) the issues raised in the RfR are material to the Guidelines and substantiated; and (c) therefore, the RfR merits further examination. The analysis can be found in the NCP’s Initial Assessment section below [emphasis added].* The NCP expressed 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”. However, in its draft final statement of March 21, 2017, produced five months after the draft initial assessment, the NCP reversed itself, rejected the case without providing any substantive clarification. The draft final statement briefly outlines the case and the NCP process and concludes that:

The NCP has concluded that an offer of good offices to the parties (i.e. dialogue facilitation) would not contribute to the purposes and effectiveness of the Guidelines. With the publication of this Final Statement, the Canadian NCP considers this Specific Instance to be closed.

In the 14 months leading up to the drafting of the March 21, 2017 final statement, the notifier had been cooperative with the process and continued to express interest in facilitated dialogue. The notifier twice requested a meeting with the NCP, in the 5 months following the release of the draft initial assessment, but was turned down. After the NCP’s unexplained reversal of its offer of dialogue facilitation in the draft final statement of March 21, 2017, the notifier went public with its concern.

⁴¹ *Ibid.*

⁴² *Ibid.*

While the public attention this case subsequently received led to a more revealing new version of the final statement, on July 11, 2017, the case was still dismissed on dubious, non-transparent and ultimately misleading grounds that further harmed the notifier's interests (See B. below).

B. NCP narrative and language used in dismissing complaints harms victims and notifiers

The NCP carries out "initial assessments" in regard to the complaints brought forward, but does not carry out full-fledged independent investigations of the complaint.

In determining whether the issues raised merit further examination, the NCP will determine whether the issues are bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:

- 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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a4

If the NCP agrees to accept a case for "further examination" and "dialogue-facilitation" the NCP issues an assessment with strong and clear language noting that the NCP's decision does not imply that the complaint is founded.

For example, in a 2011 Specific Instance brought by notifiers - Porgera SML Landowners Association (PLOA), a Papua New Guinean association, and the Akali Tange Association (ATA), a Papua New Guinean NGO, assisted by Mining Watch Canada (MWC) – regarding Barrick Gold's Porgera Joint Venture mine in Papua New Guinea, the NCP stated that:

The initial assessment of the NCP is that the issues raised merit further examination. However, the NCP is not a court or tribunal. This initial assessment should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission. [emphasis added]. See <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx?lang=eng>

However, in cases where the NCP declines to offer a forum for discussion to contribute to the resolution of issues, the narrative and language used by the NCP in public statements is not careful to insist that the decision not to offer a forum for discussion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission.

In fact the public narratives constructed by the NCP in cases it declines, and the NCP's use of language in these cases, can easily be construed by those not familiar with the case as a negative judgement by the NCP on the validity of the issues raised by notifiers and even as a confirmation of good practice in accordance with the OECD Guidelines by the corporations in question.

This practice by the NCP has harmed the interest of the notifiers.

Examples –

1. 2010 - Oyu Tolgoi Watch (OT Watch) in regard to Ivanhoe Mines Ltd. and Rio Tinto International Holdings' Oyu Tolgoi project.

In this case, discussed under A. above, the NCP rejected in its initial assessment the notifiers' request for a forum for discussion and closed the case. The NCP made a finding of fact by declaring the companies' EIA to be "complete and of a high quality" without citing evidence provided to the contrary by the notifier, including in a response to the initial assessment provided by the notifier.

Unlike in the Porgera case discussed above, the NCP made no effort to convey that a decision not to offer a forum for discussion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission.

In the same initial assessment, while closing the case, the NCP nonetheless offered its good offices "in the future": "[i]f the parties are interested and willing to engage in a facilitated dialogue..." While this may be an indication that the companies in question were not willing to participate in a dialogue, it is framed in such a way that a reader may also believe that the notifier was not willing to engage in such a facilitated dialogue when the opposite was true. This misleading impression harms the interests of the notifier.

2. 2012 - United Mongolian Movement of Rivers and Lakes (UMMRL), Oyu Tolgoi Watch (OT Watch), and MiningWatch Canada in regard to Centerra Gold Inc.

In this case, discussed under A. above, the NCP applied a review framework that considered whether the notifiers concerns were "material" and "substantiated." The NCP rejected the notifiers request for provision of the NCPs good offices to help the parties resolve the issues through facilitated dialogue. The NCP found that none of the five issues raised by the Notifiers, three of which were deemed material, were substantiated.

The NCP was not, as in the Porgera case discussed above, careful to insist that the decision not to offer a forum for discussion should not be construed as a judgment of whether or not the corporate behaviour or actions in question were consistent with observance of the OECD Guidelines and should not be equated with a determination on the merits of the issues raised in the submission.

Furthermore, as supporting materials provided by the notifiers such as pictures, video, references to credible reports etc. are not provided or discussed by the NCP, there is no way for an outside observer to the process to be able to form an informed independent assessment of the case.

By deeming all five issues to be not substantiated, and providing no qualifier as in the Porgera case, the NCP, without having done an independent investigation, gave the impression that the NCP had

determined that the company had not breached the OECD Guidelines and thereby harmed the interests of the notifiers. The fact that this impression was created was evident when a European Socially Responsible Investor called MiningWatch Canada and asked if MiningWatch Canada agreed with the NCP that the company had not breached the guidelines.

3. 2017 - Bruno Manser Fonds (BMF) in regard to Sakto Corporation et. al. (Sakto)

In this case, as discussed under A. above, the NCP underwent a complete reversal from a position of considered acceptance of the materiality and substantiation of all of the notifiers concerns, and an offer of facilitated dialogue, based on a review of more than nine months, as detailed in the draft initial assessment (October 26, 2016), to a non-transparent rejection of the case in a draft final assessment of March 21, 2017. Following a public outcry at this reversal, the NCP issued a final statement on July 11, 2017, and a narrative on its web site, that provides more insight into what may have happened between the draft initial assessment and the reversal in the draft final statement five months later on March 21, 2017. But in its July 11, 2017 public statement, the NCP unduly blames the notifier for its decision to reject the case.

The NCP notes that following the draft initial assessment: *The Notifier indicated a willingness to accept an offer of facilitated dialogue.* http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng

The NCP does not indicate whether Sakto was willing to accept an offer of facilitated dialogue, but discusses : *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...* http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng

None of this information was provided in the draft final assessment of March 21, 2017 that closed the case without a transparent explanation (as noted under A.). Had the notifier not gone public with the case, the reason for the NCPs reversal would in all likelihood have remained a mystery.

The NCP's draft final statement of March 21, 2017 simply stated the intention to close the case: *The NCP has concluded that an offer of good offices to the parties (i.e. dialogue facilitation) would not contribute to the purposes and effectiveness of the Guidelines. With the publication of this Final Statement, the Canadian NCP considers this Specific Instance to be closed.*

The NCP also, in its final statement of July 11, 2017, provides a range of justifications for having decided to close the case in March of 2017 (which were not transparent in the March 21, 2017 statement). Neither statement provides transparency on whether Sakto was willing to enter into dialogue with the notifier.

Nonetheless, the NCP ultimately blames the "derailing" of the Specific Instance on the notifier for actions the notifier took *after* the issuance of the inexplicable reversal by the NCP in its draft final statement of March 2017, fourteen months into the process.

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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng

By not being specific about the actions allegedly taken by Sakto and by the notifier, and about the timeline associated with these actions, the NCP does not allow for a proper assessment of its statements, which harms the notifier's interests. The NCP says:

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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng

This statement blames both parties for actions that may have only been taken by one of the parties. Furthermore, the NCP has acknowledged that prior to release of the draft final statement of March 21, 2017, the notifier did not breach confidentiality.⁴³ This is not made clear in the NCP's public statements, harming the notifier's interests. There was a five month period between the draft initial assessment offering dialogue and the reversal of this position in the draft final statement of March 21, 2017. Lack of transparency on what exactly happened in those five months, paired with sweeping allegations by the NCP, contributes to unacceptable harm to the notifier's interests.

Finally, the NCP went so far as to sanction BMF:

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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng

It needs to be noted that NCP provisions regarding sanctions against alleged breaches of confidentiality, was not part of the NCP's procedures in 2016, when the Specific Instance was submitted to the NCP. The NCP revised the procedures in this respect after the case was filed, thereby acting in a manner that was not predictable, further harming the interests of the notifier.

C. NCP allows delays that harm victims' and notifiers' interests

The NCP indicates that even in the case of an accepted Specific Instance and subsequent "dialogue-facilitation" the whole process should be completed with 12 months from receipt of the Specific Instance. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a4

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| <p>4.1. There are several stages involved in handling the receipt of a Specific Instance by the NCP.</p> <ul style="list-style-type: none">• Stage 1 – From Receipt of the Specific Instance to the Initial Assessment (indicative timeframe: 3 months).• Stage 2 – From the Initial Assessment to the conclusion of the facilitated dialogue or mediation (indicative timeframe: 6 months).• Stage 3 – Drafting and publication of the Final Statement (indicative timeframe: 3 months). |
|---|

⁴³ Personal communication with the NCP, September 7, 2017.

The 2016 publication “*Canada is back.” But Still Far Behind: An Assessment of Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises*”⁴⁴ notes that in each of the five cases reviewed in the publication⁴⁵ “the Canadian NCP took three to four times longer than the prescribed period to provide an initial assessment. The NCP does not provide public explanations for the majority of its delays” (p.18).

Delays also characterized the **Centerra Gold** case discussed above. The Specific Instance was submitted on March 14, 2012 and the NCP completed its initial, and final, assessment 7 1/2 months later on 2 November 2012. As some of the issues raised were time sensitive, the delays harmed the notifiers’ interests. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/closed-former.aspx?lang=eng#eight>

In the **Sakto case**, discussed above, the Specific Instance was provided to the NCP on January 11, 2016. The NCP’s draft initial statement offering facilitated dialogue followed more than nine months later on October 26, 2016. Another five months passed before the draft final statement, which said the NCP sought to close the case, was produced on March 21, 2017. And another 3 1/2 months passed until the final statement was issued on July 11, 2017. The unexplained delays in this case, paired with sweeping allegations made against the notifier in the final public statement, harm the notifier’s interests.

Delays have also harmed notifier and victim interests in cases where the NCP has recommended facilitated dialogue, as set out below.

Examples –

1. 2002/2003 – The Canadian Labour Congress (CLC) in regard to Ivanhoe Mines Ltd. in Burma

Summary - In November 2002 the CLC submitted a Specific Instance to Canada’s NCP regarding Ivanhoe Mines Ltd. in Myanmar (Burma at the time), alleging that the company violated the Guidelines’ recommendations in the Employment and Industrial Relations chapter. The NCP determined that the CLC submission merited further examination and proceeded to hold a number of discussions with each party and offered to facilitate dialogue between two sides. The NCP was not able to proceed with the case due to lack of participation from the company, and in February 2006, the NCP sent a letter to both parties that formally brought the NCP’s involvement in the case to a close.

Ivanhoe Mines, a publicly listed corporation headquartered in Vancouver, Canada, operated the S & K copper mine at Monywa in Sagaing Division, north-western Burma, in a 50-50 joint venture with the Burmese government’s Mining Enterprise No.1, and had recently announced plans to massively expand operations there. The CLC submitted its Specific Instance due to concerns that the company violated the Guidelines’ recommendations in the Employment and Industrial Relations chapter, specifically in

⁴⁴ 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*. Retrieved January 2018 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

⁴⁵ China Gold’s Gyama Copper Polymetallic Mine, Tibet Autonomous Region; Corriente-CRCC’s Mirador Copper Mining Project, Ecuador; Barrick Gold Corporation’s Porgera Joint Venture Mine, Papua New Guinea; Ivanhoe Mines’ And Rio Tinto’s Oyu Tolgoi Copper-Gold-Silver Mine, Mongolia; Mopani Copper Mines, Zambia.

relation the fact that Ivanhoe had entered into an agreement with Burma's military government in full knowledge of that government's "appalling record with respect to human and workers' rights, and is thus knowingly benefitting from that government's abuses."

The CLC expressed further concern surrounding the mass conscription of forced labour, referencing an ILO investigation of such allegations of forced labour (Co.29) and the ILO's November 2000 request that ILO member states encourage private enterprises to withdraw investments and operations from Burma. Although the Company claimed that it was not involved with the use of forced labour, the CLC challenged this claim stating that "it is impossible to operate in Burma today without being "involved with" forced labour." To this end, the CLC made the following two points: 1) Connected the mine's operation to a railway line that the ILO found to be built with forced labour (the railway was supplying the mine and enabling it to operate); and 2) Burmese law effectively outlawed the organization of trade unions – one of fundamental rights in UN's Universal Declaration of Human Rights and ILO Declaration on Fundamental Principles and Rights at Work. As such, the company had violated the Guidelines' recommendations regarding freedom of association and forced labour.

This case reflects concerns made in this submission regarding procedures (timeliness/delays) and a lack of transparency.

Timelines/delays (procedures): As indicated above, the NCP process in this case was fraught with delays and a lack of transparency surrounding the timelines. Although the original Specific Instance was received by Canada's NCP in November 2002, it was not until February 2006, over 3 years later, that the case was finally closed, without resolution. As such, this case reflects concerns raised in this submission that Canada's NCP has failed to meet reasonable timelines in the handling of cases and that there has been a lack of transparency surrounding such delays. As such we recommend that the NCP take steps to improve its compliance with its own procedures in the handling of specific cases, giving special attention to meeting procedural timelines.

Transparency: As indicated above the Ivanhoe case reflects our concerns regarding a lack of transparency with the NCP's process. Despite ongoing delays, very little information was provided to the CLC regarding the process, nor were sufficient details provided regarding the decision to bring the case to a close. A CLC representative indicated that during this three-year process very little was communicated with the CLC beyond some letters back-and-forth between the company and the CLC. The representative further stated bluntly that "if the NCP saw its role as a post office, we could have just as easily dropped letters into the mailbox ourselves." As such, this case demonstrates why the NCP should: 1) Limit confidentiality restrictions to the mediation process/offer of good offices and increase transparency; and 2) Ensure that all decisions made by the NCP are based on information that has been shared with both parties to increase fairness.

2. 2004/2005 - Communications Energy and Paper Workers Union of Canada (CEP) in regard to UPM Kymmene in Canada

Timelines/delays (procedures): As indicated under A. above, the NCP process in this case was fraught with delays and a lack of transparency surrounding the timelines. Although the original Specific Instance was received by Canada's NCP in November 2002, it was not until February 2006, over 3 years later, that the case was finally closed, without resolution. As such, this case reflects concerns raised in this submission that Canada's NCP has failed to meet reasonable timelines in the handling of cases and that there has been a lack of transparency surrounding such delays. As such we recommend that the NCP

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3. 2005 - The International Textile, Garment and Leather Workers Federation (ITGLWF) in regard to the Bata Shoe Company's subsidiary in Sri Lanka

Timelines/delays (procedures): The NCP process in this case (set out under A. above) was fraught with delays and a lack of transparency surrounding the timelines. After not receiving a timely response to the original Specific Instance, the union corresponded with the NCP stating,

"I would be extremely grateful if you could inform us at which stage of the procedure we are now in in the handling of this complaint. This would allow me to report to the dismissed workers of the Bata Show Company of Ceylan Ltd. who are expecting to see a rapid resolution to this matter... I would also appreciate if you could acknowledge receipt of this email."

The NCP responded by writing,

"The NCP has forwarded your letter to Bata headquarters along with a covering letter. Our intention is to follow up with Bata this week. I would caution against raising expectation among affected workers. A letter from the NCP may, or may not, lead to a positive outcome; it is certainly no guarantee of a quick resolution of the workers' current situation."

This email correspondence demonstrates a lack of clarity regarding the procedures and timelines throughout the NCP process, in turn supporting the recommendation made in this submission that the NCP should take steps to improve its compliance with its own procedures in the handling of specific cases, giving special attention to meeting procedural timelines.

Transparency: As indicated above, the Bata case reflects our concerns regarding a lack of transparency with the NCP's process. Despite ongoing delays, very little information was provided to the union regarding the process. As such, this case demonstrates why the NCP should: 1) Limit confidentiality restrictions to the mediation process/offer of good offices and increase transparency; and 2) Ensure that all decisions made by the NCP are based on information that has been shared with both parties to increase fairness.

4. 2011 - Porgera SML Landowners Association (PLOA), Akali Tange Association (ATA), and Mining Watch Canada (MWC) regarding Barrick Gold's Porgera Joint Venture mine in Papua New Guinea.

Summary – On March 1, 2011, two indigenous Ipili organizations from Porgera, Papua New Guinea, the Akali Tange Association and the Porgera Landowners Association, as well as MiningWatch Canada filed a Specific Instance with the Canadian NCP regarding Barrick Gold Corporation's Porgera Joint Venture (PJV) gold mine.⁴⁶ The complaint was supported by U.K.-based Rights and Accountability in Development (RAID) and U.S.-based EarthRights International (ERI). The allegations covered were: large-scale environmental impacts from uncontained mine waste; repeated violent forced evictions; excess use of force by mine security including rape and gang rape; a call from local leadership for large scale resettlement. On August 19, 2011, the NCP shared its initial assessment with the parties offering facilitated dialogue. On 5 June 2012, a mediator was appointed.

The lengthy, 9 ½, month delay between the NCPs issuance of its initial assessment, offering the parties facilitated dialogue, and the contracting of a mediator was the result of the NCP allowing the company to prolong the process.

Following a lengthy and thorough process to vet a large number of potential mediators, by January of 2012 there were two choices left for mediator. The NCP gave the parties until January 27 to make a choice. The notifiers made their choice within the deadline. From that time on the notifiers could do no more than watch as the company sought extensions for each new deadline, continually prolonging the process, with the acceptance of the NCP, until June 5th. The process to develop a mediation agreement was also protracted, with the first mediation session finally occurring in November 2012.

These delays had particular consequences for the discussions around one of the issues the notifiers had raised, as discussed below in D.

D. NCP allows confidentiality provisions to be abused to the detriment of victims and notifiers

In December 2017, the NCP updated its web site and its “**Procedures Guide for Canada's National Contact Point for the Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.**” Notably, several sections were added on confidentiality requirements and one new chapter was added on “*Participating in Good Faith.*”

14. Participating in good faith

14.1. The NCP expects all parties to a Specific Instance to participate in good faith in the entire proceedings. Good faith behaviour in this context includes responding in a timely fashion, maintaining confidentiality, not misrepresenting the process, not threatening or taking reprisals against parties

⁴⁶ MiningWatch Canada, “Specific Instance Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises, Specific Instance Regarding: The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea” (1 March 2011), online: MiningWatch Canada.
https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf

involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised. Behaviours such as breaching confidentiality or issuing threats, on the part of either party, will lead to the NCP putting an end to the process.

14.2. Undertaking public campaigns related to a case during the proceedings or disseminating NCP documents such as the NCP initial assessment or draft versions of the NCP Final Statement are not considered good faith behaviour and may constitute a confidentiality breach.

14.3. While participation in the NCP mechanism is voluntary, actions or decisions by either party that do not reflect participation in good faith in an NCP Specific Instance process will be made public in the NCP Final Statement and will have consequences.

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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng

Additional new text includes:

- *"3.8 While the case is ongoing, confidentiality of the proceedings will be maintained. Parties are expected to respect confidentiality and participate in good faith. If the NCP determines that parties do not engage in good faith, the NCP may decide to apply consequences."*
- *11.2. If they agree to participate in a facilitated dialogue or mediation, parties will be consulted on the modalities and will be asked to sign a facilitated dialogue or mediation agreement prior to the start of the facilitated dialogue or mediation. All participants will be asked to sign a confidentiality undertaking prior to the start of the facilitated dialogue or mediation.*
- *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.*

These new and restrictive confidentiality clauses and conditions regarding campaigning make the NCP even less likely to be considered as a beneficial complaints mechanism for victims of abuses by Canadian multinationals operating around the world.

The NCP's handling of confidentiality issues in its process was already subject to complaints under the previous, more user friendly, NCP procedures.

1. 2004/2005 - Communications Energy and Paper Workers Union of Canada (CEP) in regard to UPM Kymmene in Canada.

Confidentiality concerns: As indicated above under A. the UPM Kymmene case reflects our concerns regarding a lack of transparency with the NCP's process. Despite ongoing delays, very little information was provided to CEP regarding the process, nor were sufficient details provided regarding the decision to reject the case. As such, this case demonstrates why the NCP should: 1) limit confidentiality

restrictions to the mediation process/offer of good offices and increase transparency; and 2) ensure that all decisions made by the NCP are based on information that has been shared with both parties to increase fairness.

2. 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.

In this case, introduced under C. above, one of the issues the notifiers raised was excess use of force by private mine security and public police providing security for the mine under an MOU between the mine and the State of Papua New Guinea. The notifiers alleged that the excess use of force resulted in deaths, severe beatings and rape and gang rape of local indigenous villagers.⁴⁷

As the Specific Instance was being finalized, the company, which had continuously denied charges of excess use of force by mine security since 2008, was starting to acknowledge the possibility that mine security had been raping and gang raping local indigenous women. Among the recommendations made in the Specific Instance was a recommendation that the company: "Provide compensation to past and present victims (or their surviving family members) of abuse by PJV security forces" (p.16).

During the long delay between the filing of the Specific Instance (March 1, 2011) and the first mediated session (November 2012). Barrick Gold started to develop a short term, narrowly focussed remedy program for the PJV mine. The program was to be focussed only on victims of sexual violence by the mine's private security.

Although the notifiers had continuously alerted the company about the sexual violence perpetrated by mine security and police guarding the mine since 2008, and although this issue was included in the Specific Instance, when Barrick started to develop a remedy program it did not consult the notifiers. By the time the first NCP mediation took place in November 2012, Barrick's remedy mechanism for victims of sexual assault was already in place and starting to process claims.

Just prior to the first mediation session the notifiers received a copy of the remedy framework document, from a source outside the NCP process. The information in the remedy framework document raised very serious concerns in the notifiers for the women who may access the program. In January, 2013, MiningWatch Canada and two organizations that supported the notifiers issued a press release⁴⁸ to detail these concerns. This was done after consideration of provisions in the mediation agreement and after consultation with the mediator.

Although the public statements did not violate any confidentiality clauses, removal of the documents from MiningWatch's website became a condition that Barrick placed on the continued participation in the mediation by MiningWatch Canada, U.K.-based Rights and Accountability in Development (RAID)

⁴⁷ MiningWatch Canada, "Specific Instance Submitted to the Canadian National Contact Point Pursuant to the OECD Guidelines for Multinational Enterprises, Specific Instance Regarding: The Operations of Barrick Gold Corp. at the Porgera Joint Venture Mine on the Land of the Indigenous Ipili of Porgera, Enga Province, Papua New Guinea" (1 March 2011), online: MiningWatch Canada.

https://miningwatch.ca/sites/default/files/OECD_Request_for_Review_Porgera_March-1-2011.pdf

⁴⁸ 30 January 2013. Rape Victims Must Sign Away Rights to Get Remedy from Barrick.

<https://miningwatch.ca/news/2013/1/30/rape-victims-must-sign-away-rights-get-remedy-barrick>

and U.S.-based EarthRights International (ERI). This condition ultimately deprived the Papua New Guinea notifiers of critical support as the three organizations withdrew to allow the PNG notifiers to continue. The concerns the notifiers had raised regarding the remedy program for sexual assault victims were later justified.⁴⁹

The NCP did not provide clarity, but rather left the issues around the accusations by Barrick of a breach of confidentiality unresolved by stating:

Although the mediation agreement made reference to the maintenance of confidentiality, there were allegations of breach of confidentiality during the process. As noted with the terms of reference for the mediation process, the NCP made clear its expectations that all Parties will respect the confidentiality of the mediation process in order to maintain the spirit and intent of good will that underpins the dialogue and to maximise the possibility of a successful outcome. Fortunately the mediation was not derailed, although the incident raised questions and concerns about this trust building exercise, the process, and the next steps. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx?lang=eng>

The Papua New Guinea notifiers were harmed by Barrick's demands, which deprived them of support they had requested through the process. The NCP's vague and unsubstantiated references to a breach of confidentiality in its public statement does not clear up the issues around confidentiality in this case and harms the notifiers.

E. Sanctions for parties that “don’t engage or don’t engage in good faith” fall short

Since 2014, the NCP has been empowered to recommend that the Government of Canada withhold political and financial support to parties that don't participate in good faith and that Export Development Canada take such a finding into consideration when deciding whether to extend financial or other support to a party.

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. http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/procedures_guide_de_procedure.aspx?lang=eng#a4

⁴⁹ See for example Knuckey, S. and E. Jenkin, "Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?" The International Journal of Human Rights, Volume 19, no. 6 (20 August 2015), at p.801-827; Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, "Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned" (2015), online: IHRC <http://hrp.law.harvard.edu>

The 2016 publication “*Canada is back.*” *But Still Far Behind: An Assessment of Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises* ⁵⁰ points out the following limitations in the new policy:

- » A penalty is not applied for companies’ non-compliance with the OECD Guidelines, but merely for their refusal to participate in the NCP process. Consequently, a company that agrees to participate in the NCP process but fails to comply with the Guidelines would avoid a penalty by the government.
- » While a company’s failure to participate in the NCP process appears to result in its ineligibility for trade advocacy support, Export Development Canada continues to exercise discretion regarding its services. EDC may take NCP conclusions “into account,”⁵¹ however the Crown corporation “will ultimately provide or decline support based on its own due diligence.”⁵²
- » The penalty affects very few government services. For instance, it does not include the removal of protections offered via Canada’s trade and investment treaties or equity ownership by the Canada Pension Plan Investment Board (CPPIB).” (p. 20).

As is evident in the **China Gold case** described below, the imposed sanction may not change corporate behaviour at the project site, or even bring the company to the table to participate in dialogue. It also does not protect those impacted by the company against the alleged harm, or provide remedy for that harm.

Furthemore, it is unclear what, if any, criteria exist for lifting of the sanction. If the harm that has been done cannot be undone or adequacy mitigated, will it require the provision of equitable remedy? If the OECD Guidelines were breached, will it require evidence that the company has come back into compliance with the guidelines? If the sanctions are not lifted, how will the sanctions be managed over time?

Example –

1. 2014 - Canada Tibet Committee (CTC), on behalf of a group of affected communities regarding China Gold International Resources Corp. Ltd. (China Gold)

Summary – The Specific Instance was filed on January 28, 2014. China Gold is registered and headquartered in British Columbia, Canada. The project in question is the Gyama Copper Polymetallic Mine located in the Siphub Village in the Gyama Valley in Tibet. The Specific Instance raised environmental, human rights and disclosure concerns in regard to a March 29, 2013, landslide that resulting in the death of 83 mine workers in a mining camp, as well as “other adverse environmental impacts resulting from the mine, human rights issues such as discriminatory hiring and forced evictions, and inadequate disclosure by the company.” <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> The NCP offered the parties its good offices to structure a dialogue facilitation process at the time it submitted the finalised Initial Assessment to the Parties on August 29th, 2014. By April 8, 2015 the company had not responded to the

⁵⁰ 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*. Retrieved January 2018 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

⁵¹ Global Affairs Canada, “Government of Canada’s response to Environmental Petition no. 0377-B: Follow-up Petition to ‘Petition 0377L Interpretation and Application of Canada’s Corporate Social Responsibility Strategy’” (2016), online: Global Affairs Canada <<http://www.oag-bvg.gc.ca>>

⁵² Global Affairs Canada, “Minister’s Response to Petition 377: Interpretation and Application of Canada’s Corporate Social Responsibility Strategy” (2015), online: Office of the Auditor General of Canada <<http://www.oag-bvg.gc.ca>>

NCP's various correspondences, including the final statement, and the case was closed. The NCP noted that "[a]s the Company did not respond to the NCP's offer of its good offices, the Company's non-participation in the NCP process will be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made." <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>

It is puzzling, given that the NCP only had a very responsive Canada Tibet Committee with which to interact, that the NCP still missed its deadlines for the initial assessment and the final statement. The whole process should have been wrapped up in, maximum, six months, but took fifteen months.

The NCP noted that "it is the prima facie assessment of the NCP that the Company has not demonstrated that it is operating in a manner that can be considered to be consistent with the voluntary OECD Guidelines for Multinational Enterprises" <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> But even after a lengthy assessment, the NCP did not say which guidelines were breached.

Finally, as detailed in "*Canada is back.*" *But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises*⁵³ in 2016:

- There is no indication that has acted on any of the NCP's recommendations or that the NCP is monitoring the company to assess implementation.
- Local communities, fearing further environmental damage and human rights abuse, continue to protest against the mine.
- The company is now expanding the project, aiming to increase capacity from 6,000 tons of ore per day to 50,000 in 2016.
- The process resulted in no demonstrable benefit for communities affected by the disaster or those still at risk in Tibet's Gyama Valley.

F. NCP abdicates responsibility by allowing the NCP of another country to conduct a poor review of a case and to stand by its deficient recommendations

1. 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 regarding labour violations by the Canadian mining company Excellon Resources, operating in Mexico.

In the face of clear bias and obstruction of process by the Mexican NCP in conducting its investigation the Canadian NCP steadfastly refused to assume the leadership for reviewing the case, despite being requested to do so by the complainants. The Canadian NCP should have rejected the Mexican NCP's Initial Recommendations and retained a role as lead NCP in this Specific Instance. It should have made its

⁵³ 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*. Retrieved January 2018 from https://miningwatch.ca/sites/default/files/canada-is-back-report-web_0.pdf.

own initial recommendations based in the evidence and in compliance with the Guidelines. The Canadian NCP played no role in facilitating independent mediation using, a terms of reference agreeable to both parties.

On May 28, 2012, the Notifiers presented a Specific Instance to the Canadian OECD National Contact Point (NCP) against the Canadian mining company Excellon Resources, Inc. (the Company) for violations of Sections II, III, IV, V and VI of the OECD Guidelines for Multinational Enterprises (Guidelines). The same complaint was filed with the Mexican NCP office on May 29, 2012.

In this Specific Instance, the Notifiers requested that the Canadian NCP assume a role as lead NCP based on concerns related to the Mexican government's public positions regarding the Notifiers and the subject-matter addressed in the Specific Instance. The Canadian NCP made a decision that the Mexican NCP would take the lead with the support and collaboration of the Canadian NCP. See Ex. A, Letter from Canadian NCP to notifiers, June 28, 2012.

During the proceedings the Notifiers worked exclusively with the Mexican NCP making sure to copy all communications to the Canadian NCP. Unfortunately, in the six months following, the Mexican NCP expressed bias against the Notifiers, while failing to adhere to the basic principles of the Guidelines in the following manner.

1. The Mexican NCP was partial and biased in its treatment of the notifiers prior to completion of the initial recommendation

Before the Mexican NCP released its Initial Recommendation regarding this matter, the NCP treated the Notifiers' Specific Instance inconsistently with the Guidelines and in a partial manner that disfavored the Notifiers:

- The Mexican NCP surprised the notifiers with previously undisclosed technical requirements which threatened the Specific Instance.
- While the Mexican NCP held the Notifiers to unrealistic deadlines sprung upon them with little notice, it provided great deference to Excellon's Mexican subsidiary.
- The NCP was not transparent with the Notifiers regarding the steps required nor timely in its sharing of the Company's response.
- The Mexican NCP provided the Company with a deadline of August 24, 2012 to respond to the Notifiers' Specific Instance. Excellon's subsidiary provided no such response until September 22. The NCP did not provide the Notifiers with Excellon's response until October 23 at which point the NCP required a response within a week's time. Therefore, while providing the Company great latitude in responding to the NCP's deadlines, the Mexican office has been much more stringent in its requirements for the Notifiers.

2. The Mexican NCP's initial recommendation failed to adhere to fundamental principles of the guidelines.

The Initial Recommendation written by the Mexican NCP in response to the Notifiers' Specific Instance did not properly apply the OECD Guidelines to this conflict in various ways and shows a bias against the Notifiers.

- The NCP failed to accept the CLC as Notifier in this Specific Instance without justification, despite the fact that the CLC and its information was on the initial Specific Instance and was received by the Canadian NCP.
- The NCP addresses the merits of the case without full consideration of the facts alleged and evidence provided and without conducting an investigation. In fact the Mexican NCP took great lengths in its Initial Recommendation to address the merits of the case despite the office's admitted lack of clear and complete facts regarding the conflicts.
- The Mexican NCP's treatment of the labour dispute shows a clear bias against the SNTMMSSRM. The Mexican NCP ignored any reference to international obligations that both Mexico and any company in Mexico have under the OECD Guidelines. The NCP in this Initial Recommendation failed to consider any international guidance.
- The Mexican NCP stated that the existence of parallel proceedings regarding the facts alleged prohibit the acceptance of this Specific Instance in contradiction to the Commentary stated in the Guidelines. On this ground it terminated its inquiry into the Specific Instance.