



OECD Guidelines for Multinational Enterprises  
**National Contact Point Peer Reviews**  
**CANADA**



## ABOUT THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The OECD Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.

## ABOUT NCP PEER REVIEWS

Adhering governments to the OECD Guidelines for Multinational Enterprises are required to set up a National Contact Point (NCP) that functions in a visible, accessible, transparent and accountable manner. During the 2011 update of the OECD Guidelines for multinational enterprises, NCPs agreed to reinforce their joint peer learning activities and, in particular, those involving voluntary peer reviews. The peer reviews are conducted by representatives of 2 to 4 other NCPs who assess the NCP under review and provide recommendations. The reviews give NCPs a mapping of their strengths and accomplishments, while also identifying opportunities for improvement. More information can be found online at <https://mneguidelines.oecd.org/ncppeerreviews.htm>.

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## *Table of contents*

<b>1. Summary and key findings .....</b>	<b>4</b>
<b>2. Introduction .....</b>	<b>8</b>
<b>3. Canadian NCP at a glance .....</b>	<b>10</b>
<b>4. Institutional arrangements .....</b>	<b>11</b>
<b>5. Promotion of the Guidelines .....</b>	<b>17</b>
<b>6. Specific instances .....</b>	<b>23</b>
<b>Annex A. List of organisations which responded to the NCP peer review questionnaire .....</b>	<b>37</b>
<b>Annex B. List of organisations participating in the on-site visit .....</b>	<b>38</b>
<b>Annex C. Promotional activities 2017.....</b>	<b>39</b>
<b>Annex D. Overview of specific instances handled by the Canadian NCP as the leading NCP.....</b>	<b>42</b>
<b>Annex E. Canadian national contact point process flowchart .....</b>	<b>45</b>

### Boxes

Box 1. “Sakto Group” and Bruno Manser Fund.....	27
Box 6.2. Barrick and Porgera .....	28
Box 3. Endeavour Mining and Labour Union .....	30
Box 4. Banro and former Banro employees in the Democratic Republic of the Congo .....	32

## 1. Summary and key findings

This document is the peer review report of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines). The implementation procedures of the Guidelines require NCPs to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability. In addition, they recommend that NCPs deal with specific instances in a manner that is impartial, predictable, equitable and compatible with the Guidelines.

This report assesses conformity of the Canadian NCP (the NCP) with the core criteria and with the Procedural Guidance contained in the implementation procedures. The peer review of the NCP was conducted by a team made up of reviewers from the NCPs of Belgium, Denmark, the United Kingdom, and an observer from Peru, along with representatives of the OECD Secretariat. The peer review included an on-site visit taking place in Ottawa, Canada on 15-16 February 2018.

The NCP represents one component of a strong landscape of Responsible Business Conduct (RBC) policy within the government of Canada. In this respect, Canada has introduced a series of innovative measures to promote RBC including introducing provisions related to RBC in trade and investment agreements, tying trade advocacy and export credit support to RBC, and, most recently, creating the Canadian Ombudsperson for Responsible Enterprise (CORE) position. The NCP is comprised of members from across the government of Canada and as such has a high level of visibility within the government and the competency to handle a broad range of issues. The NCP has been making various efforts to respond to learnings and improve its functioning in recent years. Despite these efforts, there is a lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders. Rebuilding this trust and ensuring continued coherence on RBC across the government of Canada will be central to ensuring the effectiveness of the NCP going forward.

### Key findings and recommendations

#### *Institutional arrangements*

The NCP is a federal inter-departmental committee composed of seven member departments. The NCP Secretariat is located in Global Affairs Canada (GAC) in the Trade Planning, Coordination and Responsible Business Conduct Division of the Trade Commissioner Service (TCS). All member departments of the NCP are active in their role and knowledgeable about the Guidelines and the functioning of the NCP. The diversity of expertise within the NCP allows it to handle and respond to a wide range of issues. All decisions with respect to the activities of the NCP as well as handling of specific instances rest with the NCP as a whole. Despite this, some stakeholders noted that the location of the NCP Secretariat contributes to a perception of a lack of impartiality. During the on-site visit stakeholders did not seem sufficiently aware of the active role of NCP members from other departments (outside of TCS) in the activities and decision making of the NCP.

Stakeholders also noted that a lack of formal involvement of external stakeholders in the NCP's governance arrangements may have contributed to the perception of a lack of impartiality with respect to the NCP and signalled support for a formal advisory body to

the NCP. The NCP has noted it is looking to strengthen relationships with its social partners and that it foresees a role for a new multi-stakeholder advisory group for the NCP.

The current staff of the NCP Secretariat is recognised as professional, responsive and committed to executing the mandate of the NCP. Additionally there is strong institutional memory and some senior representation across NCP members which contributes to ensuring a high profile for the NCP and RBC within the government of Canada. However there are no formal reporting requirements within the government on the activities of the NCP.

In May 2017, human resources were increased for the NCP Secretariat from one to two full time staff. While the NCP noted that, generally, sufficient resources are available to execute its mandate, one challenge is to balance the number and unpredictable nature of specific instances with commitments for promotion of the NCP and the Guidelines, and other activities.

In January 2018, the creation of the Canadian Ombudsperson for Responsible Enterprise (CORE) was announced. The mandate of the Ombudsperson will be to address complaints related to allegations of human rights abuses linked to activities of Canadian companies abroad.<sup>1</sup> The mandate of the Ombudsperson overlaps somewhat with that of the NCP, and as a result the Ombudsperson may represent a competing venue for the handling of grievances related to business and human rights.

	Findings	Recommendations
1.1	Stakeholders did not seem sufficiently aware of the active role of NCP members drawn from other departments (outside of the Trade Commissioner Service) in the activities and decision making of the NCP.	The NCP should explore additional ways to ensure that the role of NCP members is understood by parties to specific instances and the broader public. For example, mentioning the involvement of relevant NCP members in final statements of specific instances or publicising the structure of the NCP and the role of its members within the NCP Procedures Guide for specific instances may be ways of achieving this.
1.2	A lack of formal involvement of social partners and external stakeholders in the NCP's governance arrangements contributes to the perception of lack impartiality with respect to the NCP.	The NCP should consult with its social partners and other stakeholders in connection to creating a new Advisory Body for the NCP to ensure that it is representative and effective in mitigating perceptions of a lack of impartiality. If the advisory members are drawn from another body, the NCP should ensure that they have a clear and appropriate mandate with respect to their role vis-a-vis the NCP.
1.3	A challenge noted by the NCP is to balance the number and unpredictable nature of specific instances with the need for planned resource commitments for the promotion of the NCP and the Guidelines, and other activities.	Considering the global economic presence of Canadian MNEs and in order to respond to an increasing case load, a larger NCP team would be appropriate and should be considered.
1.4	There are no formal reporting requirements within the government on the activities of the NCP.	The NCP should use its annual report to promote its work and activities across the federal and provincial governments and the parliament. This would help to demonstrate accountability and support requests for additional budget or staff.
1.5	The mandate of the Ombudsperson overlaps somewhat with that of the NCP, as a result the Ombudsperson may represent a competing venue for grievances on business and human rights.	In establishing the Ombudsperson office, steps should be taken to ensure potential synergies with the NCP are identified and potential duplication with the NCP mandate is mitigated. Institutional arrangements for the two bodies should be co-ordinated.

<sup>1</sup> Global Affairs Canada website, Responsible business conduct abroad – Questions and answers (Accessed 20 March, 2018) [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&\\_ga=2.114213760.642214138.1516213298-286120068.1454362702](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&_ga=2.114213760.642214138.1516213298-286120068.1454362702)

### *Promotion of the Guidelines*

The NCP has been increasing efforts with respect to promotion. Many stakeholders participating in the peer review noted support for the level of detail and ambition in the 2018 promotional plan of the NCP. The NCP engages in activities such as seminars, information sessions, speaking engagements, and events at international conferences, to promote the Guidelines and raise awareness of the NCP's role. The NCP also updated its website in 2017 with the objective of making it more user-friendly and accessible.

The government of Canada has a strong landscape of RBC policy and has been active in building policy coherence for RBC matters. For example, since late 2014 access to trade advocacy and financial support in foreign markets has been made contingent on Canadian companies operating responsibly and engaging in good faith and constructively with the Canadian NCP, or any other NCP or the Office of the CSR Counsellor for the Extractive Sector. This policy is colloquially referred to as the 'sanction.' Many stakeholders noted support for the sanction but demonstrated a lack understanding of it and called for more transparency with respect to its applicability. Despite this and the efforts described above, civil society organisations and NGOs in particular, do not seem very aware of the potential benefits of using the NCP's procedure for specific instances.

Findings	Recommendations
2.1 Many stakeholders noted support for the mechanism by which trade advocacy and financial support can be withheld if companies do not engage in good faith and constructively with the NCP (i.e. the 'sanction') but demonstrated a lack understanding of it and called for more transparency with respect to its applicability.	The NCP should promote the mechanism and clearly communicate on its scope and application with stakeholders and parties to specific instances.
2.2 Civil society organisations, and NGOs in particular, do not seem very aware of the potential benefits of using the NCP's procedure for specific instances.	The NCP is encouraged to continue its work with NGOs with a view to establishing a regular dialogue so as to improve their confidence in the NCP's specific instance mechanism.

### *Specific instances*

The NCP has handled 19 specific instances since 2000. The NCP has made efforts to respond to lessons learned and improve the specific instances process through engaging more systematically in follow-up and developing detailed final statements. The NCP has also made efforts to facilitate dialogue in transnational specific instances through organising video-conferencing or international mediation to promote participation. While some parties have noted positive experiences with the specific instance process, other stakeholders see the process as lacking in transparency, predictability and impartiality. Some of the recent changes to the NCP procedures have further underscored this perception. For example, some stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCP's application of the initial assessment criteria was onerous. Several civil society and trade union stakeholders raised concerns about the NCP's campaigning policy and noted that revising it would be necessary to build trust and encourage certain stakeholders to utilise the specific instance mechanism. Some submitters of specific instances noted that language in some initial assessments by the NCP undermined the position of the submitter by implying there was no breach of the Guidelines by the company or that the claims raised in a submission were without merit.

Findings	Recommendations
3.1 Some stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCP's application of the initial assessment criteria was onerous.	The NCP should offer assistance and work with submitters to further substantiate their claims or reformulate submissions where necessary to allow for them to be accepted for further examination. Additionally, substantiation requirements and evidentiary thresholds should be clearly explained to submitters in the NCP's rules of procedure and ensure accessibility.
3.2 Several civil society and trade union stakeholders raised concerns about the NCP's campaigning policy and noted that revising it would be necessary to build trust and encourage certain stakeholders to utilise the specific instance mechanism.	The NCP should ensure that its policy on campaigning is predictable, equitable (meaning the preferences and needs of both parties should be taken into account), and promotes transparency to the greatest extent possible.
3.3 Some submitters of specific instances noted that language in some initial assessment by the NCP undermined the position of the submitter by implying there was no breach of the Guidelines by the company or that the claims raised in a submission were without merit.	The NCP should be clear that a decision not to accept a specific instance for further examination during initial assessment should not in principle be equated with a determination on the merits of the issues raised in the submission.
3.4 Some stakeholders see the specific instance process as lacking in transparency, predictability and impartiality.	In order to further improve the mechanism and build trust amongst potential submitters, the NCP should enhance transparency with respect to the specific instance process. This may involve publishing initial assessments, communicating and providing explanations to parties when timelines cannot be respected, sharing the information used to make a decision amongst both parties where possible and clearly explaining the rationale for deciding whether to accept (or not accept) specific instances for further examination in statements.

Canada is invited to report to the Working Party on Responsible Business Conduct on follow up to all the recommendations within one year of the date of the presentation of this report.



## 2. Introduction

The implementation procedures of the Guidelines require NCPs to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability. In addition, the guiding principles for specific instances recommend that NCPs deal with specific instances in a manner that is impartial, predictable, equitable and compatible with the Guidelines. This report assesses conformity of the Canadian NCP (NCP) with the core criteria and with the Procedural Guidance contained in the implementation procedures.

Canada adhered to the OECD Declaration on International Investment and Multinational Enterprises (Investment Declaration) in 1976. The OECD Guidelines for Multinational Enterprises (the Guidelines) are part of the Investment Declaration. The Guidelines are recommendations on responsible business conduct (RBC) addressed by governments to multinational enterprises operating in or from adhering countries. The Guidelines have been updated five times since 1976; the most recent revision took place in 2011.

Countries that adhere to the Investment Declaration are required to establish National Contact Points (NCPs). NCPs are set up to further the effectiveness of the Guidelines and adhering countries are required to make human and financial resources available to their NCPs so they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.<sup>2</sup>

NCPs are “agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.”<sup>3</sup>

The Procedural Guidance covers the role and functions of NCPs in four parts: institutional arrangements, information and promotion, implementation in specific instances and reporting. In 2011 the Procedural Guidance was strengthened. In particular, a new provision was added to invite the OECD Investment Committee to facilitate voluntary peer evaluations. In the commentary to the Procedural Guidance, NCPs are encouraged to engage in such evaluations. In the G7 Leader’s Declaration of June 2015, G7 governments committed to strengthen mechanisms for providing access to remedy, including NCPs. Particularly, G7 leaders agreed to lead by example to make sure NCPs of G7 countries are effective, and to complete NCP peer reviews by 2018.<sup>4</sup>

The objectives of peer reviews as set out in the Core Template for voluntary peer reviews of NCPs are to assess that the NCP is functioning in accordance with the core criteria set out in the implementation procedures; to identify the NCP’s strengths and possibilities for improvement; to make recommendations for improvement and to serve as a learning tool for all NCPs involved.

This report was prepared based on information provided by the NCP and in particular, its responses to the NCP questionnaire set out in the core template<sup>4</sup> as well as responses to requests for additional information. The report also draws on responses to the stakeholder

<sup>2</sup> Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, para I(4).

<sup>3</sup> OECD Guidelines for Multinational Enterprises (2011), Foreword.

<sup>4</sup> See Leaders’ Declaration G7 Summit 7-8 June 2015

[https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT\\_FINAL\\_CLEAN.pdf](https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf)



questionnaire which was completed by 33 organisations representing Canadian enterprises, civil society, trade unions/representative organisations of the workers' own choosing (hereinafter worker organisations), academic institutions and government agencies (see Annex A for complete list of stakeholders who submitted written feedback) and information provided during the on-site visit.

The peer review of the NCP was conducted by a team made up of reviewers from the NCPs of Belgium, Denmark and the United Kingdom, with an observer from the Peruvian NCP, along with representatives of the OECD Secretariat. The on-site visit to Ottawa, Canada took place 15-16 February 2018 and included interviews with the NCP, other relevant government representatives and stakeholders. A list of organisations that participated in the review process is set out in Annex B. The peer review team wishes to acknowledge and thank the NCP for the quality of the preparation of the peer review and organisation of the on-site visit.

The basis for this peer review is the 2011 version of the Guidelines. The specific instances considered during the peer review date back to 2001. The methodology for the peer review is that set out in the core template.<sup>5</sup>

## Economic context

Canada's economy is dominated by the service sector, representing 59% of GDP. The inward stock of foreign direct investment (FDI), which represents the accumulated value of FDI in the Canadian economy over time, was USD 974 billion in 2016, equivalent to 64 percent of Canada's GDP. The outward stock of FDI was USD 1 252 billion in 2016, representing 82 percent of Canada's GDP.

The main investors in Canada are the United States, the Netherlands, Luxembourg, Switzerland and the United Kingdom, and the main inward investment sectors are mining and quarrying, manufacturing and professional, scientific and technical activities. The main destinations for outward investment from Canada are the United States, the United Kingdom, Barbados, Luxembourg and the Cayman Islands, and the most important sector is finance and insurance, followed by mining and quarrying and professional, scientific and technical activities.

As measured by employment at foreign-owned firms in Canada in 2014, the most important investors are the United States, the United Kingdom, France, Japan and Switzerland. As measured by employment at the overseas affiliates of Canadian MNEs, the most important destination countries are the United States, Mexico, the United Kingdom, Brazil and Germany.

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<sup>5</sup> Core Template for Voluntary Peer Reviews of National Contact Points (OECD, 2015), [https://one.oecd.org/document/DAF/INV/RBC\(2014\)12/FINAL/en/pdf](https://one.oecd.org/document/DAF/INV/RBC(2014)12/FINAL/en/pdf).

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### 3. Canadian NCP at a glance

Established: 1991

Structure: Federal inter-departmental committee composed of seven member departments

Location: Global Affairs Canada, Trade Planning, Coordination and Responsible Business Conduct Division of the Trade Commissioner Service (TCS).

Staffing: Two full time staff

Website: [ncp-pcn.gc.ca](http://ncp-pcn.gc.ca)

Specific instances received: 19

## 4. Institutional arrangements

*The commentary to the Procedural Guidance of the Guidelines provides:*

*“Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner.”*

### Legal basis

The 2000 Decision of Council on the Guidelines was adopted through an Order in Council by the Governor General in Council of Canada. This Order in Council expanded the already existing NCP and formalised recognition of the Procedural Guidance in the 2000 version of the Guidelines. The NCP also has a Terms of Reference which outlines its composition and mandate and is available online.<sup>6</sup>

### NCP Structure

#### *Composition*

The NCP is a federal inter-departmental committee composed of seven member departments:

- Global Affairs Canada (GAC) (Chair; Secretariat; official development expert)
- Natural Resources Canada (NRCan) (Vice-Chair)
- Environment and Climate Change Canada (ECCC)
- Innovation, Science and Economic Development Canada (ISED)
- Employment and Social Development Canada (ESDC)
- Crown-Indigenous Relations and Northern Affairs (CIRNA)
- Finance Canada (Finance)

The NCP has existed within the former Department of Foreign Affairs and International Trade since 1991. The current multi-departmental structure of the NCP was decided upon at ministerial level in 2000 in the lead up to the development of the Order in Council.

The CIRNA and Finance departments were added to the original composition of the NCP to ensure expertise on these issues which are particularly relevant in the Canadian context. Multi-departmental structures are common in the federal government of Canada. The composition of the NCP is meant to promote policy coherence and the diversity of expertise across members of the NCP allows it to handle and respond to a wide range of issues.

The NCP is chaired by a senior representative of GAC, the Director General of the Trade Strategy and Portfolio Coordination Bureau, within the “International Business Development and Chief Trade Commissioner” Branch. The Director General of the Policy

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<sup>6</sup> Terms of Reference for Canada’s National Contact Point for the OECD Guidelines for Multinational Enterprises (Terms of Reference) [http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms\\_of\\_ref-mandat.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/terms_of_ref-mandat.aspx?lang=eng)

and Economics Branch, Lands and Minerals Sector at Natural Resources Canada (NRCan) is the Vice-Chair of the NCP.

Each department represented on the NCP selects a primary contact to the NCP. However the Terms of Reference recognise that each department may have a number of operating units with an interest in NCP matters. In this respect the primary contact of each Department may determine whether representatives of other units within their Department may participate in NCP meetings as observers or resource persons.<sup>7</sup>

The NCP Secretariat is located in GAC in the Trade Planning, Coordination and Responsible Business Conduct Division of the Trade Commissioner Service (TCS). The NCP Secretariat is housed in the same division dealing more broadly with responsible business conduct files within the TCS. Some stakeholders noted that the NCP Secretariat's location contributes to a perception of a lack of impartiality because a primary function of the TCS is helping Canadian companies succeed in foreign markets. This perception is exacerbated by the fact that the NCP does not have any formal involvement by external stakeholders in its structure.

In addition to the NCP members, the Terms of Reference provide that the NCP may seek to engage the participation of representatives from other federal government Departments on a case by case basis. In such situations, the respective Department may be invited to participate in the NCP's work, and to contribute their knowledge and expertise on any particular subject matter as required.

The Terms of Reference also provide that the NCP may as required, create Ad Hoc Working Groups to perform specific activities in carrying out the NCP mandate.<sup>8</sup>

The current staff of the NCP Secretariat is recognised as professional, responsive and committed to executing the mandate of the NCP. All members of the NCP are active in their role and knowledgeable about the Guidelines and the functioning of the NCP. Additionally there is strong institutional memory and some senior representation across NCP members which contribute to ensuring a high profile for the NCP and RBC within the government of Canada.

### ***Function***

The Terms of Reference for the NCP make reference to the Procedural Guidance of the Guidelines noting that the mandate of the NCP is “to further the effectiveness of the Guidelines”, and that the responsibilities of the NCP consist of:

1. making the Guidelines known and available;
2. raising awareness of the Guidelines;
3. responding to enquiries about the Guidelines;
4. contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, and;
5. reporting annually to the OECD Investment Committee.<sup>9</sup>

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<sup>7</sup> Terms of Reference, article 9.6

<sup>8</sup> Terms of Reference, article 6.2

<sup>9</sup> Terms of Reference, Article 4.2

The NCP Secretariat is the core of the operational functioning of the NCP. The Secretariat coordinates promotional activities, NCP meetings and the handling of specific instances, and informs NCP members of relevant developments.

NCP members are involved in the steering of the NCP and in handling specific instances. When a specific instance is submitted it is discussed with the NCP as a whole. To handle specific instances a Working Group is formed made up of a sub-set of the NCP membership and the NCP Secretariat. The composition of the Working Group is decided by the NCP as a whole, and usually consists of members with the relevant expertise in the issues raised in the submission. The Working Group reviews the submission and supporting documentation. The NCP Secretariat drafts the initial assessment in collaboration with the Working Group, and makes recommendations to the broader NCP on the specific instance.

The Terms of Reference provide that at each step of the process, decisions rest with the entire NCP and decisions are based on consensus. Where consensus cannot be reached, the majority prevails. According to the NCP reaching decisions based on consensus has not been an issue for the NCP in the past. However, it has noted that co-ordinating such a large body at times poses challenges.

The NCP meets face to face on average every two months. A quorum, namely four separate member departments, is required to make any decisions and for meetings to take place. Conference calls are also held as needed and the NCP Secretariat and members communicate via email on an ongoing basis.

Neither GAC senior management (other than the Chair) nor the Minister of International Trade is involved with NCP processes and decision making on specific instances. As noted all decisions rest with the NCP as a whole.

During the on-site visit stakeholders did not seem sufficiently aware of the active role of NCP members from other departments (outside of TCS) in the activities of the NCP. For example, stakeholders did not seem to be aware of the role that members of the NCP play in decision-making with respect to specific instances or other activities of the NCP, although the terms of reference for the NCP are clear on this point and the composition of the NCP is clearly noted on its website. In this respect the NCP should explore additional ways to ensure that the role of NCP members is understood by parties to specific instances and the broader public. For example, mentioning the involvement of relevant NCP members in final statements of specific instances or publicising the structure of the NCP and the role of its members within the NCP Procedures Guide for specific instances may be ways of achieving this.

### ***NCP advisory bodies***

At the time of peer review there was no formal advisory body to the NCP. However the NCP has specific non-governmental social partners: the Canadian Chamber of Commerce, the Canadian Labour Congress, and the Confédération des syndicats nationaux. The social partners are not part of the official institutional arrangements of the NCP. Social partners lead Canada's engagement with two of the OECD institutional partners, namely the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC).

The social partners meet with the NCP at least once a year and are informed of NCP activities. They also participate in NCP annual stakeholder sessions and share their views with the NCP. The NCP consults with its social partners for their advice and expertise in

advancing promotional outreach and the NCP effectiveness in general. The social partners have held events with the participation of the NCP.

The trade union social partners noted that engagement with the NCP has not been strong and that annual meetings have not been regularly scheduled. Additionally it was noted by various stakeholders that civil society should also be a Social Partner to the NCP. Stakeholders also noted that a lack of formal involvement of external stakeholders in the governance of the NCP contributes to the perception of lack impartiality with respect to the NCP and signalled support for a formal advisory body to the NCP. Civil society and trade union stakeholders noted that ideally such a body would function as a steering committee which could review procedural aspects of specific instance handling, similar to the Steering Board in place at the United Kingdom's NCP.

The NCP noted that it is looking to strengthen relationships with its social partners and that it foresees a role for a new multi-stakeholder advisory group for the NCP.

Currently an advisory body is being developed to support advice to the Canadian government on strengthening Canada's responsible business approach, including recommendations based on global trends and procedures for the Ombudsperson for Responsible Enterprise (CORE). It was noted that a sub-group may be drawn from this advisory body to support the work of the NCP. Some stakeholders noted that it will be important for the NCP to have its own discrete group to support its work, particularly as the mandate for the advisory body for the Ombudsperson is currently envisioned to focus on providing strategic guidance on policy approaches to human rights and business within the government of Canada. Appointments to the new advisory body are being made at a ministerial level based on consultation with various stakeholders.<sup>10</sup>

The NCP is still considering what the role of social partners could be once a new advisory group is created, and whether they can continue to serve a role in addition to and/or separate from the advisory group. The NCP has noted that currently it envisions the role of the future advisory group to be advisory in nature, meaning members would be informed of specific instances and NCP activities but will not have oversight or decision making power.

The NCP should consult with its social partners and other stakeholders in connection to creating a new Advisory Body to ensure that it is representative and effective in mitigating perceptions of a lack of impartiality. If the advisory members are drawn from another body the NCP should ensure that they have a clear and appropriate mandate with respect to their role vis-a-vis the NCP.

## Institutional memory

The NCP has strong institutional memory as several members have been in the role for a significant period of time. For example the current senior policy representative from NRCan has been a member of the NCP since its inception as an inter-departmental committee in 2000. The Secretariat senior officer at the time of the peer review had been the representative for Environment and Climate Change Canada on the NCP between 2012 and 2016. Furthermore strong policy coherence on RBC issues within the Canadian government has allowed for continued exchanges with previous NCP Chairs and

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<sup>10</sup> Since the on-site visit of the peer review team this advisory body has been established. See [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/advisory-body-groupe\\_consultatif.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/advisory-body-groupe_consultatif.aspx?lang=eng)

Secretariat members and phased transitions of Chairs and Secretariat members have allowed for a smooth transfer of expertise.

The NCP also maintains a dedicated database of information in a standardised format for easy reference. Adequate document management processes are also in place to protect confidential information. Documents related to NCP specific instances, such as Requests for Reviews, Initial Assessments, Final Statements, and all correspondence with parties are kept in both electronic and paper formats.

## Resources

Human and financial resources are made available to the NCP Secretariat by the International Business Development and Chief Trade Commissioner branch of GAC, in order to support the NCP in carrying out its mandate, including the procurement of professional mediators.

In May 2017, human resources for the NCP Secretariat were increased from one to two full time staff officers. There is no discrete budget line for NCP activities, rather resources are allocated on an ad-hoc basis. The NCP has noted that in general sufficient resources are available to execute its mandate. However a challenge noted by the NCP is to balance the number and unpredictable nature of specific instances with the need for resource commitments for promotion of the NCP and the Guidelines, and other activities. Considering the global economic presence of Canadian MNEs, and in order to respond to an increasing case load a larger NCP team would be appropriate and should be considered.

## Reporting

The NCP reports annually to the OECD Investment Committee. The NCP has published its annual report online since 2011. In 2016, the NCP developed a more user friendly annual report which was written in a narrative style more accessible to a broader audience.

There are no formal reporting requirements within the government on the activities of the NCP. The NCP does not officially report to Parliament, but the NCP Secretariat and NCP members provide, as needed, information on NCP activities and on the outcomes of specific instances to their respective ministers. Systematically informing ministers about the outcomes of specific instances could help to raise their profile and increase the visibility of the NCP at the level of the government. Similarly the NCP should use its annual report to promote its work and activities across the federal and provincial governments and the parliament. This would help to demonstrate accountability and support requests for additional budget or staff.

## Canadian Ombudsperson for Responsible Enterprise (Ombudsperson)

In January 2018, the creation of a Canadian Ombudsperson for Responsible Enterprise (CORE) was announced by GAC. The mandate of the Ombudsperson will be to address complaints related to allegations of human rights abuses arising from activities of Canadian companies abroad operating in the extractive (mining, oil and gas) and garment sectors. Additionally the Ombudsperson will be empowered to undertake collaborative and



independent fact-finding, make recommendations, monitor the implementation of those recommendations, and report publicly throughout the process.<sup>11</sup>

According to GAC, the Ombudsperson will focus on investigations, informal resolution of disputes and on making public recommendations. The roles of the Canadian NCP and the new Ombudsperson will be complementary, whereby the Ombudsperson may refer cases to the NCP for formal mediation, where appropriate, and where parties are in agreement.<sup>12</sup>

Since 2000, the majority of specific instances submitted to the NCP have raised issues related to the extractive sector (84%) and since 2011 the extractive sector accounted for over half of all specific instances (54%). As such the mandate of the Ombudsperson overlaps somewhat with that of the NCP, as a result the Ombudsperson may represent a competing venue for grievances on business and human rights. This may cause confusion amongst stakeholders; this concern was raised by many business stakeholders participating in the peer review. In this respect, in establishing the Ombudsperson office, steps should be taken to ensure potential synergies with the NCP are identified and potential duplication with the NCP mandate is mitigated. Institutional arrangements for the two bodies should be coordinated. Policy development for creation of the Ombudsperson will be established under the direction of the Director General of Trade Portfolio Strategy and Coordination at GAC, who also serves as the Chair of the NCP and as such there is an opportunity to ensure coherence and synergies amongst the two bodies.

Findings	Recommendations
1.1 Stakeholders did not seem sufficiently aware of the active role of NCP members drawn from other departments (outside of the Trade Commissioner Service) in the activities and decision making of the NCP.	The NCP should explore additional ways to ensure that the role of NCP members is understood by parties to specific instances and the broader public. For example, mentioning the involvement of relevant NCP members in final statements of specific instances or publicising the structure of the NCP and the role of its members within the NCP Procedures Guide for specific instances may be ways of achieving this.
1.2 A lack of formal involvement of social partners and external stakeholders in the NCP's governance arrangements contributes to the perception of lack of impartiality with respect to the NCP.	The NCP should consult with its social partners and other stakeholders in connection to creating a new Advisory Body for the NCP to ensure that it is representative and effective in mitigating perceptions of a lack of impartiality. If the advisory members are drawn from another body the NCP should ensure that they have a clear and appropriate mandate with respect to their role vis-a-vis the NCP.
1.3 A challenge noted by the NCP is to balance the number and unpredictable nature of specific instances with the need for planned resource commitments for promotion of the NCP and the Guidelines, and other activities.	Considering the global economic presence of Canadian MNEs and in order to respond to an increasing case load, a larger NCP team would be appropriate and should be considered.
1.4 There are no formal reporting requirements within the government on the activities of the NCP.	The NCP should use its annual report to promote its work and activities across the federal and provincial governments and the parliament. This would help to demonstrate accountability and support requests for additional budget or staff.
1.5 The mandate of the Ombudsperson overlaps somewhat with that of the NCP, as a result the Ombudsperson may represent a competing venue for grievances on business and human rights.	In establishing the Ombudsperson office, steps should be taken to ensure potential synergies with the NCP are identified and potential duplication with the NCP mandate is mitigated. Institutional arrangements for the two bodies should be coordinated.

<sup>11</sup> Global Affairs Canada website, Responsible business conduct abroad – Questions and answers (Accessed 20 March, 2019) [http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&\\_ga=2.114213760.642214138.1516213298-286120068.1454362702](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&_ga=2.114213760.642214138.1516213298-286120068.1454362702)

<sup>12</sup> Id.

## 5. Promotion of the Guidelines

### Promotional Plan

The NCP engages in promotion through engagement with various stakeholders internal and external to the government of Canada. The NCP has developed a detailed promotion plan for 2018 specifying outreach activities targeting:

- Civil society organisations/labour/business
- Academics/students/legal community
- Global Affairs Canada's missions abroad and Federal /Provincial Government officials

Many stakeholders participating in the onsite visit supported the level of detail and ambition in the promotional plan and recognised that their feedback had been well integrated in the plan. The NCP noted that the current promotional plan may be overly ambitious in relation to available resources and may have to be implemented over a longer time period.

Some stakeholders, particularly business, have noted that additional promotion with respect to the recommendations of the Guidelines would be useful. Additionally, currently civil society and trade unions have a low level of trust in the NCP and the specific instance mechanism. Some of this distrust is rooted in legacy issues and misunderstandings and has led certain stakeholders, including certain social partners, to stop the promotion of the specific instance mechanism for dispute resolution. Civil society organisations, and NGOs in particular, do not seem very aware of the potential benefits of using the NCP's procedure for specific instances. In this respect the NCP should develop a strategy for repairing relationships with civil society and trade unions as part of its promotional activities. The NCP is encouraged to continue its work with NGOs with a view to establishing a regular dialogue so as to improve their confidence in the NCP's specific instance mechanism. This may include increased promotional efforts and outreach with these communities and establishing more regular meetings with social partners and NGOs.

### Information and Promotional materials

The NCP has been publishing annual reports since 2016 to promote its activities.

As part of the 2014 review of Canada's 2009 CSR Strategy for the Canadian International Extractive Sector, the government commissioned a two-part survey in 2012 and 2013 of Canadian extractive sector companies to assess the level of awareness of the Strategy, the Guidelines and other CSR standards, and their implementation by businesses. The survey indicated that in 2012, 26% of surveyed extractive sector companies were aware of the Guidelines, and this increased to 41% in 2013. In 2012, 6% of companies indicated that they were following the Guidelines, a percentage that increased to 26% in 2013.<sup>13</sup>

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<sup>13</sup> An official evaluation of the CSR Strategy was also conducted, and the summary of this evaluation is available at: <http://www.international.gc.ca/gac-amc/publications/evaluation/2014/seccsrscies-essrsesecpe.aspx?lang=eng>.

The NCP is also in the process of developing additional promotional material to raise awareness of the Guidelines and NCP mechanism including:

- Development of a new NCP Brochure
- Standing banner
- Video for GAC internal wiki

The NCP has also made efforts to improve visibility through updates to its website.

## Website

The NCP maintains a bilingual (English and French) publicly accessible website available at ([ncp-pcn.gc.ca](http://ncp-pcn.gc.ca)). The website includes:

- An overview of the Guidelines
- Links to the OECD due diligence guidance documents
- An explanation of the NCP and a link to the Procedures Guide for specific instances
- Annual reports of the NCP
- Final Statements of specific instances
- Summaries of annual NCP stakeholder sessions
- Contact information with respect to NCP social partners for the Guidelines

The website was upgraded in late 2017 with the objective of improving user-friendliness and accessibility of information. For example, a new infographic explaining the NCP specific instance process was developed. The NCP has also begun to include information on ongoing NCP specific instances on the website. Going forward the status of specific instances will be regularly updated at each stage of the process.

Between May 2016 and May 2017, the main page was accessed by over 2,700 different users. Over the same period, over 400 users viewed the NCP Procedures Guide and over 300 viewed the 2015 Annual Report.

Stakeholders participating in the peer review noted appreciation for the updates to the website. The changes made were recognised as useful to promoting increased transparency.

## Promotional events

The NCP engages in activities, such as seminars, information sessions, speaking engagements, and events at international conferences, to promote the Guidelines and raise awareness of the NCP's role. In 2017 the NCP organised 6 promotional events. There is also a GAC CSR fund of 250,000 CAD a year which has been operating since 2009 and has been used by many initiatives globally to promote CSR, the Guidelines and the NCP. In 2017, 59 initiatives on CSR were led or supported by 37 Canadian missions in Latin America, the Caribbean, Asia, Africa and Europe.

Since 2013, the NCP has organised an annual stakeholder information session. The 2016 annual meeting focused on due diligence in global supply chains and had over 50 participants from various stakeholder groups.

In 2017 the NCP developed a partnership with the Global Compact Network of Canada to promote the Guidelines and the sectoral due diligence guidance among Canadian businesses. A key objective of the partnership was to develop a user-friendly manual of the Guidelines to support Canadian business in all sectors in the implementation of the OECD

Guidelines and the various sectoral guidance tools. The e-handbook was launched in April 2018 and has since seen over 700 downloads from over 25 countries.

The NCP members each promote the Guidelines via outreach initiatives targeted to engage members of their own networks, programs and consultative activities. The websites of NRCan, ESDC and ISED include a reference to the Guidelines and the NCP and links to the official NCP website. Members of the NCP also promote the NCP and the Guidelines informally when meeting with stakeholders and formally through presentations on RBC at a variety of events, such as the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF).

## Promotion of policy coherence

The government of Canada has a strong landscape of RBC policy and has been active in building policy coherence on these themes. Some of the leading initiatives are described in more detail below.

### *Canada's CSR Strategy*

The NCP is a key pillar of Canada's CSR Strategy (Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad).

This strategy was first introduced in 2009 and updated in 2014. It provides that the Office of the Extractive Sector CSR Counsellor is mandated to promote corporate social responsibility and engage in early interventions to prevent the escalation of local conflicts associated with Canadian extractive industry operations abroad. The CSR Counsellor can also refer stakeholders to the NCP for formal mediation. The CSR Counsellor's website includes a link to the NCP's website and a reference to the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. The mandate of the CSR Counsellor ends in the summer of 2018 and the functions will be taken over by the Ombudsperson. The CSR strategy is due to be renewed in 2019 and in this context additional thinking is being done on how to enhance coherence on CSR.

Canada does not yet have a National Action Plan on Business and Human Rights (or Responsible Business Conduct). Strategies on how to bring together various related existing initiatives and engage stakeholders constructively are being considered before launching such a process.

### *Investment and trade policy*

The work of the NCP is part of a larger progressive trade agenda in Canada. The GAC division responsible for investment, trade policy and negotiations is the lead on Canada's engagement with the OECD Investment Committee. They have contributed to the inclusion of references to RBC, the Guidelines and the NCP in Canada's trade policy and Free Trade Agreements (FTAs). For example, the Canadian-European Union Comprehensive Economic and Trade Agreement (CETA) and the Canada/Chile FTA have specific language on the Guidelines and the NCP mechanism. Many other FTAs and bilateral Foreign Investment Promotion and Protection Agreements (FIPAs) signed by Canada include RBC provisions. Canada was the first country to include references to RBC in investment treaties.

The TCS is responsible for diplomats based in 160 countries who engage with business aboard. It provides training to diplomats on RBC issues and guidance on raising issues if Canadian companies are not acting responsibly abroad. Furthermore companies who wish to receive trade advocacy services are required to sign an Integrity Declaration. Since 18 November 2016, the GAC Trade Commissioner Service's Integrity Declaration includes a reference to the Guidelines and commitment to engaging constructively with an NCP (Canada's NCP or another NCP). Between November 2016 and December 2017, over 550 companies/private sector officials have signed the Integrity Declaration.

The NCP Secretariat participates periodically in GAC training on the Guidelines and the NCP to trade commissioners and diplomats prior to their deployment abroad, as well as to personnel in headquarters. The government further promotes, on an ongoing basis, the use of the Guidelines by Canadian companies in their international business operations through the TCS, which interacts heavily with Canada's network of embassies, high commissions and other offices. As part of their outreach to companies operating abroad, and regular interactions with other stakeholder groups, Trade Commissioners and other embassy officials actively promote key RBC standards including the NCP and other local NCPs (especially in Latin America).

### ***Withdrawal of trade advocacy and financial support***

Starting in late 2014, access to trade advocacy and financial support in foreign markets has been made contingent on Canadian companies operating responsibly and engaging in good faith and constructively with the Canadian NCP, any other NCP or the Office of the CSR Counsellor for the Extractive Sector. If an issue is raised and a Canadian company chooses not to engage with the Counsellor, or to not engage in good faith with an NCP, it can be recommended that the company be denied access to trade advocacy and financial support. This process is colloquially referred to as the 'sanction.'

Importantly, the decision to withdraw support rests with the TCS, which can receive recommendations from the NCP. The NCP can also recommend that support be withdrawn in follow up situations where agreements developed in the course of a specific instance are not implemented, although it has not yet been invoked for this reason. The NCP has provoked the application of the sanction once<sup>14</sup>.

The decision to withdraw such services is communicated across Canadian foreign missions, other government departments and other (provincial/territorial) levels of government. As such, this mechanism has had multiplier effects. For example, in one instance where the decision was taken to apply the sanction against a company for refusing to participate in a specific instance, support was then also withdrawn by the provincial government of British Columbia as well as the Prospectors and Developers Association of Canada (PDAC), a leading mining industry association.

Non-participation or the lack of good faith participation with the NCP is also taken into account in CSR-related evaluations and due diligence conducted by Export Development Canada (EDC), Canada's export credit agency, in its decision to provide financing or other support. EDC promotes RBC principles and standards including the Guidelines, as referenced on its website. The NCP regularly communicates with EDC and informs them of new specific instances and sends them copies of Final Statements.

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<sup>14</sup> China Gold International Resources Corporation and Canada Tibet Committee (2014)

Many stakeholders noted support for the mechanism by which trade advocacy and financial support can be withheld if companies do not engage constructively and in good faith with the NCP but demonstrated a lack of understanding of it and called for more transparency with respect to its applicability. Many understood its scope to be quite limited and were not sure how many times it had been applied in specific instances or under what circumstances the NCP may decide to trigger it. As such the impact of the mechanism seems to be underestimated by many stakeholders. Stakeholders also expressed a wish to better understand when and under what circumstances a sanction may be lifted. As part of its efforts to rebuild trust and promote engagement with the specific instance process, the NCP should promote this mechanism and clearly communicate on its scope and application with stakeholders and parties to specific instances.

### ***Sustainable Development***

Canada's international development assistance also supports the implementation of international standards and norms including the Guidelines. The GAC Departmental Sustainable Development Strategy includes an RBC paragraph with a reference to the Guidelines. The GAC (Development) Fiduciary Risk Evaluation Tool also includes such a reference.

### ***Public Procurement***

The NCP is currently working with the department responsible for Public Sector Procurement to ensure that appropriate references to the Guidelines and due diligence guidances are included in the new Code of Conduct for Procurement. The department already has a clear mandate to promote responsible purchasing. In this respect it is considering incorporating government objectives into procurement contracts and enhancing codes of conduct for suppliers to avoid forced labour or other labour abuses in supply chains. Suppliers would have to demonstrate that they are seeking to respond to the risks where present or risk termination of their contract with the government.

Currently, the public procurement agency of Canada is also looking at expanding the sanction tool to public procurement. For example, companies may be disqualified from government procurement contracts if they do not engage with the NCP or are deemed to have not acted responsibly in some other way.

### ***High level policy***

The NCP feeds expertise on an ongoing basis into Canada's position on files related to RBC and CSR, including at the OECD Ministerial Council level, G7, G20 and the UN Forum on Business and Human Rights. The NCP works to secure high level support wherever possible for RBC, the Guidelines, and the promotion, integrity and strengthening of the global NCP mechanism.

## **Proactive agenda**

The NCP Secretariat catalysed the development of the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector. It co-chaired the advisory group for this guide with Norway. The NCP Secretariat has also actively participated in the advisory groups established to steer the development of the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear sector, the report on Responsible

Business Conduct for Institutional Investors, and the (General) Due Diligence Guidance for Responsible Business Conduct.

Through its GAC Development representative, the NCP continues to engage in the OECD program on conflict minerals. Canada co-facilitated the negotiation of the gold supplement and has been actively engaged on the governance of the multi-stakeholder forum set up to support the implementation program of the Guidance. In 2015, Canada chaired the OECD Forum on Responsible Mineral Supply Chains.

## Requests for information

In 2017, the NCP Secretariat received and addressed 14 requests for information: 10 from civil society and individuals; 2 from companies and 2 from journalists. The NCP commits to responding to information requests within a few working days.

## Cooperation amongst NCPs

The NCP Secretariat has participated in three NCP peer reviews (Netherlands, Norway and France) including the chairing of the Norwegian peer review. The NCP Secretariat has also been active in peer learning events in the US, Israel, Hungary, Austria, Colombia and Turkey. The NCP provided support to the Colombian NCP to establish their office in 2011-12, which included the sharing of best practices.

Findings	Recommendations
<b>2.1</b> Many stakeholders noted support for the mechanism by which trade advocacy and financial support can be withheld if companies do not engage in good faith and constructively with the NCP (i.e. the 'sanction') but demonstrated a lack understanding of it and called for more transparency with respect to its applicability.	The NCP should promote the mechanism and clearly communicate on its scope and application with stakeholders and parties to specific instances.
<b>2.2</b> Civil society organisations, and NGOs in particular, do not seem very aware of the potential benefits of using the NCP's procedure for specific instances.	The NCP is encouraged to continue its work with NGOs with a view to establishing a regular dialogue so as to improve their confidence in the NCP's specific instance mechanism.



## 6. Specific instances

### Overview

The NCP has handled 19 specific instances since 2000, 6 of which were filed in the last two and a half years. The vast majority of specific instances handled by the NCP have concerned the extractive sector (84%).

A total of 17 specific instances have been closed and 2 are in progress as of February 2018. Out of the 17 closed specific instances 8 were not accepted for further examination and good offices were offered in 9 specific instances. Mediation was undertaken in four specific instances. Each of these resulted in either some agreement between the parties or changes to company management systems and introduction of processes to protect against future harms.

### Rules of procedure

The NCP Procedures Guide, the rules of procedure for the specific instance process, was modified in November 2017 to reflect practices that had been in place for a number of years. Through these updates, the NCP sought to simplify and clarify the NCP specific instance process. It also added expectations on good faith behaviour and confidentiality (see below) and included an explanation of the trade advocacy related 'sanction' linked to specific instances (see above).

Some stakeholders participating in the peer review noted that they were not consulted with respect to the revisions and noted that some of the changes further underscore the perception that the specific instance process is lacking in transparency, predictability and impartiality.

### *Submission*

Contact information for submitting specific instances can be found on the NCP website and in the publicly available NCP Procedures Guide. The website has a dedicated page that explains the procedure to submit a “Request for Review” (a submission) to the NCP. The NCP is developing a template for submission to facilitate the process for submitters (referred to as notifiers within the NCP’s Procedures Guide) and ensure the right information is provided.

The NCP Procedures Guide provides that the following information should be provided in a submission (this is duly reflected in the submission template developed by the NCP):

- The notifier’s identity, including contact person, name of organisation and contact details. Where a notifier is raising a matter on behalf of a number of organisations, they should list all the organisations.
- The notifier’s interest in the matter. For example, if a request for review of a specific instance is being lodged on behalf of others (e.g., a union or local community); the notifier lodging the request should outline their interest in this case and mandate or reason for lodging the request.
- The identity (name) and location of the multinational enterprise (MNE) (e.g., location of the MNE’s headquarters) whose actions or activities are the subject of

the request for review. If the MNE is a subsidiary of another company, the names of the corporate entities involved should be provided with a description of their affiliation.

- A description of the action or activity which the notifier lodging the request for review believes constitutes non-observance of the Guidelines. The stakeholder must provide any supporting documentation they may have (e.g., documents, reports, studies, articles, witness statements, etc.). Unsubstantiated allegations are not sufficient for the NCP to make an initial assessment.
- The location(s) of the action or activity to which the specific instance relates.
- The parts of the Guidelines (i.e., chapter(s) and paragraph(s)) which are considered to be most relevant.
- Information on any relevant laws or procedures and description of any potential issue regarding compliance with these laws or procedures.
- Background on whether the action or activity has been discussed with the MNE and the results of such discussions.
- A list of other fora where the same matter has been raised (e.g., other government offices, agencies, NGOs, legal action in the court system, etc.) and the status of any corresponding action that such offices may be taking.
- A description of the action(s) the notifier lodging the request for review considers the MNE should take to resolve the issues.
- Any additional details that the entity lodging the request for review wishes to bring to the attention of the NCP and/or the MNE.

The NCP Procedures Guide also note that submitters may request a meeting with the NCP when making their submission. The NCP has noted that it will communicate with submitters as necessary to ensure their submission is complete.

Stakeholders have noted that having a template for submission of specific instance is very useful but that gathering the necessary information for a submission can be onerous. They noted that small organisations may not have the necessary resources to make a submission. Stakeholders have also requested that the online form be made available in Spanish to further increase accessibility for submitters. On the other hand, one party to a specific instance noted that the NCP should have applied a higher threshold of substantiation before accepting the specific instance. The NCP has noted that it seeks to accept specific instances where it believes it can have positive impact with regard to the issues raised and has made efforts to simplify admissibility criteria in the latest version of its procedures (see below).

### *Initial assessment*

The NCP Procedures Guide aligns with the Procedural Guidance in outlining admissibility criteria for initial assessment, namely, it provides that:

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.

Prior to the 2017 revision of the Procedures Guide, two additional elements were considered in the initial assessment:

- “[T]he request(s) and solution(s) that the notifier(s) is seeking and whether these are possible within the mandate of the NCP; and
- What the notifier(s) have indicated about their willingness or unwillingness to participate in a facilitated dialogue with a view to resolving the matter.”<sup>15</sup>

Stakeholders participating in the peer review noted that these two criteria reduced the accessibility of the NCP and many appeared unaware that they had been removed from the latest Procedures Guide. According to the NCP although these criteria were only recently removed in practice the NCP had long stopped using them to assess merit. The NCP also removed the word “evidence” in the new version of the Procedures Guide to avoid the implication that issues raised in complaints must be proven in order to be considered to merit further examination by the NCP.

In making an initial assessment the NCP forms a Working Group comprised of some of its members and the NCP Secretariat (see above). The NCP Working Group can include and also consult other government experts as required (e.g. the Canadian Environmental Assessment Agency, Office of Human Rights, Freedom and Inclusion at GAC). The NCP Working Group can also conduct fact finding with the support of Canadian missions abroad. For example, the Canadian embassy in Mongolia actively supported the NCP in a case involving the operations of a Canadian mining company in Mongolia.<sup>16</sup> Additionally the NCP working group engaged with the Chinese government and the China Chamber of Commerce on promoting the Guidelines in the context of the China Gold specific instance.<sup>17</sup>

If the matter is considered by the NCP to merit further examination, the NCP will offer good offices to help the parties involved resolve the issues. According to the NCP Procedures Guide the NCP will draft an initial assessment report and circulate a draft to the parties for comments but it is within the NCP’s discretion to decide whether to modify the draft in response to comments. The NCP may also make publicly available its decision that the issues raised merit further examination and its offer of good offices to the parties involved but it does not publish initial assessments.

If the NCP does not offer mediation, it informs the parties of the reason for its decision and moves to the drafting and publication of a Final Statement. (see below).

Out of the 17 closed specific instances, nine were accepted for further examination. Out of the eight which were not accepted for further examination the following reasons were provided:

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<sup>15</sup> Procedures Guide for Canada’s National Contact Point (pre-2017), provided by the NCP to the review team during the on-site visit 15-16 February, 2018.

<sup>16</sup> Centerra Gold Inc. and UMMRL et. al. (2012)

<sup>17</sup> China Gold International Resources Corporation and Canada Tibet Committee (2014)

- The company in question was no longer operating in the country in question (i.e. no longer linked to the impact).<sup>18</sup>
- Another venue was deemed more appropriate<sup>19</sup> or the issue was already being dealt with in separate venue.<sup>20</sup>
- The issues were not likely to be resolved in mediation.<sup>21</sup>
- The issues were not material and/or substantiated.<sup>22</sup>
- Mediation would not have contributed to the purposes and effectiveness of the Guidelines.<sup>23</sup>
- The company had complied with expectations under the Guidelines.<sup>24</sup>

Some stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCPs application of the initial assessment criteria was onerous. In this respect stakeholders referenced various cases not accepted for further examination at the initial assessment stage for reasons they believed to be outside the scope of the initial assessment criteria.<sup>25</sup> Some stakeholders described one situation where a draft initial assessment was issued accepting a specific instance for further examination and then subsequently withdrawn and replaced with a different initial assessment not accepting the specific instance for further examination.<sup>26</sup> The parties were not made aware of nor consulted on the decision of the NCP to change the initial assessment and according to stakeholders this incident was highly damaging to the transparency and predictability of the process as well as to their trust in the NCP. Nearly a year later the final statement was replaced again by a different version. Some stakeholders have said publicly that they are concerned that the NCP has issued multiple versions of statements for this specific instance in response to corporate pressure. See Box 1.

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<sup>18</sup> Kakanda Development Corporation and United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Riches in the Democratic Republic of Congo (DRC) (2002)

<sup>19</sup> UPM Kymmene and Trade Union (2004)

<sup>20</sup> BATA and Trade Union (2005)

<sup>21</sup> Ivanhoe Mines Ltd. and Oyu Tolgoi Watch (2010)

<sup>22</sup> Centerra Gold Inc. and UMMRL et. al. (2012); Corriente Resources International and FIDH (2013)

<sup>23</sup> Sakto Group and Bruno Manser Fund (2016)

<sup>24</sup> The final statement notes that the company complied with law and engaged in stakeholder engagement and carried out due diligence. Seabridge Gold and Southeast Alaska Conservation Council (SEACC) (2016)

<sup>25</sup> UPM Kymmene and Trade Union (2004) (not accepted for further examination on the basis that labour issues fall under provincial jurisdiction); BATA and Trade Union (2005) (not accepted on the basis of an ongoing parallel proceeding); Ivanhoe Mines and Oyu Tolgoi Watch (2010) (not accepted as it found environmental assessments to be complete and of a high quality); Centerra Gold Inc. and UMMRL et. al. (2012) (not accepted as found to be unsubstantiated).

<sup>26</sup> Sakto Group and Bruno Manser Fund (2016)

### Box 1. “Sakto Group” and Bruno Manser Fund

On 11 January 2016, the NGO Bruno Manser Fund submitted a specific instance to the NCP regarding the activities of the “Sakto Group”, a real estate investment company, alleging that they had not observed the Disclosure chapter of the Guidelines.

On 26 October 2016, a draft initial assessment was shared confidentially with the “Sakto Group” and Bruno Manser Fund. Several months later, on 21 March 2017 a new draft final statement of one page was shared with “Sakto Group” and Bruno Manser Fund.

On 3 April 2017 Bruno Manser Fund published both documents and a press release. It was then publicly known that the initial assessment of 26 October 2016 accepted the specific instance for further examination – whereas the draft final statement dated 21 March 2017 did not accept the specific instance. The NGO called on the NCP to accept the case.

The NCP noted that publication of the initial assessment was a breach of its confidentiality rules.

On 11 July 2017, a revised final statement of 9 pages was made public by the NCP. This final statement noted that the NCP would not accept the case for further examination. It also detailed the conduct of both the “Sakto Group” and Bruno Manser Fund throughout the specific instance proceeding, explaining that an offer of good offices to the parties would not contribute to the purposes and effectiveness of the Guidelines, and making recommendations to both parties. The NCP also noted that it would consider the future use of its sanction against the “Sakto Group” if relevant.

On 11 May 2018, the final statement of 11 July 2017 was replaced by the NCP by a revised and shortened version. The statement notes it supersedes the original initial assessment which was published in violation of the NCP’s confidentiality procedure, but does not make mention of the prior final statement, officially published 11 July 2017. The 11 May 2018 final statement notes the breach of the confidentiality policy by Bruno Manser Fund but does not comment on the conduct of the “Sakto Group”.

On the same date the Canadian Department of Justice sent letters to Bruno Manser Fund as well as OECD Watch on behalf of the NCP requesting the original initial assessment be taken offline.

Civil society stakeholders have expressed very strong disappointment in the handling of this specific instance, and have underscored the lack of transparency, or predictability, and perceived impartiality in the various versions of the statements.

The NCP has explained that in some of the specific instances it has not accepted for further examination, it was not in a position to make an assessment on the issues raised in the submission (e.g. on the quality of an environmental impact assessment). The NCP should work with submitters to further substantiate their claims or reformulate submissions where necessary to allow for them to be accepted for further examination. Additionally, substantiation requirements and evidentiary thresholds should be clearly explained to submitters in the NCP’s rules of procedure while ensuring accessibility.

### *Good offices*

The NCP Procedures Guide provides that the NCP may facilitate dialogue or mediation itself or use external mediation or facilitation services to do so. If external services are used, the NCP may observe the mediation or facilitated dialogue sessions.<sup>27</sup>

The NCP has noted that when selecting an external mediator it will take into account factors such as language, geography and social context. An external mediator was used in one specific instance.<sup>28</sup> This specific instance involved the operations of Barrick Gold in Papua New Guinea. In consultation with the parties, the NCP hired an Australia-based mediator with a view to ensuring that local expertise was secured and that both parties were comfortable with the mediator. Parties to the specific instance noted that the mediator selected was very skilled and had a strong understanding of the local context. (See Box 2)

#### **Box 6.2. Barrick and Porgera**

In March 2011, the NCP received a submission from the NGOs Mining Watch Canada (MWC), Porgera Special Mine Lease (SML) Landowners Association (PLoA), and Akali Tange Association (ATA) alleging that Barrick Gold, a Canadian gold mining company, had breached the general policies, disclosure, and environment provisions of the Guidelines in Papua New Guinea.

The NCP accepted the specific instance for further examination and engaged with the parties to organise a mediation process. In this respect the NCP closely consulted with the parties to identify an external mediator which both parties felt comfortable with, developed a mediation agreement and contributed to organising two mediation sessions in Sydney, Australia. The mediation took place between 5 June 2012 and 30 June 2013.

The parties to the specific instance expressed a high degree of satisfaction with the mediator to the specific instance and noted that it was an important opportunity to engage in direct dialogue. However one of the parties noted that the mediator selection process was unreasonably long and that this had negative consequences for the submitter. Submitters of the complaint noted that having to travel to Sydney on their own expense for the mediation limited the accessibility of the mechanism.

Through this mediation process the parties addressed a number of issues which resulted in an Agreed Action Items list, dated 24 May 2013. This list covered multiple issues, but did not address all of the subjects listed in the request for review given that agreement on all of the topics was not reached during mediation.

Some of the initial submitters withdrew from the specific instance process due to disagreement with demands for confidentiality from the company. Some parties noted that the NCP could have been more active in resolving this issue and clarifying the confidentiality policy for the procedure as well as in explaining what happened with respect to this issue in the final statement for this specific instance.

<sup>27</sup> NCP Procedures Guide, para 11.3.

<sup>28</sup> Barrick Gold – Asia-Pacific and Mining Watch Canada (MWC) (2011)

Many stakeholders and parties to specific instances noted a preference for the use of external mediators. Some noted that it was unclear based on the NCP Procedures Guide when external mediation may be available. In the one case where mediation was led by the NCP the parties noted that the NCP was very professional and devoted a lot of time and attention to engaging the parties in dialogue. However one of the parties noted that they would have preferred to have worked with an external mediator.

The NCP has noted that it is looking to use external mediators more frequently. It is currently discussing the development of a memorandum of understanding (MOU) with the Federal Mediation and Conciliation Service (FMCS) of the federal Labour Program of Employment and Social Development Canada (ESDC). This department has a pool of professional mediators who mediate disputes under the Canada Labour Code for the federally regulated private sector. In order to promote predictability and to mitigate perceptions of lack of impartiality within certain stakeholder groups, the NCP could consider systematically offering the option of external mediation to parties to the specific instance.

NCP has also developed Terms of Reference templates for mediation which also include expectations around confidentiality. Parties, the NCP, and if relevant the mediator, are asked to sign Terms of Reference prior to the start of the dialogue or mediation.

In addition, in preparation for mediation the NCP and/or the mediator generally engage the parties separately in bilateral calls to set expectations and gauge any prospects for an agreement. The NCP notes that it has found it useful to ask both parties to provide a submission in writing stating their expected outcomes/objectives from the dialogue or mediation process. This information is shared with the other party in a spirit of transparency.

Out of the 17 closed specific instances handled by the NCP nine were accepted for further examination. Out of these:

- In four specific instances no mediation took place due to lack of willingness to participate in mediation by at least one of the parties.<sup>29</sup>
- In one specific instance mediation was not offered as it would not facilitate resolution of the issues, however the NCP is continuing to engage with the parties to promote the resolution of the issue.<sup>30</sup>
- In four specific instances mediation was conducted.<sup>31</sup> Out of these:
  - In two specific instance agreement was reached by the parties<sup>32</sup>

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<sup>29</sup> Ivanhoe Mines Ltd. and Canadian Labour Congress in Burma (2002); Ascendant Copper Corporation and Mining Watch Canada et. al. (2005); Goldcorp and Frente de Defensa San Miguelense (FREDEMI) et al. (2009); China Gold International Resources Corporation and Canada Tibet Committee (2014)

<sup>30</sup> Banro Corporation and Former employees of the Société Minière et Industrielle du Kivu (SOMINKI) (2016)

<sup>31</sup> First Quantum Minerals Ltd and Oxfam Canada (2001); Anvil Mining and Coalition of NGOs (2005); Barrick Gold Asia-Pacific and Mining Watch Canada (MWC) (2011); Endeavour Mining Corporation (2015)

<sup>32</sup> First Quantum Minerals Ltd and Oxfam Canada (2001); Barrick Gold Asia-Pacific and Mining Watch Canada (MWC) (2011)



- In one specific instance the procedure was concluded with agreement for parties to continue engagement directly.<sup>33</sup>
- In one specific instance the procedure was concluded without agreement by the parties but with some commitments and policy changes by the company.<sup>34</sup>

Parties to specific instances which were accepted for further examination noted various experiences with the process. Some noted that the staff of the NCP was helpful and skilled in handling the procedure and clearly and accurately explained the process. Others felt the process was unpredictable particularly with regard to timelines. In a recent specific instance the parties recognised that the NCP has demonstrated a high degree of professionalism and invested a high level of effort in trying to promote positive outcomes through the dialogue or other means. (See Boxes 3 and 4)

### **Box 3. Endeavour Mining and Labour Union**

On 19 May 2015, the NCP received a submission from a labour union alleging that Endeavour Mining, a Canadian Multinational Enterprise, improperly dismissed unionised employees and did not have adequate health and safety systems in place to protect some employees from exposure to harmful metals.

The NCP accepted the specific instance for further examination and offered to facilitate dialogue between the parties. An NCP-facilitated dialogue took place between September 2016 and March 2017 through video-conferencing. The NCP itself led the mediation between the parties.

While the dialogue did not result in a mutually agreeable solution between both parties as such, the process generated concrete positive outcomes in the form of a series of actions and commitments by Endeavour Mining, on both labour and health issues. Some of these actions were implemented proactively during the dialogue. The NCP made a series of recommendations to Endeavour and asked that Endeavour report in writing to the Canadian NCP by 1 July 2018 on: 1) its efforts to implement the NCP recommendations; and 2) how it has addressed and followed up on all the specific commitments the company made during the NCP dialogue. The NCP intends to issue a follow-up statement to reflect the company's actions and responses, as appropriate.

Both parties to the specific instance noted that the NCP was highly professional and organised in handling the specific instance and recognised the high level of time and energy spent on fostering dialogue. They also noted that the NCP acted impartially and equitable throughout the process.

<sup>33</sup> Anvil Mining and Coalition of NGOs (2005)

<sup>34</sup> Endeavour Mining Corporation (2015)

## *Reporting on specific instances*

### *Initial assessments*

If the NCP offers dialogue or mediation, it typically drafts an internal Initial Assessment document which is shared with parties for comment but is not published. The Initial Assessment can also take the form of a letter to the parties with the offer of good offices. The language from the Initial Assessment will generally be used in the Final Statement.

Some stakeholders have noted that the NCP's policy of not publishing the initial assessment contributes to a lack of transparency with respect to the process. The NCP has stated that it plans to begin publishing status updates on specific instances on its website. In this respect the NCP should consider publishing initial assessment to further rebuild trust and enhance transparency.

Some submitters of specific instances noted that language of initial assessment by the NCP undermined the position of the submitter by implying there was no breach of the Guidelines by the company or that the claims raised in a submission were without merit. The NCP should be clear that a decision not to accept a specific instance for further examination should not in principle be equated with a determination on the merits of the issues raised in the submission. In one case the final statement included language admonishing the submitter for breaching the confidentiality policy of the NCP and noting they would have to demonstrate their commitment to honour confidentiality before the NCP would consider another submission from them.<sup>35</sup>

### *Final statements*

The NCP Procedures Guide provides that the NCP consults both parties on the draft Final Statement for verification of facts however it has the discretion to decide whether or not to include comments from parties in the final version.

In line with the Procedural Guidance, the NCP Procedures Guide also provides that Final Statements may identify the parties concerned, the date on which the issue(s) were raised with the NCP, and any other observations the NCP deems appropriate. Furthermore, if the NCP determines that parties do not engage in good faith, consequences can be applied through the sanction and will be reflected in the Final Statement.

The NCP publishes Final Statements on its website. Final statements or summaries for specific instances handled prior to 2011 have been published for all specific instances handled by the NCP. Recommendations were included in 11 of the 17 published specific instances. An explicit determination was included in one specific instance<sup>36</sup> and an assessment of company conduct was included in several others.

The NCP has been making efforts to develop detailed and thorough final statements which include analysis and support of its decisions. This is a positive step towards maximizing transparency and demonstrating impartiality.

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<sup>35</sup> Sakto Group and Bruno Manser Fund (2016)

<sup>36</sup> China Gold International Resources Corporation and Canada Tibet Committee (2014)

### *Follow-up*

The NCP Procedures Guide provides that the NCP may request parties to report back to the NCP on their response to recommendations made by the NCP and the implementation of any agreement or commitments parties might have made during the proceedings. It notes that the Final Statement will indicate the timeframe for reporting back and that the NCP may issue a follow-up statement.

The NCP has noted that while active follow up has not been standard practice in specific instances, it is now taking steps to do so.

Recently, the NCP initiated follow up on its recommendations and requests included in a Final Statement on a specific instance involving Banro's activities in the Democratic Republic of the Congo. (See Box 4) The NCP also made recommendations to the Endeavour mining company in a specific instance it recently concluded and is asking for a follow-up submission by the company in 2018, after which the NCP will publish a follow up statement. (See Box 3)

Follow up activities have been welcomed by stakeholders and are broadly recognised as a useful tool for strengthening the impact of the specific instance mechanism. Publishing follow up statements can also serve as an additional tool for applying leverage to encourage the implementation of agreements between parties. The NCP has noted that it plans to publish follow up statements more systematically.

#### **Box 4. Banro and former Banro employees in the Democratic Republic of the Congo**

On 26 February 2016, a specific instance was submitted to the NCP by a group of five former employees of the Société Minière et Industrielle du Kivu (SOMINKI)) alleging that Banro Corporation had not observed the Guidelines in its operations in the DRC. More specifically, the submitters claimed that Banro failed to settle the final accounts of 4,987 former employees of SOMINKI following the creation of SAKIMA SARL (93% owned by Banro) in 1997 and transfer of SOMINKI's mining assets, namely, mining titles to SAKIMA.

The NCP concluded that the question of the liquidation of SOMINKI and the question of the payment of the final accounts of the ex-employees merited further examination. However it also concluded that offering facilitated dialogue only between Banro and the submitters without the presence of other key actors in the liquidation process (in particular the Government of DRC and the Liquidation Committee) would not facilitate the completion of the liquidation of SOMINKI.

In May 2017, the NCP released a final statement requesting that the company take action, in good faith, to reactivate the liquidation process. The NCP also asked that the company provide two written updates to the NCP 3 months and 6 months after the publication of the final statement. The NCP also recommended that Banro endorse and implement the OECD Guidelines and the OECD Due Diligence for Meaningful Stakeholder Engagement in the Extractive Sector.

The parties to this specific instance noted that the NCP clearly explained the process and has been active in handling the specific instance in an efficient and professional manner. The NCP is continuing to monitor the issue and intends to issue a follow-up statement to reflect the company's actions and responses, as appropriate, to the NCP's requests.

## Timeliness

The NCP Procedures Guide provides indicative timelines in line with the Procedural Guidance. Namely:

- Stage 1 – From receipt of the request for review 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).

It also notes that due to unforeseen circumstances beyond the control of the NCP, flexibility may be required on a case by case basis and various stages may take longer than anticipated.

Out of the 17 specific instances handled by the NCP initial assessment was concluded within approximately three months in one specific instance<sup>37</sup> and exceeded three months in 13 specific instances. Out of these 13 specific instances, initial assessment took over a year in four specific instances<sup>38</sup>. Data on the length of initial assessments is not available for three specific instances.<sup>39</sup>

Out of the 9 specific instances accepted for further examination three were concluded within a year,<sup>40</sup> and six were concluded in over a year.<sup>41</sup> Out of these one case took three years<sup>42</sup> and one took two years and nine months.<sup>43</sup>

According to the NCP it recently managed five concurrent specific instances, which led to a situation where the NCP was unable to meet the indicative timelines and where members of the NCP from other departments assisted as needed in the work of the NCP Secretariat.

Some parties to the specific instance procedure raised issues with the delays in certain cases. For example, in one specific instance parties noted that the process of selecting a mediator took over 9 months, significantly delaying the process. Delays in procedures are a common challenge amongst NCPs and in some situations can be attributed to time needed to sufficiently engage with parties, receive feedback or organise logistics related to transnational mediations. The NCP should provide explanations to parties where indicative timeframes cannot be respected to help to mitigate threats to the predictability and transparency of the process.

37 Anvil Mining and Coalition of NGOs (2005)

38 Kakanda Development Corporation and United Nations Panel of Experts (2002); Corriente Resources and FIDH (2013); Bruno Manser Fund (2016); Banro Corporation – Former employees of the Société Minière et Industrielle du Kivu (SOMINKI) (2016);

39 First Quantum Minerals Ltd and Oxfam Canada (2001); Ivanhoe Mines Ltd. and Canadian Labour Congress in Burma (2002); Ascendant Copper Corporation and Mining Watch Canada (2005)

40 First Quantum Minerals Ltd and Oxfam Canada (2001); Ascendant Copper Corporation and Mining Watch Canada (2005); Anvil Mining and Coalition of NGOs (2005)

41 Ivanhoe Mines Ltd. and Canadian Labour Congress in Burma (2002); Goldcorp and Frente de Defensa San Miguelense (2009); Barrick Gold and Mining Watch Canada (MWC) (2011); China Gold International Resources Corporation and Canada Tibet Committee (2014); Endeavour Mining Corporation (2015); Banro Corporation and Former employees of the Société Minière et Industrielle du Kivu (SOMINKI) (2016)

42 Ivanhoe Mines Ltd. and Canadian Labour Congress in Burma (2002)

43 Barrick Gold and Mining Watch Canada (MWC) (2011)

## Confidentiality and transparency

Under the NCP Procedures Guide, the NCP will generally share all relevant information that it receives from one party to a specific instance with the other party. The NCP may determine not to share certain information with the other party if it has been requested by a party with corresponding rationale.

Submitters must also state that they are aware of and consent to the fact that all information they provide to the NCP may be shared with the other party.

In line with the Procedural Guidance, the NCP Procedures Guide also notes that in order to facilitate resolution of the issues raised, the NCP will take appropriate steps to protect sensitive business and other personal information, such as the identity of the individuals involved. During an NCP process, confidentiality of the proceedings will be maintained, including the facts and arguments brought forward by the parties. At the conclusion of the process, if the parties involved in facilitated dialogue or mediation have not agreed on a resolution, they are free to communicate about and discuss the issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.

According to the NCP some assurance of confidentiality is necessary during the initial assessment phase as information may be being exchanged during this phase of the process. The NCP notes that submitters are free to publish their submissions and that this does not contravene the confidentiality policy.

The NCP has noted that it regularly encourages both sides to share information with one another to the extent possible to promote transparency and equitability. Some stakeholders noted occasions where they felt that the NCP did not sufficiently share information amongst the parties and noted that where information is used as the basis of a decision of the NCP it should be shared with both parties. The NCP should share information that is used to make a decision amongst parties to the extent possible. In this respect where valid confidentiality concerns exist with respect to information which is used as the basis of a decision of the NCP certain approaches such as redacting, summarising, or anonymising information, may be useful.

## Good faith participation

The NCP Procedural Guide notes that the NCP expects all parties to a specific instance to participate in good faith in the entire proceedings. Good faith is described as responding in a timely fashion, maintaining confidentiality, not misrepresenting the process, not threatening or taking reprisals against parties involved in the procedure, and genuinely engaging in the procedures with a view to finding a solution to the issues raised. Furthermore, it is noted that 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.

Additionally in the 2017 version of the NCP Procedural Guide new provisions were added which note that undertaking public campaigns related to a specific instance during the proceedings or disseminating NCP documents such as the NCP initial assessment or draft versions of the NCP Final Statement is not considered good faith behaviour and may constitute a confidentiality breach.

According to the NCP the new provisions do not constitute an outright ban on campaigning. The NCP notes that there is no strict definition of what may be considered “campaigning” and that this is considered on a case-by-case basis.

To date in one specific instance the submitters refused the NCP's offer of mediation due in part to a disagreement with the NCP's confidentiality policy.<sup>44</sup>

Several civil society and trade union stakeholders raised concerns about the NCP's campaigning policy and were particularly opposed to the new language added in the 2017 version of the NCP Procedural Guide noting that undertaking public campaigns related to a specific instance during proceedings is not considered good faith behaviour and may constitute a confidentiality breach. Several stakeholders noted that this policy contributed to the perceived opacity of the specific instance process and that revising it would be necessary to build trust and encourage certain stakeholders to utilise the specific instance mechanism.

The Procedural Guidance includes no explicit mention of campaigning. The NCP should ensure that its position on campaigning is predictable, equitable, (meaning the preferences and needs of both parties should be taken into account) and promotes transparency to the greatest extent possible.

In addition, the trade advocacy related 'sanction' was introduced in November 2014. As a result the NCP Procedural Guide now notes that 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 trade advocacy support and will mention it in the Final Statement. 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 EDC.

To date this sanction has been invoked in one specific instance due to a failure of the company to engage in the specific instance process in good faith.<sup>45</sup>

The NCP has noted that the availability of the sanction has been very useful in encouraging companies to participate in the specific instance process. In addition to the application of the sanction for failure to engage in good faith the NCP is also considering how the sanction may be applied in situations where agreements made within a specific instance proceeding are not implemented.

As noted above while many stakeholders welcomed the sanction tool and recognised its usefulness in strengthening the specific instance mechanism, there seemed to be a lack of understanding of its scope and when it may or has been applied. For example in one specific instance where the sanction had been invoked, some stakeholders believed that the final statement for the specific instance had been deliberately drafted to *avoid* application of the sanction. With this in mind, as noted above, the NCP should make efforts to clearly communicate on the scope and application of the sanction with stakeholders, and in particular with parties to a specific instance.

## Parallel proceedings

The NCP Procedural Guide does not include specific provisions on the impact of parallel proceedings on the specific instance process aside from stating generally that it will take into account how similar issues have been, or are being, treated in other domestic or international proceedings. (See above). The NCP should consider adding language to its

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<sup>44</sup> Ascendant Copper Corporation and Mining Watch Canada (MW) (2005);

<sup>45</sup> China Gold International Resources Corporation and Canada Tibet Committee (2014);

Procedural Guide, aligned with the Procedural Guidance, which makes it clear that the NCP should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.<sup>46</sup> The NCP did not accept a specific instance for further examination on the basis of parallel proceedings in one instance.<sup>47</sup>

## Cooperation with other NCPs

The NCP Procedural Guide provides that multi-jurisdictional specific instances that involve cooperation with NCPs of other countries will be dealt with on a case by case basis. In such cases, normally one of the NCPs will assume the lead with respect to the processing of the specific instance. Other NCP(s) may act as supporting NCPs to the lead NCP.

NCP has supported other NCPs in ten cases, involving mainly Canadian mining companies but also foreign multinationals with activities in Canada<sup>48</sup>.

Findings	Recommendations
3.1 Some stakeholders participating in the peer review noted that the requirements for substantiation were unclear and that the NCP's application of the initial assessment criteria was onerous.	The NCP should offer assistance and work with submitters to further substantiate their claims or reformulate submissions where necessary to allow for them to be accepted for further examination. Additionally, substantiation requirements and evidentiary thresholds should be clearly explained to submitters in the NCP's rules of procedure and ensure accessibility.
3.2 Several civil society and trade union stakeholders raised concerns about the NCP's campaigning policy and noted that revising it would be necessary to build trust and encourage certain stakeholders to utilise the specific instance mechanism.	The NCP should ensure that its policy on campaigning is predictable, equitable (meaning the preferences and needs of both parties should be taken into account), and promotes transparency to the greatest extent possible.
3.3 Some submitters of specific instances noted that language in some initial assessment by the NCP undermined the position of the submitter by implying there was no breach of the Guidelines by the company or that the claims raised in a submission were without merit.	The NCP should be clear that a decision not to accept a specific instance for further examination during initial assessment should not in principle be equated with a determination on the merits of the issues raised in the submission.
3.4 Some stakeholders see the specific instance process as lacking in transparency, predictability and impartiality.	In order to further improve the mechanism and build trust amongst potential submitters, the NCP should enhance transparency with respect to the specific instance process. This may involve publishing initial assessments, communicating and providing explanations to parties when timelines cannot be respected, sharing the information used to make a decision amongst both parties where possible and clearly explaining the rationale for deciding whether to accept (or not accept) specific instances for further examination in statements.

<sup>46</sup> OECD Guidelines for Multinational Enterprises (2011), Commentary on Procedural Guidance para 25

<sup>47</sup> BATA and Trade Union (2005)

<sup>48</sup> Pobal Chill Chomain Community et al. vs. Shell (Irish and Dutch NCP, 2008); Hotel industry in Benin and Canada (French NCP, 2010); ForUM and Friends of the Earth Norway vs Cernaq ASA (Norwegian NCP, 2011); First Quantum Minerals Ltd and Glencore (Swiss NCP, 2011); Norwegian Climate Network et al vs Statoil (Norwegian NCP, 2011); Mining sector in Argentina (Argentinian NCP, 2011); Mining in Mexico (Mexican NCP, 2012); United Steel Workers International Union and Birllesik Metal-Iscileri Sendikasi and Crown Holdings, Inc. (US NCP, 2014); Kinross Brasil Mineração and Paracatu neighbouring associations (Brazilian NCP, 2013); Tech Resources Chile and Mining union QUEBRADA BLANCA (Chilean NCP, 2017);



## Annex A. List of organisations which responded to the NCP peer review questionnaire

<b>Civil Society Organisations</b>
Above Ground
Amnesty International
Akali Tange Association (Papua New Guinea)
Bruno Manser Fund (Switzerland)
Banro (SOMINKI) Notifier (Democratic Republic of Congo)
Canadian International Resources and Development Institute (CIRDI)
Canadian Network for Corporate Accountability (CNCA)
Canada Tibet Committee
Inter Pares
Mining Watch
OECD Watch
Oyu Tolgoi Watch
Oxfam Canada
Porgera Landowners Association (Papua New Guinea)
Environmental Defenders Organization
Assembly of First Nations
Schulich School of Law, Dalhousie University
<b>Labour organisations</b>
Canadian Labour Congress
United Steelworkers
International Trade Union Confederation
Lucien Royer
Fédération nationale des Mines et de l'Énergie (Mali)
<b>Government Organisations</b>
Global Affairs Canada
Export Development Canada
Public Services and Procurement Canada
Canadian Commercial Corporation
<b>Business Representatives</b>
Barrick Gold Corporation
Endeavour Mining
Global Compact Network Canada
The Mining Association of Canada

## Annex B. List of organisations participating in the on-site visit

<b>Civil Society Organizations</b>
Canadian Network for Corporate Accountability
Canada Tibet Committee
Inter Pares
Assembly of First Nations
Mining Watch Canada
UNICEF Canada
OECD Watch
Canadian International Resources and Development Institute
Saint Paul University
<b>Labour Organizations</b>
Canadian Labour Congress
United Steelworkers
TUAC-OECD
<b>Business Representatives</b>
Mining Association of Canada
Goldcorp Incorporated
Facili Tech International
Kinross Gold Corporation
Global Compact Network Canada
Barrick Gold Corporation
Fasken Martineau
SNC Lavalin
Prospectors & Developers Association of Canada
Loblaw Companies Limited

## Annex C. Promotional activities 2017

### NCP-organised and co-organised events to promote the Guidelines and/or the NCP

<b>Title</b>	<b>Date</b> (dd/mm/yyyy)	<b>Location</b>	<b>Type of event</b>	<b>Size of audience</b>	<b>Organised or co-organised?</b>	<b>Targeted audience</b> <i>e.g. Business representatives, NGOs, Trade unions, Academia, General public, Government representatives, etc.</i>	<b>Theme</b> <i>e.g. the OECD Guidelines, the NCP activities on sector due diligence guidance documents, etc.</i>
Signature of GAC/NCP Partnership with Global Compact Network Canada	Summer 2017	Ottawa, Toronto	Other	<10	Co-organised	Business representatives and other stakeholders	OECD Guidelines, sectoral Due Diligence guidance documents
Hot Topic Session with SHIFT on "The Responsibility of Financial Institution to respect Human Rights"	29/09/2017	Ottawa	Conference	50-100	Co-organised	Business representatives, Government representatives, NGOs	OECD Guidelines, Due Diligence guidance documents
"Evolving ESG Due Diligence in the Mining Sector Workshop" Webinar	20/11/2017	Toronto	Webinar	10-50	Co-organised	Business representatives, NGOs and other stakeholders	OECD Guidelines, Due Diligence guidance documents
"Evolving ESG Due Diligence in the Financial Sector Workshop" Webinar	21/11/2017	Toronto	Webinar	10-50	Co-organised	Business representatives, NGOs and other stakeholders	OECD Guidelines, Due Diligence guidance documents
Special Session of the Federal/Provincial/Territorial Working Group on CSR by videoconference	23/11/2017	Ottawa and other provinces	Conference	<10	Organised	Government representatives	OECD Guidelines, NCP
NCP Meeting with Social Partners (3)	19/12/2017	Ottawa	Meeting	<10	Organised	Business representatives, Labour organizations	CSR, NCP, OECD Guidelines

### Presentations by the NCP to promote the Guidelines and/or the NCP in events organised by others

Title	Date (dd/mm/yyyy)	Location	Type of event	Size of audience	Targeted audience e.g. Business representatives, NGOs, Trade unions, Academia, General public, Government representatives, etc	Organiser(s)	Type of intervention	Theme of the intervention
Seminar on Business and Human Rights - McGill University Faculty of Law	13/02/2017	Montreal	Conference	10-50	Academia	McGill University Faculty of Law and Global affairs Canada	Presentation	Business and Human Rights
GAC-PDAC-AMEBC Workshop on SE	08/03/2017	Toronto	Conference	10-50	Business representatives, Government representatives	Business representatives	OECD Guidelines, NCP, CSR	GAC-PDAC-AMEBC Workshop on SE
Trade Commissioners Training Session at PDAC Convention	05/03/2017	Toronto	Conference	50-100	Government representatives	PDAC and Global Affairs Canada	Presentation	CSR, OECD Guidelines, NCP
Promoting CSR – Bogota presentation by videoconference	09/06/2017	Ottawa, Bogota	Conference	10-50	Business representatives, Government representatives	Global Affairs Canada and the Canadian-Colombia Chamber of Commerce	Presentation	NCP, OECD Guidelines, CSR
Trade Commissioners' Training Session	12/06/2017	Gatineau	Conference	10-50	Government representatives	Global Affairs Canada	Presentation	CSR, NCP, OECD Guidelines
Presentation on NCP at GAC with GCNC - Webinar	17/07/2017	Ottawa	Conference	10-50	Government representatives, Business representatives, NGOs	Global Affairs Canada and Global Compact Network Canada	Presentation	NCP, OECD Guidelines
NCP Chair testimony - Canada's House of Commons' Subcommittee on International Human Rights (Standing Committee on Foreign Affairs and International Development)	26/09/2017	Ottawa	Other	10-50	Academia, Government representatives, Business representatives, general public	House of Commons - Subcommittee on International Human Rights (Standing Committee on Foreign Affairs and International Development)	Presentation	NCP, Human Rights
CSR Speaker Series	11/10/2017	Toronto	Conference	10-50	Academia, Government representatives, Business representatives, general public	Ryerson University	Presentation	NCP, OECD Guidelines

<b>Title</b>	<b>Date</b> (dd/mm/yyyy)	<b>Location</b>	<b>Type of event</b>	<b>Size of audience</b>	<b>Targeted audience</b> <i>e.g. Business representatives, NGOs, Trade unions, Academia, General public, Government representatives, etc</i>	<b>Organiser(s)</b>	<b>Type of intervention</b>	<b>Theme of the intervention</b>
Fifty (50) RBC/CSR promotional activities through Canadian foreign missions in various regions (funded from GAC CSR Fund).	2017	Canadian Missions abroad	<b>Conference</b>	<b>varied</b>	Varied audience (Government representatives, Business representatives, general public)	Canadian Missions abroad	Seminars, meetings	CSR, RBC, NCP, OECD Guidelines

## Annex D. Overview of specific instances handled by the Canadian NCP as the leading NCP

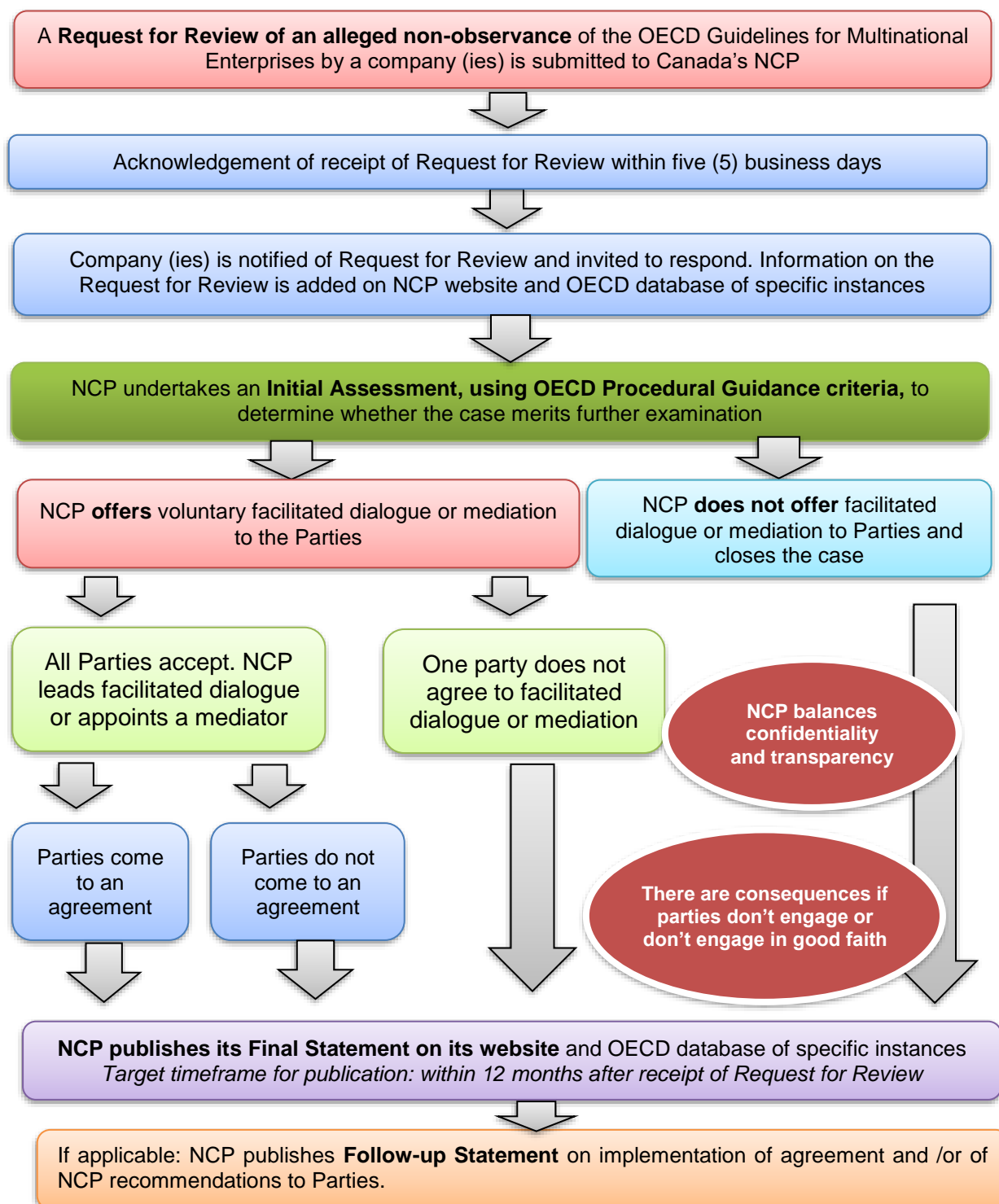
	Enterprise	Submitter	Host country	Chapter of the Guidelines	Date of submission	Date of closure	Outcome
1	First Quantum Minerals Ltd	Oxfam Canada	Zambia	Environment, General Policies	2 July 2001	October 2001	Concluded with agreement.
2	Ivanhoe Mines Ltd.	Canadian Labour Congress in Burma	Myanmar	Employment and industrial relations, Environment	1 November 2002	February 2006	Concluded without agreement due to lack of willingness to participate in the process by both parties.
3	Kakanda Development Corporation	United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Riches in the Democratic Republic of Congo (DRC)	Democratic Republic of the Congo	General policies	2 December 2002	June 2004	Not accepted for further examination because the company was no longer linked to the impact.
4	UPM Kymmene	Communications, Energy and Paper Workers Union of Canada	Canada	Employment and industrial relations	29 November 2004	November 2005	Not accepted for further examination because another avenue that was already being pursued was deemed more appropriate to resolve the dispute.
5	BATA	International Textile, Garment and Leather Workers Federation	Sri Lanka	Employment and industrial relations	05 January 2005	November 2005	Not accepted for further examination because the issue was being dealt with in a separate venue.
6	Ascendant Copper Corporation	Mining Watch Canada (MW), Friends of the Earth Canada (FoE) and DECOIN (Defensa y Conservacion Ecologica de Intag)	Ecuador	Concepts and principles, Disclosure, Environment, General Policies	16 May 2005	January 2006	Concluded without agreement as offer of mediation was refused by submitter due to disagreement with NCP confidentiality policy.
7	Anvil Mining	Coalition of NGOs	Democratic Republic of the Congo	General policies	01 August 2005	November 2005	Concluded with agreement by parties to continue engagement directly.

	Enterprise	Submitter	Host country		Chapter of the Guidelines	Date of submission	Date of closure	Outcome
8	Goldcorp	Frente de Defensa San Miguelense (FREDEMI) and Centre for International Environmental Law (CIEL)	Guatemala		General policies	09 December 2009	03 May 2011	Concluded without agreement as offer of mediation was refused by submitter due to their view that dialogue would not achieve their objectives.
9	Ivanhoe Mines Ltd.	Oyu Tolgoi Watch	Mongolia		Environment, General Policies	01 April 2010	3 May 2011	Not accepted for further examination because allegations were deemed material but not substantiated. The NCP offered to facilitate an on-going dialogue between the parties.
10	Barrick Gold	Asia-Pacific Program Coordinator of Mining Watch Canada (MWC), Porgera Special Mine Lease (SML) Landowners Association (PLOA), and Akali Tange Association (ATA)	Papua Guinea	New	Disclosure, Environment, General Policies	03 March 2011	16 January 2014	Concluded with agreement by the parties.
11	Centerra Gold Inc.	United Mongolian Movement of Rivers and Lakes (UMMRL), Oyu Tolgoi Watch (OT Watch), and MiningWatch Canada	Mongolia		Concepts and principles, General Policies, Human rights, Environment	14 March 2012	02 November 2012	Not accepted for further examination because some issues raised were not deemed to be material and/or substantiated, and lack of good faith engagement by the submitter.
12	Corriente Resources	International Federation for Human Rights (FIDH), the Ecumenical Human Rights Commission of Ecuador (CEDHU), and MiningWatch Canada	Ecuador		Concepts and principles, Environment, General policies, Human rights	25 July 2013	28 July 2014	Not accepted for further examination because the issues raised were not deemed to be material and/or substantiated.
13	China Gold International Resources Corporation	Canada Tibet Committee	People's Republic of China		Concepts and principles, Disclosure, Employment and Industrial relations, Environment, General Policies, Human rights	28 January 2014	08 April 2015	Concluded without agreement as the company refused to engage in mediation.

	Enterprise	Submitter	Host country	Chapter of the Guidelines	Date of submission	Date of closure	Outcome
14	Endeavour Corporation	Mining	Mali	Concepts and principles, General policies	19 May 2015	24 October 2017	Concluded without agreement by the parties but with some commitments and policy changes by the company.
15	Sakto Group	Bruno Manser Fund	Canada	Disclosure	11 January 2016	11 July 2017	Not accepted for further examination as it would not contribute to the purposes and effectiveness of the Guidelines.
16	Banro Corporation	Former employees of the Société Minière et Industrielle du Kivu (SOMINKI)	Democratic Republic of the Congo	General policies	26 February 2016	25 May 2017	Concluded without mediation as the NCP could not facilitate resolution of the issues without other relevant parties being involved in the process. Specific request made by the NCP to the company and NCP committed to follow up.
17	Seabridge Gold	Southeast Alaska Conservation Council (SEACC)	Canada	Disclosure, General Policies, Environment, and Human Rights	23 December 2016	13 November 2017	Not accepted for further examination as the company was deemed to have complied with the expectations of the Guidelines.



### Annex E. Canadian national contact point process flowchart



## ANNEX 6. STANDARD TEMPLATE FOR MEDIATION TERMS OF REFERENCE



Date:

# Agreement for Mediation/Facilitated Dialogue

Name of Notifier (s)

Name of Company (s)

(each a **Party** and together **the Parties**)

and

**Mediator/Facilitator**

Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises

### Details

#### Parties

Name:

Short form name:

Notice details:

Name:

Short form name:

Notice details:

#### Mediator

Name:

Short form name:

Notice details:

## **Observer**

Name: Canadian National Contact Point  
 Short form name: **NCP**  
 Notice details: 125 Sussex Drive, Ottawa, Ontario, Canada, K1A 0G2  
 Phone: +1-343-203-2341  
 Email: ncp.pcn@international.gc.ca

## **Background**

A Disputes have arisen between the Parties (**Dispute**), which are briefly but not exhaustively described in the NCP's Initial Assessment in Annex.

B The Parties agreed to the NCP's offer of its good offices of mediation for resolution of the issues described in the Initial Assessment (Annex). The terms and conditions of this Dialogue Facilitation, outlined in this document, are designed to assist the Parties reach their own resolution of the Dispute.

C The Parties record their agreement to be bound by the terms and conditions of this agreement, consistent with the policy of encouraging disputants to settle their differences rather than litigate.

D The term "**mediation**<sup>49</sup>" refers to all steps undertaken by the Parties and the NCP, whether prior or subsequent to the execution of this agreement, in an attempt to resolve the Dispute.

## **Agreed Terms**

### **1. Objective**

- 1.1. The NCP has offered its good offices for mediation to assist with resolving this Dispute. Both Parties have accepted the NCP's good offices for mediation.
- 1.2. The objective of this mediation is to contribute to the resolution of the issues raised by the X and described in the Initial Assessment by the NCP (in Annex) on the conduct of Company X related to XYZ. The aim is to improve the understanding of the respective parties' context, activities and positions and to explore, develop and agree to actions to help find resolution of the issues.

### **2. Role of the Canadian National Contact Point**

- 2.1. The mediation process will be facilitated by a professional mediator retained by the NCP with the agreement of the Parties.
- 2.2. The NCP will be an observer of the mediation.
- 2.3. The NCP will not impose decisions on the Parties.

### **3. Language**

- 3.1. Unless otherwise agreed, the language of the mediation will be English.

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<sup>49</sup> The term mediation would be replaced with "facilitated dialogue" if the process is not undertaken by an accredited mediator.

- 3.2. The NCP can provide interpretation services for English to French and French to English for the Parties, if requested by a Party.

#### 4. Date, Time and Place of Mediation

- 4.1. The mediation will take place as soon as is reasonably practicable after the parties have signed this agreement and complied with any direction given by the NCP under this agreement.
- 4.2. The mediation shall be fixed for a date, time and location agreeable to the Parties and the NCP. Video conferencing will be available during the mediation process.
- 4.3. In the event that the Parties cannot agree on the location, the NCP will nominate the location. The Parties agree to be bound by its decision.

#### 5. Mediation Process

- 5.1. Each Party agrees to:
  - 5.1.1. participate constructively and in good-faith in the mediation;
  - 5.1.2. co-operate with the mediator and each other Party in the conduct of the mediation; and
  - 5.1.3. use its best efforts to comply with requests made by the mediator to promote the efficient resolution of the Dispute.

#### 6. Communication and Meetings Between the Mediator and the Parties

- 6.1. The mediator may communicate with the Parties orally or in writing.
- 6.2. The mediator may meet with the Parties together (**General Sessions**), in groups of Parties or with any Party alone (collectively **Private Sessions**) as frequently as it deems necessary.

#### 7. Conduct of Mediation

- 7.1. The mediation, including all preliminary steps, shall be conducted in such manner as the mediator considers appropriate having reference to the views of the Parties as to the manner in which the mediation should be conducted, and the mediator may give directions as to:
  - 7.1.1. the holding of preliminary conferences which may include Private Sessions;
  - 7.1.2. the exchange of written outlines of the views of the Parties on the issues raised by the Dispute;
  - 7.1.3. any other matter ancillary to the conduct of the mediation.

#### 8. Authority and Representation

- 8.1. Each Party may be represented during the mediation by a person or persons having, or able during the course of the dialogue, to obtain authority to settle Dispute.
- 8.2. If requested by the mediator at any time, a person appearing as a representative of a Party shall produce written proof of their representative authority.

#### 9. Outcome of Mediation

- 9.1. If the mediation resolves the Dispute, in full or in part, the Parties must record their agreement (the **Settlement Agreement**) in writing. The Mediator will draft the Settlement Agreement. Parties will review and sign the formal Settlement Agreement. If settlement is reached, a hand

written document reflecting the terms of the agreement will be prepared immediately and initialed by each Party (if necessary fax/scanning facilities will be used).

- 9.2. The NCP will retain a fully executed copy of the Settlement Agreement.
- 9.3. Through the Settlement Agreement, the Parties may request that the NCP follow up with the Parties on their implementation of the Settlement Agreement. The NCP and the Parties will discuss the manner and time frame of this follow up, and the final decision on whether to conduct follow-up will reside with the NCP's discretion.
- 9.4. Regardless of whether an agreement is reached between the Parties, the NCP will issue and publish a Final Statement at the end of the proceedings and after consultation with the parties involved, in accordance with Canada's NCP Procedures Guide. The NCP will take into account the need to protect sensitive business and other stakeholder information. If there is a Settlement Agreement, it may be considered by the NCP in the preparation of its Final Statement. In accordance with both Parties, key results of the dialogue can be incorporated in the NCP Final Statement.
- 9.5. At the discretion of the NCP, through the NCP's recommendations in the NCP Final Statement, the NCP may request that the Parties follow-up with the NCP within a given timeframe to monitor the implementation of the Settlement Agreement.
- 9.6. If the mediation does not resolve the Dispute, this agreement and the mediation will not affect the rights of any Parties

## 10. Confidentiality<sup>50</sup>

- 10.1. Any persons other than the Parties and the Mediator (including legally qualified persons) permitted to attend the mediation for the purposes of assisting and/or advising a Party shall sign an acknowledgement and undertaking as to confidentiality.
- 10.2. The Mediator and each Party agree, in relation to all confidential information relating to the Dispute disclosed by any of them during the mediation:
  - (i) to keep confidential that information;
  - (ii) not to disclose that information, except to a Party or other person authorised in writing by the disclosing Party, or if compelled by law to do so; and
  - (iii) not to use that information for a purpose other than the mediation.
- 10.3. Each Party and the Mediator agree that information and documents relating to the mediation including, but not limited to:
  - (i) any settlement proposal made by a Party or the Mediator;
  - (ii) the fact that a Party is willing to consider a settlement proposal;
  - (iii) any admission made by a Party; and
  - (iv) any statement or document made by the Mediator is privileged, confidential and without prejudice and must not be disclosed or used in any arbitral or judicial proceedings relating to the Dispute.
- 10.4. The Parties acknowledge that clause 10.2 and 10.3 have no application to information and documents already in the public domain.
- 10.5. If the provisions in this section were to be breached by a Party, the NCP will immediately discontinue the proceedings and indicate the reason in its Final Statement.

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<sup>50</sup> Parties also sign a separate confidentiality undertaking

- 10.6. Subject to the procedural and evidential requirements of any enforcement proceedings, in any arbitral or judicial proceedings, unless the parties otherwise agree, the following will at all times be kept confidential and will be privileged, and the Parties will not compel the Mediator to disclose nor rely upon them nor issue nor cause to be issued any subpoena to give evidence or to produce documents concerning them:
- (i) any settlement proposal;
  - (ii) the willingness of a Party to consider any such proposal;
  - (iii) any statement, admission or concession made by a Party;
  - (iv) any statement or document made by the Mediator; and,
  - (v) any document created or brought into existence by a Party for the purpose of the mediation.

## 11. Termination of Mediation

- 11.1. A Party may withdraw from the mediation at any time by giving written notice to each other Party and the NCP.
- 11.2. The execution of the Settlement Agreement in respect of the Dispute will also have the effect of terminating the mediation.
- 11.3. Throughout the mediation process, the NCP will continuously assess progress and the value of continuing the dialogue. If the NCP believes the mediation is no longer productive or should, in its opinion, be terminated, the NCP may terminate the mediation by giving written notice to each Party.
- 11.4. As per the Government of Canada's Corporate Social Responsibility Strategy *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility (CSR) in Canada's Extractive Sector Abroad* (appended to the NCP Initial Assessment in Annex), measures are in place in case of non-participation in the NCP process. Parties may face withdrawal of Trade Commissioner Service and other Government of Canada advocacy support abroad for non-participation in the dialogue facilitation processes of the NCP. Canadian companies who refuse to participate in dispute resolution processes may no longer benefit from economic diplomacy (issuance of letter of support; advocacy efforts in foreign markets and participation in Government of Canada trade missions). This will also be taken into account in the CSR-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.

## 12. Exclusion of liability and indemnity

- 12.1. The parties agree that the Government of Canada, its employees and agents are not liable for any damages or losses suffered directly or indirectly by any Party arising in any way out of any act or omission by the Government of Canada in any manner in relation to the facilitated dialogue. The Parties agree that this section is a complete bar to any legal proceedings in any jurisdiction against the Government of Canada and its employees and agents in connection with the mediation and/or the operation of this agreement.
- 12.2. The Parties jointly and each of them severally indemnify the NCP as Mediator against all claims arising out of or in any way referable to any act or omission by him in the performance of his obligations under this agreement save for acts or omissions resulting from fraud.

**Signatures:**

Notifier:

Witness:

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.....

Company:

Witness

.....

.....

Mediator:

Witness:

.....

.....

## Standard Non-disclosure Agreement Template for Mediation

### MEDIATION/FACILITATED DIALOGUE CONFIDENTIALITY AGREEMENT

#### PARTIES:

XXX

XXX

#### FACILITATOR<sup>51</sup>:

XXX

1. In order to promote honest and candid communication among the parties and the facilitator (Facilitator), and to facilitate resolution of the dispute, the parties, their counsel and representatives, and the Facilitator, hereby enter into this Confidentiality Agreement (Agreement).
2. This Agreement governs all aspects of the Facilitated Dialogue process (Dialogue), including those that pre-date the execution of this Agreement, including, but not limited to, the convening of the Dialogue, all phone calls, correspondence, e-mail and other documents relating to the Dialogue, all person to person meetings, site visits, or conferences of any kind, and any post-DIALOGUE communications or conferences relating to the Dialogue.
3. All statements made during the course of the Dialogue are privileged settlement discussions, are made without prejudice to any party's legal position, and are non-discoverable and inadmissible for any purpose in any later legal or administrative proceeding whatsoever. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during the Dialogue.
4. The privileged character of any information is not altered by disclosure to the Facilitator. Disclosure of any records, reports, or other documents received or prepared for or by the Facilitator cannot be compelled. The Facilitator shall not be subpoenaed or otherwise compelled to testify in any later proceedings, including, but not limited to civil, criminal, and administrative proceedings, and shall not be required to produce any notes or documents, as to any aspect of the dispute that was the subject of the facilitation proceedings or was otherwise communicated to the Facilitator in confidence.
5. No aspect of the Dialogue shall be relied upon or introduced in the evidence in any legal, administrative or other proceedings, including but not limited to: (a) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (b) admissions made in the course of the Dialogue; (c) proposals made or views expressed by the Facilitator or the response of any party, and (d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Facilitator.
6. The parties further agree that confidentiality does not apply to any executed settlement document unless the parties explicitly stipulate that the terms of settlement are to remain confidential. However, should the settlement agreement be required as proof in a proceeding to enforce the terms of

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<sup>51</sup> The term "Mediation" would replace facilitated dialogue if the process is undertaken by a certified mediator. Similarly, the term "Mediator" would replace "Facilitator".



settlement, such settlement agreement shall no longer have the privilege of confidentiality and may be introduced into evidence.

7. Because the parties are disclosing sensitive information in reliance upon this privilege of confidentiality, it is acknowledged and understood that any breach of this Agreement could cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such confidential information in violation of this Agreement. Any party breaching the Agreement may be liable for and shall indemnify the non-breaching parties and the Facilitator for all costs, expenses, liabilities, and fees, including legal fees, which may be incurred as a result of such breach.

8. The parties understand and acknowledge the following with respect to the Dialogue:

- a) The Facilitator is free to meet and communicate separately with each party both before and during the Dialogue. Such private caucuses are very beneficial in facilitating a resolution of the dispute.
- b) The Facilitator reserves the right to share information learned in the private caucuses with the opposing party if the Facilitator believes that such information will facilitate a resolution of the dispute. However, should a party divulge certain information that they do not want the opposing party to know, such party will clearly inform the Facilitator that such information is to be held in strict confidence and not to be shared with the opposing party.
- c) The Facilitator is a neutral party who will not act as an advocate for any party during the course of the mediation. Though the Facilitator may freely express his views to the parties on the issues of the dispute and a settlement proposal if such appears beneficial to the resolution of the case, the Facilitator does not have a solicitor or attorney-client relationship with any of the parties.
- d) All parties in the Dialogue shall be bound by the terms of this Agreement and are required to sign this Agreement as a condition to their participation in the Dialogue.

**XXX :**

Name of representative:

Signature:

**XXX :**

Name of representative :

Signature

**Signature of facilitator :**

# National Contact Point Peer Reviews: Canada

Adhering governments to the OECD Guidelines for Multinational Enterprises are required to set up a National Contact Point (NCP) that functions in a visible, accessible, transparent and accountable manner.

This report contains a peer review of the Canadian NCP, mapping its strengths and accomplishments and also identifying opportunities for improvement.

[mneguidelines.oecd.org](http://mneguidelines.oecd.org)

