

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

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Subject

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

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1 Executive summary

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

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

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

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

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

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

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

2 Investment Committee’s jurisdiction to consider this submission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On 11 July 2017, the NCP published a [Final Statement](#) ("July 2017 first Final Statement") closing the complaint. It chastised BMF for sharing the substance of the draft Initial Assessment via its April release, but also revealed the legal and political pressure the Sakto group of companies had placed on the NCP, including "Sakto involving a Member of Parliament during the confidential NCP assessment process; (...) Sakto's aggressive challenge of the NCP's jurisdiction; (...) Sakto's legal counsel making submissions to the Government of Canada's Deputy Minister of Justice..." (p. 7). The Canadian NCP's July 2017 first Final Statement confirmed BMF's suspicion that the NCP had received undue pressure from the company.

³ Non-public correspondence, available upon request.

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

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

⁶ Non-public correspondence, available upon request.

⁷ Non-public correspondence, available upon request.

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

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

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

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

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

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

⁸ Non-Public correspondence, available upon request.

⁹ Non-public correspondence, available upon request.

¹⁰ Non-public correspondence, available upon request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷ Non-public correspondence, available upon request.

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

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

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

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

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

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

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

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

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

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

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

The OECD Guidelines recognize the relationship between transparency and accountability: “Transparency is an important criterion with respect to its contribution to the accountability of the NCP.”¹⁹

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The lack of stakeholder confidence in the Canadian NCP was also observed by the NCP’s peer reviewers in 2019. The peer reviewers asserted: “there is a lack of confidence and trust in the NCP amongst some civil society and trade union stakeholders. Rebuilding this trust and ensuring continued coherence on RBC across the government of Canada will be central to ensuring the effectiveness of the NCP going forward.”²⁴ One of the finding of the reviewers was that “A lack of formal involvement of social partners and external stakeholders in the NCP’s governance arrangements contributes to the perception of lack of impartiality with respect to the NCP.”²⁵ Unlike business and labour counterparts, civil society is not included among the NCP’s official social partners, and despite numerous requests that this be changed, the NCP has to date failed to establish this formal role for civil society. These failings have also contributed to civil society’s lack of confidence in the NCP itself.

6 Requested actions

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

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

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

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

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

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

6.1 Requests of the Investment Committee

OECD Watch requests that the Investment Committee:

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

6.2 Requests of the Canadian NCP

OECD Watch requests that the Canadian NCP:

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

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

7 Conclusion

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

8 Annex: Timeline

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

2016

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

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