

# National Contact Point of Switzerland

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## Final Statement

### Specific Instance regarding taxation policy by Mopani Copper Mines Plc. and Glencore International AG and First Quantum Minerals Ltd. in Zambia

Berne, 28 November 2012

#### Background

1. The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are voluntary principles and standards for responsible business conduct, addressed as recommendations by the governments of the 34 OECD member and 10 other adhering states to multinational enterprises operating in or from their territories. The National Contact Point of Switzerland (NCP) for the OECD Guidelines has the mandate to raise awareness and promote observance of the Guidelines. The NCP also contributes to the resolution of issues that arise relating to the implementation of the OECD Guidelines in specific instances by offering a forum for discussion and assisting parties concerned to deal with these issues.

#### Proceeding of the NCP

2. The NCPs of Switzerland and Canada received a written request for review dated on April 12, 2011 to consider a specific instance under the OECD Guidelines regarding the possible violation of Chapter II (General Policies) and Chapter X (Taxation) of the Guidelines, involving the Zambian extractive enterprise Mopani Copper Mines Plc. [Mopani] and its majority owner, the Swiss enterprise Glencore International AG [Glencore], as well as a minority owner, the Canadian enterprise First Quantum Minerals Ltd. ["First Quantum"]. The Government of Zambia is also a minority owner of Mopani. Glencore is the manager and operator of Mopani.
3. The specific instance has been raised by a coalition of five Non-Governmental Organizations ["the NGOs"]: Declaration of Berne (Switzerland); SHERPA (France); MiningWatch Canada; L'Entraide missionnaire (Canada); and The Centre for Trade Policy and Development CTPD (Zambia).
4. The concerns raised in the submission are related to tax payments of Mopani. Based on a leaked draft report by the auditing firms Grant Thornton and Econ Pöyry, the NGOs claimed that Mopani is resorting to various techniques in order to transfer taxable revenues out of Zambian territory and to avoid paying taxes in Zambia. This draft report has not been endorsed by its authors Grant Thornton and Econ Pöyry and a final version of the report has not been published.

Based on this report, the NGOs made the following allegations:

- That Mopani overestimates its operating costs with respect to comparable mining companies operating in Zambia. As an example, the high transport costs imposed by Glencore on Mopani are mentioned. Citing the above-mentioned draft report, the NGOs also claim that numerous expenses lacked the appropriate documentation, and multiple discrepancies in the accounting books and financial statements could not be adequately explained.
  - That Mopani underestimates its production volumes: extensive revenue analysis allegedly reveals that cobalt extraction is half of the extraction of other producers in the same area.
  - That the enterprise manipulates transfer pricing and breaches the OECD “arm’s length principle”. The NGOs claim that minerals are allegedly sold to Glencore under conditions that would not apply to a third-party buyer. According to the above-mentioned draft report, the hedging strategy used by Mopani appeared to be incoherent and the selling price of Mopani’s copper and cobalt was consistently below the prices set by the London Metal Exchange (LME).
5. In their submission, the NGOs claimed noncompliance of the enterprise with the following chapters of the OECD Guidelines (version 2000):

#### Chapter II: General Policies

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:*

- *1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.*
- [...]*
- *5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labor, taxation, financial incentives, or other issues.*
- *6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.*

#### Chapter X: Taxation

*It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm’s length principle.*

6. Glencore submitted a written statement to the NCP dated June 2, 2011 concerning the Mopani tax payments and the draft report by Grant Thornton and Econ Pöyry, denying the allegations made by the submitting parties. In this statement, which was also publicly released, Glencore emphasized that the draft report was a preliminary and incomplete version, which was unofficially circulated in Zambia. Furthermore, it pointed out some “fundamental and factual errors” in the report on which the allegations in the submission to the NCP are based. According to the statement of Glencore, the authors of this report did not take into account the following:

- that almost half of Mopani’s copper output is third party ore from other mines, processed at the Mopani plant for a small tolling fee. All copper is sold at arms-length basis prevailing London Metal Exchange prices and that the failure to take third party feed into account properly has led to an erroneous conclusion in the report;
- the authors of the draft report claimed that operating costs rose for unexplained reasons. They used general inflation rates and compared these to Mopani increases. According to Glencore it is well documented that worldwide mining cost inflation has been running at well above general inflation rates. For example, at Mopani specifically, unions have successfully negotiated significant pay rises for workers, whose numbers have increased by 50% since privatization. Fuel prices have been increased by between 53% and 63%, electricity by similar margins. Costs are audited annually by Glencore’s external auditors and regularly reviewed by the Zambian Revenue Authority and to date no evidence of wrong doing has been brought to light.

Glencore furthermore pointed to the fact that Mopani is audited every year by Deloitte, a major international audit firm. One of the main audit procedures is the verification of sales. Glencore attached a letter by Deloitte (Switzerland) dated February 18, 2011 stating that the draft report by Grant Thornton and Econ Pöyry contained “fundamental flaws in terms of methodology and approach” and therefore also in the conclusions reached by the auditors. Glencore also denied Mopani's lack of cooperation with tax authorities and stated that the Zambian Revenue Authority had thanked Mopani in writing for its cooperation, a letter which has been shown to the involved parties.

7. In order to explain the role and proceedings of the NCP, the NCP invited separately representatives of both parties involved for informal, bilateral meetings, held at the premises of the NCP in Bern respectively on May 2 and May 13, 2011.
8. The NCP also created an ad-hoc group with other departments of the Swiss federal administration concerned by the specific instance, notably the Federal Department of Foreign Affairs and the Federal Department of Finance.
9. In consideration of the fact that the specific instance was also submitted to the NCP of Canada and concerned a Canadian minority owner, First Quantum, the Swiss NCP engaged with the Canadian NCP upon receipt of the specific instance. Both NCPs agreed on May 5, 2011 that the Swiss NCP would take the lead regarding this specific instance. The NCPs moreover agreed that the Swiss NCP would follow its own procedures and practices while maintaining a close cooperation with the Canadian NCP at every step of the proceedings. The Swiss and Canadian NCPs also met on

several occasions on the margins of meetings at the OECD, further discussing the specific instance and facilitating the cooperation between the two NCPs.

10. The Canadian NCP liaised with First Quantum and obtained their response to the request for review. The Canadian NCP subsequently forwarded its views to the Swiss NCP with respect to the initial assessment of the request for review.
11. On October 5, 2011, the Swiss NCP concluded its confidential initial assessment and informed parties concerned that it found the issues raised to be relevant under Chapter II and X of the OECD Guidelines, and to merit further examination. At the same time, the NCP recalled that accepting this specific instance did not mean that it considered Mopani or Glencore to have acted inconsistently with the OECD Guidelines. Pursuant to the process outlined in the Procedural Guidance chapter of the OECD Guidelines, the NCP offered its good offices to facilitate a dialogue between both parties with the aim of reaching a mutually acceptable outcome.
12. Both parties accepted the offer of the NCP to facilitate a dialogue. While the NGOs confirmed their agreement to participate after the conclusion of the Initial Assessment, Glencore asked the NCP to temporarily suspend the procedures in order to await the outcome of parallel non-judicial proceedings ongoing at that time in Zambia, namely, an audit by the Zambian tax authorities. On April 13, 2012, the NCP pointed out in a letter to Glencore that it aimed to close specific instances within 12 months. The NCP however stated its willingness to keep this specific instance open for a short period of time if this was in the mutual interest of all parties involved. Following the confirmation by Glencore to participate in a dialogue facilitated by the NCP, the NCP prepared a draft framework for the meeting (Terms of Reference), which was forwarded to the parties on July 3, 2012. Over the following days, the NCP finalized the Terms of Reference with both parties, in order to provide a mutually agreed framework for a substantial dialogue on the issues raised in the specific instance. The NCP suggested to both parties to have the dialogue facilitated by a professional external mediator contracted by the NCP.
13. Both parties agreed on the Terms of Reference, including the date and format of the meeting, as well as on the person of the mediator. The Terms of Reference moreover specified that a representative of the NCP would assist the mediator and participate in the meeting with both parties on July 11, 2012.
14. With the agreement of both parties, the mediator was provided by the NCP with all the documents relevant to this specific instance. Based on the Terms of Reference and this documentation, the mediator independently prepared the dialogue meeting, in close cooperation with the parties.
15. As laid out in the Terms of Reference, the main objective of the dialogue facilitated by the NCP was:
  - a) to reach a high level of mutual understanding on the issues raised in the submission.
  - b) to agree upon confidential joint conclusions or an agreement between both parties, drafted by the mediator and the NCP in accordance with both parties. If both parties agreed to it, parts of these joint conclusions could also be incorporated in the Final Statement of the NCP on this Specific Instance.

- c) to reach clarification on the issues raised and, depending on the outcomes of the discussions, on compliance with possible demands.

### **Outcome of the Proceeding**

16. The two parties met on July 11, 2012 for an exchange of views and positions on the issues raised in this specific instance. The meeting was facilitated by an external mediator and organized at the premises of the NCP in Berne. A representative of the NCP assisted the mediator. Parties agreed to disclose the following points of their mutual agreement:
  - The parties reached a certain level of mutual understanding on the issues raised and clarification of issues raised.
  - The parties had a thorough exchange of information and open and very constructive discussions.
  - Both sides agreed to an exchange of information with the other parties, within the limits of applicable laws.
  - Both parties will explore ways how to engage in further dialogue.
  - The parties discussed and agreed on certain further steps.

### **Conclusions of the NCP**

17. Each request for review received by NCPs has a discrete set of facts. Certain particular elements of this specific instance involved the source of the request being dependent on a leaked draft document, the fact that the Zambian government was a minority shareholder in the enterprise, and the non-judicial parallel proceeding being undertaken by the Zambian tax authorities which were confidential. The NCP is pleased that the parties were willing and able to take advantage of its offer of good offices to dialogue and reach an agreement on further steps.
18. The NCP would like to thank both parties for their good co-operation during the proceedings and their constructive discussions in the mediated dialogue. The NCP in particular would like to express its appreciation for the thorough preparation by the NGOs, which allowed for comprehensive and informed in-depth discussions of the issues raised in the specific instance. Moreover the NCP welcomed the participation of the Zambian Centre for Trade Policy and Development (CTPD) in the discussions, which added the expertise of a local organization to the dialogue. The NCP would also like to thank Glencore for the high-level representation of the company in the mediated dialogue and the constructive participation by the persons in charge within the company for several of the aspects raised in the specific instance, including a representative of Glencore's external auditing firm.
19. The NCP recommends that the parties continue their constructive exchange in the future and welcomes that the enterprise has on several occasions expressed its interest to engage with stakeholders such as NGOs. The NCP moreover encourages the parties, in particular the Centre for Trade Policy and Development and Mopani, to further develop their dialogue and exchange of information in Zambia.
20. The NCP considers this specific instance to be closed.