



The Australian National Contact Point
OECD Guidelines for Multinational Enterprises
The Treasury
Langton Crescent
CANBERRA ACT 2600

Maputo, 01st October 2010

Subject: Complaint from the coalition of institutions working in the Mozal Bypass issue against BHP Billiton

Dear Sir / Madam,

Justiça Ambiental (JA!) in partnership with Livaningo, Liga Moçambicana dos Direitos Humanos, Centro Terra Viva, Kulima and Centro de Integridade Pública have been working together in the issue regarding the proposed 6 months bypass of Mozal (annex 1; brief description of the institutions part of the coalition).

BHP Billiton operates the Mozal aluminum smelter located 17 kilometers from Maputo, in the outskirts of Matola city, in a densely populated area. Mozal was officially opened on 29 September 2000. BHP Billiton has a 47.1 per cent interest in the joint venture. The other partners are: Mitsubishi Corporation (25 per cent), Industrial Development Corporation of South Africa Ltd (24 per cent), and the Government of Mozambique (3.9 per cent). BHP has, being a dual-listed company, head offices in Melbourne, Australia and London, United Kingdom. Therefore, the coalition considers it appropriate to file the following complaint to the Australian National Contact Point (NCP). See annex 2, for a list of other recipients of the complaint.

In a public meeting of 5 April 2010 representatives of Mozal announced that they had identified the need to proceed with the rehabilitation of the smoke and gas treatment centres budgeted at 10 million US Dollars, an investment urgently needed to ensure that the environmental emissions from Mozal comply with standards required by law. The relevant standards it aims to comply with by way of this rehabilitation are the domestic Regulamento sobre Padrões de Qualidade Ambiental e de Emissão de Efluentes (Decreto 2 Junho 2004 n. 18/2004), the 2005 World Health Organization Air Quality Guidelines and the 2007 International Finance Corporation Environmental Health and Safety Guidelines. During this rehabilitation Mozal would operate under bypass for 6 months starting in November 2010, which would mean that the exhaust fumes of the smelter would be released to the environment without passing through the filters. For this purpose Mozal required and obtained a special authorization issued by Ministry of Coordination of Environmental Action (MICOA), conditional on the presentation of an Environmental Management Plan (EMP), Contingency Plan and Mozal also was required to review their Social Responsibility Policy.

Given the seriousness of the issue and the passive way it was dealt with, JA! wrote a letter, dated 08 April 2010, REF: 184/JA/2010, to MICOA (annex 3) with copies to several institutions, requesting

clarifications about: the whole process of acquiring this special license, if this had already been issued, if an environmental impact assessment had been elaborated, if the communities had been consulted and were aware of potential hazards that they would be exposed to, if other alternatives had been considered, what would be the real implications to the environment and to the public health and what mitigation measures would be planned, among other questions.

In response to this and after great insistence, JA! received a letter from MICOA, dated 14 June of this year Note N. 26/SP/GM/MICOA/10 (annex 4), which informed the following:

- MICOA asked Mozal to develop an EMP for the mitigation of possible impacts of the proposed activities and that to date of submission of JA!'s letter, Mozal still did not have a permit from MICOA, this being dependent on the submission of the EMP;
- In the process, 3 alternatives were considered, namely stopping the furnace, increasing the temperature of the anodes and special authorization for continuous Bypass, being the last one considered as the most feasible;
- A study of dispersion and deposition of gases and smoke emitted by Mozal's Smoke Treatment Centers and Gas Treatment Centers was carried out using the TAPM model, to determine the areas potentially affected and assess their impacts during the 6 months mentioned. The results of this study indicated that, for being the most relevant from the standpoint of danger to public health and the environment, thus being regulated by Law, the following substances were found: Hydrogen fluoride (HF), Sulphur dioxide (SO₂), Nitrogen dioxide (NO₂) and Ozone (O₃);
- The areas potentially most affected by the gases HF, SO₂, NO₂ are limited to a maximum radius of around 40km from Mozal's precinct, and regarding O₃ and PM₁₀ (airborne particles with diameters smaller than 10 µm), locations beyond a radius of 100km from Mozal's precinct may be affected, and these can be within or outside the national territory;
- The study and simulations have not been made public yet, however their conclusions were presented at the Council of Ministers;
- The concentrations and the deposition rates of the polluting substances predicted in the used model are not significant, thus there appears to be no significant risk of acute or chronic exposure by communities and the environment to these substances during the Bypass. However, it is necessary to maintain a permanent surveillance on the potentially affected sites, being Mozal's responsibility the preparation of a Contingency Plan to address eventual problems and also the company should review its policy of social responsibility.

Apart from the severity of the potential health risks of the released substances (annex 5), the coalition insisted in its attempts to keep obtaining information from Mozal and MICOA and enhanced its worries about the situation for several reasons:

- It seems incomprehensible that Mozal would consider an investment of 10 million US Dollars to comply with legal standards if there is no need for it. The international and domestic maximum acceptable parameters of emission are created precisely because of the risk for public health and environment, hence the need and requirement for companies to place suitable filters.
- At various occasions Mozal presented different contradictory reasons for the need for rehabilitation. The only common point between the versions is a structural problem that could cause the collapse of the treatment due to the corrosion of a 8mm thick steel sheet by 1mm. Mike Fraser, president of Mozal, made at a meeting reference to poor quality of steel used in treatment centers as causing contingencies. In another, the alleged cause was the expiration of the lifetime of the treatment centers. If the foreseeable lifetime was known to be about 10 years, the initial Environmental Impact Assessment in 2001 should have provided an adequate solution. Both situations reflect a gross negligence on the part of Mozal. Either they used inappropriate material or failed in their initial Environmental Impact Assessment. Without making clear what the exact reasons for rehabilitation are, MICOA is not competent to issue a special authorization, as the relevant legislation only delegates this competence for

extraordinary emission due to unforeseeable circumstances (article 22 Decreto 18/2004).

- In October 2004, in Richards Bay, South Africa, Hillside Aluminium another subsidiary of BHP Billiton, worked on bypass for 72 hours. Hillside released a health warning in the press, for “people with asthma and others with respiratory problems, or who have low tolerance for smoke and dust, to remain indoors” (source: <http://www.groundwork.org.za/Press%20Releases/05Oct04Hillside.asp>). This difference of criteria and behaviour of BHP Billiton in South Africa and Mozambique is highly questionable.
- MICOA has given the requested special authorization for the bypass operation, but to date both Mozal and MICOA have refused to provide a copy of this authorization. After insisting attempts of the coalition to get access to the two studies on which the alleged authorization is based on, we were allowed to view them in the MICOA library for reading purposes only. Mozal saw itself at no occasion required to present the documents when requested, see request in annex 6 and response in annex 7. The studies available at MICOA library are the EMP Version 1.0 dated 22 March produced by Mozal and an 'independent' study "Forecast of the Dispersion and deposition of pollutants to the environment expected during the rehabilitation of Smoke and Gases Treatment Centers" allegedly undertaken by researchers of the Eduardo Mondlane University in Maputo (annex 8). In order to make an in-depth analysis of the presented data JA! saw itself forced to transcribe sections of the EMP and the University study by hand. JA! requests this act to remain confidential and it ought not to be communicated to any of the parties involved. The reason the coalition seeks confidentiality is that we did not have MICOA's authorization to make copies of the document but a further assessment of the studies was indispensable for a reasonable investigation of the situation and obtainable by no other means. Furthermore, this was the only way to succeed in acquire some form of proof of the existence and content of the documents.
- Beside the obscurity of the documents, the studies itself are full of controversies and voids. The EMP does not contain the annex it refers to in its report and it does not sufficiently evaluate alternatives to a bypass operation (Detailed comments annex 9). As mentioned above, in the letter from MICOA of 14 June 2010, JA! was informed that Mozal still did not have a permit from MICOA, this being dependent on the submission of the EMP, whereas the EMP in the MICOA library is already dated 22 March 2010. The University study does not give any information on authors, date and methodology (Detailed comments annex 10). Moreover, one of its authors has informed us publicly, (on a television debate) that the study was undertaken with data provided by Mozal itself. The proclaimed independency of the study is thereby nullified.
- Requests for annual reports regarding Mozal's environmental performance and initial environmental permit have been conditioned on signing a confidentiality statement or have been unduly delayed; therefore JA! at no point in the past has succeeded in obtaining any data on Mozal's emissions of smoke and gas.
- Despite three public meetings (one for NGO's, another for the media and the third for all interested and affected parties), the public remains ill-informed about the exact risks of the bypass operation due to the lack of access to impartial information and transparency. During these meetings the only information given was in the form of a Power Point presentation, of which the coalition has unsuccessfully requested copies. In all of the public meetings there was no or barely any room for the answering of neither questions nor discussion. Furthermore, the meetings were held in English and translated extremely poorly, without sufficiently transferring the content of the presentation. These meetings only took place in July, after the Special Authorization had already been issued and the main purpose was to ensure civil society that no harm would come from the proposed bypass, but in fact there was no time or even good will to openly discuss all the questions and concerns presented to date by the civil society groups.
- The communication with civil society, in particular with the coalition has been strikingly unsatisfactory, slow and inconsistent. An example of contradictory communication is the inferior impact (only 5-10 instead of 40-100 kilometres) of the substances given by Mozal in

one of the public meetings that does not correspond with the data in the EMP.

- The coalition has gathered 14809 signatures in a petition to offer to the Mozambican Parliament requesting the immediate cancellation of the Special Authorization until all options to the proposed bypass are fully analysed and discussed with civil society, this petition was submitted on the 28th of September.
- Furthermore the coalition has submitted a legal case to the Administrative Court in Maputo, to request the immediate suspension of the Administrative Act, the Special Authorization considering the obscure and secret environment in which it was issued. Both processes are still ongoing.

During this process as indicated above the coalition finds the following violations or forthcoming violations of the OECD Guidelines for Multinational Enterprises:

- Chapter II, sub 2: “enterprises should respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” Alluding to the following constitutional rights ascribed by the 2004 Constituição da República Moçambicana (17 November 2004): the right to life and physical integrity (article 40), the right to information (article 48), the right to a decent environment (article 90), all interpreted in the light of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights (article 43). In addition the following right of the African Charter on Human and Peoples' Rights will be endangered (applicable according to article 17 in conjunction with article 43 Constituição da República Moçambicana): the right to health (article 16).
- Chapter II, sub 5: “enterprises should refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.” Due to the obscure procedure of the special authorization we cannot be sure whether it was submitted in accordance with the law. Furthermore, prior short-term bypass operations have allegedly been conducted for which supposedly no special authorization was issued and therefore unlawful conduct (Regulamento sobre Padrões de Qualidade Ambiental e de Emissão de Efluentes (Decreto 2 Junho 2004 n. 18/2004)).
- Chapter III, sub 1: “enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities, structure, financial situation and performance” in conjunction with sub 2: “enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.”
- Chapter V, sub 1: “enterprises should establish and maintain a system of environmental management appropriate to the enterprise, including: a) Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities. b) Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives.”
- Chapter V, sub 2: “enterprises should, taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: a) Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and b) Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.”

The actions the coalition requests from Mozal are:

- The conduction of an independent environmental audit based on scientific verifiable data and

methodology and transparent considerations taking the requirements of Chapter V of the OECD Guidelines for Multinational Enterprises into account.

- Access to all Mozal's annual reports regarding environmental performance and their initial environmental permit.
- A detailed and comprehensive list of all other prior short-term bypass procedures undertaken by Mozal to date;
- Argued evaluation of alternatives of a bypass operation during the rehabilitation process.
- Public presentation of the environmental audit and effective consultation of civil society and affected population.

The objective of bringing this claim is to bring the intolerable conduct of BHP Billiton's subsidiary to the attention of the NCP. The coalition is confident that the NCP will consider Mozal's action and inaction in fair and transparent manner and is optimistic that it will conclude Mozal to be in breach of the OECD Guidelines for Multinational Enterprises. The coalition hopes to that the NCP by putting pressure on BHP Billiton, Mozal will be encouraged to give considerations to the coalition above mentioned requests and gets engaged in rational conciliation with civil society and the affected population.

Please do not hesitate to contact us for further information or clarification. We would recommend addressing inquiries to JA! as the most appropriate member of the coalition to answer any question. Furthermore we would kindly request a confirmation that this communication was received by the right person.

With kind regards,

Anabela Lemos
Justiça Ambiental – Director (In representation of the coalition)

JA! JUSTIÇA AMBIENTAL

Rua Marconi 110, 1 Andar – Maputo, Moçambique

Contacto: 84 4427780 / 21 496668

E-mail: ja@ja.org.mz



Numbered annexes:

1. Brief description of the institutions part of the coalition
2. List of other recipients of the complaint
3. Letter to MICOA 8 April 2010
4. Letter from MICOA 14 June 2010
5. Main risks of polluting substances
6. Letter to Mozal of 29 April 2010
7. Letter from Mozal postponing request for copies of special authorization and EMP
8. "Forecast of the Dispersion and deposition of pollutants to the environment expected during the rehabilitation of Smoke and Gases Treatment Centers"
9. Detailed comments to the EMP Version 1.0 dated 22nd March 2010
10. Detailed comments to the "Forecast of the Dispersion and deposition of pollutants to the environment expected during the rehabilitation of Smoke and Gases Treatment Centers"
11. Report on test results
12. Laboratory Analytical Report