



MiningWatch Canada
Mines Alerte



Specific Instance regarding Glencore International AG and First Quantum Minerals Ltd. and their alleged violations of the OECD guidelines for multinational enterprises via the activities of Mopani Copper Mines Plc. in Zambia.

Specific Instance submitted by the following organizations:

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Representative: Willy R. Strothotte - Chairman

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Representative: Philip K.R. Pascall - Director and director

Before the following National Contact Points:

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A. General overview

1. Object of the complaint

This complaint targets the blatant and repeated violations of the OECD guidelines for multinational enterprises committed by corporations Glencore International AG and First Quantum Minerals Ltd as members of the Mopani Copper Mines Plc. consortium in Zambia (hereafter *Mopani*).

More precisely, the plaintiffs intend to denounce the various means by which the aforementioned corporations manage to avoid taxation in Zambia. Their claims are backed by a 2009 audit ordered by the Zambian State and conducted by auditing firms Grant Thornton and Econ Pöyry.

The associations regret the extremely low level standards of operation of both Glencore International AG and First Quantum Minerals Ltd in Zambia, standards which fall short of the OECD guidelines on several key points.

To the best of our knowledge, there has been so far no parallel procedure whatsoever, in any jurisdiction, against the two corporations targeted by this specific instance.

2. Information regarding the plaintiffs

SHERPA (Paris) <http://www.asso-sherpa.org>

SHERPA is a Paris-based, non-for-profit organization dedicated to protecting and defending victims of economic crimes. SHERPA brings together international jurists and lawyers convinced that law as a key role to play to ensure fair and sustainable development.

The Berne Declaration <http://www.evb.ch/fr/index.cfm>

The Berne Declaration is a Swiss non-governmental organization with 20'000 members. Through research, public education and advocacy work, it has promoted more equitable, sustainable and democratic North-South relations since 1968.

CENTRE FOR TRADE POLICY AND DEVELOPMENT (Zambia) <http://www.ctpd.org.zm/>

The Centre for Trade Policy and Development is a non-profit making, membership based trade policy think tank which aims to promote equitable, pro-poor trade policies and practices. The CTPD mandate is to influence pro-poor trade reform at national, regional and multilateral levels as well as facilitate for the participation of various stakeholders, including member organizations, in ensuring that trade is used as tool for poverty eradication.

L'Entraide missionnaire (Canada) <http://www.web.net/~emi/>

This not-for-profit organization was founded by French-speaking missionary communities and institutes in Canada. Its goal is to train missionaries and to educate the public at large on the issues of development and international trade.

Mining Watch (Canada) <http://www.miningwatch.ca/>

MiningWatch Canada is a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organisations from across the country. It addresses the urgent need for a co-ordinated public interest response to the threats to public health, water and air quality, fish and wildlife habitat and community interests posed by irresponsible mineral policies and practices in Canada and around the world.

3. Information regarding the targeted companies

3.1 Glencore International AG (hereafter *Glencore*)

Based in the fiscally attractive Canton of Zug (Switzerland), Glencore International AG is one of the world's largest suppliers of commodities and raw materials. Glencore is the largest Swiss company by revenue (2005), right above Nestlé¹.

Formerly known as "Marc Rich & Co" after the name of its founder, the company is notorious for its irresponsible practices, something which earned it the 2008 "Public Eye Award" attributed to the worst Swiss company².

Glencore was implicated in various high-profile scandals over the years, with accusations that include illegal dealings with various states in a situation of conflict or under international sanctions (South Africa under the Apartheid Regime, USSR, Iran, Iraq under Saddam Hussein.) The company was identified by the Volcker Commission as one of the main purveyors of illegal fund transfers to Saddam Hussein's regime during the "oil for food" deal³.

Glencore also played a role as an intermediary in some of the aspects of the Angolagate scandal, where arms were illegally sold to civil war-torn Angola⁴.

Last but not least, Glencore is often criticized for its serious and repeated violations of basic human rights in the countries in which it (and its subsidiaries) operate (Columbia, Peru, Bolivia, Democratic Republic of Congo...⁵)

¹ See: <http://fr.transnationale.org/entreprises/glencore.php>

² See: http://www.evb.ch/cm_data/Glencore_engl.pdf - The Public Eye Award "rewards" companies that are notorious for their lack of responsible behavior in the fields of human rights and the protection of the environment.

³ See: <http://www.iic-offp.org/documents.htm>

⁴ See:

http://www.swissinfo.ch/fre/A_La_une/Archive/Vente_d%238217%20armes_en_Angola:_Glencore_mise_en_cause.html?cid=1954172

⁵ See: <http://www.multiwatch.ch/fr/p97000469.html> - Swiss NGOs Action de Carême (ADC) and Pain pour le Prochain (PPP) have also released a report focusing on Glencore's operations in Democratic Republic of Congo: http://www.droitalimentation.ch/fileadmin/media/texte/fr/medias/Rapport_Glencore_RDC.pdf

3.2 First Quantum Minerals Ltd. (hereafter *First Quantum*)

First Quantum Minerals Ltd. is a Canada-based company originally incorporated in 1983 in the Virgin Islands under the name Xenium Resources Ltd. The company became First Quantum Minerals Ltd. in 1996 and is now based in Vancouver, British Columbia, Canada⁶.

First Quantum's main fields of activity are mineral extraction and development. The company produces copper, gold and sulfuric acid. It reported a total production of 322.700 tons (copper) and 191.400 oz (gold) in 2010⁷.

First Quantum is among the several corporations identified by the report of a UN expert panel for their role in the conflict in Eastern Congo⁸.

The company was also the target of a Specific Instance in 2001 regarding the operating conditions of Mopani Copper Mines Plc. in Zambia (mandatory displacement of local populations), a case in which the Canadian Contact Point had ruled that chapters II and V of the OECD Guidelines has been violated by First Quantum. The NCP had adopted a resolution demanding that population displacements ceased immediately, that previously displaced communities be relocated to their former territories, and that better communication be maintained between the company and local communities⁹.

B. The complaint

1. Context

Zambia (formerly Northern Rhodesia) became independent in 1964 and immediately put in place a national policy of human development and economic growth. This policy quickly allowed Zambia to rank among the richest African nations: by the end of the decade, Zambia's GDP was three times bigger than Kenya's, twice bigger than Egypt's, and higher than nations' such as Brazil, Malaysia, Turkey or South Korea¹⁰.

As early as 1969, the Zambian government decided to nationalize the country's mining industry; the two resulting national companies merged in 1982 and became ZCCM (Zambian Consolidated Copper Mines), then ZCCM Investments Holdings Plc (ZCCM-IH), of which a majority is owned by the Zambian Government; the remaining 12.40% are in the hands of various private investors¹¹.

⁶ See: <http://www.first-quantum.com/s/Overview.asp>

⁷ Ibid.

⁸ See: Report of the Panel of Experts on the *Illegal* Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. Publication available at: <http://www.grip.org/bdg/g2044.html>

⁹ See : http://oecdwatch.org/cases-fr/Case_19/?searchterm=FIRST%20QUANTUM

¹⁰ See: "For whom the windfalls? Winners and losers in the privatization of Zambia's copper mines" by Alastair Fraser (Oxford University) and John Lungu (Copperbelt University), p. 7-87; July 2009. Publication available at: <http://www.liberationafrique.org/IMG/pdf/Minewatchzambia.pdf>

¹¹ See : http://www.zccm-ih.com.zm/index.php?option=com_content&task=blogcategory&id=1&Itemid=5

Those nationalizations of Zambian mineral resources insured a steady income and allowed local populations to enjoy newly-built public services: free education for the miners' children, affordable housing, clean water and electricity, a better transportation network, easy access to medical infrastructure...¹²

Zambia, however, suffered dearly from the falling prices of copper on the international markets in the early eighties, thus forcing the State to borrow in order to maintain the population's standards of living. Crippled by debt, Zambia's income was cut in half between 1974 and 1994, and the country is now number 25 among the poorest nations on earth¹³.

Structural adjustment policies were forced upon Zambia during the nineties and under the international pressure of the country's creditors, via the World Bank and the IMF. Austerity measures were taken, mostly to the advantage of foreign investors: experts now refer to this period as the 'decade of plunder', when whole national companies were privatized to the exclusive benefit of private investors¹⁴.

Strongly encouraged to build an attractive tax environment, Zambian authorities adopted a series of legal, fiscal and political measures deemed particularly favorable to direct foreign investment. For instance, the *Investment Law* and the *Mines and Minerals Law* of 1995 created a 3% tax on royalty fees, when similar taxation systems in similar industries reach 5 to 14% in Chile and 5 to 10% on average in developing countries (estimates: IMF, 2001¹⁵). The same laws instituted tax exemptions, authorized the importation of mining equipment free of customs duty, and even allowed for further, even more favorable, development agreements. Such agreements were indeed signed between several multinational enterprises and the Zambian Government (see table 1): the tax rate on mining operations was sometimes lowered to as little as 0.6% while various stability clauses guaranteed those agreements for periods as long as 20 years.

¹² See: "For whom the windfalls? Winners and losers in the privatization of Zambia's copper mines" by Alastair Fraser (Oxford University) and John Lungu (Copperbelt University), p. 7-87; July 2009. Publication available at: <http://www.liberationafrique.org/IMG/pdf/Minewatchzambia.pdf>

¹³ Ibid

¹⁴ See: "Aid and Poverty Reduction in Zambia: Mission Unaccomplished", The Nordic Africa Institute, Uppsala, 2002, p. 43. Publication available at: <http://www.questia.com/PM.qst?a=o&d=104609135>

¹⁵ See: "Projet Mopani (Zambie) : l'Europe au cœur d'un scandale minier", Les Amis de la Terre - France, p. 6-27. ; Décembre 2010. Publication available at: <http://www.datapressepremium.com/rmdiff/2005515/RAPPORTMOPANI.pdf>

Exemptions and benefits granted to mining companies by development agreements

Name of the Company / Year of signature	Royalty Tax Rate	Provision for Capital Investment Deductions	Corporate Tax Rate	Provision of Carry-Over losses	Customs Duty	VAT	Foreign Currency Retention	Withholding Tax	Stability Period
Konkola Copper Mines 2000	0,6	100%	25%	Authorized	Exempt Excise Duty on Power: 0%	Refund on Net Input VAT (0%)	100%	On dividends (0%)	20 years
Mopani Copper Mines 2000	0,6	100%	25%	Authorized	Exempt Excise Duty on Power: 0%	Refund on Net Input VAT (0%)	100%	On Dividends (0%) – After Stability Period (10%)	20 years
NFC Africa Ltd 1998	*	100%	35%	Authorized	As above. No customs duty on personal effects	Refund on Net Input VAT (0%)	100%	0%	15 years
Chambishi Metals 1998	2	100%	35%	Authorized	Exempt on machinery and equipment – Excise Duty on Power: 10%	Refund on Net Input VAT (0%)	100%	0%	15 years

Source: Development agreements (quoted by “For Whom the Windfalls? Winners and losers in the privatization of Zambia’s copper mines”, Alistair Fraser & John Lungu, July 2009)

In addition to this already highly favorable legal and contractual framework, one must also consider the extreme difficulty for the Zambian fiscal authority (Zambian Revenue Authority - ZRA) to collect taxes, a fact private investors have apparently succeeded at using to their profit.

In the final analysis, tax revenues derived from the mining sector remain thin: according to the ZRA the mining sector only accounts for 10 to 15 % of all tax revenues in Zambia, of which the biggest part is derived from the income tax paid by the miners¹⁶ (“Pay as you earn”). Taxes paid by the mining corporations approximately amount to 4%¹⁷.

¹⁶ See: “Zambia Budget 2010–Keeping the right balance”, Deloitte and Touche, 2009. Publication available at: <http://www.socwatch.org/fr/node/12573>

¹⁷ “Projet Mopani (Zambie) : l’Europe au cœur d’un scandale minier”, Les Amis de la Terre - France, p. 6-27, Décembre 2010. Publication available at: <http://www.datapressepremium.com/rmdiff/2005515/RAPPORTMOPANI.pdf>

Furthermore, the IMF has estimated the contribution of various sectors of the Zambian economy to the national GDP (see table 2): it is quite clear that the share of the mining sector in Zambia's GDP has been steadily declining since 1998, to the point of the sector becoming one of the least productive in the national economy.

Zambia: Sectoral Contribution to GDP 1998 to 2003

SECTOR	1998	1999	2000	2001	2002	2003
Agriculture	18,7	21,6	19,9	19,7	20	20,8
Mining and Quarrying	6,3	3,8	4,1	4	3,5	2,8
Manufacturing	11,5	10,8	10,2	9,8	10,4	10,9
Financial Institutions	9,1	9	9,8	9,4	9,2	9,1
Tourism	2,2	1,9	2,1	2,4	2,5	2,6
Sub-total	47,8	47,7	46,1	45,3	45,6	46,2

Source: IMF, Zambia: Selected Issues and Statistical Appendix 2004

Those results are all the more troubling when taking into account the fact that Zambia was still, in 2009, the second largest copper exporter (after Chile)¹⁸.

It was within this context that the ZRA contacted in 2008, with the backing of the Norwegian Government, two auditing firms - Grant Thornton and Econ Pöyry - in order to perform a large-scale fiscal review of the various mining corporations active in Zambia, with the aim of ultimately reforming the national taxation system.

It is thus important to consider the alleged actions of Glencore International AG and First Quantum Minerals Ltd in the light of these various elements and on the basis of the conclusions of the audit.

2. Regarding the targeted corporations' alleged actions

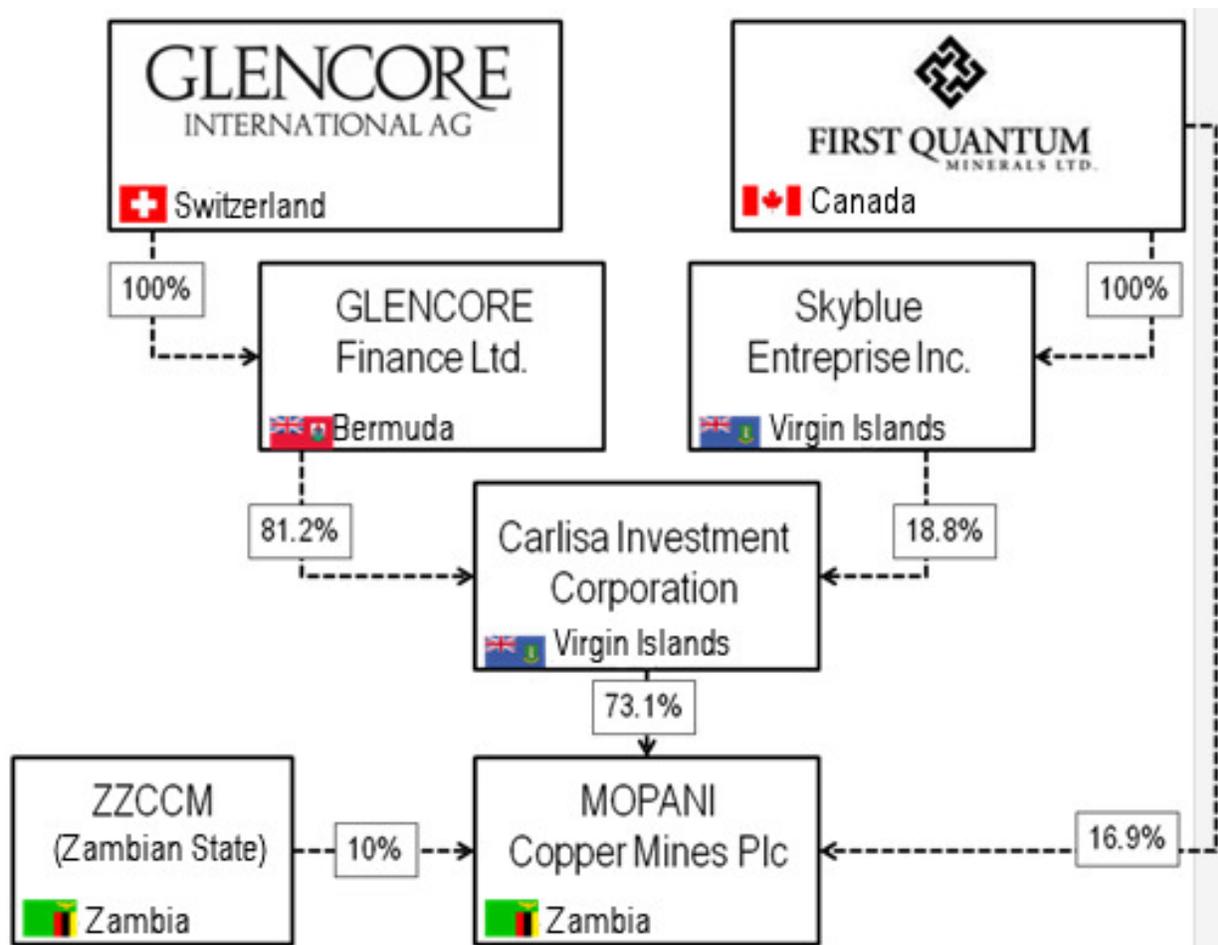
Mopani Copper Mines Plc. is the largest mining corporation operating in Zambia. Its operations encompass the mining sites of Mufulira and Nkana; it is one of the biggest producers of copper and cobalt in Zambia.

The company is established under Zambian law, and is owned by (1) Carlisa Investments Corporation (73.1%), a British Virgin Islands-based company owned (81.2%) by (a) Bermuda-based Glencore Finance Limited, itself a fully-owned (100%) subsidiary of Glencore International AG (Switzerland), and (b) Skyblue Enterprise Incorporated (18.8%), a fully-owned (100%) subsidiary of First Quantum Minerals Limited¹⁹. (2) Furthermore, First Quantum Minerals directly owns 16.9% of Mopani Copper Mines Plc. The remaining 10% of Mopani Copper Mines Plc²⁰ (3) belong to ZCCM, a state-owned Zambian company.

¹⁸ See: Cyclope Report 2010, p. 510. Publication available at: <http://www.cercle-cyclope.com/content/view/15/28/>

¹⁹ See: http://www.zccm-ih.com.zm/index.php?option=com_content&task=view&id=17&Itemid=7

²⁰ See: <http://www.first-quantum.com/s/Overview.asp>



Mopani operates within a highly attractive fiscal environment, as mentioned above: in 2000, Mopani signed with the Zambian Government a development agreement which specifies a royalty tax rate of 0.6%, a corporate tax rate limited to 25%, exemptions on customs duty, and a stability clause of 20 years.

Despite those numerous fiscal incentives and the assumed profitability of its mining operations²¹, Mopani Copper Mines Plc. reports no profits, thereby reducing considerably its tax obligations.

2.1 Conclusions of the audit report

The conclusions of the audit report rely on an in-depth analysis of documents provided by Mopani, and on numerous interviews of the company's executives performed in 2009²².

²¹ It is worth noting that Mopani was chosen for the audit because of the sheer size of its operations

²² The audit mission initially planned to begin in February 2009 was postponed several times – as late as October 2009 – because of the lack of cooperation on the part of the company, despite the fact that said company was accordingly informed of the procedure on December 22 2008. The authors of the report have similarly deplored Mopani's attitude during the audit mission: Mopani showed no proof of cooperation and seemed not to take the audit seriously, showing no fear of sanctions whatsoever. See the conclusions of the audit report, annexed to the present document.

The auditing team proceeded to analyze general operating costs, pricing, revenues, transfer prices, personnel costs and overhead expenses; the team concluded that Mopani's actual operating costs were lower than what the company claims, and that its profits were far inferior to what a company of that size could expect.

More precisely, the report concludes that Mopani is resorting to various techniques in order to avoid paying taxes in Zambia:

- **Overestimates of operating costs**

Comparative analysis reveals that Mopani's costs are much higher than those of comparable mining companies operating in Zambia. Mopani's operating costs in 2007 stood at \$804.91 million, a full \$381.21 million higher than the auditing team's provisions. No single factor appears capable of justifying such a discrepancy, since Mopani's activities had gone on normally between 2005 and 2007, without significant change or development. Production remained relatively steady save for the activity of the Mufilira mine whose increase, according to the auditors, cannot possibly account for the \$381.21 million of extra costs between 2005 and 2007.

Despite attempts to ascribe Mopani costs increase to various factors, the sheer volume of charges remains unexplained. The report notably shed light on the high transport costs imposed by Glencore on Mopani and which seem to amount to overbilling operations.

On a broader note, the auditors deplore the company's accounting opacity: numerous expenses were lacking the appropriate documentation, and multiple discrepancies in the accounting books and financial statements could not be properly explained by the various interviews conducted with the company's representatives. Some key, elementary data - such as documented volumes of produced ore, concentrate or refined copper - could not be delivered to the auditors.

Consequently, the auditing team stated that the documentation presented by Mopani did not properly account for the company's actual operating costs.

- **Underestimates of production volumes**

Extensive revenue analysis revealed cobalt extraction rates twice inferior to other producers of the same area - a difference deemed unlikely by the auditors and which indicates that some of the ore extracted by Mopani could remain undeclared.

- **Transfer pricing manipulation and breach of the Arm's Length principle**

The company's production is sold, both locally and internationally, via its main buyer Glencore International AG²³, who also happens to be Mopani's parent company.

After careful revenue analysis, it appears that the sales from Mopani to Glencore fail to comply with the OECD "Arm's Length" principle: minerals are sold to Glencore under conditions that would not apply to a third-party buyer.

According to the auditors, the **hedging** strategy used by Mopani appears to be incoherent, even bordering on counter-productive. A standard hedging strategy would involve selling ore at time T whenever price P is at its highest, in order to maximize profits. However, according to the audit, Mopani seems to prefer selling its production to Glencore whenever prices are at their lowest, something a buyer, not a seller, would be likely to do.

It further appears that sales are being conducted at **prices** that are lower than the official rates. When one compares copper prices as set by the LME (London Metal Exchange) and by Mopani when selling to Glencore, it becomes clear that Mopani is basically giving its copper away: the selling price of Mopani's copper is consistently lower than the prices set by the LME. During the 2003-2008 period, the auditors have found an accumulated difference of approximately \$700 million between the copper revenues written on Mopani's balance sheets and the expected revenues of a more traditional mining venture. A similar conclusion can be reached regarding cobalt sales: the cobalt price curve used by Mopani falls below LME prices in comparable proportions.

By the end of their mission, the auditors estimated the company's alleged lack of profits to be the result of deliberate accounting manipulations whose main purpose was to transfer taxable revenues out of Zambian territory. As a consequence, the auditors suggested that Mopani's tax base should be reconsidered.

2.2 Overview of the violated OECD guidelines

As a result of the above-mentioned facts, it is clear that Glencore International AG and First Quantum Minerals Ltd. are committing violations of the OECD's guidelines on several points:

- **General Policies (II)**

According to the text, "*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*

²³ It is worth noting that there is a sales contract between Mopani and Glencore UK Ltd, suggesting that ore sales should have been made between these two companies (instead of with Glencore International AG).

issues. 6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices.”

In this case, violation of these guidelines results from (1) the lack of cooperation of Mopani with the audit mission, despite said mission being legally mandated and performed in conformity with Zambian law, and from (2) Mopani's attempts at evading its fiscal obligations in Zambia all the while benefiting from a remarkably favorable fiscal environment.

According to Zambian law (Act n° 23, 1993), fiscal authorities have the power to request (or mandate anyone to request) any information deemed necessary, original or copy, at any time and in any place. It was thus Mopani's duty to comply and cooperate by communicating, in due time, all information required by the audit, and *a fortiori*, information needed in order to determine and verify the extent of its fiscal obligations in Zambia. However, as shown in note n° 22, the audit mission initially planned to begin in February 2009 was postponed several times - as late as October 2009 - because of the lack of cooperation on the part of the company, despite the fact that said company was accordingly informed of the procedure on December 22, 2008. The authors of the report have similarly deplored Mopani's attitude during the audit mission: the company showed no proof of cooperation and only delivered the requested documents after considerable delay.

Furthermore, multinational corporations must take into account the environment in which they decide to invest, and cannot expect to evade the laws of their host-countries. In this case, and considering the fact that Mopani already operates within a fiscal context both extremely attractive and favorable to foreign investment, one must deplore the fact that Glencore International AG and First Quantum Minerals Ltd. have not renounced to parts or all of the exemptions and limitations provided by the development agreement signed with the Zambian State in 2000. Lastly, and considering the fiscal favors enjoyed by Mopani, one must deplore the financial and accounting manipulations performed by the company in order to avoid paying taxes in Zambia.

Needless to say, those actions do nothing to help Zambia's economic progress.

- **Taxation (X)**

According to the text, enterprises must *“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.”*

The violation of this section directly results from the conclusions of the audit report.

It appears quite clearly that the company [Mopani] is resorting to various techniques of accounting manipulations in order to conceal its profits and to reduce its tax base. It also appears that transfer pricing between Mopani and its distribution partner (Glencore) fails to comply with the OECD's arm's length principle, which stipulates that the prices used for transactions between associate companies should be the same as the prices that would be used on the market between non-associate companies²⁴.

These violations are all the more shocking when one takes into account the fact that Mopani received in February 2005 a €48 million loan from the European Investment Bank (EIB) in order to develop its activities and contribute further to the development of the region²⁵.

3. Plaintiffs' demands

The plaintiffs expect the above-mentioned National Contact Points to do the following:

1/ formerly recognize the violations of the OECD Guidelines committed by corporations Glencore International AG and First Quantum Minerals Ltd.;

2/ ensure by all means necessary that the above-mentioned corporations refund the tax money the Mopani consortium should have owed to the Zambian Revenue Authority had the companies' communication been lawfully conducted, and had transfer pricings not been manipulated;

3/ require the above-mentioned corporations to commit themselves not to manipulate transfer pricing in violation of the arm's length principle and, more generally, to comply scrupulously with the OECD guidelines and with Zambian laws and regulations;

²⁴See: Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. Publication available at: http://www.observateurocde.org/news/fullstory.php/aid/2623/Prix_de_transfert:_un_d_E9fi_pour_les_pays_en_d_E9veloppement.html

²⁵ See : <http://www.eib.org/projects/pipeline/2004/20040101.htm?lang=-fr>