Sherpa

CENTRE FOR TRADE POLICY & DEVELOPMENT

BD Berne Declaration Déclaration de Berne Erklärung von Bern

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.

April 12th 2011 - PRESS FOLDER

Contacts :

SHERPA | Maud Perdriel-Vaissière + 33 (0)6 83 87 97 34 | Jean Merckaert + 33 (0)6 81 84 30 64
Déclaration de Berne | Olivier Longchamp | + 41 (0)21 620 03 09
CTPD | Savior Mwambwa | + 260 977 875404
Mining Watch | Catherine Coumans | + 1 (613) 569 3439
L'Entraide missionnaire | Denis Tougas | + 1 (514) 270 6089

I. WHAT ARE WE BLAMING GLENCORE INTERNATIONAL AG ET FIRST QUANTUM MINERALS LTD FOR?

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 Korea[1].

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 still owned by the Zambian Government[2].

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…[3]

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 earth[4].

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 investors[5].

[1] 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

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

[3] 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

[4] Ibid

[5] 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

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, 2001[6]). The same laws instituted tax exemptions, authorized the importation of mining equipment free of customs duty, and even allowed for further, even more favorable, agreements.

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 miners[7] ("Pay as you earn"). Taxes paid by the mining corporations approximately amount to 4%[8].

Furthermore, the IMF has estimated the contribution of various sectors of the Zambian economy to the national GDP (see table 1): 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)[9]. 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. Mopani Copper Mines happened to be among the audited companies.

[6] 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

[7] See: "Zambia Budget 2010–Keeping the right balance", Deloitte and Touche, 2009. Publication available at : http://www.socwatch.org/fr/node/12573

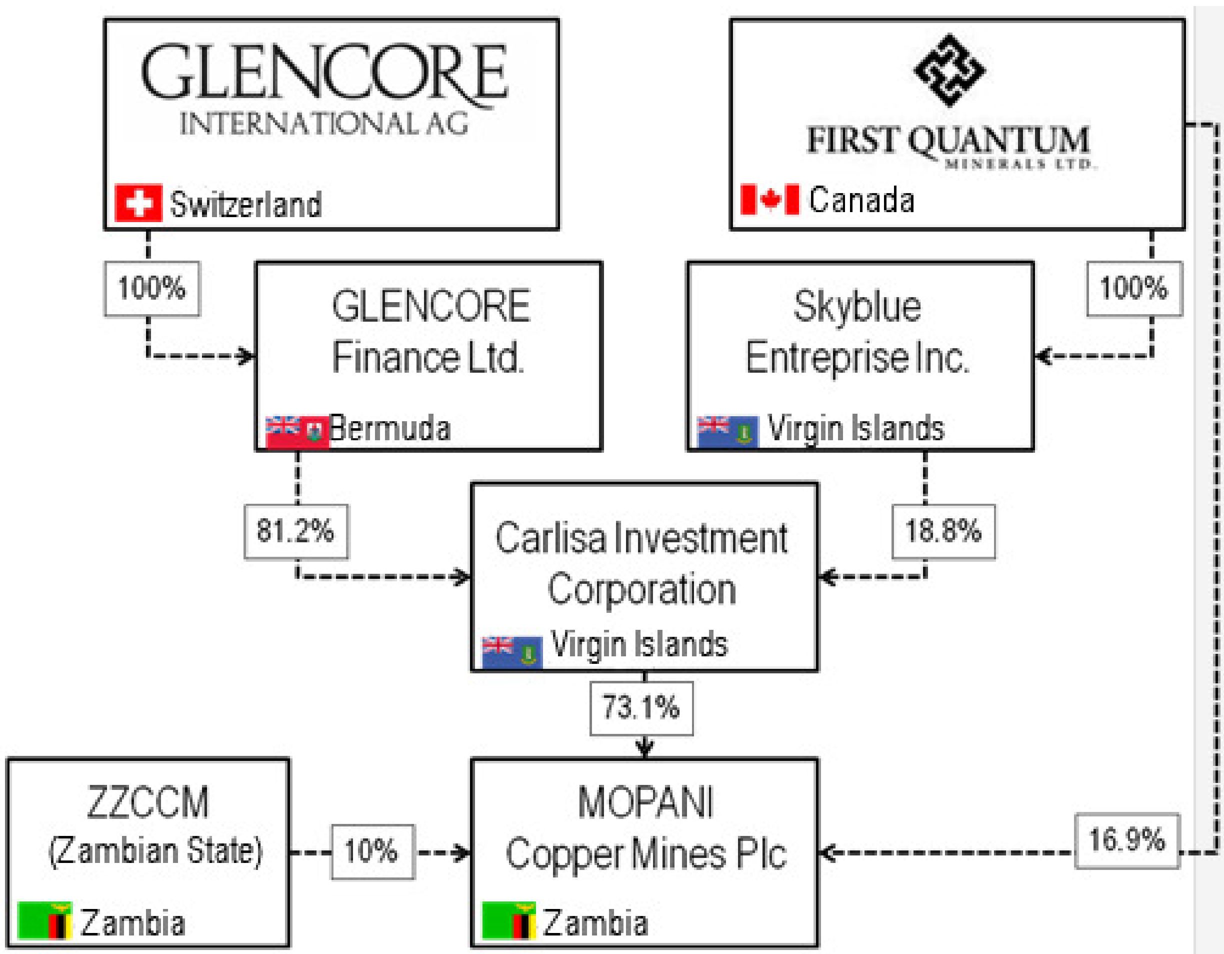
[8] See : "Projet Mopani (Zambie) : l'Europe au cœur d'un scandale minier", Les Amis de la Terre - France, p. 6-27, Décembre 2010. Publication available at :
http://www.datapressepremium.com/rmdiff/2005515/RAPPORTMOPANI.pdf

[9] See: Cyclope Report 2010, p. 510. Publication available at : http://www.cercle-cyclope.com/content/view/15/28/

2. Mopani Copper Mines Plc: conclusions of the audit report

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 Entreprise Incorporated (18.8%), a fully-owned (100%) subsidiary of First Quantum Minerals Limited[10]. (2) Furthermore, First Quantum Minerals directly owns 16.9% of Mopani Copper Mines Plc. The remaining 10% of Mopani Copper Mines Plc[11] (3) belong to ZZCCM, a state-owned Zambian company.



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 operations[12], Mopani Copper Mines Plc. reports no profits, thereby reducing considerably its tax obligations.

---

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

[11] See: http://www.first-quantum.com/s/Overview.asp

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

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 2009[13].

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 previsions. No single factor appears capable of justifying such a discrepancy, since Mopani's activities had gone on normally between 2005 and 200, without significant change or development. Production didn't go up, and actually remained relatively steady.

- **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 AG, 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.

[13] 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.

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[14].

3. The complaint

OECD Guidelines for multinational enterprises: what are they?

The OECD Guidelines for Multinational Corporations are a set of recommendations addressed to multinational companies by the governments who recognize them. The guidelines are concerned with human rights protection, information publication, labor and work relations, environment, science and technology, competition, taxation, consumer protection and the fight against corruption. The guidelines are available at: http://www.oecd.org/document/18/0,3343,en_2649_34889_2397532_1_1_1_1,00.html

In each of the countries endorsing the guidelines, a national contact point is in charge of promoting, publicizing and enforcing them. Any person, organization or community who feels the actions or activities of a multinational corporation are violating the OECD guidelines can officially ask for the review of a "specific circumstance" before the national contact point in the country where the multinational corporations has its headquarter. A specific Circumstance refers to "a question or situation" raised by interested parties and which would be in violation of the Guidelines.

The targeted companies

- **Glencore International AG**

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 Nestlé[15].

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 company[16].

---

[14] According to the estimates of the World Trade Organization, more than half of all Zambian copper exports in 2008 were made to Switzerland, an amount the swiss consumption rate can in no way justify. Source: WTO, Trade policy review - Zambia, June 2009.

[15] See: http://fr.transnationale.org/entreprises/glencore.php

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*" era[17].

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 Angola[18]. 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…[19])

It is worth noting that Glencore's past misdeeds also include Europe : the company was implicated in the French scandal of METALEUROP[20].

- **First Quantum Minerals Ltd**

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, Canada[21].

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 2010[22].

First Quantum is among the several corporations identified by the report of a UN expert panel for their role in the ongoing conflict in Eastern Congo[23]. 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 communities[24].

---

[16] 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.

[17] See: http://www.iic-offp.org/documents.htm

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

[19] 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

[20] See: http://fr.wikipedia.org/wiki/Metaleurop_Nord

[21] See: http://www.first-quantum.com/s/Overview.asp

[22] Ibid

[23] 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

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

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 fundamental points:

- **General Policies (II)**

"*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.*"

- **Taxation (X)**

"It is important that *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.*"

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 region[25].

***

This complaint constitutes a major milestone, since this is the first time a violation of the chapters concerned with tax evasion was brought specifically before the National Contact Points.

II. The Mopani project: an isolated incident?

The Mopani case is far from being an isolated incident. According to Global Financial Integrity, multinational corporations' tax evasion, when averaged per year over the last ten years, amounts to a global net loss of $400 to $440 billion for developing countries[26]. Tax evasion would then be the leading cause of fiscal hemorrhage for Southern economies, far above corruption and crime money.

---

[25] See: 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

[26] See: Dev Kar and Karly Curcio, « Illicit Financial Flows from Developing Countries: 2000-2009 », Global Financial Integrity, January 2011. Publication available at: http://iff-update.gfip.org/

The net loss for states' budgets amounts to nearly €125 billion in the last few years - a sum far superior to what those same states receive as development aid and roughly equivalent to the money the United Nations deem necessary in order to fulfill the Millenium Development Goals[27].

Tax evasion is a development issue, not only because it deprives developing countries of much needed resources they could use to fill the needs of their populations: it also compels them to transfer their fiscal burden onto their consumers and small businesses (via VAT), and makes them dependant on foreign aid and loans. On march 8, 2011 the European Parliament released, under the impulse of Eva Joly, a report which reaches similar conclusions and "exhorts the EU to make it an absolute priority of international financial and development institutions to fight tax havens, tax evasion and corruption[28]."

More importantly, the strategies deployed by multinational enterprises in order to disconnect their physical production from their financial revenues induce a severe bias in international trade and investment statistics, as shown in a recent report published by CCFD-Terre Solidaire "*L'économie Déboussolée: multinationales, paradis fiscaux et capitations des richesses*.[29]" The report points out that it took Switzerland a mere 4 years to become in 2008 the official importer of half the production of Zambian copper - the volume was 10% in 2004 -, without said copper ever physically entering the country save for the balance sheets of a few corporations… The report also lists the subsidiaries of the 50 largest European multinational corporations located in various tax havens: 100 on average for each European group.

The Mopani case is thus only one example, albeit edifying, of a phenomenon that has remained unpunished for far too long. The difficulty of punishing and limiting those practices, without mentioning the fierce fiscal competition existing between states, lies in financial and accounting opacity:

- **Financial Opacity**

Millions of entities and legal structures (trusts, offshore companies, foundations…) now have financial and economic activities across the globe without their actual owners or beneficiaries being identified by any authority. As long as there exists no public register capable, in each country, to extract this information from those entities, it will remain easy to bypass laws and fiscal regulations everywhere.

- **Accounting opacity**

None of the 50 largest European groups provide in their annual report all the basic information to which every shareholder, consumer or citizen should be entitled: the name and nature of each subsidiary, and for each country, the total revenue, profits, taxes paid and number of employees. Such publication of all relevant accounting data is deemed desirable by the European Parliament and has become a major goal of the civil society, as in France with the *Legal and tax havens platform*[30] of which SHERPA is a member, or, at the international level, with the *End Tax Haven Secrecy* Campaign[31].

---

[27] See: Christian Aid, « Death and taxes: the true toll of tax dodging », May 2008, p.45. Publication available at: http://www.christianaid.org.uk/images/deathandtaxes.pdf

[28] See: http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=fr&procnum=INI/2010/2102

[29] Publication available at : http://ccfd-terresolidaire.org/ewb_pages/i/info_2378.php

[30] See: http://www.argentsale.org/

[31] See : http://www.endtaxhavensecrecy.org/fr

Such an obligation to disclose their data would compel corporations to account more sincerely for their actual profits, wherever they happen to be made instead of where they can best evade taxation.

The idea to impose greater transparency on multinational enterprises has lately gained some steam, in particular in the extractive sector: American (since the Dodd-Frank Act of July 2010) and Hong-Kong (since June 2010) stock exchanges now force mining, oil and natural gas companies to disclose all the funds they transfer to the governments of all the countries where they operate. Discussions are under way at the European level to duplicate this obligation.

III. Who we are

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. **http://www.asso-sherpa.org**

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. **http://www.evb.ch/fr/index.cfm**

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. **http://www.ctpd.org.zm/**

L'Entraide Missionnaire is a 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 if development and international trade. **http://www.web.net/~emi/**

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. **http://www.miningwatch.ca/**