



Center for Climate Crime Analysis

Center for Climate Crime Analysis
Provision of Additional Information to the Council on Ethics
for the Norwegian Government Pension Fund Global
on the situation in Cerro de Pasco

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Principal project partner:


source

I. Introduction

1. In 2012, Volcan Compañía Minera (“Volcan”) was excluded from the Norwegian Pension Fund Global. At that time, Glencore was already a significant shareholder of Volcan, and in November 2017 it became Volcan’s controlling owner. For the purposes of this analysis, the two companies are collectively referred to as “Glencore/Volcan”.

2. On 28 June 2019, at the invitation of the Council of Ethics for the Norwegian Pension Fund Global (“Council”), the Center for Climate Crime Analysis (“CCCA”) provided a report on the situation in Cerro de Pasco (“June Report”).¹ The June Report concluded that Volcan is responsible for the environmental contamination in Cerro de Pasco and for the direct impact that this has on the physical and mental health of many people of Cerro de Pasco.

3. On 27 November 2019, the Canadian company Cerro de Pasco Resources Inc. (“CDPR”) and Volcan signed a definitive share purchase agreement (“SPA”) whereby the former will acquire Volcan’s mining operations in Cerro de Pasco. Shortly thereafter, the Council requested CCCA to provide an analysis on how the SPA will affect future risks and responsibilities.

4. For the following four reasons, CCCA concludes that notwithstanding the SPA, there continues to be an unacceptable risk that Glencore/Volcan contributes to, and is responsible for, systematic human rights violations and severe environmental damage in Cerro de Pasco: (a) Glencore/Volcan will continue to exercise substantial influence over CDPR’s mining operations in Cerro de Pasco; (b) the SPA does not eliminate Glencore/Volcan’s responsibility for future human and environmental harm in Cerro de Pasco; (c) Glencore/Volcan’s past conduct continues to cause human harm in Cerro de Pasco; and (d) the SPA does not eliminate future legal, financial and reputational risks related to Glencore/Volcan’s past conduct in Cerro de Pasco.

II. Glencore/Volcan will continue to exercise substantial influence over CDPR’s mining operations in Cerro de Pasco

5. On 28 November 2019, CDPR announced that it had executed a definitive share purchase agreement with Volcan and its subsidiaries (“SPA”). According to the announcement, the transaction will provide CDPR ownership and operation of all mining and processing assets in Cerro de Pasco. CDPR noted that it will acquire all of the issued shares of Óxidos de Pasco S.A.C. (“Óxidos”), Empresa Administradora de Cerro S.A.C (“Cerro SAC”) and Remediadora Ambiental S.A.C. (together the “Target Companies”) as a going concern.² This agreement includes all permits, licenses and concessions for a total cash consideration of USD 30 million, a variable consideration and a net smelter royalty over the

¹ [Center for Climate Crime Analysis Report to the Council on Ethics of the Norwegian Government Pension Fund Global on the situation in Cerro de Pasco](#), 28 June 2019.

² The Target Companies’ properties include: the Óxidos precious metals leach processing facility (permitted at 2,500tpd); the Paragsha base and precious metals concentrator (permitted at 17,500tpd); the San Expedito base and precious metals concentrator (permitted at 1,800tpd); the Santa Rosa oxide open pit that hosts mineral for processing through the Óxidos plant; the Raul Rojas sulphide open pit; the Lourdes and Excelsior Underground shafts; all associated surface infrastructure including the Ocroyoc tailings storage facility, offices, workshops, staff accommodations; and over 12,000 hectares of exploitation and exploration concessions that host existing porphyry exploration potential.

concessions. The closing of the transaction is expected to occur within four months of the announcement and is subject to standard closing conditions as well as certain specific closing conditions provided under the SPA.³

6. Based on its analysis of the publicly known contract modalities,⁴ CCCA concludes that under the terms of the SPA, Glencore/Volcan will continue to exercise substantial influence over CDPR's mining operations in Cerro de Pasco. Although the Cerro de Pasco mines will no longer be formally in Glencore/Volcan's books, it appears that as a result of the SPA, CDPR will *de facto* run and exploit the Cerro de Pasco mines for Glencore/Volcan's benefit, while taking on all risks of doing so. As explained in more detail below, this is particularly so as a result of the exclusive off-take agreement, the right of first refusal, the fixed minimum delivery rate dictated by Glencore/Volcan, and the royalties provided for in the SPA.

7. In this sense, the situation at hand is significantly different from that which prompted the Norwegian Pension Fund Global to revoke its prior decision to exclude Rio Tinto. In that case, once the sale was completed, Rio Tinto had no longer *any* role in the activities or operation of the mine that caused Rio Tinto to be excluded in the first place.⁵

8. Through the off-take agreement between Volcan and CDPR, once Cerro SAC is owned by CDPR, Glencore/Volcan will be the *exclusive* buyer of CDPR's entire production in Cerro de Pasco of zinc and lead concentrates.⁶ Furthermore, Glencore/Volcan will expand its already dominant position in Cerro de Pasco by means of the right of first refusal over concentrates produced from CDPR's *El Metalurgista* concessions in Cerro de Pasco, not previously owned by Glencore/Volcan.⁷

9. In addition to the total cash consideration of USD 30 million, the SPA provides for variable payments by CDPR to Glencore/Volcan of approximately USD 280 million (*see estimate below*). When selling silver and gold, CDPR will have to pay the difference between the world market price (spot price) and a contractually fixed base price to Glencore/Volcan.⁸ The fixed price is highly favourable to the latter: it corresponds to a little more than half of the current world market price.⁹ The SPA also establishes minimum quantities of produced

³ Cerro de Pasco Resources, [CDPR to Acquire Cerro de Pasco Operations in Peru](#), 28 November 2019.

⁴ See in particular Cerro de Pasco Resources, [CDPR to Acquire Cerro de Pasco Operations in Peru](#), 28 November 2019.

⁵ See [Recommendation to revoke the exclusion of Rio Tinto PLC and Rio Tinto Ltd from investment by the Government Pension Fund Global \(GPFJ\)](#), p. 1.

⁶ As noted in the [June Report](#) (as paras. 13, 101), zinc and lead, next to gold and silver are the main outputs from the mining activities in Cerro de Pasco.

⁷ "Volcan will have an offtake in respect of 100% of all zinc and lead concentrates from ore resources owned by Cerro SAC as at the Closing Date, as well as a right of first refusal to purchase all concentrates produced from CDPR's *El Metalurgista* concessions." See Cerro de Pasco Resources Inc., Management's discussion and analysis, Three-month and nine-month periods ended, September 30, 2019 (with the information available as at 29 November 2019) ("[CDPR's MD&A](#)"), p. 4.

⁸ "CDPR will pay Volcan 100% of the price difference between the average monthly spot silver price and USD 9.00/oz (the 'Base Silver Price') and where average monthly spot silver price is above USD 18.00/oz, CDPR would share 50% of the difference in price [...]"

CDPR will pay Volcan 100% of the price difference between the average monthly spot gold price and USD 950.00/oz (the 'Base Gold Price'), and where average monthly spot gold price is above USD 1,400.00/oz, CDPR will share 50% of the difference in price". See [CDPR's MD&A](#), pp. 3-4.

⁹ At the beginning of December one ounce of silver was traded at a little more than 17 USD, an ounce of gold at just under 1500 USD. See [here](#).

commodities for an “Initial Term” (the time between the closing of the transaction and the end of 2026).¹⁰ The contractually fixed minimum amounts are very high. In fact, in 2018, Óxidos produced a little more than 4,100 ounces of gold.¹¹ CDPR will have to deliver to Glencore/Volcan a *minimum* of 18,000 ounces in 2020 alone (more than four times the 2018 production).¹²

10. Assuming that the transaction is finalized on 1 January 2020, the cash payments from the price difference between the spot price and the base price that have to be paid by CDPR to Glencore/Volcan can be estimated as follows:¹³

	Minimum amount pro rata 2020	Minimum amount 2021 - 2026	Difference in price (base price/spot price ¹⁴)	
Silver in oz	3,687,535	17,677,264	8	170,918,392 USD
Gold* in oz	18,767	202,054	500	110,410,500 USD
				281,328,892 USD

* With the current price of gold of about 1,500 USD per ounce, Glencore/Volcan and CDPR would share the earnings from gold sales at a price over 1,400 USD per ounce at a 50% rate. This means that the price difference in favour of Glencore/Volcan consists of the difference between 1,400 USD and the base price of 950 USD/oz (*i.e.*, 450 USD/oz) *plus* 50% of the difference between the actual spot price and 1,400 USD/oz (*i.e.*, 50 USD/oz for a spot price of 1,500 USD/oz).

11. In addition to the off-take agreement, the right of first refusal and the variable cash payments, Glencore/Volcan will receive a royalty on the net smelter return of 2% on all sales CDPR makes except gold and silver.¹⁵

12. As a result of the conditions set out in the SPA, Glencore/Volcan will continue to exercise substantial influence over CDPR’s mining operations in Cerro de Pasco. Accordingly, there continues to be an unacceptable risk that Glencore/Volcan contributes to, and is responsible for, the human and environmental harm caused by mining activities in Cerro de Pasco.¹⁶ The nature of the relationship between Glencore/Volcan and CDPR—exclusive buying of the commodities most important to them at fixed price; taking a generous cut of the price of other valuable commodities, and a residual royalty from everything else—seems to be structured so that Glencore/Volcan has CDPR running the Cerro de Pasco mining

¹⁰ See [CDPR’s MD&A](#), pp. 3-4.

¹¹ [Volcan’s 2018 Annual Report](#), pp. 92-93.

¹² Both quantities to be adjusted based on actual Closing Date. See [CDPR’s MD&A](#), pp. 3-4.

¹³ Should the transaction be finalized at a later point in time, the payments for the year 2020 are reduced pro rata.

¹⁴ The spot price used for the purpose of the calculation corresponds to the market price at the beginning of December 2019.

¹⁵ Volcan will receive a royalty of 2% of the net smelter return as provided under a net smelter return royalty deed to be entered into between Cerro SAC, CDPR and Volcan (the “NSR Royalty Deed”) on all metal production from all the concessions owned by Cerro SAC, other than material processed through the Óxidos facilities.” See [CDPR’s MD&A](#), p. 4.

¹⁶ See Section 3 of [Guidelines for observation and exclusion of companies from the Government Pension Fund Global](#), 10 February 2017 (unofficial translation).

operations on its behalf and for its benefit, while CDPR will be taking on all legal, operational and reputational risks. This legal fiction cannot eliminate Glencore/Volcan's responsibilities, including *vis-à-vis* the Norwegian Pension Fund Global.

III. The SPA does not eliminate Glencore/Volcan's responsibility for future human and environmental harm in Cerro de Pasco

13. Because of the agreed variable payments from CDPR to Glencore/Volcan for silver and gold, as well as Glencore/Volcan's royalty on the net smelter return of 2% on all other sales, CDPR's profit margins of its mining operations in Cerro de Pasco will be relatively low. In addition, because of the contractually fixed minimum amount of commodities, CDPR will have to significantly scale up mining operations in Cerro de Pasco compared to previous years. As a result, there is a risk that CDPR may continue—and actually scale up—mining activities that cause human and environmental harm, in spite of CDPR's claim to the contrary.¹⁷ This risk exists because for CDPR to make any profit, it will be incentivised to continue Glencore/Volcan's mining practice to externalise costs at the expense of the environment and the people of Cerro de Pasco who will pay for it with their health.¹⁸

14. At the same time, the terms of the SPA provide CDPR with guarantees and predictability for any future mining operations. For instance, through the off-take agreement between Volcan and CDPR, once Cerro SAC is owned by CDPR, Glencore/Volcan will buy all its zinc and lead concentrates from ore.¹⁹ In addition, the agreement sets out the minimum amount of commodities to be produced²⁰ and sets a fixed price for the purchased commodities.²¹

15. As a matter of law, these conditions may be described as providing assistance to CDPR's mining activities, which would render Glencore/Volcan responsible for any ongoing and future illegal human and environmental harm in Cerro de Pasco. In fact, Glencore/Volcan's role could be described as that of an accomplice to any illegal activities. Under international criminal law, a person is responsible for aiding and abetting an offence by assisting it after its commission, provided that an agreement to that effect was reached

¹⁷ See "[CDPR's MD&A](#)", pp. 4, 9. See also, CDPR's [website](#). Both Volcan and Glencore have previously also claimed that sustainability plays a key role in their business practice. Yet, as show in the [June Report](#), the reality of the situation in Cerro de Pasco speaks to the insufficiency of their efforts (see for example [here](#) for Volcan's statement on environment and [here](#) for Glencore's statement in relation to Volcan's operations in Cerro de Pasco). CDPR has stated that it will follow their lead:

"Post-closing of the Transaction, CDPR will adopt a health, safety, environment and community work plan (the "HSEC Work Plan") based on Volcan's existing HSEC Work Plan prior to entering into this transaction." (See "[CDPR's MD&A](#)", p. 4.)

¹⁸ [June Report](#), para. 101.

¹⁹ "Volcan will have an offtake in respect of 100% of all zinc and lead concentrates from ore resources owned by Cerro SAC as at the Closing Date, as well as a right of first refusal to purchase all concentrates produced from CDPR's El Metalurgista concessions." See Cerro de Pasco Resources Inc., Management's discussion and analysis, Three-month and nine-month periods ended, September 30, 2019 (with the information available as at 29 November 2019) ("[CDPR's MD&A](#)"), p. 4.

²⁰ See [CDPR's MD&A](#), pp. 3-4.

²¹ See [CDPR's MD&A](#), pp. 3-4.

prior to commission of the offence.²² This form of legal responsibility is based on the understanding that a prior agreement of cooperation facilitates the commission of an offence by encouraging the principal perpetrator to commit the offence or by providing an (economic) incentive to commit the offence. The contractual conditions that incentivise CDPR to continue Glencore/Volcan's harmful mining practices in Cerro de Pasco could further be interpreted as instigating any illegal practices, which is another form of accomplice liability under many legal systems. There is no reason why the terms "contribute to or is responsible for" in Section 3 of the Pension Fund's guidelines on ethical investments should be read more restrictively.²³

16. In addition, the severe human and environmental harm caused by mining activities in Cerro de Pasco and documented in the June Report can be qualified as crimes under Peruvian criminal law.²⁴ As a result, knowingly handling of the proceeds of the crimes (both money or goods) by buyers, traders, transporters, or any other actor in the supply chain can qualify as fencing or money laundering both under Peruvian criminal law,²⁵ and under the law of the jurisdictions of the corporations or individuals involved in the activities. Accordingly, irrespectively of whether Glencore/Volcan's activities assist CDPR in the commission of any offences, Glencore/Volcan—who have committed to buy all zinc and lead concentrates from the ore—may be responsible for separate offences by knowingly handling the proceeds of any crimes committed by CDPR.

17. Accordingly, there is an unacceptable risk not only that CDPR will continue Glencore/Volcan's harmful mining practices, but that Glencore/Volcan will be responsible for any environmental and human harm caused by CDPR in Cerro de Pasco.

IV. Glencore/Volcan's past conduct continues to cause human harm in Cerro de Pasco

18. In its June Report, CCA detailed how Glencore/Volcan contributed to, and is responsible for, mining-related exposure of the inhabitants of Cerro de Pasco to lead and other heavy metals. It also demonstrated that "there is a risk that current levels of environmental contamination will continue to severely impact on the physical and mental health of many people of Cerro de Pasco in the future [...] unless drastic measures are taken to address it".²⁶

19. Accordingly, even if as a result of the SPA Glencore/Volcan will no longer directly release additional pollutants into the soil, water and air of Cerro de Pasco, it is still responsible for ongoing and future human harm. This is because Glencore/Volcan has not addressed the pollutants that it has released in the past and they continue to cause human

²² See for instance, [ICC-01/05-01/13 A A2 A3 A4 A5](#), Bemba *et al*, Appeals Judgment, 8 March 2018, para. 1399. In that case, the principal perpetrator committed the crime, knowing that he or she would receive assistance in the aftermath.

²³ [Guidelines for observation and exclusion of companies from the Government Pension Fund Global](#), 10 February 2017 (unofficial translation).

²⁴ See for instance [Peruvian Penal Code](#), Article 121 (serious bodily injury) and Articles 304-305 (aggravated forms of contamination of the environment).

²⁵ See for instance [Peruvian Penal Code](#), Article 194 (Receptación: El que adquiere, recibe en donación o en prenda o guarda, esconde, vende o ayuda a negociar un bien de cuya procedencia delictuosa tenía conocimiento o debía presumir que provenía de un delito, será reprimido con pena privativa de libertad no menor de uno ni mayor de cuatro años y con treinta a noventa días-multa).

²⁶ [June Report](#), para. 100.

harm. Glencore/Volcan's responsibility for ongoing human harm will continue until it takes adequate measures to remove or neutralize the pollutants that it has released in the past. The World Health Organization has noted that given the degree of already existing pollution in Cerro de Pasco, the use of costly large-scale soil removal or the resettlement of the community may be necessary to reduce mining-related lead exposure.²⁷ Anything short of these measures—such as the SPA with CDPR—will not absolve Glencore/Volcan of its responsibility for ongoing and future human harm in Cerro de Pasco. To be clear, the measures required from Glencore/Volcan are not intended to remedy past human harm, for which it would still be responsible, but to prevent future human harm caused by Glencore/Volcan's past environmental pollution.

20. In this context, it is worth noting that—contrary to Glencore's claim²⁸—mining activities in Cerro de Pasco have continued since Glencore gained control over Volcan in November 2017²⁹ and the levels of pollution and human harm have significantly increased since. For instance, based on remote sensing technologies, CCCA's June Report documented a significant increase of lead pollution in the soil of Cerro de Pasco and in particular in Paragsha between 26 April 2016 and 27 November 2018.³⁰ Moreover, a comparison of Source International's 2016 and 2018 hair studies of children from Paragsha shows that the heavy metals in their hair had significantly increased between mid-2016 and mid-2018.³¹ Also, a recently published report by a Peruvian investigative media indicates an increase of toxic metal exposure of the inhabitants of Cerro de Pasco since 2016.³² According to the report—which is based on information from the Peruvian National Centre for Epidemiology, Prevention and Control of Diseases—the number of people examined and identified by the authorities as affected by lead in Cerro de Pasco has more than doubled between 2016 and 2018 (from 953 cases registered in 2016 to 2,001 cases in 2018). The vast majority of these cases concerns children younger than 11 years old.³³

V. The SPA does not eliminate future legal, financial and reputational risks related to Glencore/Volcan's past conduct in Cerro de Pasco

21. Even if all the above reasons were to be disregarded, Glencore should still be excluded from the Norwegian Government Pension Fund Global. This is because the evidence uncovered against Glencore/Volcan in Cerro de Pasco provides a basis for legal action and advocacy. This increases future legal, financial and reputational risks for Glencore/Volcan, which the Council should take into consideration.

²⁷ [WHO 2012 Study](#).

²⁸ Luzerner Zeitung, [Glencore wehrt sich gegen Anschuldigungen](#), 27 November 2019.

²⁹ Volcan's 2018 annual report shows that, while the Paragsha and Vinchos mines were suspended during 2018, the Cerro de Pasco unit actually processed more tonnage that year than any of the previous ones since 2014, with the highest processed tonnage in 2017 and 2018 at 1.1 and 1.3 million tonnes treated respectively. Similarly, Óxidos de Pasco kept its processing at its historic highest, matching the amounts of 2016 and 2017 at 0.9 million tonnes. See [Volcan's 2018 Annual Report](#), pp. 86-91.

³⁰ [June Report](#), para. 58.

³¹ [June Report](#), para. 84.

³² Convoca, [La distribución ineficaz de fondos públicos para atender a pobladores expuestos a metales tóxicos](#), 30 Octubre 2019.

³³ For a dynamic chart on the evolution of number of cases see [here](#). For details on the data for the Cerro de Pasco cases specifically see [here](#).

22. For instance, the evidence laid out in the June Report is being used by the Swiss Coalition for Corporate Justice (“SCCJ”) in support of its ‘Responsible Business Initiative’. This initiative is aimed at introducing a binding legal framework in Switzerland to protect human rights and the environment from (Swiss) corporate impacts abroad and to guarantee access to justice for victims of corporate abuses.³⁴ If it were to succeed, the new legislation would directly impact on Glencore/Volcan. As Glencore is based in Switzerland, it could be held responsible for human rights violations and severe environmental contamination in Cerro de Pasco. Accordingly, the SCCJ used the Cerro de Pasco case to advocate for its initiative by demonstrating the aspired law’s concrete relevance.³⁵ In fact, out of the eight case studies used by SCCJ, four concern Glencore’s alleged corporate abuses.³⁶

23. In addition, CCCA itself will bring the evidence uncovered against Glencore/Volcan in Cerro de Pasco to the attention of law enforcement authorities, and may support various forms of litigation and advocacy intended to address Glencore/Volcan’s responsibility for the established environmental and human harm in Cerro de Pasco during the past period.

VI. Conclusion

24. For the reasons set out above, CCCA finds that in spite of the SPA, there continues to be an unacceptable risk that Glencore/Volcan contributes to, and is responsible for, systematic human rights violations and severe environmental damage in Cerro de Pasco. Glencore should therefore be excluded from the Norwegian Government Pension Fund Global.

³⁴ See [website](#) of Swiss Coalition for Corporate Justice (SCCJ).

³⁵ See Swiss Coalition for Corporate Justice (Konzern-Verantwortungs Initiative): [Glencore-Mine vergiftet Kinder mit Schwermetallen](#).

³⁶ In addition to the Cerro de Pasco case, see also [Glencore verschmutzt Wasser in Kolumbien](#); [Glencore verschmutzt Felder im Kongo](#); and [Gewaltsame Vertreibung durch Glencore](#).