

I. Privatisation in the public interest

Introduction

It is the Privatisation Act (1992) which governs privatisation in Zambia. The Act establishes the Zambia Privatisation Agency (ZPA) whose purpose is to plan, manage, implement, and control the privatisation of State owned enterprises by selling them to those with the expertise and capital to run them on a commercial basis.¹ The Act further determines how the list of enterprises to be sold is drawn up and what modes of sale are allowable.² The Act lays down parameters for competitive bidding and the conduct of negotiations.³ Arrangements for the issue and holding of shares are specified for when the option of public flotation is used.⁴ The Act also specifies the extent to which information relating to the sale process will be made public, how the sale proceeds will be recorded and banked, and the uses to which the money may be put.⁵

The Privatisation Act appears to be comprehensive and to present a sound basis upon which privatisation may proceed in a transparent and independently regulated manner. Indeed, considerable attention has been paid to drawing up the privatisation framework in Zambia. The World Bank has been instrumental in supporting the drafting of the Act and in providing technical assistance funds for the staffing of key advisory positions in ZPA.⁶ Yet, considering what is at stake in privatising entire swathes of the Zambian economy, in a country where major parastatals have acted as a parallel administration, then the Privatisation Act and related legislation must be not only well-suited to the task of achieving a commercially successful transition, but also to safeguarding the rights and legacy of the Zambian people.

It would be misplaced to conceive of the Privatisation Act as explicitly or intentionally concerned with human rights protection. On the one hand, there is an argument that the Privatisation Act should be judged narrowly in terms of the economic success or failure of privatisation. On the other hand, because the realisation of human rights is a principle of universal validity, then it is more than legitimate to scrutinise any legislation which impinges upon the enjoyment of such rights. Furthermore, there is a middle ground: when the Privatisation Act fails to deliver in its own terms on matters of accountability, transparency and the provision of information, popular participation, the protection of employment, or in the specified use of sale proceeds to promote social development, then it also fails to protect, fulfil, or promote specific human rights.

In a first subsection (A), the regulatory principles of accountability, transparency and participation, which the Privatisation Act is meant to guarantee, are articulated in terms of human rights. This brings consideration of the Privatisation Act within the remit of the Committee and sets the benchmark against which the *de jure* and *de facto* regulation of privatisation in Zambia is to be assessed. The Zambian Government's record in this regard is reviewed over three subsequent subsections. Under the rubric of accountability (B), consideration is given to the independence of the Zambia Privatisation Agency, its role in conducting each sale, and its decision-making power. Regrettably, its authority to manage privatisation has been usurped with a corresponding loss of accountability. In a subsection on transparency (C), the primary concern is with access to information on privatisation: the amount realised from the sales and the uses to which the proceeds have been put; details of bidders and the bidding process, to allow the public to judge whether privatisation is being conducted in the interests of all Zambians; and the full facts of each sale, including agreements reached on redundancies, conditions of work and the take over of social assets. (D) Participation of Zambians in the privatisation process has been narrowly interpreted and severely curtailed. The public offering of shares has concentrated a common wealth in the hands of a political and business elite. Furthermore, employee and management buyouts have succeeded in only a few instances in the face of competition from foreign business. Indeed, the use of tax and other incentives to attract foreign investors must deprive the Government of revenue for expenditure on the social sectors of education, health and welfare. In keeping with the principle of joint responsibility, the role of the World Bank in fostering the privatisation framework is reviewed in a final subsection (E).

At this juncture, it is pertinent to note that the consideration of certain aspects of the Privatisation Act *per se* is postponed until Section 2(II): in particular, the failure to safeguard the rights of employees during the sales and the absence of post-privatisation monitoring.

A. Accountability, transparency, participation and human rights

Accountability, transparency and popular participation are all prerequisites if the human rights of any group - workers, retrenched, residents of mining towns, tenants in parastatal housing, the general public - are to be protected under a process such as privatisation with its far-reaching consequences. Each of these principles can be articulated in rights terms, drawing on both Covenants, as well as the Declaration on the Right to Development and the Declaration Against Corruption and Bribery in International Commercial Transactions.

1. A basis in the Declaration on the Right to Development and the Covenant on Civil and Political Rights

Under the rubric of *accountability*, the Privatisation Act must allow each sale to proceed without behind the scenes interference for short-term political or financial gain by the ruling elite. A failure of regulation in this regard threatens aspects of the right to development which is the inalienable entitlement of each and every person and is not the exclusive preserve of those in power.⁷ Under the Declaration on the Right to Development, Government's have the right, but also a duty, to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.⁸ In respect of the Covenant on Civil and Political Rights, the right of every citizen to take part in the conduct of public affairs, whether directly or through a chosen representative, is undermined when a Government no longer considers itself accountable for its actions.⁹ There must be absolute *transparency* over the sale proceeds and how the money realised is being spent. Future projections on employment and redundancy, as well as the arrangements to be put in place to manage social assets, represent a vital knowledge base for workers and local communities. Full information must be forthcoming to allow people to judge for themselves the merits of each sale. These requirements stem both from the right to free expression and opinion based upon freedom to seek, receive and impart information under the Covenant on Civil and Political Rights;¹⁰ and from securing the right to development of the entire population and all individuals on the basis of their active, free and meaningful *participation* in development and in the fair distribution of the benefits resulting therefrom.¹¹ Where possible, it would therefore seem desirable for Zambians to be given the opportunity to share in the rewards of privatisation through schemes to encourage popular share ownership in the most successful enterprises.

2. International instruments on corruption and malpractice

The process of privatisation in general - that, is turning over state assets to private owners - has been described as 'fraught with opportunities for corruption and self-dealing'.¹² The significance of corruption in undermining fair economic competition and distorting market processes in emerging markets and in the context of large-scale privatisation programmes is noted by the UN Office for Drug Control and Crime Prevention.¹³ The degree of accountability and transparency is a determining factor in the extent of corruption and malpractice. All Member States of the UN, including Zambia, have committed themselves to implement the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions.¹⁴ This recognises that effective efforts to combat and avoid corruption and bribery 'form a critical part of promoting transparent and accountable governance, economic and social development and environmental protection in all countries.'¹⁵ The UN has also adopted the International Code of Conduct for Public Officials and recommended it to Member States.¹⁶ Furthermore, a number of regional instruments have established standards to combat corruption¹⁷ While binding on ratifying States, these instruments have a normative value: the standards they codify are applicable to *all* States. In respect of the principles of transparency and accountability, the OECD's Principles for Managing Ethics in the Public Service (1998) are particularly pertinent.¹⁸

3. The Covenant on Economic, Social, and Cultural Rights: malpractice vis-à-vis obligations of conduct and result

In respect of the Covenant on Economic, Social and Cultural Rights, corruption and malpractice violate the principle of non-discrimination and constitute steps which are incompatible with the progressive achievement of the full realisation of economic and social rights to the maximum of available resources.¹⁹ The award of the sale of a State owned enterprise through malpractice or corruption is arbitrary and results, more often than not, in the violation of specific rights.

The undertaking to ensure non-discrimination is an obligation of conduct.²⁰ the award of the sale of a State owned enterprise to one bidder over another through malpractice or corruption constitutes unequal treatment based upon an arbitrary decision. The undertaking to take steps, which must be immediately implemented, specifies that these steps must be ‘deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.’²¹ Neither corruption or malpractice are appropriate steps as both constitute an immediate violation of the overarching principle of non-discrimination. The OECD’s interpretation that bribery is an offence whether or not the award of a sale or contract was made to the best qualified bidder underlines that corruption is, by its nature, contrary to this obligation of conduct.²² However, corruption and malpractice are most obviously incompatible with the Covenant when they lead to the violation of specific rights.

The Covenant codifies an obligation of result, that a State party takes steps ‘with a view to achieving progressively the full realisation of the rights recognized’ in the Covenant.²³ There is an obligation to move expeditiously and effectively towards the goal of full realisation.²⁴ The award of a contract or sale, on the basis of malpractice or corruption, to a company or individual without a sound industry track-record, or a carefully reasoned business plan based upon due diligence studies, or proven access to the finance needed to invest in a venture will prejudice the likelihood of commercial success. This has negative implications for the realisation of the right to work. Instances are documented within this submission when the sale of a business to an unscrupulous owner in has resulted in the denial of just and favourable working conditions, the non-payment of benefits and entitlements, or asset stripping leading to business closure, mass unemployment, impoverishment and even homelessness when employees are evicted from company houses.

There is a final sense in which corruption is implicated in the dereliction of the obligations of both conduct and result. Article 2(1) of the Covenant requires each State party to take the necessary steps ‘to the maximum of its available resources.’ A Government must show that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, its minimum core obligations.²⁵ This obligation of conduct is undermined when corruption results in the diversion of public resources into private hands. This impinges upon the fulfilment of the obligation of result to achieve progressively economic and social rights. A government cannot be said to use its maximum available resources to promote the right to health, education, housing or social security if large sums of public money are diverted for private gain.²⁶

B. Privatisation and failures of accountability

1. Introduction: the Privatisation Act and accountability

The Privatisation Act, by establishing the Zambia Privatisation Agency as an independent body, seeks to ensure that the privatisation process is conducted in an accountable way and is as free from political manipulation as possible.²⁷ There is a division of decision-making power within the Act between the Government and the ZPA. While the Government determines the overall direction and timing of privatisation, ostensibly it is left to the ZPA to handle and close each sale without political interference. Hence it is the Cabinet which decides and issues policy guidelines on how the privatisation programme is to be implemented and which determines, through its approval of the divestiture sequence plan, which State owned enterprises are to be privatised and the order in which they are to be sold.²⁸ It is then left to the ZPA to advise on the mode of sale in each case.²⁹ The available options for the disposal of a business include, *inter alia*, negotiated or competitive bids, the public offering of shares, the sale of the assets and business of a State owned enterprise which thereby ceases to exist in its own right, and management or employee buyouts.³⁰ Again, it is the Cabinet which has final approval over the mode chosen.

Decisions on privatisation - including the crucial determination as to who is awarded the sale of an enterprise - are ostensibly taken by the Members of the ZPA, in effect a board of directors. Of the twelve designated positions, only three are reserved for government.³¹ The remaining nine positions fall to representatives of civil society and the private sector. This includes provision for the business community, the unions and the churches. At the head of the ZPA board is a Chairman and Vice-Chairman, both of whom are elected by the other members.³² The two government Permanent Secretaries are ineligible for these two positions.

Yet, despite the establishment of the ZPA, there have been significant lapses in accountability on two levels: firstly, a closer examination of the Privatisation Act reveals aspects of its formulation which give the lie to the apparent independence of the decision-making process; secondly, there has been considerable deviation from the prescribed privatisation process and political interference in key sales.

2. The Privatisation Act: in-built failures of accountability

If those in authority fail to account for their actions, for example, in respect of the decisions they make when selling national assets, then the right to development is undermined.³³ Under the Declaration on the Right to Development, Governments have the right, but also a duty, 'to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.'³⁴

Privatisation is a key plank of the Zambian Government's national development policy. The sale of national assets - which are the legacy of, and which belong to, the people of Zambia - must aim to improve the well-being of all Zambians. Whether or not the best interests of the majority of Zambians are served; whether or not their meaningful participation is ensured; whether or not the fair distribution of the benefits of privatisation is achieved; none of these assessments can be made unless there is accountability in the privatisation process. Furthermore, a lack of accountability makes the realisation of each facet of the right to development less likely.

The initial impression is that the ZPA board is dominated by representatives from the business community and civil society, and not by Government appointees. However, although the Privatisation Act determines which organisations are Members of the ZPA, each individual representative is appointed by the President, having first received the approval of a Select Committee of the National Assembly.³⁵ Some of the positions on the ZPA board are empty. As of June 1998, the Law Association of Zambia, the Bankers Association of Zambia, the Zambia Institute of Chartered Accountants, and the Churches of Zambia were not represented.³⁶ This situation was earlier criticised by the Parliamentary Committee on Public Investments tasked with preparing a *Special Report on Privatisation*.³⁷ The right of every citizen to take part in the conduct of public affairs, whether directly or through chosen representative, is undermined.³⁸ As will become apparent, these vacancies reflect the fact that the members of the ZPA board, in reality, have little control over privatisation.

Two seemingly insignificant clauses in the Privatisation Act combine to further undermine the independence of the ZPA board. First, it is specified that when a matter needs urgent attention, a ZPA board meeting can be called without the usual fourteen days notice.³⁹ Indeed, meetings have been convened at very short notice making it impossible for all members to attend. Second, since only five members of the board are required to decide and vote on any matter, the ZPA board may press ahead with business in the absence of full representation.⁴⁰ In such circumstances, providing all three of the Lusaka-based Government members are in attendance, then the Government has an automatic majority on the board. Manipulation is not merely a theoretical possibility, but has occurred in practice. The documented subversion of a prior decision reached by the full ZPA board over the sale of one of the ZCCM mining packages was achieved, in part, by the procedural ruse of convening an urgent meeting between the Committee of Ministers and the ZPA board at short notice.⁴¹ As a result, the letter confirming the ZPA board's original decision to award the sale of the mine to a Canadian mining firm, in contravention of the Government's/ZCCM's wishes, was withdrawn.

It is specified that the Members of the ZPA need only meet once every two months.⁴² It is therefore the ZPA management which takes decisions on the day to day running of the privatisation programme and makes recommendations to the Members.⁴³ This division of labour between the ZPA board as the executive and ZPA management constitutes common practice and is not contentious until it is realised that the board acts as little more than a rubber-stamp on the decisions of the agency's evaluation and negotiating teams. The crucial issues are the degree to which these teams are subject to political or commercial manipulation; whether other bodies, including parastatal boards or unaccountable Government committees have the final say over the sales process; and, ultimately, the extent to which such interference in the privatisation process actually matters. The benchmark for this final judgement is whether the way in which privatisation has been conducted has proved detrimental to the realisation of fundamental human rights.

3. Accountability and deviation from the Privatisation Act in practice

The United Nations has recommended that Member States, in their efforts against malpractice and corruption, are guided by the International Code of Conduct for Public Officials (1996).⁴⁴ General principles are codified whereby to be in public office implies a duty to act in the public interest.⁴⁵ Public officials shall perform their functions in accordance with laws or administrative policies and 'shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner.'⁴⁶ Moreover, they shall be 'fair and impartial in the performance of their functions' and 'at no time afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual'.⁴⁷

The Privatisation Act lays down the parameters for the conduct of each sale while ZPA has developed mechanisms by which the Act is implemented.⁴⁸ There are numerous occasions - often involving the sale of the largest parastatals - when the set procedures have been subverted.

Although other modes of sale are specified under the Privatisation Act, the most common way in which large State owned enterprises are sold is through the private sale of shares through negotiated or competitive bids. All bidders must first pre-qualify.⁴⁹ An evaluation team, which is made up of two or three ZPA staff and a consultant, then assesses each bid received for a business.⁵⁰ The team then meets with the ZPA management before presenting its Bid Evaluation Report and recommendations to the Members of the ZPA board. The Members approve a short list of bidders and invite those selected to further negotiations.⁵¹ For each actual sale, ZPA management is assisted by an independent negotiating team whose appointment is approved by the Members of the ZPA board.⁵² This comprises a chairman, a lawyer, at least two technical consultants from ZPA staff, and specialist consultants/advisers, as required.⁵³ The negotiating team liaises and bargains with each selected bidder and eventually hammers out a deal with the selected buyer.

a. The sidelining of ZPA in the privatisation of ZCCM

There are stark instances - for example, in respect of the sale of ZCCM - when the make-up of key negotiating teams has been the subject of blatant political interference. The Zambia Association of Chambers of Commerce is on public record stating, 'We believe that, despite the government's statement to the contrary, amounts realised from the sale of the mines are far less than could have been raised had there been no political interference in the process and had the job been left to Zambia Privatisation Agency.'⁵⁴

Negotiations over the sale of the mining parastatal were being led by the international merchant bank, N.M. Rothschild, when, at the end of March 1997, a former chairman and chief executive of ZCCM, Francis Kaunda, was appointed by the President, rather than by the ZPA board, to head the ZCCM Privatisation Negotiating Team. This appears to be in direct contravention of the Privatisation Act.⁵⁵ Furthermore, the chief executive of ZPA is a Director of ZCCM.⁵⁶ One of the known member's of the ZCCM Privatisation Negotiating Team is also a Director of ZCCM.⁵⁷ The Privatisation Act purposefully specifies that the ZPA, and therefore not the company board and directors of a parastatal, is to handle all sales. In the case of ZCCM, this distinction is blurred. In reality, it is the ZCCM board and the Government itself, not the ZPA, who are handling negotiations over the sale of ZCCM.⁵⁸ The appointment of Kaunda to handle the ZCCM privatisation has been heavily criticised by members of the consortium of international mining companies who failed in their bid to purchase the Nkana and Nchanga package.⁵⁹ The Parliamentary Committee on Public Investments has denounced deviation from the Privatisation Act and has urged the Government to ensure that privatisation is carried out in accordance with its provisions.⁶⁰

Once each individual agreement has been finalised by the negotiating team, it does not come back to the Members of the ZPA board for approval, although both the board and the Attorney General may review the agreement reached.⁶¹ Rather, the Privatisation Act specifies that the Minister of Finance *shall* sign the final Sales Agreement to transfer shares to the selected bidder.⁶² Once more, the process specified in the Privatisation Act is not necessarily followed. The power of decision over the sale of ZCCM lies with a special Cabinet subcommittee (also known as the Committee of Ministers) which decides whether each sale should go ahead in line with the terms which are being agreed by the negotiating team.⁶³ The subcommittee keeps in close contact with the negotiating team throughout to ensure the sale is going ahead in accordance with its wishes.

The unaccountable way in which certain crucial privatisations have been conducted has led to some anomalous decisions. Many commentators and industry analysts are highly critical of what they perceive as the mishandling and eventual collapse of the sale of the key Nchanga and Nkana mine to a credible international mining consortium.⁶⁴ At the close of bidding for the Chibuluma mine in February 1997, the Metorex Consortium openly acknowledged that it was being represented in its negotiations to purchase the mine by Francis Kaunda.⁶⁵ The other bidder for the mine was the Kafue Consortium which wanted to purchase Chibuluma as part of the Nkana/Nchanga sale package. The following month, Kaunda was appointed to handle negotiations over the privatisation of ZCCM. Chibuluma Mine was split from the recommended sale package and awarded to Metorex on 31 July 1997.⁶⁶ Kaunda did not publicly terminate his connection with Metorex, nor resign from the negotiating team, nor exclude himself from negotiations over the sale package which included Chibuluma.⁶⁷

Chronology of key events in the privatisation of ZCCM

January 1995 - An announcement is made in the budget speech that ZCCM is to be privatised within two years

October 1995 - The merchant bank N. M. Rothschild and the legal firm Clifford Chance are hired to produce a privatisation plan for ZCCM.

April 1996 - The Rothschild report recommends the unbundling of ZCCM into ten principal sale packages to be privatised through international competitive tender. The Government is to retain a 'golden share' - typically 15 per cent - in the successor companies which it has the option to sell to Zambian and other investors at a later date.

May - June 1996 - ZCCM privatisation plan approved by both the Zambian Government and the ZCCM board.

February 1997 - The bidding process closes. Each package attracts at least one bid.

A memorandum of understanding is signed between the Government/ZCCM and Anglo American for the exclusive purchase of the extensive Konkola Deep deposit outside of the main bidding process. This deal cements Anglo American's acceptance of the privatisation process, but the option granted to the company to purchase the smelter from another sale package jeopardises the future of the Mufulira mine.

The Kafue Consortium of three leading mining houses (Avmin of South Africa, Noranda of Canada, and Phelps Dodge of the USA) and UK financiers, the Commonwealth Development Corporation, enter into negotiations to purchase the core Nkana/Nchanga asset package.

March 1997 - Appointment by the President of Francis Kaunda to take over ZCCM sale negotiations from Rothschilds and the ZPA negotiating team.

June 1997 - Finalisation of the Nkana/Nchanga sale to the Kafue Consortium appears imminent. In retrospect, the best price for these mines was achieved at this time.

October 1997 - Conclusion of the sale of the Luanshya and Baluba mines to the Binani Group of India.

December 1997 - The Consultative Group meeting with donors to renew balance of payments support is postponed, ostensibly because of governance issues, but also because of the failure to conclude the privatisation of ZCCM.

April - May 1998 - After a year of protracted negotiations, during which time the price for copper has fallen sharply, the final reduced offer of the Kafue Consortium is rejected and the bidding group dissolves.

Balance of payment support from the donor community agreed at the Consultative Group meeting is made conditional on significant progress in the privatisation of ZCCM.

Mid 1998 - Anglo American invited to formulate a rescue plan to repackage the unsold assets of ZCCM.

September 1998 - Over two years after the privatisation was announced, less than 20 per cent of ZCCM's operating capacity has passed into private ownership.

October - November 1998 - Anglo American agrees to relinquish its purchase rights over the Mufulira smelter in the event of an agreement being reached allowing it to purchase the other key ZCCM assets as a single package. A prospective buyer is found for the Mufulira mine.

December 1998 - January 1999 - Anglo American negotiates the option to purchase all remaining key ZCCM assets. A number of preconditions are set by the company to include the identification of a suitable partner, the securing of finance, and the implementation of a ZCCM redundancy program to be paid for using donor funds.

New lending instruments are agreed with the World Bank and IMF as a result of the memorandum of understanding signed between the Government/ZCCM and Anglo American. However, the release of funds is made conditional on conclusion of the deal and transfer of ownership.

March 1999 - The original deadline for conclusion of the sale of the remaining key ZCCM assets passes. The preconditions set by Anglo American for the purchase have not been met.

October 1999 - Anglo American revises the basis of the original deal. A new agreement is reached whereby the high cost Nkana mine is excised from the sale, although the South African Company retains its option to run and purchase the Nkana smelter, crucial to its wider operations in Zambia. Anglo American refuses to take over social assets associated with the mines.

February - March 2000 - While a number of non-operational and smaller ZCCM mines, as well as the Power Division, were privatised relatively early, the eventual sale of the key mine packages at the core of ZCCM to Anglo American (Konkola, Nchanga, Nampundwe and a contract to run Nkana smelter) and First Quantum/Glencore (Nkana Mine and Mufulira) has only recently been concluded. Please refer to Section 2(IV) for a full consideration of the privatisation of ZCCM. A supplement appended to Section 2(IV) details the status of each ZCCM asset package to February/March 1999

b. The sale of the Luanshya Mine: allegations of malpractice

A court case disputing the sale of another ZCCM mine reveals the extent of deviation from the Privatisation Act. Luanshya and Baluba, was sold to an Indian company, the Binani Group in June 1997.⁶⁸ From the outset, the deal struck with Binani has attracted criticism and accusations of malpractice. When a company is to be sold by competitive tender, each bidder must first pre-qualify by demonstrating that they have the necessary financial resources, management capacity, and business experience to buy and run the enterprise in question.⁶⁹ The front runner to win the sale had been First Quantum, a Canadian mining company with a sound industry track record in copper mining. Binani, on the other hand, has no copper mining experience.⁷⁰ Some analysts are of the view that the Binani company does not have the necessary financial backing to fund its ambitious plans for the Luanshya operations, as outlined in its bid and in the subsequent development agreement.

In August 1997, First Quantum filed suit in the High Court against the Zambia Privatisation Agency (ZPA), ZCCM, Binani and the Government of Zambia as a fourth defendant seeking a reversal of the decision to sell to Binani.⁷¹ It alleged that a decision had been reached, on a purely commercial basis, by the Zambia Privatisation Agency to award the sale to First Quantum but that this decision was then overruled, contrary to the Privatisation Act, by members of the Zambian Cabinet. Furthermore, First Quantum alleged that details of its bid had been leaked to Binani.⁷²

The legal action has brought a number of facts to light. First Quantum had indeed originally been selected as the winning bidder by ZPA.⁷³ In doing so, the ZPA board followed the expert recommendation of its advisors, the merchant bank N M Rothschilds, rather than the wishes of the Government/ZCCM. This decision - apparently never verified by letter to the Committee of Ministers, although even this is disputed - was officially reversed following an urgent meeting between Cabinet members and a minority of the ZPA board.⁷⁴ Binani, despite having no copper mining experience, had never conducted full underground studies of the mine. The ZPA board had considered Binani's pledge to retain the workforce in its entirety as 'unlikely to be achieved and actually demonstrates that the Binani Group did not carry out an in-depth due diligence study'.⁷⁵ Yet, despite the absence of such a study and the company's lack of pertinent experience, the Binani Group was still able to table an initial bid⁷⁶. The rules governing the tender process stipulate that bids are to be placed in sealed envelopes and deposited in padlocked metal tender boxes at the ZPA offices.⁷⁷ All bids are then opened in public. In according with the bidding rules for the Luanshya/Baluba package, all offers were received by 28 February 1997 and opened the same day. The award of the sale was to be announced by 1 April 1997.⁷⁸ However, after protracted negotiations with the three competing bidders - during which time First Quantum believed itself to be the 'preferred bidder' - the ZPA requested revised bids on 17 June 1997 with a deadline for their receipt just two days later. The cash component of Binani's final bid, submitted at the last moment, bettered First Quantum's offer by a precise margin, prompting the allegation from the Canadian company that details of its own bid had been leaked.⁷⁹

The jettisoning of due legal safeguards in the conduct of the Luanshya/Baluba sale has, even in the short term, proved detrimental to worker's rights. The deterioration in employment conditions, coupled with persecution of the local union leader, prompted unprecedented industrial unrest in Luanshya in November 1998. There have been negative repercussions for social provision in the local community. A full account of the grievances of the workforce and the township residents, in the context of the flawed development agreement which was signed with Binani/Roan, is given in Section 2(IV).

The denial of rights enshrined in the Covenant in this instance is the ultimate reason why accountability throughout the sale process is vital. The ZPA board and the sale procedure were established so that informed, autonomous decisions could be reached on making the award to the bidder offering not only the highest price, but with the best development plans and a sound track record. Seemingly esoteric provisions in the Privatisation Act take on a heightened significance when their infringement results in the usurpation of the ZPA. This blatant, initial disregard for due process and accountability presaged the unrest and infringement of rights which occurred in Luanshya little more than a year after the sale was concluded. It must also be noted that the allegation has been made in public that President Chiluba had a vested interest in the award of sale to Binani and now owns shares in the enterprise.⁸⁰ The accusation has been denied by the President, but calls for full disclosure of share ownership persist.

C. Transparency and access to information

1. Introduction: the Privatisation Act and transparency

There are two aspects to public information on privatisation: balanced publicity to inform people about the nature, merits, pitfalls and progress of the process; and the publication of more detailed information about each sale to ensure transparency. This focuses here is upon the latter type of primary information. In respect of the former, the conclusion reached within an internal Bank evaluation of privatisation was that the public information campaign on privatisation 'started late and had inadequate coverage.'⁸¹

Transparency is itself predicated on a fundamental right: article 19(2) of the Covenant on Civil and Political Rights states that 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information....' There are at least three areas in which transparency under the Privatisation Act is paramount. First, and because privatisation involves the sale of national assets owned by the Zambian people, information must be made available detailing the sale proceeds and how the money realised is being spent. Second, the full facts behind each sale - who the bidders are, how negotiations are conducted, the reason for the award of the sale of a company to one buyer over another - must be published to allow people to judge for themselves the merits of the decision-making process. Finally, once a company is sold, people affected by the privatisation need as much information as possible about the new owners plans in respect of employment levels, working conditions, and the management of social assets.⁸²

In principle, a number of safeguards exist to promote transparency and to prevent those in privileged positions from benefiting unduly from privatisation. ZPA staff and consultants, together with immediate relatives and business partners, are precluded from bidding, although they may participate if shares in a business are sold by public flotation.⁸³ Indeed, ZPA staff and consultants must disclose any conflict of interest in matters relating to the privatisation process.⁸⁴ However, this disclosure is not made publicly but to the Director of the ZPA who has total discretion in deciding what action (if any) is appropriate in each case.⁸⁵ Political leaders and public officers, in contrast, may participate in the sales although they are required to publicly disclose their intention to bid for a State owned enterprise.⁸⁶ To promote transparency, all potential investors must provide information about themselves and those who make up the investor groups. A direct or indirect interest in a bid for a State owned enterprise must be disclosed.⁸⁷ All employees of the ZPA, consultants and members of the ZPA board must take an oath of secrecy and shall not publish or disclose unauthorised information.⁸⁸ There are stiff penalties under the Act for the unauthorised disclosure of information, including heavy fines and even imprisonment for up to five years for those either releasing or publishing such information.⁸⁹ While seeking to prevent the spread of 'insider information,' the same secrecy clauses reduce the likelihood of those party to proceedings from alerting the public about apparent malpractice or deviation from set procedures.

Under the Act, the ZPA must publish certain information by notice in the *Gazette*⁹⁰: the names of State owned enterprises to be privatised; the names of registered consultants, valuers, lawyers, public accountants and merchant banks dealing with the privatisation process; the names of bidders and how much they are bidding; the successful bidders and the reason they have been selected; the price of shares, or any other special conditions of the sale of shares; and details of any other matters thought to be appropriate. This information is consolidated and reproduced every six months in a progress report which the ZPA must submit to the Minister of Finance.⁹¹ This report is presented to the National Assembly and then published for sale to the public.⁹² Under the Privatisation Act, the ZPA must also submit an annual report and accounts to the Minister of Finance who presents these to the National Assembly before the report is published for sale to the public.⁹³ A parliamentary select committee on parastatals monitors the operations of ZPA.

There are positive aspects to the Privatisation Act in respect of transparency, although, once more, many of its provisions are not fulfilled in practice. At the same time, there are omissions within the Act itself which prevent the public from gaining access to information or from meaningful participation in the process.

2. The Privatisation Act: in-built failures of transparency

In spite of these stipulations, the form in which certain information is published precludes detailed scrutiny. For example, the consultancy listings in neither the *Gazette* nor in the ZPA's progress reports reveal who is in each independent negotiating team or the extent to which any one firm or individual is being used. ⁹⁴ There is often a protracted delay in revealing the details of certain deals.⁹⁵ This engenders mistrust. For example, industry commentators have noted that '[h]ere in a country and under a regime where nondisclosure normally means there is something to hide, we the Zambian public are justified in maintaining a fair degree of scepticism at the way the financial results of the

recent mines privatisation are being withheld from public scrutiny.’⁹⁶ Furthermore, what the ZPA’s annual report and accounts and the six monthly progress reports omit to tell you is often of equal, if not greater, importance than what they reveal. Hence details of how much an enterprise was valued at originally are not published as a matter of course. This makes it impossible for the general public to judge whether the business in question was sold at a fair price. Most seriously of all, there is a total lack of transparency in revealing how much revenue has been generated by privatisation and what has happened to these sums of money.

3. Transparency and deviation from the Privatisation Act in practice

a. Allegations of corruption and self-dealing

The meaning of corruption is often reduced to that of bribery, the definition of which hinges on the offer and acceptance of payments or other advantages.⁹⁷ However, bribery does not necessarily capture the corrupt activity of self-dealing when public officials and politicians manipulate the bidding process to achieve the award of sale to a company in which they have a vested and often hidden interest. The meaning of corruption is taken to encompass both bribery and self-dealing. Privatisation in Zambia has encompassed a diversity of enterprises, some of which have been small in size. However, the process has also involved the sale of large firms and major conglomerates. Privatisation is therefore the preserve of big business and high-level officials. As such, any corruption associated with privatisation is likely to be characterised as ‘grand corruption’.⁹⁸ Malpractice describes both improper or negligent deviation from set procedures and guidelines. Malpractice is often, but not always, both the result and means of corruption.

The UN’s International Code of Conduct for Public Officials stipulates that:

‘Public officials shall not use their official authority for the improper advancement of their own or their family’s personal or financial interest. They shall not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties or the discharge thereof.’⁹⁹

Privatisation in Zambia has been described as ‘a looting exercise’ by the anti-corruption group Transparency International. Many of the provisions to ensure transparency in principle have been disregarded in practice. According to one commentator the program has stalled ‘amid accusations of incompetence graft and asset-stripping’ and has become ‘a source of corruption.’¹⁰⁰ Transparency International and Zambian journalists have accused a cabal of ministers and officials of buying smaller businesses at bargain prices while failing to close on the sale of major industries. A former Minister for Legal Affairs confirms that Ministers were party to information about the lowest acceptable bid prices.¹⁰¹ The ZPA does not have a clear-cut responsibility, let alone the capacity, for monitoring whether businessmen and politicians have bought shares through third party proxies, even though this is illegal under the Privatisation Act. Furthermore, when remaining Government holdings in some of the larger businesses are publicly floated, the ZPA has no duty to gather information about how many shares individuals have purchased. The fact that most smaller companies have been sold direct to investors by-passes the more stringent disclosure requirements under the Securities and Investment Act.

A copy of ZPA’s consolidated list of political leaders, public officers and individual citizens who have bought former state owned companies was obtained from ZPA in January 1998. The last transaction date given is January 1997 and hence the information requires updating. From the list it can be ascertained that eighteen businesses had been sold to politicians and public officers. Twelve shops and trading outlets in towns across the country were bought by ten MPs, including among their number seven Ministers or Deputy Ministers.¹⁰² Hotels were bought by the Minister for Local Housing and a former MMD Party MP.¹⁰³ A dairy farm near Lusaka was sold to the Deputy Minister for Transport.¹⁰⁴ A much larger farm of 10,000 hectares in Copperbelt Province was sold to RDS Investments Limited, which is owned by the immediate family of Ronald Penza, the then Finance Minister.¹⁰⁵ Consolidated Tyre Service Limited was bought by Amon Kambole Sikazwe and Chibulu Jane Penza.¹⁰⁶ The Penzas had also bid for the strategically important Mpulungu Harbour on Lake Tanganyika, but Ronald Penza was killed before the sale was awarded. The former Finance Minister’s business interests had been subject to press scrutiny following his sacking by the President in a cabinet reshuffle in March 1998.¹⁰⁷ Less than nine months later, in late November, Penza was shot dead at his home in an apparent bungled robbery. Those suspected of the crime were all shot in extrajudicial killings by police. Some believe that Penza was assassinated and accuse the authorities of a cover-up.¹⁰⁸ The investigation into Penza’s murder and the killing of several of the suspects has been roundly condemned by human rights organisations.

There are apparent anomalies in that politicians named in the press as owning newly privatised companies do not appear in the ZPA list. A former MMD Finance Minister, Emmanuel Kasonde, completed the purchase of the General

Pharmaceuticals Company based in Kabwe in May 1994. The acquisition is not recorded in the ZPA's list of purchases by politicians although Kasonde's name is given in the relevant privatisation progress report.¹⁰⁹ It is alleged that, subsequent to the sale, the company was stripped of its assets, employee housing was sold to the Zambian military, the main plant was disposed of, and the workforce sacked without severance pay.¹¹⁰ This must represent a violation of the right to housing and the right to just and favourable conditions of work. The Parliamentary Committee on Public Investments has also expressed its concern over asset stripping by parastatal managers in companies prior to their privatisation.¹¹¹ The ZPA has itself noted that: 'Management of certain SOEs provided themselves extraordinary and excessive benefits in anticipation of privatisation. This created difficulties in negotiations and had a negative impact.'¹¹²

The danger posed by high-level political, administrative and financial corruption stems from its power to determine the whole structure of political and economic relationships, undermining democracy and the rule of law.¹¹³ Other internationally recognised principles iterate that 'political leaders are responsible for maintaining a high standard of propriety in the discharge of their official duties.'¹¹⁴ Allegations have been made in a reputable business journal that public money has been siphoned-off into private offshore companies, many of them based in the British Virgin Islands where confidentiality laws are strong and disclosure requirements are minimal.¹¹⁵ The article repeats the accusation that the web of corruption includes the President who owns assets beyond the purchasing power of his salary including properties in Belgium, the Netherlands, South Africa and Zambia as well as stakes in an emerald mine and a lime producer.

The sale of Ndola Lime was handled by Francis Kaunda's negotiating team and not by ZPA. Two leading players in the industry, Chilanga Cement and Portland Cement, tabled bids. Yet the sale was awarded in September 1998 to Socomer SA, a small Belgium firm with neither the relevant background in cement production nor apparent access to the necessary large-scale finance required to invest.¹¹⁶ Sources within the Ministry of Finance were quoted in the Zambian press raising serious questions about the merits and transparency of the deal.¹¹⁷ Attention was drawn to Chiluba's close contacts with Socomer, including his friendship with the majority shareholder in the company. Both Socomer, through a statement from its lawyers, and the ZCCM negotiating team rejected the allegation of any links between the company and the President or the Democratic Republic of the Congo.¹¹⁸ There is presently some doubt as to whether Socomer has the finance to complete its purchase of Ndola Lime and whether other bidders are to be invited to reconsider their original tenders.¹¹⁹ However, conflicting reports suggest that Socomer is itself seeking to reduce its bid for the company to below \$10 million because of the prospect of Anglo American insisting on a five year fixed price for lime for use by Chilanga Cement while it refurbishes former ZCCM facilities.

Kagem Mining, an emerald producer, was due to be sold in late 1999 under the fourth tranche of privatisation. While the Government has a majority stake, forty-five per cent of the shares are owned by an Israeli gem company, Hagura which is running existing operations. The MUZ has expressed its dissatisfaction with returns from the company under private management: good quality stones mined in Zambia are apparently resold for much higher prices in the Far East.¹²⁰ It has been alleged that President Chiluba has an interest in Hagura. Allegations have also been voiced in the Zambian press that the President and a former Finance Minister have shared in the privatisation proceeds and even sanctioned company liquidations for personal gain.¹²¹

These allegations require further substantiation. In this regard, attention is drawn to the Declaration Against Corruption and Bribery in International Commercial Transactions and Zambia's commitment, *inter alia*, 'to take appropriate action to enhance cooperation to facilitate access to documents and records about transactions and about identities of persons engaged in bribery in international commercial transactions.'¹²² Furthermore, the UN's International Code of Conduct for Public Officials stipulates that 'Public officials shall, in accord with their position and as permitted or required by law and administrative policies, comply with requirements to declare or to disclose personal assets and liabilities, as well as, if possible, those of their spouses and/or dependants.'¹²³

b. Discrepancies in the banking and use of privatisation proceeds

i. Sale proceeds and their deposit in the Privatisation Revenue Account

'Public officials shall at no time improperly use public moneys, property, services or information that is acquired in the performance of, or as a result of, their official duties for activities not related to their official work.'¹²⁴

The sale of former state enterprises might be expected to generate money for the Government of Zambia, although this will not be anywhere near as much as might be assumed. This is because many of the enterprises are currently running at a loss and will continue to do so until the new owners invest in them. For example, over the period 1985-1989,

parastatals cost the Government \$455 million in hidden subsidies against dividends paid to the Government of just \$22 million.¹²⁵ ZCCM has recently been running at a loss of \$25 million every month.¹²⁶ Hence privatisation is less to do with raising money than with saving money and attracting new investment. A small proportion of the money generated from the sale of sound companies has been used to pay off the debts and liabilities of other state-run enterprises.¹²⁷ However, rather than ZPA covering the costs of company liabilities out of the money made from privatisation, often the price paid for an enterprise is adjusted in order to take into consideration existing debts. This means that the amount of money actually received - the cash consideration - is often much less than the value of the sale as a whole.¹²⁸ Yet, even if the market dictates that the prices realised are low, it might still be expected that the sheer size of the sale - involving some very large parastatal companies, as well as hundreds of small and medium sized enterprises - would generate a significant amount of capital for the Government of Zambia which could then be used to increase public expenditure, for example, on retraining or social provision. This has not happened for a number of reasons.

The United Nations Declaration Against Corruption and Bribery in International Commercial Transactions requires States 'to develop or maintain accounting standards and practices that improve the transparency of international commercial transactions.'¹²⁹ Under the Privatisation Act, proceeds from the sale are to be deposited in the privatisation revenue account (PRA) at the Bank of Zambia which is controlled by the Minister for Finance. It is difficult to determine how much money has been generated as figures for the amount of money in the privatisation revenue account are not made public. Initially, the ZPA progress reports did list how much money from each sale went into the PRA, but this practice ceased altogether after the end of 1995 and before the bulk of the sales went through.¹³⁰ Even when deposits into the PRA were listed, no figures have ever been published by the ZPA or the Ministry of Finance detailing outgoings from the account or how the money generated is being spent. This means that it is impossible to calculate the balance in the account.

Although the balance of money in the PRA is not officially stated, a certain amount of information can be pieced together. By adding up the cash realised from each and every sale, the total amount of money generated up until the end of June 1997 was in the region of K143 billion. Some of this amount was on deferred payment terms, but, by the same date, at the very least K100 billion should have gone into the privatisation revenue account. Unofficial estimates put the actual amount passing into the account at less than half this figure. At the end of 1997, the balance in the account was believed to be approximately K30 billion.

Before ZPA stopped publishing any details about the PRA, it was apparent that deposits into the account were not always for the full amount realised in the sale and no explanation was given as to where this money went. On many occasions, the sale price listed or the amount deposited in the PRA were misleading. For example, they either included a sum for liabilities which the new owners had agreed to take over or included capital which they had agreed to invest.¹³¹

At other times, although very large sums of cash were generated from the sale of valuable medium-sized operations or from the sell-off of the largest companies of all, no money was listed as going into the PRA. Nor was it revealed where this money went. The list of unaccounted for revenue includes: Zambia Sugar Company - \$14.8 million; Munkumpu/Nchanga Farms - \$7.2 million; and Mpongwe Development - \$507,000. The complete list is unquestionably much longer and is almost certain to include other significant sales.¹³²

This diversion of funds was confirmed by the Committee on Public Investment in December 1997. In its report on privatisation, it notes instances when the GRZ/ZCCM Privatisation Negotiating Team has sold ZCCM assets such as schools without the prior authorisation of the of the ZPA board. The Committee has questioned the deposition of proceeds from the sale of the mines and their associated assets into a ZCCM account, apparently to be put towards meeting the company's obligations, and not into the Privatisation Revenue Account as required under the Privatisation Act.¹³³ Proceeds from all ZCCM completed sales to the end of 1999 - Konkola North, Chibuluma, Kansanshi, Power, Luanshya/Baluba, Chambishi, Ndola Precious Metals Plant, and Chambishi Cobalt and Acid Plants - should have yielded a cash consideration to date in the region of \$185 million.¹³⁴ The whereabouts or use to which these funds have been put requires clarification.

A further serious omission in public accounting concerns the public flotation of the Government of Zambia's remaining shares in a company. These sales can generate significant sums of money, but the amount realised is not recorded in the ZPA's published records and, once more, it is impossible to verify whether the money generated is deposited in the PRA in accordance with the Privatisation Act or whether it is diverted elsewhere.

ii. The use of the sale proceeds

Assuming the figures on revenue and the balance in the PRA at the end of 1997 are broadly correct, then anywhere between K70 billion and K110 billion of the money generated from the privatisation programme to that date had already been spent or moved to other accounts. It is by no means clear that this revenue, the inheritance of the people of Zambia,

has been put to the uses specified under the Act.¹³⁵ Despite the lack of official information, it is apparent that the income generated has been spent disproportionately on a narrow range of uses from among those specified under the Privatisation Act. With the prior approval of the Minister for Finance, the money generated may be used, *inter alia*, for funding the cost of privatisation and the Privatisation Trust Fund; for financing credit creation by the Government for Zambian investors; for rehabilitating existing plants and supporting new capital investments; and for funding the restructuring of State owned enterprises to be privatised.

A great deal of the money from the sales has gone into paying for the running of the Zambian Privatisation Agency. In October 1998, the ZPA put the figure at K20 billion.¹³⁶ However, it seems likely that this expenditure refers only to funding of the Agency from the beginning of 1995 until the end of 1997. Government Ministers have confirmed that most of the money generated from the sales had been ploughed back into ZPA.¹³⁷ This situation, in which proceeds from the sale of virtually every nationalised company in Zambia has been used up in the running of one organisation for five years, has been described by opposition figures as 'the worst crime'.¹³⁸

At the level of the Privatisation Act, there is a social dimension to the use of sale proceeds for supporting redundancy payment schemes in consultation with the Ministry responsible for labour; for supporting alternative income generating projects; and for funding of any social project that will be in the public interest. These areas have been badly neglected. The fact that no official figures are available from the Ministry of Finance on how the money in the Privatisation Revenue Account has been spent necessitates, from the other side of the equation, a consideration of the Government's poor record of achievement in those other areas earmarked for funding under the Act. Please refer to Section 2(II) and Section 3 on, respectively, the neglect of retraining and the inadequacy of welfare assistance available to retrenchees.

D. The limits to popular participation in privatisation

1. Introduction: defining participation

The right to development of the entire population and all individuals must be secured 'on the basis of their active, free and meaningful participation in development'.¹³⁹ Participation in development moves beyond access to information to encompass 'the fair distribution of the benefits resulting therefrom'.¹⁴⁰ Clearly such benefits in the context of privatisation may be widely defined: for example, a possible expansion in employment or increased tax revenue from a prosperous private sector. However, these benefits are, in the context of Zambia, promissory.

Indeed, privatisation is much more concerned with stemming parastatal losses than with an immediate expansion of the business and industrial base. This is confirmed by the World Bank itself: 'The transition from a state-owned to a private-sector driven enterprise sector...meant that firms were more likely to retrench workers and consolidate operations than to undertake new investment, particularly in the short term.'¹⁴¹

Foreign investors are entitled to incentives under the Privatisation Act in accordance with a comprehensive range of tax concessions and duty exemptions under the Investment Act.¹⁴² This has reduced the amount of revenue which could, in theory, be used to increase social expenditure of benefit to all. Separate legislation or schedules deal with incentives and taxation for the mining sector.¹⁴³

The tax concessions granted to investors in the mining industry in recent budgets are extraordinarily generous; many are guaranteed for periods up to twenty years. Mining-related concessions in the 1998 budget alone were calculated to result in a revenue loss of K18 billion in one year. The concessions confirmed in the 2000 budget are even more far-reaching and will reduce revenue further still. The total cost to the Government will increase year upon year while the concessions remain in place. It will only be reversed when the mining companies not only begin to make a profit, but begin to make a profit which is eligible for tax. Please refer to Section 2(IV) for a more detailed analysis of the nature and implications of the tax regime applicable to the mining sector.

The focus here will be upon those aspects of fair and beneficial participation which can be readily identified: the extent to which Zambians have been afforded the opportunity to share in the rewards of privatisation through direct buyouts; and schemes to encourage popular share ownership in the most successful enterprises.

2. *Employee and management buyouts versus sales to foreign investors*

a. **Employee and management buyouts**

There are two main ways through which Zambians can, theoretically, participate in privatisation. The first is through employee and management buyouts.¹⁴⁴ In a small number of cases, managers and employers have been given the first opportunity to bid for the company in which they work.¹⁴⁵ In general, their bid is considered by competitive tender alongside all others. The barriers to be overcome in launching a successful bid are significant. They include a need for the necessary expertise to draw up and agree upon a business plan and the funds to make a competitive bid.¹⁴⁶ It is not surprising, therefore, that most buyouts have been launched by management. Four buyouts have been initiated with any direct employee involvement of which only one has been successful.¹⁴⁷ The number of successful buyouts by managers has also been small. Of the 59 management buyout teams who have initiated bids, 18 have been successful.¹⁴⁸ This should be set against a total of 188 privatisations by June 1997. Virtually all the businesses bought through buyouts have been officially classified as small companies by the ZPA or else are individual hotels or mills.¹⁴⁹ The approximate value of the firms bought in this way to June 1997 was K4.5 billion out of a total sale value in the region of K143 billion from all privatisations.

b. **Sales to foreign investors**

As of February 1998, 128 companies had been sold to Zambians and 70 to foreigners.¹⁵⁰ The impression is that the majority of enterprises have been sold to Zambians. It is a truism to say that the businesses will have been sold to the well-off: they are the only Zambians able to secure the necessary finance. As has been noted, significant number of politicians and those close to political power have figured prominently in domestic purchases. However, the bald figures on ownership are themselves misleading if it is then assumed that the bulk of the Zambia's newly privatised industries and businesses *by value* are now owned by Zambians. The companies sold to foreigners tend to be the largest companies or those medium sized operations with the potential to make good profits. Those businesses sold to foreigners by mid-1997 were worth eight times as much as those sold to Zambians.¹⁵¹ Once the continuing sale of ZCCM is complete, this will massively alter the balance still further towards foreign ownership. An internal Bank evaluation concluded that no consideration was given to assisting Zambians to purchase enterprises.¹⁵² Without private funding or instalment payment arrangements, few Zambian entrepreneurs or managers could participate as domestic loans were scarce and expensive. Hence the Bank notes that the sale of most of the larger enterprises to foreign interests has created 'some resentment that may have political consequences.'¹⁵³

Any new, committed owner who has a genuine interest in expanding a business by investing in Zambia should be welcomed, whether this is a foreign-owned multinational or a Zambian company. The important question is the type of investment and management which new ownership brings. If the interest is in long-term, sustainable profits, a fitting proportion of which are reinvested in the company; if working conditions are improved; if wages are fair; if employees and local communities are consulted as part of a company's plans, then the nationality of the owners is irrelevant. There is, however, evidence to suggest that some foreign employers have been less than scrupulous in safeguarding working conditions: please refer to Section 2(II) on the right to just and favourable conditions of work.

The ZPA, in its selective presentation of privatisation to the public, emphatically denies that foreign firms will take money out of Zambia.¹⁵⁴ However, at the same time it is conceded that foreigners may 'externalise profits'. What is critical for Zambia's economic future is the level at which profits are taken out of the country in comparison to the amount of capital which is reinvested. Zambia removed restrictions on how much hard currency could be brought in and out of the country by abolishing the Exchange Control Act in 1994. On the one hand, this means that an investor can now repatriate all amounts of capital introduced into Zambia, and can send out of Zambia all dividends, interest earned, and after tax profits without restriction. All earnings by expatriates can also be externalised without difficulty. On the other hand, this removal of restrictions is precisely what is attractive to overseas companies in the first place. Investment can flow in at the same time as profits flow out.

However, there are reasons why countries like Zambia are at a disadvantage when it comes to the free movement of foreign exchange. In common with many countries in the developing world, Zambia is already short of hard currency which it needs to service Zambia's foreign debt; to build up reserves to be used by the Government in the event of unforeseen crises such as drought, a drastic fall in copper prices, or interruptions in foreign exchange coming in from international donors; and to fulfil the needs of domestic businesses which must purchase equipment and machinery from overseas, meet expatriate wages, and to repay off loans to foreign banks.¹⁵⁵ The Government's poor record on governance and the failure to conclude the sell-off of ZCCM in 1997/98 resulted in the suspension of balance of payments from donors. This caused an almost complete lack of foreign exchange: less than \$4 million in total was

delivered from non-traditional exports and one bilateral donor in the first quarter of 1998, forcing the Government to release reserves.¹⁵⁶

3. Popular share ownership

The second route to participation is through popular share ownership schemes. Much has been made of public flotation by political leaders and the ZPA, but the vast majority of Zambians are impoverished and are in no position to participate.¹⁵⁷ In 1996, seven-tenths of households in Zambia shared only 23 per cent of per capita income while the remaining three-tenths of wealthy households accounted for 77 per cent of per capita income.¹⁵⁸ Households in the highest income decile cornered almost 53 per cent of per capita income.

The World Bank has long been preoccupied with the issue of the endorsement of the privatisation program in Zambia. In recognition of the anticipated unpopularity of privatisation, it recommended that the PIRC ought to encourage public participation in the process.¹⁵⁹ Agreement was reached with the Government that it would establish a privatisation trust fund to hold blocks of shares for later public flotation in order to facilitate local investment and avoid the concentration of corporate ownership in the hands of a few, perhaps foreign, investors.¹⁶⁰ A Privatisation Trust Fund has therefore been set up to hold shares which the Government owns in some of the newly privatised companies. It is managed by the Ministry of Finance and five trustees. Remaining Government shares in the newly privatised companies are released in a controlled way from the Privatisation Trust Fund to be sold on the Lusaka Stock Exchange.¹⁶¹ Zambian citizens who purchase a small number of shares will be able to do so at a discount. All Zambians - the public, employees and management - will also be able to pay for these shares in instalments. It is claimed this will encourage more Zambian citizens to become involved as small investors. Adverts are placed in newspapers and on TV which tell people about any new share offer and advise people on how to go about purchasing shares. The proceeds from the sale of shares should be transferred to the Privatisation Revenue Account. There is reason to believe that this has not always happened in flotations to date.

Out of more than one hundred and fifty companies which are being privatised, about thirty or so have been deemed suitable for public floatation.¹⁶² These companies are generally those which are large, have been well managed and have a strong likelihood of making good profits in the near future. Examples of companies which have seen a proportion of their shares publicly floated are Zambia Sugar, Zambia Breweries, Chilanga Cement, Rothmans and National Breweries.¹⁶³ The flotation of other major companies is envisaged.¹⁶⁴

Popular participation in privatisation through the wide public ownership of shares is at best a myth and at worst a subterfuge for the further concentration of economic power.¹⁶⁵ Such industries were owned on behalf of the Zambian people and it is therefore unacceptable for an elite band of investors to benefit from the purchase and sale of shares. There has been a marginal improvement in income inequality in Zambia between 1993 and 1996, albeit described as 'only a silver lining in the dark cloud of inequality.' In 1996, the top fifth of households accounted for over two-thirds of per capita income while the bottom fifth of households shared a fiftieth of per capita income.¹⁶⁶

The early indication is that privatisation and public share flotations will exacerbate this skewed pattern of income generation and consumption. After all, the poor will not buy shares. The Government cites the fact that, by January 1998, 6,000 Zambians had invested in the Lusaka stock market, as a measure of the success of liberalisation and privatisation. This must be juxtaposed to the 6.5 million living in poverty and the 5.5 million people lacking sufficient income to meet their nutritional needs. Less than one per cent of the population own shares while eighty-five per cent of the population subsist on less than two dollars each day.¹⁶⁷

While it is difficult to ascertain the undeclared interests of politicians, it is apparent that many have purchased large numbers of shares. For example, out of the K16.7 bn worth of assets declared by the Energy and Water Development Minister, Ben Mwila, just over K15 bn were in shares.¹⁶⁸ The Minister had holdings in companies awarded nine district water supply and sanitation rehabilitation contracts. The Local Government and Housing Minister, Bennie Mwiinga, declared shareholdings in MG Paterson and Sons, Mubula Estates Ranch, Mwiimbu Gem Mining, Coin Zambia, Lake Hotels and Chilanga Cement Plc.

E. The World Bank's underpinning of the privatisation framework

The World Bank's Country Director for Zambia, Phyllis Pomerantz, has attempted to absolve the Bank from responsibility for failings within a privatisation framework it has itself fostered:

'Pomerantz maintains she has good reason for not letting allegations of corruption and human rights abuses derail aid to Zambia. "By the World Bank's articles of agreement, we cannot take governance aspects into account," she says. "We're committed to working with Governments on issues such as corruption, but only when corruption impinges on economic development." Faced with direct evidence of high level graft that does impinge on economic development, however, she is unwilling to "talk about specific cases".'¹⁶⁹

It is important to record the role of the Bank as instigator and facilitator of privatisation and private sector development in Zambia. It serves as a reminder, in the context of what would otherwise appear a consideration of domestic laws and policy, of the culpability shared by the Bank for those aspects of reform which have resulted in many Zambians suffering a denial of the economic and social rights. While the Government of Zambia is ostensibly responsible for the legal framework and institutional framework - the Privatisation Act, the ZPA, the timetable of divestiture - its development has hinged upon agreements and stipulations in the Bank's adjustment credits backed up by technical assistance. The Bank therefore shares responsibility when this framework is shown to be ill-conceived in respect of its failure to guarantee accountability, transparency and popular participation in privatisation.

The Bank's underpinning of the privatisation framework takes two forms. Firstly, through the implementation of agreed policies and legislation tied to a number of adjustment credits which deliver assistance in the form of balance of payments support. Certain key measures are given force through legally binding covenants so that their fulfilment becomes a condition for the release of further funds. Secondly, through technical assistance credits which pay for the relevant expertise - often private sector financial and legal consultants - to draw up specific strategic documents and advise upon the framing of legislation. Overall, the influence of the Bank at a detailed level on economic, legislative and policy measures can therefore be profound. As technical assistance is often targeted to advance implementation of the agenda agreed under an associated adjustment credit, the impact of both types of lending on promoting aspects of privatisation antithetical to the realisation of economic and social rights will be considered in tandem.

Those adjustment credits which frame objectives and components geared towards the advancement of privatisation include the two Privatisation and Industrialisation Reform Credits (PIRC I and II, FY 1992 and FY 1993 respectively), together worth \$349 m; the closely related first Economic and Social Adjustment Credit (ESAC I), worth \$164 million, which followed in 1994 and has since been succeeded by ESAC II¹⁷⁰; and the Economic Recovery Investment Promotion Credit (ERIP, FY 1995). Both PIRC I and the ERIP credit were accompanied by technical assistance credits.

The two PIRC programs were designed to deepen macroeconomic reform, to continue parastatal reform and to push ahead with privatisation. The specific objectives of PIRC I were to promote competition and efficiency, encourage the private sector, and improve the Government's ability to manage the reform program.¹⁷¹ PIRC II was to build on the same objectives.¹⁷² Two components are of the most immediate interest here: that concerned with the privatisation of the vast majority of parastatals and the improvement of the efficiency of the few that remained,¹⁷³ and that which is aimed at the development of a policy and institutional framework to encourage the private sector.¹⁷⁴ The \$10 million Privatization and Industrial Reform Technical Assistance Credit (PIRTA) was designed to support the implementation of policies agreed with the Bank under PIRC.¹⁷⁵

The enactment of privatisation law, together with a privatisation strategy and implementation plan, was a requirement of PIRC I. The agreement between the Bank and the Government stipulated that the State holding company (ZIMCO) was to be restructured and all of its commercial subsidiaries, as well as other State owned enterprises, were to be privatised.¹⁷⁶ Targets for the number of companies to be sold by set dates were fixed under both PIRC I and II.¹⁷⁷ Under PIRC II, parastatals were to pay government a 10 per cent dividend and to no longer receive subsidies.¹⁷⁸ Companies that could not be sold were to be closed and their assets liquidated.¹⁷⁹ The Government was required to effect a separation of the operational and regulatory roles of major public utilities.¹⁸⁰ Concern that indirect State subsidies to the public utilities would threaten the stabilisation program lead the Bank to demand the introduction of automatic pricing and a tariff structure which would ensure their short-term profitability.¹⁸¹ In other words, Zambian consumers were to be required to pay more for their electricity and fuel.¹⁸²

The objective of PIRTA was 'to strengthen the capabilities of ministries and other institutions responsible for the privatization and parastatal reform program' and to facilitate macroeconomic reforms.¹⁸³ Technical assistance was focused, *inter alia*, upon the development and implementation of a privatization plan for 105 parastatals, to include the

preparation and restructuring of companies to be sold; the reform of major utilities; and, as an overarching component, the development of new laws and the legal system, together with policies, programs, and implementing institutions, all orientated towards furthering private sector development.¹⁸⁴ The Bank's influence in shaping the privatisation through PIRTA is pervasive. Agreements with the Government included stipulations relating to the recruitment of an international privatisation adviser; the drawing up of terms of reference for the main studies and long-term consultants;¹⁸⁵ and the completion of yearly reviews of privatisation progress.¹⁸⁶ At the outset, the enactment of a Privatisation Act was a condition against which the effectiveness of the loan would be judged.¹⁸⁷ A mid-term review would determine the achievement of State-owned enterprise sale targets, the status of legal reforms, and ZPA's ability to operate 'independently and with transparency'.¹⁸⁸ Provision is made to keep the Bank informed about any developments under the privatisation program *vis-à-vis* its objectives.¹⁸⁹

While certain failings in accountability and transparency are due to the fact that the Zambian Government has exploited loopholes in the Privatisation Act or else has deviated from it, other failings relate to serious omissions and silences. The Bank is exacting in specifying how appointees and consultants at the ZPA will plan divestiture and prepare each sale; it is meticulous in its stipulation of financial and technical benchmarks relating to privatisation; yet it has paid scant attention to the regulation of the inevitable social consequences. The Privatisation Act omits to ensure that affected workers are consulted; it fails to give legal expression to the protection of the right to just and favourable working conditions; it neglects to provide for post-privatisation monitoring; and it is silent on the question of arrangements for the continued management of social services associated with some of the larger parastatals.

Closely related to the issue of privatisation *per se* is that component of the two PIRCs underpinning a framework for private sector development. The release of PIRC I funds was conditional on, *inter alia*, the implementation of the 1991 Investment Act, the effective operation of the Zambian Investment Centre, and the overhaul of business related laws, including anti-monopoly legislation.¹⁹⁰ By the end of PIRC I, the legal framework for the private sector had been drafted but not implemented and the Zambian Cabinet was given additional time to review the laws in question before their enactment became a condition for the release of the second tranche PIRC II. The review of land ownership in Zambia and the adoption of a plan to develop a properly functioning market for commercial land was made a condition of third tranche release.¹⁹¹ The financial sector and capital markets were earmarked for reform and legislation was passed to regulate banking and securities. A blueprint for a stock market and Securities and Exchange Commission, which had been prepared by consultants paid for by the Bank, was to be implemented under PIRC II with IFC and other donor assistance.¹⁹²

Notes

¹ Privatisation Act (1992), respectively sections 3 and 8. An Act to amend the Privatisation Act (1996) introduced some minor changes to the principal Act. The analysis which follows takes into consideration these amendments.

² Privatisation Act (1992), respectively sections 8(2)(e), 8(2)(f), 17, and 22.

³ See *ibid.*, section 8(2)(i). On the appointment of an independent negotiating team, see section 32.

⁴ *Ibid.*, section 29.

⁵ *Ibid.*, respectively sections 38 and 39.

⁶ Both the Bank's Privatisation and Industrialisation Technical Assistance (PIRTA) and its Economic Recovery and Investment Promotion Technical Assistance (ERIPTA) have been used in this manner. For a full discussion of this assistance, please see Section 2(IV).

⁷ See DRD, article 1; also article 2(1).

⁸ *Ibid.*, article 2(3).

⁹ ICCPR, article 25(a).

¹⁰ *Ibid.*, article 19.

¹¹ DRD, article 2(3). See also article 8(2).

¹² Susan Rose-Ackerman (1998), 'Corruption and the Global Economy'.

¹³ Office for Drug Control and Crime Prevention (1999), *Global Programme against Corruption: an outline for action*, para. 9. For a wide-ranging examination by the UN of the issue of corruption, see the report of the Secretary-General on action against corruption (E/CN.15/1997/3) and the report of the Expert Group Meeting on Corruption, held at Buenos Aires from 17 to 21 March 1997 (E/CN.15/1997/3/Add.1).

¹⁴ Adopted by the General Assembly in December 1996 - see A/RES/51/191 and annex. A resolution in February 1998 called upon Member States to, *inter alia*, report on steps taken to implement the Declaration for consideration by the Commission on Crime Prevention and Criminal Justice, to ratify appropriate international instruments against corruption, and to criminalize the bribery of public office holders of other States in international commercial transactions. NGOs were invited to provide relevant information to the Commission. (See A/RES/52/87). See also the long-standing General Assembly resolution 3514 (XXX) of 15 December 1975 which condemns corruption and seeks to strengthen national laws to resist bribery in international business transactions.

¹⁵ DAC, 'Preamble'. While the onus in the Declaration is upon the criminalisation of the bribery of public officials of other States in international commercial transactions through the enactment of national legislation to allow for the prosecution of companies and individuals proffering bribes, the definition of bribery offered includes the soliciting, demanding, accepting or receiving of such undue consideration by any public officials or elected representatives (article 3(b)). Hence both the 'supply' and 'demand' sides of bribery are recognised in the text. Compare the text of the

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and accompanying commentary. See note 22 below.

¹⁶ Adopted by the General Assembly on 12 December 1996. See A/RES/51/59 and annex; also A/RES/50/225 of 19 April 1996 on public administration and development; and the Economic and Social Council resolution 1995/14 of 24 July 1995 on action against corruption.

¹⁷ The Organization of American States has adopted the Inter-American Convention Against Corruption (1996). The Council of Europe has adopted the Criminal Law Convention on Corruption (1998) and its Multidisciplinary Group on Corruption is preparing a convention on civil remedies for compensation for damage resulting from acts of corruption and a Model Code of Conduct for Public Officials. Within the European Union, the European Council adopted the Convention on the Fight against Corruption involving Officials of the European Communities or officials of Member States of the European Union on 26 May 1997. The OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) is open for signature and ratification to countries beyond the twenty-nine member countries provided they agree to participate in the Working Group on Bribery. The OECD has also adopted Principles for Managing Ethics in the Public Service (1998) backed by a Council recommendation. The OECD's Development Assistance Committee endorsed a set of Anti-corruption proposals for bilateral aid procurement on 6-7 May 1996.

¹⁸ Principle 6 reads 'The decision-making process should be transparent and open to scrutiny. The public has a right to know how public institutions apply the power and resources entrusted to them. Public scrutiny should be facilitated by transparent and democratic processes, oversight by the legislature and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media.' Principle 11 reads 'Adequate accountability mechanisms should be in place within the public service. Public servants should be accountable for their actions to their superiors and, more broadly, to the public. Accountability should focus both on compliance with rules and ethical principles and on achievement of results. Accountability mechanisms can be internal to an agency as well as government-wide, or can be provided by civil society. Mechanisms promoting accountability can be designed to provide adequate controls while allowing for appropriately flexible management.'

¹⁹ Cf. undertakings within ICESCR article 2 (1) and (2).

²⁰ See *GC 3*, esp. para.1. See also the arguments of Jayawickrama (1998), 'Corruption - A Violation of Human Rights?'

²¹ *GC 3*, para.2

²² Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, paragraph 4 in respect of article 1. The Commentaries are reproduced in OECD (1997a), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related documents*, DAF/IME/BR(97)20. The Convention itself seeks to make the proffering of bribes on the part of international business a criminal offence. It does not, therefore, explicitly address the illegality of accepting bribes. This notwithstanding, the principle of the incompatibility of corruption with the obligation of conduct is reinforced.

²³ ICESCR, article 2(1). See also *GC 3*, para. 9.

²⁴ *Idem*.

²⁵ *GC 3*, para.10.

²⁶ Cf. clause within ICESCR, article 2(1).

²⁷ The ZPA describes itself as 'an autonomous agency of Government' and emphasises that it is an independent body. See ZPA (undated), 'About Zambia Privatisation Agency'; ZPA (undated), 'Legal Issues in Privatisation,' section 2; and ZPA (undated), 'How far have Zambians participated in the privatisation programme? - Questions and Answers,' q.21. Available at <www.zamnet.zm/zamnet/zambus/zpa>.

²⁸ Both policy guidelines on privatisation and the divestiture sequence plan is prepared by ZPA in accordance with sections 8(2)(a) and (e) of the Privatisation Act (1992). However, it is Cabinet which has final approval over policy and the plan. Certain of the larger enterprises - for example, ZCCM operations - are not listed in the divestiture plan but are selected and time-tabled for privatisation by cabinet resolution.

²⁹ Privatisation Act (1992), section 8(2)(f).

³⁰ Two other methods specified under the Privatisation Act (1992) are the offer of additional shares in a State owned enterprise to an existing shareholder to reduce the Government's holding and the issue of lease and management contracts whereby a private sector company runs a State owned enterprise for a specified period.

³¹ These are the Permanent Secretary of the Ministry of Finance; the Permanent Secretary of the Ministry of Commerce, Trade and Industry; and the Attorney General. See Privatisation Act (1992), section 5.

³² *Ibid.*, section 5(2).

³³ 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' (DRD, Article 1(1)).

³⁴ DRD, article 2(3).

³⁵ Privatisation Act (1992), section 5(1).

³⁶ ZPA (1998b), *Progress Report No. 12*, Members of ZPA: Names and Affiliations, Appendix 2.

³⁷ Report presented before the House in December 1997. See also 'Composition of ZPA Board worry MPs,' *The Post*, 1 December 1997.

³⁸ 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives...' (ICCPR, article 25).

³⁹ Privatisation Act (1992), section 9(3).

⁴⁰ *Ibid.*, section 9(4).

⁴¹ The sale in question was that of the Luanshya/Baluba ZCCM mine. For further discussion of this manipulation of the sale process, see *intra*, pp. 57 ff.

⁴² Privatisation Act (1992), section 9(2).

⁴³ ZPA management comprises the Chief Executives Office, headed by Mr. Valentine Chitalu, and senior staff in the technical directorate. The latter department is responsible for the operational side of ZPA, to include responsibility for all professional functions. Support services are supplied by an administrative directorate.

⁴⁴ A/RES/51/59, para. 2; for the text of the Code, see the annex to the resolution.

⁴⁵ International Code of Conduct for Public Officials, I. General Principles, article 1.

⁴⁶ ICCPO, I. General Principles, article 2.

⁴⁷ *Ibid.*, I. General Principles, article 3.

⁴⁸ See Privatisation Act (1992), section 8(2)(i); also, in general, Part IV, Procedure for Privatisation and Commercialisation. Sale tender procedures are prescribed in Statutory Instrument 40. For a summary and analysis of these procedures, please see ZPA (undated), 'Bid Evaluation Process'.

⁴⁹ The intention of pre-qualification is to ensure a company's background, management structure and financial resources make it a suitable bidder. The requirement of pre-qualification is specified in section 8(2)(h). See also ZPA (undated), 'Privatisation Program,' Prequalification, para. 1.4.

⁵⁰ Evaluations are carried out in accordance with section 23 of the Privatisation Act (1992). See also ZPA (undated), 'Bid Evaluation Process'.

⁵¹ ZPA (undated), 'Privatisation Program,' Members of ZPA Decisions to Shortlist, para. 2.4.

⁵² Privatisation Act (1992), section 32.

⁵³ ZPA (undated), 'Privatisation Program,' Negotiating Teams, para. 2.5; also ZPA (1993a), *Progress Report No. 2*, especially Appendix 6..

- ⁵⁴ Statement by Zambia Association of Chambers of Commerce and Industry spokesperson, cited in *Times of Zambia*, 5 January 1998.
- ⁵⁵ 'Colonel Nawa, contributing to the debate to adopt the *Special Report on Privatisation* of the Committee on Public Investments, said the appointment of former ZCCM chief executive Francis Kaunda as chairman of the GRZ/ZCCM Privatisation Negotiation Team by President Frederick Chiluba was a blatant disregard of section 32 of the Privatisation Act (1992) which stipulates that all members of the team shall be appointed by the Zambia Privatisation Agency Board. (See 'ZCCM sale smells corruption charges Sesheke AZ MP,' *The Post*, 3 December 1997).
- ⁵⁶ Mr. Valentine Chitalu. As listed in Financial Times Energy (1999), *Mining 1999*.
- ⁵⁷ Mr. Willa Mung'omba. As listed in Financial Times Energy (1999), *Mining 1999*.
- ⁵⁸ For example, when the chief executives of the four major partners in the Kafue Consortium - at the time bidding for the Nkana/Nchanga mines - visited Lusaka in August 1997, they met with President Chiluba, Francis Kaunda, Luke Mwananshiku, and Edward Shamutete to press for a speedy resolution of negotiations. A question was asked in Parliament by Lusaka Central Independent MP Mr. Dipak Patel as to why the Government was heading the ZCCM negotiations, and not the ZPA, as stipulated in the Privatisation Act.. The Deputy Minister of Mines and Mineral Development, Mr. Lembalemba, failed to answer the question or address the issues it raised.
- ⁵⁹ See, for example, Lance Tieghart, project development officer of consortium member Noranda: 'If you'd drawn up a worst-case scenario for the privatization, you couldn't have imagined anything this bad.' (As quoted in Barraclough (1998), 'Trouble in Lusaka').
- ⁶⁰ Parliamentary Committee on Public Investments (1997), *Special Report on Privatisation*.
- ⁶¹ ZPA (undated), 'Privatisation Program,' Conclusion of Negotiations, para. 2.8.
- ⁶² Privatisation Act (1992), section 36.
- ⁶³ This subcommittee is chaired by the Minister of Finance. Its other members are the Minister of Mines and Mineral Development, the Minister of Commerce, Trade and Industry, and the Minister of Energy by virtue of the sale of ZCCM's Power Division.
- ⁶⁴ See, for example, 'Selling the family copper,' *The Economist*, 6 November 1999, p.86.
- ⁶⁵ Murray Sanderson, 'Is Francis Kaunda linked to Metorex?' *Times of Zambia*, 13 August 1997.
- ⁶⁶ ZCCM (1997c), Press Release, 'Sale of Chibuluma Mine'.
- ⁶⁷ 'Is Francis Kaunda linked to Metorex?' *Times of Zambia*, 13 August 1997.
- ⁶⁸ The sale agreements were signed on 30 June 1997. The Luanshya and Baluba mining and metallurgical complex was handed over to the new owners on 15 October 1997 and now operates under the name Roan Antelope Mining Corporation Zambia Plc (RAMCZ or RAMCO).
- ⁶⁹ A ZPA investigating team may also examine the company profile of prospective bidders, seeking information from industry sources, accountants, even foreign embassies. The idea is to prevent Zambia's industry from falling under the control of investors with a dubious background or a poor track record.
- ⁷⁰ Its background lies rather in zinc manufacture and the trading of non-ferrous metals, although it has recently sought to diversify.
- ⁷¹ First Quantum Mineral Limited vs. Zambia Privatisation Agency, Zambia Consolidated Copper Mines Limited, and Binani Industries Limited, The High Court for Zambia, case 1997/HP/2065.
- ⁷² Founding Affidavit, Philip Pascall, 30 October 1997, First Quantum Mineral Limited vs. Zambia Privatisation Agency, Zambia Consolidated Copper Mines Limited, and Binani Industries Limited, The High Court for Zambia, case 1997/HP/2065.
- ⁷³ ZPA (1997g), 'ZCCM Limited: Privatisation of Bco (Luanshya/Baluba Mine),' Minutes of the ZPA board, ZPA/336 6/97, 26 June, para. 4.11.
- ⁷⁴ The ZPA board had approved award of the sale to First Quantum Minerals on 26 June 1997. This decision ran contrary to the wishes of the Cabinet. An Special Meeting of the ZPA board with the Committee of Ministers was convened at short notice for 30 June 1997 which meant that only the Lusaka-based Agency Members were able to attend, to include two Government members and three others. The earlier decision of the full ZPA board was effectively annulled and the letter from the ZPA to the Committee of Ministers confirming the award of sale to First Quantum withdrawn. This paved the way for the subsequent award of the sale to the Government's preferred buyer, Binani Industries, confirmed in a meeting of the ZPA board on 4 July 1997. This chain of events is revealed in documents presented before the High Court for Zambia. In particular, see ZPA (1997h), 'ZCCM Limited Privatisation Reporting Structure,' Minutes of 38th Special Meeting of the ZPA board, ZPA/344 7/97, 4 July.
- ⁷⁵ ZPA (1997g), 'ZCCM Limited: Privatisation of Bco (Luanshya/Baluba Mine),' Minutes of the ZPA board, ZPA/336 6/97, 26 June, para. 4.11(i)(b).
- ⁷⁶ A Confidential Information Memorandum (CIM) on the enterprise in question is prepared by one of ZPA's teams of business analysts as part of a 'tender package'. This gives prospective buyers the information they need in order to assess the worth of an enterprise in conjunction with their own due diligence studies. These involve a careful examination of the company information which is supplied and site visits if these are arranged in advance through ZPA. Each bidder has four to twelve weeks to carry out this assessment and then make a bid.
- ⁷⁷ ZPA (undated), 'Privatisation Program,' Receipt and Opening of Bids, para. 1.8.
- ⁷⁸ N.M. Rothschild/ZPA (1996), 'BCo Information Memorandum,' Bidding Rules, para. 3.10; also para. 3.14.
- ⁷⁹ The cash component of the Binani bid at \$35 million bettered the final bid of First Quantum by \$1 million - an amount considered 'insignificant' by Rothschilds in its bid evaluation. (See ZPA (1997g), 'ZCCM Limited: Privatisation of Bco (Luanshya/Baluba Mine),' Minutes of the ZPA board, ZPA/336 6/97, 26 June, para. 4.7(i)). The accusation by First Quantum that details of its final bid had been leaked was made in a letter from the Chairman of First Quantum to the Chairman of the ZCCM Privatisation Negotiating Team, dated 2 July 1997.
- ⁸⁰ See Edwin Sakala, 'Minerva has failed,' Letters to the Editor, *The Post*, 19 January 1999.
- ⁸¹ *PIRC & ESAC PAR*, p. 30.
- ⁸² See also *intra*, Section 2(IV), for a discussion of the confidentiality of development agreements containing such information.
- ⁸³ Privatisation Act (1992), section 25.
- ⁸⁴ *Ibid.*, section 14 (1).
- ⁸⁵ *Ibid.*, section 14 (2).
- ⁸⁶ *Ibid.*, section 26.
- ⁸⁷ *Ibid.*, section 27.
- ⁸⁸ *Ibid.*, section 15; also section 16(1).
- ⁸⁹ *Ibid.*, section 16(2) and (3).
- ⁹⁰ *Ibid.*, section 38.
- ⁹¹ *Ibid.*, section 44 (1). The ZPA also produces consolidated lists of successful bids which detail ownership by politicians, Zambians, foreigners and overseas companies.
- ⁹² *Ibid.*, section 44 (2) and (3).
- ⁹³ *Ibid.*, section 43.
- ⁹⁴ '...not much is known about the process of picking the independent valuers, consultants and lawyers working the ZPA trail...there is a great need to remove suspicions that these lucrative engagements with the ZPA have been circulating among a clique privileged by their social positioning.' ('Pitfalls of privatisation hearsay,' *Times of Zambia*, 3 December 1997)
- ⁹⁵ For example, Sales Agreements for Luanshya and Baluba mines to the Binani Group were signed on 30 June 1997; for the sale of Power Division to the Copperbelt Energy Consortium on 6 October 1997; for the sale of Chibuluma mine to the Metorex consortium on 31 July 1997. However, by the end of the year no full details of the value of the bids received or the reason for the award of the sale to any of the companies concerned had been made public. Independent Lusaka Central MP Dipak Patel, in the parliamentary debate over the Committee on Public Investments *Special Report on*

Privatisation, raised the issue of ZPA's failure to comply with section 38 of the Privatisation Act providing for the publication of sales information in the Government Gazette. See 'Committee cries foul,' *The Post*, 4 December 1997.

⁹⁶ Bull (1997/8), 'ZCCM - the story nears its close,' p.19.

⁹⁷ Bribery has two sides. It is defined by as the offer, promise or giving of any payment, gift or other advantage, to public officials or elected representatives as undue consideration for performing or refraining from the performance of their duties in connection with an international commercial transaction. It is also defined by the soliciting, demanding, accepting or receiving of such undue consideration by any public officials or elected representatives. (Following from the definition given in the United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, article 3 (a) and (b)).

⁹⁸ Susan Rose-Ackerman (1998).

⁹⁹ ICCPO, II. Conflict of Interest and disqualification, article 4.

¹⁰⁰ Barraclough (1998).

¹⁰¹ Cited in *idem*.

¹⁰² The National Drug Company outlet at Monze was bought by Hon Suresh Desai, MMD MP and then Minister of Agriculture. Former National Home Stores were bought in Sichili and Mongu by Hon Leonard Subulwa, MMD MP and then Minister for Western Province; in Kaoma by Hon Stephen Manjata, MMD MP and Deputy Minister of Community Development and Social Welfare; in Lukulu by Hon S C Ngombo, MMD MP and then Deputy Minister for Education; in Namwala by Hon Chulu Kalima, MP; in Sinazongwe by Hon S Madyenkuku, MMD MP and Deputy Minister of Labour and Social Security; in Siavonga by ZEFA Trading Limited, a company in which Hon Frederick Hapunda, MMD MP has an interest; and in Sesheke by Tusa Security Limited, part-owned by Hon Richard N'ganga, MP. Tusa Security Limited was also successful in its purchase of another outlet in Sesheke, formerly part of the Zambia National Wholesale & Marketing Company. Other shops owned by the Consumer Buying Corporation of Zambia at Kabompo and Kasempa were sold, respectively, to Hon Anoshi Chipawa, MMD MP and Deputy Minister of North West Province and Hon Patrick Kafumukache, MP and Cabinet Minister.

¹⁰³ Lake Hotels was sold to Hon Bennie Mwiinga, MP and Minister for Local Government and Housing. La Hacienda Hotel in Mumbwa, Central Province, was bought by Stanford Hlazo, who subsequently resigned his position with the MMD to join the National Party.

¹⁰⁴ Hartley Farms, bought by Gilbert Mululu.

¹⁰⁵ Nchabga-Mbala Farms.

¹⁰⁶ Two previous attempts to sell the business by competitive tender in 1992 and by designated Management Buyout in 1994 had both failed. CTS had a workforce of 176 prior to its privatisation. See ZPA (1996), *Progress Report No. 8*.

¹⁰⁷ Penza objected to the award of an oil contract by the Ministry of Energy to a firm whose tender had previously been rejected by the Zambia National Tender Board which he chaired. The implication was that vested interests wished to protect what has been described as 'recurrent corrupt crude oil importation deals'. Comments by the President at the swearing in ceremony of the successor cabinet warned ministers against advertising their personal wealth or displaying arrogance. The comments were interpreted to be directed at Penza. Amid claim and counter-claim, it is difficult to establish clear-cut culpability. The Post demanded the naming of those involved in the oil cartel, describing Chiluba's Government as 'a virtual kleptocracy lacking even elementary transparency'. See 'Penza fired over oil deal,' *The Post*, 24 March 1998; 'Chiluba advises ministers,' *The Post*, 25 February 1998; 'Penza's sacking - Editorial,' *The Post*, 25 March 1998.

¹⁰⁸ Penza was shot and killed at his home on the outskirts of Lusaka in the early morning of Friday 6 November 1998. Police issued a statement saying that robbery was the motive for his killing even before they had launched their investigation. By 11.00 on the same day they had caught up with five suspects. All were killed by police - not in a gun-battle, but in circumstances when they could have been apprehended and then interviewed. One man was taken from his home, escorted into the bush near Lusaka, and shot by plain clothes officers. Another was taken from his place of work and was killed in the same manner. Four days later, three further suspects were shot. Permanent Human Rights Commission (HRC) chairperson, Judge Lombe Chibesakunda, condemned the extrajudicial killing of the Penza suspects. Inter Africa Network for Human Rights and Development (AFRONET) Executive Director Ng'ande Mwanajiti described the manner in which police killed the alleged Penza murderers as suspect. The Penza family were not asked to identify the alleged killers. No ammunition cases were found at the scene and one of the security guards at the house told *The Post* that the killers informed him they had come for Penza. The murder of Penza and the immediate killing of the suspects by police has been condemned by, amongst others, AFRONET, the Law Association of Zambia, the Human Rights Commission, the Foundation for Democratic Process (FODEP), Women for Change, and Church of God Superintendent for Central Africa, Archbishop John Mambo. All called for further investigations into his death. Two additional suspects were arrested on 14 December 1998. Their trial for the murder began in the High Court in June 1999, but had not been completed by the year end. The police officer who shot three of the suspects shortly after Penza's murder was convicted of manslaughter in the High Court in April 1999. See the following newspaper reports: 'Penza had been warned of death,' *The Post*, 9 November 1998; 'LAZ dismisses police claims,' *The Post*, 9 November 1998; 'Cover-up blown,' *The Post*, 10 November 1998; 'Another police lie,' *The Post*, 11 November 1998; 'Penzas question police actions,' *The Post*, 13 November 1998; also Barraclough (1998); 'Suspected Penza killers deny charge,' *Times of Zambia*, 8 June 1999; 'How Penza was shot dead...', *Times of Zambia*, 24 June 1999; also 'Cop jailed 15 years,' *Times of Zambia*, 23 April 1999.

¹⁰⁹ ZPA (1994), *Progress Report No. 4*.

¹¹⁰ Barraclough (1998).

¹¹¹ Parliamentary Committee on Public Investments (1997), *Special Report on Privatisation*, presented before the House in December 1997. See also 'Parley endorses decision,' *Times of Zambia*, 29 November 1997.

¹¹² ZPA (1993a), *Progress Report No. 2*, para. 4.3.3.2, p.15.

¹¹³ Office for Drug Control and Crime Prevention (1999), *Global Programme against Corruption: an outline for action*.

¹¹⁴ OECD Principles for Managing Ethics in the Public Service (1998), principle 5.

¹¹⁵ Barraclough (1998).

¹¹⁶ In May 1999, it was reported that the conclusion of the sale awaited the signing of supply contracts with Anglo American to provide materials for the refurbishment of a number of mine facilities. See 'Ndola Lime sale on hold,' *Times of Zambia*, 31 May 1999.

¹¹⁷ 'Ndola Lime to be sold to Congolese,' *The Post*, 28 August 1998.

¹¹⁸ 'ZCCM explains Ndola Lime sale,' *The Post*, 4 September 1998.

¹¹⁹ See 'Chilanga, rivals asked to revise bid for Ndola,' *Business Day*, 9 March 2000.

¹²⁰ See 'Mine sale delay backlash,' *Times of Zambia*, 23 September 1998.

¹²¹ 'Workers enslaved,' *The Post*, 10 March 1998.

¹²² DAC, article 9.

¹²³ ICCPO, III. Disclosure of assets, article 8.

¹²⁴ *Ibid.*, II. Conflict of Interest and disqualification, article 6.

¹²⁵ Interview with Valentine Chitalu, Chief Executive of the ZPA, Special Advertising Section, *Fortune Magazine*, 24 July 1995.

¹²⁶ Bull (1997/8), p.17.

¹²⁷ At a conservative estimate, perhaps K5 billion has gone to State owned enterprises, including shops in the trade sector, in an attempt to maintain their viability.

¹²⁸ Consider the examples of Munkumpu/Nchanga Farms, National Milling Company, and Cleanwell Dry Cleaners.

¹²⁹ DAC, article 5. Governments must ensure that businesses keep appropriate records of transactions. It follows that Governments should themselves

use appropriate accounting standards and ensure the transparency of accounts, such as the PRA in the case of Zambia.

¹³⁰Last listed in *Progress Report No. 7* which covered privatisations in the six months to the end of 1995.

¹³¹See, for example, ZPA's listings in its *Progress Reports* for Munkumpu/Nchanga Farms, Zambia Horticultural Products Limited, Kabwe Industrial Fabrics Limited, Lusaka Engineering Company. There are other similar, documented examples of the ZPA overstating PRA deposits.

¹³²For example, Metal Fabricators of Zambia, Zambia Horticultural Products, BP Zambia and Zamtube, Zambia Oxygen, and many others.

¹³³Parliamentary Committee on Public Investments (1997), *Special Report on Privatisation*. See also 'Committee cries foul,' *The Post*, 4 December 1997.

¹³⁴Some of the cash consideration - for example, in the case of Kanshanshi and Konkola North mines - is on deferred terms, conditional on the buyer opting to move to the next stage in development of the prospect. This has been taken into consideration in estimating the cash value.

¹³⁵Criticism of this lack of accountability over the sale proceeds has appeared in the Zambian press. See, for example, 'Govt challenged to account for privatisation proceeds,' *The Post*, 12 May 1997.

¹³⁶'K20bn spent on privatisation,' *The Post*, 26 October 1998.

¹³⁷The then Finance Minister, the late Ronald Penza, confirmed this in a meeting with businessmen in Livingstone. See 'Aka sees red over ZPA funding,' *Zambia Daily Mail*, week of 9 February 1998.

¹³⁸Ibid., citing Agenda for Zambia president, Akashambatwa Mbikusita-Lewanika.

¹³⁹DRD, article 2(3). See also article 8(2).

¹⁴⁰Ibid.

¹⁴¹*PIRC & ESAC PAR*, Evaluation Summary, para. 18.

¹⁴²See, respectively, Privatisation Act (1992), section 30; Investment Act, Part IV, 'General Incentives,' and Part V, 'Special Incentives'.

¹⁴³Incentives and deductions for mining companies are stipulated under Part VI of the fifth schedule of Income Tax Act. Mineral tax is defined under the Mineral Tax Act.

¹⁴⁴Specified as a mode of sale under section 22 of the Privatisation Act (1992).

¹⁴⁵These were earmarked by Government in 1994. Only if the management/employee bid is considered inadequate or if negotiations fail is the sale opened up to other interested buyers.

¹⁴⁶There are incentives for both employee and management buy outs. As with all successful bids by individual Zambians, and unlike foreign buyers, all MBOs and EBOs may defer payment for a company, allowing them additional time to raise finance.

¹⁴⁷NIEC Overseas has been the only successful buyout involving employees, excluding the formation of a handful of farming co-operatives. In the case of the Dairy Produce Boards in Kabwe and Ndola, local dairy farmers joined together to buy the businesses which they had previously been supplying. In the case of the National Tobacco Company, the business was sold to the tobacco growers themselves through the Tobacco Association of Zambia in partnership with a German firm, Contraf-Nicotex. Such arrangements are strictly the exception rather than the norm.

¹⁴⁸Although tensions can sometimes build between employees and managers when the latter launch a bid without informing their employees, in every case there is a requirement that a 25 per cent share in the company must be put in trust for all employees when a MBO or EBO is successful. This means if the company does well, all employees will share in the success.

¹⁴⁹The one exception to June 1997 is MIL Construction Ltd..

¹⁵⁰Cited by Enoch Kavindele, Minister of Commerce, in a statement to Parliament, 2 February 1998. Cf. Figures given by ZPA in January 1998, which serve only to raise more questions. Of a total of 215 state owned enterprises privatised, 40 were listed as having been sold to foreigners and 100 to Zambians. The ownership by nationality of the remaining 65 enterprises is not accounted for.

¹⁵¹Using figures published by ZPA for the total sale values of State owned enterprises sold up to the end of June 1997.

¹⁵²*PIRC & ESAC PAR*, p.30.

¹⁵³Ibid.

¹⁵⁴See ZPA (undated), 'How far have Zambians participated in the privatisation programme? - Questions and Answers,' question 8.

¹⁵⁵In conjunction with balance of payment support, the other major source of foreign exchange in Zambia has traditionally come through ZCCM which sells currency to the Bank of Zambia and the commercial banks. The decline in ZCCM's revenue from copper and cobalt has already resulted in shortages of foreign exchange. When ZCCM is privatised, the new owners will not be required to supply foreign exchange. Hence the warning of Independent MP Robert Sichinga: 'This country and the Bank of Zambia will be starved of foreign exchange and it will not be possible to sustain the imports that are coming through.' (Quoted in 'ZCCM sale smells corruption, charges Sesheke AZ MP,' *The Post*, 3 December 1997).

¹⁵⁶Edwin Musaika, 'How Zambia fared during the lean first quarter,' *Times of Zambia*, 25 May 1998.

¹⁵⁷See, for example, ZPA (undated), 'How far have Zambians participated in the privatisation programme? - Questions and Answers'.

¹⁵⁸*LCMS* (1996), table 10.6.

¹⁵⁹*ERP PCR*, para.48.

¹⁶⁰*PIRC & ESAC PAR*, para. 2.16.

¹⁶¹The Lusaka Stock Exchange, because it is new and relatively small, does not yet have the capacity to deal in all the shares to be publicly floated. It would simply be overwhelmed if all the shares were put up for sale all at the same time. Shares are therefore held in trust prior to their gradual release for sale to the public and investors. Once all the shares have been released, the Privatisation Trust Fund will be shut.

¹⁶²Many of these larger companies were already part-owned by foreign companies and investors, although it was the Government of Zambia which held the controlling interest in all of them. However, when the time came for the Government to sell its shares as part of the privatisation, the existing co-owners had a legal right to be asked first whether they wished to buy the Government's shares. The Government, in negotiations, secured an agreement from many of these companies that they would not exercise their pre-emptive right to buy up all the shares. This allowed a proportion of the shares to be retained for public floatation. Note: the lower figure of one hundred and fifty companies cited as being privatised is lower than the figure of two hundred plus referred to elsewhere in this paper. This is because the latter figure relates to the number of enterprises being sold and includes companies and holdings which have been split into several asset packages.

¹⁶³Share releases are as follows: Zambia Sugar, 30 per cent; Zambia Breweries, 10 per cent; Chilanga Cement, 37 per cent; Rothmans, 18 per cent; National Breweries, 30 per cent.

¹⁶⁴The prospective list includes BP, Mpongwe Development, AGIP, certain former ZCCM mines, Nanga Farms, Metal Fabricators of Zambia, Kafironda, Zambia Oxygen, Zambia State Insurance Corp., and Zamtel.

¹⁶⁵'The only Zambians who have participated in the process are either those who were already rich in both government and the opposition, and those in government able to borrow from banks because of their positions.' (George Zulu, spokesman for UNIP vice-president Chief Inyambo Yeta, quoted in 'Pitfalls of privatisation hearsay,' *Times of Zambia*, 3 December 1997).

¹⁶⁶*LCMS* (1996), table 10.6.

¹⁶⁷Ronald Penza, Minister for Finance, *Budget Address 1998*.

¹⁶⁸Affidavit declaring interests, sworn on 14 January 1998 and deposited with the Chief Justice.

¹⁶⁹Barracrough (1998).

¹⁷⁰*PIRC & ESAC PAR*, Preface, p.5. PIRC I and ESAC were closed and fully disbursed by, respectively, April 1995 and January 1996. PIRC II closed in June 1997. ESAC II, worth a total of \$98, was initially approved in August 1994 to close in January 1998. (World Bank (1998b), *Statement of Loans/Credits: Zambia*, as of 31 March 1998)

¹⁷¹*PIRC & ESAC PAR*, para. 2.4.

¹⁷²Ibid., para. 2.6.

¹⁷³Ibid., para. 2.4.

¹⁷⁴This action was taken further by PIRC II which sought to develop financing arrangements to assist local investors participate in the ownership of newly privatised companies and to improve local capital markets to encourage private sector development. (*PIRC & ESAC PAR*, paras. 2.6 (a) and (b)).

¹⁷⁵Privatisation and Industrial Reform Technical Assistance (TA) Credit (Credit No.2406-ZA - FY 1992).

¹⁷⁶This represented a total of 140 enterprises, excluding ZCCM and a number of public utilities, to be privatised over 5-7 years. (*PIRC & ESAC PAR*, para. 2.14). The ZIMCO group was to be restructured and an investment company established to control the finances of parastatals as they prepared for sale. To prevent the diversion of funds or their absorption in inefficient operations, restrictions were placed on new capital investment. Managerial autonomy was increased by the requirement of a majority of non-Government directors on the Boards of all parastatals. (*PIRC & ESAC PAR*, paras. 2.17 and 2.18).

¹⁷⁷The privatisation of 20 companies was specifically required under PIRC I. By the time of the Bank's appraisal of PIRC II in early 1993, 48 companies had been offered for sale. The actual completion of sale or liquidation of 15 SOEs was required prior to the third tranche release of PIRC II and the Government agreed to do all within its power to sell 20 more. Overall, a minimum of 60 companies were to be offered for sale by the end of the third tranche release. (See *PIRC & ESAC PAR*, paras. 2.14 - 2.15)

¹⁷⁸*PIRC & ESAC PAR*, para. 2.18.

¹⁷⁹Ibid., para. 2.14; see also para. 18 and the requirement that nonviable companies be liquidated under PIRC II.

¹⁸⁰Ibid., para. 2.17.

¹⁸¹Under PIRC II. See *PIRC & ESAC PAR*, paras. 2.9 and 2.18.

¹⁸²Public utilities to be reformed under PIRC included, amongst others, PTC (post and telecommunications), ZESCO (electricity), and ZIMOIL (oil imports).

¹⁸³*PIRC & ESAC PAR*, para. 4.12.

¹⁸⁴*PIRTA M&R*, para. 9.

¹⁸⁵Procurement was to be strictly controlled by the Bank: 'All terms of reference, short lists, consultant contracts, and contracts with a value of US\$100,000 or more will be subject to prior IDA review and approval....A total of about 90 percent of procurement will be subject to prior IDA review.' (*PIRTA M&R*, Annex I, para. 13).

¹⁸⁶Each yearly audit was to be carried out by IDA approved auditors. The Ministry of Finance was to furnish quarterly reports on implementation progress and a final evaluation report within six months of the end of the project. (*PIRTA M&R*, Annex I, para. 16).

¹⁸⁷Ibid., Annex I, para. 3.

¹⁸⁸Ibid., para. 13.

¹⁸⁹The remit for the Adviser to Economic Analysis and Reports Unit requires that the post-holder must keep all donors informed of privatisation progress to ensure consistency with their objectives. (*PIRTA M&R*, Annex I C).

¹⁹⁰*PIRC & ESAC PAR*, para. 2.11. The Government also undertook to review the role of the Export Board and to reduce the burden of licensing and regulation affecting small-scale business.

¹⁹¹Ibid., para. 2.12. To improve the framework for private sector development, the Government agreed under PIRC II to review the deregulation of small-scale enterprises and the operation of the Zambia Investment Centre.

¹⁹²Ibid., para. 2.13.