

IV. The conduct of parastatal and private companies

Introduction

In a consideration of the realisation or denial of economic and social rights in Zambia, it would be negligent to ignore the actions, and unrealistic to ignore the influence, of companies. In the specific context of privatisation, the actions of both parastatals and private sector companies are duly examined in this section.

As a State party to the Covenant, the Zambian Government has an obligation to respect, fulfil and protect economic social rights. The obligation to respect requires it to abstain from action which impinges upon the enjoyment of such rights. The obligation to fulfil requires active, concrete steps by the Government to ensure the progressive realisation of the rights in the Covenant. It is the Zambian Government's obligation to protect against the denial of economic and social rights by third parties which is often the most pertinent when considering its response to the conduct of companies. In the context of privatisation, the Government must ensure that private sector companies and parastatals do not violate human rights. Yet when determining the obligations of various actors *vis-à-vis* the realisation or denial of economic and social rights, three further arguments are advanced.

First, it is maintained that private sector companies have direct responsibilities in respect of the International Bill of Human Rights and other human rights instruments and have already been brought within the purview of corresponding supervision both within and outside of the UN forum.

Second, when parastatals such as ZCCM perform governmental functions they cease to become third parties and their actions are directly attributable to the State in terms of the binding effect of international human rights law. Third, it is necessary to reiterate that the World Bank has certain obligations under article 22 to ensure that the assistance measures it adopts are advisable in contributing towards the effective, progressive implementation of the Covenant. This is particularly important when a nexus forms between the public and private sector arms of the Bank and both private and parastatal companies, as it has done in respect of privatisation in Zambia.

The argument as to why international human rights law is considered to apply directly to private companies and parastatals is presented in a preliminary subsection (A). Appeal is made to the Committee to lead the way by extending its consideration of economic and social rights to the actions of companies. In this regard, the long-standing invitation to NGOs to submit written information to the Committee provides a basis upon which companies as non-governmental entities could themselves be encouraged to participate in the work of the Committee.¹ In respect of the matters raised in this submission, the companies concerned could be invited to supply written information to shed light on events.

Many aspects of deregulation are given expression in statutory law in Zambia. The Government is clearly culpable when economic and social rights are eroded or denied as a result, although the influence of the World Bank in fostering legal reform in Zambia has been documented. The focus in a second subsection (B) is upon other aspects of social deregulation which arise out of the plan to privatise ZCCM. A number of private companies, in different ways, have formed a nexus with the Bank and Government/ZCCM to set the parameters of privatisation. The end result is a privatisation plan which not only purposefully neglects to deal with complex questions of social provision and informal settlements on mine land in the Copperbelt mining towns; but it is a plan which furnishes model sales and development agreements for the unbundling of ZCCM which deliberately dismantles or suspends Government environmental and social protection in those few areas where it has been successfully advanced.

A third and final subsection (C) examines whether the potential for the denial of a subset of economic and social rights inherent within the ZCCM privatisation plan has resulted in actual violations in practice. By way of substantiation, an account is given of two situations which are the cause for serious concern. The first relates to the Luanshya Mine which was at the centre of unprecedented civil unrest and industrial action on the Copperbelt in November 1998. Behind these disturbances lies a development agreement which is detrimental to the interests of employees and the wider mining community. The second pertains to the forced eviction and involuntary displacement from mine land of ex-miners, villagers, and the residents of squatter townships. Both ZCCM and the private company which purchased the Kansanshi Mine are implicated in these actions.

A. The direct application of international human rights law to private companies and parastatals

1. *The direct responsibilities of private companies to protect, promote and respect human rights*

Governments and intergovernmental agencies with their clear duties in respect of economic, social and cultural rights have retrenched substantially in recent years, handing over many activities which had previously been considered solely their responsibility to the private sector. Consequently, the capacity of corporate entities to impact both positively and negatively on the realisation of economic, social and cultural rights has increased.

An emerging issue is the extent to which companies are subject to international human rights instruments.² International law does not govern state behaviour alone and any assertion that corporates as private entities are outside its realm is misleading. Private individuals and groups have been held responsible for acts prohibited under international law such as piracy, slavery, crimes against humanity and genocide.³ In its *Statement on Globalisation and Economic, Social and Cultural Rights* issued pursuant to the Day of General Discussion, the Committee recognised that globalisation involves:

‘...the privatisation of various functions previously considered to be the exclusive domain of the State ... and a corresponding increase in the role *and even responsibilities* attributed to private actors.’⁴

It is recognised within the International Bill of Human Rights *per se* that private actors have responsibilities. The Universal Declaration of Human Rights asserts that ‘Every individual and organ of society ...shall strive by teaching and education to promote respect for [the rights and freedoms contained therein] and by progressive measures, national and international, to secure their universal and effective recognition and observance...’⁵ Two obligations, applicable to *all* actors, and this must include private companies, are apparent: first to promote human rights and second to work to secure their achievement. Both Covenants frame similar provisions.⁶ Article 30 of the Universal Declaration adds an obligation to respect: ‘Nothing in this Declaration may be interpreted for any state, *group or person* any rights to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein’ [emphasis added].⁷ Once more, there is a corresponding article in each Covenant.⁸ Whether injunctions to promote, protect, respect and secure human rights carry the same meaning as they do for states has yet to be clarified. The expert opinion of the Committee is sought in this regard.

Although traditionally regarded as outside the scope of human rights mechanisms, the private sector has featured in recent pronouncements by human rights bodies which are pertinent to the Committee’s own supervision of the Covenant.⁹ A threefold distinction can be drawn between a general recognition of the role played by private actors in the denial of human rights and the need to apply human rights standards to their conduct; the expression of concern over the actions of private companies, often in the context of the State’s obligation to protect human rights; and the active steps taken to examine specific private sector issues or violations within the remit of the human rights body in question. This simultaneously defines the direct responsibilities and obligations of private actors. This progression from (a) recognition of the issue, through (b) the expression of concern, to (c) an active consideration of concrete situations and even the assignment of responsibilities, means that private actors, including companies, are gradually being brought within the purview of human rights bodies.

a. Recognition

Under the rubric of recognition, the Subcommittee on the Prevention of Discrimination and Protection of Minorities has, through its appointment of key Special Rapporteurs, made clear its concern regarding the role of the private actors in denying human rights. The Special Rapporteur on the Realisation of Economic, Social and Cultural Rights has recognised that the ‘rush to denationalise and leave economics, politics and social matters to the whims of the private sector...will inevitably have an impact on the full realisation of economic, social and cultural rights.’¹⁰ The Special Rapporteur on the question of the impunity of perpetrators of human rights violations has stated that ‘violations of economic, social and cultural rights can also be perpetrated by private individuals.’¹¹ Successive reports by the Secretary General on the enjoyment of human rights and the working methods and activities of transnational corporations have underlined that ‘shared responsibility for the realization of the right to development must be extended to actors in the private sector which are creators of wealth and hence agents of growth. To this effect, "ground rules" are necessary at the national and international levels to combat the abuses of economic concentration and restrictive trade practices. States should establish a regulatory framework and economic instruments which would ensure the transparent operation

of the market and correct its deficiencies, to implement policies for the development of human resources, and to achieve equity in the allocation of resources and incomes.¹²

The Intergovernmental Group of Experts on the Right to Development, in its first progress report to the Commission on Human Rights in 1997, calls for measures to be taken 'to address the growing influence and impact of transnational corporations, especially in terms of ethical behaviour; effects on the environment, health and safety; culture; technology transfer; development and social objectives and priorities; effects on local firms and sectors, the domestic economy and the resources of the local population; and the right to development.'¹³ The practical steps envisaged include the regulation of transnational corporations through an international code of conduct.¹⁴

One of the most unequivocal determinations by the Committee on the responsibilities of corporate bodies is in respect of the right to food. Under the obligation to protect, the Committee recognises that '[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.'¹⁵ Furthermore, '[a]s part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.'¹⁶ However, the Committee imparts direct responsibilities on such entities: 'The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.'¹⁷ If this direct responsibility exists in respect of the right to food, then it must apply to other rights under the Covenant. No authoritative interpretation of the Covenant suggests that the right to food is a 'special case' in this regard.

b. Expressions of concern

It is increasingly common for human rights bodies, in the consideration of periodic State reports, to express concern over the actions of companies. The Committee itself, in its recent concluding observations on the situation in the Russian Federation, noted that 'the economic rights of indigenous peoples are exploited with impunity by oil and gas companies which sign agreements under circumstances which are clearly illegal.'¹⁸ Similarly, attention has been drawn by the Committee to the negative impact of oil companies working in the Ogoniland of Nigeria.¹⁹ The Human Rights Committee has expressed the concern that the practice of contracting out or transferring security functions from the State to the private sector weakens the protection of human rights.²⁰ It has recommended that measures be taken to ensure that law and order remain State responsibilities.²¹ Implicit in the Human Rights Committee's observations is the notion that there are some state responsibilities the privatisation of which is incompatible with the fulfilment of civil and political rights. The same must apply in the realm of economic and social rights. The Committee on Economic, Social and Cultural Rights should perhaps be prepared to consider recommending possible limitations on the privatisation of certain state functions.

c. Active consideration

Certain bodies have moved to active examination of the conduct of private actors, either thematically or in the context of situations arising in specific states. Most notably, in respect of the former, the UN Special Rapporteur on Toxic Waste was explicitly enjoined to scrutinise the activities of TNCs involved in the transit and disposal of toxic waste. The Special Rapporteur was mandated to include 'information on countries *and enterprises*, including TNCs, engaged in the illicit movement and dumping of toxic and dangerous products and wastes' in her reports to the Commission on Human Rights.²² The Commission has itself issued a resolution noting the impact that corporate entities can have on the right to life and to health through the illicit movement and dumping of toxic and dangerous products.²³

In relation to situations within specific states, the Inter-American Commission on Human Rights was petitioned by a group of indigenous people from Ecuador to consider the negative impact of two oil companies, Texaco and the national oil company Petroecuador. The Commission sent a fact-finding mission to Ecuador in 1994 which reported that '[b]oth the state and the companies conducting oil exploitation activities are responsible for such anomalies [the spillages leading to denial of various rights], and both should be responsible for correcting them.'²⁴

These citations add weight to the argument that it is not beyond the bounds of precedent for the Committee to consider the responsibilities of corporate actors. The denial of human rights by companies ought to be dealt with at a national level within the regulatory and legal framework²⁵. However, as in the case of Zambia, national law and regulation is frequently inadequate.²⁶ In the context of globalisation, as states retrench and companies become increasingly influential, arbitrary distinctions are created whereby those whose rights are violated by the State have recourse to human rights mechanisms, whereas those who suffer damage through corporate activity are left with no avenue of complaint. The Committee must continue to engage with this reality if a whole range of abuses of economic, social and

cultural rights are not to fall outside its remit, creating distinctions that are arbitrary and at odds with the universality of human rights. The pressing need is for further clarification of the obligations of private actors.

2. Direct obligations under the Covenant arising from the attribution of ZCCM actions to the State

To the extent human rights standards apply to private companies, they automatically apply to ZCCM as a parastatal company. An additional argument is advanced in this subsection. ZCCM is described as a parallel administration in the Copperbelt; in other words, ZCCM carries out governmental functions and, in doing so, it becomes an extension of Government in that its actions are attributable to the State. Hence not only must the Zambian Government protect those within its jurisdiction from the actions of parastatals which are detrimental to the realisation of human rights, but these entities themselves are directly subject to duties under the Covenant.

The question of attribution of the acts of third parties to a state has great significance for the application of human rights law in the context of privatisation and deregulation when functions previously regarded as the preserve of the state are hived off to parastatal and private sector actors.

The International Law Commission's Draft Articles of State Responsibility, although they are presently being finalised and therefore remain unadopted, do provide a well-founded interpretation of attribution and effectively express principles of customary international law.²⁷ A state cannot be held responsible for the actions of those within its jurisdiction unless (i) the action is attributable to it, and (ii) the action involves a breach of an international obligation owed by the state to the person or entities affected therein.

a. Attribution

There is a narrow range of bodies in society which are subject to the same duties as a state under international law by virtue of the principle of attribution. Of the entities identified in the ILC Draft Articles whose behaviour may be attributable to the state, it is the category of parastatals defined in article 7(2) as outside the formal structure of the state but who are empowered to exercise elements of governmental authority which is relevant to the operation of ZCCM.²⁸ In respect of such entities, the ILC regards the key criteria for attribution to be whether the body takes on a function which is 'normally exercised by organs of State'.²⁹ Overall, the ILC does intend its categorisation to be 'wide enough in meaning to cover bodies as different as ...public corporations, semi-public entities, public agencies of varying kinds and even, in special cases, private companies'.³⁰

ZCCM was established by the Kaunda Government in 1981 by the merger and full nationalisation of Nchanga Consolidated Copper Mines Ltd and Roan Consolidated Mines Ltd.³¹ The Government of Zambia has a controlling interest in ZCCM by virtue of its majority 60.3 per cent holding. A majority of eight out of fifteen directors are appointed by Government. However, international law acknowledges the separateness of corporate entities from state bodies. Thus the fact that a state establishes, owns or controls a company does not mean that the company's acts are necessarily attributable to it.³² However, when it can be ascertained that ZCCM performs governmental functions, then it falls within the scope of article 7(2) and thus its behaviour becomes attributable to the state. Furthermore, if the state uses the company deliberately to achieve a specific result that is at odds with its international obligations, then the company's actions are once again attributable.

b. The breach of international obligations

It is maintained that a number of key economic and social rights in the Covenant have been violated as a consequence of the way in which the privatisation of ZCCM has been handled. Ostensibly, ZCCM has a long history of performing governmental functions. It provides all manner of municipal services - water supply, sewage systems, roads and other infrastructure, lighting, waste disposal, township security - not only to miners and their families, but to the wider community. It also runs schools, hospitals, clinics and other social amenities in mining communities. The extent of this provision is mapped further in subsection B.1. In the run-up to privatisation, the Government has abrogated its duty to ensure that the governmental functions of ZCCM are transferred to either central or local Government. Realisation of the right to an adequate standard of living, the right to adequate housing, and the right to health has been diminished as a result.³³

Furthermore, action by a public company can be attributable if ‘the State directed or controlled the *specific* operation and the conduct complained of was a necessary, integral or intended part of *that* operation.’³⁴ Article 10 of the Draft Articles considers the question of entities acting outside their competence or contrary to instructions regarding their activities.³⁵ There is general agreement that actions of both organs of state and those entities exercising governmental functions are attributable to the state so long as they were acting in their public capacity. Case law implies that where such bodies were ‘purporting to act in official capacity’ or ‘cloaked with governmental authority’ their *ultra vires* acts are attributable no matter how manifestly incompetent.³⁶

Evidence is presented in subsection C.2 which suggests Government complicity in action by ZCCM to begin a programme of forced displacement. In contrast, full realisation of the right to housing requires a State party to take measures to provide security of tenure and refrain from action leading to forced eviction. Ultimately, even if the Government/ZCCM were to successfully defend itself against the charge of complicity and deny attribution, the Government *per se* cannot evade the charge that it has failed to protect the right to housing of squatters and others on mine land from the detrimental actions of a third party.

3. *Corporate codes of conduct*

Codes of conduct at the firm, industry, and corporate levels are also relevant in extending the concept of company responsibility. First, their existence amounts to a recognition of the importance of ethical standards and corporate governance issues by both organisations concerned with trade, investment and economic relations, and also by companies themselves. Second, such instruments carry considerable normative legitimacy. The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977) (hereafter ‘the ILO Tripartite Declaration’), the OECD Guidelines for Multinational Enterprises (hereafter ‘the OECD Guidelines’) and the OECD Principles of Corporate Governance (hereafter ‘the OECD Corporate Principles’) are of particular importance in this regard.³⁷ Finally, the overlap in terms of content between human rights instruments and internationally recognised principles governing corporate behaviour is by no means inconsiderable: in other terms, a recognition of corporate codes is simultaneously a recognition of the legitimacy of human rights standards and *vice versa*.

a. ILO and OECD corporate standards

It is recognised within the ILO Tripartite Declaration that multinational enterprises, within the framework of development policies established by governments, can fulfil an important role in the promotion of economic and social welfare, the improvement of living standards, the creation of employment opportunities and the enjoyment of human rights. On the other hand, the supranational organisation of such enterprises ‘may lead to abuse of concentrations of economic power and to conflicts with national policy objectives’.³⁸ The OECD Guidelines offer an essentially similar formulation.³⁹

The common aim pursued through the OECD Guidelines and the ILO Tripartite Declaration is ‘to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise’.⁴⁰ Both the OECD Guidelines and the ILO Tripartite Declaration lay down recommendations governing the activities of multinational enterprises.⁴¹ The instruments are addressed to both parent companies and local entities within the multinational enterprise according to the actual distribution of responsibilities among them.⁴² Domestic enterprises too are subject to the same expectations in respect of their conduct wherever the Guidelines or the principles within the Declaration are relevant.⁴³

Whereas the OECD Guidelines cover a broader range of issues pertaining to the conduct of multinational enterprises, the ILO Tripartite Declaration limits the extent of its consideration to the fields of employment, training, working conditions, and industrial relations.⁴⁴ However, in these specific areas the ILO Declaration provides more detailed standards. The OECD Guidelines relate to all key aspects of multinational enterprises’ operations: general policies, information disclosure, competition, financing, taxation, employment and industrial relations, environment, and science and technology. Both the OECD and ILO instruments are referred to in the analysis, drawing on the scope of the former and the detail of the latter.

Finally, reference must be made to the recently adopted OECD Principles on Corporate Governance which address issues of corporate conduct relating to accountability to shareholders, relations with other stakeholders, disclosure and transparency, and board responsibility. As such, the Principles compliment the OECD Guidelines for Multinational Enterprises.⁴⁵ The OECD Corporate Principles are intended ‘to assist Member and non-Member governments...to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and

to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance.⁴⁶ They focus upon publicly traded companies, but are applicable, at least in part, to state-owned enterprises. Particular recognition is given to the global nature of investment and the need for strong corporate governance arrangements in order to attract 'patient' capital.⁴⁷

b. Normative legitimacy arising from the endorsement of ILO and OECD corporate standards

Use will be made of all three instruments in the analysis of the conduct of certain companies in the context of privatisation in Zambia. It is therefore necessary to establish that the standards in question carry the necessary normative legitimacy. This makes it more difficult for a company, should it be so minded, to argue that the instruments do not apply.

The OECD Guidelines for Multinational Enterprises were adopted in their original form in 1976 as one part of the OECD Declaration on International Investment and Multinational Enterprises.⁴⁸ The OECD Guidelines complement both the UN Principles and Rules on Restrictive Business Practices and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.⁴⁹ The latter, approved by the ILO Governing Body in 1977, is addressed to governments, business and labour in the ILO's 174 member countries, thereby lending considerable normative legitimacy to the Declaration.⁵⁰ Zambia is an ILO member State. The multinational companies involved in the privatisation of ZCCM - for example, Anglo American, Avmin (Anglovaal), Genbel and Metorex, all of South Africa, Cyprus Amax of the USA, Midlands Power International and the National Grid Company of the UK, the Crew Development Corporation and First Quantum of Canada, Binani Industries of India, and China Non Ferrous Metals Industries Corporation - all operate out of countries which are members of the ILO.

The OECD Guidelines have their own inherent normative value. They are supported not only by all 29 Member countries of the OECD, but also by a corpus of multinational companies, represented through the OECD's Business and Industry Advisory Committee (BIAC), and by employees, represented through the corresponding Trade Union Advisory Committee (TUAC).⁵¹ Certain non-Member countries fully support the Guidelines through their adherence to the underlying Declaration and Decisions on International Investment and Multinational Enterprises.⁵² Moreover, and because multinational enterprises are organised on a global basis, support for the extension of the Guidelines to cover their operation in all countries is recognised.⁵³ Indeed, and with particular reference to developing countries, efforts are to be undertaken to improve the welfare and living standards of all people 'by encouraging the positive contributions which multinational enterprises can make and by minimising and resolving the problems which may arise in connection with their activities.'⁵⁴

The OECD Corporate Principles are also widely endorsed. Their development is the result of a decision taken at the Ministerial level among the Member countries of the OECD.⁵⁵ Not only do they embody the views of Member countries on the issue of corporate governance, but non-OECD countries, the World Bank, the International Monetary Fund, the business sector, investors, trade unions, and other interested parties were all consulted in their formulation.⁵⁶

While their observance is voluntary and not legally enforceable,⁵⁷ the OECD Guidelines represent 'Member countries' firm expectations for multinational enterprise behaviour.'⁵⁸ The recommendations within the Guidelines are therefore viewed as a supplement to, rather than a substitute for, national law and practice.⁵⁹ Likewise, multinational enterprises, as well as employers' and workers' organisations, are recommended to observe the principles set out in the ILO Tripartite Declaration, again on a voluntary basis.⁶⁰ However, although all concerned parties should respect the sovereign rights of States and obey national laws and regulations, the ILO Tripartite Declaration is more forthright than the OECD Guidelines in drawing attention to the applicability of international instruments.⁶¹

It should also be noted that both the OECD and ILO instruments are not disembodied texts, but are underpinned by mechanisms for their supervision. The ILO Tripartite Declaration is supervised through the examination of periodic reports invited from governments on the effect given to the Declaration after consultation with workers' and employers' organisations. There is also a procedure for the examination of disputes concerning the application of the Declaration. There is a procedure for the implementation of the OECD Guidelines which includes, in theory, consideration of individual cases involving specific enterprises, albeit with full anonymity.⁶² From this it can be concluded that the instruments are meant to be applied; furthermore, and as explored in the next section, there is scope for the Committee, as a UN human rights body, to make use of ILO and OECD corporate standards in its own supervision of the Covenant.

c. The relevancy of corporate governance issues to the Committee's supervision of the Covenant

The Committee has adopted a statement on globalisation.⁶³ This identifies a number of strands to the phenomenon: *inter alia*, the rise of information technology, reliance on the free market, the private or institutional control of international capital flows, a diminished role for the State, privatisation, and deregulation.⁶⁴ The Committee recognises a corresponding increase in the role and responsibilities attributed to private actors, in particular transnational corporations, not only in the business sphere, but also in civil society. While the Committee recognises that none of these associated developments are necessarily incompatible with the Covenant, 'if not complemented by appropriate additional policies, globalization risks downgrading the central place accorded to human rights by the United Nations Charter in general and the International Bill of Human Rights in particular. This is especially the case in relation to economic, social and cultural rights.'⁶⁵

At the time of its statement on globalisation, the draft Multilateral Agreement on Investment was singled out by the Committee as one instrument with the potential to impact upon the realisation of economic, social and cultural rights.⁶⁶ The OECD's Guidelines for Multilateral Enterprises were appended to this Agreement. Notwithstanding the fact that the MAI has subsequently been abandoned, the Committee has signalled that issues relating to global investment and the OECD Guidelines *per se* are within the purview of its work in monitoring compliance with the Covenant.⁶⁷

Article 18 of the Covenant itself establishes a mechanism by which relevant work of the UN specialised agencies, including the ILO, is to be given consideration by the Committee.⁶⁸ Repeated resolutions have called upon the UN specialised agencies to submit reports detailing such work.⁶⁹ It is maintained here that the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, together with information relating to its monitoring, are relevant to supervision of the Covenant and warrant consideration by the Committee. The basis for the Committee's consideration in its own work of the Declaration is strengthened by the Limburg Principles: 'The experience of the relevant specialised agencies...including the United Nations working groups and special rapporteurs in the field of human rights should be taken into account in the implementation of the Covenant and in monitoring State Parties' achievements.'⁷⁰

B. Social deregulation, private influence and the privatisation of ZCCM

Introduction

Large parastatals in Zambia have traditionally provided a web of social support to workers, their families and the wider community. The obligations of private sector employers are being renegotiated under privatisation and the extent to which measures are in place to safeguard the interests of those affected during and after the transfer of ownership is a test of the commitment of the actors concerned to realise economic and social rights.

The focus here must be limited to a consideration of ZCCM. Not only is it the largest service provider - often described in terms of a parallel administration or a state within a state - but it exemplifies the full range of issues to be resolved in the transfer of responsibility for social provision in all its dimensions after privatisation.

Private companies associated with the privatisation of ZCCM have acted in different capacities. At the most obvious level, a number of the World's leading mining companies have sought to buy the various sale packages on offer. The Anglo American Corporation of South Africa is in a different position to other potential bidders in that it already has a significant holding in ZCCM. Less obvious is the role played by merchant banks, private consultancies and international legal firms in planning for the privatisation of the conglomerate. Such actors have been highly influential in setting the parameters for the sale, including the vexed question of separating ZCCM's commercial and social functions.

ZCCM has become part of the country's urban social fabric. Under Kaunda's Zambian humanism, all parastatals served a social as well as a purely commercial purpose. It is important to distinguish between two facets of this support. The first concerns social provision for employees and their families, many aspects of which were guaranteed at the time in law and which, to a lesser degree, are presently the subject of collective agreements and contracts of employment. The second relates to the role of ZCCM as a parallel administration. Entire towns in the Copperbelt - Kitwe, Ndola, Mufulira, Chingola, Chililabombwe, Kalalushi, Luanshya - have developed on the back of mining. There are visible

reminders everywhere of the importance of ZCCM: the mines themselves on the edge of town; the mining compounds; corporate offices; cinemas; hospitals; sports grounds; social clubs; ZCCM diggers working on public roads. There are elements of support which are less obvious: ZCCM water pipes and sewers which articulate with the municipal system; ex-miners and others farming land rented to them by ZCCM; former mine houses now occupied by non-miners; even extensive squatter settlements on mine land tolerated by the company. Overall, the level of integration is such that it is not always possible to maintain the distinction between the social amenities available only to miners and those used by the community as a whole.

Social regulation/deregulation has occurred at three levels. First, as has been noted, deregulation at the level of legislation has dismantled worker-related social provision. Employers, and this includes ZCCM and private mine owners, are no longer required by law to provide employee housing and social amenities. Yet, as a balance to this, an adequate system of precise State regulation and social protection has not been established.

It is unnecessary to argue that employers must be compelled by law to make blanket social provision for their workers in order to advocate that certain matters require Government regulation and that preparations must be in place for the take-over of those social responsibilities which are to be transferred. This applies doubly so to services provided by ZCCM to the wider community and councils as such relationships are seldom formalised. Local councils are certainly not in any position to shoulder the financial cost of any increase in their burden of responsibility.

The principal obligation of result reflected in article 2(1) of the Covenant is to take steps to achieve the progressive realisation of the rights recognised.⁷¹ ZCCM has carried out governmental functions and, in doing so, it has become an extension of Government in that its actions are attributable to the State. In other words, ZCCM has been the vehicle through which the Zambian Government has sought to fulfil certain social rights. This pertains to both miners and their families and to many residents in the wider community. In respect of both groups, social services traditionally associated with ZCCM on the Copperbelt underpin aspects of the right to an adequate standard of living, the right to housing, the right to health, and even the right to education.⁷² It is pertinent to recall that the right to adequate housing, as recognised under the Covenant, encompasses the availability of services and infrastructure. The right is not realised if sustainable access to, *inter alia*, safe drinking water, sanitation, heating and lighting, refuse disposal and emergency services is denied.⁷³ Furthermore, adequate housing must be in a location where there is provision for health-care services, schools and other social facilities.⁷⁴

Specifically in relation to workers, both the Covenant and the ILO Social Policy (Basic Aims and Standards) Convention (No. 117) require a State party, respectively, to take steps to ensure a decent or minimum standard of living.⁷⁵ Within the ILO Social Policy Convention, 'essential family needs of the workers as food and its nutritive value, housing, clothing, medical care and education' are recognised elements of a minimum standard of living.⁷⁶ If the Zambian Government, in conjunction with other agents, is shown to have omitted to make the necessary preparations to ensure adequate social provision is maintained, then the undertaking to take steps is jeopardised; furthermore, the principle of progressive realisation is violated when deliberate measures are adopted which result in the increased denial of social rights. The onus is upon the State party to justify such regression.⁷⁷

It is at this juncture that a comprehensive privatisation plan - a second level of regulation - is crucial in order to plan for this transition. Instead, the ZCCM privatisation plan has purposefully sidelined the question of the continued provision of municipal services while the obligations on the new owners to provide social amenities for employees, to honour existing working conditions and to deliver environmental protection have been carefully and systematically reduced.

At a third level - that of individual development agreements pertaining to each sale as the result of negotiations - social and environmental protection has been further undermined. It is incumbent upon both parastatals and private companies to abide by the limited body of laws and regulations governing their conduct which do exist. Instead, there is evidence to suggest that where legislation has been enacted in Zambia, for example to protect social goods such as the environment, private investors have immediately used their financial power to negotiate exemptions in the development agreements.

In examining the debacle surrounding the transfer of social responsibility, it is necessary in a first subsection (1) to map the extent of ZCCM's social support. In a second subsection (2), an account is given of how the decision to privatise ZCCM was taken. A first consultancy study, in recommending that the conglomerate be unbundled and sold, did at least address the implications of disentangling ZCCM's social and commercial functions and suggested the use of tax credits to prevent the rapid withdrawal of private companies from social provision. This measured approach fell by the wayside as a casualty of the decision to commission a second consultancy report into the sale of ZCCM. Once more, the recommendation of the consultants, a merchant bank and an international legal firm, was to unbundle ZCCM; yet the time lost in carrying out this second study, combined with the pressure to privatise ZCCM rapidly and stem huge losses to the Zambian economy, has resulted in a deliberate decision to put aside the whole complex issue of municipal social provision and concentrate on the sale of the business. (3) Regrettably, as evidenced in a third subsection, the actual

privatisation of ZCCM has resulted in the worst of both worlds: after three long years, the sale has only recently been successfully concluded in 2000, while the decision to neglect the question of long term social provision on the grounds of expediency has proved detrimental to the realisation of economic and social rights on the Copperbelt. The Zambian Government, the World Bank and various private sector companies are responsible for bringing about this situation. In a final subsection (4), the conduct of each actor is variously related to the benchmark of the Covenant, other human rights instruments and, in the case of private companies, to OECD and ILO corporate principles and guidelines.

1. The extent of ZCCM social provision

The importance of ZCCM's social functions is readily apparent. Three citations affirm the web of support for employees, local authorities, and people in the wider community in each town on the Copperbelt:

'ZCCM has created a corporate culture which extends past a workplace involvement. ZCCM as an employer provides for all of an employees [sic] needs: Shelter, medical assistance, hospitals, education for his children, free electricity, water and transport, a number of subsidised items including burial arrangement. Once severed from this support an ex-employee has little to fall back on except final redundancy payment...'⁷⁸

'Historically, the local authority townships have received basic services such as water, electricity and hospital services from the mines. The mine authorities have over the years been keen to shed all town responsibilities, but incorporation under local authorities has been delayed by remarkable administrative complexities and the reluctance of the Mine workers Union of Zambia (MUZ) to accept this proposition....As a result, the amenities in the mine townships have remained privately administered.'⁷⁹

'The Zambia Consolidated Copper Mines, has operated a 'cradle to grave' welfare policy. It has had a paternalistic approach to communities providing medical care services, schools and other social amenities, much wider in scope than those offered by the mines during the colonial period.'⁸⁰

In March 1995, prior to privatisation, 58,953 employees worked for ZCCM and its subsidiary companies, accounting for twelve per cent of Zambia's formal sector workforce.⁸¹ Each ZCCM employee often supports a family. The average household size in towns on the Copperbelt in 1996 was 5.4.⁸² Hence somewhere in the region of 320,000 people are directly dependent, to a high degree, on ZCCM. Furthermore, hundreds of thousands of others - from market traders to employees in ZCCM's suppliers - rely on the multiplier effects generated by the company. It is difficult to overstate the importance of the social support provided by ZCCM, yet it is hard to quantify its actual level or cost to the company.

The cost of social support is subsumed under the category of 'divisional overheads' and covers a plethora of expenses ranging from support for social clubs and the sponsorship of sports teams to the provision of ongoing and emergency assistance to local councils in the running of services and the maintenance of infrastructure.⁸³ A 'community contribution' is often listed in the divisional records, but this is ill-defined and it cannot be determined whether it represents support for local councils: to establish the true figure would require detailed review of the accounts at each division. However, the expenditure on divisional overheads does, by and large, indicate the 'consistent contribution which ZCCM makes towards the support of services either directly or indirectly'.⁸⁴ In 1992/3, this amounted to \$109 million. In the case of the largest working mines - Nchanga, Nkana, Mufulira, and Luanshya - these divisional overheads in the early 1990s were in the region of \$20 million per year for each operation.

Information obtained from ZCCM lists company-wide capital expenditure on social assets and infrastructure as peaking at \$36 million in 1993.⁸⁵ No figure was provided for recurrent costs. Between 1990 and 1997, such capital expenditure averaged \$9 million each year. The array of capital purchases or facilities rehabilitated is astonishing: the relaying of sewers, the replacement of municipal pumping stations, water reticulation, the sinking of boreholes, the provision of a new chlorination plant and a one million gallon reservoir; the installation of an electricity substation to power a local cinema, floodlights at a local sports ground, the upgrading of electrical supply systems; home ownership schemes, the demolition of defunct housing, the building of new houses, road rehabilitation, the repair of streetlights, expenditure on the local market, money to revamp a telephone exchange; the provision of libraries, training and youth schemes, the rehabilitation of women's centres, the building of shelters for mourners at local cemeteries; hospital refurbishments, the purchase of X-ray equipment, ventilators, blood banks, mortuary chambers, pathology labs, the construction of entire health centres; the purchase of laundry equipment, furniture, typewriters, fridges and cookers, kennels for the dogs of the mine police, a lawn mower, a fish pond, and three Tata buses.⁸⁶

It is difficult to present a full picture of the level of ZCCM social support to employees, their dependants and the non-mining communities in the Copperbelt precisely because of the lack of systematic research on this issue. Without this baseline data, monitoring the likely and actual impacts of privatisation will be problematic. Nevertheless, by way of example, it has been possible to map the extent of social services provided by the former ZCCM operating division at Luanshya. There are two qualifiers. First, it must be emphasised that the inventory of facilities and projected costs refers to the situation bequeathed by ZCCM. Further research would be necessary to clarify the current state of social services and the level of expenditure during the last two and a half years of private ownership. Second, the operating division is relatively small in comparison to others, in particular Nkana and Nchanga, where the net of social provision is even more extensive.

Social services provided by Luanshya Mine

The medical department at Luanshya employed 582 staff in 1997.⁸⁷ Of these, 24 were doctors, including 6 consultants. There were 310 nurses. The two hospitals at Luanshya - one high cost and one low cost - have units for general surgery, orthopaedics/traumatology, paediatrics and neonatology, and obstetrics and gynaecology. The hospitals run outpatient and emergency clinics. Seven clinics are run in residential areas, concerned mainly with maternal and child screening, antenatal and immunisation services, family planning, nutritional surveillance and home-based care services for HIV/AIDS patients. In 1995/96, a total of 66,000 people attended the hospital outpatient clinics, half of them on a non-contributory basis. Hospital admissions totalled over 15,000, 80 per cent on a non-contributory basis. The dependants of mine employees make up the bulk of patients; however, a significant number of people in the wider community attended the hospitals as in- and out-patients on a non-contributory basis. Almost 12,000 did so in 1995/96, dispelling the myth that mine medical facilities serve only those among the general public with an ability to pay. Attendance at the residential clinics averaged 235,000 each year over the period 1993 - 1996. Once more, a quarter of patients were from the wider non-mining community.

There is one mine primary school at Luanshya with a teaching staff of 27 and an enrolment of 440 pupils, of which 50 are the children of non-mine employees.⁸⁸ Whereas the children of company employees paid K25,000 per term in 1996/97, the parents of other children were charged a commercial rate of K400,000. This gives some indication of the degree to which costs to all parents will escalate if the company subsidiary to schools is removed. It seems doubtful that miners will be paid a market wage commensurate with such increases.

The Division contracts refuse services to collect rubbish and clear drains in all mine townships and markets. It also pays for tending to grass verges, the digging of graves and the making of coffins. The cost to the Division was estimated to be K154.6 million for 1997/98. Added to this is the cost of township maintenance - houses, roads, sewers - calculated at K2.36 billion in the same year. Water treatment and supply to all townships was budgeted at K411.4 million. Electricity was provided to all mine houses at low/no cost to employees. The cost to the Division was estimated at K2.4 billion.

Other facilities provided by the Division included three markets, twenty-one social clubs, a cinema, four welfare halls, eight football fields and sports stadia, six centres for women, and seven nurseries for pre-school children.

One socio-economic study of mine areas which has been undertaken suggests that particularly severe community-wide impacts might be expected in the health sphere.⁸⁹ Overall, there are two ZCCM hospitals at Nkana (Kitwe), two at Nchanga, two at Mufulira, two at Roan (Luanshya), one at Konkola (Chililabombwe) and one at Chibuluma.⁹⁰ Some of the mining towns, for example Nchanga and Konkola, have no Government hospital. Hence the general public are reliant on the mine hospitals for treatment. All the hospitals have satellite clinics; a total of no less than thirty-seven across the six mining towns in question. Each clinic is staffed by nurses with a daily visit by a doctor each day. Nearly all clinics have maternity units.

The responsibilities of the ZCCM medical and educational institutions include, *inter alia*, the provision of health care and education to ZCCM employees, their dependants, employees in subsidiary companies and the paying public and 'to contribute to the national effort in providing medical and educational services aimed at promoting health and education in Zambia...'⁹¹ However, social services, especially medical care, are provided to the wider community on a non-contributory basis. This is evident in the breakdown of attendance figures for ZCCM health facilities at Luanshya.

The same study gives brief consideration to the issue of the dependency of local councils on ZCCM for water supply. Mine operators, including ZCCM since the sector was nationalised, have held water rights. These were last renewed in 1986 and will run until the holder lease expires. Privatisation, in the absence of prior agreements, is seen to jeopardise existing *ad hoc* arrangements: 'The water situation will be of concern to people when these rights go into private companies. The new proprietors may apply economic criteria, and sell water to the council whenever water shortages are experienced in council areas. It is recommended that ZCCM's social concern in this regard be respected [,] [the] more so that the Copperbelt has experienced outbreaks of cholera from time to time.'⁹²

The study notes that the council treatment plants at Chililabombwe receive water pumped from underground to prevent Konkola mine from flooding. Both Chililabombwe and Mufulira are supplied with water from the mine treatment plant

during the frequent shortages in council areas.⁹³ This pattern of dependency is repeated across most of the other present and former ZCCM operating divisions. Using information from the Environmental Impact Statement (EIS) for Nkana Division, an attempt has been made to illustrate the extent to which both the mining townships and council areas rely upon the company for water provision and sewerage disposal and treatment. The recommendation in the EIS, made repeatedly, is to investigate opportunities to transfer responsibilities for water supply and sewage treatment services in both council and ZCCM communities to the local authorities.⁹⁴ It is no coincidence that this recommendation to shift the burden from mine proprietors to impoverished local councils is made against the backdrop of the privatisation of ZCCM.

The dependency of local councils on ZCCM water and sewage services: the example of Nchanga

In a 1997 survey of the ZCCM water supply and the sewage systems managed by Nchanga Division, it was calculated that the water requirement of the 90,000 strong ZCCM community in the area was 30 million litres per day.⁹⁵ The actual supply was 50 million litres per day because of the supply of treated water to non-ZCCM communities: 'It is apparently informally recognised that the ZCCM treatment and reticulation facilities are supplying non ZCCM consumers.'⁹⁶ This relationship is reported to have arisen because of the inability of the municipal authorities to meet local demand due to lack of finance for maintenance, servicing, and treatment chemicals. The report records that greater than two hundred people were observed collecting water manually from 'illegal' connections at one of the ZCCM reservoirs at Nchanga because there was no supply in the areas in which they lived.⁹⁷ To cite another example, the ZCCM Lulamba works was attempting to treat sewage from a population four times greater than that living in the ZCCM township it was designed to serve.⁹⁸ This indicates the level to which the local council is reliant on ZCCM services.

The dilapidated system of water pipes resulted in frequent interruptions of supply and bursts, exposing consumers to 'a significant health risk.'⁹⁹ A similar danger to health was presented by the rupturing of sewage pipes.¹⁰⁰ Even worse, each of the ZCCM sewage works at Nchanga and Lulamba was regarded as 'incapable of performing as a treatment plant'. Their failure to comply with domestic standards was deemed to expose staff and downstream water users to health hazards, endanger the aquatic environment and expose the mine to risks of prosecution.¹⁰¹

The cost of rehabilitating the water treatment plant to a capacity of 70 million litres per day is estimated to be \$7.9 million.¹⁰² However, this would still not achieve the preferred level of supply in mine and non-mine communities around Nchanga.¹⁰³ It is calculated that a further \$2.75 million is needed to provide new reservoir capacity.¹⁰⁴ The cost of rehabilitating the Nchanga sewage works to the capacity needed to serve existing mine and non-mine communities is estimated at \$11.2 million; at Lulamba the cost was \$2 million.¹⁰⁵ The total cost of these minimal measures alone is in the region of \$24 million. In comparison, it is estimated that just \$3.5 million is to be provided towards the rehabilitation of the ZCCM reticulation system as part of the World Bank/African Development Bank project to rehabilitate Kitwe's municipal water and sewage systems in an area overlapping with the Nchanga mine.¹⁰⁶

Since August 1992, the Water and Sewerage Services Department of Kitwe Town Council has been required to fund its operations from charges on services. Yet the council admits that the collection of rates from low-cost housing areas, let alone squatter settlements, has proved impossible.¹⁰⁷ In an act which is indicative of its increasing desperation, it has, on occasion, cut-off water supply to residents among whose number rank the poorest of the poor.¹⁰⁸

2. The decision to privatise ZCCM: commercial and social considerations

a. Initial consideration of the future of ZCCM

An initial consultancy report, paid for out of donor funds, was commissioned by the Government of Zambia in 1993 to determine strategic options for the future of ZCCM. Some attention was given to the social implications of the sale. In assessing ZCCM's costs against a comparable operation in Chile, the consultants - Kienbaum Development Services GmbH of Germany - determined that, although overall operating costs were not much higher at ZCCM, indirect costs were almost twice as high. They concluded that a potential buyer would wish to reduce indirect expenses, to include financing costs and corporate overheads.¹⁰⁹ Excluding subsidiaries, Kienbaum calculated a ratio of production to administrative staff of 77:33. The fact that human resources and medical functions employed over two thirds of the administrative staff was seen as an indicator of how seriously ZCCM viewed its social responsibilities. The consultants stated that '[a] significant question for privatisation is therefore how a new owner may address those social responsibilities.'¹¹⁰

Kienbaum cautioned that privatisation must entail a solution to the problem of maintaining this level of services for employees, their dependants and the local community. To do otherwise would engender suspicion and apprehension and threaten public opposition to privatisation.¹¹¹ It was noted that support for selected social services - sports facilities,

cultural activities, education and housing - far from being incompatible with commercial aims, correlated with increased productivity.¹¹² The consultants recognised the necessity to ensure the approach adopted was suited to an environment in which 'the central Government may not have the capacity to support major redevelopment on its own' and was designed to 'allow government to avoid the immediate responsibility of providing services from a revenue base which is already overburdened.'¹¹³

Kienbaum proposed, in the short-term, to negotiate with potential buyers to rehabilitate infrastructure and take over the running of social services for an agreed period and to compensate them for doing so through a system of tax credits or offsets against local council rates. From a commercial perspective, improved infrastructure was necessary in any case to rehabilitate the mines: tax credits made this expense less onerous. From the Government's perspective, the loss in receipts from the mines would be more than offset by forestalling the need to increase local authority funding.¹¹⁴ In the longer-term, the recommendation was for effective application of the new rates system of 1993 to existing and former ZCCM properties so that company payments 'in-kind' could be gradually wound-down and replaced by quantifiable cash payments. Over time, the level of offsets would discourage company involvement in municipal service provision and disentangle private sector and local government obligations.¹¹⁵

Kienbaum envisaged that schools and hospitals would ultimately be hived-off from the mines and run on a commercial basis.¹¹⁶ In the interim, it proposed that the new mining companies cater for the educational and medical needs of their workforce by providing tax efficient 'non-cash' benefits as part of an employee's salary. The public would be expected to pay a realistic charge.¹¹⁷ However, while the consultants suggested that companies should be free to offer services on a fee paying basis, they conceded that 'given the social problems which already exist in the Copperbelt in terms of unemployment, the generally low living standards and the existing interdependence between the public and private sector it might also be necessary for the "new" ZCCM to offer services at a subsidised rate to low income or unemployed members of the public.'¹¹⁸ The level of tax credit received would be proportional to the level of subsidy.

Above all else, Kienbaum emphasised the importance of clarifying the complex nature of service provision in mining areas. The consultant underscored the need to plan for any transfer of responsibilities in advance. Recommendations were put forward to review all local council budgets in towns/cities where ZCCM has a presence to determine the source of local government income, whether through rates, personal levies, fees, and other charges or from central government funding.¹¹⁹ Only on such a basis could it be established whether the finance available was commensurate with the level of services planned or provided. Kienbaum noted not only changes to the system of local authority finance which resulted in councils receiving less money, but also the withholding of mandatory provision. By late 1993, for example, the Government had not disbursed sales tax receipts, a major source of council revenue. The overall aim was to calculate the shortfall in resources, so often met in kind by ZCCM. Establishing the magnitude of this shortfall prior to negotiations was seen as essential for clarifying the potential liability for the new owners. An accurate determination of these costs was to be reflected in the price paid, but at least social assets and liabilities were placed openly upon the agenda so their take-over could be planned and a system of credits or alternative funding agreed.

b. The decision to privatise ZCCM

The privatisation of ZCCM had not originally been part of the MMD's policy agenda in 1991. It had hoped to run the mining parastatal by attracting new investments through joint ventures. According to the Bank, the recognition that there was no alternative to privatise became apparent due to falling production levels in 1993-94.¹²⁰ This was the immediate context for the completion of Kienbaum's final report in September 1994. In accordance with prior speculation, the recommendation was that ZCCM should be unbundled into five operating divisions run as partnerships between the Government and private sector companies as majority shareholders.¹²¹ The study was championed by few inside the Government, the notable exception being the deputy Minister of Mines who attributed the lack of support to vested political and personal self-interest.¹²² He was duly sacked the following month. The entrenched ZCCM management were against the report's findings and were fighting a rearguard action to resist privatisation *per se*.¹²³ A bitter domestic exchange was waged in the media between the proponents and opponents of unbundling and, indeed, those resisting any move to privatisation of the mines.¹²⁴ Anglo American opposed the splitting-up of ZCCM on the grounds of inefficiency and the difficulty of organising investment: the obvious reason was, of course, that it would stand to become the controlling shareholder if the company was to be privatised as a single unit.¹²⁵

From the outset, any attempt to privatise ZCCM was always going to be complicated by the fact that the company is not wholly owned by the Government. As has been noted, Anglo American has a significant holding in the company. The ZCCM Board is split into two groups of A and B Directors. The A Directors consist of those appointed by Government through the state-owned ZIMCO holding company to look after the Government of Zambia's 60.3 per cent interest in ZCCM. The B Directors are all appointed by Anglo American via its holding company Zambia Copper Investments which has a 27 per cent holding in ZCCM. Given Anglo/ZCI's position as principal minority shareholder, privatisation

could not proceed without its agreement. Furthermore, Anglo has pre-emptive rights under an act of parliament over any shares offered for sale by the Government once the latter's holding drops below 50 per cent.

The fact of ZCCM's continued decline and its cost to the economy was a powerful argument for privatisation. An announcement was finally made in the budget speech in January 1995 that ZCCM would be privatised within two years. The Government Mining Privatisation Team was duly established and tasked with identifying suitable privatisation advisers. The World Bank had been frustrated by the position of both certain politicians and Anglo American which it viewed as the driving force behind the rejection of the Kienbaum report.¹²⁶ Nevertheless, it paid for the hiring in October 1995 of consultants - the investment Bank N. M. Rothschild and Sons and the international legal firm Clifford Chance - to produce a second report and plan on the best way to privatise ZCCM.

c. The Rothschild's report and ZCCM privatisation plan: relegation of the social dimension

i. The pressure to privatise ZCCM and adoption of the Rothschild's report

The Rothschild's report was commissioned and produced in the context of an ever more urgent push by the World Bank, other donors, and ZCCM's creditors to see the conglomerate sold. Over the period March 1993 to March 1996, broadly corresponding to the dates when the Kienbaum study was first commissioned and when Rothschild's subsequent report was completed, the copper output of ZCCM had declined by thirty per cent.¹²⁷ The adoption of a ZCCM privatisation plan was made a specific Bank condition for the release second tranche of the ERIP Credit.¹²⁸ This pressurised climate was not conducive to allowing meaningful consideration of the future of social provision.

Rothschild's recommendations in the form of a privatisation report and plan were presented to the Government in April 1996. The mode of privatisation recommended was to unbundle ZCCM and sell its assets in business packages. This was to happen in two stages. First, the majority shareholdings in the new successor companies (packages A - L) were to be sold to trade buyers. ZCCM, in the capacity of an investment holding company, was to retain a minority interest in each company. Second, pending the successful conclusion of the first stage, the Government would have the option to sell its shares in the ZCCM holding company to Zambians and other investors.¹²⁹ This privatisation plan was approved by both the Government and the ZPA in May 1996 and unanimously by the ZCCM Board in June 1996. However, the Board made it clear at the outset that the privatisation mode would take into account consents from the company's shareholders.¹³⁰ Anglo American's own opposition to the unbundling of ZCCM was dropped after the company negotiated the option of purchasing the Konkola mine with its associated massive deposits of copper outside of the main sale.¹³¹

In order for privatisation to proceed in accordance with the Rothschild report, a memorandum of understanding was drawn-up between Anglo/ZCI and the Government of Zambia.¹³² This confirmed, *inter alia*, that ZCI appointed directors would give proper consideration to bids and vote in favour of proposals from bidders where, in their opinion, acceptance would be in the best interests of ZCCM and its shareholders.¹³³ As the proposed sale process was to unbundle ZCCM and to sell a majority holding in the relevant package to the selected buyer at the first stage, followed by the disposal of the Government's remaining holding at the second stage, Anglo/ZCI also agreed to waive its pre-emptive rights to purchase shares. Overall, however, and notwithstanding the memorandum of understanding between the Government and Anglo/ZCI, it is essential to recognise that the ZCCM Board, including the Anglo/ZCI B directors, must approve each sale before it can proceed and that a key criterion in reaching a decision in each case is the extent to which the deal is deemed to be in the best of interest of the company and its shareholders.

ii. The ZCCM privatisation report and its implications for social provision

The Rothschild's ZCCM privatisation report is regarded as commercially sensitive and strictly confidential while negotiations continue over the purchase of ZCCM assets. Its conclusion that ZCCM should be unbundled and sold was rapidly disseminated after the adoption of the plan by the Government and the ZCCM board. Indeed, this publicity was part and parcel of the sale process. The authorities and other concerned parties, such as the Bank, have been far less candid in revealing the analysis and recommendations in respect of the social impact of the privatisation, yet a number of facts have emerged through a mixture of official and unofficial leaks.

First, it is apparent that privatisation of ZCCM is predicated on rationalisation and mass redundancy. The report purportedly analyses ZCCM's performance in respect of El Teniente Mine in Chile, identified by the World Bank as a good comparator. For ZCCM to achieve the productivity of El Teniente, it is concluded that labour reductions of between 20 - 70 per cent would be required depending upon the mine/operation in question. The report projected an overall reduction in ZCCM's employment by a third compared to the size of the workforce at the end of 1995/96. It is

understood that the report viewed an initial wave of 9000 planned redundancies as sending out a good signal to investors that the Government had the political will to push ahead with a difficult privatisation. Across the major operating divisions, retrenchment costs were estimated to total in the region of \$65 million over the period 1996 - 1999 or approximately \$85 million including the shedding of staff at the corporate head office, the operations centre and Kabwe/Nampundwe mines. To part fund redundancies of this magnitude, it is believed that Rothschilds recommended that the Government seek concessional funding. The main source of such funding is, of course, the World Bank.

Second, the report is understood to acknowledge the complexity of any sale of social assets and therefore to recommend that the whole issue of determining the future of social provision should not be pursued because this would delay privatisation. The immediate solution was to adopt temporary measures by which the new buyers would continue to run social services, but strictly in the short-term. It is believed that Rothschilds concluded that investors would need to control operational costs and that expenditure on social service provision at mines such as Luanshya and Mufulira could make the difference between economic and uneconomic operation. However, despite the implication that the new proprietors would therefore be expected to withdraw from social provision, the question of planning for the longer term is left unresolved.

Finally, an annex to the report contains model development and sales agreements drawn up by Clifford Chance as a basis upon which to expedite the actual sale. It has been reported that, for a period specified in the development agreement, the government will not introduce any legislative changes which increase taxes, royalties or duties paid by the mining company or adversely change the basis upon which these are levied; nor will the government prejudice the foreign exchange rights conferred on the mining company by restricting its right to exploit its product and to retain foreign exchange proceeds of sales offshore. Finally, there is an undertaking on the part of Government not to tighten the environmental standards to which the mining company is required to operate.¹³⁴ It is also apparent that the development agreements commonly require the new owners of former ZCCM operations to run hospitals and schools and other social assets for an initial two year period. This creates great uncertainty over the future of these facilities.

From what has been reported, it would therefore appear that the development agreements are silent on a number of key social issues: the way in which *ad hoc* arrangements between ZCCM and the local councils over municipal service provision is to be managed in the longer term; the degree to which employees and wider public, especially the poor, will continue to have access to the web of hospitals and health clinics on affordable terms after the two year management period has ended; whether the new owners will continue to rent former ZCCM land to local farmers on favourable terms; and the attitude of private sector companies to squatter settlements on mine land, especially in the context of increased exploration activity to map the extent of untapped reserves.

It can safely be assumed that both the concessions and the areas of omission, as outlined, are common to each sale: they are certainly confirmed in the Development Agreement for the Luanshya mine. However, the model development agreement as sketched represents the minimum advantages which a new proprietor is likely to enjoy. The latest negotiations between the Government and Anglo American over the sale of the core assets of ZCCM have seen the South African company use its influence to win additional concessions while at the same time retreating from any responsibility whatsoever for social provision.

3. *The ZCCM sales debacle*

The first step of plan preparation and approval was described by the Bank as having proceeded smoothly.¹³⁵ In the initial stages of the second phase - the actual sale - a number of bidders pre-qualified and bids for all the packages were received by the target date of 28 February 1997. The aim was to complete the privatisation by June 1997.

Unfortunately, the sale of ZCCM has not proceeded according to plan. On the contrary, it has been characterised by delay, indecision on the part of the MMD administration, overt pressure from multilateral donors, and corporate exploitation of the Government/ZCCM's weak bargaining position in a falling copper market. By September 1998, over two years after the privatisation was announced, less than 20 per cent of the conglomerate's operating capacity had passed into private ownership.¹³⁶ As of January 2000, the sale of the key mine packages at the core of ZCCM - Konkola, Nkana, Nchanga and Mufulira divisions - has still not been finalised, although completion appears imminent. The conclusion reached by *The Economist* magazine in November 1999 is damning: 'As an object lesson in how not to privatise, the sale of Zambia Consolidated Copper Mines (ZCCM) is exemplary.'¹³⁷ *Mining Magazine*, in a review of the ZCCM sale, is of the view that '[s]adly, it has been one of the most protracted and problematic mining industry privatisations of all time.'¹³⁸

Despite initial progress in selling non-operational and smaller ZCCM mines, as well as the Power Division, the failure to conclude the sale of the Nkana/Nchanga mines to the Kafue Consortium is recognised as marking the point at which the

privatisation stalled. The Consortium comprised three major international mining companies - Phelps Dodge of the USA, Noranda of Canada, and Avmin of South Africa - and the UK Commonwealth Development Corporation to provide development finance. A year of protracted negotiations saw the replacement of ZPA/Rothschilds by a Government/ZCCM negotiating team in apparent contravention of the Privatisation Act; the refusal of the Government team to accept a deal in June 1997 worth over \$1 billion in cash, debt assumption, and investment; the excise of the Chibuluma Mine from the overall Nkana/Nchanga package to be sold to a rival bidder; a collapse in the price of copper reflecting overproduction and continued repercussions from the Sumitomo trading scandal;¹³⁹ the failure of the Government to conclude a deal worth a total of \$700 million it had accepted in October 1997; the onset of recession in Asia and Japan and further falls in the copper price; and progressively lower bids by the Consortium, culminating in an unacceptably reduced final offer in May 1998 which were flatly rejected. The Consortium dissolved and all its former members finally pulled out of negotiations in June 1998.

The Government has subsequently accused the major mining companies involved as banding together in the Kafue Consortium to form a buyer's monopoly in order to force the sale of Nkana/Nchanga for a knockdown price. This allegation, at the very least, raises questions about fair competition, for example, *vis-à-vis* the OECD Guidelines for Multinational Enterprises.¹⁴⁰ The eventual tax exemptions demanded by the Consortium in respect of mineral royalty, excise duty on electricity and import duties on fuel, all in addition to the existing package of concessions common to all development agreements, were deemed unacceptable. The Government, in turn, has been criticised for passing up the 'dream ticket' comprising four major players with the expertise to turn prospects for the bulk of ZCCM's operations around. Within the mining industry, the view is that to develop reserves of base metals such as copper increasingly requires the cooperation of more than one company.¹⁴¹ The accusation against the Government has been one of a failure to act decisively to clinch the best deal in June 1997 because of its preoccupation with the cash component of the overall package when its priority should have been to stem the haemorrhage of losses incurred by ZCCM and secure its future.

Throughout, Anglo American has fully exploited its privileged position as the principal minority shareholder in ZCCM. By virtue of the initial agreement it signed with the Government in February 1997, it was assured the right to purchase the highly lucrative Konkola Deep concession and given first refusal over a modern smelter excised out of the Mufulira sale package, despite the fact that this threatened the viability of the associated mine. Furthermore, the purchase of Konkola by Anglo was always conditional on the prior sale of the Nkana and Nchanga mines. When the sale of the latter collapsed in June 1998, the pressure on Anglo to finalise its purchase of Konkola was removed while its rights to the Mufulira smelter, to all intents and purposes, precluded the privatisation of the remainder of the package. The privatisation of ZCCM was effectively halted while the conglomerate continued to lose between an estimated \$1 million to \$2 million each day.

From this position of strength, Anglo American has been able to negotiate the purchase not only of Konkola, but also the mines at Nchanga and Nampundwe. Furthermore, the company has gained access to the Nkana smelter and secured a right of veto over who buys the Nkana mine itself if the development and investment plans are not in its own interests. It has signed agreements with the Government/ZCCM in January, October and December 1999 to this effect, although the sale still has not been concluded. There will be mass redundancies, the cost of which will be borne by the Government using finance provided by the World Bank.

The price paid for the productive core of ZCCM amounts to just \$90 million in cash, the bulk of which is on deferred payment terms, and investment commitments of \$208 million at Nchanga and the existing Konkola mine. The company will also begin implementation of the Konkola Deep Mining Project, although the cost of this has been scaled down somewhat.¹⁴² In stark contrast, the offer of the Kafue Consortium for broadly comparable assets, accepted in October 1997 but never successfully concluded by the Government/ZCCM, was worth \$150 million in cash, with debt take-over of \$75 million, and investment commitments of \$400 million. ZCCM was to retain a 12 per cent holding and benefit from profit sharing worth up to \$75 million. Even the Consortium's reduced offer at the end of March 1998 had been worth \$105 million in cash with the assumption of \$35 million debt and retention of the profit sharing component: 'How badly the country has been served since then, by those who have allowed the value to fall so far to what it is today. Quite apart from the loss in value of the operations, what has been the toll caused by disrupting management and destabilising the workforce in general?'¹⁴³

On 27 January 2000, Anglo American confirmed a setback in finalisation of the sale. The company blamed complex legal and administrative problems for the delay. The Government downplayed speculation about the failure to complete by the January 31st deadline, referring to this as an arbitrary target date.¹⁴⁴ In an address to Parliament on 27 January, the Minister of Mines cited low copper prices as a factor which made the conclusion of the sale difficult. Others pointed to delays in securing finance for the sale and in agreeing arrangements for retrenchments. On the same day, extensive concessions to the buyers of the remaining ZCCM were framed in the budget. The Government also announced that it would make provision to pay miners their redundancy packages and would meet ZCCM's obligations to creditors. K423 billion, the equivalent of 4 per cent of GDP, has been set aside to settle part of ZCCM's colossal debt to local suppliers.

The sale of the core of ZCCM to Anglo American, as well as that of Mufulira and Nkana mines to First Quantum/Glencore, were finally completed on 31 March 2000.

Overall, the initial strategy was to unbundle ZCCM and sell it in packages to different buyers in order to avoid its wholesale transfer to Anglo American. The final outcome is that Anglo American is now in a position where it has either bought or controls the core assets of ZCCM at a price substantially below that achieved in the previous year. Under the rubric of competition within the OECD Guidelines for Multilateral Enterprises, companies should '[r]efrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example: a) Anti-competitive acquisitions;...c) Unreasonable refusal to deal...'¹⁴⁵ It is beyond the scope of this submission to fully explore the actions of Anglo American in respect of these requirements; however, further examination appears to be warranted.¹⁴⁶ A more detailed account of the ZCCM sale to the end of March 2000 is summarised in the supplement accompanying this Section.

4. Obligations and responsibilities arising out of economic and social rights standards and company codes of conduct

In the context of this submission, the manipulation of the ZCCM privatisation process and the soundness or otherwise of the Government/ZCCM's commercial judgement are of concern only to the extent to which they impinge upon the realisation of economic and social rights.

The compatibility or otherwise of the conduct of the different entities involved in the privatisation of ZCCM is reviewed in relation to the obligations and responsibilities arising out of the Covenant, related human rights instruments, pertinent ILO labour standards and OECD codes of conduct. There are six aspects to the sale which cause considerable disquiet: first, the deliberate neglect by the Government, the Bank and the private sector of measures to ensure essential social provision after privatisation; second, exploitation by certain companies of their strong negotiating position to demand and win an excessive level of tax concessions; thereby reducing the level of resources available to the Government; third, a lack of transparency in the sales process to the extent that affected communities are deprived of essential information; fourth, a failure of accountability to the point where the Bank appears to be acting in the interests of Anglo American; fifth, discrimination in the provision of finance to fund redundancy payments; and finally, the negative repercussions for domestic social spending and policy arising out of Bank conditionality on the privatisation of ZCCM.

The analysis is organised around three main subsections: (a) State obligations and the actions of the Zambian Government; (b) the fulfilment or rejection of corporate responsibilities; and (c) the advisability of measures adopted by the World Bank.

a. State obligations and the actions of the Zambian Government

i. The failure of the Government to take steps to ensure continued social provision

The Zambian Government is obliged to take steps for the progressive achievement of the rights under the Covenant.¹⁴⁷ In contrast, it has omitted to prepare for the take-over of social provision on the Copperbelt; moreover, the unjustified adoption of deliberately regressive measures is incompatible with the undertaking of progressive realisation.¹⁴⁸ Zambia has also ratified the aforementioned ILO Social Policy (Basic Aims and Standards) Convention (No. 117). This requires that '[a]ll policies shall be primarily directed to the well-being and development of the population and to the promotion of its desire for social progress' and that '[a]ll policies of more general application shall be formulated with due regard to their effect upon the well-being of the population.'¹⁴⁹ The improvement of standards of living is regarded as the principal objective in planning economic development.¹⁵⁰ More specifically, the Zambian Government, as a State party to the Convention, is required to take all practicable measures 'in the planning of economic development to harmonise such development with the healthy evolution of the communities concerned.'¹⁵¹ In particular, 'efforts shall be made to avoid the disruption of family life and of traditional social units, especially by...the promotion of town and village planning in areas where economic needs result in the concentration of population...'¹⁵²

In accepting the advice of the Rothschild's report on the privatisation of ZCCM in 1996, the Government has done little or nothing to prepare for the take-over of social assets, postponing the adoption and implementation of concrete measures over the initial two year period during which time the buyers of the mines have been running services. However, these commitments are now coming to an end. Moreover, and in respect of the core ZCCM divisions which

have recently been sold, Anglo American and other buyers are refusing to take on any responsibility for social provision.

Belatedly recognising that the local councils are utterly lacking in the resources and capacity to take over provision, the Government's last minute response, at the end of March 1999, has been to establish an Asset Holding Company (AHC).¹⁵³ ZCCM social assets owned by the parastatal in Nchanga, Nkana, Konkola, Mufulira and Luanshya have been transferred to the AHC which is to take-over responsibility for municipal services in the five mine townships.¹⁵⁴ A private operator is to be engaged by the AHC to deliver services on the basis of a four year management contract and will be responsible for operating and maintaining the associated facilities, for billing customers and for collecting revenue on behalf of the AHC. In return, the operator is to be paid a management fee together with incentives for reaching specified performance targets. Essential operation and maintenance costs are to be met out of two funds.¹⁵⁵

The criticisms of the Government's plans are manifold. First, the programme represents a belated, reactive response to a problem that was apparent as soon as the decision was taken to privatise ZCCM. This runs contrary to the determination made by the Committee that '...steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies...with the obligations under article 11 of the Covenant.'¹⁵⁶ The decision to act has been forced upon the Government by the uncompromising stance of Anglo American. It has not been initiated or informed by the need to ensure the realisation of social rights. There has been a lack of consultation with local councils.¹⁵⁷ At this late stage, the AHC is not operational. A World Bank project, key to the programme, is at the appraisal stage and there is little prospect of approval by the Bank's Board before the end of May 2000 at the earliest.¹⁵⁸

Second, the programme is limited in scope and duration. It relates only to water services, waste water services and solid waste management systems. It is unclear who is to be responsible in the longer-term for other municipal services such as lighting, refuse disposal, and road maintenance, let alone the management of extensive health facilities and the running of former mine schools. The AHC is itself an interim arrangement: the expectation is that local councils will take-over the management of water supply and sewerage disposal in the mining townships on a commercial basis as part of major reforms underway in the water sector as a whole. The ultimate aim is to share-out the cost of provision in rural areas, but recover costs from consumers in urban centres.¹⁵⁹ While the first phase of a pilot project on the Copperbelt has seen eight town councils form three joint companies to run water and sewerage services, the latter are not yet operational.¹⁶⁰ The same applies to the National Water Supply and Sanitation Council (NWASCO), the body which will regulate the AHC in its setting of water tariffs, despite have been established under the Water Supply and Sanitation Act of 1997.¹⁶¹

Finally, the commercialisation of water supply and sewerage services on a cost recovery basis, and in the absence of effective regulation and safeguards, is liable to lead to the exclusion of poor residents from provision and must threaten the realisation of the basic right to adequate, serviced housing and jeopardise the right to health. For those unable to pay a market tariff for their water, the prospect of disconnection must increase.

The current proposals to transfer the cost of social provision from the proprietors of the mines to employees and the public amounts to regression in respect of the Covenant. There will be an inevitable deterioration in an already low standard of living. This argument is made in specific terms and is not founded on an unreasoned *a priori* rejection of the market in supplying social goods. It is recognised that services which contribute to the realisation of social and economic rights may be provided by either the public or the private sector either separately or in combination.¹⁶² However, this in no way diminishes the obligation upon a State to ensure the satisfaction of minimum essential levels of each right.¹⁶³ As is evidenced within this submission, it is apparent that significant numbers of individuals in Zambia are already denied their rights to an adequate standard of living, food, housing, health, and education. In the circumstances which exist in Zambia, where seventy per cent of the population are poor and fifty-three per cent live in extreme poverty in the virtual absence of social welfare, the decision to provide services on a commercial basis will inevitably result in yet more people being denied the most basic of rights.

ii. The use of maximum available resources

The onus is upon the Government to overturn a conclusion of *prima facie* violation. To do so, it may cite resource constraints; yet still it must demonstrate 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, those minimum obligations.'¹⁶⁴ On the one hand, it is the MMD Government which has taken measures to guarantee unprecedented tax and other concessions to companies in the mining sector. In this respect, it is pertinent to note that the Declaration on Social Development commits the Zambian Government to 'increasing significantly and/or utilizing more efficiently the resources allocated to social development' by, *inter alia*, ensuring that 'in accordance with national priorities and policies, taxation systems are fair, progressive and economically efficient, cognizant of sustainable development concerns, and ensure effective collection of tax liabilities.'¹⁶⁵ Yet the tax regime applicable to the mining sector in Zambia will have negative repercussions on revenue, and ultimately on public spending and the level of resources available for social provision, for decades to come.

Moreover, there is no indication that proceeds from the sale of ZCCM are being set aside or earmarked for social provision. Cash from the sale of ZCCM assets to date has not been deposited in the Privatisation Revenue Account administered under the Privatisation Act, but has instead been returned to the company. There are mitigating circumstances. As a consequence of chronic indebtedness in the face of declining production in the absence of investment, ZCCM is recording losses in excess of \$30 million per month.¹⁶⁶ The Zambian Government has therefore been providing finance - estimated at \$6 million each month, and therefore at a level significantly above any privatisation receipts - to keep ZCCM afloat in order to stave off moves by creditors to seek the liquidation of ZCCM which could trigger the collapse of the conglomerate and threaten the very basis of the Zambian economy. Despite this situation, it still might be assumed that any ostensible savings which the Government realises each time a loss-making ZCCM division is sold would free up domestic resources which could be allocated to the social sectors.

On the other hand, it is at this juncture that the culpability of both the international community and influential private sector players must be scrutinised. The neglect of preparation for the take-over of social provision and restraints on the ability of the Government to switch adequate funds towards the social sectors is a reflection of the agenda of the World Bank and IMF. Once more, the measures they have taken in respect of the privatisation of ZCCM have proved ill-advised when viewed in relation to the progressive implementation of the Covenant. This circumstance, in which the Government fails to invest in essential social services for the poor while simultaneously according massive tax breaks to rich foreign mining houses, also reflects the powerful vested influence of those very companies.

b. The advisability of measures adopted by the World Bank

To recap the argument made earlier in this submission, article 22 enables the Committee to bring to the attention of other organs of the United Nations and specialised agencies matters which may assist them in deciding on the advisability of international measures likely to contribute to the effective implementation of the Covenant. In accordance with article 22, recommendations of either a general policy nature or which relate to a specific situation may be made to the World Bank and IMF.¹⁶⁷ Recommendations of the second type open the way for the Committee to address concerns arising from individual projects or programmes. Use is made by the Committee of the principle that development assistance may be ill-conceived and even counterproductive in human rights terms. Hence '[i]n order to reduce the incidence of such problems, the whole range of issues dealt within the Covenant should, wherever possible and appropriate, be given specific and careful consideration.'¹⁶⁸ The Committee recommends that 'every effort should be made, at each phase of a development project to ensure that the rights contained in the Covenants are duly taken into account.'¹⁶⁹

Once more, it is strongly contended that the Bank has neglected to give consideration to the effective progressive implementation of the Covenant in the design and implementation of the measures it has taken to foster the privatisation of ZCCM. There are at least four areas of concern. First, the Bank's neglect of the social dimension to the privatisation of ZCCM; rather, technical assistance to support the sale is conceived of, supported, and supervised solely in relation to economic criteria centred on performance and productivity. Second, although there is no conditionality requiring the Government to plan for the social consequences of the ZCCM privatisation, it is apparent that continued Bank/IMF lending has increasingly been predicated on the rapid conclusion of the sale. The withholding of balance of payment support has reduced the resources available to the Government for social spending while, at the same time, the negotiating position of companies bidding for mine assets has been considerably strengthened by the knowledge that the Government is under immense pressure from the donor community to jettison ZCCM. Third, the Bank is itself seen to be reacting to events, taking action through both its private and public arms in the interests of Anglo American. This raises issues of accountability and discrimination. Furthermore, and finally, the refusal of the private sector to take on responsibility for social provision has forced the Bank to consider the use of project assistance to support municipal services in the Copperbelt towns. Putting aside the fact that social measures should have been an integral part of the ZCCM privatisation when it was initiated three years ago, there are other grounds for criticising the assistance on offer. The objective of the project is not to transfer responsibility for social provision, formerly attributable to the State through ZCCM, to central or local government; rather, the aim is to encourage a commercial system in which private companies provide services at market prices to consumers. Yet it appears that the Bank has so far failed to consider the implications of these plans for the realisation or denial of the social rights of poor residents.

i. *The culpability of the World Bank in failing to consider the social dimension in the privatisation of ZCCM*

The Bank's neglect of the social dimension in the measures it has promoted to privatise ZCCM is apparent at both the level of the mining sector as a whole and at the level of the privatisation plan *per se*.

A number of Bank lending instruments have been explicitly concerned with shaping the mining sector in Zambia and advancing the privatisation of ZCCM. A Mining Technical Assistance (Mining TAS) project was first supported by the Bank in 1991. One key objective was to develop institutional capacity within the Ministry of Mines and Minerals Development and to assist in the creation of a pro-private sector environment to encourage mining companies to invest in Zambia.¹⁷⁰ The Economic Recovery and Investment Promotion Credit was designed for the purpose, *inter alia*, of 'improving the legal, fiscal, environmental framework for the mining sector, strengthening the Ministry of Mines and Minerals Development (MMMD), and adopting a plan for the privatization of ZCCM.'¹⁷¹ While the Government of Zambia agreed to carry out this reform agenda, funds from the ERIP credit were provided as general balance of payments support. The specific requirements for the release of funds under the credit included, *inter alia*, the adoption of a new Mines and Minerals Act together with a legally secure pro-investment fiscal regime and environmental framework.¹⁷² The Bank also provided \$23 million to be spent directly on support for the ERIP programme through a technical assistance facility, building on the previous Mining TAS, to implement policy, institutional and regulatory reforms in four areas:¹⁷³ the privatization of ZCCM; the financing of ZPA activities; improving the operational capability of the Ministry for Mines and Mineral Development; and the drafting of new business related laws.¹⁷⁴ The latter required the use of funds to restaff the Department of Legal Drafting at the Ministry of Legal Affairs (MOLA).¹⁷⁵

Despite the far-reaching implications of legislative reform on people's rights in matters from housing to employment, from the environment to taxation, the Bank's monitoring of technical assistance to the Ministry of Legal Affairs was geared to 'the number of pieces of legislation (together with the number of pages) drafted by the department every year, with 1995 as a baseline' and 'the number of draft bills contracted out to private lawyers.'¹⁷⁶ The Mining and Minerals Act itself was designed to guarantee security of title to mine owners, unrestricted access to foreign exchange, the right of companies to market products, and freedom of commercial operation.¹⁷⁷ Agreement under the ERIP credit ensured a new pro-mining fiscal regime which 'concentrates taxation on profits, rather than output and is non discretionary, and internationally competitive.'¹⁷⁸ When crystallised in the development agreements accompanying the Rothschild privatisation plan, it is apparent that the Zambian Government has been forced to offer blanket tax and other concessions to mining companies on the premise that this will attract investment. Even so, international mining houses have attempted to exploit their position and gain further advantage. The allegation has been made in the Zambian press that the negotiating position of certain companies has been facilitated by subtle donor pressure.¹⁷⁹

Turning to the question of Bank support for ZCCM itself, privatisation of the conglomerate was not considered an option when the first technical assistance package was designed. The primary component of the Mining TAS aimed to assist ZCCM to improve its operational performance by lowering its costs, to initiate joint ventures to enable the company to mine hitherto underdeveloped copper reserves, and to divest itself of non-mining assets. The corporate plan prepared by ZCCM failed to reduce costs.¹⁸⁰ On the contrary, efficiency and production declined to a point where ZCCM was in danger of insolvency. As a result of this deterioration, the Bank intervened directly at the request of Government: 'Bank staff worked rapidly and intensively to identify the underlying problems and to support ZCCM in preparing an Emergency Action Program to enable ZCCM to survive...'¹⁸¹ In its later stages, finance under the Mining TAS was used, in conjunction with subsequent technical assistance, to prepare the mining parastatal for privatisation.

The Bank, in explaining the delay in the ZCCM privatisation, suggests that, among other reasons, '...complex issues relating to the retrenchment of labor, handling of ZCCM's accumulated arrears, liability for past environmental damage, ownership of staff housing, and provision of social infrastructure and municipal services had to be resolved.'¹⁸² Yet many of these matters have either not been resolved at all or else have been resolved to the detriment of mining communities.

First and foremost, the ZCCM privatization report advises that, beyond interim measures of limited import, the issue of social provision should be set aside so as not to delay the sale. The Bank's enthusiastic endorsement of this plan - and, in other terms, the Bank's culpability for its social failings - is unequivocal. It was the Bank which provided the necessary finance and which congratulates itself on playing a 'vital role' in the privatization of ZCCM. Under the ERIPTA credit, a \$2 million project preparation facility advance was made available to fund the hiring of legal/financial advisors.¹⁸³ The part subsequently played by Rothschilds and Clifford Chance in the drawing up of the ZCCM privatization plan and related sale documentation is described as 'indispensable'.¹⁸⁴ The Bank may consider the hire of this high quality international investment and legal advice as necessary to lend 'political and business credibility' to the sale of ZCCM, but no consideration is given to the plan's social credibility.¹⁸⁵ The Bank concedes that the rights of other ZCCM shareholders, namely Anglo American, had to be considered and protected in drawing up the privatization plan,

while no account is taken of the economic and social rights of those living in mine-dominated townships in the Copperbelt.¹⁸⁶ Legal covenants and conditionality associated with the ERIP are solely concerned with the adoption and implementation of the ZCCM privatisation plan. They do not envisage preparations for the take-over of ZCCM social responsibilities; nor the establishment of social safety nets to cover direct and indirect retrenchments. The performance indicators used by the Bank relate to the company's fiscal position, production targets, operating costs and employment levels.¹⁸⁷ No use is made of social indicators, despite the pivotal position of ZCCM in providing social services. In relation to the ZPA, the preoccupation is solely with quantifying privatisation progress.¹⁸⁸

ii. Conditionality on the privatisation of ZCCM and the withholding of balance of payments support

The underlying imperative from the Bank and IMF has been to privatise ZCCM. Over time, there has been a gradual hardening of the tactics employed to bring this about, culminating in uncompromising conditionality requiring the conclusion of the sale. The consequences, with negative repercussions for the realisation of economic and social rights, have been twofold: firstly, and at a general level, the withholding of balance of payments support which has reduced the resources available to the Government for social expenditure; and secondly, the reinforcement of a situation in which incoming buyers have been able to demand unprecedented tax concessions and to reject responsibility for existing employees and social service provision.

The Bank's preference was for the early privatisation of ZCCM. However, when PIRC I and PIRC II were developed, the sale of ZCCM was considered too politically sensitive and practically difficult for the Government to achieve early in its tenure, although it is clear that Bank staff in Washington favoured the inclusion of the mining conglomerate in the original privatisation program.¹⁸⁹ Instead, the Bank confined its role to the initiation in 1992 of preparatory studies on State divestiture from ZCCM.¹⁹⁰ Under PIRC II (FY93), the Government agreed to examine strategic options on how to privatise ZCCM. This culminated in the Kienbaum report. However, at this juncture, the acceptance of its findings was not a covenanted requirement of Bank lending. The omission of ZCCM from the original privatisation program was subsequently described by the Bank's Operations Evaluation Department as 'a missed opportunity,' 'misguided' and 'the major shortcoming of the privatisation program.'¹⁹¹ Although the imperative was clearly to push for the privatisation of ZCCM, regional Bank staff were 'trying to find the right balance between insisting on tight timetables and dictating methods on the one hand and allowing the Government to choose methods that fit their political goals on the other.'¹⁹²

Once the decision had been taken to commission the Rothschild's report, the Bank made the adoption of this privatisation plan for ZCCM a specific Bank condition for the second tranche release of funds under the ERIP Credit (FY95).¹⁹³ At this point in time, the Bank, although candid in its aim to achieve the disposal of ZCCM, showed restraint: 'Although the ultimate objective of the ERIP program was the actual privatization of ZCCM, this was not made a condition of the ERIP Credit in order to keep the playing field level for ZCCM and the Government vis-à-vis potential buyers.'¹⁹⁴ Second tranche release of the Bank's follow-on ESAC II (FY 96) was similarly made conditional on satisfactory progress in implementing the ZCCM privatisation action plan.¹⁹⁵

The Bank appears to have been satisfied with initial progress in the first stage of privatisation under which the sale packages were put out to competitive tender and bids were received by the end of February 1997.¹⁹⁶ However, the replacement of the ZPA/Rothschilds' negotiating team and subsequent delays in the sale of key ZCCM assets prompted some disquiet. Although the Consultative Group meeting scheduled for December 1997 was undoubtedly postponed because of concerns over governance and human rights, representatives of both the World Bank and IMF were cited in the Zambian press referring to the failure to sell ZCCM. However, it was the effective collapse of negotiations to sell the core Nkana/Nchanga mines to the Kafue Consortium in the second quarter of 1998 which caused the multilaterals to withhold balance of payments support. External program support of \$235 million was pledged at the consultative group meeting on May 1998, but its release was conditional on the swift privatisation of ZCCM.¹⁹⁷ Any vestige of the policy which resisted tying balance of payments support to the final sale of ZCCM, on the grounds that potential buyers could exploit such conditionality for their own ends in negotiations, was therefore abandoned.

It is in this context, when the Government's access to much needed foreign exchange and the funding of aspects of its domestic program for 1998 was dependant upon the restoration of balance of payments support, that Anglo American entered into talks over the prospect of restructuring the core ZCCM sale packages to its advantage. Indeed, it was not until the company, from this position of strength, had negotiated and signed a memorandum of understanding with the Government over the purchase of Nkana, Nchanga and Konkola on 24 November 1998, that the donor community indicated that it would consider the approval and release of funds. In December 1998, the IMF agreed in principle to a second Enhanced Structural Adjustment Facility for Zambia, the negotiation of which had been delayed since May 1998. However, confirmation was dependant upon a number of prior actions, one of which was substantial progress on the privatisation of ZCCM.¹⁹⁸

The Bank's long-awaited \$170 million Public Sector Reform and Export Promotion Credit was approved by the Bank's Board of Executive Directors on 26 January 1999, but only after the memorandum of understanding between the Government/Anglo American over the sale of remaining ZCCM assets had been affirmed in a 'final' agreement signed on 19 January 1999. The PSREPC is specifically designed to facilitate completion of the privatisation of ZCCM by bankrolling the labour reduction program.¹⁹⁹ The first tranche release is for \$65 million; however, the payment of an interim \$40 million 'floating tranche' is dependant on the fulfilment of conditions relating to public sector reform while the second tranche release of the balance of \$65 million is the subject of a number of covenanted agreements. In this respect, conditionality on the completion of privatisation is explicit: 'The transfer to the new owners of ownership and control of the remaining core ZCCM assets for which MOUs and/or ales agreements have been reached and decisions concerning the future status of any major ZCCM assets that are unsold will also be conditions for the release of the Second Tranche.'²⁰⁰ It is understood that similar conditionality applies to the release of bilateral funds from certain donors.²⁰¹

At the end of March 1999, the IMF Board finally approved its follow-on ESAF worth a total of \$349 million and designed to support the 1999/2001 economic and financial program as outlined in the Policy Framework Paper agreed between the Fund, Bank and the Government.²⁰² IMF lending in the first year, worth \$55 million, is conditional not only on a number of fiscal and monetary benchmarks, but also on structural performance criteria to include continued 'substantial progress' being made in the privatisation of ZCCM which is understood by the Zambian Government to mean 'the transfer of the major asset packages of the ZCCM.'²⁰³ Given that the final sale of the remaining core ZCCM assets had still not been finalised at the end of October 1999, it is apparent that the further release of both IMF and Bank funds is once again in abeyance.²⁰⁴

The recent withholding of balance of payments support triggered by the failure to privatise ZCCM has required the Government to plunder its foreign currency reserves and even transfer resources out of the domestic budget. This sequence of events is described in more detail in Section 1; the consequences for social spending are explored in Section 3. At this juncture it is sufficient to note that the equivalent of \$183 million was transferred from the domestic budget in 1998 to meet servicing on foreign debt.²⁰⁵

Moreover, because the Zambian Government's support for ZCCM has its origin in donor finance, any savings that are made as loss-making divisions are sold will undoubtedly be mirrored by a corresponding fall in balance of payments support. As a result, there is unlikely to be a freeing-up of domestic resources in the near future. Meanwhile, ZCCM's debts have mounted: net short-term debt and arrears to suppliers were estimated to total \$124 million to the end of March 1999 while the parastatal's debt service obligations to the World Bank alone amounted to \$23 million at the same date.²⁰⁶ The total has undoubtedly risen in the interim and will continue to do so until all ZCCM divisions are sold. It is the intention of the Government to assume these obligations when the conglomerate is finally privatised. Furthermore, the first tranche of \$65 million under the PSREPC which the Government is borrowing from the World Bank is to be on lent to ZCCM to cover a redundancy program required by Anglo American as a condition of its purchase of the core mines. This transaction is discussed in more detail in the next subsection.

iii. Bank action in the interests of Anglo American

As has been noted, the Bank initially avoided tying its adjustment lending to the privatisation of ZCCM in order to create a level playing field for the sale. However, the question must be asked as to whether its support for the privatisation of ZCCM was always going to be in the best interests of Anglo American given the company's position on the ZCCM board? The Bank has readily conceded that the Rothschild report paid for through ERIPTA was commissioned precisely because of Anglo's opposition to the earlier Kienbaum study. Furthermore, from the outset, this second study had to deliver recommendations at least acceptable to Anglo American if it was to be approved by the ZCCM board. The Bank has subsequently become locked into supporting a privatisation process over which Anglo American has exercised considerably influence: its negotiation of the exclusive right to develop Konkola Deep; the excise of the Mufulira smelter from its recommended sale package; the retention of the right of Anglo appointed directors on the ZCCM board to vote on the final acceptance or rejection of each winning bid. The latter is confirmed in a document produced in court in the case bought by First Quantum against Binani, ZCCM, ZPA and the Government as fourth defendant over the award of the sale of the Luanshya package confirm the key position of Anglo American:

'The Board of Directors of ZCCM comprises GRZ and ZCI [an Anglo subsidiary] directors. Despite GRZ directors been [sic] in the majority[,] the Articles of Association provide that any decision to dispose of major assets or shares of ZCCM requires approval by a quorate of directors. A decision can therefore not be made by simple majority and requires the consent of both sets of directors....The Agency [ZPA] Members should note that while the objectives of GRZ in the privatisation of ZCCM are broad and encompassing, those of the minority shareholders may be narrower and focusing [sic] more on maximising value for their shareholding in ZCCM in the short and long term. For instance,

the objective of diversifying ownership of Copperbelt assets may not necessarily be consistent with that of maximising value...Therefore, any decision reached in the sale of ZCCM's assets will require a delicate balance between these possibly varying objectives of GRZ and the minority shareholders.'²⁰⁷

The fact that the Bank has supported a privatisation process which has implicitly favoured Anglo American is undeniably a reflection of the company's real and pre-existing influence; however, other aspects of the Bank's support have been explicit and direct. This applies to both the Bank's public and private sector arms, respectively the International Development Association and the International Finance Corporation. First, concessional IDA funds of almost \$10 million have been spent not only on the services of Rothschilds and Clifford Chance in the ZCCM privatisation, but also on assisting ZCCM in the joint-venturing with Anglo American of Konkola Deep.²⁰⁸ Second, the International Finance Corporation has long been engaged in talks with Anglo American over finance for its plans to develop not only Konkola Deep, but also the existing Konkola Mine and Nchanga. Indeed, one of the preconditions set by Anglo in January 1999 in respect of its purchase of the remaining core ZCCM assets was the securing of third party 'non-recourse' financing.

The IFC board has recently approved an investment of \$30 million, in equity and shareholder loans, to part finance the purchase and initial two year mining rehabilitation programme at Konkola, Nchanga, and Nampundwe.²⁰⁹ The total cost is estimated at \$260 million. The Corporation, in the context of revitalising the mining sector as 'a key component of World Bank Group strategy,' describes the Konkola Copper Mine plc assets as 'the essential part of this privatization' and its own involvement as providing 'the final impetus to allow their successful privatization'.²¹⁰

The IFC recognises that there are concerns over the project in respect of the environment, health and safety of personnel, and adverse social consequences.²¹¹ The project is designated Category A which means that an Environmental Assessment is required. It is acknowledged that arrangements relating to the transfer of responsibility for the provision of services such as health, education, housing, water, sanitation and power require careful monitoring given the fact that negotiations between the World Bank, the Government and Anglo have not been concluded. Moreover, given that the IFC has already drawn attention to the importance of involuntary resettlement as a social issue, it is of the utmost importance that the project is implemented in full compliance with international human rights standards and the Bank's own policy on resettlement. Please see subsection C.2 for further discussion of the latter.

Finally, a related element of the sale requires that funds are raised through multilateral donors to pay for redundancies. A substantial part of the Bank's latest IDA credit is to be used for this purpose: 'In the transactions concluded so far, the new owners have undertaken to take over the existing labour force and to honor all existing conditions and terms of service. Any labor reduction programs will thereafter be implemented at their discretion and cost. The investors negotiating for the remaining assets are reluctant to take over all the workers.'²¹² Instead, such workers will remain with the residual ZCCM holding company which will implement a mass redundancy programme.²¹³ IDA funds of \$65 million under the PSREPC are to be lent to the Government and then on-lent to ZCCM on commercial terms so that it can meet the cost of redundancies.²¹⁴ 7,400 employees, representing about a quarter of ZCCM's workforce at the end of 1998, are to be made redundant under the ZCCM rationalisation programme.²¹⁵ The residual ZCCM holding company is to have a staff of just 30.

The programme was originally to have been implemented over the period January 1999 to March 2000, but has been postponed while the finalisation of the sale of ZCCM's core assets was itself delayed. On 21 January 2000, Reuters reported the findings of a study by the Anglo/ZCI subsidiary Konkola Copper Mining plc which quantified mass redundancies. The workforce at Nchanga was to be cut by 3000 prior to completion of the sale. A further 450 posts will be lost at the mine by the end of 2000. At the existing Konkola mine, there are to be 1,640 redundancies while 91 workers are to lose their jobs at Nampundwe. Articles in the press suggest that morale among miners is extremely low: reportedly, many have already received notices of termination of employment.²¹⁶

The Bank agreed to provide public support at the insistence of a private company on the basis of what was, at the time, a non-binding agreement. Indeed, the original deal of January 1999 to buy the mines was renegotiated by Anglo and has only just been concluded.²¹⁷ Given that the Bank is using public funds to meet ZCCM redundancies, it is incumbent upon it to account for why these job losses are necessary. The payment of terminal benefits is, of course, no substitute for secure employment. The Bank has conceded that, even taking into consideration severance payments, the short term impact of thousands of redundancies in both the public service and ZCCM is a matter of concern.²¹⁸

If retrenchment is inevitable, it is of course of paramount importance that ZCCM employees are paid their terminal benefits promptly and in full. The use of Bank funds for this purpose when there is no alternative source of finance is vital to the interests of affected employees. However, and in comparison, the discrimination suffered by those workers in Zambia who have lost their jobs before and after privatisation, but who have not received their terminal benefits is heightened. The Committee calls upon all relevant bodies, including the World Bank, to make every effort in the

measures it employs to ensure that the rights contained within the Covenant are given 'specific and careful consideration' and are 'duly taken into account'.²¹⁹ The Covenant encompasses the right to fair and equal remuneration.²²⁰ In this respect, it is also pertinent to consider the ILO Equal Remuneration Convention, 1951 (No. 100), to which Zambia is a State party.²²¹ Moreover, the overarching principle of non-discrimination applies to the exercise of all rights in the Covenant.²²² The Bank may be justified in its decision to fund ZCCM redundancies, although it must account for other aspects of its backing of the Anglo sale; however, what it must do, in respect of obligations arising out of the Covenant, is explain why it has omitted to act when other equally deserving employees who have lost their jobs as a result of privatisation have been deprived of their entitlements and denied access to assistance.

iv. The advisability of belated project assistance: the Zambia Mine Township Services Project

The Bank has responded to the refusal of the purchasers of the remaining ZCCM core assets to take on the responsibility, even in the short-term, for service provision by preparing a last minute package of assistance. The principal objective of the Mine Township Services Project is to support the Government's own belated plans for an Asset Holding Company to manage water supply and sewerage services in the five mine townships of Nchanga, Nkana, Konkola, Mufulira and Luanshya during the transition period following the privatisation of ZCCM. The project has four specific aims: firstly, to introduce a management structure to promote private sector participation and commercialisation; secondly, to implement cost recovery and 'demand management mechanisms'; thirdly, to develop and make operational a longer term strategy to integrate the running of water and sewerage services in the mine townships with those provided by the local councils - again on a commercial basis - in non-mine areas; and, finally, to undertake selected rehabilitation and maintenance of the existing infrastructure.²²³

The Bank's Public Information Document for the project betrays a number of ostensible misconceptions. It is stated that the ZCCM water and sewerage systems are 'self-contained' when, in fact, certain councils are reliant on ZCCM plant and infrastructure.²²⁴ The systems are characterised as having been 'fully supported by ZCCM' and 'sheltered from the maintenance decline of the majority of the country's infrastructure'.²²⁵ While this assessment has some validity in relative terms, the Environmental Impact Statements commissioned by ZCCM and completed in March 1997 prior to privatisation record a system which is overwhelmed by demand and dilapidated to the point where there is a threat to public health.

Whereas the measures adopted by the Bank in respect of the ZCCM privatisation should be informed by the whole range of issues dealt with in the Covenant,²²⁶ once again, the organisation is rather seen to be reacting, in the main, to the dictates of a private company: 'The need to put in place a transitional arrangement to oversee the urban/municipal services and reassure the new mine owners of the continuation of these services, cannot be overemphasized'.²²⁷ Clearly the timing of each stage of the project cycle is being managed to coincide with the unravelling of the latest twists in the final purchase negotiations. Following the signing of the conditional agreement between the Government/ZCCM and Anglo American on 27 October 1999, the project was due to be appraised by Bank staff in November 1999 for projected board approval in March 2000. The delay in finally concluding the sale resulted in the appraisal date being put back to February 2000. The projected date for approval by the Bank's Board is not until the end of May 2000. Too little is being done too late.

Project planning which is not informed by a close reading of the Covenant has resulted in an exclusive and inappropriate reliance on the market to deliver essential services which underpin social rights to housing and health. It must be reiterated that the Committee, in its interpretation of the Covenant, is neutral in respect of the vehicle used to realise economic and social rights.²²⁸ Moreover, an increased reliance on the free market and the growing role of private providers are recognised as features of globalisation which are not, in themselves, necessarily incompatible with the principles in the Covenant.²²⁹ At the same time, the principal obligation of result is to take steps to achieve the progressive realisation of the rights recognised in the Covenant.²³⁰ The adequacy or otherwise of the totality of public and private measures in this regard is assessed against this datum.

In comparison, the commercial arrangements envisaged for social service provision on the Copperbelt, in the absence of measures designed to protect the rights of the poor, will result in inevitable regression and an increased denial of article 11. A requirement under the Covenant is for the targeting of vulnerable groups. Juxtaposed to this, the Bank is supporting commercially-based reform measures in the full knowledge that '[m]arket forces will...dictate the level of services that will prevail for the various income groups'.²³¹ The Bank regards the involvement of the private sector as the key to sustainable service provision in urban areas. To achieve this goal, the Bank endorses the principle of cost recovery;²³² moreover, private operators must generate a profit either through contract fees or direct charges. Either way, the expectation must be that charges to residents will increase to reflect the total cost of provision which was formerly subsidised by ZCCM. In its statement on globalisation, the Committee is of the view that the introduction of user fees, or cost recovery policies, if not supplemented by necessary safeguards, can easily result in significantly reduced access by the poor to services which are essential for the enjoyment of the rights recognised in the Covenant.²³³

The Bank fails to address the inevitable, adverse consequences for the poor of the proposals within the Mine Township Services Project. The Public Information Document neither articulates a concern with poverty alleviation nor does it give any consideration to the use of safeguards to ensure that those without the means to pay market prices will continue to receive essential services. Article 22 provides a basis for the Committee to examine whether the Mine Township Services Project, as planned by the World Bank, is itself advisable in this respect. In the context of globalisation, with its attendant recourse to the free market and private provision, the Committee calls for ‘a renewed commitment to respect economic, social and cultural rights’ and emphasises that ‘international organizations, as well as the governments that have created and manage them, have a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations and to seek to devise policies and programmes which promote respect for those rights.’²³⁴

c. The fulfilment or rejection of corporate responsibilities

A company, in conjunction with the Government, has agency through negotiation in shaping the development agreements to which it is subject. Given this agency, a company must be answerable to the extent in which it succeeds in negotiating a development agreement which is manifestly not in conformity with international labour and human rights instruments or corporate codes of conduct. However, this assessment is made problematic by the fact that such agreements are, for the most part, executed in accordance with national law. A company may argue that it need only comply with national law and with the terms of the agreements governing its operation; yet, the root basis for nonconformity with international standards may exist at the underlying level of national legislation. In the context of deregulation in Zambia, aspects of national laws relating to employment and industrial relations, or wider Government social policy, are themselves incompatible with international instruments such as the Covenant and relevant ILO standards.

A critique on three levels is therefore required. First, the compatibility of national legislation and practice must be assessed in relation to international human rights and labour law. Second, corporate codes are useful in highlighting instances when companies seek to avoid, suspend or reduce national curbs on their operations. This initial differentiation is a necessary, but is not a sufficient basis, for a full critique. Any acceptance of the argument that companies are automatically absolved of responsibility for upholding economic and social rights as long as they are in compliance with Zambian law and the terms of development agreements is profoundly misplaced. This is because national laws are subject to the prior influence of the private sector, together with the World Bank, IMF, and other advocates of deregulation; and because firm or industry-level agreements reflect the strong negotiating position of companies in their individual or collective capacity. In Zambia, there are instances when the terms *first* agreed in negotiations are *subsequently* reflected in law. Hence a third level critique is required in which the conduct of companies is subject to direct scrutiny in relation to international standards.

The OECD Guidelines for Multinational Enterprises, and the ILO Declaration of Principles concerning Multinational Enterprises are relevant at the second level of critique: they apply directly to companies and are suited to reviewing their conduct in respect of domestic parameters agreed with a Government. At the third level of critique, the usage of the OECD Guidelines is limited, although by no means annulled, by a degree of ambiguity. For example, it is recognised in the Guidelines that ‘[e]very State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction’ yet this right is qualified as ‘subject to international law and to the international agreements to which it has subscribed.’²³⁵ Hence explicit recognition is given to the application of overarching obligations. At the same time, ‘[t]he entities of a multinational enterprise located in various countries are subject to the laws of these countries.’²³⁶ The perception that companies need only comply with national laws is reinforced, but this remains a partial interpretation of the Guidelines. While they are not viewed as a substitute for national law and practice, the recommendations within the Guidelines are perceived in supplementary terms and the firm expectation is that companies will adhere to them.²³⁷ After all, their *raison d’être* is the need for standards applicable across national boundaries to mirror the organisation and operation of multinationals. It is pertinent to note, based on the example available in the public domain, that the development agreements governing the operation of the new proprietors of the mines in Zambia formulate respect for domestic and international law in strikingly similar terms: ‘This Agreement shall be governed by and construed in accordance with the laws of Zambia which the Parties acknowledge and agree includes, so far as they are relevant, the rules of international law.’²³⁸

The ILO Tripartite Declaration is less circumscribed in its consideration of the applicability of international human rights and labour law. While all parties concerned should respect the sovereign rights of States and obey national laws and regulations, the Declaration places particular and specific emphasis on respect for international standards.²³⁹ Concerned parties, including multinational enterprises, ‘should respect the Universal Declaration of Human Rights and the corresponding International Covenants...as well as the Constitution of the International Labour Organisation and its principles according to which freedom of expression and association are essential to sustained progress.’²⁴⁰ The ILO

Tripartite Declaration constitutes guidance for all concerned parties, including multinational enterprises, when taking measures or adopting social policies.²⁴¹ In this regard, the relevancy of ILO Conventions and Recommendations for social policy formulation is underlined.²⁴² Governments who have not ratified ILO Conventions Nos. 87, 98, 111 and 122 are urged to do so.²⁴³ All Governments, whether or not they are State parties to these Conventions, should apply the principles they embody through national policies. Governments are reminded of their obligation to ensure compliance with the Conventions they have ratified. Where there is non-compliance, all parties, including multinational enterprises, should refer to them for guidance in their social policy.²⁴⁴

Two provisos arise from this consideration. First, the use which is made of existing normative standards governing the operation of multinational enterprises is pragmatic: it should not be inferred that they are considered a sufficient check on corporate conduct. The ambiguity of the OECD Guidelines in respect of the applicability of international standards is a particular shortcoming. The ILO Tripartite Declaration is more robust in asserting respect for such standards. Second, while international human rights and labour instruments are drawn upon extensively within this submission to assess the adequacy or otherwise of State legislation and practice, it is maintained that such instruments are increasingly interpreted to apply direct responsibilities for companies. Hence, and where appropriate, reference will also be made to articles within the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, the ILO Social Policy Convention (No. 117), and the Declaration on the Right to Development. In this way, international human rights and labour law and normative corporate codes are viewed as complimentary.

The UN Special Rapporteur on the Realisation of Economic, Social and Cultural Rights recognises that '[w]here measures designed to stimulate the private sector are put into place, what often occurs is the de facto relinquishment of what were previously State responsibilities.... Even in cases where the State remains committed to at least aiming to guarantee the range of economic, social and cultural rights, it is unable to do so.'²⁴⁵ The parallel with the evolving situation in Zambia is unequivocal. Privatisation of ZCCM has seen the relinquishment of parastatal social responsibilities attributable to the State. This, in itself, constitutes regression on the part of the Zambian Government in fulfilling economic and social rights under the Covenant. At the same time, the ability of the Zambian State to take up direct responsibility for social provision through central or local government is precisely undermined by the tactics adopted by powerful corporate players: first, by use of their negotiating power to demand and win financial concessions which deprive the Government of revenue and its capacity, if so minded, to increase social spending; and second, by their insistence to withdraw from social provision without acknowledging longer term responsibilities to local communities and the necessity for a carefully planned transition period. There is normative support for this interpretation.

i. Excessive tax concessions and the misuse of corporate power

Companies as private collective bodies have a significant role to play in achieving the right to development, and as such are enjoined in article 2(2) of the Declaration on the Right to Development to respect human rights and to 'promote and protect an appropriate political, social and economic order for development.'²⁴⁶ In contrast, the exploitation of a strong negotiating position to increase tax and other concessions to the point where the resources available to the Zambian Government to realise economic and social rights are significantly diminished must amount to a contravention of this article. In the sphere of normative codes governing company conduct, it is recognised in both the ILO Tripartite Declaration and the OECD Guidelines that enterprises should 'take fully into account established general policy objectives of the Member countries in which they operate'.²⁴⁷ In particular, it is specified within the ILO Declaration that '[t]heir activities should be in harmony with the development priorities and social aims...of the country in which they operate' while under the OECD Guidelines, multinational enterprises should give due consideration 'to those countries' aims and priorities with regard to economic and social progress...'²⁴⁸ Tax concessions for investors in the mining sector in Zambia have been written into the Mines and Minerals Act, made more favourable still in successive budgets, and protected in the long term through model development agreements; yet still private mining companies, either individually or through consortiums, have pressed to secure ever greater advantage.

Tax concessions pursued by the Kafue Consortium

At various points in its fruitless negotiations for Nkana and Nchanga, the Kafue Consortium sought additional allowances. The Consortium's first offer was reportedly subject to tax concessions for up to 20 years.²⁴⁹ Its improved bid of June 1997 was also tied to tax concession over and above those already granted across the board to mining companies: a further reduction in mineral royalty tax from two to one per cent;²⁵⁰ and exemptions from the payment of Import Declaration Fees and withholding tax on loan interest.²⁵¹ If these concessions were refused, the cash consideration was to be reduced by \$75 million. By November 1997, as the result of further negotiations, the requirement of extra tax concessions had been dropped and the conclusion of the sale seemed likely. However, and against a background of falling copper prices and increasing ZCCM liabilities, the Consortium, in its unsuccessful final bid of March 1998, was demanding 100 per cent exemptions from mineral royalty tax for seven years, from Import Declaration Fees, from excise duty on electricity for five years, and, if necessary, from import duties on fuel products.²⁵²

Tax concessions achieved by Anglo American

Anglo American has secured a lower level of company income tax in order to improve the internal rate of return from the Konkola Deep Mining Project as it progresses.²⁵³ The tax rate to be applied is 25 per cent in comparison to the normal rate of 35 per cent for companies listed outside of Zambia. Based on existing concessions at the time relating to the offset of losses for ten years, it was calculated that any profits from KDMP would not be taxed until its eleventh year of operation. The period for the carry over of losses has since been doubled. In addition, Anglo American has been guaranteed a reduction in the power tariff by almost 20 per cent.²⁵⁴ This will significantly reduce the company's costs and increase profitability.²⁵⁵ Finally, mineral royalty was to have been reduced from an already low 2 per cent to 1 per cent. In the event, the reduction has been even greater. These concessions and others are confirmed in the 2000 budget, as analysed further in the main text.

Overall, the pursuit of ever greater tax concessions constitutes regression when considered in relation to the privatisation of ZCCM on equitable terms. The recommendation made by Kienbaum in its original consultancy report on strategic options for ZCCM was for the use of a system of tax credits to be used to reward companies for their continued support of social services. Instead, not only have private buyers rejected responsibility for social provision, but they have also demanded extraordinary tax concessions.

Investors in mining have benefited from tax concessions in successive budgets. The 1998 budget allowed for the offset of 100 per cent of losses against profits and to carry forward losses for ten years. Mineral royalty tax was reduced from 3 to 2 per cent. Withholding tax on interest and dividends was reduced from 15 per cent to 10 per cent. Designated mines were already allowed to write-off 100% of capital expenditure against tax.

Prompted by IMF concern over the effect of preferential tax treatment on revenue, the Government committed itself to refrain from introducing any further tax concessions in 1999. However, tax incentives relating to the sale of ZCCM were explicitly exempted.²⁵⁶ Certain members of the IMF voiced significant reservations about this arrangement: '...some Directors expressed concern about the generosity of the tax concessions granted in the context of the privatization of ZCCM, which would entail significant fiscal costs in the long term, while other Directors agreed that these concessions were important for the recovery of the copper sector in Zambia.'²⁵⁷

Since the time when the concerns of IMF directors were made public, the Zambian Government has proceeded to announce a raft of additional and extraordinary concessions in its 2000 budget to benefit the new buyers of the remaining ZCCM operations.²⁵⁸ The measures will largely benefit Anglo American and are not applicable to the mining sector as a whole. The concessions were granted in order to facilitate recapitalisation and encourage investment in the mining industry. As justification for their exclusivity, it was stated that the remaining assets suffered operational problems which translated into lower output and export earnings.²⁵⁹

The concessions are unprecedented. The expected reduction in corporate tax from 35 per cent to 25 per cent is confirmed; however, the period for carry over of losses is extended to 20 years. The mineral royalty rate is lowered from 2 to just 0.6 per cent of the gross value. Furthermore, a ceiling of \$16 million in the first year and \$15 million in subsequent years has been set, above which the mine operator will cease to pay royalties.

The new buyers are also exempted from paying customs duty on consumables. Moreover, they will not be charged any excise duty on electricity consumed. Neither will they be required to pay withholding tax on interest, dividends, royalties and management fees paid to shareholders and affiliates. Fees relating to copper and cobalt price participation will be tax deductible. Finally, for the purposes of the Income Tax Act, the mines will be deemed 'a 1975 new mine', allowing them to qualify for the deduction of 100 per cent of capital expenditure.

The budget announcements are already being incorporated into legislation. The Income Tax (Amendment) Bill which, *inter alia*, 'seeks to give Anglo-American Corporation (AAC) exclusive long-term and wide-ranging tax incentives,' passed its second reading in Parliament on 16 February 2000.²⁶⁰ Opposition to the Bill centred on its partisan nature. There were calls for the concessions to be extended equitably to all operators in the mining sector.²⁶¹

The Zambia Institute of Chartered Accountants, while welcoming the incentives, observed that the concessions should have been spread across the industry. The accountants Price Waterhouse Coopers, in their budget analysis, recognised the need to boost mining operations, but noted that a second tier of tax rates would be created within the sector.²⁶² Moreover, the Government will almost certainly be under pressure to extend similar concessions to other companies. For example, a clause in the Development Agreement for the Luanshya Mine stipulates that the tax regime will not be altered in a way which discriminates against the purchaser 'when compared to other mining companies or joint ventures conducting similar operations...'.²⁶³ Please refer to subsection C.1 below for further analysis of the incentives secured under the rubric of 'taxation stability' in this Agreement.

ii. *The rejection of social responsibilities*

In the sphere of normative standards applicable to company conduct, Principle III of the OECD Principles of Corporate Governance states that:

'The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.'

Principle III refers to the assurance for the respect of the rights of stakeholders protected by law.²⁶⁴ There is complementarity with the Covenant, a key purpose of which is to ensure that national laws themselves are in conformity and constitute appropriate steps for the realisation of economic, social and cultural rights.²⁶⁵ In other words, the adequacy or otherwise of State legislation and practice is examined in respect of the Covenant while, at the same time, the OECD's Principles of Corporate Governance seek to ensure that powerful companies do not use their influence to diminish the *de facto* protection of the law.

Stakeholders referred to by the OECD include investors, employees, creditors, and suppliers.²⁶⁶ In addition, recognition is given to stakeholders with broader interests whose relationship to a company is not necessarily formulated in legal terms: 'Even in areas where stakeholder interests are not legislated, many firms make additional commitments to stakeholders, and concern over corporate reputation and corporate performance often require the recognition of broader interests.'²⁶⁷ Companies are not only responsible for ensuring that the legally recognised interests of employees are respected, but also that due recognition is given to wider community interests. In the Zambian context, this must encompass, at the very minimum, ensuring that long-standing social provision is not neglected, curtailed or ended unless and until adequate measures are in place to ensure its take-over by other parties so as not to diminish enjoyment of the right to an adequate standard of living. It should be recalled that the ILO Social Policy (Basic Aims and Standards) Convention recognises that 'improvement of standards of living shall be regarded as the principal objective in the planning of economic development' and that 'all practicable measures shall be taken in the planning of economic development to harmonise such development with the healthy evolution of the communities concerned.'²⁶⁸ The ILO Tripartite Declaration requires that where enterprises provide workers with basic amenities such as housing, medical care, these amenities should be of a good standard.²⁶⁹

The framework development agreement appended to the Rothschild's report sets the parameters for company take-over of social responsibilities. As a result, none of the new proprietors of the mines which have been sold are committed to providing social services beyond the short term. Of the ZCCM packages privatised prior to 2000, three are associated with significant social assets. Two of these are operational mines, while the third is former ZCCM power Division. In respect of the latter, the Copperbelt Energy Consortium as purchaser has made a public commitment to provide social services at a standard not worse than that at the time of take-over.²⁷⁰ However, details of the exact nature or extent of CEC's continued social responsibilities have not been made available. The two main consortium members - Midlands Power International and the National Grid Company, both incorporated in the UK - failed to respond to a request to release further information.

Social services connected to the relatively small Chibuluma Mine, sold to the Metorex Consortium of South Africa in July 1997, include the Kalulushi Hospital and a primary school, as well as the usual infrastructure - roads, sewers, water systems.²⁷¹ According to information released in the public domain, the company agreed to run these assets until they were privatised. Luanshya and Baluba mine was sold to Binani of India in October 1997. The new owners made commitments to maintain municipal services and infrastructure, but only for a maximum period of two years. In respect of the running of schools and hospitals, no time-frame was stipulated. The company may continue to run schools,

hospitals and clinics, but it is not bound to do so and is permitted to contract out or privatise such provision. Overall, caveats allow the company to withdraw from provision at any time for any reason provided certain conditions are met: please see subsection C.1 below for further details. It is assumed that similar terms relating to social provision are common to those other development agreements which remain confidential, thereby qualifying public statements about the secure future of service provision.

The core of ZCCM has finally been disposed off in March 2000. Extensive social services are associated with the mines at Nkana, Nchanga, Konkola and Mufulira, yet the future of such services is under immediate threat. The uncompromising refusal of Anglo American and First Quantum to take on social provision is confirmed in public documents of the World Bank:²⁷²

‘Within the context of the current negotiations for the sale of the remaining ZCCM assets, private investors have been unwilling to take responsibility for assets that are not directly linked with copper mining. Investors are looking to the GRZ to provide mechanisms that will assure the continuation of an adequate and reliable range of vital urban services for their employees. Without a reasonable level of confidence that these services can be fully provided, the sale of the mines could be jeopardized.’

Not only is it a requirement of each sale that the proprietor’s social responsibilities to the wider community are ended, but the expectation is that the Government, the World Bank and, ultimately, employees themselves will henceforth meet the costs associated with aspects of their social welfare. In order to be able to do so, employees must be paid a wage which allows them to afford market prices for these services. Article 7 of the Covenant requires the payment of fair wages which, as a minimum, provide workers with a decent living for themselves and their families.²⁷³ If wages do not rise to compensate miners for the loss of in-kind social benefits, then employees will suffer a significant deterioration in their standard of living thereby infringing article 7 and article 11 of the Covenant. In this regard, it is pertinent to recall article 11 of the ILO Social Policy Convention which requires that where, *inter alia*, housing, essential supplies and services form part of remuneration ‘all practicable steps shall be taken by the competent authority to ensure that they are adequate and their cash value properly assessed.’²⁷⁴ There is no evidence to suggest that such an assessment is being made in respect of the remuneration paid to miners who will be affected by the withdrawal of service provision under the terms of the sale.

Overall, it is only when the ending of company responsibility for social service provision is considered in combination with the extraordinary level of tax concessions afforded to the mining sector that the implications for the realisation of economic and social rights on the Copperbelt begin to crystallise. Firstly, and most obviously, the withdrawal of company responsibility and support for social services in towns across the Copperbelt will precipitate a crisis in provision. Notwithstanding the fact that no adequate preparations have been made for the take-over of such services, the Government at central and local level is the obvious candidate to take over this burden. Secondly, however, it is at precisely this juncture when greater financial resources are required that the Government’s revenue base is further undermined by the very tax concessions demanded by private mining houses. The wider context is one of austerity insisted upon by the World Bank and IMF with the consequent decimation of public expenditure. Thirdly, the Government, incapacitated in the face of this situation, has sought to shift the cost of social provision to employees and an already impoverished wider public on the Copperbelt by adopting a strategy under which services will be operated by private providers on the basis of cost recovery. The negative repercussions on the social rights of the poor of moving to a commercial system have not been given due consideration.

iii. Accountability, transparency and the corporate veil

Serious questions of public access to information and accountability are raised by the ‘corporate veil’ of confidentiality. The public in general, and affected parties in particular, have been denied access to information over the privatisation of ZCCM stemming, in the first instance, from the Rothschild report and plan. This has curtailed not only meaningful debate about the process as envisaged, but has also prevented local councils and workers’ representatives from making their own preparations in advance of the sale.

Subsequently, binding development and sales agreements have been negotiated between the Government/ZCCM and the buyer. While under negotiation, such agreements are regarded as commercially sensitive. The result is that no information, even in relatively broad terms, is available in the public domain at that time. The result is that other affected parties are presented with a *fait accompli* and can do little or nothing to alter the terms of such agreements. Yet, even when terms have been agreed, these documents are still withheld from public scrutiny.

In contrast, a requirement for transparency stems 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;²⁷⁵ 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.²⁷⁶ Furthermore, the principles of transparency and accountability are fully endorsed in normative codes relating to business conduct.

The importance of information disclosure to the general public is recognised within the OECD Guidelines for Multinational Enterprises. The purpose is to encourage greater transparency.²⁷⁷ Enterprises should ‘publish in a form suited to improve public understanding a sufficient body of factual information on the structure, activities and policies of the enterprise as a whole...’²⁷⁸ Where national law requiring disclosure is minimal, supplementary information in accordance with the Guidelines should be published.²⁷⁹ In respect of employee representatives, companies should provide information which is needed for ‘meaningful negotiations on conditions of employment’.²⁸⁰ Further information - if necessary, over and above that provided in the public domain - should also be made available to enable employee representatives ‘to obtain a true and fair view of the performance’ of the subsidiary company or, where appropriate, the enterprise as a whole.²⁸¹ Parallel requirements are recognised in the ILO Declaration of Principles.²⁸²

While the recommendations concerning disclosure of information are addressed primarily to the parent company, they are applicable, where relevant, to subsidiary entities, and indeed, to the conduct of all domestic companies.²⁸³ Information is required on, *inter alia*, structure and ownership, areas of operation and principal activities, and sources and uses of funds.²⁸⁴ Information on operating results and sales, new capital investment, and the average number of employees should be broken down by geographic area before disclosure.²⁸⁵

Likewise, Principle IV of the OECD Principles of Corporate Governance states that ‘[t]he corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.’²⁸⁶ Accordingly, disclosure should include, but not be limited to, material information on, *inter alia*, company objectives, material issues regarding employees and other stakeholders, governance structures and policies.²⁸⁷ Under the rubric of company objectives, ‘companies are encouraged to disclose policies relating to business ethics, the environment and other public policy commitments.’²⁸⁸ Only on the basis of disclosure can concerned parties ‘...better evaluate the relationship between companies and the communities in which they operate and the steps that companies have taken to implement their objectives.’²⁸⁹ Moreover, under the rubric of material issues regarding employees and other stakeholders, ‘[c]ompanies are encouraged to provide information on key issues relevant to employees and other stakeholders that may materially affect the performance of the company. Disclosure may include management/employee relations, and relations with other stakeholders such as creditors, suppliers, and local communities.’²⁹⁰

In the case of the ZCCM sale, aspects of all these matters are covered by development agreements. The information they contain has profound importance beyond the purely commercial sphere. Clauses relating to employment and redundancy, information on post-privatisation working conditions, clarification of the arrangements to be put in place to manage social assets, and details of the measures required to protect the local environment, all represent a vital knowledge base for workers and local communities. The development agreements contain further information on training requirements and local business plans. People are entitled to know the extent to which clauses on employment levels and social provision are binding or whether companies have negotiated exemptions from the tightening of environmental regulation. It is therefore imperative that, minimally, pertinent parts of such agreements are made available in the public domain. It is recognised in the OECD’s Corporate Principles that channels for disseminating information should provide for fair, timely and cost-efficient access to relevant information by users.²⁹¹

C. The reality of privatisation: the denial of economic and social rights

Introduction

A substantial part of this submission examines Government legislation and practice in respect of obligations arising from the application of human rights instruments. The focus here is upon demonstrating the economic and social costs when corporate responsibilities are rejected. An account is given of disturbances at the Luanshya Mine, events presaged by a development agreement which, from the outset, was always going to be detrimental to the interests of employees and the wider mining community. A second case study relates to forced evictions and involuntary displacement of people from mine land. Both ZCCM and Cyprus Amax, the purchaser of the Kansanshi Mine, are implicated in these actions.

At a primary level, deregulation in Zambia has been integral to many major policy documents issued by the MMD Government and has been consolidated through fundamental changes to legislation. By and large, deregulation has been implemented in the absence of due safeguards or balances to counteract, where appropriate, the growing reliance on

market forces. At a secondary level, as exemplified in the privatisation of ZCCM, development agreements have not only consolidated, but have actively extended, the scope of deregulation. As a result of the weak bargaining position of the Zambian Government, certain companies have sought to further reduce their level of responsibility for social provision and environmental protection by negotiating development agreements with such a degree of latitude that they are able to deny certain rights with apparent impunity. Whether they do so or not in practice depends upon the value placed on good industrial and community relations. However, given the economic imperative of maximising profits, it must be a matter of serious concern that issues of central importance to the realisation of economic and social rights are dependant upon self-regulation.

Regrettably, there is increasing evidence of how the concessions, caveats and loopholes which have been negotiated from a position of power are indeed being fully exploited by certain companies. This cuts against both the welcome concept of corporate responsibility and is antithetical to the notion of universal human rights which, through instruments such as the Covenant, codify benchmarks which can be used as an overlay to determine compliance. The use of the Covenant is, of course, especially suited to those situations in which domestic legislation, either in its concept or practice, cannot guarantee fundamental rights in the face of the interests of powerful third parties. The crux of the matter is this: the Government and the multilateral agencies may be culpable by action for excessive deregulation and by omission for the disintegration of social services; safeguards to protect employee and community interests may have been negotiated away; yet it is maintained that companies have a direct responsibility to uphold basic human rights.

1. Luanshya Mine: an example of a development agreement

As has been noted, it has been impossible, both for local people and for other interested parties, to ascertain the full social implications of the development agreements associated with the sale of the mines. Despite, or rather because of, their vital significance in determining the limits to the responsibilities of the private sector owners in safeguarding employment, maintaining conditions of service, providing social services, and protecting the environment, the development agreements are regarded as confidential and are not available in the public domain. However, disclosure of documents in respect of the court case instigated by the Canadian company First Quantum over the sale of the Luanshya/Baluba mine has brought the development and sales agreements between the Government of Zambia and Binani Industries, the successful buyer, to light.

During October and November 1998, one of the most serious disturbances of recent times took place at the newly privatised Luanshya Mine. During a strike over conditions of service, there were numerous violent clashes between miners and the police which spilled over into the wider community. The deaths of up to three citizens as a result of police action were reported. In the twelve months since RAMCZ had been operating the mine, its ambitious development plans, which had not secured full finance, contrasted with a paring back of long-standing support to miners and their families. This was in part due to the apparent financial difficulties facing RAMCZ, but was also predicated on the nature of the agreements negotiated as part of the sale.

The accompanying box provides immediate background to the dispute. When the account of this unrest is read in conjunction with the analysis of the development agreement concluded between Binani and the Government on the sale of the mine, it is apparent that the seeds of the industrial action and associated disturbances lay in the lack of due safeguards. The development agreement was always detrimental to the interests of the workforce and the wider community.

The analysis which follows is structured across six subsections. The intention is to draw out the implications of the Luanshya/Baluba Development Agreement in relation to (a) employment levels, conditions of employment, and trade union rights; (b) procurement and local business development; (c) social provision; (d) the resolution of disputes; (e) environmental protection; and (f) the collection of Government revenue through taxes and duties.

Industrial action and social unrest at the Luanshya mine during October and November 1998

Police killings in Luanshya

On Monday 2 November 1998, at least one and possibly two people were killed by police during riots in Luanshya sparked by a long-running dispute between mineworkers and the mine owners over allowances and proposed service charges. A third person, a child of about one year, is also believed to have choked to death after inhaling tear-gas from a canister which went off in the house of its parents. One of those killed was a street vendor, identified only as Nkole of Roan township. It is unclear from press reports whether a second person was shot and killed at the same time, as reported by *The Post* newspaper, or whether the second death was that of the child, as reported in *The Times of Zambia*. The shooting happened in the aftermath of a march by miners through Luanshya during which incidents of looting were alleged to have taken place. The killing, which is seen as part of a growing pattern of police brutality when dealing with striking miners, has been condemned by opposition parties and the Zambia Independent Monitoring Team (ZIMT).

Events leading up to the strike

A number of events led up to the unrest and deaths. Mineworkers Union of Zambia (MUZ) Roan branch chairman, Cameron Pwele, had publicly criticised the management in a petition to the chairman of the Binani Group of Companies, dated 23 October 1998, calling for the removal of the mine's general manager, Mr Sam Phiri. Pwele cited mismanagement, the failure to honour the 1998 collective agreement between the union and the company, and Phiri's dismissal of certain workers who had staged a protest on 2 October 1998 over housing allowance arrears. On the day Pwele issued the petition, mine managers had reneged on the earlier agreement and had announced significant reductions in the housing allowance. In the petition, Pwele warned of the staging of a second protest on 2 November 1998 if outstanding issues were not resolved. Mr Pwele stated that the mine should not have been sold to the Binani Group who did not have the financial resources to fund the operation.

On Saturday 24 October, the Copperbelt Energy Consortium carried out their threat to cut power supplies to the mine because of the failure of RAMCZ to pay long-standing arrears. This precipitated a shutdown of operations and many miners believed the future of the mine was in jeopardy.

The beginning of the strike and protests

The dispute over the supply of power to the mine was resolved the next day, but Mr Pwele was suspended by RAMCZ on Monday 26 October while investigations were carried out into his denunciation of the company in the press and for provoking industrial unrest. His suspension immediately sparked a strike by the workforce, already harbouring grievances over the non-payment of housing allowance arrears, proposed deductions from these allowances and revised charges for water, electricity and land rates. A demonstration by strikers and their families followed on Tuesday 28 October during which property was damaged, a few vehicles were set on fire, and a mine welfare shop and recreation club were looted. Police used tear gas to disperse crowds in Roan and Mpatamatu townships and detained six suspects. The next day, miners and their families gathered at Mpatamatu police station. Running battles were fought with police who responded with the use of truncheons and tear-gas. Meanwhile, warning letters were delivered by armed police to the houses of striking miners ordering them to return to work.

On Friday 30 October, talks between the company and the union resulted in the reinstatement of Mr Pwele. However, he was excluded from further negotiations over the issue of the unpaid housing allowance. On return to Luanshya, MUZ Roan branch executive members used a public address system to announce the outcome of the talks in the townships and appealed to miners to return to work. Miners reacted angrily to news of Mr Pwele's exclusion from the talks. On the Saturday morning, miners beat up eleven MUZ Roan officials because of their failure to produce written details of the settlement which had been reached. Police intervened to prevent the beatings. Tear gas was used and the miners themselves retaliated by breaking the windscreens of police vehicles and later by smashing windows in the Mpatamatu Mine police station.

On Sunday 1 November, negotiations between the company and MUZ Mpatamatu and Roan branch officials stalled. An order was issued for Mr Pwele's arrest for addressing an illegal meeting. At that time, Mr Pwele was believed to have gone into hiding. Miners were ordered by police to disperse. At the same time, residents in Mpatamatu Township had their water supplies cut-off in an apparent deliberate act by the company. On Monday 2 November, amid rising tension, miners marched to the house of a RAMCZ spokesman. Looting was reported along the route of the march in Luanshya town centre. The crowd then advanced in two groups towards the RAMCZ general office and the house of the general manager, Mr Samuel Phiri. Police halted the march on the general office, but Mr Phiri's house was allegedly ransacked. Furthermore, miners set fire to the house of Roan MUZ vice-chairman John Musenge.

Running battles were fought with police and thirty suspects were arrested as thousands of miners and their families took to the streets until they were dispersed. In Luanshya itself, police guarding the headquarters of Mpelembe Drilling shot and killed a street vendor. A child of about one year died after inhaling tear-gas from a canister thrown into the house of her parents in Roan township.

Urgent talks between RAMCZ management, MUZ Roan branch officials and the Government on 3 November resulted in the miners being paid their October wages and in an amnesty being announced for all striking miners who returned to work by 06:00 on Wednesday 4 November. The vast majority did so and calm was restored while talks continued, despite an unsuccessful attempt by police to force Mr Pwele into a car so that he could be driven away for interview. Discussions were held between MUZ, the company, and Government representatives in effort to finally resolve the dispute.

[Sources: contemporary reports in the *Times of Zambia* and *The Post* newspapers].

a. Implications of the sale for levels of employment, conditions of employment, and trade union rights

i. Employment levels

A clause in the development agreement states that the company shall not be ‘restricted in its employment, selection, assignment or discharge of personnel’ provided that terms and conditions relating to employment, discharge or disciplinary matters comply with Zambian law, the Collective Agreement in force, and the terms in individual contracts.²⁹² This notwithstanding, RAMCZ’s has made a commitment not to make any compulsory redundancies. This pledge appears to accord with the provision within the ILO Tripartite Declaration stating that multinational enterprises ‘should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability’ and ‘assume a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment.’²⁹³ However, the RAMCZ ‘employment protection’ clause is limited to a period of two years.²⁹⁴ Moreover, the company’s commitment to desist from compulsory redundancies is itself subject to alteration as the terms of the development agreement, the Approved Programme of Mining Operations and any related programme can be added to substituted, cancelled or varied.²⁹⁵ To do so, Roan Antelope need only notify the Government of the proposed modification which is automatically approved within 30 days.²⁹⁶ While the Government has powers to object to most major modifications to the agreement and approved programmes, reducing the number of employees is explicitly discounted as a ‘Major Change’.²⁹⁷ In other words, there is little to prevent the company from making redundancies whenever it wishes.²⁹⁸

Under the OECD Guidelines for Multinational Enterprises, the main situation envisaged in which enterprises are required to consider Government policy objectives and priorities with regard to economic and social progress is the cutting back or closure of operations.²⁹⁹ The right of the enterprise to reach decisions on this matter is upheld, although ‘a prudent company should seek clarification of government policies through advance consultations with the government concerned.’³⁰⁰ To comply with the ILO Declaration of Principles, companies considering changes in operations involving ‘major employment effects’ should provide reasonable notice to workers’ representatives and the appropriate government authorities ‘so that the implications may be examined jointly in order to mitigate adverse effects to the greatest possible extent.’³⁰¹ There is an essentially similar provision in the OECD Guidelines,³⁰² under which it is intended that notice should be given prior to any final decision being taken on redundancies to allow for meaningful consultation.³⁰³ On the issue of redundancies, no such provision is stipulated in the terms of the Luanshya development agreement.

The repercussions of the original and controversial decision to award the sale, amid allegations of self-dealing, to a company without an industry track record are becoming increasingly apparent: ‘The Indian-owned Binani and its local company Ramcoz...are dangerously exposed. They are new to copper mining, apparently under-capitalised, and have used some of their limited resources unwisely. Apart from bungling their union negotiations[,] the copper price has fallen dramatically. Thus it is not impossible that Ramcoz may be forced to close temporarily at least and the consequences could be worrying - for the public’s perception of the outcome of privatisation[,] for the shaky economy and for the prospects for peace and democratic governance.’³⁰⁴ Other commentators have criticised the Government for ‘ignoring the long-term viability of the buyer’ in the privatisation process, citing the sale of Luanshya to Binani as an example of this short-sightedness: ‘...the badly managed Luanshya remains a potential tinder-box; political risk underwriters at Lloyds recently refused to provide expropriation cover because Binani’s proposals included massive redundancies.’³⁰⁵ Please refer to Section 2(I) for further analysis of the award of sale.

It is regrettable to record that 400 redundancies were announced by RAMCZ in early February 2000, to take effect in the following month. This restructuring exercise and programme of job losses comes only three months after the expiration of the original undertaking by the company not to cut the workforce within the first two years.

ii. Trade union rights

The OECD Guidelines require enterprises to respect the right of employees to be represented by trade unions and engage in constructive negotiations ‘with a view to reaching agreements on employment conditions, which should include provisions for dealing with disputes arising over the interpretation of such agreements, and for ensuring mutually respected rights and responsibilities’.³⁰⁶ The thrust of the Guidelines is to engender a positive management approach towards employee representatives.³⁰⁷ The ILO Declaration of Principles affirms the right of workers to establish and join a trade union of their choosing,³⁰⁸ seeks protection against acts of anti-union discrimination,³⁰⁹ interference,³¹⁰ or the hindrance of union representatives,³¹¹ and recognises collective bargaining rights.³¹²

While RAMCZ agreed in the development agreement to honour the collective agreement then in force with the union, there is, of course, nothing in to prevent its renegotiation.³¹³ In 1998, the MUZ did conclude a new collective agreement with the company; yet, as is starkly demonstrated by the subsequent unrest, problems arise when either the company is believed by the workforce to have reneged on agreements relating to conditions of work or else when the union is itself split and the local MUZ executive is accused by large sections of the workforce of complicity with management. As was noted in Section 2(II) in considering the right to just and favourable conditions of employment, the development agreement does not envisage any explicit monitoring role for ZPA or any other independent body to ascertain whether the company is in compliance with any of the agreements it has reached.

The ICFTU, in its annual survey of the violations of trade union rights, attests to the fact that two union leaders at Luanshya were fired by RAMCZ on account of their union activities.³¹⁴ The 'employment protection' clause in the development agreement does not, of course, prevent RAMCZ from seeking voluntary redundancies nor from making dismissals of the kind condemned by Mr. Pwele following the action taken by miners in early October.³¹⁵ The ILO code concerning multinationals confirms that arbitrary dismissal procedures should be avoided.³¹⁶ Dismissal on the grounds of participation in union activities constitutes a violation of articles 4 and 5 of the ILO Termination of Employment Convention and article 6 of the Covenant itself.³¹⁷ The intimidation of the local MUZ leader and other union members prior to and during the industrial action at Luanshya is a matter of record: please refer to the accompanying text-box.

In December 1999, the MUZ distanced itself further from Mr. Pwele, disassociating itself from a letter which the RAMCZ branch chairman had written to the labour commissioner.³¹⁸ In the letter, Mr. Pwele proposed that the union would interview and sign agreements with political aspirants before they would be supported. The MUZ President described the move as contrary to the MUZ constitution.

Mr Pwele was finally suspended from the MUZ. On 11 January 2000, he was expelled from the union by its national disciplinary committee.³¹⁹ Mr. Pwele had refused to recognise the jurisdiction of the committee because his case had not been first reviewed at the branch level. Mr. Pwele was charged with threatening violence and arson, gross misconduct and misbehaviour, unauthorised issuance of Press statements, falsifying and divulging information to unauthorised institutions, and insubordination towards the MUZ president, Mr. Andrew Mwanza. Mr. Pwele rejected the charges and vowed to fight his expulsion.

Shortly after his expulsion from the union, Mr. Pwele was served with a retrenchment letter by Roan Antelope. He joins those 400 other miners who are to be made redundant by the company in early March. Another union official, the MUZ Mpatamatu branch treasurer, is also to lose his job in the restructuring. Mr. Pwele accused the union and company of conspiracy: 'I knew that after expelling me from the union they would retrench me. My expulsion was meant to pave the way for my retrenchment.'³²⁰

iii. Conditions of employment

Recommendations within the OECD Guidelines on employment conditions and industrial relations are situated within the context of prevailing national laws and regulations.³²¹ However, the supplementary nature of the recommendations applies. It is recognised under the ILO Tripartite Declaration that '[w]ages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.'³²² A similar formulation is used in the OECD Guidelines.³²³ Requirements in the ILO Tripartite Declaration are more readily situated in the framework of international standards. Specific attention is paid to employment conditions in developing countries where enterprises should provide 'the best possible wages, benefits and conditions of work, within the framework of government policies.'³²⁴ While the economic position of the enterprise is to be taken into consideration, employment conditions should be 'at least adequate to satisfy basic needs of the workers and their families.'³²⁵ Article 7 of the Covenant constitutes a basis for this requirement in international human rights law.³²⁶

The development agreement confirms that RAMCZ will honour the terms and conditions in the contracts of employment of transferring employees.³²⁷ As with the collective agreement in force with the union, such contracts are open to renegotiation. The company also agrees to adopt the current redundancy terms applicable to transferring employees and agrees that no adverse change will be made to these.³²⁸ However, this does not preclude the company from making other changes to the terms. Within the same clause the circumstance is envisaged where altered terms can be implemented without the transferring employees consent.

Concern over employment conditions would seem to be justified by events which reached a climax in the disturbances of November 1998. The non-payment of housing allowance arrears, proposed deductions from these allowances and revised service charges were viewed as a failure by RAMCZ to honour the collective agreement and a direct threat to the

satisfaction of the basic needs of miners and their families which undermined their right to a decent living. In the twelve months prior to this sustained unrest, there had been a number of other disputes at the mine over employee entitlements.

In January 1998, more than 1000 miners at Luanshya went on strike for two days demanding payment of four months worth of target bonuses which were owed to them. Agreement was reached with RAMCZ management to pay two months arrears and the strike was called off. On 9 June 1998, several former ZCCM miners gathered at the general offices in Luanshya demanding to see mine managers over the payment of their terminal benefits, at that time eight months overdue. Police were called by the company to restore order. These claims were purportedly met by the company in August 1998.

At the end of July 1998, 243 workers contracted by Techpro Zambia, a ZCCM subsidiary, downed tools. Their action paralysed operations at the RAMCZ's smelter in Luanshya. The workers were demanding improved conditions of service, to include a medical scheme for their dependants, before signing new contracts. The workers were hired by Techpro for six months as casuals. The workers were described in the press as 'mere casuals' who were not entitled to certain conditions.

In mid-July 1998 the Lands Tribunal granted an injunction to 3,000 sitting tenants, mainly non-miners, denied the opportunity to buy ZCCM and former ZCCM houses in Luanshya. The injunction restrained both ZCCM and RAMCZ from evicting the tenants from the houses until the case was disposed of in court.

In March 1999, there were further protests by 87 ex-miners, made redundant by Roan Antelope in October 1998, over the failure of the company to pay terminal benefits.³²⁹ A demonstration by the retrenchees at the Luanshya mine on 24 March brought operations to a halt. The demonstrators were assured that the Binani Group chairman, Gokul Binani, who was visiting the Copperbelt, would meet them on 29 March to discuss their grievances. The ex-miners, family members, and widows of former miners, a total of 190 people, duly assembled at the company's offices on the appointed date only to be told that Mr. Binani had left for Lusaka without attempting to resolve the matter.³³⁰ This discourteous treatment appears to contravene the letter and spirit of ILO principle 51.³³¹ Moreover, to comply with the ILO Tripartite Declaration, enterprises should cooperate with the Government 'to provide some form of income protection for workers whose employment has been terminated.'³³² In the case of the ex-miners, this provision is their legal entitlement.

Finally, the development agreement requires the company to comply with the existing ZCCM Training and Human Resources Management Programme until it submits a new programme within the year.³³³ This undertaking appears to be broadly in line with the ILO principle that 'enterprises should ensure that relevant training is provided for all levels of their employees in the host country, as appropriate, to meet the needs of the enterprise' and the parallel recommendation under the OECD Guidelines for Multilateral Enterprises.³³⁴ In the case of the Luanshya Mine, the Programme is subject to alteration by Roan Antelope if it considers itself unable to comply with the provisions it contains. Please refer to Section 2(II) for further discussion of the extent and limit of the company's training obligations.

While it has not been possible to verify the extent of RAMCZ's compliance with the required Training and Human Resources Management Programme, the ICFTU records that the company has employed expatriates in preference to qualified Zambians.³³⁵ Such practices are contrary to ILO principle 18, whereby multinationals should give priority to the employment and occupational development of nationals of the host country, and appears to violate the principle of non-discrimination.³³⁶

b. Procurement and local business development

One of the much vaunted aspects of privatisation is the multiplier effects generated in the local economy of the Copperbelt *per se*, and in Zambia more generally, as the new proprietors invest in the business. Under the OECD Guidelines for Multinational Enterprises, companies should '[f]avour close co-operation with the local community and business interests' while the ILO Declaration of Principles entreats them 'wherever practicable' to consider the conclusion of contracts with national enterprises and the use of local raw materials.³³⁷ In this respect, there is limited provision within the development agreement to encourage local procurement by Roan Antelope, but the bottom-line is that Zambian businesses must be competitive to be awarded contracts.³³⁸ The financial constraints facing Roan Antelope have slowed the development of operations and limited the business opportunities for local companies.

In addition, Roan Antelope is required to comply with a Local Business Development Programme designed to encourage the establishment of businesses within Zambia to supply the company.³³⁹ However, the actual obligations on the company are qualified. Hence Roan Antelope will utilise local businesses for servicing its operations, but is only required to do so 'wherever feasible and appropriate.'³⁴⁰ The company agrees to supply sufficient experienced staff to assist with implementation of the programme and to review its progress with a view to making modifications which

reflect changing circumstances.³⁴¹ A committee, comprising one member each from Roan Antelope, the Ministry of Mines and Minerals Development, the local council and chaired by a representative from the Ministry of Commerce, Trade and Industry, is formed to monitor the supply of goods and services by reviewing quarterly reports which the company provides.³⁴² Ultimately, however, Roan Antelope may fundamentally amend or alter the Programme if it is unable to comply with its provisions due to 'circumstances or events beyond its control.'³⁴³ The Government either accepts these alterations or the matter is referred to a Sole Expert for determination.³⁴⁴

c. Uncertainties over social provision in the mining communities

The privatisation of Luanshya and Baluba will inevitably have wider social impacts on the local community. The company has assumed ownership, operational control and responsibility for the social assets connected to the mine.³⁴⁵ These comprise the medical and education services (two hospitals, nine clinics, and one trust school), recreational facilities, sports clubs and essential municipal infrastructure, including electricity and water supply and sewerage systems.³⁴⁶ The company agrees to apply existing eligibility criteria for registering dependants entitled to these services.³⁴⁷

Both medical and education services are to be provided not only to employees and their dependants, but also to persons in the wider community eligible to use them under an existing Private Social Services Access Agreement.³⁴⁸ The level of service is to be appropriate to the number of patients/children and offer at least the same standard of care or education as before.³⁴⁹ Charges to miners are to be no greater than those levied by ZCCM, taking into account inflation, while others are charged in accordance with the Private Social Services Access Agreement.³⁵⁰ Almost identical provision is made in respect of the use of recreational facilities and access to municipal services.³⁵¹

There are, however, a number of clauses within the development agreement which create uncertainty over the future of social services, limit the company's responsibilities in time and scope, and sideline employees, the wider community and the local council in resolving disputed claims.

In respect of the running of schools and hospitals, no time-frame is stipulated. While the company may make a decision to keep running these facilities itself, it is not bound to do so and is indeed permitted to contract out the management of these facilities.³⁵² RAMCZ has expressed an interest in developing the hospital at Luanshya but this development may, ultimately, result in increased user fees, pricing treatment beyond the means of all but the highest paid. In the future, company employees, as well as the public, may be expected to meet the cost of such fees. Their ability to do so will depend upon whether or not they are paid a fair market wage. In this respect, it should be noted that the ILO Social Policy (Basic Aims and Standards) Convention requires that the cash value of services as part of remuneration is properly assessed.³⁵³

RAMCZ are only bound to maintain municipal services and infrastructure for two years at the most.³⁵⁴ While the company is required to maintain these services in compliance with public health legislation and standards, it is explicitly exempted from carrying out maintenance which incurs a 'substantial additional expenditure' and from implementing the recommendations in the Environment Impact Statement (EIS) to rehabilitate water and sewerage systems.³⁵⁵ There is an immediate contradiction: the EIS confirms that public health standards are not being met, thereby making it impossible to provide services which comply with these standards without spending money on refurbishment.³⁵⁶

Houses formerly serviced by ZCCM are to be adopted 'as soon as reasonably practicable and in any event within 24 months' by the local council.³⁵⁷ Immediately thereafter, the local council is required to make offers of employment to Transferring Employees engaged in providing municipal services.³⁵⁸ Roan Antelope is thereby freed from meeting the salaries of such staff, but it is difficult to see how the cash-starved local council will be able to find the resources to take on and pay these employees.

In the case of water and electricity provision to owner occupied houses in the mine area, RAMCZ indicated in April 1998 that it would examine options as to how these services would be run and paid for by residents after this two year period is over. It is clear that the company is seeking to reduce its costs for social provision, estimated as \$5.5 million. Its proposal, in the wake of an audit by the accountants KPMG, to levy increased service charges and rates from miners contributed to the recent unrest. Furthermore, a specific clause in the development agreement stipulates that 'Roan Antelope shall not be required to pay the house rent allowance, or any other equivalent payment, to any of the Transferring Employees whilst such services are so maintained.'³⁵⁹ This does not, of course, preclude the company from doing so, but it does set the parameters within which the current dispute over housing allowances has been conducted. The recent audit completed in October 1998 by KPMG resulted in proposed deductions of between K83,000 and K166,000 from the housing allowance owed to miners. It was such proposals which fuelled the November 1998 dispute.

To comply with the ILO Tripartite Declaration, a mutually agreed system should be in place within an enterprise to provide for regular consultation between employers and workers on matters of mutual concern.³⁶⁰ Under the OECD Guidelines, companies ‘considering changes in their operations which would have major effects upon the livelihood of their employees’ should provide reasonable notice to employees and the relevant government authorities ‘so as to mitigate to the maximum extent practicable adverse effects’.³⁶¹

‘Reasonable notice is linked to the recommendation that management co-operate with employee representatives and governmental authorities in order to mitigate the adverse effects of such changes. For such notice to be “reasonable”, it should be sufficiently timely for the purpose of mitigating action to be prepared and put into effect. Notice of changes should be given and the actual changes implemented in such a way that meaningful co-operation can take place. It would conform to the general intention of this paragraph, in light of the specific circumstances of each case, if management were able to give such notice prior to the final decision being taken.’³⁶²

It must also be noted - and this overrides all other considerations - that a clause in the development agreement concedes that if Roan Antelope determines that it is unable to comply with the provisions concerning social facilities and services ‘for any reason whatsoever’, then the Government of Zambia will not take action, provided that certain conditions are met.³⁶³ The company either sets out a timetable for rectifying its non-compliance and compensates employees and the counterparty to the Public Services Access Agreement (i.e., the local council) for loss of service or else it withdraws from provision provided that it pays agreed compensation to the local council in question, increases general levels of pay or other employee benefits (although further details as to the nature and level are not specified), and reaches prior agreement with the union and council.³⁶⁴ The acceptability or otherwise of a proposed change to social provision by the company is considered in a joint committee ‘comprising equal numbers of representatives of the Parties.’³⁶⁵

The impression created is that all those affected meet to discuss the proposed change; however, the strict definition of ‘Parties’ under the Development Agreement refers solely to the signatories, that is the Government of Zambia and RAMCZ.³⁶⁶ Hence unions or employees or a local council or others affected by decisions of the company have no automatic right under the Development Agreement to sit on the joint committee, although it is supposed that they might be invited to do so.

The same exclusive committee also considers complaints by employees or the counterparties to the Private Social Service Access Agreement over the level or availability of services.³⁶⁷ Failure to agree over the validity or otherwise of a complaint, the level of services to be maintained, service standards, charges, the competence of third party contractors, or any proposal made by the company to suspend or withdraw services results in the matter being referred to a Sole Expert for determination.³⁶⁸

d. The role of the Sole Expert in resolving disputes

The Sole Expert is defined simply as ‘a person appointed to resolve any difference of view or disagreement between the parties’ who ‘shall not be, or have been an employee of GRZ or Roan Antelope [the company] or any Shareholder or any of their respective Affiliates or any authority or corporation of GRZ.’ The power of referral to a sole expert for determination rests solely with the Parties to the Agreement and not with affected persons.³⁶⁹ To the detriment of wider participation, the sole expert is appointed by agreement between the Parties to the Agreement, that is the Government and the company, and neither employees, the unions nor the council have any say in who is chosen.³⁷⁰ In addition to determining matters of social provision, the sole expert may be called upon to decide disagreement concerning fair contracts with third parties, changes to the Human Resources Management Programme, insurance cover, the suspension of mining operations, compliance with the Environmental Plan or changes to it, and assignment (sale) of the mine and its assets.³⁷¹ In addition, issues concerning the termination of the agreement or relating to the definition of a major change to the agreement and the validity or otherwise of an objection by the Government to such a proposal, may be referred to the Sole Expert³⁷². In all of these matters, the determination of the Sole Expert is final.³⁷³

e. The diminishment of environmental protection

The Zambian Government introduced a comprehensive Environmental Act in 1990 and established the Environmental Council of Zambia to oversee its implementation. Yet environmental protection in respect of mining in Zambia has been rendered problematic because, firstly, mining activities are governed by a distinct, and less rigorous, statutory instrument under the Mines and Minerals Act; and, secondly, because clauses within the development agreements delay compliance with existing regulations.

In this circumstance, the critical value of environmental recommendations in the OECD Guidelines for Multinational Enterprises is somewhat diminished because the reference point used is domestic regulation.³⁷⁴ At the same time, the fact that ‘multinational and domestic enterprises are subject to the same expectations in respect of their conduct’ and must ‘take due account of the need to protect the environment and avoid creating environmentally related health problems’ lends weight to the argument that exempting the new owners of existing mines from the full force of domestic environmental regulation amounts to preferential treatment which, moreover, threatens the rights of others.³⁷⁵ Furthermore, adherence by multinational mining companies to the recommendation that they should ‘[t]ake appropriate measures in their operations to minimise the risk of accidents and damage to health and the environment, and to co-operate in mitigating adverse effects, in particular...by introducing a system of environmental protection at the level of the enterprise as a whole’ would help end the situation whereby the same company applies diminished standards of protection in the developing world compared to those used in the developed world.³⁷⁶

Under the development agreement, Roan Antelope is explicitly excepted from liability for fines or penalties or third party claims made in respect of the past activities of ZCCM *vis-à-vis* the environment.³⁷⁷ At the same time, as the new proprietor, it is required to comply with environmental and safety laws and regulations, together with the provisions of the Environmental Plan which forms part of the EIS commissioned by ZCCM prior to privatisation.³⁷⁸ It is also obliged to perform Environmental Clean Up Obligations which are outlined in a schedule attached to the Agreement.³⁷⁹

However, subject only to compliance with the Environmental Plan and Clean Up Obligations, the Government confirms that it will not take any action against the company under, or in enforcing, any applicable existing or new environmental laws or regulations which are intended to secure early compliance with these obligations; or to require the company to clean up pre-existing pollutants not part of the clean up obligations; or impose a fine or penalties for non-compliance with environmental laws or new environmental laws when the existing Environmental Plan provides a remedy in accordance with a specified timetable.³⁸⁰ Moreover, fines or penalties in excess of those applying on the date of the Agreement cannot be imposed.³⁸¹ Should the company fail to comply with these minimal obligations, a notice must be issued by the Government after which the company has a further three months to remedy the breach.³⁸² The company has power to dispute this decision of non-compliance and have the matter referred to a nominated Sole Expert.³⁸³ Hence the Environmental Council of Zambia, as the body entrusted with implementing the Environmental Act (1990) in Zambia, is bypassed.

In effect, the company is accorded an extended window of time - that is, to 2011 - before it must implement an Environmental Management Plan originally delivered in 1996.³⁸⁴ The EIS, from which this Plan is derived, was rushed through in less than eight months once the decision to privatise ZCCM was taken. Contrary to provisions in the legislation, the EIS was approved without due public consultation. The views of affected persons and parties were not elicited. The EIS was not made available for public consultation and the Environmental Council did not exercise its powers to convene a public enquiry, despite the major environmental and social consequences of the continued operation, expansion or decommissioning of the mine. The consultants themselves have conceded that, in respect of socio-economic issues, ‘[t]he time allowed for the Study precludes detailed surveys.’³⁸⁵ Despite the listing of development NGOs, community-based organisations and local residents as key informants in the study methodology, such groups and persons are absent from the list of consultations appended to the Luanshya study.³⁸⁶

Under the development agreement, there is limited provision for the Environmental Plan to be modified by the Government, but this mechanism precludes consultation with the public or affected parties over the proposed change and falls well short of the consultation which, in theory at least, would otherwise be triggered by a full EIS. Indeed, no mention is made in the development agreement of the need for public information or consultation. In this respect, there is a failure even to attain the minimal requirement within the OECD Guidelines for Multinational Enterprises which specifies that companies should ‘take measures to support, in an appropriate manner, public information and community awareness programmes’ on issues relating to health and the environment’.³⁸⁷

It is specified within the terms of the development agreement that the Minister of Environment may propose an amendment to the Environmental Plan if there is a threat to public health and safety, if there is the prospect of significant ecological damage which is irreversible or which will only be reversed after the fifteen year window is closed, or if the environmental impact is substantially more adverse than anticipated.³⁸⁸ The company, while it is obliged to consider the proposed amendment, has the power to lodge a written objection setting out its analysis of why it considers the revision unreasonable, the direct cost incurred to implement the change and its appraisal of wider economic and other effects.³⁸⁹ The Government must meet half the cost to the company in preparing this objection.³⁹⁰ The Minister considers the objection and decides whether or not to withdraw the proposed revision to the Environmental Plan.³⁹¹ If this is not withdrawn, the company either accepts the revision or else may appeal to the Sole Expert for determination.³⁹² This may include the drawing up of alternative proposals, schedules or plans to mitigate costs.³⁹³

Overall, there is a shift in power from mandatory compliance with environmental standards on the part of the company to the Government having to justify revisions to the existing Environmental Plan because the main premise in the Development Agreement is that environmental regulations will not be tightened. The company too is entitled to amend the Environmental Plan or Environmental Clean Up Obligations, provided the changes are in accordance with Zambian environmental standards.³⁹⁴ Revisions to the Approved Programme of mining Operations which result in a material, adverse impact of the mining operations on the environment are defined as a ‘major change’ which means the Government has the power, if it wishes, to object to the proposal in question.³⁹⁵ In the event of continued disagreement between the Parties, the matter is referred to the Sole Expert for determination.³⁹⁶ However, the RAMCZ also has powers to challenge the very categorisation of its amendment to the Environmental Plan as a major change.³⁹⁷ If the Sole Expert agrees with the company’s interpretation, then minor amendments are passed automatically and the Government cannot object.³⁹⁸

f. Long term tax concessions and the limitation of exchange controls

In respect of the mining sector, provision for specific financial and tax incentives is made within the Mines and Minerals Act. Moreover, most significant concessions are guaranteed for years to come in the development agreements. The tax and other concessions to the mining industry announced in the 1998 budget and presaged in such development agreements were worth K18 billion in lost Government revenue in the first year alone.³⁹⁹ The total cost to the Government in lost revenue will accumulate year upon year while the concessions remain in place. A positive overall balance will only be achieved when the companies concerned not only begin to make a profit, but begin to make a profit which is eligible for tax.

The development agreement for the Luanshya/Baluba mine guarantees that the Government will not increase or adversely change the tax, royalty or duty rates paid by the mining company for fifteen years.⁴⁰⁰ The concessional tax regime applicable to Roan Antelope’s operations is set out in Schedule 8 to the Agreement and anticipates many of the sector-wide concessions made in the subsequent 1998 budget and confirmed in amendments to existing legislation.

It is made clear that, in the event of any ambiguity between tax legislation and this Schedule, then the latter will apply.⁴⁰¹ This amounts to a *de facto* override of applicable legislation.⁴⁰² Under the rubric of ‘taxation stability,’ the Government undertakes, for a period of fifteen years, not to change the tax regime so as to adversely effect the company’s profits or dividends. This encompasses undertakings neither to increase corporate income tax or withholding tax or reduce allowable deductions and rebates; nor to amend VAT or corporate tax regimes as agreed in the Schedule to the Agreement;⁴⁰³ nor to impose new tax laws to remove the right of non-Zambians employees to remit all income earned out of the country.⁴⁰⁴

Company income tax is thereby fixed at a maximum of 35 per cent or 30 per cent if Roan Antelope were to obtain a full listing on the Lusaka Stock Exchange.⁴⁰⁵ However, further concessions mean that it will be some time before the company makes a *taxable* profit which generates revenue for the Government. The Development Agreement entitles the company not only to offset of losses against profits, but also allows 100 per cent of losses to be carried forward for up to ten years.⁴⁰⁶ Moreover, the company is entitled to write-off 100 per cent of capital expenditure against tax.⁴⁰⁷ Finally, the amount of tax withheld on interest payments and dividends is reduced from 15 per cent to 10 per cent.⁴⁰⁸ The 1998 Budget reaffirms all three provisions for the mining sector as a whole.

Similarly, undertakings are made by the Government for the same stability period neither to increase mining royalties above 2 per cent;⁴⁰⁹ nor to raise import duties on goods and materials above specified limits.⁴¹⁰ While Schedule 8 to the Development Agreement includes a cap on the Import Declaration Fee (IDF) which can be charged to the company for certain non-exempt goods, the IDF itself was abolished altogether in the 1998 budget, a move which cost the Government K20 billion in revenue in the expectation of encouraging modernisation and increased investment in albeit imported machinery.⁴¹¹

Overall, there is an undertaking in the Development Agreement not to impose any other royalties or duties in respect of the company’s normal operations.⁴¹² Whatever agreements the Government concludes with other mining companies in the future, Roan Antelope is given a guarantee that it will not be discriminated against, that is, be treated less favourably, in respect of tax matters.⁴¹³ Overall, while the Government retains its power to alter the tax regime, to do so in a way which adversely affects or discriminates against Roan Antelope will require reimbursement or the use of offsets to ensure the company is fully and fairly compensated.⁴¹⁴ This clause may have significance in the light of 2000 budget and the tax concession won by Anglo American in its purchase of the remaining core ZCCM assets. It remains to be seen whether other operators will demand treatment on the same terms.

The Development Agreement for Luanshya also reiterates the absence of foreign exchange controls in Zambia and the freedom of the company to, *inter alia*, bring in or remit foreign currency and to retain outside of Zambia money made from overseas sales.⁴¹⁵ Once again, the company is exempted for fifteen years from any subsequent foreign exchange controls in specified key areas while it will always be entitled to buy and sell currency on no less favourable terms than other commercial operators should controls be reintroduced.⁴¹⁶

2. Privatisation of the copper mines: threatened and realised forced evictions by ZCCM and private companies

‘Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States Parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States Parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.’⁴¹⁷

It is blinkered to view an increase in the incidence of threatened or actual evictions, intimidation and the disconnection of essential services in Zambia solely in relation to changes in land law or housing policy which have proved detrimental to the rights of squatters and those with degraded tenancies. Such violations must be seen in conjunction with the policy to liberalise the economy and prepare for privatisation. A threefold categorisation is useful in understanding this situation. Firstly - as already documented in Section 2(III) - local councils have resorted to intimidation, the cutting of essential services, and evictions in an effort to recoup revenue from rates and rental arrears. Their heightened need to do so on the Copperbelt is a direct result both of the withdrawal of ZCCM from sharing responsibility for essential services as it is privatised and of the policy to sell council houses to tenants lacking the means to pay for their homes or meet subsequent service costs. Secondly, in the run-up to privatisation, ZCCM has itself become implicated in actual or threatened forced evictions. As evidenced in Section 2(III), sitting tenants who do not work for the company have been coerced from their homes. While this pernicious situation is a consequence of procedures drawn up by ZCCM management, it is ultimately a reflection of the Government’s failure to regulate the sale of Government-derived housing stock. Thirdly, and in contradistinction, plans to forcefully evict and resettle residents of squatter settlements on mine land has its root basis not in housing policy, but firmly in the way in which the mines are being privatised and sold. There is increasing evidence that the tolerance or laissez-faire attitude to squatters once shown by the parastatals no longer characterises their position. Nor does it accord with the plans of the new private sector owners. The concern in this subsection is with parastatal and private sector evictions which are directly associated with the sale of the mines.

The right to housing, as codified in the Covenant, is used (a) as the benchmark in international law: whether or not the Zambian Government has met its obligations depends upon the extent to which appropriate safeguards exist to protect against forced evictions carried out by the authorities or by third parties. An account of the extent of squatter settlements on mine land (b) is given together with details of a recent, abortive programme of eviction and resettlement implemented by ZCCM. The fact that the existence of such settlements is increasingly viewed as a problem is a cause for deep concern. The potential for mass eviction and conflict has not gone away. Rather, it will continue to resurface as the mines are sold. (c) A second account is given, by way of example, of recorded evictions and planned displacements affecting local communities at the Kansanshi Mine purchased in 1997 by Cyprus Amax of the USA. (d) Given the use of adjustment loans and technical assistance to support the privatisation of ZCCM, the World Bank ought to have considered the situation of settlers on mine land. This requirement arises from Covenant obligations *vis-à-vis* article 11 on the right to housing and article 22 on the advisability of international assistance; it also concerns a serious failure by the Bank to apply its own policy on involuntary resettlement to its ZCCM-related lending.

a. The Covenant as a benchmark

The Committee’s General Comment 4 on the right to housing, issued in 1991, is considered to constitute ‘one of the most comprehensive legal views on evictions.’⁴¹⁸ The determination is made that ‘instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.’⁴¹⁹ The reports which the Committee has submitted to ECOSOC on the prevailing situation *vis-à-vis* the right to housing in specific countries constitute emerging jurisprudence which places the act of forced eviction firmly in the category of unacceptable actions.⁴²⁰ This view is consistent with a number of resolutions adopted by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and protection of Minorities⁴²¹. All affirm that ‘the practice of forced evictions

constitutes a gross violation of human rights, in particular the right to housing.⁴²² The resolutions of the Commission and Sub-Commission are seen as providing a very strong legal basis for preventive measures against forced evictions at the national and international levels.⁴²³

Following its first General Comment on the right to housing, the Committee has since issued General Comment 7 which is dedicated to the issue of forced evictions. The term 'forced evictions' is defined as 'the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'⁴²⁴ States must 'refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.'⁴²⁵ However, evictions carried out by force but 'in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights' are not considered to be 'forced evictions' by this definition nor prohibited.⁴²⁶

It is precisely because evictions carried out with certain safeguards are not deemed incompatible with either Covenant that the Committee has provided clarification of what constitutes legal protection against forced eviction. These are the adoption of laws to provide security of tenure;⁴²⁷ measures, in conformity with the Covenant, to ensure due process and legal remedy;⁴²⁸ the exploration of all feasible alternatives to eviction, in consultation with those affected;⁴²⁹ and the provision of adequate compensation.⁴³⁰ The Zambian Government, in contrast, continues to fail in its obligation to intervene to safeguard the rights of squatters or to provide leadership on this issue. Indeed, recent legislation has only served to heighten their insecurity.

The Zambian Government is obliged to use 'all appropriate means,' including the adoption of legislative measures, to promote all the rights protected under the Covenant.⁴³¹ The Committee has determined that 'legislation against forced evictions is an essential basis upon which to build a system of effective protection' and 'should include measures which...provide the greatest possible security of tenure to occupiers of houses and land...'⁴³²

People living in squatter townships on mine land in the urbanised Copperbelt - many residents of long-standing who have built homes in communities served by schools, clinics and churches - enjoy no security of tenure. Title to the land itself either belongs to ZCCM or else has already passed to those private companies who have completed the purchase of mine packages. Residents neither benefit, therefore, from the albeit degraded occupancy licences and certificates of title issued in local authority designated Statutory Improvement Areas nor have the prospect, however distant, of gaining title to degazetted land.

The Lands Act 1995, in its stark codification of the illegality of occupying vacant land, must heighten the insecurity of squatters and provide any party who is so minded with a root basis for launching evictions. The Act has also removed barriers to the ownership of land by foreign companies and has facilitated the conversion of land held under customary tenure to statutory leasehold. While the consent of chiefs and the local authority is sought before title is converted, local people - including any squatters - are not consulted directly and are therefore unlikely to have any control over the decision reached. Provisions within the Mines and Minerals Act itself constitute a further erosion of squatters rights. For a fuller analysis of Zambian land law and issues of security/insecurity of tenure, please refer to Section 2(III).

b. The threat to squatter settlements on ZCCM land

The sale of ZCCM threatens the eviction not only of certain tenants of mine housing, but also that of tens of thousands of squatters from company owned land as a result of privatisation. A crisis of greater magnitude has only been forestalled because of the delay and confusion in concluding the sale of ZCCM's core assets. The threat of mass eviction has in no way been averted. It is of paramount importance that the rights of those residing on mine land are acknowledged and safeguarded now to preclude forced evictions in the future.

Originally, when privatisation of the mines was timetabled for completion in June 1997, ZCCM appointed a working team to conduct a study of illegal settlements on mine land with a view to carrying out mass evictions and resettlement.⁴³³ The commercial pressures behind its decision are unambiguous:

'One of the issues which has been raised by the would-be buyers of the various [ZCCM mine] packages is the question of illegal settlements in Mine areas on land which is designated for exploration and future development. They have requested that the issue be resolved prior to the completion of the sale process planned for June 1997.'⁴³⁴

ZCCM stated policy is that 'no unauthorised settlements of any kind should be allowed on mine land.'⁴³⁵ However, the company acknowledges that squatters have been allowed to settle on mine land over many years.⁴³⁶

Preparations for the mass forced eviction and resettlement of squatters on mine land

In mid-1997, ZCCM wrote to all local councils requesting their assistance in evicting and resettling squatters. A series of meetings were held between the company and the councils concerned in early June 1997.⁴³⁷ ZCCM officials also visited a number of squatter townships over the same period.

Action plans for eviction and resettlement were drawn up and agreed at each meeting.⁴³⁸ Common to all of these were the identification of those settlements to be targeted; an approach to local MPs by the council concerned to seek their assistance in sensitising local residents; the preparation of eviction notices by the relevant ZCCM Division; delegation of the task of demolishing buildings as they were vacated to the ZCCM Division; the drawing-up of agreements between ZCCM and each council to help with transport, plot allocation and, where necessary, service provision in resettlement areas; and the recruitment of land rangers by ZCCM to assist with the exercise and patrol mine land in order to discourage further illegal settlement in the run-up to privatisation.

It was recognised that the programme would stir up considerable controversy and was liable to be met with concerted resistance in some townships. The councils maintained that settlers should be given assistance in relocating. Compensation to squatters was not viewed as a right or entitlement but many councils advocated that it should be offered on compassionate or humanitarian grounds.⁴³⁹ In the case of St. Anthony township, perceived as the home to militant residents, '[t]o remove these settlers some form of compensation and/or military state force is imperative to pre-empt violent action by settlers.'⁴⁴⁰ While some of the residents on land owned by Konkola Division farmed for a living, the ZCCM report noted that proposed resettlement site at Kawama 'is purely a residential area' continuing 'settlers will not find land there and this may force some people to resist moving.'⁴⁴¹ Furthermore, it was deemed expedient to begin the programme without delay so that it could be completed before anticipated local government elections in September 1997. A number of the action plans fixed dates for delivering mass eviction notices to certain townships within the month.⁴⁴²

The councils did not have the resources to implement resettlement. Hence the costs to ZCCM were estimated at a total of K415 million: K227 million for compensation and K188 million to improve roads, provide water and carry out demolitions and site clearance in designated resettlement areas.⁴⁴³ With the exception of Chingola, according to ZCCM all other councils confirmed that they had sufficient land for resettlement.⁴⁴⁴ However, the short-termism of the entire resettlement component to the programme is starkly demonstrated by the fact that the principal resettlement area - Kawama Compound - is itself liable to be turned into a tailings dam if and when the mines of Konkola Deep and Konkola North are developed.⁴⁴⁵

The number and size of squatter settlements on mine land within Nkana and Nchanga Divisions was viewed as particularly problematic by ZCCM. At the time, negotiations to sell this key package at the core of ZCCM's productive mines to the Kafue Consortium were well-advanced.⁴⁴⁶ On 12 June 1997, ZCCM and the Kitwe City Council met to discuss the proposal made by the company to move 10,000 squatters from mine land in advance of the sale to enable the new buyer to extend mining operations unencumbered.⁴⁴⁷ A resolution was arrived at whereby the Council would provide an alternative area in which to settle those evicted while ZCCM would make provision to enable residents to establish permanent infrastructure in the resettlement area. The townships affected were St. Anthony, Kandabwe and Lute while an area in Kawama was earmarked to receive those displaced.⁴⁴⁸ In St Anthony, the company and council had previously relocated a small number of squatters while the majority had refused to move. Other settlers had subsequently moved into the area.⁴⁴⁹ Kitwe City Council and ZCCM formed resettlement committees comprising area MPs and councillors to sensitise those to be affected by the planned action and to advise them on the need to cooperate with the council and ZCCM. This sensitisation period was to last for only one month before the resettlement exercise would begin.⁴⁵⁰

The ZCCM report lists 41 squatter settlements with a combined population of 44,556 across all six operational divisions of the company.⁴⁵¹ However, these figures are disputed and are likely to be a gross underestimation of the number of people residing on mine land. For example, the 1998 Chingola Town Council estimate for the number of squatters on ZCCM land at Nchanga Division is 15,000 - 20,000 as opposed to the company's 1996 estimate of 3,873. Similarly, for Kamakonde compound within the mining area of Nkana Division, the company records its population as 4,854 whereas Kitwe Town Council cites an estimate of 15,000. It is pertinent to reiterate that the Zambian Government has an immediate obligation under the Covenant to monitor the prevailing housing situation.⁴⁵² In particular, it ought to be in a position to provide detailed information on realisation or denial of the right to housing in respect of vulnerable and disadvantaged groups, *inter alia*, those living in 'illegal' settlements and those evicted or lacking legal protection against arbitrary eviction.⁴⁵³ This notwithstanding, whatever the precise number of settlers on mine land, there is no doubting its magnitude.

Under the Covenant, the procedural protection which must be applied in relation to forced evictions should, *inter alia*, include: an opportunity for genuine consultation with those affected; adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; timely information on the proposed evictions and, where applicable, information on the alternative purpose for which the land or housing is to be used; the provision of legal remedies; and provision, where possible, of legal aid to enable persons to seek redress from the courts.⁴⁵⁴ The incompatibility of the abortive ZCCM programme of resettlement with the Covenant is brought into sharp relief by these requirements.

In June 1997, ZCCM met with local councils to discuss how thousands of squatters would be evicted and resettled. Action plans were drawn up. As evidenced in the accompanying text-box, these plans were a blueprint for forced eviction. The alternatives to eviction were not considered. Residents of the squatter townships were not genuinely consulted before the plans for mass eviction were drawn-up. The time-frame for implementation was massively compressed. Eviction notices were to be issued in June and August and the exercise was to be completed by September 1997. People were to be given grossly inadequate notice of their pending removal from established communities. All buildings - poorly fabricated and well-built houses alike, churches, schools, shops, clinics - were to be demolished immediately after they were vacated. Furthermore, neither the time nor resources available for the programme were in any way commensurate with the need to demarcate plots, install essential services, and prepare roads in resettlement areas which were to receive a minimum of 50,000 people. Resettlers would then be expected to build their own homes with salvaged roofing sheets and on the back of little or no compensation.

The fact that this action was even contemplated is indicative of the enormous importance attached to the sale of ZCCM. Indeed, the decision to remove squatters from mine land at the insistence of new investors would have to be authorised at the highest level, that is by the President.⁴⁵⁵ Council officials have expressed their doubts that he would concur.⁴⁵⁶ This notwithstanding, it is inconceivable that the President would not have known about ZCCM's planned resettlement programme. Either this programme was an elaborate ruse on the part of the Government/ZCCM in the midst of negotiations - to be seen to be taking action on the squatter issue - or else it was a serious proposal sanctioned at the highest level.

Kitwe City Council and Nkana Division did actually begin implementation of the eviction and resettlement plan, undoubtedly because of the pressure to act arising at the time from the advanced state of negotiations with the Kafue Consortium over the sale of the Nkana/Nchanga package. It is reported in an Oxfam study of land tenure insecurity on the Copperbelt, that:⁴⁵⁷

‘All potential purchasers, we were told, wanted to buy the mines and the mining land ‘unencumbered’, i.e. with all tenants removed. Negotiations on this were said to be ‘quite emotive’ in the cases of Nkana (Kitwe) and Nchanga (Chingola).’

ZCCM and council officials visited Kandabwe township on 1 August 1997 to deliver eviction notices giving those occupying ZCCM land one month in which to vacate the area. That the action was directly linked to the pending sale is reinforced by the fact that the first settlement targeted was within the Nkana Mining License Area and that the eviction notices cited the area as ‘earmarked for mining development.’⁴⁵⁸ The notice further advised residents to contact the council about resettlement to Kawama. As word of the action spread, eighty or so residents threatened the official team and police were called to restore order. The squatters refused to vacate a site upon which they had built houses, churches and retail outlets.⁴⁵⁹ The attempt to begin eviction failed almost before it started because of the resistance from residents.

It is abundantly clear that the councils, in particular, were fully aware of the widespread civil unrest which would result from any attempt to implement the eviction and resettlement programme. While political expediency may have dictated cooperation between the councils and ZCCM in drawing up the resettlement programme, it is clear that council officials believed - and still believe - that the problem presented by the squatters to ZCCM is one of the company's own making. At the time, the councils certainly did not wish to provoke a confrontation with the communities in question.⁴⁶⁰ It is apparent that Kitwe City Council regrets the deterioration in its relations with ZCCM squatters as a result of the eviction plans.⁴⁶¹

The fear of further unrest, coupled with a lack of political will in the run-up to planned local elections, and the eventual collapse of the sale of Nkana and Nchanga to the Kafue Consortium which seriously disrupted and delayed the privatisation of other ZCCM packages, all resulted in *de facto* suspension of the resettlement plan.⁴⁶² However, the problem posed by squatter settlements on mine land persists. With completion of the sale of the core ZCCM mines of Nkana, Nchanga, Konkola, Mufulira and Nampundwe, the plight of squatters on mine land is once more cause for immediate concern. It must be noted that the IFC, in its summary of project information for its financing of Anglo/Konkola Copper Mines, makes specific reference to involuntary resettlement and ‘informal activities and settlements on the concession’ as an important issue to be resolved.⁴⁶³ A number of other mines have already been sold prior to satisfactory resolution of this issue, storing up the potential for future conflict and violation of the right to housing.

c. The privatised Kansanshi Mine: evictions and planned displacements

The sale of Kansanshi mine to the Cyprus Amax of the USA was completed on 14 March 1997. Large-scale mining at the site had ceased in 1986. In a complex deal, the company is to carry out exploration within two years before exercising its option to move to a full feasibility study to secure finance prior to making a final decision on whether or not to commence mining.⁴⁶⁴ Cyprus Amax agreed that an existing small-scale mining operation at the site could continue in the near term under ZCCM/Government of Zambia surveillance.⁴⁶⁵ As was noted in Section 2(II), even though exploration drilling and prefeasibility studies alone were to take two years, less than one year after the completion of the deal, these operations were closed.⁴⁶⁶ At issue is both the subsequent eviction of miners and their families from mine housing and the preparations which are underway for the displacement of villages as the prospect is developed. The handling of these matters is related to the matrix of requirements governing such action under the Covenant to prevent forced evictions.

i. The eviction of miners

Formal production at the small-scale operations ceased on 15 January 1998. Cyprus Amax maintains that the decision to close was taken by ZCCM alone on commercial grounds, although under the terms of the agreement Cyprus Amax could require such termination if the mining was deemed incompatible with its exploration work.⁴⁶⁷ 160 miners and their families and 55 youths on short-term contracts lost their jobs.⁴⁶⁸

After the operations were closed, Cyprus Amax announced its intention to clear the site and demolish the township - high density housing, garden plots, a basic school, a church - still occupied by miners and their families and situated within the Mining Licence Area. The land itself was earmarked for exploration by the company. The miners were told to leave their homes.⁴⁶⁹ This is in stark contradiction to the assurances issued by the Zambian Privatisation Agency when the Kansanshi Mine was sold:⁴⁷⁰

‘Employees living in ZCCM houses owned by ZCCM at Kansanshi will be entitled to live in their homes, *regardless* of whether the land is sold to Cyprus Amax.’ [Emphasis added]

Forty-two almost completed houses were subsequently demolished by Cyprus Amax in February and March 1998 on the grounds that they were poorly built, located in a mining area and liable to collapse due to the use of explosives in exploration for copper.⁴⁷¹ This provoked an angry public response from miners’ representatives. In April 1998, the local branch of the MUZ alleged that ZCCM had originally issued letters offering the houses to miners who had signed contracts to that effect. This is confirmed by Oxfam in its report on a fact-finding visit to Solwezi in August 1998.⁴⁷² However, the paperwork was not processed and the offers withdrawn, ostensibly because Cyprus Amax, as the incoming buyer, had directed ZCCM to reserve all habitable houses for their use as part of the purchase.⁴⁷³ In June, Cyprus Amax issued final eviction notices to residents in the long-established township setting 6 August as the date by which all houses were to be vacated.⁴⁷⁴ The miners and their families - a total of 930 people - began to leave in the same month.

Former miners were paid the terminal benefits due to them by ZCCM. The amount received ranged between K6 million and K20 million.⁴⁷⁵ No counselling was available to ex-miners on how they might invest this money with the result that many have sunk money into unsustainable businesses and have failed to buy houses.⁴⁷⁶ The payment of terminal benefits by ZCCM should not, of course, be confused with the requirement for compensation for eviction.

ii. Wider displacement

Under ZCCM, the Kansanshi Mine Licence Area covered 4,244 hectares, although mining activities were confined to 51 hectares by 1997.⁴⁷⁷ The Mine Surface Area covered 7,200 hectares. It is assumed that the corresponding licence granted to Cyprus Amax as purchaser of the mine covers the same land. Much of the land adjacent to the Mining Licence Area is under customary tenure. The company has been undertaking extensive exploration and has stated its intention to extend the mining area. To this end, it has sought and obtained the prior approval of the chiefs and local authorities.⁴⁷⁸

The future of three villages is in jeopardy - Kyafukume, Kametele and Mushitala.⁴⁷⁹ The latter, located one kilometre from the existing mine compound, is most immediately threatened by development. After approaches from the company seeking his consent, the chief called a meeting in February 1998 to inform Mushitala villagers that they would be required to move by 2000 and would be resettled in the forested area of Mbonge. In addition to houses, the village has a school, hospital and church. Cyprus Amax has agreed to provide a new school and hospital. It will also pay for transport to the resettlement area. However, it is by no means clear that the villagers will be assisted to build new homes or compensated for disruption and loss of livelihood. Oxfam maintains that local people were neither consulted directly nor were they in a position, if so minded, to challenge the decision of the chief. The root basis for this failure to elicit the

views of directly affected people lies in the Mines and Minerals act itself. Section 56(1)(c) stipulates that a license holder requires only 'the written consent of the chief and the local authority for the district in which the village is situated' before commencing operations. This effectively allows grassroots' opinion to be by-passed.

iii. Specific observations vis-à-vis resettlement in the Solwezi area and protection from forced evictions

Relations between the company and Solwezi Town Council appear to be good. When the area was struck by floods in January 1998, 600 low cost houses were washed away. To assist with the housing and support for the flood victims, Cyprus Amax gave K80 million to the Council for relief work.⁴⁸⁰ The remainder of materials from the demolished mine township were also donated by the company. The Council is using the money to demarcate 1,000 plots in a new site-and-service called Kasamba.⁴⁸¹ Those displaced by the flood, 650 families in total, are to be given priority in the allocation of plots. Existing residents of Zambia and Chawma shanty compounds will be resettled next. Remaining plots will be allocated to former miners.⁴⁸²

Given the elective nature of the agreement to develop the deposits at Kansanshi, it is by no means certain that Cyprus Amax will open a new mine. Although the exploration phase is to take up to five years, the company has already estimated reserves of 100 - 200 million tonnes and as expressed itself as 'cautiously optimistic' over a move to production.⁴⁸³ The development of Kansanshi will require a temporary construction workforce of 2000. It has requested land from the Council on which to build serviced accommodation.⁴⁸⁴ After the main period of construction is over, the workforce required at the mine will drop to 400. Surplus housing will be given to the Council. This transfer, if realised, will add to Solwezi's serviced housing stock.

However, it is profoundly misplaced to consider human rights, including economic and social rights, in terms of a zero-sum argument. The fact that some people have benefited from the actions of Cyprus Amax does not alter, let alone cancel out, the apparent denial of the right to housing suffered by others.

1) Genuine consultation

'The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected...'⁴⁸⁵

It is alleged that Cyprus Amax refused to consult the community over its decision to begin evictions and demolish the township: 'According to local people there was no willingness to negotiate with the miners - it was a question of 'take it or leave it'. The miners were isolated, and people did not really even know who they should be negotiating with.'⁴⁸⁶ The same source records that Cyprus Amax refused to discuss its decision to demolish the church at Kansanshi and threatened to charge the Parish if it defied the order and kept the church open.⁴⁸⁷ Furthermore, Oxfam has expressed its doubts over whether there has been genuine consultation with villagers affected by the proposed mining-related displacement.

2) Adequate compensation

'States Parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected.'⁴⁸⁸

The Kansanshi branch of the MUZ is adamant that the miners were discriminated against: they lost their right to buy and were not offered surplus ZCCM houses in other mining towns. They also appear to have been inadequately compensated for the loss of their homes, gardens and community. It is reported by Oxfam that Cyprus Amax made funds available to ZCCM Nchanga Division which paid the ex-miners between K600,000 and K1,200,000 (approximately \$360 - \$720) in compensation, although the development NGO was unable to confirm this with ZCCM. The former miners were also given permission to salvage the fabric of the houses, but many were moving out of the area and the removal of materials was not feasible.

The Catholic church at the Kansanshi mine belonging to St Kizito Parish in nearby Solwezi was demolished in August 1998. It had served a local population in and outside the mine of about five hundred. The Franciscan Fathers of the parish had a letter from ZCCM Nchanga Division, dating back to March 1991, granting them permission to occupy land inside the Mine License Area.⁴⁸⁹ The Parish was provided with a certificate exempting it from the need to register the land while ZCCM offered the assurance that it had 'no objection to their continuing to develop the plot.'⁴⁹⁰ The letter

confirms that the parish was being encouraged to build a permanent structure to serve the needs of the local Christian community. The church was duly completed during the same year at a cost of K7 - 8 million.⁴⁹¹

The actual destruction of the church was witnessed and recorded on videotape by Oxfam in its visit to Kansanshi. The Parish was given permission to salvage roofing sheets from the building but, as of September 1998, both ZCCM and Cyprus Amax had refused to provide compensation.⁴⁹²

3) *Homelessness and vulnerability*

‘Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.’⁴⁹³

The ZCCM Kansanshi impact statement of the previous year anticipated that ex-miners were likely to move into informal settlements around Solwezi because of a desire to remain close to local amenities.⁴⁹⁴ No measures were put in place to mitigate the impact of this relocation. Others, despite having lived in Solwezi for most all of their lives, felt they had little option but to be repatriated to now unfamiliar rural areas in Luapula and Northern Provinces. ZCCM, with backing from Cyprus Amax, agreed only to pay the transport costs of those miners and their families who moved out of the district.⁴⁹⁵

It is apparent that no provision was made either locally or in distant villages to rehouse the miners and their families. The extent to which this resulted in homelessness is unknown. Oxfam was sufficiently alarmed by the prospect of impoverishment among those who were displaced to recommend that the Zambian authorities ‘should engage in proper monitoring of those workers who have been repatriated to ascertain their circumstances.’⁴⁹⁶

d. World Bank support for the privatisation of ZCCM: the failure to apply the operational directive on involuntary resettlement

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities Resolution 1991/12 recognises that ‘forced evictions can be carried out, sanctioned, demanded, initiated or tolerated by a number of actors, including...bilateral and international financial institutions and aid agencies.’ Hence international financial institutions can be seen as actors behind forced evictions⁴⁹⁷. It is further recognized in the same resolution that ‘misguided development policies can result in mass forced evictions’ while a subsequent resolution of the Sub-Commission invites all international financial, trade, development and other related institutions and agencies to take fully into account pronouncements under international law on the practice of forced evictions⁴⁹⁸.

The argument has already been made that the advisability of the Bank’s assistance measures, as these impinge upon the realisation of rights under the Covenant, is a matter of concern for the Committee.⁴⁹⁹ To reiterate, the Committee recognises a first general principle of the indivisibility and interdependence of human rights under which ‘international agencies should scrupulously avoid involvement in projects which, for example, involve...large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation’;⁵⁰⁰ and recognises a second general principle that ‘[m]any activities undertaken in the name of “development” have subsequently been recognized as ill-conceived and even counter-productive in human rights terms’.⁵⁰¹ To operationalise the principle of the advisability of international assistance measures contained in article 22, the Committee therefore draws to the attention of all relevant organisations that the rights recognised in the Covenant are to be taken into account during each phase of a development project.⁵⁰²

The privatisation of ZCCM is, of course, a key component of the Bank and IMF-backed structural adjustment programme in Zambia. In General Comment 4 on the right to housing, the Committee asserts that ‘[i]nternational financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to housing.’⁵⁰³ In General Comment 7, the Committee not only recognises that development projects financed by international have resulted in forced evictions, but draws specific attention to the guidelines on resettlement drawn up by the World Bank in this regard: ‘Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and States Parties to the Covenant.’⁵⁰⁴ Any argument that invokes a lack of overall development to justify evictions and abridgement of internationally recognised human rights is rejected by the Committee.⁵⁰⁵

The resolutions of the Commission and Sub-Commission, together with the cited Covenant articles and General Comments, place the actions of the Bank as these relate to the right to housing and forced evictions firmly in the human

rights arena and specifically within the remit of the Committee. For the Bank to be answerable to the Committee in this regard, it must be demonstrated that the measures it has adopted in Zambia, by action or omission, are implicated in forced evictions. It is argued, firstly, that Bank lending and technical assistance has supported the privatisation of ZCCM; second, that privatisation of the mines, as envisaged by the Government in agreement with the Bank, threatens mass displacement; and third that, despite its support for a program likely to give rise to involuntary displacement, the Bank has failed in its obligation to apply its own operational directive on involuntary resettlement.

i. Bank lending and technical assistance to support the privatisation of ZCCM and foster a pro-private sector mining regime

The fact of the Bank's close involvement in shaping the mining sector in Zambia is a matter of record, as already recounted in the subsection detailing the use of adjustment lending and technical assistance to foster the privatisation of ZCCM. At this juncture, it is sufficient to recall that the bulk of IDA funds of \$21 million under the 1991 Mining TAS was spent on the failed plan to revive ZCCM's fortunes and on the initial development of a framework to encourage private sector investment in mining. Bank staff were directly involved in formulating an emergency plan for ZCCM. Almost \$10 million has been spent subsequently on the services of Rothschilds and Clifford Chance in drawing up the ZCCM privatisation plan.⁵⁰⁶ The adoption of the ZCCM privatisation plan *per se* was made a specific Bank condition for the release second tranche of the ERIP Credit.⁵⁰⁷ The implementation of a pro-private sector mining policy was a covenanted requirement of the same credit.⁵⁰⁸ A further component of ERIPTA was to improve ZCCM's technical capacity to monitor the Bank-backed Emergency Plan introduced to keep the company solvent. A Bank Technical Review Mission looked at ZCCM's problems in November 1995 and November 1996.⁵⁰⁹ \$3.6 million of the ERIPTA Credit was on-lent direct to ZCCM for technical skills strengthening, advisory services and staff support to the Board of Directors.⁵¹⁰ At the same time, the Bank claims that the ERIPTA project, because of the nature of the reforms supported, was prepared with 'the full participation of the Government and the agencies/institutions concerned.' Yet, the list of those consulted does not include development NGOs or community groups.⁵¹¹ Certainly, there was no attempt under ERIPTA to elicit the views of the 50,000 - 100,000 residents living without secure tenure on mine land despite the fact that poverty alleviation is a stated program objective. Nor did the project seek to consult with those local councils struggling to cope with additional burden of service provision and municipal administration heaped upon them as ZCCM withdraws from carrying out its social functions. A dialogue with the councils would quickly have established the number and scale of squatter townships on mine land and the absence of policy guidance on this issue.

ii. Privatisation of ZCCM and the threat of involuntary displacement

The fate of squatter settlements and other residents on mine land under privatisation was always at issue once the intention to privatise ZCCM was taken. It could not have been otherwise. ZCCM is the second largest holder of title to land in Zambia after the State. Hundreds of thousands of people, whether classified as illegal or legal, reside, live and work on mine land. As has been documented, ZCCM's 1997 study of illegal settlements and its controversial programme of involuntary resettlement is incontrovertible evidence that such occupancy of mine land was, and remains, highly problematic in the eyes of the industry in the context of privatisation, investment and planned expansion: 'ZCCM is being privatised[;] therefore, on the assumption that the new investors will bring with them enough capital to develop these mines further, the squatters that had [sic] been 'allowed' to settle on mine land cannot now continue to do so at the expense of developing the mines.'⁵¹² As the sale of ZCCM commenced, local councils in the Copperbelt were under no illusion that the buyers wanted to buy the mines 'unencumbered'.⁵¹³

Many of the 1997 Environmental Impact Statements for each of the existing thirteen ZCCM Mining Licence Areas note with concern that informal settlements have developed within many Mine Surface Areas and Mine Licence Areas. Attention was drawn to the potential that existed for conflict between ZCCM, the new buyers, the councils, politicians, and the residents over the future of the squatter settlements on mine land. These statutory studies recommended that urgent consideration should be given to planning the future of such settlements on mine land with sufficient lead time to negotiate solutions with the squatters, non-governmental support groups and relevant government departments, especially local government.⁵¹⁴

Faced with this clear evidence that the existence of extensive squatter settlements on mine land was not only fully recognised, but was viewed as problematic in the context of privatisation, it is inconceivable that the Bank was unaware of the issue. The Bank acknowledges that development-induced involuntary displacement gives rise to severe economic, social and environmental problems: productive assets and sources of income are lost; people are located to an alien environment where their productive skills are of less use; community structures and social networks are weakened; and kin groups are dispersed.⁵¹⁵ The Bank recognises that subsequent involuntary resettlement causes severe long-term hardship and impoverishment unless appropriate measures are planned and implemented. Given the prevailing situation in Zambia, it is strongly contended that it was incumbent upon the Bank to apply its operational directive on involuntary

resettlement in its appraisal of lending instruments geared towards the privatisation of ZCCM.⁵¹⁶ Its failure to do so threatens further involuntary displacement without due safeguards or an adequate plan for resettlement. In such a circumstance, forced evictions will continue to occur and result in the violation of human rights under both Covenants.

iii. The Bank's failure to apply Operational Directive 4.30 on involuntary resettlement

There is a recognition by the Bank that the potential for violating individual and group rights under domestic and international law makes compulsory resettlement unlike any other project activity.⁵¹⁷ The World Bank's *Operational Directive 4.30 Involuntary Resettlement* applies to all projects that cause involuntary displacement: 'Planning and financing resettlement components or free-standing projects are an integral part of preparation for projects that cause involuntary displacement.'⁵¹⁸ It pertains to all relevant Bank lending operations: indeed, specific reference is made to its applicability to IDA credits.⁵¹⁹ The directive is understood to be applicable to programme assistance and investment lending.⁵²⁰

The objective of the resettlement policy 'is to ensure that the population displaced by a project receives benefits from it.'⁵²¹ The directive codifies a number of principal policy considerations. First, involuntary displacement should be avoided or minimised where feasible.⁵²² Second, where displacement is unavoidable, resettlement plans should be developed (see the accompanying text-box).⁵²³ Resettlement should be conceived as a development program in which resettlers benefit. Displaced persons should be compensated for their losses at replacement cost; assisted in the move and for a transition period; and assisted to improve, or at least restore, their former living standards and earning capacity. A third requirement that land, housing, infrastructure, and other compensation should be provided to the adversely affected population arises from this: 'The absence of legal title to land...should not be a bar to compensation.'⁵²⁴ Two final considerations are the encouragement of participation in planning and implementing resettlement in both the displaced and host communities and the fostering of social and economic integration.⁵²⁵

The Resettlement Plan

Where large-scale population displacement is unavoidable, a detailed resettlement plan, timetable, and budget are required.⁵²⁶ Resettlement plans should make provision, *inter alia*, for:⁵²⁷

- delegating who has responsibility for organizing resettlement;⁵²⁸
- community participation;⁵²⁹
- a socio-economic survey;⁵³⁰
- the review of the legal framework governing resettlement and land law;⁵³¹
- the identification of the resettlement site(s) after considering alternatives;⁵³²
- the payment of compensation;⁵³³
- land acquisition and the transfer of title to resettlers;⁵³⁴
- the allocation of resources to provide serviced housing with access to infrastructure and social amenities;⁵³⁵
- and access to training, employment and credit.⁵³⁶

Applying OD 4.30 on involuntary resettlement: project preparation, appraisal, implementation and evaluation.

It is emphasised throughout the operational directive that the issue of involuntary displacement should be dealt with from the earliest stages of project preparation.⁵³⁷ At this stage, 'the feasibility of resettlement must be established, a strategy agreed upon, the resettlement plan drafted, and budget estimates prepared'.⁵³⁸ The submission to the Bank of a time-bound resettlement plan and budget that conforms to Bank policy is a condition of appraisal for projects involving resettlement.⁵³⁹ The Bank's appraisal mission ascertains the adequacy of the plan and whether the borrower has the resources and capacity to implement it.⁵⁴⁰ The resulting Staff Appraisal Report and the Memorandum and Recommendation of the President should summarize the plan and state that it meets Bank policy requirements. During implementation, resettlement components should be supervised throughout by Bank staff.⁵⁴¹ Finally, resettlement and its impact on the standards of living of the resettlers and the host population must be evaluated.⁵⁴²

The operational directive on involuntary resettlement specifies the responsibilities of Bank staff at the stages of project identification, preparation, appraisal, implementation and evaluation. Under the rubric of identification, 'the possibility of involuntary resettlement should be determined as early as possible and described in all project documents.'⁵⁴³ The construction or establishment of mines is specifically noted as one example of a project which displaces people involuntarily.⁵⁴⁴ The parallel potential for displacement arising in the context of privatisation is obvious. As plans were prepared for splitting up and privatising the conglomerate, the existence of squatter settlements on ZCCM land

presented the immediate possibility of involuntary resettlement; yet this determination was not made by the Bank and there appears to be no reference to the issue in project documents relating to the pertinent credits.⁵⁴⁵

It is incumbent upon the Bank's Task Manager to inform borrowers of the Bank's own resettlement policy, discuss policies, plans and institutional arrangements with the resettlement agencies appointed by the borrower, and ensure the provision of necessary and timely technical assistance. This includes the use of project preparation facility resources, of the type used so readily by the Bank in Zambia to support the Rothchild's ZCCM privatisation plan. There is no evidence, during the project identification stage of each proposed credit, that the Task Manager or senior Bank staff questioned Government/ZCCM policy towards squatter settlements or the compatibility of existing and developing land law with the existing World Bank guidelines on resettlement or with underlying principles of international law.

Once the Bank neglected to identify the need to apply the directive on involuntary resettlement to its ZCCM-related lending and technical assistance, its further consideration through stages of the project cycle was precluded (please refer to the text-box).

Oxfam, in its recent study of land tenure insecurity on the Copperbelt, concludes that 'there is no indication that the Bank, despite its long-standing technical and financial support for the privatisation of ZCCM, has implemented these [involuntary resettlement] guidelines.' The report continues '...no adequate resettlement plan has been prepared by the Government, ZCCM and the new owners and that currently there is almost no assistance provided to families who are evicted from mine land.' In the light of this, the recommendation is for immediate action by the Bank to redress its neglect of the squatter issue.⁵⁴⁶

'The first priority is for the World Bank to implement its resettlement guidelines (OD 4.30) and assess the numbers of squatters who are entitled to compensation and/or other forms of assistance as part of its support to Zambia's privatisation programme. World Bank resettlement specialists should carry out a full land acquisition assessment.'

Notes

¹ The invitation to submit written material was reiterated by the Committee in E/C.12/1993/WP.14 and is codified as Rule 69(1) in its Rules of Procedure (E/C.12/1990/4 & Rev.1). See also ECOSOC Resolution 1987/5, para. 6; and Resolution 1988/4, para.16.

² The Committee, and its individual members, have recognised the importance of this issue in the context of its Day of General Discussion on Globalisation and its Impact on Economic, Social and Cultural Rights. '[T]he international community should begin seriously to tackle the question of the role of private actors in the promotion of human rights. Why did international human rights rules apply only to governments and not to corporations, whose power was increasing as that of States was declining?' (Alston, E/C.12/1998/SR.20, para. 7).

³ The provisions of humanitarian law as expressed in the Geneva Conventions and the Additional Protocols have direct applicability to private parties as well as to states. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) is confirmation that private actors can be held to account under international law. Article 4 reads 'Persons committing genocide or any of the other acts enumerated [in the Convention] shall be punished, whether they are constitutionally responsible rulers, public officials, or *private individuals*.' [Emphasis added]. The Nuremberg trials demonstrated that individuals could be tried for crimes against humanity, a principle that has been reiterated in recent years with the establishment of the international tribunals for the former Yugoslavia (1993) and Rwanda (1994). In addition, the Rome Statute of the International Criminal Court, recently adopted on 17 July 1998 at the end of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, will provide, pending its ratification, such a permanent court with jurisdiction over individuals with respect to genocide, and crimes against humanity, war crimes, and crimes of aggression. (See article 5, Rome Statute of the International Criminal Court, A/CONF.183/9).

⁴ Statement on globalisation and economic, social and cultural Rights, para. 2. [Emphasis added]. (The statement is reproduced in E/1999/22, Chapter VI, paras. 515 ff.).

⁵ UDHR, preambular paragraph 7.

⁶ The ICCPR and the ICESCR confirm that private actors have responsibilities under human rights law. Common preambular paragraph 5 states: '...the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant...'

⁷ Furthermore, the universal responsibility for human rights is reinforced by article 29 that states that 'Everyone has duties to the community'.

⁸ See common article 5(1): 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.'

⁹ 'The experience of the relevant specialised agencies ... including the United Nations working groups and special rapporteurs in the field of human rights should be taken into account in the implementation of the Covenant and in monitoring State Parties' achievements.' (Limburg Principles, reproduced in E/CN.4/1987/17, para. 5).

¹⁰ 'The realization of economic, social and cultural rights,' Second Report, E/CN.4/Sub.2/1991/17.

¹¹ 'The question of the impunity of perpetrators of human rights violations,' Second Interim Report, E/CN.4/Sub.2/1996/15.

¹² Cited from 'The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations,' Background document, E/CN.4/Sub.2/1995/11, para. 142. See also, 'The impact of the

activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject-matter,' E/CN.4/Sub.2/1996/12.

¹³ 'Progress report of the Intergovernmental Group of Experts on the Right to Development on its first session,' E/CN.4/1997/22, para. 86.

¹⁴ *Ibid.*, Annex III, Proposals for the drafting of chapter III of the report on measures for the implementation and promotion of the Declaration on the Right to Development, subpara. 10. Likewise, in its second report, the Group of Experts insists: 'There should be coherence between respect for the right to development and the functioning of the international trading system. In particular, less economically developed nations should not suffer losses from trade rules.' ('Report of the Intergovernmental Group of Experts on the Right to Development on its second session,' Chapter I. United Nations system and other international organizations, E/CN.4/1998/29.

¹⁵ *GC 12*, para. 19.

¹⁶ *Ibid.*, para. 27.

¹⁷ *Ibid.*, para. 20.

¹⁸ E/C.12/1/Add.13, para. 14.

¹⁹ E/C.12/1/Add.23, para. 29. See also E/C.12/1998/SR.6, especially paras. 21 and 36 ff.

²⁰ In its commentary to the UK submission in 1995, the Human Rights Committee was 'concerned that the practice of the State Party contracting to the private commercial sector core State activities which involved the use of force and the detention of persons weakens the protection of rights under the Covenant.' (A/50/40, para. 423).

²¹ In its consideration of Algeria's policy of devolving security functions to private 'legitimate defence groups', the Human Rights Committee has noted that '... serious questions arise as to the legitimacy of the transfer of such power by the State to private groups, especially in view of the power which the State itself confers upon them and the very real risk to human life and security entailed by the exercise of that power... The Committee recommends that the government urgently takes measures to ensure that it maintain within its police and defence forces the responsibility of maintaining law and order and the protection of life and security of the population.' (A/53/40, para 356).

²² Commission on Human Rights Resolution 1996/14, reiterated in Resolution 1997/9. [Emphasis added].

²³ Commission on Human Rights Resolution 1995/81. Likewise, the Secretary General's comprehensive report to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1995 outlined the extent to which corporate practices were at odds with human rights precepts. ('The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations,' E/CN.4/Sub.2/1995/11).

²⁴ Inter-American Commission on Human Rights (1997), 'Report on the Situation on Human Rights in Ecuador,' OEA/Ser.L/V/II.96, Chapter 8, Conclusions, p.94.

²⁵ The Committee itself in *GC 9* has encouraged the incorporation of the Covenant into domestic law. This would provide redress to those whose social, economic and cultural rights are violated by third parties, to include private companies. However, few States have taken the step of incorporation.

²⁶ Furthermore, transnational companies are often able to escape justice by claiming jurisdictional and other legal privileges: 'The violations committed by TNCs in their many trans-boundary activities do not come within the competence of a single state, and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by states individually or as a group, should form the subject of special attention.' (E/CN.4/Sub.2/1996/15, para. 132).

²⁷ The Draft Articles on State Responsibility were adopted, after a first reading, by the full Commission at its 48th session in 1996. Subsequently, after discussion based on two reports prepared by the duly appointed Special Rapporteur on State Responsibility, the Drafting Committee has revised and adopted Part I of the Draft Articles. It is proceeding with work on the other Parts and Chapters. The Commission has given due priority to the work, and the aim is to complete a second reading of the Draft Articles by 2001. As the revised text has not yet been considered for adoption by the full Commission, it remains provisional. Citations therefore refer to the original text as adopted by the Commission, although annotations record changes made to date by the Drafting Committee in its second reading in respect of Part I, Chapters 1 & 2 (1998); and Part I, Chapters 3, 4 & 5 (1999). The original Draft Articles of State Responsibility (1996) are reproduced in the report of the ILC on its 48th session, A/51/10, Chapter III, State Responsibility. The source for the revised text is 'Draft articles provisionally adopted by the Drafting Committee,' A/CN.4/L.569.

²⁸ Article 7(2) of the original draft corresponds to article 7 in the Drafting Committee's revised text, while the reference to 'territorial governmental entities,' originally under article 7(1), is removed.

²⁹ 'First report on State responsibility,' Addendum, A/CN.4/490/Add.5, para. 187. Furthermore, because what is considered a governmental function varies from state to state, and over time, four factors are assessed in arriving at this classification: the content of the powers; how they are conferred on the entity; the purpose for which they are exercised; and the extent to which the entity is accountable to government (*idem*, para. 193).

³⁰ Commentary to article 7, para. 19 (cited in A/CN.4/490/Add.5, para. 187).

³¹ Both Nchanga Consolidated Copper Mines Ltd and Roan Consolidated Mines Ltd, owned respectively by Anglo American of South Africa and Roan (formerly Rhodesian) Selection Trust, were partly nationalised in 1969. In 1973 the Government terminated its special concessions to the mining companies and in 1979 increased its shareholding from 51 per cent to just over 60 per cent prior to the formation of ZCCM two years later. See Bull & Simpson (1993), 'ZCCM - privatisation's golden opportunity'.

³² This is confirmed in the Commentary to article 7, para. 18 (cited in CN.4/490/Add.5, para. 187): 'the existence of a greater or lesser state participation in its [the company's] capital, or, more generally, in the ownership of its assets...do not emerge as decisive criteria for the purposes of attribution'.

³³ Respectively, ICESCR articles 11 and 12.

³⁴ A/CN.4/490/Add.5, para 216.

³⁵ The content of Article 10 in the revised draft remains close to that embodied in the original. There are a few textual changes, *inter alia*: the conduct of an organ of State or entity empowered to exercise elements of the governmental authority shall be considered an act of State even if it 'exceeded its authority' (replacing 'exceeded its competence according to internal law') or 'contravened instructions concerning its exercise' (replacing 'contravened instructions concerning its activity').

³⁶ A/CN.4/490/Add.5, paras. 238 ff.

³⁷ It should be noted that discussions are currently underway to revise the OECD Guidelines and the mechanism by which they are applied.

³⁸ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 1.

³⁹ OECD Guidelines for Multinational Enterprises, introductory paragraph 1. The positive role of multinational enterprises is conveyed simply as 'the promotion of social and economic welfare.'

⁴⁰ OECD Guidelines for Multinational Enterprises, introductory paragraph 2; ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 2.

⁴¹ A precise legal definition of a Multinational Enterprise is not given in either the ILO Declaration nor the OECD Guidelines. They may be of private, State or mixed ownership (ILO and OECD). Characteristically such enterprises are established in different countries and are so linked to that one or more of them may be able to exercise a significant influence over the activities of others (OECD). The ILO definition is similarly concerned with geography: multinational enterprises include enterprises which 'own or control production, distribution, services or other facilities outside the country in which they are based.' See ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 6; OECD Guidelines for Multinational Enterprises, introductory paragraph 8.

- ⁴² ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 6; OECD Guidelines for Multinational Enterprises, introductory paragraph 8.
- ⁴³ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 11; OECD Guidelines for Multinational Enterprises, introductory paragraph 9.
- ⁴⁴ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 7.
- ⁴⁵ Specific references are made to the OECD Guidelines within the Preamble, para. 4, of the OECD Principles on Corporate Governance. Furthermore, in the annotations to the principle of disclosure and transparency, reference is made to the relevancy of the Guidelines. See the OECD (1997b) briefing, *The OECD Guidelines for Multinational Enterprises*, GD(97)40, Chapter IV. Disclosure and transparency, p.19.
- ⁴⁶ OECD Principles of Corporate Governance, Preamble, para. 1.
- ⁴⁷ *Ibid.*, Preamble, para. 5. The term 'patient' is not further defined; however it is assumed to refer to investment which is sustainable and non-exploitative.
- ⁴⁸ The three other parts to the Declaration are *The National Treatment Instrument (NTI)* on the equal treatment of foreign and domestic enterprises; an instrument to improve cooperation on *International Investment Incentives and Disincentives*; and an instrument seeking to minimise or avoid *Conflicting Requirements* imposed by different countries on multinational enterprises. See OECD (1992a), *The OECD Declaration and Decisions on International Investment and Multinational Enterprises - Basic Texts*. Major reviews in 1979, 1982, 1984, and 1991 contain clarifications, comments and explanations on the Guidelines. For an overview of the adoption, revision and implementation process, please see the OECD (1997b) briefing, GD(97)40.
- ⁴⁹ See OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 28; also *idem*, Chapter II, p.7.
- ⁵⁰ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 4: 'The principles set out in the ILO Declaration are commended to governments, employers' and workers' organisations of home and host countries and to the multinational enterprises themselves.'
- ⁵¹ OECD (1997b) briefing, GD(97)40, Chapter I. Introduction, p.4.
- ⁵² As of May 1997, Argentina and Chile have adhered to the Declaration and Decisions.
- ⁵³ OECD Guidelines for Multinational Enterprises, introductory paragraph 3.
- ⁵⁴ *Ibid.*, introductory paragraph 3.
- ⁵⁵ The OECD Council, meeting on 27 - 28 April 1998, called for the development of corporate governance guidelines and standards. An Ad Hoc Task Force on Corporate Governance was tasked with developing the Principles. See OECD (1999), *OECD Principles of Corporate Governance*, SG/CG(99)5, introductory paragraph, p. 2.
- ⁵⁶ *Idem*.
- ⁵⁷ OECD Guidelines for Multinational Enterprises, introductory paragraph 6.
- ⁵⁸ OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 21.
- ⁵⁹ OECD Guidelines for Multilateral Enterprises, introductory paragraph 7: 'Every State has the right to prescribe the conditions under which multinational enterprises operate within its national jurisdiction, subject to international law and the international agreements to which it subscribes.' See also OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 21.
- ⁶⁰ The recommendation is likewise addressed to Governments. However, nothing in the Declaration shall 'limit or otherwise affect obligations arising out of ratification of any ILO Convention.' In other words, primacy is given to the binding undertakings of State parties.
- ⁶¹ See ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, paras. 8 and 9: all concerned parties should respect the Universal Declaration and the two International Covenants, as well as ILO standards. Furthermore, in para. 5, multinational enterprises and other concerned parties are advised to consider ILO Conventions and Recommendations in formulating social policy and action.
- ⁶² As the central concern in the context of this submission is with the normative value of the OECD Guidelines, the mechanism in place for their implementation in OECD Member countries is not reviewed in depth. As an overview: It is the OECD Committee on International Investment and Multinational Enterprises (CIME) which provides clarification, consultation review and amendment of the Guidelines and responds to requests from Member countries and the social partners - the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC) - for consideration of various aspects of the Guidelines. At the country-level, a system of National Contact Points has been established in government offices in the Member countries to promote the Guidelines and to assist in solving problems which may arise between business and labour. There is a procedure to clarify application of the Guidelines in respect of individual cases and enterprises. Labour and business organisations, through the BIAC or TUAC, first approach the National Contact Point for consideration. If the issue cannot be resolved at the national level, it may be referred to the CIME for clarification. The interpretation offered is not meant to represent a judgement on the behaviour of an enterprise, whose identity is withheld, although full use is made of the details of the case. These procedures are set down in an OECD Council Decision on follow-up to the Guidelines: please refer to OECD (1993), *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*; see also the OECD (1997b) briefing, GD(97)40, Chapter III. Discussions are currently being held to revise the mechanism by which the Guidelines are applied.
- ⁶³ Statement on globalisation and economic, social and cultural rights.
- ⁶⁴ *Ibid.*, para. 2.
- ⁶⁵ *Ibid.*, para. 3.
- ⁶⁶ *Ibid.*, para. 7.
- ⁶⁷ Since the failure of the OECD to adopt the MAI, subsequent WTO talks at Seattle in late 1999 also failed to result in agreement on the deregulation of global investment. For a critique of the MAI and the social and environmental costs of the deregulation of investment, see Vallianatos & Durbin (1998), *License to Loot: the MAI and how to stop it*.
- ⁶⁸ Under article 18, the UN specialised agencies are called upon to submit reports on progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities. The Committee is entrusted with the task of considering these reports. (See Rules of Procedure, E/C.12/1990/4/Rev.1, Rules 66 and 67).
- ⁶⁹ See, for example, ECOSOC Resolution 1988(LX), para. 6, reproduced in E/C.12/1989/4; reiterated in the Committee's *Rules of Procedure*, Rule 66. See also ECOSOC Resolution 1979/43, para.10; ECOSOC Resolution 1982/23, para.(d); ECOSOC Resolution 1984/9, para. 5, also reproduced in E/C.12/1989/4; and ECOSOC Resolution 1985/17, reproduced in E/C.12/1989/4. The ILO is one of the few agencies which has regularly contributed to the work of the Committee. Nevertheless, its failure to formally report on the Declaration in any contribution to the Committee should not preclude such consideration. Furthermore, under article 17 of the Covenant, and within the Committee's own reporting guidelines, States are requested to reference in their State reports relevant information furnished to the UN specialised agencies. Information submitted under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which is relevant to supervision of the Covenant, is thereby brought within the remit of the Committee.
- ⁷⁰ Limburg Principles, para. 5.
- ⁷¹ See *GC 3*, para. 9.
- ⁷² See, respectively, ICESCR articles 11, 12, 7, and 13.
- ⁷³ *GC 4*, para. 8(b).
- ⁷⁴ *Ibid.*, para. 8(f).
- ⁷⁵ See ICESCR, article 7(a)(ii); ILO Social Policy Convention, article 5(1). The latter was ratified by Zambia on 23 October 1979.

⁷⁶ ILO Social Policy Convention, article 5(2).

⁷⁷ GC 3, para. 9.

⁷⁸ Kienbaum Development Services GmbH (1993), *Strategic Options for the Privatisation of Zambia Consolidated Copper Mines*, p.60.

⁷⁹ Lungu & Silengo (1997), 'The socio-economic assessment impact of privatization on the Zambian Copperbelt: the case of Mufulira and Konkola,' para. 2.0.

⁸⁰ *Ibid.*, para. 6.0.

⁸¹ The figure for ZCCM and subsidiary employment is from ZCCM (1996b), *ZCCM Annual Report 1996*, p.2. The percentage of formal sector employment is estimated on the basis of the Central Statistical Office figure of 484,967 formal sector employees in Zambia at the end of 1995.

⁸² LCMS (1996), table 5.5.

⁸³ Kienbaum (1993), p.89.

⁸⁴ *Ibid.*, p.90.

⁸⁵ ZCCM (1998), 'Capital Expenditure on Social Assets and Infrastructure 1983 - 1997'.

⁸⁶ *Idem.*

⁸⁷ Development Agreement between the Government of Zambia and Roan Antelope Mining Corporation of Zambia plc, 14 October 1997, Schedule 4 [hereafter 'Development Agreement']. All facts and figures in this paragraph are from the same source.

⁸⁸ Development Agreement, Schedule 4.

⁸⁹ Lungu & Silengo (1997), para. 6.1.

⁹⁰ *Idem.*

⁹¹ Cited in *idem.*

⁹² *Ibid.*, Issue 10: Water Supply.

⁹³ *Idem.*

⁹⁴ ZCCM (1997b), *Nchanga EIS*, Volume 4.2, Appendix H: Water Supply and Sewage, for example, p. 18, recommendation ix; p. 23 (iii); p.36 (iv); p.40 (iii); p.41 (iii).

⁹⁵ *Ibid.*, Appendix H: Water Supply and Sewage, p. 7. The figures are already adjusted for leakage. As significant, unaccounted for losses are unlikely, the high supply must reflect non-ZCCM demand.

⁹⁶ *Idem.*

⁹⁷ ZCCM (1997b), *Nchanga EIS*, Volume 4.2, Appendix H: Water Supply and Sewage, p. 20.

⁹⁸ *Ibid.*, Appendix H: Water Supply and Sewage, p. 34.

⁹⁹ *Ibid.*, Appendix H: Water Supply and Sewage, p. 22.

¹⁰⁰ *Ibid.*, Appendix H: Water Supply and Sewage, p. 37.

¹⁰¹ *Ibid.*, Appendix H: Water Supply and Sewage, pp. 33 and 35 - 36.

¹⁰² *Ibid.*, Appendix H: Water Supply and Sewage, p. 17.

¹⁰³ *Ibid.*, Appendix H: Water Supply and Sewage, p.18. Equivalent to 250 litres per person each day.

¹⁰⁴ *Ibid.*, Appendix H: Water Supply and Sewage, pp. 22 - 23.

¹⁰⁵ *Ibid.*, Appendix H: Water Supply and Sewage, pp. 33 and 36.

¹⁰⁶ *Ibid.*, Appendix H: Water Supply and Sewage, pp. 22 and 39. The total projected cost of the entire Kitwe water and sewage rehabilitation project, to be supported principally by the Bank/ADB, is recorded as \$33.13 million. This will only bring the system back to former capacity, not required capacity. See *idem.*, pp. 4 - 5. See also Kitwe Water and Sewerage Service Department (1994), 'Report of the Acting Director of Water and Sewerage Services Department.'

¹⁰⁷ Kitwe Water and Sewerage Service Department (1994), paras. 2.0 and 2.1.

¹⁰⁸ See *intra*, Section 2(III).

¹⁰⁹ Operating costs in 1992 for Codelco, the state-owned mining company in Chile, were 64.8 cents/lb compared to 67.9 cents/lb at ZCCM. Indirect costs at ZCCM were 39.5c/lb cf. 21.3c/lb at Codelco. (Kienbaum (1993), p.53).

¹¹⁰ *Ibid.*, p.60.

¹¹¹ See *ibid.*, p.90; also p.91.

¹¹² Kienbaum cite the example of Codelco-Chile where increases in expenditure in 1992 of 6 per cent on the company's social functions contributed to lower absenteeism, lower accident rates and an increase in productivity of 6.2 per cent (see Kienbaum (1993), p.91).

¹¹³ *Ibid.*, p.90.

¹¹⁴ *Ibid.*, p.91.

¹¹⁵ *Ibid.*, pp. 91 - 92.

¹¹⁶ While schools and hospitals lend themselves to independent operation, Kienbaum envisaged that complex legal issues surrounding their status needed time to be resolved. It therefore recommended that the new owners continue to run such facilities until these could be rationalised and contracted-out or sold to specialist private-sector providers. See Kienbaum (1993), p.91.

¹¹⁷ *Ibid.*, p.92.

¹¹⁸ *Ibid.*, p.90.

¹¹⁹ *Ibid.*, p.92.

¹²⁰ ERIP ICR, para.10

¹²¹ Bull (1994a), 'ZCCM - the future lies in unbundling'.

¹²² Dr. Mpanda. See Bull (1996), 'ZCCM - Light at the end of the tunnel?'

¹²³ The ZCCM management plan to resurrect the company is roundly criticised by Bull in 'ZCCM cries for a policy to survive,' *Times of Zambia*, 7 May 1994.

¹²⁴ See Bull (1994), 'ZCCM - the future lies in unbundling,' an advert taken out in the *Times of Zambia* in response to a previous piece sponsored by senior ZCCM board members: 'ZCCM Replies,' advert taken out in the *Times of Zambia*, 14 September 1994. This advert was itself a response to Bull's original article which appeared in the September 1994 issue of *Profit Magazine*.

¹²⁵ It is suggested that the Mineworkers Union of Zambia itself favoured the sale of ZCCM as a single entity to Anglo while seeking to attract other mining companies to investment in exploration and the development of new mines. See Muchindu (1998), 'Issues on the Privatisation of the Mines'.

¹²⁶ 'ZCCM was a powerful company able to resist privatisation because of its deep links with parliamentarians. It was also partially owned by Anglo-American (about 26 per cent) complicating the decision to privatise....The first preparatory study for privatization made recommendations which Anglo-American did not accept.' (*PIRC & ESAC PAR*, para. 3.9). The Bank has described the failure to privatise ZCCM expeditiously after the completion of the initial Kienbaum study as 'a missed opportunity' which would have 'helped prevent its deteriorating financial condition and might have given the private sector significant growth impetus.' (*Idem.*, para. 2.27, esp. pp. 29-30).

¹²⁷ ZCCM (1996b), *ZCCM Annual Report 1996*, Historical Summary, p.43.

¹²⁸ ERIP ICR, para.11. The legal covenant under Schedule 3,7 of the ERIP requires the Government to '[a]dopt and furnish IDA a satisfactory plan to privatize ZCCM.'

¹²⁹ See 'Cabinet Resolution: Privatisation of the ZCCM Assets,' reproduced in ZPA (1998b), *ZPA Progress Report No. 12*, p.29; see also Chikwese (1997), 'Zambia Consolidated Copper Mines Limited (ZCCM) - Progress Report'.

¹³⁰ZCCM (1996b), *ZCCM Annual Report 1996*, p.14

¹³¹See ZCCM (1996b), *ZCCM Annual Report 1996*, Chairman's Statement (appended), p.2. A memorandum of understanding was signed between the Government and Anglo American on 11 February 1997.

¹³²Statement from ZCI on privatisation of ZCCM. ZCI proposes the arrangements outlined be recorded in the form of a legally binding agreement. A copy of the statement can be found appended to the Ministry of Finance (1997) press release, 'Sale and Purchase Agreement signed on ZCCM's Konkola North Mining Prospect'.

¹³³The ZCI appointed directors would also abstain from voting on any motion involving an offer or tender for any part of ZCCM by ZCI, Anglo American or subsidiary or associate companies.

¹³⁴Chibe (1997), 'Privatisation of Zambia Consolidated Copper Mines'; see also Chikwese (1997).

¹³⁵*ERIPTA ICR*, para. 12.

¹³⁶Oxford Analytica (1998), 'Zambia: copper consequences'.

¹³⁷'Selling the family copper,' *The Economist*, 6 November 1999, p.86.

¹³⁸'Going it alone - at last and at what cost!' *Mining Magazine*, vol. 184, no. 1, January 2000.

¹³⁹Serious market manipulation by Sumitomo's chief copper trader and others came to light in June 1996. Copper prices plummeted amid uncertainty over the extent of the scandal. An international investigation was launched by the UK's Securities and Investments Board into the London Metals Exchange's effectiveness of regulation. See Anyaduke (1999), *Copper: a new material for the millennium*, p.1 and pp.20 ff.

¹⁴⁰Under the OECD Guidelines for Multinational Enterprises, enterprises should '[r]efrain from participating in or otherwise purposely strengthening the restrictive effects of international or domestic cartels or restrictive agreements which adversely affect or eliminate competition...' (Recommendation 4(3) [emphasis added]). However, the recommendation continues 'and which are not generally or specifically accepted under applicable national or international legislation'. Furthermore, the overarching qualifier is conformity with 'official competition rules and established policies' of the countries in which an enterprise operates. *Vis-à-vis* the Guidelines, the accusation of the Zambian Government that a consortium was formed with the specific intention of driving down the price paid for the ZCCM package is weakened by the fact that no action was taken or protests voiced prior to the collapse of negotiations. Yet this failure *ab initio* of the Government to act undoubtedly reflects the power of the mining companies concerned.

¹⁴¹See, for example, the May 1999 address to the London Institute of Mining and Metallurgy by Anglo American Executive Director and head of the company's coal and base metals division, James Campbell (1999), 'The Changing role of mining corporations in economic development' [abridged].

¹⁴²The current cost of the project to be implemented by Anglo is \$523 million; previous estimates costed the full implementation of KDMP as originally planned at between \$700 - 800 million.

¹⁴³'Going it alone - at last and at what cost!' *Mining Magazine*, vol. 184, no. 1, January 2000.

¹⁴⁴Statement to Parliament, Dr. Syamakayumbu Syamujaye, Minister of Mines and Mineral Development, 27 January 2000.

¹⁴⁵OECD Guidelines for Multinational Enterprises, recommendation 4(1).

¹⁴⁶The qualifier 'while conforming to official competition rules and established policies of the countries in which they operate' applies. (OECD Guidelines for Multinational Enterprises, recommendation 4). In Zambia, Anglo American was able to use its position to alter the envisaged bidding process by negotiating exclusive options and to break-up recommended sale packages to its advantage. Once more, the starting point is not necessarily competition rules and policy, but prior influence.

¹⁴⁷ICESCR, article 2(1).

¹⁴⁸*GC 3*, para. 9.

¹⁴⁹Article 1 clauses (1) and (2) respectively, ILO Social Policy (Basic Aims and Standards Convention, 1962 (No. 117)).

¹⁵⁰Article 2, ILO Social Policy Convention.

¹⁵¹Article 3(1), ILO Social Policy Convention.

¹⁵²Article 3(2)(b), ILO Social Policy Convention.

¹⁵³The Asset Holding Company was incorporated under the Companies Act on 29 March 1999.

¹⁵⁴*ZMTS PID*, para. 6.

¹⁵⁵The Operations, Maintenance and Repair Fund and the Rehabilitation Fund.

¹⁵⁶*GC 4*, para. 12.

¹⁵⁷For example, it is noted in the study on the socio-economic impact of privatising Mufulira and Konkola mines that '...the municipal council has not been involved in the discussions making it completely unprepared for the eventual tasks it may have to inherit such as water supply, refuse collection and road maintenance.' (See Lungu & Silengo (1997), Issue 6: Lack of Wide Consultation Among Stakeholders).

¹⁵⁸*ZMTS PID*. The projected appraisal date in the PID of 20 October 1999 was given as November 1999, together with a projected approval date of March 2000. However, a later PID of 9 February lists these dates, respectively, as 22 February and 25 May 2000.

¹⁵⁹For an overview of the reform of the water sector in Zambia, visit the website of the Water Sector Development Group at <www.zament.zm/zament/water/wsdg/>.

¹⁶⁰See 'Water sector masterplan!' *Times of Zambia*, 22 November 1997; 'Three team up in water venture,' *Times of Zambia*, 24 December 1997; 'Water reforms on course,' *Times of Zambia*, 10 February 1998.

¹⁶¹The Water Supply and Sanitation Act (1997) establishes the National Water Supply and Sanitation Council and defines its functions and powers; and it provides for the establishment, by local authorities, of water supply and sanitation utility companies. The latter are to supply water and provide sanitation services on an efficient and sustainable basis under the general regulation of the National Water Supply and Sanitation Council. For more detail on reform of the water sector, see the information provided by the Water Sector Development Group, the secretariat charged with co-ordinating and implementing reform, at <www.zamnet.zm/zamnet/water/wsdg/>.

¹⁶²Cf. *GC 3*, para. 9; also *GC 4*, para. 14.

¹⁶³*GC 3*, para. 10.

¹⁶⁴*Idem*.

¹⁶⁵Declaration on Social Development, Commitment 9(e).

¹⁶⁶ZCCM losses were estimated to be \$25 million per month at the beginning of 1998. See Bull (1997/8), 'ZCCM - the story nears its close,' p. 17. By November 1998, Bull estimated losses of between \$1 - \$2 million each day (see 'Economy Watch,' *The Post*, 16 November 1998). The Zambian resident vice-president of Citibank has recently been cited in press reports as stating that ZCCM has been milking the taxpayer of at least \$1 million per day over the last two years to October 1999 (see 'Relief as Anglo buys the assets of Zambia Consolidated Copper,' *Business Day*, 28 October 1999).

¹⁶⁷Article 22 covers 'virtually all United Nations organs and agencies involved in any aspect of international development cooperation.' (*GC 2*, para. 9). Specific reference is made to the IMF and the World Bank Group (IDA, IBRD, IFC).

¹⁶⁸*GC 2*, para. 7.

¹⁶⁹*Ibid.*, para. 8(d).

¹⁷⁰The component of the project aimed at the development of a new mining code and fiscal regime conducive to private investment was evaluated by the Bank as successful. Overall, however, the project was considered unsatisfactory because of the failure of its main objective, to improve the performance of ZCCM. A third non-copper related component was to assist Maamba Collieries to reduce costs and prepare a long run strategy. This

concluded that the company was not viable as a parastatal operation. Maamba was subsequently offered for sale under the privatisation programme and sold to Benicon of South Africa. See *Mining TAS ICR*, Operations/Project Data Document.

¹⁷¹*ERIP ICR*, para. 1.

¹⁷²Summarised in *ERIP ICR*, Table 5, Key Indicators for Project Implementation and Operation, pp.17 ff. See also *idem*, Table 6 - Status legal covenants, especially Schedule 3.1, Schedule 3.2, and Schedule 3.6. Other requirements included the enactment of legislation to restructure the Bank of Zambia and to regulate both the insurance industry and pension provision.

¹⁷³The ERIPTA was designed to support the reform program required under the Bank's ERIP adjustment credit.

¹⁷⁴*ERIPTA M&R*, para. 10.

¹⁷⁵*Ibid.*, para. 8. This was worth \$1.2 million in IDA support - see *idem*, para.11(iv).

¹⁷⁶*Ibid.*, Schedule B, para D (a) and (c).

¹⁷⁷*ERIP ICR*, para.15.

¹⁷⁸*Idem*. A new fiscal regime favourable to the mining industry was implemented by amending the Income Tax Act, the Customs and Excise Act and the Investment Act.

¹⁷⁹'Mines' sale - the inside story,' Times of Zambia, 8 April 1998.

¹⁸⁰The Interim Short Term Corporate Plan (ISTP) for FY93/94 - FY95/96.

¹⁸¹*Mining TAS ICR*, Operations/Project Data Document Summary, under 'Project sustainability'.

¹⁸²*ERIP ICR*, para. 30.

¹⁸³Under the ERIPTA credit a \$2 million project preparation facility advance was made available to fund the hiring of legal/financial advisors. See *ERIPTA M&R*, para.11(i); see also *ERIP ICR*, para.25.

¹⁸⁴*ERIP ICR*, para. 25.

¹⁸⁵*Ibid.*, para. 29.

¹⁸⁶*Ibid.*, para. 30.

¹⁸⁷*ERIPTA M&R*, Schedule B - performance indicators.

¹⁸⁸*Inter alia*, the number of privatizations, the number of new private enterprises advertised, the amount investment commitments as part sale agreements.

¹⁸⁹*PIRC & ESAC PAR*, para. 3.9.

¹⁹⁰*Ibid.*, para. 2.27, p. 29.

¹⁹¹*Ibid.*, respectively paras. 17, 4.7 and 3.9; also paras. 2.27, 5.2 and 6.4.

¹⁹²Cited in fn. 3, *PIRC & ESAC PAR*.

¹⁹³*ERIP ICR*, para.11. The legal covenant under Schedule 3.7 of the ERIP requires the Government to '[a]dopt and furnish IDA a satisfactory plan to privatize ZCCM.'

¹⁹⁴*ERIP ICR*, para. 12.

¹⁹⁵*ESAC II R&R*, para. 39; also para. 57(e).

¹⁹⁶*ERIP ICR*, para. 12.

¹⁹⁷*PSREPC R&R*, para. 36; see also para. 5: 'In 1998, multilateral balance of payments support was also held up due to the delays in privatising ZCCM.'

¹⁹⁸See Government of Zambia (1999a), *Letter of Intent to the IMF*, 10 March 1999, Table 2 - Zambia: Prior Actions, Structural Performance Criteria, and Benchmarks During the First Annual Arrangement Under the Enhanced Structural Adjustment Facility, January 1, 1999 - December 31, 1999. The other two required actions relate to the revocation of a number of ad hoc tax exemptions and the formulation of an implementation plan for civil service retrenchments.

¹⁹⁹*PSREPC R&R*, para. 2.

²⁰⁰*PSREPC R&R*, para. 39; also para. 55(c).

²⁰¹For example, German support of DM20 million is understood to be conditional on the prompt and timely privatisation of ZCCM and support from the UK, worth an extra £54 million, is similarly thought to be dependent upon the Zambian Government reaching agreement over a renewed IMF/Bank adjustment program.

²⁰²IMF (1999a), 'IMF Approves ESAF Loan for Zambia'. It is noted: 'The damaging impact on Zambia's economy from delays faced in the privatization of the ZCCM have [sic] amply demonstrated the need for a rapid completion of this process.'

²⁰³See Government of Zambia (1999a), *Letter of Intent to the IMF*, Table 2. See also Government of Zambia (1999b), 'Memorandum of Economic and Financial Policies,' para. 34.

²⁰⁴IMF Directors, while welcoming 'recent progress made in the sale of the major assets of the ZCCM to a prominent international mining house' noted that 'the sales agreement had not yet been finalized, and strongly urged the authorities to do everything in their power to expedite the transfer of the assets.' (IMF (1999b), 'IMF Concludes Article IV Consultation with Zambia').

²⁰⁵K341 billion were transferred. See *SCR* (1999), Statistical Appendix, table 13. To convert into US\$, the prevailing exchange rate of \$1 = K1862 has been used.

²⁰⁶Government of Zambia (1999b), 'Memorandum of Economic and Financial Policies,' paras. 30 - 31. The debt is net and has already been adjusted in line with expected receipts from the privatisation of ZCCM's remaining assets. Of the total debt, \$110 million is owed to the Copperbelt Energy Consortium. \$50 million of the debt owed to CEC is to be rescheduled beyond 1999.

²⁰⁷Attachment 6 to the Rothchild's Report on the Privatisation of ZCCM, reproduced as exhibit AM1 to the affidavit of Abel Mkandawire (ZPA chairman), 10 September 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.

²⁰⁸*ERIPTA M&R*, para. 11.

²⁰⁹*ZKCM SPI*. The projected IFC Board date to consider finance for the project is 27 January 2000.

²¹⁰*Ibid.*

²¹¹*Ibid.*

²¹²*PSREPC R&R*, para. 24.

²¹³*Ibid.*, paras. 24 - 25.

²¹⁴*Ibid.*, para. 38. \$58 million is to cover redundancy payments and \$7 million is earmarked for retraining, outplacement, financial counselling, job search seminars, and skills bridging programs. Finalisation of a redundancy program acceptable to IDA is required. An unqualified independent audit certifying that ZCCM has implemented the redundancy program is a condition for the release of the second tranche of the credit. Furthermore, it also a requirement of the PSREPC that the ZCCM Board approves and begins satisfactory implementation of a restructuring plan for the remaining ZCCM holding company detailing its objectives, functions, organisational arrangements and staffing levels. (*Idem*, para. 39).

²¹⁵*PSREPC R&R*, Annex I, Letter of Development Policy, paras. 17 ff.

²¹⁶The Panafican News Agency, 19 January 2000.

²¹⁷The Bank recognised the possibility of delay in the privatisation of ZCCM beyond 1999, but believed the risk was 'mitigated by the detailed agreements that have been reached between the Government, ZCCM and the prospective buyers....' (*PSREPC R&R*, para. 61).

²¹⁸*PSREPC R&R*, para. 52.

²¹⁹See *GC 2*, respectively paras. 8 and 8(d).

²²⁰ICESCR, article 7(a)(i).

²²¹Ratified by Zambia on 20 June 1972.

²²²ICESCR, article 2(2).

²²³*ZMTS PID*, 'Objectives,' para. 2.

²²⁴*Ibid.*, para. 1(b).

²²⁵*Ibid.*, para. 1(b).

²²⁶*GC 2*, para. 7.

²²⁷*ZMTS PID*, para. 1(c).

²²⁸*Cf. GC 3*, para. 8.

²²⁹Statement on globalisation and economic, social and cultural rights, paras. 2 - 3.

²³⁰ICESCR, article 2; see also *GC 3*, para. 9.

²³¹*ZMTS PID*, para. 1(c).

²³²*Ibid.*, para. 7.

²³³Statement on globalisation, para. 3. The Committee refers to health and education services. By implication, the use of economic criteria to regulate access to any service which underpins a basic right recognised in the Covenant must be accompanied by due safeguards.

²³⁴Statement on globalisation and economic, social and cultural rights, para. 5.

²³⁵OECD Guidelines for Multilateral Enterprises, introductory paragraph 7.

²³⁶*Idem.*

²³⁷See OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 21.

²³⁸Development Agreement between the Government of Zambia and Roan Antelope Mining Corporation of Zambia plc, 14 October 1997, clause 20.1.

²³⁹ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 8.

²⁴⁰*Idem.*

²⁴¹ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 5.

²⁴²*Idem.*

²⁴³ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 9. Respectively, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - ratified by Zambia on 23/10/1979; and Employment Policy Convention, 1964 (No. 122) - ratified by Zambia on 23/10/79.

²⁴⁴ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 9.

²⁴⁵E/CN.4/Sub.2/1991/17.

²⁴⁶The full article reads: 'All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.' (Declaration on the Right to Development, article 2(2)).

²⁴⁷ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 10; OECD Guidelines for Multinational Enterprises, 2. General Policies, para. (1).

²⁴⁸ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 10; Guidelines for Multinational Enterprises, 2. General Policies, para. (2). The main situation envisaged under the Guidelines in which enterprises are required to consider Government policy objectives and priorities with regard to economic and social progress is the cutting back or closure of operations. The right of the enterprise to reach decisions is upheld, although 'a prudent company should seek clarification of government policies through advance consultations with the government concerned.' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 23). Notwithstanding the exemplar of closure or rationalisation, any decision with far-reaching social and economic impact - as in the case of social provision on the Copperbelt - gives rise to the same requirements.

²⁴⁹'Mines' sale - the inside story,' *Times of Zambia*, 8 April 1998.

²⁵⁰Mineral royalty tax had already been reduced by the Government from three to two per cent.

²⁵¹Withholding tax had already been reduced by the Government from 15 per cent to 10 per cent.

²⁵²'Mines' sale - the inside story,' *Times of Zambia*, 8 April 1998.

²⁵³'Finally, we have a deal!' *Times of Zambia*, 23 January 1999.

²⁵⁴KDMP will enjoy a lower power tariff of 2.7 cents per kilowatt-hour, while the rate to other mines is 3.3 cents/kWh. See 'Finally, we have a deal!' *Times of Zambia*, 23 January 1999.

²⁵⁵Konkola is the wettest mine in the world. The cost of running pumps to remove underground water accounts for 30 per cent of operational costs in comparison to an average industry cost of 9 per cent.

²⁵⁶'In addition, we will refrain from introducing any tax reductions, new exemptions, rebates, or any other preferential tax treatment in 1999, except for the suspension of import duties on agricultural machinery and equipment, and the specific tax concessions that were made in the context of the privatization of the ZCCM.' (Government of Zambia (1999b), 'Memorandum of Economic and Financial Policies,' para. 16). See also Government of Zambia (1999a), *Letter of Intent to the IMF*, Table 2.

²⁵⁷IMF (1999b), 'IMF Concludes Article IV Consultation with Zambia'.

²⁵⁸Dr. Katele Kalumba, Minister of Finance, *Budget Address*, 28 January 2000, especially para. 107. See also the following commentaries: 'Kalumba presents a K124 bn deficit budget,' *The Post*, 31 January 2000; 'K423 bn set aside to settle ZCCM debt,' *Times of Zambia*, 29 January 2000; 'As police get large chunk...', *Times of Zambia*, 29 January 2000; 'Zambia reduces tax for its mine buyers,' *Business Day*, 31 January 2000.

²⁵⁹See 'K423 bn set aside to settle ZCCM debt,' *Times of Zambia*, 29 January 2000.

²⁶⁰'Income Tax Bill passes second reading,' *Times of Zambia*, 16 February 2000.

²⁶¹Lusaka Central MP Dipak Patel (Independent).

²⁶²'Zica nods concessions,' *Times of Zambia*, 16 February 2000

²⁶³Development Agreement, clause 15.3.

²⁶⁴Principle III. A.: 'The corporate governance framework should assure that the rights of stakeholders that are protected by law are respected.'

²⁶⁵In order to satisfy the obligation to take steps, article 2(1) refers to 'all appropriate means, including particularly the adoption of legislative measures.' The Committee recognises that appropriate legislation is highly desirable and may even be indispensable in ensuring the realisation of certain rights recognised in the Covenant. However, the use of all appropriate means encompasses, for example, the adoption of measures in the policy sphere. See *GC 3*, paras. 3 ff.

²⁶⁶OECD (1999), SG/CG(99)5, Annotations to the OECD Principles of Corporate Governance, III. The role of stakeholders in corporate governance.

²⁶⁷OECD (1999), SG/CG(99)5, Annotations to the OECD Principles of Corporate Governance, III.A.

²⁶⁸ILO Social Policy (Basic Aims and Standards) Convention, respectively Articles 2 and 3(1).

²⁶⁹ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 34. See also the ILO Social Policy (Basic

Aims and Standards) Convention, article 11(7).

²⁷⁰See ZPA (1998b), *Progress Report No. 12*, p. 39.

²⁷¹ZCCM (1997c), 'Sale of Chibuluma Mine'; also ZCCM (1997d), *Employee Privatisation Update*, p. 1 ff.

²⁷²ZMTS PID.

²⁷³ICESCR, article 7(a)(ii).

²⁷⁴ILO Social Policy Convention (No. 117), article 11(7).

²⁷⁵ICCPR, article 19.

²⁷⁶DRD, article 2(3). See also article 8(2).

²⁷⁷OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 25: 'The purpose of this chapter [on disclosure] is to encourage greater transparency of the enterprise as a whole through the publication of a body of information sufficient to improve public understanding. This can alleviate concerns arising from the complexity of multinational enterprises and the difficulties in clearly perceiving their diverse structures, operations and policies.'

²⁷⁸OECD Guidelines for Multinational Enterprises, recommendation 3. Qualifiers apply. Although the onus is upon enterprises to disclose information, due regard is given to 'their nature and relative size in the economic context of their operations and to requirements of business confidentiality and to cost...'

²⁷⁹A clause within recommendation 3 reads 'as a supplement, in so far as necessary for this purpose, to information to be disclosed under the national law of the individual countries in which they operate.'

²⁸⁰OECD Guidelines for Multinational Enterprises, recommendation 7(2)(b). 'The term "meaningful" must be applied in the circumstances of each case, but it has operational value to persons experienced in labour relations' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 29).

²⁸¹OECD Guidelines for Multinational Enterprises, recommendation 7(3). 'While the Disclosure of Information Guidelines address the provision of information to the general public, employees of multinational enterprises may need and should have access to more specific information, beyond that available to the general public, and in a form suitable for their interests and purposes. Enterprises should provide information on aspects of the performance of the enterprise which will also enable users to assess, inter alia, likely future developments. In so doing, they should be guided by the information items enumerated in the Disclosure of Information chapter of the Guidelines.' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p.30, para. (d)(i)). Recommendation 7(3) is, however, qualified by the subclause 'where this accords with local law and practice'. Moreover, '[c]onsiderations of business confidentiality may mean that information on certain points may not be provided, or may not be provided without safeguards.' (Chapter IV. Commentary on the Guidelines, p.30, para. (d)(i)). However, the onus on disclosure remains.

²⁸²ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 54. See also ILO Recommendation (No. 129) concerning Communications between Management and Workers within Undertakings. The provision of information to workers' representatives on performance of the entity or enterprise as a whole is qualified 'where this accords with local law and practices'.

²⁸³The chapter on Disclosure of Information addresses the parent company directly when referring to the publication of '...factual information on the structure, activities and policies of the enterprise as a whole'. (OECD Guidelines for Multinational Enterprises, recommendation 3; see also OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 22). At the same time, the Guidelines are addressed to both parent companies and local entities within the multinational enterprise according to the actual distribution of responsibilities among them. (OECD Guidelines for Multinational Enterprises, introductory paragraph 8). Domestic enterprises too are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant. (*Idem*, introductory paragraph 9). Whereas recommendation 3 relates to public information, a separate general provision requires enterprises (that is, parent companies) to supply their entities with supplementary information the latter may need in order to meet requests by national authorities. (See OECD Guidelines for Multinational Enterprises, 2. General policies, para. 3).

²⁸⁴See, OECD Guidelines for Multinational Enterprises, recommendation 3, respectively paras. (a), (b) and (e). This is specified at the level of the enterprise as a whole. However, recalling introductory paragraphs 8 and 9, similar information, where applicable and available, ought to be provided at the level of subsidiary and domestic companies. Other subjects for disclosure relate to research and development expenditure (recommendation 3(g)), intra-group pricing policies (recommendation 3(h)), accounting policies and segmentation of information (recommendation 3(i)). The information required under each category is elaborated in OECD (1988), *Multinational Enterprises and Disclosure of Information: Clarification of the OECD Guidelines*.

²⁸⁵See, OECD Guidelines for Multinational Enterprises recommendation 3, respectively paras. (c), (d) and (f): '...the term "geographical area" means groups of countries or individual countries as each enterprise determines is appropriate in its particular circumstances.' (*Idem*, fn. 5).

²⁸⁶Principle IV. Disclosure and Transparency, OECD Principles of Corporate Governance.

²⁸⁷Principle IV. A. (2), (6) and (7), OECD Principles of Corporate Governance.

²⁸⁸OECD (1999), SG/CG(99)5, Annotations to the OECD Principles of Corporate Governance, IV. A.(2).

²⁸⁹*Idem*.

²⁹⁰OECD (1999), SG/CG(99)5, Annotations to the OECD Principles of Corporate Governance, IV. A.(6).

²⁹¹Principle IV. D, OECD Principles of Corporate Governance.

²⁹²Development Agreement, clause 6.6.

²⁹³ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 25.

²⁹⁴Development Agreement, clause 6.7.

²⁹⁵Development Agreement, clause 22.1.

²⁹⁶Development Agreement, clause 22.2(a). Major changes relate to 'elimination or material dilution' in the capacity of processing facilities, mine production or the mine plan which reduce or delay Government tax or royalty revenue or adversely affect the environment (clause 22.3). Major changes are themselves automatically approved within thirty days unless the Government objects (clause 22.4(b)). Where there is disagreement over whether a modification constitutes a major change, this is decided by the Sole Expert (clause 22.2(b)). Similarly, when the Government objects to a major change, RAMCZ may refer the matter to the Sole Expert for determination (clause 22.4(d)). In either case, the decision of the Sole Expert is final (respectively, clauses 22.2(b) and 22.4(e)).

²⁹⁷Development Agreement, clause 22.6.

²⁹⁸Under clause 6.6 of the Development Agreement, it is specified that a minimum number of employees necessary to operate the mine is identified in the Training and Human Resources Management Programme. However, this will be set at a relatively low threshold and can be set aside if the Government is notified 90 days in advance of any reduction below this level.

²⁹⁹See OECD Guidelines for Multinational Enterprises, 2. General Policies, paras (1) and (2); also OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 23.

³⁰⁰*Idem*.

³⁰¹ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 26. See also para. 17 on prior and continued consultation by multinationals with the authorities and workers' and employers' organisations to keep manpower plans, as far as practicable, in harmony with national social development policies.

³⁰²OECD Guidelines for Multinational enterprises, recommendation 7(6). The Guidelines do not intend rigid rules and recognise the sensitivity of certain business decisions 'in terms of possible serious damage to a particular enterprise' which make it difficult for management to give early

- notice; '[h]owever, these considerations would only apply in exceptional circumstances. There is no business sector or business activity where such circumstances can be considered usual.' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 31, para. (g)(ii)).
- ³⁰³*Idem*.
- ³⁰⁴'Economy Watch,' *The Post*, 16 November 1998.
- ³⁰⁵'Nkana held back in Anglo-ZCCM deal,' *Africa Analysis*, 29 October 1999.
- ³⁰⁶OECD Guidelines for Multinational Enterprises, recommendation 7(1).
- ³⁰⁷OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, pp. 28 - 29.
- ³⁰⁸ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 41. See also ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) , article 2.
- ³⁰⁹ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 41. See also ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98), article 1(1).
- ³¹⁰ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 42. See also ILO Convention (No. 98), article 2(1).
- ³¹¹ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 46.
- ³¹²*Ibid.*, para. 48. See also paras. 49 - 51 on the conduct of collective bargaining and the recognition of collective agreements.
- ³¹³Development Agreement, clause 6.11.
- ³¹⁴ICFTU (1999b), *Annual survey of violations of trade unions rights 1999*, p.46.
- ³¹⁵Development Agreement, clause 6.7(b).
- ³¹⁶ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 27. See also ILO Recommendation (No. 119) concerning Termination of Employment at the Initiative of the Employer.
- ³¹⁷The corollary of the right to work in article 6 of the ICESCR is protection from unjust deprivation of employment. For a discussion of this, see *intra*, Section 2(II), p. 82.
- ³¹⁸'Pwele disowned,' *Times of Zambia*, 18 December 1999.
- ³¹⁹'MUZ expels Pwele,' *Times of Zambia*, 13 January 2000.
- ³²⁰'RAMCZ retrenches Pwele,' *Times of Zambia*, 8 February 2000.
- ³²¹The qualifying subclause reads 'Enterprises should, within the framework of law, regulations and prevailing labour relations and employment practices, in each of the countries in which they operate...' (OECD Guidelines for Multinational Enterprises, recommendation 7). In respect of industrial relations, the ILO Declaration of Principles, para. 40, refers to the observance of industrial relations 'not less favourable than those observed by comparable employers in the country concerned.'
- ³²²ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 33.
- ³²³Enterprises are required to '[o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country'. (OECD Guidelines for Multinational Enterprises, recommendation 7(4)).
- ³²⁴ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 34.
- ³²⁵*Idem*.
- ³²⁶ICESCR, article 7(a)(ii), in respect of the right to just and favourable conditions of work, recognises that remuneration must provide all workers, as a minimum, with 'A decent living for themselves and their families in accordance with the provisions in the present Covenant'. This requirement goes beyond the fulfilment of basic needs and, given the status in international law of the Covenant, must be overriding.
- ³²⁷Development Agreement, clause 6.10.
- ³²⁸*Ibid.*, clause 6.12.
- ³²⁹'Operations 'halted' at Luanshya mine,' *The Post*, 24 March 1999.
- ³³⁰'Ex-RAMCZ workers demonstrate,' *The Post*, 30 March 1999.
- ³³¹'Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation.' (ILO Declaration of Principles, principle 51).
- ³³²ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 28.
- ³³³Development Agreement, clause 6.1; also Schedule 6, 'Training and Human Resources Management programme'.
- ³³⁴ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 30. See also OECD Guidelines for Multinational Enterprises, recommendation 7(5). This recognises that companies should 'to the greatest extent practicable, utilise, train and prepare for upgrading members of the local labour force in co-operation with representatives of their employees and, where appropriate, the relevant governmental authorities'.
- ³³⁵ICFTU (1999b), *Annual survey of violations of trade union rights 1999*, p. 46.
- ³³⁶On the issue of discrimination, see ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 19.
- ³³⁷Respectively, ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 20; and OECD Guidelines for Multinational Enterprises, 2. General Policies, para. (4).
- ³³⁸The company agrees to identify and register local businesses which are capable of supplying materials, equipment and services (Development Agreement, clause 4.1). Such prequalified business must be afforded the opportunity to tender and the Roan Antelope shall not discriminate against them *provided* that they are competitive in terms of price, quality, delivery etc. (*Idem*, clause 4.2).
- ³³⁹Development Agreement, clause 5.1(a). The Local Business Development Plan, written in general terms and just one page in length, is attached as Schedule 2 to the Agreement. In Schedule 2, the company states that it will provide a more detailed plan within the year, although it is unclear whether this constitutes a binding commitment.
- ³⁴⁰Development Agreement, Schedule 2.
- ³⁴¹Development Agreement, clause 5.1(c) and (b) respectively.
- ³⁴²*Ibid.*, clause 23.2.
- ³⁴³*Ibid.*, clause 5.2(a).
- ³⁴⁴*Ibid.*, clauses 5.3 and 5.4 respectively.
- ³⁴⁵*Ibid.*, clause 9.1.
- ³⁴⁶A full list of social assets is given in Schedule 4 to the Development Agreement.
- ³⁴⁷Development Agreement, clause 9.1.
- ³⁴⁸*Ibid.*, clause 9.2(a) on health; clause 9.3(b) on education.
- ³⁴⁹*Ibid.*, clause 9.2(b)(ii) and (c) on health; clause 9.3(c)(ii) and (d) on education.
- ³⁵⁰*Ibid.*, clause 9.2(d) on health; clause 9.3(e) on education.
- ³⁵¹Respectively, *ibid.*, clauses 9.4 and 9.5(b) - (d).
- ³⁵²*Ibid.*, clause 9.6.
- ³⁵³Article 11(7), ILO Social Policy (Basic Aims and Standards) Convention (No. 117), 1962.
- ³⁵⁴Development Agreement, clause 9.5.
- ³⁵⁵*Ibid.*, clause 9.5(a)(i).
- ³⁵⁶ZCCM (1997e), *Luanshya & Baluba EIS*, Volume 4.2, Appendix H, Water Supply, Sewage and Stormwater Management. See also *idem*,

Executive Summary, Volume 1, p.7.

³⁵⁷Development Agreement, clause 9.5(a)(iii).

³⁵⁸*Ibid.*, clause 9.5(a)(iv).

³⁵⁹*Ibid.*, clause 9.5(a)(ii).

³⁶⁰ILO Declaration of Principles concerning Multinational Enterprises and Social Policy, para. 56. See also Recommendation (No. 94) concerning Consultation and Cooperation between Employers and Workers of the Level of Undertaking; Recommendation (No. 129) concerning Communications within the Undertaking.

³⁶¹OECD Guidelines for Multinational enterprises, recommendation 7(6). The particular example of a change with major effect referred to within the recommendation relates to closure associated with collective redundancies or dismissals. However, the same responsibilities must apply when other changes with major adverse effects on the livelihoods of employees occur, such as the curtailment of social provision. Furthermore, '[t]his paragraph must be read together with the General Policies chapter which provides that enterprises take account of the established general policy objectives of Member countries in which they operate and their economic and social priorities.' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 31, para. (g)(i)).

³⁶²OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 31, para. (g)(ii). See also *intra*, fn. 302 which outlines the exceptional circumstances under which difficulties in giving early notice are recognised.

³⁶³Development Agreement, clause 9.7.

³⁶⁴*Ibid.*, clause 9.7, respectively subclauses (i)(a) - (c).

³⁶⁵*Ibid.*, clause 9.9.

³⁶⁶*Ibid.*, clause 1.1, 'Definitions and Interpretations,' p.6.

³⁶⁷*Ibid.*, clause 9.9.

³⁶⁸Respectively, *ibid.*, clause 9.9 (a) - (e).

³⁶⁹*Ibid.*, clause 19.10.

³⁷⁰*Ibid.*, clause 19.11. In the event that the parties themselves fail to agree over who is to be appointed as the sole expert, the matter will be decided by the President of the London Court of International Arbitration.

³⁷¹*Ibid.*, clause 19.10, relating to, respectively, clauses 3.3(c), 6.4, 7.3, 8.8, 12.5, 12.8, and 16.5(b)(ii).

³⁷²*Ibid.*, clause 19.10, relating to, respectively, clauses 18.6(c), 22.2(b) and 22.4(d).

³⁷³*Ibid.*, clause 19.18.

³⁷⁴The relevant subclause reads 'within the framework of laws, regulations and administrative practices in the countries in which they operate'. See OECD Guidelines for Multinational enterprises, recommendation 8.

³⁷⁵OECD Guidelines for Multinational enterprises, recommendation 8. See also *idem*, introductory para. (9). 'This chapter does not single out multinational enterprises for special attention. On the contrary, a key feature of the Guidelines is their non-discriminatory nature. The Guidelines do not imply differences in the treatment or behaviour of multinational and domestic enterprises or that particular enterprises should adhere to higher standards - both groups of enterprises are subject to the same expectations with respect to their conduct whenever the Guidelines are relevant to both.' (OECD (1997b) briefing, GD(97)40, Chapter IV. Commentary on the Guidelines, p. 36).

³⁷⁶OECD Guidelines for Multinational enterprises, recommendation 8(3)(b). The use of environmental auditing is specifically mentioned in this context.

³⁷⁷Development Agreement, clause 12.13.

³⁷⁸*Ibid.*, clause 12.1.

³⁷⁹*Ibid.*, clause 12.2.

³⁸⁰*Ibid.*, clause 12.3(a) - (c).

³⁸¹*Ibid.*, clause 12.3(d). Fines may only increase in line with inflation.

³⁸²*Ibid.*, clause 12.4.

³⁸³*Ibid.*, clause 12.5; see also 12.4.

³⁸⁴The Environmental Management Plan is presented as Volume 2 of the EIS, commissioned by ZCCM from the consultants Steffen Robertson and Kirsten. The complete EIS was published in March 1997. The Environmental Management Plan was presented in September 1996. See ZCCM (1997e), *Luanshya & Baluba EIS*, Volumes 1 - 4.

³⁸⁵See ZCCM (1997e), *Luanshya & Baluba EIS*, Volume 4.1, Appendix C: Socio-Economic Issues, Attachment C1: Scope of work and methodology, para. 2.2.2.

³⁸⁶See *ibid.*, Appendix C: Socio-Economic Issues, Appendix 1: Key informant interviews - Luanshya Division. A business owner was interviewed on behalf of Rotary International.

³⁸⁷OECD Guidelines for Multinational enterprises, recommendation 8(3)(f).

³⁸⁸Development Agreement, clause 12.6(a) - (b).

³⁸⁹*Ibid.*, clause 12.7.

³⁹⁰*Idem.*

³⁹¹Development Agreement, clause 12.8.

³⁹²*Idem.* If and when the company accepts the revision, the Environmental Plan is modified accordingly under clause 12.9.

³⁹³Development Agreement, clause 12.8.

³⁹⁴*Ibid.*, clause 12.11.

³⁹⁵*Ibid.*, clause 22.3; also clause 22.4.

³⁹⁶*Ibid.*, clause 22.4(d) - (e).

³⁹⁷*Ibid.*, clause 22.2(b).

³⁹⁸*Ibid.*, clause 22.2(a).

³⁹⁹*Budget Address 1998*, para. 116.

⁴⁰⁰Development Agreement, clauses 13 - 15.

⁴⁰¹*Ibid.*, clause 13.1.

⁴⁰²Cf. 'While Schedule 8 is not intended to override applicable legislation, in the event of any ambiguity between applicable legislation and Schedule 8, GRZ and Roan Antelope agree that the provisions of Schedule 8 shall apply....' (Development Agreement, clause 13.1).

⁴⁰³Under Schedule 8, provision (4), VAT on mine products is zero rated while the company may reclaim input VAT on goods and services which will be credited 'within a reasonable period of time' on the basis of Roan Antelope's monthly VAT returns.

⁴⁰⁴Development Agreement, clause 15.1(a), (b) and (e). The Government also undertakes not to impose VAT on metal or other exchange arrangements (clause 15.1(c)). Furthermore, non-Zambian employees and their dependants may import or export household and personal effects free of duty or tax (clause 15.1(d)).

⁴⁰⁵Development Agreement, Schedule 8, provision (1)(ii).

⁴⁰⁶*Ibid.*, Schedule 8, provision (1)(iii). In addition, all mines and facilities owned by a company are now considered a single entity for the purpose of allowable deductions so that 100 per cent of losses can be offset (Schedule 8, provision (6)). A previous restriction limiting the offset to 20 per cent of losses for those mines with a common owner, but which were not adjacent, was thereby removed. This was confirmed in the 1998 budget.

⁴⁰⁷Development Agreement, Schedule 8, para. (1)(v).

⁴⁰⁸Development Agreement 15.1(a); also Schedule 8, provision (5).

⁴⁰⁹The rate of Mineral Royalty Tax is confirmed in the Development Agreement at 2 per cent by value, minus transport and processing costs (Schedule 8, provision (2)(i) - (ii)). Once more, this anticipates the 1998 budget announcement and represents a reduction of one percentage point in over the prior rate. Furthermore, royalty payments are themselves deductible against liability for income tax for the fifteen year stability period (Schedule 8, provision (2)(iii)). In addition, when the cash operating margin - that is, company revenue minus operating costs - is less than zero, the payment of royalty tax can be deferred at the Government's discretion (Schedule 8, provision (2)(iv) - (v)).

⁴¹⁰Development Agreement, clause 15.2; also Schedule 8, provision (3)(i). The import duty is not to be raised above five per cent on goods and materials required for approved and normal operations (clause 15.2(a)(i)). At the time of the Agreement - and the same still applies - machinery or equipment imported into Zambia for use in the mining sectors was exempt from duty. The duty used to be 20 per cent. This concession was introduced to encourage capital investment, but it simultaneously results in a loss of revenue for the Government. In the case of other goods and materials outside of the approved and normal operations, the limit is set at the 20 per cent threshold (clause 15.2(a)(ii)).

⁴¹¹In the event that the Import Declaration Fee is reintroduced, the Development Agreement fixes the maximum Import Declaration Fee (IDF) at 5 per cent by value of goods imported, save where these goods comprise capital expenditure and are already exempt under the Third Schedule of the Mines and Minerals Act (Schedule 8, provision (3)(ii)).

⁴¹²Development Agreement, clause 15.2(b). The Government is already precluded from increasing its Rural Electrification Levy (clause 15.2(a)(iii); also Schedule 8, provision (3)(iii)).

⁴¹³Development Agreement, clause 15.3.

⁴¹⁴Ibid., clause 15.4.

⁴¹⁵Ibid., clause 11.1.

⁴¹⁶Ibid., clauses 11.2 and 11.4.

⁴¹⁷GC 7, para. 10.

⁴¹⁸See 'Forced Evictions: Analytical Report compiled by the Secretary General,' E/CN.4/1994/20, para. 106; also para. 5. Since the time of writing, the Committee has adopted General Comment 7 which considers forced evictions in respect of the right to housing. In addition to the Committee's action on State reports and its General Comments, other sources of jurisprudence on the matter of forced evictions are provided in the Committee's guidelines on reporting and the questions addressed to State parties appearing before it on the occurrence and extent of forced evictions carried out (see Reporting Guidelines, Article 11 of the Covenant, The right to adequate housing, para.3(iv)).

⁴¹⁹GC 4, para. 18.

⁴²⁰ See E/CN.4/1994/20, para. 100. Especially important in this regard are the reports of the Committee in which the Dominican Republic and Panama were declared to be in violation of article 11 (1) of the Covenant, the latter due to the extent and manner of the evictions it had carried out. In respect of the Dominican Republic, see Report of the 5th session, E/1991/23, paras. 234 - 249; see also Report of the 6th session, E/1992/23, Draft Decision II; Report of the 7th session, E/1992/23, Draft Decision III. In respect of Panama see Report of the 6th session, E/1992/23, paras. 95 ff., esp. para. 135; see also Report of the 7th session, E/1993/22, paras. 197 - 200 and Draft Decision I; Report of the 10th session, E/1995/22, paras. 211 - 215; Report of the 11th session, E/1995/22, paras. 356 - 362. After consideration of additional information supplied by Panama at the Committee's 7th session failed to answer all the questions relating to forcible evictions, the Committee offered technical assistance in the form of a visit to Panama. This decision was endorsed by ECOSOC Resolution 1993/294 and Panama finally agreed to the visit in December 1994. For a report on the Committee's findings, see E/C.12/1995/8.

⁴²¹ See, for example, Resolution 1991/12 of the Sub-Commission and Resolution 1993/77 of the Commission; see also the Sub-Commission's follow-up Resolutions, for example, 1993/41, and 1998/I.17; and Sub-Commission Resolution 1991/26 on the appointment of a Special Rapporteur on the right to adequate housing whose mandate included the question of forced evictions.

⁴²²See, for example, Resolution 1998/I.17, para. 1.

⁴²³E/CN.4/1994/20, para. 6.

⁴²⁴GC 7, para. 4.

⁴²⁵Ibid., para. 9.

⁴²⁶Ibid., para. 4.

⁴²⁷Ibid., para. 10.

⁴²⁸Ibid., para. 14. See also *idem*, para. 10.

⁴²⁹Ibid., para. 14.

⁴³⁰Ibid., para. 14.

⁴³¹In accordance with article 2 (1).

⁴³²GC 7, para. 10. The measures must also 'conform to the Covenant' and 'be designed to control strictly the circumstances under which evictions may be carried out.'

⁴³³As well as ascertaining the extent of squatter settlements on mine land, the ZCCM team were tasked with soliciting the involvement of local community leaders and settlers; with identifying resettlement sites; with acquiring land when required; with drawing up plans for basic services; and with planning and implementing resettlement in line with the sale and transfer of the mines to new owners. (ZCCM (1997f), *Report on Illegal Settlements in Mine Areas*, p.1).

⁴³⁴Ibid., p.1, para. 1.0.

⁴³⁵Ibid., p.1.

⁴³⁶Ibid., Executive Summary.

⁴³⁷According to the ZCCM report, the meetings were held between 2 - 6 June 1997. However, according to press reports the key meeting with Kitwe City Council was held on 12 June 1997. All meetings were conducted between the dedicated ZCCM working party, Divisional management at each mine, Council personnel and local Councillors (when they attended). See ZCCM (1997f), *Report on Illegal Settlements in Mine Areas*, p.1.

⁴³⁸These are reproduced in tabular form in Appendix 1 of the *Report on Illegal Settlements*.

⁴³⁹Chingola Town Council emphasised that people should be sensitised to resettlement, that reasonable notice should be given prior to implementation of the plan and that the demolition of permanent structures warranted compensation. The Council noted that many had lived in the townships for a long time and deserved to be treated humanely. The ZCCM report records the view of Kitwe City Council that 'illegal settlers have no legal or moral right to any form of compensation for being resettled' but that this could be considered by ZCCM or Government on 'humanitarian grounds.' See ZCCM (1997f), *Report on Illegal Settlements in Mine Areas*, respectively pp. 2 and 6.

⁴⁴⁰Ibid., p.8. St. Anthony is located on Nkana Division land within the administrative jurisdiction of Kitwe City Council.

⁴⁴¹Ibid., p.13.

⁴⁴²Nkana Division was to deliver eviction notices to illegal settlers in Kandabwe, St. Anthony, Kamwefu and Kansengu by 30 June 1997. Konkola Division was to issue evictions notices to all squatters on mine land by 30 June 1997. In the case of the largest squatter township - PPZ Chililabombwe with 6,000 residents - the deadline was 31 August 1997. See *ibid.*, pp. 9 and 14 respectively.

⁴⁴³Ibid., p.16. The figures exclude compensation for five farms and seventeen houses built with authorisation from Ndola City Council but in the wayleave of transmission lines from ZCCM Power Division. See also 'ZCCM needs K500m squatters fund,' *Times of Zambia*, 1 August 1997.

⁴⁴⁴ZCCM (1997f), *Report on Illegal Settlements in Mine Areas*, Executive Summary. The Chingola Municipal Council proposed to ask the

Government to degazette forest reserves in the locality to provide land for resettlement - an extremely drawn-out process with no guarantee of success. See *idem*, p.2.

⁴⁴⁵A 1997 socio-economic impact study confirms that an increase in the tailings area would occur when the mines at Konkola North and Deep were fully operational. They characterised the resulting need to relocate 3000 residents of Kawama as a 'very costly and politically volatile venture.' If a displacement akin to ZCCM's abortive 1997 programme were to occur, the population at Kawama would multiply many times over. See Lungu & Silengo (1997), 'The socio-economic assessment impact of privatization on the Zambian Copperbelt: the case of Mufulira and Konkola,' part 8.0, issue 9.

⁴⁴⁶The sale subsequently collapsed, to the consternation of the international community and industry insiders, sending shock waves through the Zambian economy.

⁴⁴⁷'Move squatters now says ZCCM,' *Times of Zambia*, 13 June 1997.

⁴⁴⁸These three townships are specifically mentioned in newspaper reports. See 'Move squatters now says ZCCM,' *Times of Zambia*, 13 June 1997. However, in the ZCCM *Report on Illegal Settlements*, the action plan agreed with Kitwe City Council refers to the issuing of the first eviction notices in St. Anthony, Kandabwe, Kamwefu and Kansengu. See *intra*, fn. 438.

⁴⁴⁹'Move squatters now says ZCCM,' *Times of Zambia*, 13 June 1997.

⁴⁵⁰'Kitwe, ZCCM plan for resettlement,' *Times of Zambia*, 17 June 1997.

⁴⁵¹*Ibid.*, Appendix 4. The operating divisions studied were Nchanga, Mufulira, Nkana, Luanshya, Konkola and Power.

⁴⁵²*GC 4*, para. 13; also *GC 7*, para. 22. See also *GC 2*, para. 3 on the obligation to monitor.

⁴⁵³*GC 4*, para. 13; also Reporting Guidelines, Article 11 of the Covenant, para. 3(b) paras. (iii) and (iv).

⁴⁵⁴See *GC 7*, para. 16, respectively subclauses (a) - (c), (g) and (h). Other procedural safeguards are: '(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise...'

⁴⁵⁵Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 42 and p.53.

⁴⁵⁶*Ibid.*, p.53.

⁴⁵⁷*Ibid.*, p.41, citing the evidence of a meeting with ZCCM officials, Kitwe, 18 August 1998.

⁴⁵⁸Part of the eviction notice is quoted in 'Squatters chase eviction squad,' *Times of Zambia*, 2 August 1997.

⁴⁵⁹*Ibid.*

⁴⁶⁰The Town Clerk of Chingola is cited as stating that the Council has 'no intention of taking on the squatters.' Kitwe City Council indicated that, although there was no controversy between themselves and ZCCM, they had warned the company of the dangers of eviction. See Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, respectively p. 49 and p. 53.

⁴⁶¹'In the past the Council had reasonable relations with ZCCM squatters, but once the issue of evictions emerged they have encountered a lot of hostility and St. Anthony's people are said to encourage others to resist eviction.' Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p.53.

⁴⁶²There have been other relatively low-key attempts to tackle localised problems. Settlers farming restricted mine land at Lima settlement on the Kalalushi road near Kitwe faced eviction by the company in advance of the sale of Nkana Division. The Council invited those affected to agree on a blanket plan for their relocation to council land on the banks of the Kafue river. (Continuation of article 'I Ordered settlers to stay put - Official,' *Times of Zambia*, 8 August 1997).

⁴⁶³*ZKCM SPI*.

⁴⁶⁴The deal is in three stages: (i) Cyprus Amax paid \$3 million cash and, within 2 years, was to invest \$5 m on exploration drilling and a prefeasibility study; (ii) if it then elects to proceed, a further payment \$10 million to the Government/ZCCM is required and it must commit an additional \$15 million for exploration and a bankable feasibility study; (iii) if the project is deemed viable, and Cyprus Amax elects to develop, a final payment of \$15 million will be made to the Government/ZCCM and the company will provide all the necessary finance to bring the mine into production. If the project does not proceed beyond stages (i) and (ii), the asset will revert to the Government/ZCCM and Cyprus Amax will pay 50 per cent of any shortfall in committed expenditures. Provided the deal goes through all three stages, the Government/ ZCCM will receive a total of \$28 million in cash and retain a 20 per cent interest in the mine. See ZPA (1997b), *Progress Report No. 10*, p. 42.

⁴⁶⁵Stipulated under the terms of a Small Scale Mining Agreement. See *ibid.*, p.42; and ZPA (undated), 'The Zambia Consolidated Copper Mines (ZCCM) Kansanshi Mine Sale: Questions and Answers.'

⁴⁶⁶The sale of Kansanshi is listed by the ZPA as completed on 14 March 1997. Formal production at the small-scale operations ceased on 15 January 1998. Cyprus Amax maintains that the decision to close was taken by ZCCM alone on commercial grounds, although under the terms of the agreement, Cyprus Amax could require such termination if the mining was deemed incompatible with its exploration work. See 'Kansanshi Mine Shut,' *Times of Zambia*, 14 January 1998; 'Kansanshi workers refute claims,' *Times of Zambia*, 28 January 1998; ZCCM (1997a), *Employee Privatisation Update*, Number 2, p.6; also Knight-Ridder Money Center, Story #16117, 13 January 1998; also Cyprus Amax (1998), 'Cyprus Amax Kansanshi PLC - Update of 1997 Exploration Activities'.

⁴⁶⁷See ZCCM (1997a), *Employee Privatisation Update*, Number 2, p.6; also Cyprus Amax (1998), 'Cyprus Amax Kansanshi PLC - Update of 1997 Exploration Activities'.

⁴⁶⁸See *intra*, Section 2(II), p.74 and p.92.

⁴⁶⁹Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 64.

⁴⁷⁰See ZPA (undated), 'The Zambia Consolidated Copper Mines (ZCCM) Kansanshi Mine Sale: Questions and Answers,' question 8: 'What will happen to the current ZCCM workforce at Kansanshi, given that construction of a new mine may not start for several years?' Answer: 'Cyprus Amax has agreed that while they are conducting their studies, ZCCM will have the right to continue mining on the current scale at Kansanshi. ZCCM is currently considering how this might be achieved and will keep its employees at Kansanshi informed. Employees living in ZCCM houses owned by ZCCM at Kansanshi will be entitled to live in their homes, regardless of whether the land is sold to Cyprus Amax.'

⁴⁷¹'Pruned Kansanshi miners cry for houses,' *Times of Zambia*, 13 April 1998.

⁴⁷²Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 64.

⁴⁷³'Pruned Kansanshi miners cry for houses,' *Times of Zambia*, 13 April 1998.

⁴⁷⁴Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 64.

⁴⁷⁵*Idem*.

⁴⁷⁶This is despite the fact that statutory impact studies commissioned by ZCCM recognised how 'many retrenchees struggle to cope with retrenchment' and that 'reckless spending of retrenchment benefits and the frequent failure of ill-considered business ventures' is common. (See ZCCM (1997g), *Kansanshi EIS*, Volume 4.1, Appendix C: Socio-Economic Issues, p.25). See also Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p.65: 'Some put it [their terminal benefits] into doomed commercial ventures, like buying taxis, only to find the cars they had required were not roadworthy. Most failed to use their terminal benefits to buy houses, with the result that whole families are now living in cramped accommodation and have suffered a sharp deterioration in their quality of life.'

⁴⁷⁷ZCCM (1997g), *Kansanshi EIS*, Volume 1, Executive Summary, p. 6.

⁴⁷⁸Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 63.

⁴⁷⁹*Ibid.*, p.66.

⁴⁸⁰Speech for Solwezi Disaster Relief delivered by a Cyprus Amax spokesman on 16 January 1998. For press coverage, see 'Cyprus Amax

Kansanshi spends \$7m on explorations,' *Times of Zambia*, 17 February 1997; 'Veep sounds further flooding alarm,' *Times of Zambia*, 17 February 1998; and 'Food rushed to hunger stricken areas,' *Times of Zambia*, 19 February 1998.

⁴⁸¹Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p.67.

⁴⁸²*Idem*. Oxfam reports that people will be given 14-year leases.

⁴⁸³See interview with Dave Watkins, senior vice-president of explorations, cited in Buchanan (1998), 'Slow progress for Zambian copper'.

⁴⁸⁴Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p.67.

⁴⁸⁵GC 7, para. 16.

⁴⁸⁶Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p.64.

⁴⁸⁷Confirmed by the Parish Priest, Father Cavalio. See Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, pp. 65 - 66.

⁴⁸⁸GC 7, para. 14 which continues: 'In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States Parties to ensure 'an effective remedy' for persons whose rights have been violated and the obligation upon the 'competent authorities (to) enforce such remedies when granted'.

⁴⁸⁹ZCCM (1991), Letter from W.L.A. Yasini, Administrative Secretary, Property Management Department, ZCCM Nchanga Division, to the Franciscan Fathers of St. Kizito Parish, 27 March.

⁴⁹⁰At the time, registration was normally required under the Land Perpetual Succession Act, Cap 288 of the Laws of Zambia, unless an exemption certificate was issued.

⁴⁹¹Confirmed by the Parish Priest, Father Cavalio. See Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, pp. 65 - 66.

⁴⁹²St Kizito Parish (1998), 'Report on the Kansanshi Chapel,' as cited in *ibid.*, p.66.

⁴⁹³GC 7, para. 17.

⁴⁹⁴ZCCM (1997g), *Kansanshi EIS*, Volume 4.1, Appendix C: Socio-Economic Issues, p.27.

⁴⁹⁵See Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, pp. 65 - 66.

⁴⁹⁶*Ibid.*, p. 66.

⁴⁹⁷It is reiterated in the Commission on Human Rights Resolution 1993/77 that 'the ultimate legal responsibility for preventing forced evictions rests with states'. In the authoritative report by the Secretary General on forced evictions it is noted that when a government accepts development assistance from international and monetary agencies that 'liability does not shift entirely to the provider of finance': the corollary, by implication, is therefore that a significant proportion of liability does indeed remain with the provider of finance (see E/CN.4/1994/20, para. 40).

⁴⁹⁸Resolution 1993/41 of the Sub-Commission. This recommendation was recently reaffirmed in resolution 1998/1.17, para. 6.

⁴⁹⁹See *intra*, Section 1, especially p.10 and pp.18 ff.

⁵⁰⁰GC 2, para. 6.

⁵⁰¹*Ibid.*, para. 7.

⁵⁰²*Ibid.*, paras. 8 and 8(d). Efforts to consider the rights contained in the Covenants apply in project design, implementation and evaluation.

⁵⁰³GC 4, para. 19.

⁵⁰⁴GC 7, para. 19.

⁵⁰⁵The Committee cites the Vienna Declaration and Programme of Action, Part I, para. 10 in this regard. See GC 7, para. 19.

⁵⁰⁶Under the ERIPTA credit a \$2 million project preparation facility advance was made available to fund the hiring of legal/financial advisors. See *ERIPTA M&R*, para. 11(i); see also *ERIP ICR*, para. 25.

⁵⁰⁷*ERIP ICR*, para.11. The legal covenant under Schedule 3,7 of the ERIP requires the Government to '[a]dopt and furnish IDA a satisfactory plan to privatize ZCCM.'

⁵⁰⁸See *ERIP ICR*, Table 6 - Status legal covenants, Schedule 3,1. The Government of Zambia issued its Mining Sector Policy Statement in December 1995.

⁵⁰⁹*ERIPTA M&R*, para. 5.

⁵¹⁰*ERIPTA M&R*, para. 12; also *idem*, Credit and Project Summary.

⁵¹¹The list is given as Government, the business community, workers representatives, professional associations and consumer groups. (*ERIPTA M&R*, para. 20)

⁵¹²ZCCM (1997f), *Report on Illegal Settlements in Mine Areas*, Executive Summary.

⁵¹³Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, p. 41.

⁵¹⁴See, for example, ZCCM (1997h), *Nkana EIS*, Volume 4.1, Appendix C, Socio-Economic Issues. Many of the recommendations are repeated in other statements.

⁵¹⁵OD 4.30, para. 2

⁵¹⁶In 1980 the World Bank issued its initial resettlement policy *OMS 2.33: Social Issues Associated with Involuntary Resettlement in Bank-Financed Projects*. In 1986, after a review of the policy, new recommendations were adopted by Bank management and issued formally as an Operations Policy Note (OPN 10.08). This strengthened the 1980 guidelines by emphasizing that every project with resettlement must develop a new productive base for resettlers. In 1988, the Bank published its policy on resettlement in its World Bank Technical Paper, No. 80, written by Michael Cernea. In 1990 the resettlement policy was revised and reissued as Operational Directive 4.30: Involuntary Resettlement. This policy is once more under review: please refer to *intra*, fn. 545.

⁵¹⁷Shihata (1993), 'Legal aspects of involuntary resettlement'.

⁵¹⁸OD 4.30, para. 1; see also *idem*, para. 3.

⁵¹⁹OD 4.30, fn. 1.

⁵²⁰Sector investment loans are specifically alluded to in OD 4.30, para. 26. However, whereas the submission of a time-bound resettlement plan and budget that conforms to Bank policy is a condition of appraisal for projects involving resettlement, subprojects under sector investment loans are to be screened by the implementing agency to ensure consistency with OD 4.30 before being approved individually by the Bank. The OECD Development Assistance Committee states that there should, in principle, be no difference between programme assistance and project assistance in the care with which loans are prepared. Social and political risks must be taken into account in programme design and special efforts made to counter them. (See OECD (1992b), *DAC Principles for Effective Aid*). Oxfam has drawn upon this interpretation to recommend that the Bank, in its revision of policies and procedures on resettlement, should ensure that these continue to apply fully to programme assistance and investment lending. (See Oxfam (1997), *Safeguarding Standards in Resettlement*, pp. 2 - 3). It should be noted that technical assistance loans are classified by the Bank as investment lending (see OP. 1.00).

⁵²¹OD 4.30, para. 3.

⁵²²*Ibid.*, para. 3(a).

⁵²³*Ibid.*, para. 3(b).

⁵²⁴*Ibid.*, para. 3(e).

⁵²⁵*Ibid.*, para. 3(c) - (d).

⁵²⁶OD 4.30, para. 4. Small-scale displacement is seemingly defined as involving 'less than 100-200 individuals.' By corollary, large-scale displacement is defined above this threshold. See *idem*, fn.8.

⁵²⁷Summarised under OD 4.30, para. 5(a) - (k). The final two components required in a resettlement plan are (j) environmental protection and management; and (k) implementation schedule, monitoring, and evaluation.

⁵²⁸OD 4.30, para. 6. The responsibility for implementing resettlement rests with the borrower; however, the Bank has a responsibility to ensure the plan is drawn-up and implemented in accordance with OD 4.30. See *idem*, paras. 25 and 31.

⁵²⁹OD 4.30, paras. 7 - 10.

⁵³⁰*Ibid.*, para. 11.

⁵³¹*Ibid.*, para. 12.

⁵³²*Ibid.*, para. 13.

⁵³³*Ibid.*, para. 14 - 16.

⁵³⁴*Ibid.*, para. 17.

⁵³⁵*Ibid.*, para. 19.

⁵³⁶*Ibid.*, para. 18.

⁵³⁷See *ibid.*, paras. 1, 3 and 28.

⁵³⁸*Ibid.*, para. 29.

⁵³⁹The only exception to this is under sector investment loans: a resettlement plan *per se* is not required when the resettlement needs of each subproject are not known in advance. In this circumstance, the borrower must still agree 'resettlement policies, planning principles, institutional arrangements, and design criteria that meet Bank policy and requirements as a condition of the loan.' See OD 4.30, respectively paras. 30 and 26.

⁵⁴⁰'The appraisal mission should ascertain (a) the extent that involuntary resettlement and human hardship will be minimized and whether borrowers can manage the process; (b) the adequacy of the plan, including the timetable and budget for resettlement and compensation; (c) the soundness of the economic and financial analysis; (d) the availability and adequacy of sites and funding for all resettlement activities; (e) the feasibility of the implementation arrangements; and (f) the extent of involvement of beneficiaries. At negotiations, the borrower and the Bank should agree on the resettlement plan. The resettlement plan and the borrower's obligation to carry it out should be reflected in the legal documents.' OD 4.30, Appraisal and Negotiation, para. 30.

⁵⁴¹OD 4.30, para. 31.

⁵⁴²This is to be done in the project completion report submitted to the Operations Evaluation Department. See OD 4.30, para. 32.

⁵⁴³*Ibid.*, para. 28.

⁵⁴⁴*Ibid.*, fn. 4.

⁵⁴⁵Principally ERIP, ERIPTA, the Mining Technical Assistance credit, and PSREPC. At the time of approval of all relevant loans, OD 4.30 was in force. This is the directive which should have applied to the Bank's ZCCM-related lending. The Bank is currently converting 'operational directives' to 'operational policies' and 'Bank procedures' and 'good practice'. The planned replacements for OD 4.30 are OP 4.12 and BP 4.12. However, these have not been adopted. Commentators consider the replacements to offer weaker protection for those affected by involuntary resettlement. See, for example, Oxfam (1997), *Safeguarding standards in resettlement*. For an overview of the conversion process, see Friends of the Earth (1997), 'The conversion of World Bank's Operational Directives into Operational Policies, Bank Practice and Good practice documents'.

⁵⁴⁶Hansungule et al. (1998), *Report on Land Tenure Insecurity on the Zambian Copperbelt*, Recommendations, p.72.