THE COMMISSION
OF INQUIRY INTO THE OIL-FOR-FOOD PROGRAMME
IN IRAQ

COMMISSION REPORT: 30 SEPTEMBER 2006

ERRORS IN COMMISSION REPORT: 30 SEPTEMBER 2006

Please note that the following errors in the initial Commission Report, delivered to the President on 6 November 2006, have been corrected in the manner set out below: -

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
1	14	[1.]	2	By deletion of the hyphen and its substitution with a comma.
2	15	[6.]	1 to 2	By deletion of the words "*Security Council Sanctions Committee ("the 661 Committee")*", and their substitution with the words "*661 Committee*".
3	21	7.5	5	By the deletion of the last word *viz.* "*seller*", and its substitution with the word "*sellers*".
4	23	[12.]	1	By the deletion of the word "*material*".
5	23	[12.]	2	By the deletion of the word "*for*" and its substitution with the word "*to*".
6	23	Fn 19	2	By renumbering "*Document No. 2*" as "*Document No.3*".
7	27	[25.]	4	By the deletion of the last word in the first sentence *viz.* "*there*" and its substitution with the word "*therein*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
8	32	Fn 26		By the addition, before the words "*Section 85*", of the word "*Compare*".
9	35	Fn 35		By citing the case of "*Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs*" in small print instead of large.
10	42	[26.]	5	By the deletion of the word "*preventive*"
11	47	[38.]	4 to 5	By the addition, after the word "*deal*", of the word "*with*".
12	48	[42.]	1	By the insertion of a comma after the word "*made*".
13	48	[42.]	3	By the deletion of the existing comma.
14	53	[14.]	3 and 5	By the deletion of the existing commas, as well as by the insertion of a comma, between the words "*that*" and "*whether*" on line 3.
15	56	Fn 48 and 49		By the deletion of page references 1 to 6 in both footnotes.
16	57	[24.]	4	By the deletion of the words "*Bay Oil*" and its substitution with the word "*Koch*".
17	67	[58.]	12 to 14	By deleting the clause which appears after the colon, and its substitution with the following: "*that is, explaining how he proceeded to negotiate more oil contracts after Mocoh had already incurred an obligation to pay surcharges*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
18	68	[60.]	16 (4th line from the end of [60.])	By the deletion of the word "*Imvume*" and its substitution with the word "*Mocoh*".
19	77	[8.]	2	By the deletion, between the word "*Iraq*" and the words "*the supplier*", of the word "*by*", and its substitution with the word "*from*".
20	85	[9.]	2	By the deletion of the words "*relate to*" and their substitution with the words "*deal with*".
21	87	[18.]	4	By the insertion of an apostrophe before the last letter of the word "*Pumps*", i.e. the word "*Pumps*" is substituted.
22	88	[21.]	2	By the insertion of a comma after the name "*Bruggeman*".
23	89	[25.]	3	By the insertion of the word "*also*" after the word "*it*".
24	91	[28.]	1	By the deletion of the words "*the letter*", and their substitution with the word "*it*".
25	102	[60.]	1	By the insertion of an apostrophe before the last letter of the word "*Commissions*", i.e. the word "*Commission's*" is substituted.
26	102	[60.]	1	By the addition of the letter d to the last word "*acknowledge*", i.e. the word "*acknowledged*" is substituted.
27	104	[66.]	10 (i.e. the 2nd last line of the par.)	By the deletion of the word "*whether*" and its substitution with the word "*that*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
28	105	[70.]	2	By the insertion of a comma after the bracket.
29	108	[5.]	2	By the insertion of the word "*former*" before the words "*Divisional Managing Director*"
30	108	[5.]	3	By the insertion of the word "*former*" before the words "*General Manager Business Development*".
31	111	[15.]	2	By the deletion of the abbreviation "*No.*" and its substitution with the word "*Number*".
32	111	[15.]	4 to 6	By the deletion of the last sentence and its substitution with the following sentence: "*Even before the formal imposition of ASSF, the Iraqi Ministry of Health demanded a bribe before it would contract with Reyrolle*".
33	114	[27.]	6 (i.e. the last line of the par.)	By the deletion of the word "*concluded*" and its substitution with the word "*determined*".
34	115	[30.]	5	By the deletion of the numerals "*11*" and their substitution with the numerals "*12*".
35	117	[35.]	1	By the deletion of the word "*was*".

	Page reference	Paragraph or footnote	Line(s)	Manner of correction
36	119	[42.]	6	By the deletion of the second and third sentences and their substitution with the following: "*The application to ship goods to Iraq was submitted by the Mission on 7 December 2000, and approved by the OIP on 13 February 2001. The goods included various transformers, a Cutler Hammer, 1600 Amp Busbar Trunking, an ABB, Powertech Dry type stepdown fan, a medium voltage switchboard, Busways 16000 and 5000 Amp Ratings, and a complete High Voltage Substation*".
37	120	Fn 133		By the deletion of the numerals "*105*" and their substitution with the numerals "*106*".
38	126	[15.]	1	By the deletion before the word "*summons*" of the word "*the*" and its substitution with "*a*".
39	132	[4.]	5	By the substitution of the word "*possible*" with the word "*possibly*".
40	136	Intro par.	2	By the deletion of the word "*First*", and by its substitution with the word "*Firstly*".
41	141	Intro par.	5	By the deletion of the word "*first*".
42	142	Omni Oil 2)	2	By the substitution of the word "*is*", with the word "*was*".
43	146	Falcon 2 (c)	1	By the deletion of the comma, after the reference "*Euro 21, 780*".

The Commission regrets any inconvenience caused by the need to effect the above amendments.

4 December 2006

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[1.] This report encompasses the investigation by the Commission up until, and including, 30 September 2006. It elaborates upon and should be read together with the Commission Report, dated 17 June 2006 ("*the June Report*").

[2.] In the June Report the Commission set out certain allegations made by the Independent Inquiry Committee ("*the IIC*"), and analysed these with reference to documentation, relating to the following subjects of the Commission's investigation *viz.*:

2.1 Contracts involving purchases of oil by Montega Trading (Pty) Ltd ("*Montega*"), Imvume Management (Pty) Ltd ("*Imvume*") and Omni Oil ("*Omni*");

2.2 the non-contractual beneficiaries of the these contracts *viz.* Mr. Sandi Majali ("*Majali*") and Mr Shaker Al-Khafaji ("*Al-Khafaji*")[1]; and

2.3 the sale of humanitarian goods by Falcon Trading Group Limited ("*Falcon*").

[3.] Without the exercise of its unchallenged powers to summons and question the necessary witnesses, *viz.* Majali, Ivor Ichikowitz

[1] In the documentation, the first name of Al-Khafaji is Shakir. This spelling is used below.

("*Ichikowitz*"), George Poole ("*Poole*"), Riaz Jawoodeen ("*Jawoodeen*") and Mr Rodney Hemphill ("*Hemphill*"), or the input of Mr Kgalema Motlanthe ("*Motlanthe*")[2], the Commission will remain unable to investigate and establish, with any evidential certainty, whether the four entities and two persons aforementioned paid or offered to pay surcharges or kickbacks[3].

[4.] The relevant terms of reference were therefore executed in an attenuated form. Certain other terms of reference[4], which flow from the conclusion that such payments were in fact made or offered to be paid, may also be affected. Similar limitations apply to the investigation dealt with in the present report, except in relation to Ape Pumps (Pty) Ltd ("*Ape Pumps*").

[5.] This report analyses the allegations made by the IIC in relation to:

5.1 The contracting company, Mocoh Services South Africa (Pty) Ltd ("*Mocoh*"), and its non-contractual beneficiary, Mr Michael Hacking ("*Hacking*"), whom the IIC Report held responsible for three surcharge payments into an account at Jordan National Bank; and

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2 Mr Motlanthe is pertinently identified in the text of the IIC Report, and in the tables annexed thereto, as a witness to the alleged illicit activities of Majali and Imvume. Commissioner Chauke has for some time been addressing proposed input by Mr Motlanthe, in the form of an affidavit. A meeting with Mr Motlanthe's Counsel was arranged. This was prevented by the effluxion of the period within which the Commission was bound to present its final report.

3 For convenience illicit payments in regard to purchases of humanitarian goods (as opposed to surcharges on oil sales) are referred to as kickbacks.

4 Notably the terms of reference 1(i)(b), (c), and (d).

5.2 the supplier companies, Ape Pumps, Glaxo Wellcome SA (South Africa) (Pty) Ltd ("*Glaxo Wellcome*") and Reyrolle Limited ("*Reyrolle*").

[6.] Once again the conclusions that have been drawn in this report, rely almost entirely on a study of documentation, largely hearsay. In the case of Mocoh, a statement directed to the Commission by Mr Tokyo Sexwale ("*Sexwale*"), is examined and analysed with reference to documentation.

[7.] The study in this report gives rise to specific questions which ought to be directed at the witnesses identified. Because of pending litigation in the Pretoria High Court ("*the pending litigation*") and time constraints, this proved to be impossible before 30 September 2006. As will appear below, questions which were directed by the Commission in writing to material witnesses have largely been avoided. It is therefore recommended that the Commission should be permitted to exercise its powers, to summons and question witnesses under the Commissions Act, 1947 (Act 8 of 1947) ("*the Commissions Act*"), subject to the privilege against self-incrimination which is granted to witnesses by section 3 of this act.

[8.] In Part F of the June Report, the Commission described how it had been prevented from carrying out its terms of reference by the pending litigation, as well as by previously imposed time constraints. Since that time, the resources of the Commission have been taxed by exigencies

of the pending litigation and analyses of a plethora of documents. The latter occurred without the benefit of input from the authors of documents: as a result of the inability of the Commission to exercise the aforementioned powers.

[9.] The Commission was established by the President's Minute, signed on 3 February 2006. At its inception the Commission was required to report to the President by 17 May 2006[5]. On 31 May 2006, the Commission was notified of an extension of this period, until 17 June 2006. On 8 August 2006, the date was extended to 30 September 2006, pursuant to a President's Minute. The duration of each extended period, from the time that notice was given to the Commission till it ended, was insufficient to permit the timeous issue of summonses to necessary witnesses in terms of section 3 of the Commissions Act, as well as to conduct hearings in order to receive oral evidence and analyse the relevant evidence.

[10.] From 2 June 2006, the Commission was constrained to negotiate with the lawyers of Hemphill, the applicant in the pending litigation. On 3 August 2006, it became apparent that he had no intention of ever answering questions put to him by the Commission, whether or not the questions and answers were affected by his application. The Commission was then constrained to focus its resources, until 18 August 2006, on the drafting of a comprehensive answering affidavit in

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5 In terms of paragraph 2 of the terms of reference published in a Schedule in the Government *Gazette* No. 28528 on 17 February 2006.

order to assist the Court. These facts and circumstances are set out in Part H[6].

[11.] By agreement with the legal advisors of the President, while the litigation was pending the Commission did not use its coercive powers under the Commissions Act: that is, to summons witnesses in order to examine them under oath and to compel them to provide documentation in their possession[7]. Instead, the Commission engaged in correspondence in order to obtain answers and documentation. This process was time consuming. Witnesses delayed in responding to the Commission's written requests. They produced only what they were inclined to produce, and did so in the form of their choice. Except in the case of one compliant subject, it remains necessary for the Commission to use its statutory powers in order to deliver a comprehensive report to the President, based on a conclusive investigation of IIC allegations against South African companies and individuals.

[12.] The one exception is Ape Pumps, which responded punctiliously to the Commission's summons to produce documentation, in spite of the pending litigation. From the documents produced, the Commission was able to conclude that Ape Pumps paid after-sales-service fees ("*ASSF*") to Iraqi government institutions on two contracts, in the amounts of Euro 67, 894.20, and Euro 3, 122.20, respectively. The

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6 For convenience that part of the answering affidavit which deals with the delay in filing the Commission's answer (*viz.* pages 25 to 34), as well as the annexures thereto are contained in an Addendum to this report. See Document No. 1 in Addendum 3.

7 See section 3 of the Commissions Act.

success of this exercise and the ease with which the Commission's objects were achieved in the investigation of Ape Pumps are testimony to the effectiveness of the residual powers of the Commission which are not subject to the pending litigation.

[13.] The report is divided into 9 parts before the conclusions of the Commission are set out. Part A deals with the period under investigation, as well as the attitudes of the UN and the Iraqi regime towards illicit payments at that time.

[14.] Part B is a statement of the principal exercises which the Commission regards as necessary in order to conclude its mandate according to its terms of reference. In the Commission's view, the implications of the terms of reference are such that further investigation remains necessary. Part B also includes a description of certain techniques of investigation into illicit payments which appeared as a result of the meetings held between Counsel for the IIC and the Commission during March 2006.

[15.] Part C explores further recommendations which have become apparent since the June Report was presented to the President, as well as certain considerations that affect the recommendations made therein. These considerations were precipitated by the useful input of the Department of Minerals and Energy ("*the DME*").

[16.] Part D deals with the investigation of whether or not surcharges arising from two oil contracts, in the amounts of US $ 94, 631 and US $ 480, 068 were paid by Mocoh, as stated in the Commission's terms of reference.

[17.] In Part E, the allegations made by the IIC and its methodology in relation to kickbacks, are set out.

[18.] In Parts F, G and H the Commission analyses certain documentation relating respectively to Ape Pumps, Reyrolle and Glaxo Wellcome; in order to establish whether the kickbacks identified in the Commission's terms of reference were paid by these companies.

[19.] In Part I, the Commission deals with the approach it adopted towards the pending litigation. The Commission requested the Pretoria High Court, as a matter of urgency, to authorise the Commission to exercise powers to summons and question Hemphill and other material witnesses – if necessary without requiring them to answer self incriminating questions. The object of this request has apparently been defeated.

[20.] The Commission's findings up to 30 September 2006, are set out in the conclusion, together with certain recommendations. The President is then formally requested to permit the Commission to file a further report, at least 12 weeks after notice of such permission has been communicated to the Commission. The President is also requested to

authorise the Commission to use unchallenged statutory powers to summons and question witnesses during this period, i.e. subject to the right of each witness to refuse to answer questions on the ground that the answers may incriminate her or him under South African law.

[21.] Such permission and authority would allow the Commission to complete its investigation. In this twelve week period, the Commission would seek to obtain the input of witnesses to the alleged activities of Glaxo Wellcome and Reyrolle, as well as material cooperation from certain witnesses referred to in this report.

[22.] Meanwhile, it is respectfully suggested that any adverse findings made against subjects of the Commission's enquiry in this report and the June Report, should be presented to the subjects in question for their comment before the findings are made public. This process would not only allow the Commission to benefit from the direct personal knowledge of each subject, but it would also prevent adverse, possibly mistaken findings, from being made without the application of the *audi alteram partem* rule.

[23.] Without the application of the just administrative action provisions referred to in section 33 of the Constitution of the Republic of South Africa, 1996, the adverse findings may prove to be unfair and unconstitutional. The procedure proposed is also consonant with the terms of reference. These imply that the IIC made findings without

reference to all but two of the South African companies and individuals identified in the Annexure to the Schedule[8].

[24.] The subjects of the Commission's enquiry against whom adverse findings are made include Majali, Al-Khafaji, Hacking, Montega, Imvume, Mocoh, Omni, Ape Pumps and Falcon. Of these Al-Khafaji and Hacking reside beyond the jurisdiction of the Commission. Omni and Falcon are entities that appear to be controlled by Al-Khafaji.

[25.] The Commission has made the following adverse findings against Majali and the remaining companies, all of whom are South African *viz.*:

25.1 Majali, representing Imvume, probably offered to pay oil surcharges owed by Montega, in a total amount of US $ 464, 000;

25.2 it is not improbable that an advance surcharge of US $ 60, 000 was paid for and on behalf of Imvume;

25.3 Hacking made two surcharge payments in Swiss Francs for and on behalf of Mocoh in the amounts of CHF 424, 995 and CHF 550, 630, respectively;

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[8] See the fourth paragraph of the preamble and paragraph [67.] of the June Report.

25.4 Ape Pumps paid kickbacks in the amounts of Euro 67 894.20 and Euro 3, 123.

[26.] Documents referred to in this report, in the form of an addendum (Addendum Three) will be submitted in due course. **Except in Parts C and I, and the conclusion, certain observations by and comments of the Commission, as well as information introduced *en passant* by the Commission are printed in bold.** Significant words and phrases have been underlined by the Commission for emphasis.

PART A

THE PERIOD OF ILLICIT ACTIVITIES AND ATTITUDES AT THE TIME

[1.] With the passage of Resolution 661, the Security Council created a special sanctions committee, the 661 Committee, comprised of all fifteen Council members in order to conduct ongoing oversight of the Iraq sanctions regime. Eventually the 661 Committee was entrusted with "*monitoring the implementation of the sanctions regime in all its aspects*" in conjunction with the "*cooperation of Member States and international organizations*"[9].

[2.] **The period during which illicit activities occurred was relatively brief. The tragic effects of economic sanctions were catastrophic. The contradictions within the "*smart sanctions*" created by Resolution 986 were confusing. For many UN member states, humanitarian considerations and economics seemed to take precedence over the strict application of international obligations. Corporations acted accordingly.**

[3.] Resolution 986 was adopted in April 1995. Oil exports from Iraq did not begin until December 1996. The first humanitarian goods did not arrive in that country until March 1997. The Programme was just under

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[9] See IIC Report Management of the Oil-For-Food Programme: Volume II – Chapter 1, page 17 of 259.

three years old when the Iraqi regime openly began to demand illicit payments from its customers[10].

[4.] The Oil Overseers[11] expressed their concerns in this regard to the Secretariat of the UN[12] and to the Security Council. Little action was taken. The central conclusion of the IIC was that a failure in UN oversight and management had occurred.

[5.] **No doubt the *insouciance* of the Security Council had a trickle down effect on corporate participants in the Programme and their states of nationality. Certainly, the escrow bank (BNP), which was in a position to have first hand knowledge, did not recognise or carry out its responsibility to inform the UN of illicit activity[13]. Permanent Missions to the UN contributed to the approval of participation by their national companies in the Programme. They also took no action.**

[6.] The sale of crude oil had to be monitored and approved by the 661 Committee. However, the Iraqi Ministry of Oil and its marketing arm, the State Oil Marketing Organisation ("*SOMO*") were given "*significant*

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10 See IIC press release, dated 27 October 2005, on www.iic-offp.org.

11 The 661 Committee's rules provided for it to select at least four independent experts in the international oil trade to act as overseers of oil transactions, to assist the 661 Committee with its obligation to ensure that Iraq sold oil only at fair market value and to examine contracts in order to ensure that they complied with the Programme and did not contain attempts of fraud or deception.

12 The UN Secretariat comprises of the Secretary-General and such staff as the organisation may require.

13 As to the appointment and functions of the escrow bank, see the June Report, paragraphs [37.] and [38.] at pages 27 to 28. Banque Nationale de Paris S.A was appointed in 1996 by the Secretary-General to serve as the escrow bank under the Programme. Proceeds of the sale of Iraqi oil were required to be placed with the escrow bank and were to be used strictly to provide for the humanitarian needs of the civilian population of Iraq through the Programme.

leeway" in choosing their customers and the amount of oil to be sold to each one. In the early autumn of 2000, the Government of Iraq ordered that surcharges be imposed on every barrel of oil sold under the Programme. The scheme was implemented by the Ministry of Oil and SOMO. It lasted for over two years from the middle of Phase 8 through the middle of Phase 12.

[6.] The SOMO database maintained a running tally of surcharges collected – organised by beneficiary and by contracting company. This source of evidence was dealt with in the June Report. Most surcharges were paid through deposits to designated SOMO bank accounts in Jordan and Lebanon, usually to Fransabank in Lebanon and the Jordan National Bank.

[7.] The largest source of illicit income under the Programme accrued to Iraq from "*kickbacks*" paid on behalf of companies that it had selected to receive contracts for humanitarian goods. The kickback policy began in mid 1999 with an unauthorised attempt to collect Iraq's costs for transporting goods to inland destinations after their arrival by sea at the port of Umm Quasr. It was easy to impose inland transportation fees ("*ITF*") that far exceeded actual transportation costs.

[8.] During mid 2000, Iraq instituted a broad policy of imposing a general ten-percent kickback requirement on all humanitarian contractors in addition to the requirement for contractors to pay ITF. ASSF were incorporated into contracts. The contract prices were inflated

accordingly. Contractors were able to pay kickbacks to the Iraqis secretly and to recover the amount paid from the escrow account.

[9.] According to the IIC Report, the relevant period for the investigation of surcharges commenced in mid 2000. Inferences that kickbacks were paid as a result of Iraqi policy can only be drawn from mid 2000. The cut off period for the payment of kickbacks in the IIC Tables is 1 July 2003. Documentation relating to the activities of Reyrolle shows that the Iraqi Ministry of Health was demanding bribes from potential contractors during late 1999.

[10.] The IIC found that many companies were not prepared to openly pay kickbacks. Instead they would make payments to third parties or agents without examining or admitting to the likely purpose of these payments. Ape Pumps and Reyrolle documentation supports this conclusion. The IIC calculated that more than two thousand two hundred companies worldwide paid kickbacks to Iraq in the form of ITF or ASSF or both.

PART B

THE COMMISSION'S PRINCIPAL TERMS OF REFERENCE, THEIR OBJECT AND IMPLICATIONS FOR THIS INVESTIGATION

[1.] **This part of the report deals firstly with the object of the Commission's terms of reference. Thereafter the principal terms of reference are stated. The observations and comments of the Commission are printed in bold.**

[2.] The object of the Commission's terms of reference is to advise the Government of South Africa on the appropriate action or steps to be taken in relation to the alleged involvement of any identified South African company or individual in illicit activities alleged by the IIC[14], and the adoption of any preventative measures to avoid any such future illicit activities. The proposal of measures aimed at preventing sanction busting in the future by companies or persons falling under South African jurisdiction is pertinently expressed in the term of reference numbered 1(i) (e).

[3.] To achieve these objectives the Commission must investigate and determine whether surcharges on oil sales and kickbacks were in fact paid, or offered to be paid, by identified South African companies or individuals as set out in the Annexure to the Schedule which specifies the Commission's terms of reference ("*the Annexure*").

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[14] In the final report of the IIC, published on 27 October 2005.

[4.] In relation to proof of illicit payments the documentation in possession of the Commission suffers from evidential inadequacy.

[5.] Offers to make illicit payments can be established from official documents. During the period of the Programme official applications and contracts were processed by the South African Permanent Mission to the UN ("*the Mission*") and the UN's Office for Iraq Programme ("*OIP*") which administered the Programme. During 2003 certain illicit payments (in the form of ASSF), were removed from the sale prices of humanitarian goods by formal written amendment of the original contracts. These amendments tend to prove that originally the payment of kickbacks was agreed to by the Iraqis and the contractors in question. The amendments do not prove that the kickbacks were paid, but suggest the contrary. Evidentially they constitute proof of attempts by contractors to make illicit payments. The amendments were executed officially and were made available to the Commission by the IIC (e.g. the amendment signed by Hemphill and identified in the June Report[15]).

[6.] However, most of the documentary evidence of illicit activities was unofficial. This could best be sourced from the companies and individuals under investigation i.e. through the exercise of the

15 See paragraph [90.], page 59 of the June Report.

Commission's powers (or the spectre of the exercise of such powers). These powers were rendered nugatory in circumstances described elsewhere in this report.

[7.] The following documentary evidence was regarded as material by the IIC and was requested by the Commission (or sought in other ways), from the four subjects who are alleged in the Annexure to have paid kickbacks in the form of ASSF or ITF.

7.1 Side agreements in terms whereof the seller would agree to pay ASSF and/or ITF directly to an Iraqi government department or state controlled institution. (Five side agreements identified in the June Report[16] illustrate this phenomenon in the case of Falcon.)

7.2 Tenders submitted by companies for the supply of humanitarian goods that differed in price by approximately ten percent from the selling price approved by the UN (i.e. by the amount of ASSF).

7.3 Agreements concluded by contractors with agents who were located outside of South Africa. These agents dealt directly with the Iraqis (often to the exclusion of the seller), in presenting the tenders, inflating selling prices to include ASSF and ITF (in addition to agent's commissions), and in

16 See footnote 31 at page 57 of the June Report.

facilitating payment of kickbacks directly to Iraqi bank accounts. These agency agreements were sometimes characterised by the absence of a proper term specifying the agent's commission or a basis for calculation of this commission.

7.4 Guarantees by the sellers or their banks, to the effect that kickbacks would be paid.

7.5 Letters of credit issued by the bank of the seller in favour of the relevant purchaser, usually an Iraqi government department or institution. (The legitimate letters of credit contemplated by the Programme were intended to be issued by the escrow bank in favour of the sellers).

7.6 Bank documentation indicating that illegitimate guarantees or letters of credit referred to above were given effect to.

7.7 Bank records of the sellers which indicate the payment of inflated commissions to agents.

7.8 Documentation indicating that after-sales-service fees were paid together with the principal contract price: but well before after sales service either became necessary or desirable.

[8.] **The abovementioned documentation ought to be obtained from the subjects of investigation by way of summons, in terms of section 3 of the Commissions Act.**

[9]. **In order for the Commission to become properly informed of the facts, so as to enable it to determine the involvement of companies or individuals and recommend preventative measures and systems, it is essential for the Commission to interview officials of the Mission who were involved in the Programme. They are Mr Andries Dormehl ("*Dormehl*"), Mr Simon Cardy ("*Cardy*") and Mr Fadl Nacerodien ("*Nacerodien*"). The Commission has had to speculate about illicit activities with reference only to documents. The content of these documents suggest that Cardy (and Dormehl) were intimately involved in the processing and execution of every contract under investigation by the Commission, except for the Mocoh contracts. Since the June Report was delivered, similar considerations have arisen in relation to officials at the South African Mission in Jordan (particularly Mr S Du Plessis), who were involved in facilitating humanitarian contracts[17].**

[10.] **The Department of Foreign Affairs ("*the DFA*") was informed of the nature and scope of the proposed interviews[18]. The DFA did commit itself to cooperation in this regard by 30 September 2006.**

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17 See the section on Reyrolle below.

18 See the letters exchanged between the Commission and the Department, Document No. 2 in Addendum 3.

[11.] **While the documentation analysed in the June Report suggests that Majali/Montega/Imvume offered to pay the surcharges levied on Montega Contract No. M/09/06, and/or paid an advance of US $ 60, 000 on the First Imvume Contract (as outlined in the Annexure), Majali disputes these conclusions. For the purposes of making the initial factual findings required by the terms of reference, these issues will not be disposed of until after Majali, Ichikowitz, Poole, Jawoodeen (and possibly Hemphill), have provided the Commission with material information.**

[12.] **Motlanthe, similarly, appears to be privy to information which is material to the resolution of these issues. The Commission has therefore been constrained to seek his assistance. The information in question relates to Imvume/Majali's attempt to pay oil surcharges owed by Montega, from the proceeds of two Imvume contracts that were concluded as a result of Motlanthe's alleged support. Allegedly Motlanthe attended a meeting held on 10 May 2002, between Majali and Iraq's Deputy Prime Minister, Mr Tariq Aziz ("*Aziz*")[19], where settlement of the aforementioned surcharge debts was proposed. The questions which require an answer from Motlanthe, as well as the relevant document which**

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19 See the IIC Report on Programme Manipulation: Chapter Two: Oil Transactions and Illicit Payments, page 113 of 623: Document No. 3 in Addendum 3. See too IIC Table 3, page 30 of 60 (Document No. 3 in Addendum 3.), which suggests that the instruction to award Imvume, Contract No. M/11/72 involved a letter from Kgalema Motlanthe, Secretary General of the ANC. See too the June Report, paragraph [127.] at page 76, that deals with a letter addressed to Aziz by Motlanthe. The Commission has sought to obtain a copy of this letter from the Embassy of Iraq via the Department of Foreign Affairs. A copy of the Commission's request is Document No. 4 in Addendum 3. The DFA has not replied to the Commission's request for assistance.

he may possess, have been identified in correspondence with Motlanthe's attorney[20].

[13.] In the June Report, the Commission concluded that Omni and Falcon were neither companies nor South African. Difficulties of jurisdiction and admissibility of evidence arise in the investigation of Omni, Al-Khafaji and Falcon. These would be overcome by the oral testimony of Hemphill.

[14.] The position in regard to the investigation of Mocoh, Reyrolle and Glaxo Wellcome is dealt with further below. Glaxo Wellcome has avoided the attention of the Commission, both as a result of the pending litigation and the effluxion of time.

[15.] By virtue of the conclusion that the payment of surcharges and kickbacks were not illegal in South African law it is apparent that the Commission may legitimately rely on the powers to summons and question witnesses, which are vested by the Commissions Act, subject to the privilege against self-incrimination. The exercise of this power would enable the Commission to reach evidentially sound conclusions.

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20 On 15 September 2006, Mr S Hockey of the attorney's firm, E Moosa, Waglay and Petersen (who represent Motlanthe), undertook to revert to the Commission as soon as they received instruction from their client. Mr Hockey duly reverted and proposed a meeting with Motlanthe's Counsel, Advocate Seth Nthai. This meeting could not take place before 30 September 2006. Correspondence exchanged between the Commission and Motlanthe as well as his representatives, forms Document No. 5 in Addendum 3.

[16.] The investigation, proposed action and recommendations to remedy conduct outlined in the terms of reference, appear to relate to two classes of conduct *viz.* offences on the one hand and illegal activity which contravenes any other South African law on the other[21].

[17.] **Because of time constraints, the Commission has not yet investigated each and every source of existing legal regulation, not amounting to an offence, which may have been violated by the payment of surcharges or kickbacks.**

[18.] **Before the Commission can advise on preventative measures in the future, it becomes necessary to establish and analyse all the material facts related to past "*illicit activities*": i.e. whether or not the conclusion is reached that a particular subject of this investigation participated in or contributed to an illicit activity illegally or in bad faith. As stated in the June Report, the illicit activities under investigation involved a multiplicity of participants between the actual buyers and sellers who concluded the contracts listed in the Commission's terms of reference. Some of the participants may have acted in good faith[22].**

[19.] As a "*first step*" in the investigation, all evidence and information obtained and assessed by the IIC which related to payments by South African companies or individuals, had to be accessed and analysed.

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21 See the term of reference numbered 1 (i) (c).

22 See June Report, paragraphs 21.13, 21.14 and 21.15.

The relevant payments are identified in the IIC Tables that accompany the IIC Report and are repeated in the Annexure.

[20.] **An analysis of certain documentation provided to it by the IIC has been carried out by the Commission. However, the IIC has refused to furnish the Commission with certain evidence e.g. copies of recordings and transcripts of statements made by South African individuals such as Majali and Hemphill. The IIC may have also failed to provide the Commission with further information contemplated by the abovementioned "*first step*".**

[21.] **Also relevant to the investigation were the records of Alia Transport ("*Alia*"), an agent of the Iraqi regime. This agency collected illicit payments due by contractors under the guise of being a legitimate carrier of humanitarian goods. Some of Alia's records were provided to the Commission by the IIC. As will appear below, when conclusions are sought to be drawn in relation to Glaxo and Falcon, *lacunae* in the Alia records become apparent.**

[22.] **Some conclusions reached by the Commission on the basis of information provided to it by the IIC, differ from those reached by the IIC in the IIC Tables. Resolving this conflict is complicated, because the IIC has effectively been dissolved. The Commission would therefore seek to debate the major differences with Mr Brian Mich ("*Mich*"), Counsel for the IIC. He retains both the**

necessary authority to debate the differences, as well as any data that may have given rise to them.

[23.] Should the Commission conclude that surcharges or illicit payments were in fact paid or offered to be paid by the listed companies or individuals, the Commission is bound to report and to make recommendations as to whether or not such conduct falls within the jurisdiction of a South African court: and if so, whether any conduct as outlined in the Annexure amounts to the commission of an offence which may be tried by a South African court. Furthermore, whether there is sufficient and admissible evidence to provide a reasonable prospect of success in any prosecution which may follow. In the case of the commission of an offence, or other illegal, illicit or irregular activity action or steps to be taken, must be proposed.

[24.] Finally, any further proposed actions or steps to be taken to prevent sanction busting in the future by companies or persons falling under South African jurisdiction, are required to be investigated and reported on, and recommendations made.

[25.] **In the June Report[23], the Commission concluded that certain payments of surcharges (by Mocoh and Omni) and the offer to make payments of surcharges (by Majali/Montega/Imvume), were supported by the documentation analysed therein. Similarly, the Commission concluded that Falcon had agreed to pay ASSF and**

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23 See paragraph [48.] at page 36 of the June Report.

ITF. A further conclusion reached was that these payments did not constitute offences which may be tried by a South African court. The primary reason for this conclusion was that no legislation currently exists in South Africa that binds individuals to obey Security Council resolutions made under Chapter VII of the UN Charter.

[26.] In spite of this conclusion, the course of "*the conduct*" of certain companies or individuals outlined in the Annexure (as well as the documented conduct of Hemphill), could fall within the jurisdiction of a South African court, and may be tried: in that it is shown to have been associated with and part of other activity that was unlawful.

[27.] The conduct in question involved the conclusion of identified contracts by individuals on behalf of identified entities. Contracts arose after applications to participate in the Programme, and each contract had been approved by the 661 Committee established by the Security Council. The applications and contracts were processed through the Mission. The process involved making representations to the Mission and the UN to the effect that the applicant entity was a South African company.

[28.] Hemphill misled the Mission and the OIP into believing that Omni and Falcon were South African companies.

[29.] Every contractor recorded acknowledgement of the fact that Resolutions 661 and 986, as well as the Memorandum of Understanding between the UN and Iraq ("*the MOU*"), were applicable to the transactions subject to approval by the UN. Applicants can be deemed to have been aware that UN sanctions prohibited direct payments to the Iraqis and that this principle underlay the Programme and bound South Africa.

[30.] Proof of the offence of fraud would require evidence that the representors such as Majali/Montega/Imvume (and Hemphill on behalf of Omni and Falcon):

a) knew that the surcharges and kickbacks listed in the Annexure would have to be paid at the time when they relied on the Mission to deal with the UN in facilitating their contracts;

b) nevertheless represented to the Mission that they intended to comply with the MOU, as well as the provisions of Resolutions 661 and 986; and

c) intended to make illicit payments to the Iraqis.

[31.] The relevant documentation which the Mission processed seems to contain acknowledgements by subjects of this enquiry, to the effect that Resolutions 661 and 986 and the MOU were applicable.

[32.] **Majali/Imvume may have perpetrated another fraud on the Republic of South Africa, i.e. by knowingly selling oil tainted by surcharges to a state controlled institution *viz.* the Strategic Fuel Fund ("*the SFF*"), without making the necessary material disclosure that the oil sales in question involved the payment of surcharges. The SFF fell under the auspices of the DME which was bound to uphold Security Council resolutions. The Republic of South Africa therefore suffered prejudice or potential prejudice as a result of this non-disclosure.**

[33.] **To the extent that the conduct referred to in the previous five paragraphs is not specifically outlined in the Annexure, it is so closely connected thereto that, in view of the Commission, it stands to be dealt with under the term of reference which requires the Commission to propose further action or steps to be taken to prevent companies or persons falling under South African jurisdiction from getting involved in future illegal, illicit or irregular international activities, or to propose the establishment of systems and mechanisms, so as to ensure that such companies and persons do not, in future, contravene binding UN resolutions[24]. As will appear below, the leadership role of the DME may have to be addressed in this regard.**

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[24] See the term of reference numbered 1(i) (e).

PART C

SUPPLEMENTARY RECOMMENDATIONS ARISING FROM INVESTIGATION AFTER JUNE REPORT

[1.] In Part D of the June Report[25], the Commission raised six possible recommendations. Those recommendations are now endorsed, amplified, and commented upon in the light of further investigation as well as the input made by the DME. The Commission is indebted to the DME and particularly to Advocate Sandile Nogxina, the Director-General of the DME ("*Advocate Nogxina*"), for their contribution.

[2.] In the June Report the Commission made two distinctions:

2.1 Firstly, between sanctions proper and the ameliorated sanctions imposed under the Programme; and

2.2 secondly, between criminal measures and regulatory measures intended to prevent sanction busting.

[3.] Sanctions proper had to be enforced by South Africa in terms of the provisions of Resolution 661. A primary purpose of this resolution was to impose an obligation on member states, including South Africa, their nationals and persons within their territories from making funds available to the Iraqi Government and its institutions. Responsibility

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25 See paragraph [60.] of the June Report.

rested upon the states to control the individual. No legal obligation rested upon the individual.

[4.] Ameliorated sanctions were determined by Resolution 986 and the MOU. Their object was to provide for the humanitarian needs of the Iraqi people, and still achieve the aforementioned primary purpose. Two mischiefs appeared. The first, which is the one under investigation, was the corruption of contractors (and UN officials). The second was the effect of this corruption on the aforementioned obligation of member states.

REGULATION BY THE STATE

[5.] It is the responsibility of the National Executive to impose a coherent transparent regulatory regime which operates within the domestic legal system[26]. This regime should not only achieve the purpose of sanctions proper, but also provide for the humanitarian and economic activity authorised by Security Council resolution.

[6.] Though the Republic, as a member of the UN, is bound under international law to prevent sanction busting[27] perpetrated from within its territory, the duty of prevention may not inevitably extend to unqualified criminalisation thereof. What is required is a system which

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26 Compare Section 85 of the Constitution particularly subsections (2) (b), (c) and (d).

27 South Africa ratified the United Nations Convention Against Corruption on 22 November 2004, and is therefore also bound, on an international plane, to prevent corruption.

will be effective in preventing sanction busting, including direct payments to a regime under sanction.

[7.] Criminalisation, which is intended to deter potential offenders and impose retribution on proven offenders, would not constitute a preventative measure if it did not prove to be preventive in effect, or could not be implemented for other reasons. Practical regulation by the public administration with unambiguous direction from the National Executive is the primary recommendation of the Commission. This should prevent recurrences of illicit activities. The criminalisation of listed activities[28] is likely to play a small but meaningful role in the prevention of recurrences.

[8.] The state's obligations under international law may be met by convincing state departments, and state owned institutions and corporations, that a legal duty to prevent sanction busting rests upon South Africa, and by promulgating suitable regulations which officials employed by such departments would be bound to implement. The regulations should be aimed not only at preventing sanction busting, but also at the effective administration of any programme which ameliorates hardship inflicted upon foreign civilians by economic sanctions.

[9.] It is apparent from the affidavit of Advocate Nogxina that, during September 2001, the DME did not act with an overriding appreciation

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28 In the manner suggested, in sub paragraph 60.1 of the June Report.

that state departments were bound by international law to prevent the payment of surcharges by South African companies. The dominant consideration reflected in Advocate Nogxina's memorandum to the Minister[29], in relation to Iraqi surcharge demands at the time, appears to have been that surcharges created an economic barrier for South African companies wishing to enter the international oil market.

[10.] What was highlighted in the affidavit of Advocate Nogxina was the tragic effect of sanctions on Iraqi civilians and the consequential policy considerations for South Africa during the Programme. These factors legitimately affected the approach of the DME at the time. They were and remain relevant. However, the importance of international law, as law, also requires emphasis by the state. The individual within South Africa is entitled to unambiguous direction from both the law and the administration in regard to her or his legal duties.

[11.] Any domestic measures which are taken in order to comply with Chapter VII Resolutions will remain subject to the Constitution, its values and the principle of legality.

[12.] The content of Advocate Nogxina's affidavit vividly illustrates that at any particular time the implementation of economic sanctions might appear to conflict with the values enshrined in the Bill of Rights[30]. This

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29 The purpose and content of the memorandum, dated 7 September 2001, are set out in paragraph [188] of the June Report, at page 103.

30 However, by virtue of the provisions of Section 36 of the Constitution (and subject to what is set out in the Table of Non-Derogable Rights), rights in the Bill of Rights, may be limited. Furthermore, Section 233 of the Constitution provides that every court, when interpreting any legislation, must prefer any reasonable interpretation of the

could arise, firstly, because of the political nature of international legal obligation which is generated *via* the Security Council as currently constituted. Secondly, and not unrelated to the first reason, is the fact that at any particular time and given the harm caused to civilians in the state under sanction, a particular Security Council resolution may contradict the commitment of the Peoples of the United Nations to fundamental human rights. It may also tend to negate conditions under which justice and respect for obligations arising from sources of international law, such as the Charter, can be maintained. These assumptions, contained in its preamble, underlie the Charter and South Africa's membership of the United Nations. In such circumstances it could be argued that members of the UN are not bound to carry out a decision of the Security Council because it is not "*in accordance with the Charter*" as required by Article 25 thereof.

[13.] Similar contradictions in international law have pertinently been raised by Sachs J in a judgement of the Constitutional Court. "*What was regarded as (international) law just yesterday is condemned as unjust today. When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena embodied in the laws of the so-called civilised nations and blessed by as many religious leaders as they were denounced*"[31].

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legislation that is consistent with international law. International sanctions under Chapter VII of the UN Charter may arguably constitute a justified restriction on the rights set out in Chapter 2. As to the protection of human rights violations beyond the borders of South Africa, see Kaunda and Others v President of the Republic of South Africa, 2005(4) SA 235 CC.

31 Per SACHS J in Minister of Home Affairs v Fourie: Lesbian and Gay Equality Project v Minister of Home Affairs 2006(I) SA 524 CC at paragraph [102.] page 546.

[14.] Nevertheless, whatever perception of Resolutions 661 and 986 may have existed within member states of the UN, it remained the obligation of members to prevent their nationals and any persons within their territories from making funds or resources available to the government of Iraq[32].

[15.] In the circumstances, it is useful to repeat certain statements made by Advocate Nogxina. He made his statement to the Commission after he had consulted with officials of the DFA. He had also studied various government policy documents on Iraq at the time and the relevant resolutions of the Security Council. He relayed certain information, concerning the humanitarian crisis in Iraq and South Africa's policy at the time, to the Commission.

"*12. **Sanctions and humanitarian crisis***

12.1 Sanctions created a humanitarian crisis in Iraq. During 2000, the birth mortality rates in Iraq were amongst the highest in the world. In fact birth weight affected at least 23% of all births. Chronic malnutrition affected every fourth child under five years of age. Only 41% of the population had access to clean water. 83% of all schools needed substantial repair.

12.2 Sanctions also had negatively impacted on the Iraq extended family system. There was an increase in single parent family,

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32 See Clause 4 of Resolution 661 (1990).

divorces, and families were forced to sell their homes and furniture and other possessions to put food on the table resulting in homelessness. Prostitution was also reported (a phenomenon unknown in Iraq).

13. ***International outcry***

As a result of various reports of the humanitarian crisis in Iraq, national and international outcry about sanctions grew. South Africa also added its voice. As a result of the mobilisation by many countries, the Security Council adopted resolution 208 of 2000 which mandated it to explore every avenue to alleviate the sufferings of the population, who were after all not the intended targets of sanctions.

14. *Humanitarian flight*

The South African government decided to send a humanitarian flight to Iraq. The Department of Foreign Affairs was the lead to department in organising this flight." (***sic***)

[16.] Advocate Nogxina also endorsed certain findings that had been made in a report by the Office of the Public Protector[33] on 29 July 2005,

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33 The Office of the Public Protector investigated a complaint made by the Freedom Front in connection with an advance payment of R 15 million that was made by Petro SA to Imvume in December 2003. This related to a contract for procurement of oil condensate.

pursuant to the input of Advocate Nogxina. These findings are quoted in part below:

"*18.2.1 The Public Protector reported as follows:*

> *"During the period 10 to 14 June 2001, the former Minister of Public Enterprises, Mr J Radebe, led a follow-up humanitarian flight to Iraq, accompanied by the Deputy Minister of Foreign Affairs, government officials and a business delegation. The purpose of this visit was to provide assistance to the people of Iraq in the light of the catastrophic humanitarian situation that prevailed as a result of the imposition of sanctions and to explore trade relations under the UN Iraq Oil For Food Programme;*

18.2.2 It was against the background as set out above that he approached the Minister of Minerals and Energy to approve a visit to Iraq by himself, Mr A Nkuhlu (Director: Ministerial Services), and Mr T Mafoko (of the International Liaison section) for the period 10 to 14 September 2001."

"*19.1 "South Africa's foreign policy towards Iraq in 2001 provided for the strengthening of trade relations between the two countries, including trade in the oil industry;*

19.2 ...

19.3 *The visit by the Director General of Minerals and Energy and officials of the department and the SFF to Iraq, in September 2001, related directly to the Government's expressed commitment to improve trade relations with Iraq. The then Minister of Minerals and energy was properly informed of the intention of the visit and she approved it accordingly;"*

[17.] Advocate Nogxina dealt with the purpose of his visit to Iraq as follows:

"20. *I must emphasise that my visit to Iraq, first was informed by the government policy on Iraq and secondly, it will be seen from a number of the institutions referred to above, that I head the DME which contributes significantly in the economy of this country. Furthermore, the DME has been in the forefront in promoting black empowerment. Indeed it is the first department to legislate on black empowerment."*

[18.] The affidavit of Advocate Nogxina was solicited by the Commission with a view to exploring his justification to the Minister for the visit to Iraq by officials of the DME during September 2001. This justification included the imposition of oil surcharges on "*Black Economic Empowerment Groups*" which had to be addressed. (For convenience these groups are referred to below as BEE companies.)

[19.] The records of the DME, as well as the affidavit of Advocate Nogxina are characterised by a singular lack of clear reference to the legal issue created for South Africa by the imposition of oil surcharges on its nationals, or to how this problem was being addressed by the DME[34].

[20.] Following an aborted visit to Iraq[35] during September 2001, one would have expected concern to be expressed and recorded, to the effect that South Africa was being exposed to potential violations of Resolutions 661 and 986 as a result of the imposition of surcharges on BEE companies that were receiving allocations of oil. Certainly, by 14 May 2001, Cardy and Nacerodien, officials at the Mission in New York, had become alarmed and had reported to Ambassador Kumalo "*that the Government should not be seen to be supportive of illegal trade with Iraq*"[36].

[21.] The DME delegation had met informally with the Iraqi Deputy Minister of Oil. No minutes were kept. The Deputy Minister had informed the delegation that the Government to Government Oil For Food Programme deadline had passed.

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34 See Document No. 6 in Addendum 3, which is made up of correspondence between the Commission and the DME. The Commission sought to obtain any documentation in the possession of the DME, related to the imposition of surcharges that was created before, during and after the September visit.

35 The DME delegation arrived in Baghdad on 11 September 2001. Iraqi government officials were "*inundated with other activities following the 9/11 events*".

36 See June Report, paragraphs 192.5 to [193.] at pages 106 to 107.

[22.] The DME was therefore rendered unable to regulate and control the import of oil and exclude the payment of surcharges by concluding a government to government contract[37].

[23.] In the circumstances, it must have seemed inevitable that South African BEE companies would be allocated barrels of oil, that surcharges would be levied by SOMO on the barrels lifted, and that the contracting BEE companies would be bound to pay the surcharges.

[24.] According to the IIC Report, the Iraqis tolerated no exclusions from their surcharge policy. The largest proportion of oil allocated to contractors under the Programme went to Russian corporations. Russia, as a permanent member of the Security Council, was powerfully placed to assist Iraq, *inter alia*, by supporting the lifting of sanctions. Russian nationals were not excused from surcharge demands. There is no evidence to suggest that, during or about September 2001, BEE companies were better placed than Russian corporations were to avoid the payment of surcharges.

[25.] The effect of administrative *insouciance*, in relation to international obligations such as those imposed by Resolutions 661 and 986 on South Africa, ought to be addressed by the National Executive in the future in relation to similar resolutions.

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37 See June Report, paragraph 42 (c) at page 31.

[26.] On 6 March 2002, Imvume contracted with the Strategic Fuel Fund ("*the SFF*") to supply oil that would be allocated to Imvume by the Iraqis. Proceeds of the sale by Imvume to the SFF were, in all likelihood, calculated to have been used to pay surcharges owed by Montega[38]. These circumstances suggest that measures should be taken to prevent relevant material non-disclosure by contractors with the state in the future.

[27.] During the operation of economic sanctions, contractors with the state or with state institutions should be required:

a) to disclose whether any commodity or goods, intended to be supplied to the state or a state institution, emanate from a country under sanction; and if so,

b) to warrant that the supplier has complied with all relevant Security Council resolutions, UN agreements and memoranda of understanding that may be applicable to the acquisition of the commodity in question.

[28.] Similarly, where commodities or goods are supplied to a regime under sanction, the South African Government department licencing

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38 See the case against Majali: June Report, paragraphs [117.] to 126.] at pages 71 to 76.

participation in the UN Programme[39] should require an undertaking that no bribes have been paid or stand to be paid to the regime by the contractor.

SPECIFIC REGULATION SUGGESTED AFTER ANALYSIS OF DOCUMENTATION PROVIDED BY APE PUMPS

[29.] The only insight which the Commission has enjoyed into the precise *modus operandi* employed by contractors in the payment of ASSF arises from the punctilious provision of documentation by Ape Pumps in response to the Commission's summons. This is dealt with in Part E below. The supplementary recommendations which follow are necessary to curb the provision of funding:-

a) by banks in South Africa to states under sanction, or to the Government departments of such states and the institutions they control; and

b) to the foreign agents of contractors who pay kickbacks, either directly or indirectly, to a regime under sanction.

[30.] Firstly, it is recommended[40] that banking legislation and/or regulation should be created which spontaneously prohibits the provision of guarantees and the making of direct payments to governments under

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39 As to such licencing, see June Report, paragraph 60.2, page 42.

40 In amplification of sub-paragraph 60.5 of the June Report.

sanction (and government controlled institutions), as soon as they are placed under such economic sanction by Security Council resolutions.

[31.] Secondly, where UN managed programmes exist for the amelioration of economic sanctions, banks should be required to ensure that international payments to agents and/or foreign institutions, in respect of transactions affected by such programmes, are authorised by Security Council resolution. To this end, the Reserve Bank, in overseeing payments of foreign currency, should be required to certify international financial transactions with reference to such resolutions and authentic written agency agreements which expressly provide for the payment of commissions, as well as legitimate formulae for calculation of amounts payable.

[32.] The abovementioned banking legislation and/or regulation should contain a further provision: to the effect that any contract/agreement which permits an agent to receive an indeterminate or excessive commission for facilitating the involvement of a South African contractor in a UN sanctions programme should be deemed to involve an illicit payment.

SPECIFIC REGULATION RAISED BY MOCOH/HACKING'S CONDUCT

[33.] It would appear that, like Al-Khafaji, Hacking exploited the favoured status of South Africa, in order to obtain oil allocations. Unlike them he managed to deal directly with the UN. He did not deal with the UN

through the Mission. Ultimately the responsibility for the payment of surcharges for and on behalf of Mocoh was attributed to South Africa, on the basis that the Mission had processed the contracts which had become tainted by the surcharge payments. In the circumstances, and if these conclusions are shown to be correct, it will become necessary to pass legislation requiring any South African company which intends to participate in sanctions programmes of the UN, or which in fact does participate, to do so only under the supervision of an appropriate South African department of state after licencing as above. In the view of the Commission, such legislation would not involve state interference in the so called "*free market*", because UN sanctions programmes are not free. They impose legal obligations on member states to implement regulation.

THE REMEDY FOR CORRUPTION

[34.] The essential mischief which arose under the Programme was the illicit payment of surcharges and kickbacks to the Iraqis. These direct payments to the Iraqi Government and the institutions it controlled violated the express terms of Clause 4 of Resolution 661, as well as the purpose of sanctions *viz.* to weaken Iraq's capacity to wage war. The payments defeated the purpose of Resolution 986 (*viz.* to provide for the humanitarian needs of the Iraqi people), in that they deprived civilians, who had suffered from both war and sanctions, of the proceeds of the escrow account. Instead, the proceeds of oil sales, that were intended for the victims described by Advocate Nogxina,

were corruptly diverted to certain contractors and the regime. The mischief was made possible by corruption on the part of contractors and/or their agents. They acted in a conspiracy with the Iraqi regime.

[35.] With the amendments suggested below, the Prevention and Combating Corrupt Activities Act, 2004 (Act 12 of 2004) ("*the Corruption Act*"), particularly sections 3, to 6, 12 and 13 thereof, could operate to criminalise such corruption in the future.

[36.] The Corruption Act came into operation on 27 April 2004. It therefore cannot be applied to prosecute corrupt activities during the period of the Programme under investigation.

[37.] Section 35 of the Corruption Act vests a South African court with extraterritorial jurisdiction, if the act alleged occurred outside the Republic, and regardless of whether or not the act constitutes an offence at the place of its commission. Jurisdiction exists if the person to be charged –

(a) is a citizen of the Republic;

(b) is ordinarily resident in the Republic;

(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be

registered in the Republic at the time the offence was committed;

(d) is a company, incorporated or registered as such under any law, in the Republic; and

(e) (is) any body of persons, corporate or unincorporated, in the Republic.

[38.] As this act stands, the aforementioned sections seem to apply to corruption on the part of natural and legal persons, but not where this occurs in collusion with sovereign states that are also perpetrators and beneficiaries. An appropriate amendment may be necessary to deal with corruption of the kind that occurred under the Programme.

[39.] Section 3 creates a general offence of corruption relating to the acts of "*any person*". Section 4 creates an offence in respect of corrupt activities relating to public officers for the benefit of the public officer or any other person. Section 5 creates offences in respect of corrupt activities relating to foreign public officials. Official is defined essentially with reference to a natural person in employment. Section 5 criminalises a person in relation to a benefit for a foreign public official or another person. Section 6 creates offences in respect of corrupt activities relating to agents for the benefit of another person. Section 12 creates an offence in respect of corrupt activities relating to contracts involving persons. Section 13, similarly creates offences in

respect of corrupt activities relating to procurement and withdrawal of tenders.

[40.] Person is not defined in the definition section of the Corruption Act. The meaning excludes sovereign states, not least of all, because a state cannot be prosecuted under South African domestic law. A presumption against criminalising corrupt activities in collusion with state perpetrators may be applied when these sections are interpreted by a court. Therefore, the Commission recommends that an amendment to the Corruption Act should be effected so as to make provision for conviction on a charge of corruption when a sovereign state is found to be a beneficiary in the application of sections 3 to 6, 12 and 13.

[41.] The adoption of an additional Protocol to the UN Convention Against Corruption, that would make provision for the criminalising of corrupt activities by sovereign states and trial by international tribunal, could appropriately be lobbied for while South Africa is a non-permanent member of the Security Council.

[42.] Further recommendations, over and above those already made, may still be required after the full and proper investigation described elsewhere in this report has taken place.

PART D

HACKING AND MOCOH

[1.] The relevant IIC findings in Tables 1 to 5 as well as certain inferences to be drawn against Mocoh and Hacking from IIC documentation were set out in the June Report[41]. The Commission is in possession of IIC documents relating to five contracts concluded between Mocoh and SOMO. Hacking represented Mocoh in the conclusion of every one of them. Hacking is resident in the United Kingdom.

[2.] Within the Commission's jurisdiction, the material witness, in relation to both Hacking and Mocoh, is Sexwale. A written statement ("*Sexwale's response*") was presented to the Commission on his behalf by his legal representatives, Werksmans Attorneys ("*Werksmans*"). It was received on 15 June 2006, while the June Report was being finalised. This statement was a response to written questions which had been directed to Sexwale by the Commission on 24 May 2006.

[3.] At all times Sexwale has publicly expressed a willingness to assist in the investigation of illicit activities. On 25 March 2004, he wrote to the Secretary-General of the UN, Kofi Annan on the letterhead of Mvelaphanda Holdings (Pty) Ltd ("*Mvelaphanda*")[42]. He stated, *inter alia*, the following: "*As your office is aware our company Mocoh Services (South Africa) has, till recently traded Basrah Light Oil from*

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41 See paragraph [44.] of the June Report.
42 See Document No. 7 in Addendum 3.

Iraq under the auspices of the United Nations Special Committee as set out in Resolution 661 – Oil For Food Programme". Sexwale also stated that, "*For the record our company is more than willing to assist the United Nations should it be required*". In his response, Sexwale indicates that the IIC did not request a response to the allegations made against his company by the IIC.

[4.] The Commission considers Sexwale's response to suffer from evidential and probative deficiency. His response was neither made under oath nor signed by him. However, it does reveal errors in the IIC Tables. These are dealt with further below.

[5.] For purposes of the June Report, the Commission remarked that participation in the Programme by South African entities was characterised by "*compelling indications of exploitation by foreign entrepreneurs..*". **In the case of Mocoh, the documentary evidence, Sexwale's response and an absence of Mission records, point in this direction.**

[6.] In the circumstances the Commission sought to interview Hacking. Following a lengthy telephonic conversation, on 30 August 2006, between the Chairperson and Hacking's solicitor in London, Mr David Corker ("*Corker*") of the firm Corker Binning, the Commission directed an e-mail to Corker on 5 September 2006. Therein a telephonic request for a consultation with Hacking, either in South Africa or in the United Kingdom, was repeated. Corker replied via e-mail, stating that

the telephonic conversation had "... *given rise to a number of issues requiring careful consideration* ...". He requested time to respond until 14 September 2006, and added that this request was not "... *a sign of non cooperation on (Corker's) or Mr Hacking's part*". Up to this time and despite a written reminder, Corker has not responded. Nor has Hacking cooperated. This contact with Corker was facilitated by Hacking's co-director, Sexwale.

[7.] On 18 July 2006, the Commission had requested Sexwale, via a letter to Werksmans, "*to put the Commission in touch*" with Hacking and/or Mr Harith Al-Hajil ("*Al-Hajil*"), who are registered as co-directors of Mocoh. Both are resident in the United Kingdom according to the records of the Registrar of Companies. On 4 August 2006, Werksmans replied. They did not deal with the Commission's request, but rather suggested that the Commission was no longer vested with powers of investigation and was "*in fact functus officio*".

[8.] On 25 August 2006, after Werksmans had been satisfied that the final report date had been extended to 30 September 2006, they informed the Commission that Sexwale had lost contact with Al-Hajil, and had in fact not communicated with him for several years. The Commission was informed that Hacking could be contacted through Corker. Details of Corker's e-mail, telephone and telefax numbers were then provided.

[9.] As a result of Hacking's failure to co-operate, more cogent evidence from Sexwale will have to be sought. For reasons which become

apparent below, the Commission needs to question Sexwale further and/or summons relevant documentation in the possession of Mocoh and/or Mvelaphanda. The last-mentioned company apparently regards Mocoh as "*our company*".

CONTRADICTIONS BETWEEN THE IIC REPORT, SEXWALE'S RESPONSE AND OTHER DOCUMENTATION

[10.] Table 1 reflects that Mocoh entered into 6 contracts to purchase oil and that the Mission country was South Africa. A total of 10, 800, 000 barrels were allocated, of which 8, 592, 627 were lifted. The aggregate amount expended by Mocoh for the purchase of this oil was US $ 185, 598, 266. Surcharges of US $ 574, 699 were paid, although only US $ 574, 120, was levied. This left Mocoh with a credit. Mission records provided to the Commission establish that South Africa did not act as the Mission country for these contracts.

[11.] Table 3 names Sexwale as the non-contractual beneficiary of oil allocations during Phases 6 (two million barrels), 7 (eight hundred thousand barrels), 8 (one million barrels) and 13 (two million barrels). According to SOMO records there was no contracting company for any of the allocations. In his response Sexwale alleges the following:

"*All barrels allocated to me were lifted by MSSA (Mocoh), and Hacking and his company Mocoh (Energy International Limited) would have attended to that detail*".

[12.] In Table 2 it was alleged that Mocoh lifted barrels of oil during Phases 5 to 9. (Only Phases 8 and 9 fall into the period when surcharges were levied). South Africa is incorrectly reflected as the Mission country. Surcharges of US $ 94, 631 (arising from Contract No. M/08/54), and US $ 479, 489 (arising from Contract No. M/09/40), were levied. For convenience these two contracts are respectively referred to below as "*the First Mocoh Contract*" and "*the Second Mocoh Contract*". The amount levied in respect of the First Mocoh Contract was duly paid. US $ 480, 068 was paid in respect of the Second Mocoh Contract, leaving a surcharge credit of US $ 578.

[13.] According to the notes appearing at the end of Table 2, IIC allegations that surcharges were levied and paid are based on Ministry of Oil records. The surcharge surplus was derived from SOMO records. The notes to Table 2 reflect that occasionally Iraq applied a surcharge payment to the wrong contract number for a particular purchaser, resulting in a negative outstanding surcharge balance. Furthermore, differences are also attributed to advance payments and discrepancies between the UN and SOMO data.

[14.] **In relation to the surcharges allegedly paid pursuant to the Second Mocoh Contract, compelling documentation obtained from Jordan National Bank by the IIC suggests that, whether or not these errors occurred, surcharges were paid on two occasions for and on behalf of Mocoh.**

[15.] The Commission provided Sexwale's legal representatives with copies of four letters (in Arabic) which reflect the approval of oil contracts by SOMO and the Ministry of Oil[43]. These letters of approval related to contracts concluded during Phases 5 to 9. The last-mentioned was an approval of the Second Mocoh Contract. The Commission has obtained a sworn translation thereof[44]. This translation was provided to Sexwale's representatives. Paragraph 11 of the approval, is translated as follows:

"*11 – Recovery Amount: Payable within (30) Days after shipment loading*".

[16.] **The documentation provided to the Commission by the IIC included the First Mocoh Contract. It did not include a letter of approval of this contract. The Commission therefore cannot determine whether or not a surcharge was levied on this allocation.**

[17.] The IIC provided the Commission with two documents, in Arabic, emanating from Jordan National Bank[45]. An English stamp on the first document states "*PAID BY MICHAEL HACKING*". A handwritten annotation says "*this presents %50 of the total amount*". An English stamp on the second document states "*BY ORDER OF MICHAEL HACKING TO ACCOUNT*". A handwritten annotation reads, "*On*

43 See Documents No. 8, 9, 10 and 11 in Addendum 3.
44 See Documents No. 12 in Addendum 3.
45 See Document No. 13 and 14 in Addendum 3.

behalf of Mocoh Services". None of the signatures on these documents resemble the signatures of Hacking which appear on Mocoh oil contracts and applications.

[18.] Sworn translations of these two documents (into English), were obtained by the Commission[46]. The translations were also furnished to Werksmans. The translation of the first document reflects that a transfer of Swiss Francs from account to account by order of Michael Hacking was effected on 19 April 2001, in the amount of CHF 424, 995. The due date for payment is reflected as 12 April 2001.

[19.] From the translation it appears that a handwritten note, in Arabic, on the second document, reads – "*Mr Ibrahim please do not repeat/only to know the name of the financing company with kind regards*". **This suggests that an Iraqi official was reprimanded for naming Hacking as the person who authorised the payment on behalf of Mocoh**. The translation reflects that an amount of Swiss Francs *viz.* CHF 555, 630 was transferred from account to account by order of Michael Hacking on behalf of Mocoh Services on 15 July 2001. The due date for payment was 15 July 2001.

[20.] Table 5 reflects three surcharge payments associated with Mocoh. Two relate to the Second Mocoh Contract. The first payment of the two is dated 12 April 2001. The amount of this surcharge is reflected as US $ 249, 117.82. The second payment date is reflected as 15 July

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46 See documents No. 15 and 16 in Addendum 3.

2001. The amount reflected is US $ 230, 949.74. The total is US $ 480, 067.56. The notes to Table 5 state that the amount of surcharge payments is as indicated in the SOMO ledger of surcharges. Both the "*native currency*" and the US dollar value were provided in the ledger. Only the US dollar value is presented in Table 5.

[21.] Documentation exchanged between Hacking and the Oil Overseers, the escrow bank and the UN, as well as a note from the Senior Undersecretary to the Ministry of Oil[47], record the approval of the extension of the validity of the Second Mocoh Contract (dated 30 January 2001), to 20 April 2001, instead of 31 March 2001.

[22.] On 18 April 2001, according to SOMO records, 917, 957 barrels were lifted at Al Bakr by the vessel, LYRIA. Copies of the receipt were to be directed to Mocoh, "*care of the escrow bank, Mocoh Benmore South Africa and Hacking, care of SOMO Baghdad*"[48]. On the same date, another million barrels were lifted by the same vessel[49]. The receipts were to be distributed as in the first lift. Two credits drawn on BNP London were issued. The letter of credit number was ILC 57218.

[23.] **Two surcharge payments in respect of the one oil contract are not extraordinary; because two lifts were recorded by SOMO.**

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47 See Documents No. 17, 18, 19, 20 and 21 in Addendum 3. The last mentioned is an English translation of the note from the Undersecretary, Document No. 19.

48 See Document No. 22 in Addendum 3.

49 See Document No. 23 in Addendum 3.

[24.] Table 4 which relates to the known Underlying Oil Financier of the Second Mocoh Contract reflects that the allocation was shipped in two lifts of 100, 000 and 917, 957 barrels and that the aggregate amounts expended by Koch *via* letters of credit were US $ 24, 080, 573 and US $ 22, 104, 931, respectively.

MOCOH'S CONDUCT AS DOCUMENTED

[25.] In Sexwale's response he stated that his understanding was that Mocoh had to be registered via the South African Mission, that Hacking attended to this and that it was done.

[26.] On 27 March 2003, Hacking directed a letter to the Ambassador at the Mission on Mocoh's letterhead[50]. He referred therein to "*our contract with SOMO to load two million barrels of Basrah Light under contract number M/12/126*". He asked the Mission to ensure that this contract was fully implemented. The basis for his claim was that Mocoh was a South African registered company. **(Mocoh was registered as a company in South Africa, but not with the Mission as a participant in the Programme)**. A handwritten note on this letter, apparently directed by Nacerodien to Cardy at the Mission, suggests that neither Mocoh nor Hacking were registered at the UN through South Africa. **(This contradicts Table 2)**. Nacerodien's advice was that Hacking should be told to work through the mission "*through which the contract was signed*".

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50 See Document No. 24 in Addendum 3.

[27.] On 8 April 2003, Cardy directed a letter by telefax to "*Mr Michael Hacking (Mocoh Services South Africa)*" on behalf of the Mission[51]. Cardy advised Hacking that "*According to the Mission's records 'Mocoh Services South Africa' is not registered as a South African national oil purchaser in terms of the United Nations Iraq Programme*".

[28.] UN documentation provided by the IIC to the Commission contains no evidence of relevant communication directed to the Mission by Mocoh and Hacking, or of UN communication with the Mission in relation to Mocoh. The documentation shows that Hacking dealt directly with the Oil Overseers on Mocoh letterheads. These bore a post office box address at Benmore South Africa, as well as South African telephone and telefax numbers.

[29.] **The conclusion to be drawn is that Hacking attempted to exploit the South African nationality of Mocoh, as Al-Khafaji (Omni) was shown to have done in the June Report: save that Hacking bypassed the Mission. From Sexwale's version it is apparent that Hacking was able to obtain oil allocations on the strength of Sexwale's profile.**

[30.] **Cardy, Dormehl and Nacerodien could explain how this was possible under the Programme. It becomes imperative for Cardy and Nacerodien to assist the Commission by sharing their first**

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[51] See Document No. 25 in Addendum 3.

hand knowledge of the illicit techniques employed by participants in the Programme who either made illicit use of the Mission or managed to bypass it, while leaving the UN and the IIC to believe that the Mission was involved in the process.

[31.] A media release was issued by Mvelaphanda on 20 January 2004[52]. It stated, *inter alia*, that "*Mvelaphanda participated in the Oil for Food Programme*". The UN awarded tenders to "*Mvelaphanda, through our UK .. based partner, Mocoh Services*". The media release added that the above process was above board and that there were no financial transactions with the Iraqi Government or its leadership.

[32.] Sexwale's response suggests that allocations were made to Sexwale and were lifted by Mocoh, Hacking and his (UK) company. The media release on the other hand, avers that Mvelaphanda participated through Mocoh UK. In Sexwale's response no mention is made of Mvelaphanda being the beneficiary, or the company which contracted to lift the oil. (However, in terms of an agreement between the joint venture partners in Mocoh, entities controlled by Sexwale received 50% of the issued share capital in Mocoh.)

THE IIC TABLES v SEXWALE'S RESPONSE

[33.] **In Table 3 "*Sexwale's Country*" is referred to as Italy. This could partly explain why Mocoh was never registered with the South**

52 See Document No. 26 in Addendum 3.

African Mission. It does not explain how Hacking was able to deal directly with the Oil Overseers in concluding and executing the five contracts which are dealt with below.

[34.] In Sexwale's response he states that the "*reference to Italy is not understood, and must, as far as I am concerned be an error in either the IIC Report or SOMO's records*". In Table 3 the Mission country for the Phase 6 and 7 allocations to Sexwale, is identified as South Africa. The Phase 8 allocation, is reflected there as not being attributable to any contracting company. According to SOMO records there was no Mission country. (**This allocation probably related to the First Mocoh Contract.**)

[35.] Annexed to Sexwale's response was a schedule of barrels allocated to Sexwale and lifted during Phases 5, 6, 7, 8 and 9 ("*Sexwale's Schedule*"). No allocation is reflected during Phase 12, the Phase in which Hacking claimed to the Mission that Mocoh had concluded a contract. A further allocation of two million barrels is reflected on Sexwale's Schedule during Phase 13. This was allegedly never lifted. The allocations in Sexwale's Schedule accord with the allocations to Sexwale reflected in Table 3 in relation to Phases 7, 8 and 13 (when eight hundred thousand, one million and two million barrels respectively were lifted).

[36.] Sexwale's Schedule reflects that three million barrels were allocated in Phase 6. The allocation is reflected as two million barrels in Table 3.

According to the Sexwale's Schedule; 2, 982, 625 barrels were allegedly lifted during Phase 6. A note from the executive director of SOMO, Mr Saddam Hassan ("*Hassan*"), to the Ministry of Oil accords with Sexwale's version. The note states that: "*based on the approval of Vice-President of the Republic Mr Taha Yaseen Ramadan, on 14 October* 1999", the quantity of the SOMO contract with Mocoh (Contract No. M/02/28) was increased from two million to three million barrels (i.e. during Phase 6)[53]. Table 3 reflects that none of the barrels allocated to Sexwale were lifted during Phase 6. However, in Table 2 Mocoh are reflected as having lifted 2, 982, 625 barrels during Phase 6, under Contract No. M/06/28. (The contract value was US $ 63, 289, 351.)

[37.] **This suggests that Sexwale is correct when he contends that Mocoh lifted barrels allocated to him and that the Tables are incorrect. In this respect, the methodology of the IIC was faulty in the case of Mocoh.**

[38.] **Though the Tables are exposed to contradiction, Sexwale could assist the Commission to establish important facts, and also by exposing the precise nature of any defects in the IIC methodology.**

[39.] **Mocoh ought to respond to the cogent evidence which shows that surcharge payments were made pursuant to the Second Mocoh Contract. Sexwale has failed to assist the Commission to**

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53 See Document Nos. 27 and 28 in Addendum 3. The last mentioned is a translation of Hassan's note.

establish the veracity of the allegations in Table 5 (which are fortified, in regard to the Second Mocoh Contract by letters of approval and documents emanating from Jordan National Bank), to the effect that Hacking made or authorised surcharge payments. His statement contradicts other documentation. The position should be resolved by reference to documentation that may be in the possession of Mocoh and Mvelaphanda, and by obtaining a further and better explanation from Sexwale. A summons of the relevant documents may also be necessary.

THE TEXT OF SEXWALE'S RESPONSE

[40.] The *gravamen* of Sexwale's response is as follows. He left public office in 1998 and entered the commercial arena with a publicly stated focus on the energy and resources sectors. He established that Hacking was a man of good standing and repute in the oil industry: and believes him to be so till this day.

[41.] Hacking has been involved in the oil industry since 1979, both in South Africa and elsewhere. He is an expert in oil trading transactions, more specifically in negotiating, financing and structuring them, particularly via his company, Mocoh Energy International Limited ("*Mocoh UK*").

[42.] During 1998, Hacking and his associate Mr Harith Al-Ajil ("*Ajil*"), an Iraqi businessman based in Iraq and Jordan, approached Sexwale with a view to forming a joint venture to participate in the Programme.

Apparently they had observed that no South African company was trading under the Programme, notwithstanding the close relationship between South Africa and Iraq. They believed that with Sexwale's "*Black Empowerment credentials*", allocations of oil could be obtained from SOMO. After extensive negotiations the three men decided to form a company, Mocoh, to register it with the UN under the Programme and thereafter to trade under that Programme.

[43.] **It would therefore appear that between 1998 and 14 June 2006, when his response was directed to the Commission, Sexwale never became aware that Mocoh were not registered as a South African national oil purchaser in terms of the Programme.**

[44.] After protracted negotiations it was agreed that the profits would be shared according to the agreed shareholding: that is, Sexwale (or entities controlled by Sexwale) received five hundred and one shares, equating to 50,1% of the issued shared capital of Mocoh; Ajil, three hundred shares, equating to 30% of the issued shared capital of Mocoh, and Mocoh UK, a company controlled by Hacking, one hundred and ninety nine shares, equating to 19,9% of the issued shared capital.

[45.] Hacking was to assume all financial risk and would bear all and any losses that might be incurred in the transactions. For this financial risk it was agreed that Hacking would be entitled to receive an additional fee over and above his company's profit share. This would be

determined on a reasonable basis as appropriate to each transaction. This fee, together with Hacking's costs and other costs, would be deducted before distributing the profits of Mocoh to each shareholder.

[46.] **A company search has established that Mocoh was duly registered in terms of the Companies Act and that Sexwale, Hacking and Ajil (reflected in the relevant records as Al-Hajil) were appointed as directors on 24 May 1999, together with Mark John Willcox. The last-mentioned is reputed to be Sexwale's co-director in Mvelaphanda. Prior to his appointment as director, on 7 February 1999, Hacking had already signed Oil Contract Number M/05/62, as a director of the purchaser, Mocoh. He personally directed this contract to Alexander Kramer, an Oil Overseer, on 11 February 1999, on a Mocoh letterhead. This reflected Sexwale and Hacking as directors. A post office box at Benmore and Johannesburg telefax and telephone numbers were given as contact details. The letter stated that Hacking could be contacted telephonically in London[54].**

[47.] In the agreement between the joint venture partners, the specific role of each person was defined. Sexwale's primary role was to lobby for support from the Iraqi government in order to obtain oil allocations. He was not required to be involved in the day to day mechanics of trading in oil or with the raising of finances, the lifting of oil, payment for the oil, the onward oil sales or any administrative matters. This was the

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54 See Document No. 29 in Addendum 3.

responsibility of Hacking. Ajil's role was to assist in the lobbying process by acting as a liaison between SOMO and Mocoh. (Ajil was based in Iraq.)

[48.] Over and above the responsibilities of Hacking mentioned above, he was also to be responsible for attending to all administrative matters, for ensuring that all of the requirements of the UN were met and that all payments of oil were made into the escrow account.

[49.] In order to fulfil his lobbying function, Sexwale travelled to Iraq on numerous occasions. He met with various officials such as Hassan. He also met Deputy Prime Minister, Aziz. Throughout the Programme, South Africa and Iraq were actively developing business and political ties.

[50.] Mocoh entered the Programme during the fifth Phase (24 November 1998 to 24 May 1999). It concluded Contract No. M/05/62 and lifted 1, 912, 759 barrels.

[51.] During Phase 6 (25 May 1999 till 11 December 1999), under Contract No. M/06/28 it lifted 2, 982, 625 barrels. **As pointed out above the IIC Report incorrectly states that two million barrels were allocated during this Phase and that they were allocated to Sexwale personally. He alleges that the oil was lifted for and on behalf of Mocoh on all occasions.**

[52.] During Phase 7 (12 December 1999 to 8 June 2000), under Contract No. M/07/26, Mocoh lifted 832, 973 barrels.

[53.] During Phase 8 (9 June 2000 to 4 December 2000), under Contract No. M/08/54, Mocoh lifted 946, 313 barrels.

[54.] During Phase 9 (1 December 2000 to 2 July 2001), under Contract No. M/09/40, Mocoh lifted 1, 917, 957 barrels.

[55.] "*During the currency of phases eight or nine*" (**the duration of this period was one year approximately**), Sexwale learned from Hacking and Ajil that SOMO had demanded that surcharges be paid to it. They advised Sexwale that all companies trading with Iraq under the Programme would have to make these payments. Mocoh also had to do so: unless Sexwale, through his relationships with persons such as Aziz and Hassan, could persuade them to forgo the surcharges. He duly made the requests.

[56.] **Sexwale is silent as to when and to whom he made the requests. Sexwale's response is also silent as to whether or not he received a response to his requests let alone a positive response.**

[57.] Sexwale's response continues with an affirmation that he was at no stage prepared to sanction the payment of surcharges. He relied instead on his ability to lobby senior Iraqi officials and those who

controlled SOMO to waive payment of surcharges. Sexwale's objection to these surcharges was both commercial and moral.

[58.] **Clearly his requests fell on deaf ears. Mocoh is alleged by the IIC to have paid surcharges in relations to contracts which were concluded during the currency of Phases 8 and 9. Given Sexwale's alleged profile, one would have expected the Iraqis to have done him the courtesy of responding one way or the other. One would have expected him to convey to the Commission the details of any requests and the response(s) which must have been elicited (or to state emphatically that he received no response). In the absence of any response, one would also have expected information relating to the time by which any response would have been reasonable. A further and better explanation from Sexwale is necessary: that is, explaining how he proceeded to negotiate more oil contracts after Mocoh had already incurred an obligation to pay surcharges.**

[59.] "*Prior to the tenth Phase*" **(this began on 3 July 2001)**, a formal discussion was held between various representatives of Mocoh, including Hacking and Sexwale. The question of surcharges was discussed and it was expressly agreed that no surcharges would be paid in any manner or form. Mocoh would continue to apply for more oil allocations and lobby for a waiver of surcharge payments.

[60.] **Contract No. M/08/54 (the First Mocoh Contract), was concluded on 26 June 2000 (i.e. more than a year before Phase 10 commenced). The SOMO distribution records, copies of which apparently went to Hacking, show that 946, 313 barrels had already been lifted on 3 November 2000[55]. The IIC alleges that surcharges were levied and paid thereon. In the circumstances, one would have expected Sexwale to deal in his response with what was discussed between Mocoh representatives in relation to the First Mocoh Contract which had been concluded during Phase 8: alternatively to explain why this contract was not discussed. One would have expected Sexwale to inform the Commission of what was discussed in relation to Iraq's demands, and whether or not the participants in the "*prior to the tenth phase*" meeting showed any concern for the fact that they were acting too late to prevent the payment of the surcharge during Phase 8. The First Mocoh Contract must have been in Sexwale's mind at the time. The one million barrels had, according to Table 3, been allocated to Sexwale personally. On his own version, he had successfully lobbied for this allocation.**

[61.] During Phases 10 to 12 (i.e. the period 3 July 2001 to 25 November 2002), neither Mocoh nor Sexwale were allocated barrels: nor did they "*lift any barrels from Iraq whatsoever*". This was despite constant lobbying by Sexwale and applications being submitted in each of the phases for the allocations of barrels. Sexwale concluded that this was

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55 See Document No. 30 in Addendum 3.

a consequence of the fact that Mocoh was not prepared to pay surcharges and did not do so.

[62.] **In contradiction to Sexwale's response, his co-director of Mocoh, Hacking (in his letter to Ambassador Kumalo at the Mission, on 27 March 2003), stated unequivocally that Mocoh had concluded Contract No. M/12/126 with SOMO, for the delivery of two million barrels.**

[63.] In relation to Phase 13 (5 December 2002 to 3 June 2003), Sexwale confirms that the IIC Report is correct in so far as it states that he was allocated two million barrels which were never lifted. Had they been lifted, he confirms that this would have been done with Mocoh in accordance with past practice.

[64.] **Therefore during Phase 12, when Hacking alleges that Mocoh concluded Contract No. M/12/126:**

a) **Mocoh was still in the business of concluding oil contracts with SOMO as alleged by Hacking in his letter to Cardy;**

b) **Hacking was still a director; and**

c) **Sexwale was unaware of Hacking's activities.**

Contract Number M/05/62

[69.] On 11 February 1999, Hacking directed the signed contract and other documentation to the UN Overseers under cover of a letter bearing a Mocoh letterhead[56]. Hacking and Sexwale, are reflected there as directors i.e. some three months before they were appointed. The ultimate consumer in terms of the contract was to be "*refining systems in the Far East*". Hacking was the contact person and he signed the contract on 7 February 1999.

[70.] A letter of credit was issued by the United European Bank, Geneva, on 15 April 1999 (Number LC1M1075853), in the amount of US $ 24, 000, 000, by order of Mocoh.

Contract Number M/06/28

[71.] Similarly, this contract was directed to the Oil Overseers by Hacking on Mocoh's letterhead on 2 June 1999. Hacking signed the contract on 30 May 1999, in his capacity as director of Mocoh[57]. An amended letter of credit was issued by United European Bank, Geneva (Number LC1M1096936), in the amount of US $ 22, 000, 000, on behalf of Mocoh[58]. The original letter of credit was for a maximum amount of US $ 15, 000, 000.

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56 See Document No. 31 in Addendum 3. This document, *inter alia*, is referred to in paragraph [30.] of Part D.

57 See Document No. 32 in Addendum 3.

58 See Document No. 33 in Addendum 3.

Contract Number M/07/26

[72.] This contract was approved on 10 January 2000 by the 661 Committee. In a letter directed by Mocoh to the Oil Overseers and signed with Hacking's authority, the quantity was changed from 1, 200, 000 barrels to 800, 000 barrels. The contract had been signed on 14 December 1999 by Hacking[59]. The letter of credit (Number LC K1ILC0000260), in the amount of US $ 20, 160, 000, was issued on behalf of Mocoh, by BNP Hong Kong (i.e. a sister company of the escrow bank): by order of Zhen Rong Co. Ltd for and on behalf of Mocoh[60].

Contract Number M/08/54

[73.] This is the First Mocoh Contract. The contract was approved on 5 July 2000. An undated application for approval was signed by Hacking on behalf of Mocoh. The contract was signed by Hacking in his capacity as director on behalf of Mocoh on 26 June 2000[61]. The letter of credit (Number LC F21LC0002751) was issued by BNP Paris (a sister company of the escrow bank), in the amount of US $ 30, 000, 000, by order of Mocoh, on 24 October 2000[62].

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59 See Document No. 34 in Addendum 3.
60 See Document No. 35 in Addendum 3.
61 See Document No. 36 in Addendum 3.
62 See Document No. 37 in Addendum 3.

[74.] This is the Second Mocoh Contract. Hacking signed the original contract as a director on 30 January 2001[63]. The contract was approved, in an amended form, on 26 March 2001. SOMO had agreed to extend the validity of the original contract until 20 April 2001, instead of 30 April 2001. On 7 March 2001, in a letter signed by Hacking for and on behalf of Mocoh, Hacking had requested the Oil Overseers to extend the original contract which had been concluded on 30 January 2001[64]. The undated application for approval of the original contract had been signed by Hacking as the managing director of Mocoh[65].

[75.] A letter of credit (Number LC ILC57218), in the amount of Euro 49, 400, 000, was issued by BNP London (a sister company of the escrow bank), by order of Mocoh on 30 March 2001[66].

[76.] **It is apparent from all the documentation that Hacking dealt directly with the UN Overseers. Sexwale was incorrect when he suggested that registration through the Mission was likely and had occurred. This calls for an explanation. The likely sources of such an explanation are Cardy, Mich (Counsel for the IIC) and Hacking.**

63 See Document No. 38 in Addendum 3.
64 See Document No. 39 in Addendum 3.
65 See Document No. 40 in Addendum 3.
66 See Document No. 41 in Addendum 3.

[77.] This anomaly suggests that it may be necessary to pass legislation prohibiting any participation by South African nationals (i.e. by natural or legal persons), in UN Programmes of the kind in question, except under the supervision of South African departments of state and after registration with the relevant department.

PART E

IIC METHODOLOGY APPLICABLE TO THE INVESTIGATION OF THREE SOUTH AFRICAN COMPANIES ALLEGED BY THE IIC TO HAVE PAID KICKBACKS

[1.] For purposes of assessing the payment of kickbacks related to the sale of humanitarian goods, the relevant allegations made by the IIC are contained in three Tables *viz.* Table 6, Table 7 and Table 8.

[2.] Table 6 deals with humanitarian goods purchased by the Government of Iraq from each supplier. The supplier is defined by the name of the contracting entity for the supply of humanitarian goods procured by the Government of Iraq. The IIC recognised that some of the entities were either no longer active or had been dissolved: others were subsidiaries of larger organisations. The Mission country was the country with which the supplier had registered to provide goods to Iraq. Categories of goods are described as stated in the OIP database.

[3.] The number of contracts referred to is the number of separate contracts for which goods were delivered and paid for from the escrow account. The contract face value given in this Table is defined as "*the aggregate contract value by supplier in USD equivalent as stated in the OIP database for contracts for which goods were funded and delivered*". Contract disbursements are listed. These are defined as "*the aggregate amount by supplier in USD equivalent of payments paid*

from the Escrow Account to the supplier for the delivery of procured goods".

[4.] Evidence of illicit payments is either based entirely on projections or is based in whole or in part on actual data. Under the last-mentioned heading the IIC refer to a company that has at least one contract for which direct or indirect evidence exists of illicit payments. (Companies found to have evidence of illicit payments total 2, 253, or 62% of the 3, 614 companies that participated in the Programme.)

[5.] Table 7 relates to actual and projected illicit payments on contracts for humanitarian goods. A summary is given of each supplier. A number of qualifying contracts are listed. These are defined as "*the number of contracts for the supplier listed in which direct or indirect evidence exists of an illicit payment... For a contract to be listed, payments to the supplier on the contract must have been made prior to July 1, 2003 at which time the CPA*[67] *amended contracts to remove their illicit payment components*.

[6.] Table 7 tabulates "*levied ASSF*". This is defined as the total amount of ASSF estimated to have been levied by Iraq on the related supplier for the qualifying contracts. "*The total amount levied for all suppliers (was) estimated at US $ 1, 2 billion. This amount is comprised of either actual levy data or is estimated.*"

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67 The Coalition Provisional Authority of Iraq.

[7.] A detailed accounting of fees levied for each of the contracts, its source and basis of quantification are described in Table 8.

[8.] "*Paid ASSF*" is defined as "*the total amount of ASSF estimated to have been collected by the Government of Iraq from the supplier on the qualifying contracts (including amounts collected by payment agents such as Alia Company for Transportation)*". (The total amount collected from all suppliers is estimated at US $ 1, 02 billion.) This amount is comprised of either actual payment data or is estimated.

[9.] **It is important to bear in mind that only UN contract numbers appear in the Tables. The Government of Iraq, its departments of state and Iraqi state institutions used their own reference numbers.**

[10.] A detailed accounting of fees collected for each of the contracts, its source and basis of quantification are described in Table 8.

[11.] Also tabulated in Table 7 are "*inland transportation fees (amount)*". This "*indicates the amount paid on the contract for inland transportation fees for goods delivered through Umm Quasr. The total amount collected from all suppliers (was) estimated at US $ 527 million*". This total was comprised of actual data where available. Actual figures were obtained from the Central Bank of Iraq ("*the CBI*") documents, Alia Company for Transport and general trade statements, the Iraq

State Company for Water Transport ("*the ISCWT*") documentation, company correspondence and bank statements.

[12.] The IIC found evidence indicating that some shipments through land crossings were also assessed with a minor inland transportation fee. The computation of ITF on many contracts was hindered by the lack of specific shipping information.

[13.] A detailed accounting of fees collected for each of the contracts, was quantified. Source and basis of computation were included as part of Table 8.

RECORDS OF ALIA COMPANY FOR TRANSPORTATION ("*ALIA*")

[14.] Alia acted as an agent for the Iraqi regime. It collected kickbacks from suppliers on a very large scale. It kept comprehensive records which were furnished to the Commission by the IIC. These reveal transactions relating to companies described only as "*Glaxo*" and "*Falcon Co*".

[15.] The single Glaxo reference appears in a file which specifically tabulates kickbacks. It relates to a guarantee dated 9 September 2001, on a Contract No. 844. The ASSF is Euro 6, 229.77, and the original contract value is Euro 62, 297.67. The total contract value is given as Euro 68, 527.44. The letter of credit number is T 732 709. The request and approval numbers are also listed. However, the

Commission was unable to trace this contract among the contracts that appear in the Tables.

[16.] Another file contains information relating to Alia's transactions. The following entries relate to Falcon Co.

16.1 On 29 January 2002, an incoming transfer credit of 160, 158, 000 was passed in the currency of an unknown account. This had an equivalent currency value of Euro 98, 080, 759 on the date in question.

16.2 On the same day three entries were passed. These related to a total credit of 47, 258, 000 in the currency of the unknown account. This was equivalent to Euro 28, 940, 799.

16.3 On 18 February 2002, a credit was passed for 44, 158, 000 in the unknown currency. This was equivalent to Euro 27, 286, 332.

16.4 On 25 September 2002, a credit was passed for 53, 358, 000 in the unknown currency. This was equivalent to Euro 37, 008, 042.

16.5 On 12 November 2002, a credit was passed for 49, 850 in the unknown currency. This was equivalent to Euro 35, 787, 066. On the same date, a further entry was made for 37, 199, 000, in

the unknown currency. This was equivalent to Euro 28, 704, 976.

16.6 On 3 February 2002, a credit of 99, 705, 000 in the unknown currency, was given "*as per the request of FALCON L/C 727 958L*", apparently for "*the account of the State Company for Iraqi Water Transport*"[68] (i.e. the ISCWT). This was equivalent to Euro 61, 221, 363.

16.7 A further entry, without a date or any information, appears for the supplier "*Falcon Company*" for 375 tons of tea in relation to the ISCWT.

[17.] Besides Falcon Trading Group Limited, only one other company bearing the name Falcon appears in the Tables, *viz.* Falcon Trading (PTE) Ltd, whose Mission country was SRI LANKA. This company supplied tea: as did the Falcon Trading Group which is under investigation. However, the conclusions drawn by the IIC against the SRI LANKAN company were apparently based entirely on projections made by the IIC; whereas the findings against the "*South African*" entity were based on actual data. This suggests that the entries in sub paragraphs 15.1 to 15.6 above related to the Falcon Trading Group Limited.

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68 As will appear below from the documentation relating to ITF paid by Ape Pumps and agreements signed by Al-Khafaji on behalf of Falcon, the ISCWT was an agent for the collection of ITF on behalf of the government of Iraq.

[18.] **The correlation of these entries in the books of Alia with findings made by the IIC constitute one issue that requires resolution with the assistance of Mich (Counsel for the IIC).**

PART F

ANALYSIS OF CERTAIN DOCUMENTATION RELATING TO APE PUMPS

[1.] The investigation of Ape Pumps illustrates the effectiveness of exercising the powers vested in the Commission by the Commissions Act. In answer to a summons to produce documents which was issued in terms of section 3 thereof, Ape Pumps produced the documents in their possession punctiliously. A comparison of these documents with those provided by the IIC and the Mission permits a final conclusion to be reached in respect of the payment of ASSF. It is clear that Ape Pumps paid ASSF in respect of two contracts numbered 830775 and 1030506 respectively. The only further investigation required relates to the determination of whether ITF were paid.

[2.] Furthermore, the methodology of the IIC in relation to techniques of investigation is vindicated. These techniques include the examination of agency agreements, correspondence between contractors and their agents, and the analysis of payments made to agents in order to establish whether such payments accommodated ASSF.

[3.] Unfortunately, Ape Pumps was the only company listed in the Annexure which co-operated fully with the Commission.

[4.] Table 6 correctly reflects the Mission country for the supplier, Ape Pumps, as being South Africa. Three contracts, with a total contract face value of US $ 1, 178, 535, are referred to. The contract disbursements amounted to US $ 1, 303, 660. The findings were based in whole or in part on actual data[69].

[5.] Table 7 alleges that two of Ape Pump's contracts qualified i.e. involved illicit payments. Their contract value was US $ 1, 058, 329. Contract disbursements amounted to US $ 1, 153, 942. ASSF of US $ 96, 386 were levied. US $ 96, 200 was paid. These findings relate to contracts where the amounts reported were based entirely on actual data[70].

[6.] Table 8 alleges that, during Phase 8, Ape Pumps concluded Contract No. 830775 to supply pumps and spare parts. The face value of this contract was US $ 1, 028, 096. The contract disbursements i.e. payment from the escrow account, amounted to more than that *viz.* US $ 1, 117, 565. ASSF was levied in the amount of US $ 93, 637. (This information was derived from company correspondence) An amount of US $ 93, 460 was paid. (This information was obtained from Ministry financial data) ITF of US $ 3, 600 were paid. (The source referred to is "*other documents*")

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69 IIC Table 6: page 20 of 192, Document No. 42 in Addendum 3.
70 IIC Table 7: page 20 of 190, Document No. 43 in Addendum 3.

[7.] During Phase 10, Ape Pumps concluded Contract No. 1030506 for the supply of pumps, blowers, gearboxes and spares. The contract face value was US $ 30, 233. Again payment from the escrow account exceeded the face value of the contract. The contract disbursements amounted to US $ 36, 377. ASSF was levied in the amount of US $ 2, 749. (Company correspondence was the source of this information) Ape Pumps paid ASSF in the amount of US $ 2, 740. (The source of this information was Ministry financial data) ITF were paid in an amount of US $ 600. (The source of this conclusion is referred to as "*other documents*")[71].

[8.] On 26 July 2005, the IIC informed Ape Pumps in a confidential letter that information in its possession indicated that Ape Pumps had contracts during the Programme "*on which unauthorized payments were made*"[72]. Mr Dave Murphy ("*Murphy*"), the sales director of Ape Pumps, replied on their behalf on 11 August 2005[73]. Murphy stated that the allegations had "*raised concern in our company*". He added that all financial transactions were handled by Ape Pump's agent, "*but we were aware that a ten per cent sales tax was paid, for contracts we received were always inflated by this amount compared to our tendered figures*"

"*This was confirmed by both P & O and MSC shipping lines, for they would not handle the goods unless we supplied to them the official receipt, showing that sales tax had been paid.*"

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71 IIC Table 8: page 42 of 381, Document No. 44 in Addendum 3.
72 See Document No. 45 in Addendum 3.
73 See Document No. 46 in Addendum 3.

DOCUMENTATION

[9.] The Mission records deal with all three of the agreements aforementioned. They also deal with a fourth contract, Number 1030554, which related to pumps for which Ape Pumps had not previously quoted[74]. The Mission's contact person at Ape Pumps was Murphy.

[10.] The relevant contracts, for present purposes, are the two on which kickbacks were allegedly paid: firstly, Contract Number 830775 ("*the First Ape Pumps Contract*"), and secondly, Contract Number 1030506 ("*the Second Ape Pumps Contract*"). According to the matrix:

[11.] The First Ape Pumps Contract, which involved the sales of pumps, was valued at Swiss Francs 1, 655, 234. It was deemed eligible for payment by the 661 Committee on 17 October 2001. (Mission records show that an official letter of approval was sent by courier to Ape Pumps, on 23 October 2001.) The first batch of goods was delivered on 24 May 2002, the second batch on 12 June 2002. The UN completed authentication and treasury clearance of the first batch on 19 June 2002. The Mission reference number was 242/01/07.

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[74] See Document Numbers 47 and 48 in Addendum 3. The first is a letter, dated 13 March 2003 from the OIP to Cardy, querying the price on an application which was being processed by the OIP for the sale of a Horizontal Centrifuge Pump, where the price was "*significantly higher than the prices for these goods previously quoted*". On 11 April 2002, Cardy informed Ape Pumps that the 661 Committee deemed this contract eligible for payment.

[12.] The Second Ape Pumps Contract was valued at Euro 34, 344. It was submitted to the OIP on 13 December 2001. The Mission reference number was 242/01/23. A missing sector item code was supplied to the OIP on 11 January 2002. The contract was deemed eligible for payment on 13 March 2002. An approval letter was received by the Mission on 15 March 2002. A letter of credit was received on 24 June 2002. Payment in full was received on 12 March 2003.

[13.] The IIC provided the Commission with documentation in relation to three contracts. They bear out the content of the matrix provided by the Mission.

[14.] **The documents provided by Ape Pumps are more illuminating. They establish that Ape Pumps knowingly paid kickbacks in association with Mr Tony Davies ("*Davies*").**

[15.] Davies was the representative of Eastoft Hall Limited ("*Eastoft*"), Ape Pump's agent, who was responsible for its tenders to the Iraqis. It is quite apparent that by 23 August 2001, Davies had informed Ape Pump's managing director, Eric Bruggeman ("*Bruggeman*"), and their marketing director, Alan Sternsdorf ("*Sternsdorf*") that a "*10% technical service fee*" had to be added to any pricing supplied to their agent by Ape Pump's sales director, Murphy[75].

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75 See Document No. 49 in Addendum 3.

[16.] On 17 October 2001, Davies informed Ape Pumps that the First Ape Pumps Contract (for the delivery of pumps to the Oil Pipelines Co. in Iraq), had received UN approval[76]. To his letter he attached "*blank copies of the bank and company guarantees required to cover the SHPF portion of the transaction*" that would need completion by Ape Pump's bankers in due course when they received a letter of credit from BNP Paribas, the escrow bank. **The Oil Pipelines Company ("*Oil Pipelines*") was part of the Iraqi Oil Ministry.**

[17.] The guarantees constituted acknowledgement that Ape Pump's bankers would pay Oil Pipelines an amount of money upon receipt of the letter of credit from the escrow bank, and that the amount of the undertaking would be paid in a currency to be advised by Oil Pipelines into a bank account to be nominated by Oil Pipelines.

[18.] **The execution of the aforementioned guarantees involved direct payment to an Iraqi state institution. This was prohibited by Resolution 661 and defeated the object of Resolution 986. To the extent that Ape Pump's bankers were regulated by South African legislation or under government control, the failure on South Africa's part to prohibit and reasonably prevent the issue of such guarantees (and more particularly any payments made pursuant thereto), may have violated South Africa's obligations to prevent the payment of funds to the Iraqi regime or an Iraqi Government**

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[76] See Document No. 50 in Addendum 3.

institution. Suitable preventive banking regulation is required under South African law.

[19.] In the same letter, Murphy was urged to liaise with the Mission to ensure that the letter of credit was issued by the escrow bank and received by Ape Pump's bankers as soon as possible.

[20.] On 4 January 2002, Bruggeman had assured the Director-General of the Oil Pipelines company that Ape Pumps were using their full pressure to ensure that their obligation in respect of their 10% TEF[77] due under Contract No. PL/M/09/14, was remitted to Oil Pipeline's bank as soon as possible[78]. **Bruggeman was therefore well aware of the need to make illicit payments to the Iraqis before Ape Pumps delivered the first batch of goods to them in May 2002**.

[21.] It is apparent from a complaint, made on 11 July 2002 and directed to Davies by Bruggeman, that Ape Pump's personnel were never permitted to speak directly to Ape Pumps customers and that one, "*Sadik*", was used as Davies contact person with the Iraqis[79].

[22.] On 24 June 2002, Davies informed Murphy by e-mail[80] (with reference to letter of credit no. C731890 and pursuant to the First Ape Pumps Contract), that unless arrangements were "*put in place to cover the 10% sales tax deposit*" by noon on 27 June 2002 Ape Pump's existing

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77 Technical Engineering Fee.
78 See Document No. 51 in Addendum 3.
79 See Document No. 52 in Addendum 3.
80 See Document No. 53 in Addendum 3.

contracts would be cancelled and put out for reissue. It appears that Davies proposed that Eastoft should pay this "*10% sales tax*" in cash directly to Oil Pipelines. In his e-mail, Davies suggested that Eastoft would make the payments and issue invoices to cover these transactions with Ape Pump's written agreement to repay Eastoft on invoicing.

[23.] On 5 August 2002 Eastoft directed a letter to Murphy identifying the deduction of commission on an "*engineering service fee*" as an item of disagreement, which had been resolved when Bruggeman had agreed to pay the TEF of Euro 60, 000, and full 10% commission as soon as Ape Pumps received money from the letter of credit[81].

[24.] Murphy's answer to the IIC was that Ape Pumps remained "*unaware of any fraud or corruption, for the contracts that were awarded to us were won against International tenders and we assume our offers were the best both commercially and technically*".

CONTRACT NUMBER 830775 (THE FIRST APE PUMPS CONTRACT)

IIC DOCUMENTATION

[25.] IIC documents show that this contract was based on an offer by Ape Pumps, dated 19 June 2001, bearing reference number SE2806LP-60/9. It also bore an "*EFD*" reference number PL/08/23. The parties

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[81] See Document No. 54 in Addendum 3.

were Ape Pumps and the Economics and Finance Department Ministry of Oil, Baghdad – Republic of Iraq ("*EFD*"). The end user was Oil Pipelines, Daura – Baghdad – Iraq. The item sold was described as an electrical and diesel driven pump for the replacement of the end users existing idle pumping sets. The total value, CIP Baghdad, in Swiss Francs was CHF 1, 655, 234.70. The contract was signed by the sales director of Ape Pumps, Sternsdorf, on 27 August 2001[82].

[26.] The IIC documents include a side agreement, dated 2001, in which reference is made to Contract No. PL/08/23: (i.e. to the First Ape Pumps Contract). It is headed "*Subject 10% agreement (after sales services)*". The agreement was signed by Sternsdorf on behalf of Ape Pumps as well as K Jofar, on behalf of the end user, Oil Pipelines. Paragraph 1 of this side agreement included an undertaking by Ape Pumps *viz.* "*to pay oil pipelines company an amount of (150, 760 Swiss francs) say, One Hundred Fifty Thousand and Seven Hundred sixty Swiss Francs Within two weeks of receiving payment under the abovementioned contract.*" Paragraph 2 provided for a bank guarantee within three weeks of approval of this contract by the UN[83].

[27.] **In answer to paragraph 20 of the Commissions summons, Ape Pumps was requested to produce "*any side agreement(s) concluded by or on behalf of the company in relation to the main contract concluded by the company*". "*None!*", was the reply.**

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82 See Document No. 55 in Addendum 3.
83 See Document No. 56 in Addendum 3.

[28.] On 11 December 2001, BNP Paribas issued the letter of credit number C731690 in favour of Ape Pumps and directed it to Ape Pump's bankers, the Standard Bank of South Africa Limited, Johannesburg, South Africa. The amount was CHF 1, 655, 234.70[84].

DOCUMENTS PROVIDED BY APE PUMPS

[29.] In answer to Part 3 of the summons served on Ape Pumps on behalf of the Commission, the Commission requested "*all documentation relating to the amount of US $ 93, 460 ASSF paid on Contract No. 830775*". Ape Pumps provided the following:

29.1 Firstly, a customer advice from the Standard Bank indicating that on 25 July 2002 a principal amount of Euro 67, 894.20 was paid in South African rand (R 697, 623.07) to a beneficiary, Mr Firas Ibrahim Obid Yasin ("*Yasin*") at the Arab Bank[85].

29.2 Secondly, an undated letter directed by Murphy to the Standard Bank which made reference to Contract No. PL/8/23 and letter of credit number C731890. Certain documents were also enclosed. Item 13 referred to a "*Copy of payment of the 10% import surcharge plus receipt*"[86].

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84 See Document No. 57 in Addendum 3.
85 See Document No. 58 in Addendum 3.
86 See Document No. 59 in Addendum 3.

29.3 Thirdly, a letter emanating from the shipping line P&O Nedlloyd, dated 25 May 2002, addressed to Eagle Freight[87] in which the author, one Dean Forrester, stated that he had "*been informed that the following documents for the subject shipment are required by our Jebel Ali office for customs purposes*". Item 6 provided as follows: "*6. A proof of payment (copy only) of the 10% after-sales tax*".

The author continues as follows: "*the reason for point no. 6, is due to our offices requiring a proof of payment of the 10% after-sales tax levid (sic) on all shipments to Iraq which are moved under phase 8 onwards Fyi. this is paid directly by the Shipper to the consignee. here the carrier is not involved, however shipments which have not been paid will not be allowed to discharge in Umm Qasr and will be returned to Jebel Ali. Therefore any charges involved in returning cargo or any additional cost for delays of the vessel in Iraq, will be for the shippers account*".

29.4 Fourthly, a letter, dated 26 April 2002, from Davies (who is described as Ape Pumps "*Middle East Sales Manager*"), addressed to P&O on the letterhead of Ape Pumps[88]. In the letter Davies said the following: "*Mr Murphy from our head office in South Africa has asked me to fax the official receipt for the 10% sales tax relating to our shipment against SOMO/Oil*

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87 See Document No. 60 in Addendum 3.
88 See Document No. 61 in Addendum 3.

Pipelines, Iraq contract number PL/8/23 that you have requested in order to tranship the container to Umm Qasr".

29.5 Fifthly, a telefax, dated 26 April 2002, which Murphy had directed to Eagle Freight, in which he had stated the following: "*Please find attached copy of official receipt of the 10% after-sales tax from Iraq.*

Original document is with the harbour master and copy has been given to the clearing agents"[89].

[30.] **The ineluctable conclusion is that a kickback of 150, 760 Swiss Francs was levied on the First Ape Pumps Contract, and that on 25 July 2002 Ape Pumps paid a further kickback, in the amount of Euro 67, 894.20, to Oil Pipelines, which was part of the Iraqi Oil Ministry at the time.**

CONTRACT NUMBER 1030506 (THE SECOND APE PUMPS CONTRACT)

IIC DOCUMENTS

[31.] A notification of a request to ship the goods sold by Ape Pumps, is dated 17 January 2002[90]. It refers to the Mission reference number and bears a stamp to the effect that Ape Pump's submission was received by the OIP on 13 December 2001. The exporter is reflected as Ape

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89 See Document No. 62 in Addendum 3.
90 See Document No. 63 and Document No. 64 in Addendum 3.

Pumps and the receiving company as Oil Pipelines. The total value of this contract is given as Euro 34, 344.20. The contract attached to this notification describes the client as the EFD Ministry of Oil and the end user as Northern Gas Industry NGI ("*NGI*"), with its reference number NGI10/39. The contract was signed on behalf of Ape Pumps on 27 November 2001 by the Middle East Sales Manager, who appears to be Davies.

[32.] Davies also signed a side agreement on behalf of Ape Pumps which related to "*Contract No. NGI/10...*". A handwritten addition to this side agreement in the equivalent document provided to the Commission by Ape Pumps refers to NGI10-39 i.e. to the Second Ape Pumps Contract. In the side agreement Ape Pumps declared its "*obligation for payment of (3, 123 Euro) say (three thousand and one hundred twenty three Euro only) as services by issuing bank guarantee to cover the above amount after UN approval (maximum three weeks from date of UN approval. The payment of the guarantee value to be within thirty days after UN approval)*"[91]

DOCUMENTS PROVIDED BY APE PUMPS

[33.] On 12 August 2002, Standard Corporate and Merchant Bank ("*SCMB*") issued a payment guarantee in the amount of Euro 3, 122.20 to NGI, "*AS COMMISSION FOR ARRANGING THE CONTRACT, AN AMOUNT OF 10% (TEN PERCENT) OF THE CONTRACT SUM IS*

91 See Document No. 65 in Addendum 3.

PAYABLE TO MESSRS NORTH GAS COMPANY"[92]. A side agreement[93], endorsing this guarantee, was attached.

[34.] A year earlier, on 23 August 2001, Davies had telefaxed Bruggeman and Sternsdorf and attached the Second Ape Pumps Contract after it had been signed by the respective parties. He stated that the original would be sent to Ape Pumps by courier, "*with a copy[94] sent to our agent in New York that specialises in the workings of the corridors of power at the United Nations.*

You are aware of the 10% "technical service fee" added to our commercial offer from pricing supplied from Dave Murphy.

The next stage is to present the original contract through the South African Export Trade Department to the South African Mission to the United Nations in New York together with a completed application form which is obtained from the UN website". (emphasis supplied)

[35.] **It is apparent that Davies was aware that an illicit payment in the form of a bribe was involved in the transaction and that he communicated this to the directors of Ape Pumps. To the extent that this form of bribery was known, and withheld from the Department of Trade and Industry and the Mission, fraud may have been committed. However, Murphy's denial of unlawful**

92 See Document No. 66 in Addendum 3.
93 See Document No. 67 in Addendum 3.
94 See Document No. 68 in Addendum 3.

intent on the part of Ape Pumps part that is contained in his abovementioned letter to the IIC would constitute a defence.

[36.] **The manner in which Davies implemented the side agreement was by inflating the technical amount tendered by Ape Pumps. This is illustrated in the documentation. It is also admitted by Murphy.**

[37.] On 19 September 2001, Ape Pumps directed a tender to Davies for purpose of transmission to the North Gas Co.[95]. The tender was signed by Murphy and was sent by telefax to Eastoft. The tender related to the supply of two Ape Pumps/Hawk pumps. The price basis quoted was in Euro, C.I.F Baghdad and included 10% commission and 5% for a technical training fund. In the schedule attached to the specifications the total price in Euros amounted to Euro 31, 222. Six items were described and each was priced in Euros to reach this total.

[38.] On 20 September 2001, Davies directed a "*commercial proposal in accordance with a Memorandum of Understanding MOU Phase 10, signed between the Government of Iraq and United Nations*", to the Commercial Committee of the NGI[96]. The proposal was on an Ape Pumps letterhead and bore the recipient's reference number 10403/2001. Ape Pumps reference number was 3443/100122/10. The total price in Euros was Euro 34, 344.20.

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95 See Document No. 69 in Addendum 3.
96 See Document No. 70 in Addendum 3.

[39.] **Each of the six items on the price schedule had been inflated by 10% to reach this total, which apparently made provision for both the agent's commission, the (curious) "*5% technical training fund*", as well as the kickback provided for in the side agreement.**

[40.] The proposal provided that payment should be confirmed via letter of credit issued by BNP New York and advised through Standard Bank, Bruma Lake, Republic of South Africa. The account details were also given. The account number was 421550775. Ape Pumps retained the discretion to change the advising bank.

[41.] On 17 September 2002, BNP Paribas issued a letter of credit numbered T737095 in favour of Ape Pumps, care of their bankers, the Standard Bank of South Africa Limited, Johannesburg in the amount of Euro 34, 344.20.

[42.] On 13 January 2003 Standard Bank directed a customer advice to Ape Pumps that related to a payment made by the bank from their account to the beneficiary NGI at the latter's bank, *viz*. Rafadian Bank, Amman, Jordan. A principal amount of Euro 3, 123 (valued on 8 January 2003), was transferred to the beneficiary from customer account number 421550775[97].

[43.] The payment was precipitated by a request on a letterhead of Eastoft, made on 7 January 2003, giving the details of the payment and stating,

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97 See Document No. 71 in Addendum 3.

inter alia, the following: "*Technical Services fee in respect of Third Party relating to contract number NGI/10/39*"[98]. The document was stamped by the Standard Bank on 7 January 2003 and the exchange was fully provided for.

[44.] On 23 January 2003, Clover Cargo International ("*Clover*"), the shipping agents, informed Murphy by telefax[99] that documents which had been submitted to Iraq customs in Jebel Ali, would only be approved "*against the 10% to load the container, thus the reason they (Maersk the Shipping Company carrying the goods) could not give us specific shipping details*".

[45.] **It is therefore apparent that the pumps sold under this contract could not be cleared for landing in Iraq without proof of payment of the kickback**.

[46.] On 19 February 2003, Murphy directed a telefax to Rafadian Bank[100]. It is apparent that Murphy visited the bank on 5 February 2003 with reference to this payment. In this letter he requested an official receipt. It is also apparent that he had made a similar request to the bank by telefax on 17 January 2003, when he had directed proof of payment to them[101].

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98 See Document No. 72 in Addendum 3.
99 See Document No. 73 in Addendum 3.
100 See Document No. 74 in Addendum 3.
101 See Document No. 75 in Addendum 3.

[47.] Similarly, on 9 January 2003, one Kim De Villiers directed a telefax to Standard Bank on behalf of Ape Pumps[102]. It is apparent from her letter that the management of Ape Pumps believed that the pumps could not be landed in Iraq until Ape Pumps had paid "*the 10% import duty*" and Standard Bank had not sent this.

[48.] On 18 February 2003, one Ausha Moodley, an Account Analyst at Standard Bank received a copy of a reply from Deutsche Bank confirming that the amount of Euro 3, 123 had been credited to NGI's account at Rafadian Bank on 16 January 2003[103].

[49.] **In the circumstances it is clear that the NGI, which fell under the control of the Iraqi Ministry of Oil, levied a kickback of Euro 3, 123 on the Second Ape Pumps Contract and that this was paid to NGI on 13 January 2003.**

IIC METHODOLOGY (THE ROLE OF AGENTS IN THE PAYMENT OF KICKBACKS)

[50.] **For purposes of the Commission's investigation and recommendations, understanding the role of agents in the payment of kickbacks under the Programme is fundamental.**

[51.] In reply to the Commission's request for copies of agreements concluded with agents in relation to the OFFP, Ape Pumps produced

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102 See Document No. 76 in Addendum 3.
103 See Document No. 77 in Addendum 3.

two agreements. The first one was concluded with Eastoft, represented by Davies[104]. The second was concluded with Falcon represented by Hemphill[105].

[52.] On 6 September 2000, Bruggeman signed a marketing representative agreement with Eastoft, whose principal place of business was in Scunthorpe, England. Davies signed the agreement on behalf of Eastoft on 29 January 2001. In terms thereof, Ape Pumps appointed Eastoft to be its exclusive representative to obtain orders from customers in Iraq. The agreement came into force on 1 September 2000. Eastoft's obligation, *inter alia*, included a duty to establish appropriate office facilities in Iraq and to inform Iraqi purchasers that all orders would be placed directly with Ape Pumps.

[53.] Eastoft would become entitled to commission payments following the conclusion of valid sales contracts, once Ape Pumps had received the full purchase price agreed to in the sales contract at a rate specified in part 2 of schedule 1 of the marketing agreement. Part 2 provided that the commission would be agreed and not "*ex-works contract value*". Clause 6.4 provided that Eastoft agreed to abide by all laws applicable by England and Iraq and undertook "*not to make any payments of bribes, kickbacks, political contributions, or other prohibited payments out of the commission that it (might) receive under this agreement*".

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104 See Document No. 78 in Addendum 3.
105 See Document No. 79 in Addendum 3.

[54.] It is apparent that a dispute arose out of this issue. Prohibited payments out of commission were subject to the cancellation of clause 6.4.

[55.] On 9 October 2002, Ape Pumps terminated its relationship with Eastoft for failing to deal with Ape Pumps "*openly and honestly, a duty which had been breached on various occasions*".

[56.] On 2 December 2002, Ape Pumps concluded another distribution and agency agreement: this time with the Falcon Trading Group SA Ltd and/or Falcon Commodity Trading (Pty) Ltd. (The contract in identical terms had been signed on behalf of Falcon on 15 October 2002 by person whose signature differs from that of Hemphill.)

[57.] **The firstmentioned company is the one of which Hemphill denies any knowledge of in the pending litigation. The second is the one which he admits recent involvement in. The commencement date of this agency agreement was 2 December 2002.**

[58.] **Falcon was appointed sole and exclusive distributor of Ape Pump's products within Iraq. Although the undertaking constituted "*the entire agreement between the parties*" and provided that "*no terms not contained in the agreement*" would be binding on the parties, no provision was made for the payment of commission therein.**

[59.] Finally it is significant that on 1 November 2000, Ape Pumps had appointed Salman Kannan Bureau of Baghdad, as sole agent for the sale of their range of pumps. A commission of one percent (1%) of the contract value would be "*paid to the company*" to support operating costs[106]. Evidently the Bureau was the contact person with the Iraqi regime.

COMMISSION PAID

[60.] In response to the Commission's summons, Ape Pumps acknowledged payment of commission on three contracts *viz.* PL/10/24; NGI/10/39 (the Second Ape Pumps Contract) and SOC/10/108. That is, it was suggested that no commission was paid on the First Ape Pumps Contract. However, in a letter sent by Eastoft on 18 March 2002, which served as a commercial invoice 75-960/BT6, Eastoft claimed Euro 60, 000 from Ape Pumps; as a technical service fee in respect of "*supervisor engineering costs*" relating to Contract No. PL/09/14, as agreed on 14 August 2001.

[61.] On 2 July 2002, Eastoft invoiced Ape Pumps (commercial invoice 75/960/ZT9) in the sum of Swiss Franc 75, 238, being 50% of the commission due against letter of credit no. 731890 relating to Contract No. PL/M/09/14. (This letter of credit related to the First Ape Pumps Contract) The invoice was received by Standard Bank on 1 August 2002.

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106 See Document No. 80 in Addendum 3.

[62.] On 30 July 2002, Ape Pumps directed Standard Bank to pay R 262, 250.82 in sterling to Eastoft. On 2 August 2002, this sum was paid to Eastoft's account at the Midland Bank on 2 August 2002.

[63.] On 19 July 2002, Davies informed Sternsdorf by e-mail that a final balance due under a letter of credit in the amount of Swiss Francs 805, 778.60 would be credited to Ape Pump's account at Standard Bank, with a value date of 22 July 2002. In the e-mail Davies requested Sternsdorf to make the payment of Eastoft's commission for value in Eastoft's account by 26 July 2002 "*so that my Iraqi associates receive payment from EHL before the end of July*"[107].

[64.] **It is possible therefore that kickbacks over and above the ASSF (which was paid directly to the Iraqis by Ape Pump's bankers), had to be paid out of Eastoft's commission. If so, this kickback was probably ITF.**

INLAND TRANSPORTATION FEES (ITF)

[65.] In item 5 of its summons, the Commission requested all documentation relating to the amount of US $ 3, 600, paid for ITF on the First Ape Pumps Contract. Ape Pumps responded by providing certain documents which appear to be legitimate. They relate to carriage in South Africa and marine insurance. **Without questioning the**

107 See Document No. 81 in Addendum 3.

directors of Ape Pumps, the Commission can reach no conclusion as to whether or not ITF was paid on the First Ape Pumps Contract.

[66.] Item 10 in the summons was couched in similar terms to Item 5, but in relation to the Second Ape Pumps Contract and an alleged payment of ITF in the amount of US $ 600. Tax invoices and sea freight estimates from Clover Cargo International, freighting agents, were provided to the Commission. These documents refer to carriage to Kirkuk from the port, Umm Quasr, the port where the pumps were landed. The fee was US $ 9, 758.55, approximately one quarter of the total carriage charged[108]. Half of the total went towards ocean freight. **The Commission is not in a position to conclude that the transportation fees by land to Kirkuk were unreasonable and/or inflated.**

[67.] The only other relevant document is an e-mail dated 25 February 2003, which was directed by the container shipping line, MAERSK to Clover[109]. Therein the consignee was urged to ensure that the cargo had been processed and cleared with the Iraqi State company for Water Transport. **This company was involved in the collection of ITF.**

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108 See Document No. 82 in Addendum 3.
109 See Document No. 83 in Addendum 3.

[68.] **The IIC Tables and the Annexure[110], suggest that Ape Pumps concluded three contracts of which two were tainted by the levy of ASSF. These conclusions are incorrect.**

[69.] Both the Mission and IIC records contain documents relating to a fourth contract numbered 1030554. The documents provided by the IIC contain an amendment to this contract (*viz.* Iraqi Contract No. SOC/10/108 on which Ape Pumps paid commission to Davies), dated 9 January 2002. An amendment was signed by Davies on 8 October 2003, and specifically provides for the removal of ASSF, making the amended contract total Euro 525, 000, after reduction of Euro 52, 500 from the original contract value of Euro 577, 500[111].

[70.] Similarly Contract No. 1030290 (also identified as Iraqi Contract No. PL/10/34), dated 28 October 2001, was amended on 6 October 2001 when Davies signed the amendment[112]. It too provided for a reduction "*by Euro 12, 270 to remove the after sales service fee making the amended Contract total Euro 122, 720*". The original contract value was Euro 134, 992.

[71.] Kickbacks were therefore levied on the two contracts aforementioned, but were never paid.

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110 To the Schedule to the Commission's terms of reference.
111 See Document No. 84 in Addendum 3.
112 See Document No. 85 in Addendum 3.

CONCLUSION

[72.] In the circumstances there can be no doubt that Ape Pumps paid ASSF in the amounts of Euro 67, 894.20, to the account of the Iraqi's agent, Yassin, via Arab Bank, on Contract No. 830775, and Euro 3, 122.20, to NGI on Contract No. 1030506. Nor is there any doubt that ASSF were levied in the amounts of Euro 52, 500, on Contract No. 1030554, and Euro 12, 270, on Contract No. S 1030290, respectively. The probabilities suggest that the directors and management of Ape Pumps agreed to pay these kickbacks and/or were aware that they were included in the agreed sales prices which were conveyed to the Mission and the OIP.

[73.] The allegation made by the IIC to the effect that Ape Pumps paid ITF in relation to the Second Ape Pumps Contract is probably correct, but no firm conclusion can be reached as to whether the amount was US $ 600.

PART G

ANALYSIS OF CERTAIN DOCUMENTATION RELATING TO REYROLLE

[1.] Mission and IIC documents establish that Reyrolle concluded three contracts under the Programme. Other evidence of the activities of Reyrolle in the Programme is illusive and was obfuscated by a company restructuring.

[2.] A company search revealed that Reyrolle was registered in South Africa. It started business during 1946. It was a public company which was later placed under voluntary liquidation. In the circumstances the Commission sought to establish the whereabouts of the records kept by Reyrolle.

[3.] The Commission was constrained to rely on the voluntary assistance of Mr Craig Holden ("*Holden*"), the Operational Director of another company, ABB South Africa (Pty) Ltd ("*ABB*"). Holden was a former "*director*" of Reyrolle, but was not involved in the Programme. As a result of Holden's assistance, the Commission obtained and perused documentation in the archives of ABB.

[4.] Holden provided the Commission with four files. While this report was being prepared, ABB discovered nine other files in their archives which they have offered scrutiny of at their premises. These documents

[8.] Griffiths told the Chairperson that he was unaware of any of the allegations made by the IIC, to the effect that Reyrolle had paid kickbacks to the Iraqis. Griffiths also seemed to be unaware of the existence of any agents through whom Reyrolle might have contracted. Though the Commission found no indication of such agents through the documentation made available by the IIC and the Mission, documentation provided by ABB indicates that Reyrolle used an agent and that the agent's commission was inflated.

[9.] **It is therefore crucial to acquire and analyse every document which was in Reyrolle's possession during the Programme and to compel Griffiths, Upton and Pritchard to provide the Commission with evidence under oath.**

[10.] The archives of ABB revealed a "*Cooperation and Agency Agreement*" ("*the Agency Agreement*")[113] that Reyrolle had concluded. The parties named therein were Reyrolle, a division of NEI African Operations Limited ("*NEI*"), a South African company with its registered office at Ristone Office Park, 15 Sherborne Road, Parktown, Johannesburg, and Winter International ("*Winter*"), a company existing under Jordanian law with its registered office at Building No 91, Nablus Street, Amman, Jordan. The agreement was signed on 24 July 2000, by Upton on behalf of Reyrolle. On 6 August 2000, it was signed in

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113 See Document No. 86 in Addendum 3.

Amman by Winter's General Manager, Mr AM Jabori ("*Jabori*"), on behalf of Winter.

[11.] Upton was interviewed telephonically. He stated that Al-Jabori was introduced to Reyrolle by the Mission in Jordan.

[12.] **According to South African law, a division is not a legal person. For domestic purposes NEI was the principal. Pritchard informed Winter in a letter that although Reyrolle was part of the NEI Group, it operated as an individual company with its own bank account[114].**

[13.] In terms of the Agency Agreement, Winter was nominated as the principal's agent for three years and would be paid a commission of 15% of contract value (subject to the approval of the South African Reserve Bank). In terms of Clause 6 thereof, the agent would be responsible for the remuneration of any third party after the principal had approved a contract. Winter was authorised to negotiate and conclude contracts on behalf of its principal in terms of Clause 2.

[14.] It is apparent that Winter had represented Reyrolle well before the conclusion of the Agency Agreement. In a letter dated November 1999, a director of Winter, AS Sulaiman ("*Sulaiman*"), urged Upton to take immediate action "*to set your proposal to Kimadia (the Iraqi Health Minister) in order to avoid mishandling*"[115]. At that stage a proposed sales contract (No. 77/99/671) had been signed by Kimadia on behalf

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114 See Document No. 87 in Addendum 3.
115 See Document No. 88 in Addendum 3.

of the Iraqis. The original had been handed to Pritchard for Reyrolle's approval and signature. Pritchard had given a draft of the Agency Agreement to Winter.

[15.] **By the time that this agreement was finally concluded, it seems to have acquired UN Contract Number 601682. The contract was submitted to the OIP by the South African Mission on 6 December 1999. The Mission's reference number was 242/2. Even before the formal imposition of ASSF, the Iraqi Ministry of Health demanded a bribe before it would contract with Reyrolle.**

[16.] On 7 November 1999, one A Hassan ("*Hassan*"), a Regional Manager of Winter, had written to Upton requesting that consideration should be given to the Iraqis in lieu of "*a heavy discount*" for the project. Such consideration included the following:

"*1. Mini bus which will cost ($10, 000.00) ten thousand dollars.*

2. 2 (Pentium 3) computers with their printers which will cost ($ 3, 5000) three thousand five hundred dollars.

3. One office furniture which will cost ($ 3, 000) three thousand dollars"

[17.] This demand had been made in writing by the import manager of the "*Ministry of Health*"[116]. In his letter Hassan added: "*As this is your first contract in Iraq we believe that you need to satisfy your clients. Your immediate action is appreciated*". A handwritten note on this letter suggests that Reyrolle's management were inclined to increase the commission "*on a shared basis, and we give 10K ... and they give 6.5K*".

[18.] On 13 November 1999, Pritchard wrote to Winter confirming that an amount of US $ 15, 000.00, was to be provided by Reyrolle, on the cost of contractual facilities on Contract No. 77/99/626[117].

[19.] On 22 November 1999, Hassan wrote to Pritchard informing him that another order of US $ 800, 000.00, would be awarded to Reyrolle by the Ministry, "*so we got to please them*". Hassan was thinking of "*paying and sending the car now instead of (Pritchard), until the approval of the United Nations on this contract*"[118].

[20.] In a telefaxed letter, dated 5 June 2000, and directed by Pritchard to AS Sulaiman, Pritchard stated that (as a result of the bribery), Reyrolle were "*now getting a very low margin figure on the contracts, however, in both our interest we are able to give you an additional secondary commission of 5% increasing the total commission to 20%*". The subject of this letter was the "*Medical City Contract*"[119].

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116 See Document No. 89 in Addendum 3.
117 See Document No. 90 in Addendum 3.
118 See Document No. 91 in Addendum 3.
119 See Document No. 92 in Addendum 3.

[21.] Griffiths informed the Chairperson that Pritchard and Upton had visited Iraq and negotiated the contracts. He added that they were assisted by the South African Mission in Jordan. He said that the supply, delivery and installation of the high voltage electrical switch gear supplied by Reyrolle to the Ministry of Health, was supervised by Griffiths and Pritchard. He also said that contracts were submitted by Reyrolle directly to the Iraqis.

[22.] **ABB documents show that the last statement was false.**

[23.] On 2 July 1999, Griffiths drafted a statement of an apparent offer to the Ministry of Health for the Medical City Substation, which Griffiths directed to a Dr A Shlash at Winter. He stated the following : "*As previous quotes, we have included an undisclosed commission of 5% (five percent) on the FCA figures for yourselves*". **This undisclosed 5% was made available before the advent of general 10% ASSF**.

[24.] **The documentation provided by the IIC and the Mission raises suspicion, but is inconclusive in relation to the contract under review in terms of the Commission's terms of reference. Cardy at the Mission and officials at the Mission in Jordan should be interviewed, in this regard.**

IIC ALLEGATIONS

[25.] IIC allegations relating to Reyrolle accord with the Annexure to the Schedule. Table 6 lists the Mission country as South Africa[120]. The goods supplied under three contracts were allegedly made up of medical equipment, parts thereof and spare parts. The contract face value was US $ 3, 759, 045. The contract disbursements amounted to US $ 3, 759, 034. **These conclusions were based entirely on IIC projections. They are unhelpful.**

[26.] Table 7 alleges that one contract qualified[121]. The face value thereof was US $ 1, 848, 246. This corresponds with contract disbursements. ASSF was levied and paid in the amount of US $ 168, 022.

[27.] Table 8 alleges that, during Phase 8 and under Contract No. 800993 ("*the illicit Reyrolle Contract*"), spare parts were sold and ASSF was paid. The contract and disbursement values were both US $ 1, 848, 246. ASSF was levied in the amount of US $ 168, 022[122]. This was a projected value based on Government of Iraq policy documents. On this basis the IIC also determined the projected ASSF that was paid.

[28.] Reyrolle did not respond to the allegations made by the IIC.

[29.] On 13 December 2000, the OIP queried Reyrolle's application for approval of the illicit Reyrolle Contract. It appeared that not all the

120 IIC Table 6: page 142 of 192, Document No. 93 in Addendum 3.
121 IIC Table 7: page 139 of 190, Document No. 94 in Addendum 3.
122 IIC Table 8: page 285 of 381, Document No. 95 in Addendum 3.

goods to be shipped to Iraq had been listed in Reyrolle's application. This query was directed *via* Dormehl at the Mission[123]. Cardy directed Griffith's reply to the OIP on the following day[124]. The number of items of which Griffiths is aware appears to be fewer than the number of items referred to in the contract. **These discrepancies raise a query as to whether or not sale items were falsely added to the contract presented to the UN in order to inflate the price.**

[30.] Documentation provided to the Commission by ABB, includes a letter of credit (number C726300)[125], which was issued on 15 March 2001 by the escrow bank to Absa Bank, Braamfontein Johannesburg, where it was received and stamped on 11 April 2001. The amount was US $ 1, 848, 245.80. Notification thereof was given to Griffiths on 12 April 2001[126]. This letter of credit was issued at the request of the Iraqi Ministry of Health, State Company for Drugs and Medical Appliances in favour of Reyrolle (and not NEI).

[31.] A contract in this amount[127] (probably the illicit Reyrolle Contract), had been signed (above a stamp stating that Reyrolle was a division of NEI), by a person whose signature appears to be identical to the signature of one witness to the Agency Agreement. The contract was signed in Baghdad. It bears a date of 28 June 2000. The subject matter of the sale as listed in the contract included the sale and installation of a stepdown transformer and a complete highvoltage

123 See Document No. 96 in Addendum 3.
124 See Document No. 97 in Addendum 3.
125 See Document No. 98 in Addendum 3.
126 See Document No. 99 in Addendum 3.
127 See Document No. 100 in Addendum 3.

substation, a medium voltage switchboard, a Busways 5000 amp rating as well as a Busways 1600 amp rating. All the items were sold with spare parts. The purchaser was the State Company for Marketing Drugs and Medical Appliances. The Iraqi "*Indent No*" on this contract was 77/2000/516.

[32.] An addendum, dated 28 October 2000, signed by Upton, converted the contract from a Phase 7 to a Phase 8 contract[128]. **(That is, it became amenable to ASSF).**

[33.] On 6 August 2000, Jabori signed a document headed "*Supplement to Contract No (77/2000/516)*", in which he purported to amend the Agency Agreement by providing that a commission of 20% of contract value be paid to Winter, instead of 15%. The two parties agreed that "*Contractual facilities of US $ 31, 092.00*", would be paid to Winter[129]. **It is apparent that Reyrolle agreed to pay Winter an inflated commission on the illicit Reyrolle Contract, which bore Contract No. 77/2000/516, in the records of the Iraqi Ministry of Health.**

[34.] On 12 August 2000, Al-Jabori invoiced Reyrolle (care of Pritchard), in the amount of US $ 74, 194.30, being commission for the aforementioned contract[130]. The amount was to be remitted to the account which Winter held at Union Bank, Amman. The invoice stated that the commission constituted a first and second partial payment for

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128 See Document No. 101 in Addendum 3.
129 See Document No. 102 in Addendum 3.
130 See Document No. 103 in Addendum 3.

the contract and that a balance of US $ 252, 260.62, would have to be paid within 30 days "*after the drawn down of the L/C*".

[35.] **The total commission that Winter claimed, in the order of twenty per cent of the original contract, was excessive. The excess may well have been intended for transmission into an account held in Jordan for the Iraqi Ministry of Health.**

MISSION RECORDS

[36.] Mission records relate to three contracts. In the matrix the status of each contract is referred to. The contact person at Reyrolle was Griffiths.

[37.] The illicit Reyrolle Contract is recorded as involving the sale of electrical goods in the amount of US $ 1, 848, 245. The status was "*paid in full*". Site remedial work was pending. The contract was apparently approved on 21 February 2001. A letter of credit was issued on 15 March 2001. Partial payment was secured. There were problems with final installation. The Iraqis refused to certify installation because the equipment did not work. Reyrolle claimed that the problem lay with the Iraqi electricity network, which fell outside the scope of the contract[131]. The Iraqi Ministry of Health was reluctant to sign off on the contract. The company informed the Mission that it had

131 See Griffith's plea to the Mission for assistance in a letter to Cardy, dated 10 June 2002. Document No. 104 in Addendum 3.

been paid in full. The company was committed to returning for site remedial work when security permitted.

[38.] According to the matrix, two other contracts were also concluded by Reyrolle. These are recorded as having involved identical amounts of US $ 1, 848, 245.

[39.] Contract No. 601683 was approved on 7 June 2000. No further information is given on the matrix. Contract No. 601682 was approved on 12 June 2000. On 8 April 2003, the company informed the Mission that it had been paid in full. The company was committed to returning for site remedial work when security permitted. **This was the contract in respect of which Reyrolle had agreed to pay a bribe to the Iraqi Health Ministry during 1999.**

[40.] The existence of three identical sale prices for the Reyrolle contracts, and the absence of relevant information raise a doubt about the correctness of the information recorded on the matrix. In the file there was a similar dearth of information and documentation relating to the illicit Reyrolle Contract. The Commission was therefore bound to seek the cooperation of ABB on an informal basis.

IIC DOCUMENTS

[41.] **Documentation provided to the Commission by the IIC is more illuminating than the Mission documents. It also raises more questions.**

Contract Number 800993 ("*The Illicit Reyrolle Contract*")

[42.] The IIC documentation shows the following. The application to ship goods to Iraq was submitted by the Mission on 7 December 2000, and approved by the OIP on 13 February 2001. The goods included various transformers, a Cutler Hammer, 1600 Amp Busbar Trunking, an ABB Powertech Dry type stepdown fan, a medium voltage switchboard, Busways 16000 and 5000 Amp Ratings, and a complete High Voltage Substation[132].

[43.] The goods were to be installed in a medical city substation for the Saddam Medical Complex in Baghdad. The total value was US $ 1, 848, 245.80. The price included a warranty. The purchaser was the Ministry of Health. The registration date was 7 December 2000. The Mission reference number was 242/9.

[44.] Although the Reyrolle stamp appears on the contract and the addendum, the signature of the seller's representative does not appear to be the signature of Pritchard, i.e. as it appears on the other two

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132 See Notice and Notification Document No. 105 in Addendum 3.

Reyrolle contracts. In those two contracts, Pritchard also printed his name beside his signature. However, Prichard's signature, without his printed name as it usually appeared on Reyrolle's contracts, seems to appear at the foot of four of the six items on a schedule to the contract. None of these documents appears to bear a clear signature of the Director-General of the State Company for Drugs and Marketing who represented the purchaser. **The identity of the signatory of the illicit Reyrolle Contract needs to be established with certainty.**

[45.] Similarly, the order form for this contract bears a signature resembling Pritchard's (but without his printed name).

[46.] The purchase price was to be paid in terms of letter of credit no. C726300[133]. The goods arrived in Iraq on 30 January 2002 and 9 November 2002[134]. Two instalments of US $ 1,617, 640.04, and US $ 230, 605, were paid by the escrow bank, on 21 February and 4 December 2002 respectively[135].

[47.] **In the above circumstances it is apparent that Reyrolle's contractual relationship with the Iraqi Ministry of Health involved bribery and corruption from the outset. The Illicit Reyrolle Contract fell into a phase when the Iraqis did extract ASSF. It seems that by this time Reyrolle had decided to pay the Iraqis in contravention of Resolutions 661 and 986 by inflating the agent's commission. On the basis of the documentation, a strong**

133 See letter of credit: Document No. 106 in Addendum 3.
134 See Document No. 107 in Addendum 3.
135 See IIC payment records for those dates, Document No. 108 in Addendum 3.

suspicion exists that Reyrolle paid kickbacks to the Ministry of Health, of the kind contemplated by the Commission's terms of reference.

[48.] It therefore becomes necessary to exercise the Commission's unchallenged powers, vested by section 3 of the Act to question Griffiths, Upton and Pritchard so as to determine whether or not the ASSF described in the Commission's terms of reference were paid.

[49.] Without this exercise two conclusions can be reached. Firstly, the commission of 20% that was payable to Winter on the contract price of the illicit Reyrolle Contract, was extraordinarily high. This commission allowed room for both the payment of kickbacks of 10% or more (on the amount paid by the escrow account), as well as for agent's commission (arising from the services which Winter was required to provide in terms of the agency agreement). Secondly, the course of conduct of Reyrolle prior to the execution of the illicit Reyrolle Contract revealed that its management and agents were willing and able to pay bribes demanded by the Iraqi Ministry of Health.

ANALYSIS OF CERTAIN DOCUMENTATION RELATING TO GLAXO WELLCOME

[1.] The investigation of Glaxo Wellcome was fettered entirely by the inability of the Commission to use its powers, the shelter which Glaxo Wellcome received from the pending litigation, the nature of the relationship between the international Glaxo companies, as well as a restructuring of the local company.

IIC FINDINGS

[2.] Table 6 reflects that Glaxo Wellcome concluded one contract for the sale of medicine to Iraq. The Mission Country was South Africa. The contract face value was US $ 243, 241. The contract disbursement value was US $ 218, 194. Evidence of illicit payments is based entirely on projections.

[3.] Table 7 reflects that ASSF in the amount of US $ 22, 113 was levied of which US $ 19, 836 was paid.

[4.] Table 8 reflects that the projected ASSF levied was based on Government of Iraq policy documents and that the payment made was also based on such documents. The contract in question was concluded during Phase 8 and bore the UN number 802557.

[5.] Glaxo Wellcome failed to respond to these allegations. Similar allegations were made against Glaxo Wellcome Export Ltd (Mission Country France; United Kingdom), Glaxo Wellcome Egypt S.A.E (Mission Country Egypt) and GlaxoSmithKline Wallshouse (Mission Country United Kingdom).

[6.] It is apparent that Glaxo Wellcome is part of a multi-national corporation. One person, Fadia Adnan ("*Adnan*"), signed both the contract under investigation as well as the contracts for Glaxo SmithKline SPA (Contract No. 1579), Glaxo Wellcome (Egypt), Glaxo Wellcome Export Limited and Glaxo Wellcome Italy. Cooperation by persons beyond the territorial jurisdiction of the Commission may be necessary to make an interview with Adnan possible.

[7.] Official documents proved to be entirely innocuous.

MISSION RECORDS

[8.] The matrix reflects that Contract No. 802557 was approved by the 661 Committee on 5 June 2001 and that Glaxo Wellcome was notified thereof on 6 June 2001. A letter of credit was received by the company in January 2002. The subject of the sale was angised tablets. The contract price was Euro 271, 700. The contact person was Ms Elizabeth Visser ("*Visser*"). Johannesburg telephone and telefax contact numbers (*viz.* 011 – 313 6373 and 011 – 313 6315), were

given. However, the e-mail contact address given was apparently in the United Kingdom *viz.* eev90849@GlaxoWellcome. co.uk.

[9.] The matrix reflects the conclusion of two further contracts, also for the sale of angised tablets (the "*second*" and "*third*" contracts"). The second contract involved GlaxoSmithKline (Contract No. 1200477). The contract price was Euro 516, 079.27. (This was a "*priority contract*") The third contract (Contract No. 1300378) also involved GlaxoSmithKline. The contract price was Euro 198, 366.30.

[10.] The entry dealing with the second contract refers in brackets to Glaxo Wellcome. The Mission reference was 242/02/08. This was submitted to the OIP on 17 September 2002. It was deemed non-compliant on 24 September 2002 due to a discrepancy over the company name (*viz.* whether it was Glaxo Wellcome or GlaxoSmithKline).

[11.] However, it was deemed eligible for payment by 14 November 2002. It was approved on 7 February 2003, but needed an amendment during August 2003. At that stage the World Health Organisation contracted on behalf of Iraq. This suggests that the second contract may originally have been subject to ASSF. The contact person was Ms Georgina Gordon ("*Gordon*"), who had different contact numbers in Johannesburg to those of Visser above.

[12.] The third contract had the same contact numbers. The contact person was Ms Delmaine Krombeen ("*Krombeen*"). Both the second and third contacts had e-mail contact addresses at "*@gsk.com*".

[13.] The Mission was provided with a certificate of change of name of Glaxo Wellcome. It states that Glaxo Wellcome South Africa (Propriety) Limited changed its name by special resolution to GlaxoSmithKline South Africa (Propriety) Limited. A stamp of the Registrar of Companies appended to the certificate was dated 18 February 2002. Glaxo Wellcome therefore changed its name shortly after it had received the letter of credit relating to the contract under investigation.

[14.] The Commission issued a summons to Glaxo Smith and Kline South Africa (Pty) Ltd, which was served on 26 April 2006 at 57 Sloane Street (Dimension Data Campus, Flushing Meadows), Bryanston, Johannesburg. These details appeared on the records of the Registrar of Companies.

[15.] In their initial dealings with the Commission, Glaxo Wellcome was legally represented by Mr George Poole of the firm Bell, Dewar. Prior to making contract with the Commission Mr Poole had been summonsed to testify before the Commission in relation to the activities of Majali, Montega and Imvume[136]. Following the institution of the pending litigation and by agreement with the Commission, the Financial

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136 At one stage Mr Poole had also been the attorney of Hemphill, Majali and Montega.

Manager of Glaxo Wellcome to whom a summons was directed, did not appear before the Commission or produce documents.

[16.] Poole directed a letter to the Commission on behalf of GlaxoSmithKline, the apparent successor in title to Glaxo Wellcome. Poole's instructions are apparent from the content of his letter: -

"*Our client has received a summons to produce by 15 May 2006 various books and documents to the Donen Commission of Inquiry. Our client notes that the documents to be produced by it relate to contract number 802 557 relating to the provision of medicine to Iraq during the United Nations Oil-for-Food Programme. Our client notices that the documents required relate to a payment of $218,194 allegedly paid to it, an amount of $22,113 allegedly levied as after sales service fees, and an amount of $19,836 allegedly paid. Our client searched its records and can find no record of any such contract or payments either made or received, and therefore has no knowledge whatsoever of this matter*"[137].

[17.] On 6 September 2006, after it had become clear to the Commission that the pending litigation would have to proceed and that the Commission could not simply exercise powers of compulsion without the blessing of the court, the Chairperson directed a letter by telefax to Poole. His client's cooperation in obtaining the contact details of Visser and a certain Pradeep Shetty ("*Shetty*") was requested.

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137 See Document No. 109 in Addendum 3.

[18.] On 12 September 2006, Mr Andrew Leontsinis of Bell, Dewar and Hall replied in writing. He stated that the Commission's request had been conveyed to Glaxo Wellcome and that the attorneys would revert as soon as they had instructions from their client[138].

[19.] **The attorneys had not reverted by 30 September 2006. Glaxo Wellcome's ignorance of the contract under investigation is curious. The curiosity arises from the apparent passing of the sales baton from Glaxo Wellcome to GlaxoSmithKline after the name change. The latter continued to sell the identical products to the Iraqis that Glaxo Wellcome had sold pursuant to Contract No. 802557. Both did so via the Mission, which even confused the two. The name Glaxo Wellcome remained competent to elicit payment arising from Contract No. 802557 well after the change of name.**

[20.] The IIC documentation in the Commission's possession shows the following.

[21.] On 7 June 2001, the OIP informed Ambassador Kumalo, at the Mission, that the shipment of goods to be supplied by Glaxo Wellcome had become eligible for payment[139].

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138 See Document No. 110 in Addendum 3 *viz.* the Commission's letter to Bell, Dewar and Hall attorneys.

139 See Document No. 111 in Addendum 3 *viz.* Report concerning request to ship goods.

[22.] The goods supplied consisted of 130, 000 packs of angised 0.5mg tablets (in packets of one hundreds), as well as 13, 000 packs of free medicine samples and 200 tablets free of charge from each batch (for analysis). The purchase price was Euro 271, 700. The purchaser was the State Company for Marketing Drugs and Medical Appliances. The date of submission was 24 May 2001. The Mission reference number was 242/01/06. The contract was signed on 19 December 2000 by Adnan. She also signed contracts with the Iraqis for and on behalf of Glaxo Wellcome's sister companies abroad, but through Missions other than South Africa's[140].

[23.] The exporter is described in the contract as Glaxo Wellcome SA (Pty) Ltd, PO Box 1388, Halfway House, 1685, South Africa. The signature of Adnan is accompanied by a stamp of Glaxo Wellcome, without any reference to the exporter's further particulars. The post office box on the stamp differs from that of the exporter. The telephone and telefax numbers differ from those which appear on the matrix of the Mission. The signed contract appears to have been telefaxed by Glaxo Wellcome Dubai to the Iraqi Ministry on 23 May 2001.

[24.] A Glaxo Wellcome *pro forma* invoice[141], apparently bearing the signature of Visser, the authorised signatory, was directed by the exporter (address 44 Old Pretoria Road, Midrand, RSA), to the consignee on 23 March 2001. The exporter's customs code was 45450. The buyer's reference was 40/2000/1055. The contact person

140 See Document No. 112 in Addendum 3.
141 See Document No. 113 in Addendum 3.

at Glaxo Wellcome was Shetty. The consignee was Appliances Marketing, Mansoor, Baghdad. The final destination was Iraq. The mission submitted this contract to the OIP on 24 May 2001[142].

[25.] **In the circumstances, the Commission sought to interview Visser and Shetty.**

[26.] The UN had approved a letter of credit, number C732262, in favour of Glaxo Wellcome SA Ltd, Halfway House, South Africa. This letter of credit was issued to the Standard Bank of South Africa Limited, Johannesburg on 12 June 2001, in the amount of Euro 271, 700.

[27.] **This letter of credit in favour of the identically named beneficiary was re-instated on 4 September 2003 (some 17 months after Glaxo Wellcome had changed its name). The reinstatement had the approval of the UN Treasury for an amount of Euro 27, 170: that is for 10% of the contract price. The address of the beneficiary was the original exporter's address at Halfway House.**

[28.] The accounting history of the letter of credit that was obtained by the IIC from the UN, shows that on 26 April 2002, some two months after Glaxo Wellcome had changed its name, the sum of Euro 217, 216 was paid into the account of the beneficiary, Glaxo Wellcome. On 11 May 2002, the beneficiary was credited with Euro 24, 135.11.

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142 See Document No. 114 in Addendum 3.

[29.] **Glaxo Wellcome therefore continued to benefit from the UN, in its own name (and apparently at its original address), some 17 months after it changed its name and address. The ten per cent payment to Glaxo Wellcome during May 2002, requires explanation.**

[30.] **It is necessary to exercise the powers of the Commission to compel the cooperation of GlaxoSmithKline so as to achieve the object of its terms of reference in so far as Glaxo Wellcome is concerned.**

THE EFFECT OF THE PENDING LITIGATION

[1.] The drafting of this report commenced on the basis that the Pretoria High Court might consider giving express authorisation to the Commission to use its unchallenged powers, vested by Section 3 of the Commissions Act ("*statutory powers*"), before 30 September 2006. Following the week commencing 28 August 2006, the Commission directed its attorney to brief Senior Counsel to facilitate an urgent hearing at which such a preliminary ruling could be given. The instructions had not been given effect to by 30 September 2006[143]. The developments around the litigation and effects thereof, up to 3 July 2006, were set out in the June Report[144]. Further developments are set out below.

[2.] In a letter directed to the Commission, on 3 August 2006, Hemphill's attorneys made it clear that Hemphill would refuse to answer any questions put to him by the Commission, whether or not the answers incriminated him. He also refused to provide the Commission with any documentation. This conclusion is supported by the Commission's affidavit and the correspondence annexed thereto[145].

[3.] Hemphill's recalcitrance went beyond any protection that could be afforded to him by success in the pending litigation. His attitude

143 See Document No. 115 in Addendum 3.
144 See Part F, pages 45 to 52 and paragraph [200.], page 111, of the June Report.
145 See Document No. 1 in Addendum 3.

materially inhibited the investigation of Al-Khafaji, Omni, and Falcon. Furthermore, Mocoh and Glaxo Wellcome appear to have sheltered behind this litigation. Key witnesses and subjects of this investigation have exploited the time constraints placed on the Commission.

[4.] The pending litigation has prevented the Commission from executing its terms of reference by using statutory powers. As has been demonstrated above, such an exercise is necessary in order to reach sustainable conclusions in respect of the alleged illicit activities of Montega/Imvume/Majali (and possibly Mocoh), as well as Glaxo Wellcome and Reyrolle.

[5.] Furthermore, the need to use alternative less incisive means of investigation has prevented the Commission from completing its investigations within the permitted time period.

[6.] To resolve the impasse, between 3 August 2006 and 18 August 2006, the Commission drafted a comprehensive affidavit which was filed at court on the last-mentioned date. For convenience the final paragraph is repeated.

"***THE APPROACH OF THE COMMISSION IN SUMMARY***

120. In all the circumstances:-

120.1 The Commission abides the decision of the honourable court in relation to the merits of the review. The main concern of the Commission is to carry out its terms of reference lawfully and expeditiously. It is a matter of less concern to the Commission whether it should afford witnesses the privilege referred to in Section 3 of the Commissions Act or whether it should apply the provisions of Regulation 6. Nevertheless, in order to carry out its terms of reference lawfully and for the public purpose envisaged, it is necessary to exercise the powers to summons and question witnesses which are vested in a Commission by section 3 of the Commissions Act, i.e. irrespective of whether or not the provisions of Regulation 6 are to be applied.

120.2 The Commission respectfully requests that the review be disposed of expeditiously in order to allow it to carry out its terms of reference. It cannot do so without clarity as to its powers to question witnesses.

120.3 Whether the first applicant has misled this Honourable Court in material aspects, has abused its process, in order to avoid assisting the Commission (inter alia, by answering questions which do not incriminate him), and whether he has deliberately subverted the Commission, are matters which the Commission respectfully leaves in the hands of the honourable court, without further comment."

[7.] In support of its request, the Commission was constrained to inform the court of the Commission's view *viz.* that the provisions of Resolutions 661 and 986 have no legal effect on individual persons, legal or natural, in South Africa's domestic law. Individuals, who associated themselves with or made payments to Iraq, contrary to these resolutions, had not committed offences in South Africa by doing so. It follows, in so far as the Commission is concerned, that the issues raised by Hemphill's claim are moot. There is no need for the Commission to ask incriminating questions in order to establish whether or not illicit payments were made, as alleged in the Commission's terms of reference.

[8.] The interest of the Commission and the Executive in the pending litigation, therefore differ. This was expressed in the following way in the Commission's affidavit:

"27. *In the view of the Commission the material legal dispute in this matter lies between the first applicant and the executive branch of government viz. the fourth and fifth respondents. A primary interest of the Executive lies in the validity of Regulation 6. I am led to understand that this regulation contains a principle on which the proper functioning of many Commissions may rely. The primary interest of this Commission lies in implementing lawful regulations made by the Executive, whatever they may be. The question of requiring incriminating answers from the*

first applicant in relation to this Commission's terms of reference is addressed below[146].

28. *Accordingly the Commission abides the decision of this honourable court in relation to the abovementioned relief. The Commission has been independently represented by Senior Counsel, on whose advice it relies. However, by virtue of its peculiar knowledge of the facts and circumstances surrounding the present application, the Commission has elected to place certain information before this honourable court which it members believe may assist in determining the application.*"

[9.] It appears that, based on the advice of the Senior Counsel, the Executive respondents were not as inclined to facilitate an urgent hearing of the pending litigation as the Commission was.

[10.] Ultimately, the Commission's terms of reference were not amended to dispose of the challenge. Nor were the powers vested in the Commission to compel incriminating answers from witnesses vindicated by timely defence of Hemphill's challenge. The Commission has not been afforded sufficient time to achieve its public purpose through the use of alternative, more time consuming and less effective means that remained available to it while the litigation was pending.

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146 The issue was ten addressed in the affidavit with reference to the principals set out in paragraph [7.] above.

CONCLUSION

From the documentation that has been made available to the Commission, it has reached the conclusions below. Firstly, the content of the relevant documents are set out. Then, where necessary, the conclusions and their degree of probability are stated. For convenience the relevant issues raised by the terms of reference are printed in bold. The conclusions then appear in ordinary print[147].

A

Whether alleged surcharges on oil sales or illicit payments relating to purchases of humanitarian goods or any other illicit payments in respect of the Programme, or the offer to make such payments, referred to in the IIC Report and identified in the Annexure, were in fact paid or offered to be paid by the South African companies or individuals identified?

MONTEGA TRADING (PTY) LTD ("*MONTEGA*")[148]

1) a) On 21 December 2000, Montega, represented by an alleged non-contractual beneficiary, Mr Sandi Majali[149], concluded Oil Contract Number M/09/06, with the Iraqi State Oil Marketing Organisation ("*SOMO*"). In terms thereof two million barrels were allocated to Montega.

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147 In order to facilitate the reading of these conclusions as a separate document, the abbreviations used in the previous parts of this report, are repeated.

148 See June Report, pages 69 to 99, paragraphs [113.] to [180.]. See too the IIC Report on Programme Manipulation: Chapter Two: Oil Transactions and Illicit Payments at pages 104 to 236.

149 See Table 3 attached to the IIC Report at page 30.

b) The approval of the contract by the Iraqi Oil Minister, on 1 January 2001, made it subject to the payment of a surcharge to be paid during the month after delivery.

c) The number of barrels loaded, for and on behalf of Montega, was 1, 858, 530.

d) The surcharge required by the Oil Minister was never paid.

e) On a date unknown, Mr Sandi Majali gave a written undertaking to SOMO "*to perform all my obligation accordingly to SOMO's requirements regarding the return money (i.e. US $ 0.30/BBL) for US destination or (US $ 10.25/BBL) for Far East destination for the quantity of 2.0 million barrels*".

f) The undertaking was signed in his capacity as a representative of Imvume Management (Pty) Ltd ("*Imvume*").

g) The rates per barrel mentioned are surcharge rates imposed during the majority of the surcharge phases[150].

h) On 6 March 2002, Mr Majali made an offer to the Iraqi Oil Minister to pay the aforementioned outstanding surcharge in an amount of US $ 464, 000 in two equal instalments of US $ 232,

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150 See IIC Report on Programme Manipulation: Chapter II: OIL TRANSACTIONS AND ILLICIT PAYMENTS at page 111.

000, "*from the proceeds of the two liftings*" that were negotiated in favour of Imvume, under Crude Oil Contract Number M/11/72, dated 27 March 2002 ("*the First Imvume Contract*").

i) After 10 May 2002, on a date unknown and when Mr Majali's undertaking had not yet been fulfilled, he made a written offer to pay the first of the aforementioned surcharge instalments on 15 July 2002. He also offered to settle the outstanding balance by 15 August 2002 from the proceeds of a proposed allocation to Imvume of another two million barrels of oil.

j) The proceeds contemplated by Mr Majali's two offers were, in all likelihood, to have been derived from the resale of the oil in question to the Strategic Fuel Fund ("*SFF*"), in terms of two supply contracts. These contracts were concluded between Imvume and the SFF on 6 March 2002 and during or about 21 May 2002, respectively.

2) Mr Majali, representing Imvume, probably offered and attempted to pay the surcharges owed by Montega, in an amount of US $ 464, 000.

IMVUME MANAGEMENT (PTY) LTD ("*IMVUME*")[151]

1) a) On 27 March 2002, Imvume, represented by an alleged non-contractual beneficiary[152], Mr Sandi Majali[153], concluded Oil

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151 Ibid.

Contract Number M/11/72 ("*the First Imvume Contract*"), with SOMO. In terms thereof, two million barrels of oil were allocated to Imvume.

b) On 27 July 2002, Imvume, represented by Mr Majali, concluded Oil Contract Number M/12/78 ("*the Second Imvume Contract*"), with SOMO. In terms thereof, four million barrels were allocated to Imvume.

c) The approval of the First Imvume Contract by the Iraqi Oil Minister was granted as a result of an agreement between Iraqi Vice President Taha Yassin Ramadan and Deputy Prime Minister Tariq Aziz, on 30 March 2002. This approval made the First Imvume Contract subject to the payment of surcharges within thirty days after delivery. Delivery was required to take place before 29 May 2002.

d) On or about 10 May 2002 and at Baghdad, Mr Majali held a discussion with Mr Aziz and Mr Amer Rashid, the Iraqi Minister of Oil. Surcharges due to the Oil Ministry were discussed, particularly with reference to the First Imvume Contract.

e) After 10 May 2002, on a date unknown, Mr Majali, acting for and on behalf of Imvume, made a written offer to pay the surcharges

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152 See Table 3 attached to the IIC Report at page 30.

153 Mr M Mandela signed the First Imvume Contract with the authority of Mr Majali.

owed by Montega from the proceeds of the First Imvume Contract on 15 July 2002 and 15 August 2002.

f) On 21 May 2002, Imvume directed a letter to the SFF confirming that Imvume would supply the SFF with two million barrels of Basrah Light Crude Oil, over and above the four million barrels to be delivered to the SFF in terms of the supply contract concluded on 6 March 2002.

g) The approval of the Second Imvume Contract was granted by the Oil Minister, on 28 July 2002. This made the Second Imvume Contract subject to the payment of surcharges within thirty days after delivery. Delivery was required to take place before 25 November 2002.

2) It is probable in the circumstances which prevailed between 6 March 2002 and 28 July 2002 that an advance surcharge payment of US $ 60, 000 would have had to be made on the First Imvume Contract before the Oil Minister would have seen fit to approve the Second Imvume Contract.

3) It is not improbable that an advance surcharge payment amounting to US $ 60, 000 was deposited at the Central Bank of Iraq for and on behalf of Imvume, in connection with the First Imvume Contract[154] on

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154 See June Report, paragraph [116.] at pages 70 to 71 and paragraphs [120.] to [126.], at pages 72 to 76.

20 July 2002, i.e. a few days before the Second Imvume Contract was concluded and approved.

MOCOH SERVICES (PTY) LTD ("*MOCOH*")[155]

1) Mr Michael Hacking is a director of Mocoh. The company is registered in South Africa. Mr Hacking is not a South African national.

2) a) On 26 June 2000, Mocoh, represented by Mr Hacking, concluded Oil Contract Number M/08/54 ("*the First Mocoh Contract*") with SOMO. In terms thereof one million barrels were allocated to Mocoh.

b) On 30 January 2001, Mocoh, represented by Mr Hacking, concluded Oil Contract Number M/09/40 ("*the Second Mocoh Contract*") with SOMO. In terms thereof two million barrels were allocated to Mocoh.

c) Mr Hacking was the non-contractual beneficiary of the First Mocoh Contract and the Second Mocoh Contract.

d) The approval of the Second Mocoh Contract by the Oil Minister, on 9 February 2001, made the Second Mocoh Contract subject to the payment of a recovery amount. This was payable within 30 days after shipment loading.

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155 See Part D of this report at page 49.

e) On 18 April 2001, a total of 1, 917, 957 barrels of oil were lifted in two separate loadings pursuant to the Second Mocoh Contract.

3) Two surcharge payments that arose from Iraqi levies on the Second Mocoh Contract were paid for and on behalf of Mocoh in Swiss Francs at Jordan National Bank.

4) The first payment was made by Mr Hacking (or with his authority), on 19 April 2001. This amount was CHF 424, 995.

5) The second payment was made by order of Mr Hacking on 15 July 2001. This amount was CHF 550, 630.

OMNI OIL ("*OMNI*")[156]

1) Omni is not registered as a company in South Africa.

2) Mr Shakir Al-Khafaji was the non-contractual beneficiary of the oil contracts concluded between Omni and SOMO.

3) Mr Al-Khafaji is an Iraqi national. He is resident in the United States.

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156 See the June Report, paragraphs [98.] to [112.], at pages 62 to 69.

4) a) On 22 July 2001, Omni concluded Oil Contract Number M/10/24, with SOMO. In terms thereof two million barrels were allocated to Omni. In concluding this contract, Omni was represented by Mr Rodney S Hemphill, who purported to be its managing director.

b) On 28 July 2001, the approval of this contract by the Oil Minister, based on an allocation list, dated 6 July 2001, was requested by the General Manager of SOMO[157].

c) The request for approval contained the terms of the contract that had been concluded between SOMO and Omni. The request stated that Mr Al-Khafaji had signed the contract.

d) The contract made provision for a recovery amount made up of US $ 60, 000, being an advance payment already made, and a balance (90% of the recovery amount) which had to be paid within 30 days after shipment loading.

e) Approval of the request was granted accordingly.

5) In the circumstances it is likely that Omni, represented by Mr Al-Khafaji, made an advance surcharge payment of US $ 60, 000, and that this amount was deposited at Jordan National Bank on 17 July 2001, as the IIC alleged.

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157 See Document No. 116 in Addendum 3.

6) It is not unlikely that Omni, represented by Mr Al-Khafaji, would have paid the outstanding surcharge balance required by the Iraqis on the 2, 070, 270 barrels of oil that were lifted, *viz.* US $ 540, 000 on 5 September 2001 and US $ 21, 000 on 24 January 2001, at Jordan National Bank, as the IIC alleged.

7) Without compelling the oral testimony of Mr Hemphill, the Commission cannot come to a firmer conclusion about the activities of Omni and Mr Al-Khafaji[158].

APE PUMPS (PTY) LTD ("*APE PUMPS*")[159]

1) a) In relation to Contract Number 830775 ("*the First Ape Pumps Contract*"), illicit after-sales-service fees ("*ASSF*") amounting to CHF 150, 760 were levied by the Oil Pipelines Company, a state institution which fell under the control of the Iraqi Ministry of Oil.

b) On 25 July 2002, Ape Pumps paid ASSF in the amount of Euro 67, 894.20, to the Oil Pipelines Company.

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158 Mr Hemphill has, in the view of the Commission, misrepresented facts: to the South African Permanent Mission to the UN, to the Office for Iraq Programme and to the Pretoria High Court. It is likely that he made similar misrepresentations in statements to the IIC and the Federal Prosecutors for the Southern District of New York. The Commission will therefore be unable to place any weight on a statement made by Mr Hemphill in relation to the Programme unless it is made orally under oath and is subject to cross-examination.

159 See Part F of this report, particularly paragraphs [8.] and [25.].

2) a) In relation to Contract Number 1030506 ("*the Second Ape Pumps Contract*"), ASSF amounting to Euro 3, 123, were levied by the Northern Gas Industry ("*NGI*"), a state institution which fell under the control of the Iraqi Ministry of Oil.

b) On 8 January 2003, Ape Pumps paid ASSF in the amount of Euro 3, 123, to NGI.

FALCON TRADING GROUP LIMITED ("*FALCON*")[160]

1) Falcon is not registered as a company in South Africa.

2) a) At the material times, this entity was represented in South Africa by Mr Hemphill, a South African national. Elsewhere it was represented by Mr Al-Khafaji and/or Mr Hemphill.

b) On 3 November 2003, Mr Hemphill, purporting to be a director of the "*Falcon Trading Group*", signed an amendment to Contract Number 11-0-996[161]. The purpose of this amendment was to reduce, by Euro 21, 780, the original contract price of air conditioning materials that had been sold to the Iraqi Ministry of Trade, State Company for Shopping Centres. The original contract had been concluded, on 16 June 2002. Mr Al-Khafaji had signed this contract on behalf of the seller.

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160 See the June Report, paragraphs [80.] to [97.], at pages 54 to 62 and in particular paragraph [87.] at page 57.

161 See Document No. 8 in Addendum 1.

c) The sum of Euro 21, 780 represented the value of ASSF that the Falcon Trading Group had agreed to pay to the government of Iraq in terms of the original contract.

3) Therefore, in terms of Contract Number 11-0-996, Mr Al-Khafaji, representing an entity known as the Falcon Trading Group, offered to pay ASSF amounting to Euro 21, 780.

4) Falcon, represented by Mr Al-Khafaji, offered to make the following payments of ASSF and/or inland transportation fees ("*ITF*") in regard to purchases made by the Iraqi State Trading Company for Construction Materials: -

a) Ten per cent of the contract price (CIF) of Iraqi Contract Number 10-H-23, dated 18 October 2001, for the supply of twenty five thousand MT deformed bars as after sales service: in addition to the payment of ITF to the Iraqi State Company for Water Transport ("*the ISCWT*"). These kickbacks were to be paid for each shipment before unloading the vessel.

b) Ten per cent of the contract price of Iraqi Contract Number 011-H-024, dated 15 September 2002, for the supply of three thousand tons of IPE steel joists as after sales service.

c) Ten per cent of the contract price of a contract, dated 15 September 2002 (with an undecipherable number), for the

supply of "*1, 000 tons round (of) plain bars*" as after sales service.

d) Ten per cent of the contract price of Iraqi Contract Number 12-C0-00211, dated 30 January 2003, for the supply of "*5 000 CBM white wood*" as after sales service: in addition to the payment of ITF to the ISCWT.

e) Ten per cent of the contract price of Iraqi Contract Number 12-C0-00210, dated 1 February 2003, for the supply of "*3, 000 cubic feet yang wood*", as after sales service, as well as ITF.

4) Without compelling the oral testimony of Mr Hemphill, the Commission can come to no further conclusions about the activities of Falcon.

GLAXO WELLCOME SA (SOUTH AFRICA) (PTY) LTD ("*GLAXO WELLCOME*")[162]

Without exercising the coercive statutory powers vested by section 3 of the Commissions Act, the Commission was unable to make any factual finding about the contract concluded by Glaxo Wellcome during Phase 8 of the Programme.

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162 See Part H of this report.

REYROLLE LIMITED ("*REYROLLE*")[163]

Considerable suspicion exists that Reyrolle paid ASSF to the Iraqi Ministry of Health via an agent in Iraq, pursuant to Contract Number 800993. Without the exercise of the aforementioned powers, the Commission remains unable to reach any sustainable conclusion in relation to this contract.

B

Whether the illicit conduct found to have been perpetrated by Mr Majali (acting personally and/or on behalf of Montega and Imvume), Mr Hacking (acting personally and/or on behalf of Mocoh), Mr Al-Khafaji (acting personally and/or representing the entities known as Omni Oil and Falcon Trading Group Limited), and the illicit conduct admitted by Ape Pumps, fall within the jurisdiction of any South African court of law or amount to the commission of offences, which may be tried in such court?

1) The only illicit conduct shown to have been perpetrated within the territorial jurisdiction of a South African court was the payment of ASSF, for and on behalf of Ape Pumps[164], by Standard Bank of South Africa Limited. The criminal jurisdiction of such a court does not exist

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163 See Part G of this report.

164 The first amount was Euro 67, 894.20, which was paid to Mr Firas Ibrahim Obid Yasin, at the Arab Bank on 25 July 2002. The second amount was Euro 3, 123.00, which was paid to North Gas Industries, Rafadian Bank on 8 January 2003.

over this contract. Nor could it have existed over any other illicit conduct shown to have been perpetrated above.

2) The payments in question, as well as the offers to make payments, did not *per se* constitute offences which may be tried by a South African court of law. The basis for this conclusion was set out in the June Report[165].

3) The Charter of the United Nations ("*the Charter*"), bound South Africa when the Constitution took effect[166]. However, the Charter does not create obligations for individual South Africans or persons within the territory of South Africa. The Charter could only become law within South Africa after its enactment into domestic law by national legislation[167]. No legislation currently exists in South Africa that incorporates Security Council resolutions, made under Chapter VII of the Charter, into domestic law.

4) The prohibitions and restraints contained in Resolution 661 and 986 have no criminal legal effect on individual persons, legal or natural, in South African domestic law. By virtue of the principle that a crime cannot be committed unless it already exists in law[168], individuals who associated themselves with or made payments to Iraq, contrary to the provisions of Resolutions 661 and 986 did not commit offences in South Africa by doing so. Nor does the proven or admitted illicit

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165 See paragraph [48.] at page 36 of the June Report.
166 See section 231(5) of the Constitution.
167 See section 231(4) of the Constitution.
168 The *nullum crimen sine lege* principle.

illegal, illicit or irregular international activities, including sanction busting in respect of internationally imposed sanctions:

1) The proposals set out in Part E of the June Report[169] are endorsed with the qualifications and additions referred to in Part C above[170].

2) In dealing with Security Council resolutions such as Resolution 661 ("*sanctions proper*") that impose economic sanctions, national legislation should be enacted to incorporate the provisions of Chapter VII of the Charter into domestic law to such an extent as may be necessary to create liability for the individual. Such legislation should prohibit South African nationals, both within South Africa and abroad, as well as any person within the territory of South Africa, from committing any "listed activity" in violation of the provisions of Security Council resolutions passed under Chapter VII, after such activity has been listed by the National Executive in the *Gazette*. In the same legislation, criminal sanctions for persons (legal or natural) who commit a listed activity should be enacted.

3) The National Executive should, within the parameters of the Constitution, impose a coherent, transparent regulatory regime that attempts to achieve the objects of sanctions proper and also regulates humanitarian and economic activity which may be authorised by the Security Council.

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169 See paragraph [60.] at pages 42 to 44 of the June Report.
170 See Part C at pages 31 to 49 of this report.

4) In order to prevent monetary payments to states under economic sanction, provision should be made to put exchange control regulations into place, spontaneously and in line with Chapter VII resolutions, as soon as such resolutions are passed in the future.

5) In addition to exchange control regulation, banking legislation and/or regulation should prohibit the provision of guarantees as well as the making of direct payments to governments under sanction.

6) Provision should also be made for spontaneous control of the import into South Africa of goods affected by sanctions and/or the transhipment thereof via the territory of South Africa, or through the use of South African flag vessels.

7) During the operation of economic sanctions, contractors with the state or with state institutions should be required to disclose whether any commodity or goods, intended to be supplied to the state or a state institution, emanate from a country under sanction.

8) In dealing with Security Council resolutions such as Resolution 986, that partially lift and/or ameliorate economic sanctions, a legislative prohibition should be created, that prohibits South African companies and individuals, and any person within South Africa who may become involved in UN sanctions programmes, from executing contracts without a licence. Such licensing should be introduced and administrated by the Treasury, the Department of Foreign Affairs

and/or the State departments which are relevant to the particular activity.

9) The department licencing participation in a UN Programme should require an undertaking that no bribes have been paid or stand to be paid to the regime by the contractor.

10) Banks should be required to ensure that international payments to agents and/or foreign institutions, in respect of transactions affected by such programmes, are authorised by Security Council resolution.

11) To this end, the Reserve Bank, should be required to certify international payments to agents with reference to authentic written agency agreements that expressly provide for the payment of commissions, as well as legitimate formulae for calculation of amounts payable. Any agreement which permits an agent to receive an indeterminate or excessive commission for facilitating the involvement of a South African contractor in a UN sanctions programme should be deemed to involve an illicit payment.

12) During the existence of ameliorated economic sanctions such as Resolution 986, contractors with the state should be required to warrant that they have complied with all relevant Security Council resolutions, UN agreements and memoranda of understanding that may be applicable to the transactions in question.

13) Directives should be issued to the various Missions which fall under the Department of Foreign Affairs, to the effect that UN regulated exemptions from the imposition of economic sanctions under Chapter VII that are processed via a Mission, should be thoroughly scrutinised: and refused whenever the participants are not South African nationals.

14) An amendment should be effected to the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), so as to make provision for conviction of an individual on a charge of corruption under the Act in cases where a sovereign state is found to be a beneficiary of corruption in the application of sections 3 to 6, 12 and 13.

E

It is respectfully suggested that the adverse findings made against certain subjects of the Commission's enquiry in this report and the June Report, should be presented to the subjects in question for their comment before the findings are made public.

F

Finally, because of the inhibitory effect which the pending litigation has had on the execution of the Commission's terms of reference, the Commission respectfully requests that its terms of reference be extended so as to facilitate a final report based on a full and proper exercise of its powers of investigation:

1) Firstly, by extending the period for a final report to a date twelve weeks[171] after notice thereof has been given to the Commission.

2) Secondly, by authorising the Commission to exercise the powers as to witnesses which are vested by section 3 of the Commissions Act, i.e. to issue summonses for the attendance of witness, for the production of any document and for the giving of oral evidence under oath.

Michael Donen, SC
(Chairperson)

Adv Andrew Chauke
(Member)

Snr Supt Lucy Moleko
(Member)

171 This period will allow the Commission to interview material witnesses such as Mission officials and others identified above. It will also allow the Commission to obtain the assistance of Mr Kgalema Motlanthe, Messrs Upton, Griffiths and Pritchard (regarding Reyrolle), and to carry out its investigation of Glaxo Wellcome. Documentation which has been withheld from the Commission could also to be obtained by the issue of summonses. Finally the grounds for reaching conclusions in the reports of the Commission that differ from the conclusions of the IIC would be determined in consultation with Mr Brian Mich, counsel for the IIC.