

two agreements. The first one was concluded with Eastoft, represented by Davies¹⁰⁴. The second was concluded with Falcon represented by Hemphill¹⁰⁵.

[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".

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 costs¹⁰⁶. 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.

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.

As 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 charged¹⁰⁸. 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 Clover¹⁰⁹. 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.

¹⁰⁸ See Document No. 82 in Addendum 3.

¹⁰⁹ See Document No. 83 in Addendum 3.

IIC METHODOLOGY (THIRD AND FOURTH AGREEMENTS)

[68.] The IIC Tables and the Annexure¹¹⁰, 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, 500¹¹¹.

[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 amendment¹¹². 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.

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

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 account¹¹⁴.**
- [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

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. 77/99/626¹¹⁷.
- [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.

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 Africa¹²⁰. 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 qualified¹²¹. 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, 022¹²². 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 Mission¹²³. Cardy directed Griffith's reply to the OIP on the following day¹²⁴. 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 2001¹²⁶. 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 amount¹²⁷ (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 contract¹²⁸. (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 Winter¹²⁹. 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 contract¹³⁰. 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

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 contract¹³¹. 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 Substation¹³².

[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

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, Pritchard'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. C726300¹³³. The goods arrived in Iraq on 30 January 2002 and 9 November 2002¹³⁴. 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 respectively¹³⁵.

[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.

PART H

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 Invume¹³⁶. Following the institution of the pending litigation and by agreement with the Commission, the Financial

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.

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 client¹³⁸.
- [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 payment¹³⁹.

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's¹⁴⁰.

[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* invoice¹⁴¹, 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 2001¹⁴².

[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.

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.

PART I

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 2006¹⁴³. The developments around the litigation and effects thereof, up to 3 July 2006, were set out in the June Report¹⁴⁴. 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 thereto¹⁴⁵.

[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 below¹⁴⁶.

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 its 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.

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 print¹⁴⁷.

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 Majali¹⁴⁹, 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.

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 phases¹⁵⁰.
- 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,

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 beneficiary¹⁵², Mr Sandi Majali¹⁵³, concluded Oil

¹⁵¹ Ibid.

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

- b) On 27 July 2002, Invume, represented by Mr Majali, concluded Oil Contract Number M/12/78 (*"the Second Invume Contract"*), with SOMO. In terms thereof, four million barrels were allocated to Invume.
- c) The approval of the First Invume 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 Invume 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 Invume Contract.
- e) After 10 May 2002, on a date unknown, Mr Majali, acting for and on behalf of Invume, made a written offer to pay the surcharges

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

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

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

- f) On 21 May 2002, Invume directed a letter to the SFF confirming that Invume 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 Invume Contract was granted by the Oil Minister, on 28 July 2002. This made the Second Invume 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 Invume Contract before the Oil Minister would have seen fit to approve the Second Invume 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 Invume, in connection with the First Invume Contract¹⁵⁴ on

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 Invume Contract was concluded and approved.

MOCOH SERVICES (PTY) LTD (“MOCOH”)¹⁵⁵

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

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

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

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

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

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.

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 SOMO¹⁵⁷.
 - 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.

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-Khafaji¹⁵⁸.

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.

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 11-0-996¹⁶¹. 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.

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 ISJWT*"). 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.

¹⁶² See Part H of this report.

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 Pumps¹⁶⁴, by Standard Bank of South Africa Limited. The criminal jurisdiction of such a court does not exist

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 Report¹⁶⁵.
- 3) The Charter of the United Nations ("*the Charter*"), bound South Africa when the Constitution took effect¹⁶⁶. 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 legislation¹⁶⁷. 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 law¹⁶⁸, 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

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 Report¹⁶⁹ are endorsed with the qualifications and additions referred to in Part C above¹⁷⁰.
- 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.

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 transshipment 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

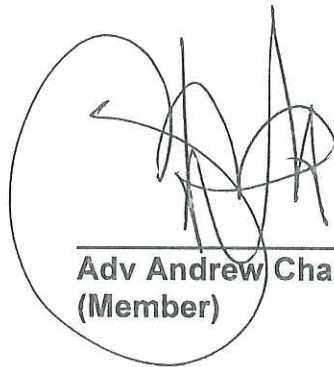
Finally, because of the inhibitory effect which the pending litigation has had on the execution of the Commission's terms of reference, the Commission respectfully requests that its terms of reference be extended so as to facilitate a final report based on a full and proper exercise of its powers of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

- 1) Firstly, by extending the period for a final report to a date twelve weeks¹⁷¹ 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.