

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 Moch. 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 Moch and/or Mvelaphanda. The last-mentioned company apparently regards Moch as "our company".

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

[10.] Table 1 reflects that Moch 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 Moch 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 Moch 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 (Moch), and Hacking and his company Moch (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 Oil⁴³. These letters of approval related to contracts concluded during Phases 5 to 9. The last-mentioned was an approval of the Second Moch Contract. The Commission has obtained a sworn translation thereof⁴⁴. 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 Moch 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 Bank⁴⁵. 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 Commission⁴⁶. 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

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 Oil⁴⁷, record the approval of the extension of the validity of the Second Moch 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 Moch, “care of the escrow bank, Moch Benmore South Africa and Hacking, care of SOMO Baghdad”⁴⁸. On the same date, another million barrels were lifted by the same vessel⁴⁹. 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.**

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 Moco 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 Moco 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 Moco's letterhead⁵⁰. 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 Moco was a South African registered company. (Moco 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 Moco 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*".

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 Mission⁵¹. 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**

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 2004⁵². 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 Moco 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 Moco 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 Moch (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 Moch 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 Moch 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 Moch.

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

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 Moch 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 Moch 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, Moch Energy International Limited ("*Moch 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 Moch to each shareholder.

[46.] A company search has established that Moch 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, Moch. He personally directed this contract to Alexander Kramer, an Oil Overseer, on 11 February 1999, on a Moch 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 London⁵⁴.

[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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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, Moco lifted 832, 973 barrels.
- [53.] During Phase 8 (9 June 2000 to 4 December 2000), under Contract No. M/08/54, Moco lifted 946, 313 barrels.
- [54.] During Phase 9 (1 December 2000 to 2 July 2001), under Contract No. M/09/40, Moco 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. Moco 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. Moch 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 Moch 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 Moch, 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. Moch 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 2000⁵⁵. 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

⁵⁵ See Document No. 30 in Addendum 3.

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

[62.] **In contradiction to Sexwale's response, his co-director of Moch, Hacking (in his letter to Ambassador Kumalo at the Mission, on 27 March 2003), stated unequivocally that Moch 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 Moch in accordance with past practice.

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

- a) **Moch 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 Mochh letterhead⁵⁶. 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 Mochh.

Contract Number M/06/28

[71.] Similarly, this contract was directed to the Oil Overseers by Hacking on Mochh's letterhead on 2 June 1999. Hacking signed the contract on 30 May 1999, in his capacity as director of Mochh⁵⁷. 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 Mochh⁵⁸. The original letter of credit was for a maximum amount of US \$ 15, 000, 000.

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 Mochoh 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 Hacking⁵⁹. The letter of credit (Number LC K1ILC0000260), in the amount of US \$ 20, 160, 000, was issued on behalf of Mochoh, 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 Mochoh⁶⁰.

Contract Number M/08/54

[73.] This is the First Mochoh Contract. The contract was approved on 5 July 2000. An undated application for approval was signed by Hacking on behalf of Mochoh. The contract was signed by Hacking in his capacity as director on behalf of Mochoh on 26 June 2000⁶¹. 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 Mochoh, on 24 October 2000⁶².

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 Mochoh Contract. Hacking signed the original contract as a director on 30 January 2001⁶³. 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 Mochoh, Hacking had requested the Oil Overseers to extend the original contract which had been concluded on 30 January 2001⁶⁴. The undated application for approval of the original contract had been signed by Hacking as the managing director of Mochoh⁶⁵.

[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 Mochoh on 30 March 2001⁶⁶.

[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 CPA⁶⁷ 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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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.

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.

IIC ALLEGATIONS

- [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 data⁶⁹.
- [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 data⁷⁰.
- [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*")

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 2005⁷³. 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."

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 quoted⁷⁴. 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.

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, Murphy⁷⁵.

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 approval⁷⁶. 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**

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% TEF⁷⁷ due under Contract No. PL/M/09/14, was remitted to Oil Pipeline's bank as soon as possible⁷⁸. 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 Iraqis⁷⁹.

[22.] On 24 June 2002, Davies informed Murphy by e-mail⁸⁰ (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

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 credit⁸¹.

[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

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 2001⁸².

[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 UN⁸³.

[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.**

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, 234.70⁸⁴.

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 Bank⁸⁵.

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.

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 Freight⁸⁷ 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 Pumps⁸⁸. 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*

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 2002⁹⁰. 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

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 COMPANY⁹². A side agreement⁹³, 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 copy⁹⁴ 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 NGI⁹⁶. 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.

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 421550775⁹⁷.
- [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,

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 telefax⁹⁹ 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 Bank¹⁰⁰. 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 them¹⁰¹.

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 Pumps¹⁰². 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 2003¹⁰³.

[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

¹⁰² See Document No. 76 in Addendum 3.

¹⁰³ See Document No. 77 in Addendum 3.