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Report

of the

Judicial Commission of Inquiry

into the

Goldenberg Affair

Chairman:

The Hon. Mr. Justice S. E. O. Bosire, J.A.

Presented to:

His Excellency Hon. Mwai Kibaki, C.G.H., M.P.

President and Commander-in-Chief of the Armed Forces of the Republic of Kenya

October, 2005

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ABBREVIATIONS

In a report of this size, we have had to use abbreviations. The main ones are as follows:-

Pattni or Mr. Pattni refers to Mr. Kamlesh Mansukhlal Damji Pattni. All other Patnis are reffered to by their first of full names.

GIL	-	Goldenberg International Ltd.
EBL	-	Exchange Bank Ltd.

Other abbreviations are listed alphabetically:

AMEX	-	American Express Bank Ltd.
BIA	-	Banque Indosuez Sogem Aval Ltd.
CBK	-	Central Bank of Kenya
CD3	-	Customs Declaration Form 3
Forex C	-	Convertible Foreign Exchange Bearer Certificate
GSU	-	General Service Unit of the Kenya Police Department
IMF	-	International Monetary Fund
LSK	-	Law Society of Kenya
KANU	-	Kenya African National Union
KCB	-	Kenya Commercial Bank Ltd
KICC	-	Kenyatta International Conference Centre
NBK	-	National Bank of Kenya
NOCK	-	National Oil Corporation of Kenya Ltd.
OMO Bills	-	Open Market Operation Bills
PAB	-	Pan African Bank Ltd.
PAC	-	Public Accounts Committee of Parliament
PMG	-	Paymaster General Account with the Central Bank of Kenya
TNB	-	Trans National Bank Ltd.
VP/MF	-	Vice President and Minister for Finance (Hon. Saitoti)
WB	-	World Bank

LETTER OF TRANSMITTAL

His Excellency the President
Hon. Mwai Kibaki, C.G.H., M.P.
State House
NAIROBI

Your Excellency,

By Gazette Notice Nos. 1237 and 1238 of 24th February 2003 and No. 7593 of 29th October 2003, you appointed us as members of the Judicial Commission to enquire into the Goldenberg affair with specific terms of reference which we have reproduced at the beginning of this report. You also asked us to make various recommendations in lines suggested in the said terms of reference.

We have carried out the assignment in terms of section 7 of the Commissions of Inquiry Act Cap 102, Laws of Kenya, and now have the honour, Your Excellency, to submit our report to you. We thank you most sincerely for the trust you bestowed on us.

We are,
Your Excellency's most obedient servants,

The Hon. Mr. Justice S.E.O. Bosire, J.A.
Chairman

Mr. Nzamba Kitonga, Senior Counsel
Vice-Chairman

Mr. Peter Le Pelley, Senior Counsel
Commissoner

3rd February 2004

ACKNOWLEDGMENTS

Our task would have been impossible without the assistance and support of various persons, individual, and corporate. In that connection, we would like to thank the Attorney General, Hon. Amos S. Wako, E.G.H., E.B.S., M.P. who appeared as amicus curiae before us and for his valuable assistance to us at various stages of the inquiry.

We would like to thank the Chief Justice, Hon. Evan Gicheru, the Commissioner of Police, the Commandant Administration Police, and other Government Ministries and Departments for releasing the various officers who were attached to this Judicial Commission.

We would like to express our appreciation to counsel assisting the Judicial Commission, viz Mr. Waweru Gatonye, Mrs. Dorcas Oduor, Dr. John Khaminwa and Dr. Kamau Kuria whose assistance was invaluable in our endeavour to unravel the Goldenberg Affair. We particularly thank Mrs. Dorcas Oduor, for her resourcefulness in identifying some important witnesses who testified and some documentary material which was tendered in evidence.

We would like to express our appreciation to other Counsel who appeared for various persons, corporate and individual, who were adversely mentioned. They displayed excellent advocacy and decorum during the inquiry and for that we commend them.

We must record our appreciation for the contribution of the Joint Secretaries to this Judicial Commission, Mr. Dan Ameyo (presently the Postmaster General) and Mr. William Ouko (now a Judge of the High Court), whose contribution to the judicial Commission although for a short time, was invaluable and memorable. Mr. George Mongare Kegoro, replaced those two and worked single handedly as Joint Secretary for this Judicial Commission for a period in excess of one and half years. His contribution merits special mention. The Judicial Commission on the Goldenberg Affair had a chequered history. It had many challenges. Often we worked long hours and this inquiry involved a lot of documentation, a lot of correspondence, consultation, co-ordination etc. Mr. Kegoro was equal to the task and worked tirelessly to

ensure that there were no administrative bottlenecks. We must thank him very much.

The following deserve our special thanks for their commendable role in the proceedings; the Parliamentary Hansard team for the preparation of the voluminous verbatim report of our proceedings which runs to 18,324 pages. They were useful in compiling our Report; The Executive Officer, Mr. Henry Aoko, who coordinated the various activities during the proceedings and at our offices deserves commendation for his tireless efforts to ensure that all necessary facilities were present; Simon Wasilwa and Thomas Furaha of the High Court Nairobi and Chief Magistrate's Court, Mombasa, respectively whose personal support to us was indispensable.

The most difficult and challenging part of our assignment was the compilation and writing of our report. The exercise took long as the documentation involved was massive. We could not have put the report together without the dedicated work of our secretaries; Miss Teresa Miyogo, Mrs Felista Kiliku and Miss Lilian Amogola; and our clerk Mr. Simon Wasilwa who was identifying and availing the various documentary exhibits to us. Mr. Isaiah Langatt, Computer Operations Assistant, printed and bound our report. We thank him very much for his invaluable assistance.

Finally, we would like to thank the clerk of the National Assembly and the Management of KICC who placed at our disposal the physical and other facilities for the use of the Judicial Commission and all other staff of the Commission for their respective roles.

THE HON. MR. JUSTICE S.E.O. BOSIRE
JUDGE OF APPEAL
CHAIRMAN

MR. NZAMBA KITONGA (SENIOR COUNSEL)
VICE-CHAIRMAN

MR. PETER LE PELLEY (SENIOR COUNSEL)
COMMISSONER

INTRODUCTION

[A] CITATION

1. By Gazette Notices Nos.1237 and 1238 dated 24th February, 2003 [See **Appendix A & B]** Hon. Mr. Justice Samuel Elkana Onderi Bosire, Hon. Mr. Justice Daniel K. Aganyanya and Mr. Peter Le Pelley Senior Counsel (S.C.) were appointed to be Commissioners of a Judicial Commission of Inquiry by His Excellency Mwai Kibaki, President of the Republic of Kenya in exercise of the powers conferred by **Section 3** of The Commissions of Inquiry Act Cap 102 Laws of Kenya with Hon. Mr. Justice Samuel Elkana Onderi Bosire, a Judge of Appeal as Chairman and Hon. Mr. Justice Daniel K. Aganyanya, a Judge of High Court as Vice Chairman. By Gazette No.7593 dated 29th October, 2003 the appointment of Hon. Mr. Justice Daniel K. Aganyanya was revoked and Mr. Nzamba Kitonga, (S.C). was appointed to replace Hon. Mr. Justice Aganyanya both as Commissioner and Vice Chairman of this Judicial Commission of Inquiry.

2. In the citation Mr. William Ouko and Mr. Dan K. Ameyo were appointed Joint Secretaries to the Judicial Commission; Mr. Waweru Gatonye and Mrs. Dorcas Agik Oduor as Assisting Counsel, but in a later gazette notice to wit **Gazette Notice No 2223** dated 4th April, 2003 John Mugalasinga Khaminwa and Gibson Kamau Kuria were appointed additional Counsel to assist the Judicial Commission. In yet a further Gazette Notice No. 5133 dated 29th July, 2003 Mr. George Mongare Kegoro was appointed joint secretary to replace Mr. Dan K. Ameyo whose appointment was revoked by the same Gazette Notice.
In conformity with the Commonwealth tradition the Judicial Commission was designated the "Bosire Commission". Although the period of our inquiry was not limited we were directed to undertake the inquiry and make a report to His Excellency the President as soon as possible

[B] TERMS OF REFERENCE

3. In exercise of the powers conferred upon the President by **Section 3** of the Commissions of Inquiry Act, we were particularly directed in the citation as our Terms of Reference:

"(a) to inquire into the origins of, the acceptance and the implementation by the Government of the proposal to award export compensation in respect of exports of gold and diamond jewellery under the Local Manufactures (Export Compensation)Act (Chapter 485 of Laws of Kenya;

(b) **to inquire into allegations of irregular payments of export compensation under the Local Manufactures ((Export Compensation) Act to Goldenberg International Limited, being a percentage of the value of gold and diamond jewellery allegedly exported from Kenya by the said company, with a view to establishing -**

(i) whether in fact any gold or diamond jewellery was exported from Kenya and if so, how much and to whom;

(ii) whether the amount of gold of diamond jewellery export was processed through Customs as required;

(iii) **whether there was a declaration and remittance of the alleged foreign currency earnings;**

(iv) whether the alleged foreign currency earned was cleared and remitted to the Central Bank of Kenya and if so, how much;

(v) **the circumstances and grounds upon which the compensation was claimed and paid to Goldenberg International Limited;**

(vi) **the actual amount of export compensation paid to Goldenberg International Limited, including but not limited to Kshs 5.8 Billion, and whether any of the said amount was paid to third parties and if so, the identity of such third parties and the amount paid to them;**

(c) **to inquire into the alleged payment of US$210 (Ksh.13.5 billion) by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims with a view to establishing –**

(i) whether the equivalent in Kenya shillings was paid to Exchange Bank Limited and/or Goldenberg International Limited and if so, how the money was utilised; and

(ii) **whether any or all the money was paid to third parties and if so, the identity of such parties and the amounts paid to them;**

(d) **to establish all persons, public or private, involved in the alleged irregular claims and payments to Goldenberg International Limited and/or Exchange Bank Limited and the extend of their responsibility**;

These terms of reference were later expanded under **Gazette Notice No 5134** of 29th July, 2003 to include the following:

(e) **to inquire into the origins of, acceptance and implementation by the Central Bank of Kenya of the Rediscounting Facility for Pre-Export Bills of Exchange**;

(f) to inquire into allegations that under the Central Bank of Kenya Rediscounting Facility for Pre-Export Bills of Exchange, various amounts were fraudulently paid out of the Central Bank of Kenya, through the Exchange Bank Limited, Kenya Commercial Bank Limited, National Bank of Kenya Limited , Delphis Bank Limited, Trust Bank Limited, Trade Bank Limited and any other commercial bank, to Goldenberg International Limited, Siro Voulla Rousalis and any other party, occasioning loss to the Central Bank of Kenya;

(g) to inquire into allegations that a the moneys fraudulently paid to Goldenberg International Limited, Exchange Bank Limited and other companies as export compensation under paragraphs (b) and (c), and under the Rediscounting Facility for Pre-Export Bills of Exchange under paragraph (f), were allegedly used by those companies, their shareholders or directors to fraudulently earn profits by speculating in convertible foreign exchange bearer certificates;

(h) **to inquire into allegations that the Exchange Bank Limited, Goldenberg International Limited, their shareholders and directors, used the moneys paid to them under paragraphs (b), (c) and (f), jointly with Pan African Bank Limited, Delphis Bank Limited, Transnational Bank Limited and Post Credit Bank Limited to defraud the Central Bank of Kenya through a fraudulent scheme of cheque kiting**;

(i) to inquire into origins of, acceptance and implementation of the special issue of Treasury Bills by the Central Bank of Kenya during the years 1992 and 1993, in relation to the moneys obtained under paragraphs (b), (c) and (f) and establish the further loss, if any, occasioned to the Central Bank of Kenya;

(j) to inquire whether the moneys illegally obtained from the Central Bank of Kenya, the Customs Department and the Treasury were utilized, in part or at all, to fund the campaigns of any political parties, and if so, which parties and to what extent;

(k) to inquire into the effect the Goldenberg-related civil and criminal litigation had on the administration of justice in Kenya;

(l) to inquire into and establish the identities of the shareholders, directors and beneficial owners of all companies, partnerships and other business entities involved in the transactions in question;

(m) to inquire into, establish and trace, locally and internationally, all assets acquired directly or indirectly with moneys illegally obtained from the Central Bank of Kenya, the Customs Department and Treasury through the transactions under inquiry;

(n) **to inquire into and establish the identities of the parties involved in the illegal destruction of documents and other materials in a scheme to cover up the colossal loss to the Government occasioned by the "Goldenberg Affair"in order to avoid detection, investigation and prosecution or otherwise obstruct the course of justice;**

(o) **to inquire into allegations that the disputed acquisition of the asset in Kenya, of World Duty Free Company Limited, incorporated in the Isle of Man, by Kamlesh Pattni vide a court order in Kenya was in pursuance of the cover-up of the irregularities in the Goldenberg Affair";**

(p) **to inquire into and establish the identities of all persons adversely affected, or who sustained any loss or damage as a result of the aforesaid illegal attempt to cover up the irregularities in the "Goldenberg Affair";**

(q) **to inquire into the overall detrimental effect on the Kenyan economy following the irregular payments and to inquire into the extent of the damage, if any, the foregoing transactions had on the economy, and may continue to have in future;**

(r) **to inquire into and investigate any other matter that is incidental to or connected with the foregoing terms of reference;**

(s) **to recommend –**

(i) **the prosecution or further criminal investigations against any person or persons who may have committed offences related to such claims or payments**

(ii) **ways, means and measures that must be taken to prevent, control or eradicate such schemes or frauds in the future;**

(iii) **any reimbursement and/or compensation to the Government by any person and the extent of such reimbursement or compensation; and**

(iv) **any other policy or action that may conclusively deal with the "Goldenberg Affair."**

4. Prior to commencing our duties, and pursuant to the provisions of **Section 5** of the **Commissions of Inquiry Act**, each of us made and subscribed an oath in the prescribed form before the Chief Justice, Evans Gicheru The Commission had an opening session on 31st March, 2003 at **Room No.2** of the Kenyatta International Conference Centre, in Nairobi. Thereafter, the sessions of the Commission were held in Public at the same venue until the proceedings were concluded on 10th February, 2005. During the opening session of the Judicial Commission, its chairman summarized the issues involved in the work of the Commission thus:

> "The Goldenberg Affair has been in the news for over a decade; and has had a chequered history. We understand that Parliament through a committee or committees of the House have as also individuals by way of research severally tried to unravel the issue. The courts too, have tried through the judicial process to unravel this conundrum. But as yet we, as a Judicial Commission of Inquiry, are unaware of their respective findings. It cannot be gainsaid that the government, the private sector and indeed the public in general are anxious that the Goldenberg Affair, be unraveled and conclusively dealt with. That His Excellency the President thought it fit to establish this Judicial Commission of Inquiry, is an important milestone and a crucial step in that direction.
>
> ...
>
> In a nutshell, and without setting out in detail the terms of reference, it is clearly our duty to, inter alia, identify whether, and, if so, how much money was paid out by the Ministry of Finance and the Central Bank allegedly as export compensation and or export retention money or whatever the reason given for the payment, to Goldenberg International or any other person, legal or natural, and justification or basis for the payments; those who effected the payments; those to whom such payments were made; and related matters, and to make recommendations as to the recovery thereof and any possible criminal prosecution or further criminal investigations against any or all persons who in our opinion and according to received evidence merit such action."
>
> (See **Appendix "C" for the full text).**

The amicus curiae summarized the Goldenberg Affair, or Goldenberg Scandal thus:

> "My Lords, what has become known as the Goldenberg Affair, or Goldenberg Scandal, or the Goldenberg Scam, has been and still remains the most emotive concern in the minds of Kenyans. One can think of no other matter which has engaged the time of all organs of Government; the Executive, the Legislature and the Judiciary, as much as the Goldenberg affair. Nothing in the public perception has come to epitomize corruption as the Goldenberg affair. The evils of corruption and the devastating negative effects of the society are well known. The cost of opportunity lost in terms of economic and social development, in terms of creating national ethics of transparency and accountability, hard work and the spirit of entrepreneurship cannot be over-estimated. The Goldenberg affair became, in the words of that British Dramatist and novelist, Dodd Smith, "the dear octopus, whose tentacles we never quite escape." Kenyans want to escape from this octopus so that Kenya can be a vibrant state with a free and democratic system of government that enshrines good governance and the rule of law, and where there is an equitable framework of economic growth and equitable access to national resources. The tentacles of the octopus have to be cut."

(See Appendix "D" for full text)

5. On his part the Chairman of the Law Society (LSK), after expressing displeasure regarding the Attorney General's earlier stand on a private prosecution of those he alleged were principals in the Goldenberg scandal stated as follows:

> "My Lords, the previous Government, through the Attorney-General, exhibited pathological fear not to solve the Goldenberg case, and the Law Society of Kenya welcomes this Commission that will hopefully provide answers to the thousands of questions that remain unanswered over the Goldenberg scam. For the last ten years, the Goldenberg cases, whether civil or criminal, have jammed the congested corridors of our judicial system. Case after case often came to our courts usually on the same issue, but at times leading to different results. The cases have muddled the jurisprudence of our courts. For those of you who were students of jurisdiction of the Goldenberg cases, you will recall that initially during the tenure of Hon. Chief Justice Cockar, the decisions of court went one way and the Central Bank won most of the cases. However, when the late Justice Chesoni assumed the office of the Chief Justice, the jurisprudence of the courts went the very opposite direction, and the Central Bank lost most cases, notwithstanding the fact that the Judges remained the same and the facts were constant. Justice Chunga's tenure as Chief Justice was a mere continuation of Justice Chesoni's tenure in so far as those issues are concerned.
>
> ...
>
> My Lords, in this regard, the Tribunal as part of its mandate must address, in the view of the Law Society of Kenya, three issues: First, it will be wrong for the Commission to see the Goldenberg issue just as an economic crime. Yes, it is an economic crime, but that is just one facet of the puzzle ... Secondly, we must appreciate and investigate why the Government, despite its enormous resources and legal powers failed to prosecute the principals of this crime. The role played by the office of the Attorney-General which in a way led to the formation of this Commission of Inquiry, must in our view be appreciated, addressed and investigated. My Lords, thirdly, it is the view of the Law Society of Kenya that you must consider why the courts initially ruled in favour of the Central Bank and then continued to rule against it for the past eight years when the facts have remained constant."

(See Appendix "E" of the report).

6. We have set out how the Goldenberg issue or affair is viewed by various people or groups of people only to show the enormity of the issue this Judicial Commission of Inquiry was called upon to unravel. Whichever way it has been viewed, the bottomline is that the Goldenberg

Affair is a matter which we think needs resolution once and for all, be put behind us and be consigned to the annals of history.

[C] PROCEDURE

7. There were no directions in the citation of the Commission as to how the Commission would be executed, but as required by **Section 3** of The Commissions of Inquiry Act, it behoved us, in exercise of the powers conferred upon us by **Section 9** of the said Act, to and we prescribed rules and procedure for the conduct and management of the proceedings of the Judicial Commission. These rules of procedure, among other things designated the amicus curiae and provided for the matters required by **Section 3** of the Act to be observed by this Judicial Commission of Inquiry. The rules were published under Gazette Notice No.1566 dated 14th March, 2003 and are reproduced **in Appendix "F"** of this report.

Section 3(3)(a) of the Commissions of Inquiry Act, provides in pertinent part, that:

> "(3) Without prejudice to any regulations made under **Section 19,** every commission shall direct how the Commission shall be executed and, in particular, shall in a suitable case contain the following directions to be observed by the commissioner –
>
> (a) that the Commissioner shall conform with the following instructions
>
> (i) that evidence adversely affecting the reputation of any person, or tending to reflect in anyway upon the character or conduct of any person shall not be received unless the Commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that, where no such warning has been given, the general nature of the evidence has been communicated to that person."

8. That part of the section and the other requirements were of necessity included in the rules. In the course of the proceedings of this Judicial Commission of Inquiry the requirements of the above provision became the source of controversy. Initially we mistakenly thought that counsel were unable to distinguish between a witness summons and an adverse notice. For instance there were times when, as Commissioners, in

exercise of our discretion under that provision, declined to direct the issuance of an adverse warning, it was taken that we were trying to protect certain individuals who they perceived as having been involved in the Goldenberg Affair. An incident which merits specific mention occurred on 15th October, 2003 at a time when we were about to conclude the evidence of Prof. T. Ryan. Dr. Khaminwa one of the Assisting Counsel, stood up and passionately applied for the said witness to be stood down. That application, as would be expected took us by surprise considering that the witness was being cross-examined by the last advocate. Dr. Khaminwa wanted one Ibrahim Ali to be put on the witness stand alleging that the said Ali had crucial evidence and that it could not wait on account of the busy schedule of the witness. In a reserved ruling we did not hesitate to decline the request. That ruling sparked off accusations against the Chairman that it was not within his power to decline the request. One Hon. Paul Muite M.P, who with our leave, was appearing for Ali joined in the fray and said that the Chairman was protecting certain people. That was notwithstanding the fact that the ruling refusing to stand down Prof. Ryan in favour of Mr. Ali, was read by the vice-chairman. The outburst by Hon. Muite, and a subsequent press conference condemning the Chairman, which was held by Hon. Muite, together with Dr. Khaminwa and Dr. Kamau Kuria, convinced us that the three had an ulterior motive. That was the more so because later, despite a written direction that the witness be made available to testify, he was not produced and no reasons were ever given for that failure. We did not insist on him testifying because his evidence would not have added anything. Mr. Pattni had already admitted that GIL did not at any time export any gold or diamond jewellery to Ali's Company. The events of that day did not in any way deter us in our work, and we did not consider it appropriate to comment on it within or outside the Hall of Inquiry as doing so would have distracted us from our serious assignment.

9. We wish to state, that the Commissioners have the power under **Section 3** of the Commissions of Inquiry Act, to control the proceedings of

the inquiry and in particular to ensure that no evidence is received, unless it is relevant, and until persons likely to be adversely mentioned had received prior notice and the nature of evidence against them made available to them subject to security considerations.

10. There is an alternative or co-existing explanation, namely, that the reactions of counsel could be explained on the basis that the Goldenberg Affair has been an immotive issue in Kenya and is commonly perceived, rightly or wrongly, as the cause of suffering for many Kenyans. Such incidents were happily relatively few, and did not deter us from making a full, faithful, and impartial inquiry as is required of us by Section 7 of the Commissions of Inquiry Act. We wish to observe that Section 3 of the Act has provisions, in effect for the due observance of the rules of natural justice and we considered it our duty to ensure full compliance with its terms. Consequently, in compliance thereof, we did not receive any evidence adverse to any person where practicable without giving him due notice and appropriate opportunity to be present either in person or by counsel at the hearing of such evidence and to cross-examine any witnesses. They were also duly notified of their right to call evidence in rebuttal. **Appendix "G"** of this report has a complete list of the persons who were served with such notice.

11. Under the Evidence Act Cap 80 Laws of Kenya, hearsay evidence may only be received in very limited circumstances, particularly those set out in Section 33 of the said Act. The Commissions of Inquiry Act, does however generally permit hearsay evidence to be received except where it adversely affects the reputation of any person, or tends to reflect on the character or conduct of any person. Where however we received hearsay evidence we did not act on it except when it became authenticated by other acceptable evidence. Previous Commissions, notably The Njonjo Commission, and The Akiwumi Commission on tribal clashes, adopted the same approach. We would therefore say that the practice is well settled in Kenya. The citation of this Judicial Commission of Inquiry directed us on

what evidence to receive and we consider it proper to reproduce the direction.

> **"And I do direct that in the performance of its task, the Commission shall receive views from members of the public and receive oral and/or written statements from any person with relevant information, and may -**
>
> **(a) use official reports of any previous investigations into the said payments;**
> **(b) use any investigation report by any institution or organization into the payments; and**
> **(c) Commission reports from experts in any relevant areas.**
>
> And I do direct that in accordance with the **provisions of Section 10(1) of the said Act, the Commissioners shall summon any person or persons concerned to testify on oath and to produce any books, plans and documents that the Commissioners may require."**

12. These are wide powers. We exercised those powers fully, of course subject to the law currently in force. We summoned many witnesses some who in obedience to our summons produced several documents on which they were cross-examined in the open hearings. It was a daunting task going through those documents. Some witnesses remained in the witness box for several weeks due to the importance of their evidence and in view of the fact that their evidence touched adversely on several people, who, in obedience to adverse notices served on them chose to appear, and cross-examined those witnesses at great length. The list of documents and other exhibits produced in evidence appear in **Appendix "H"** of this report. In all 102 witnesses testified and a complete list of those witnesses appears as **Appendix "I"** of this report.

13. The power of the Commission to summon witnesses became the subject-matter of protracted litigation. Nine individuals, to wit, Jackson Mwalulu, Kiriro wa Ngugi, Kepta Ombati, Sande Oyolo, Mutembei Marete, Jacob Opiyo, Cyprian Nyamwamu, Wambua Munywoki and Paul Thumbi moved the High Court under **Misc. Application No.1279 of 2004** for orders of Judicial Review to command us, as Commissioners to compel certain specified individuals to appear before us to testify. Among those

were, His Excellency Daniel Arap Moi, former President of Kenya, Hon. George Saitoti and Mr. Musalia Mudavadi former vice Presidents of Kenya. The basis of the said application was that this Inquiry would be incomplete if those individuals were not called and cross-examined on their perceived role in the Goldenberg Affair. The High Court (Nyamu, Ibrahim and Makhandia, JJ.) obliged and granted them the orders. The orders were granted at a time when this commission was due to wind up its public sittings. **Appendix "J"** is the ruling on the matter.

14. In our understanding of the law, while the commission generally possesses the power to compel the attendance of witnesses before it, it lacks the power to compel adversely mentioned persons to testify. In our view their position is analogous to that of an accused person in a criminal trial. Moreover, the Commissions of Inquiry Act, Section 3(3), does make express provisions as to how to deal with the adversely mentioned people.

15. The Court order directed that unless we compelled all "the adversely" mentioned people to testify and received their respective evidence in full, we would not wind up our public hearings. Nor could we prepare and present our report to the appointing authority. The adversely mentioned persons who had not testified numbered over 1500. As at the date we wanted to conclude public hearings we had received evidence in public from 102 witnesses; over a period of about 20 months. In view of that we did not consider that it would be reasonably feasible to conclude the public hearings within a reasonable time. That was also the view of the Hon. The Attorney General, who immediately preferred an appeal to the Court of Appeal against that decision.

16. The Court of Appeal made a ruling in Civil Application No. Nai 310 of 2004 allowing us to proceed with our mandate. This ruling appears at **Appendix "K"** of this report.

17. Some reports of investigations earlier on carried out on the Goldenberg Affair were among the documentary exhibits which were tendered in evidence. These include, the Report on the Parliamentary Public Accounts Committee, Proceedings on PAC [**Exht.51 and 122A**], Extracts of PAC **Vol.1990/91, 1995/95** [**Exhts. 92,92A, 92B**], Price Waterhouse Report [**Exht.60**] and Wabuti Report [**Exht. 122**]

18. We pored over these and other documentary exhibits, and we must add that they were useful as a basis for a more detailed inquiry.

[D] PROBLEMS FACED DURING THE INQUIRY

19. Our task was not without major obstacles. This Judicial Commission was established before the Goldenberg related criminal cases were terminated. Those cases concerned Messrs Kamlesh Pattni, Eliphas Riungu, Lazarus Wanjohi, Michael Wanjihia Onesmus, Wilfred Karuga Koinange, Job Kilach and Goldenberg International Limited.

20. To pave the way for our inquiry, in view of the sub judice rule, the Attorney-General on 24th February, 2003 entered a nolle prosequi pursuant to the provisions of **Section 82 of the Criminal Procedure Code**, in exercise of his powers under **Section 26** of the Constitution of Kenya, by informing the trial court, in writing that he did not intend to proceed with those cases. The termination of those cases was challenged by Mr. Rebelo who was representing Kamlesh Pattni, Goldenberg International Limited and Dr. Karuga Koinange. He submitted before the trial magistrate, inter alia, that the Attorney General, could not properly terminate those cases in the circumstances of those cases, as in his view, doing so would infringe on the constitutional rights of the accused persons in those cases and successfully applied to have the issue referred to the High Court, purportedly under **Section 67**, of the Constitution. In view of that reference the accused persons believed, rightly or wrongly, that the reference sustained their cases and therefore if this commission

proceeded with its task it would be breaching the sub judice rule. Indeed when we notified the public that we would start our public sittings on 31st March, 2003 one of those accused persons, Job Kilach, successfully moved the High Court under High Court Misc. Application No.304 of 2003, for leave to apply for an order of prohibition, which leave was ordered to act as a stay of any proceedings or further proceedings of this Commission. The said order, which on the face of it was clear, was served upon us after our first sitting, and on the second sitting we made an order, as follows:

> "We had our first sitting yesterday, 31st March, 2003, when counsel assisting this Judicial Commission of Inquiry made their opening statement. At some stage in the course of that sitting, Mr. Wambua Kilonzo, advocate who said he was appearing for one Job Kilach, tried to serve the Commission with an order, whose contents we were unaware of and which, according to him had been issued by the High Court stopping us from proceeding with our mandate. As we had not been served with the copy of the said order, we could not properly accept and act on his verbal statement. Consequently we went on with the sitting until upon application by counsel assisting the Commission we adjourned further hearing to this morning.
>
> We have now been served with an extracted version of the said order which order was made in High Court Misc. Application No.304 of 2003. That being the case and in accordance with the judicial practice in this jurisdiction we cannot possibly proceed on with our sittings as doing so will amount to a breach of an order of a court of competent jurisdiction. Accordingly, we adjourn this and further sittings of this Judicial Commission of Inquiry to the 15th day of April 2003 at 9.30 a.m. by which time we hope, the amicus curiae would have taken necessary legal steps to have the aforesaid order either vacated or stayed.
>
> Made this 1st day of April 2003.
>
> S.E.O. BOSIRE — CHAIRMAN
> D.K.S. AGANYANYA — VICE-CHAIRMAN
> P. LE PELLEY — COMMISSIONER"

21. Indeed the amicus curiae moved the Court of Appeal in Misc. Civil Application No. NAI. 77 of 2003, for an order staying the aforesaid order of the High Court. That court after hearing the parties made an order in pertinent part, in these terms:

> "We are equally satisfied that the Commission itself must be given an opportunity to deal with the complaints raised by the Respondent against some of its members. Accordingly ... the Commission is directed to resume its sittings and

other operations as soon as is reasonably practicable. The Commission is further directed that at its first sitting pursuant to this order it must accord to the Respondent the chance to ventilate his complaints against its two members and thereafter the commission must consider those complaints and give its ruling thereon."

22. The respondent in that application was Mr. Job Kilach. In obedience to the aforesaid Court of Appeal order, we heard Mr. Wambua Kilonzo counsel for Mr. Kilach not only on the issues raised in High Court Misc. Application No.304 of 2003, but also on several other new matters. In the application before us he included two additional complainants, namely Goldenberg International Ltd and Mr. Kamlesh Pattni. In a ruling delivered on 16th April, 2003 we dismissed the complaints. No sooner had we done so than Mr. Kilonzo made a further informal application seeking an order that we stay further hearings of the Commission principally, on the ground that Mr. Kilach's application before the High Court was still pending and he did not think that it would be proper for us to continue. Our ruling on that issue was as follows:

"We cannot stay our proceedings because we are under orders of the Court of Appeal to carry on. If we do so, we will be in contempt of the orders of the Court of Appeal. So, we carry on".

23. And we did carry on, but not for long. The very next day Mr. Rebelo for Dr. Koinange, Goldenberg International Limited and Mr. Kamlesh Pattni, with our leave brought to our attention an order of the High Court made in its **Misc. Civil Application No.359 of 2003**; in which his above named clients were shown as applicants with this Judicial Commission of Inquiry and the Attorney General as nominal respondents. The concluding part of the ruling giving rise to that order read as follows:

"VI. CONCLUSIONS

(1) As I am satisfied that the intended judicial review proceedings raise weighty issues, I hereby grant leave to the applicants to bring judicial review proceedings against the respondents as prayed in prayers 2,3 and 4 of the Chamber Summons.

(2) The application to be filed with 14 days.

(3) As the complaints are weighty, I direct that the commission do accord the applicants the chance to ventilate the complaints herein against the commission and/or some of its members and thereafter to consider them and give its ruling.

(4) Should the decision of the commission be unfavourable to the applicants, the grant of leave herein to operate as a stay against receipt of evidence relating to the 1st , 3rd and 4th applicants until the Judicial Review application is determined. For avoidance of doubt the commission is at liberty to continue with its sittings and continue hearing evidence relating to the subject of the commission namely the 2ndRespondent.

(5) The costs hereof to be in the cause.

Dated and delivered this 16th day of April, 2003.

G.P. Mbito
JUDGE"

24. Mr. Rebelo relying on that ruling, submitted before us that it was imperative that the Commission stay its further proceedings pending determination of the application in **High Court Misc, Civil Application No.359 of 2003**. After drawing his attention to certain contradictory terms of the High Court order and that as worded it was incapable of meaningful compliance, Mr. Rebelo responded thus:

> "My Lords, would you not hear me upon facts other than what the Judge might have raised. Just put aside this ruling for one moment, and let us look at the issue as lawyers."

25. It was quite clear to us that he was trying indirectly to raise the same issues we had ruled on. Consequently we ruled that the High Court order was not capable of compliance. Thereafter the hearings of the Commission proceeded on uninterrupted for some time.

26. Then came 6th July, 2003 Mr. Kamlesh Mansuklal Pattni, who with one James Kanyotu, are the directors and only shareholders of Goldenberg International Ltd, was prevented by the police from boarding a Dubai bound flight and his passport was seized. It was alleged that the seizure of the passport was on orders from this Commission. His counsel Mr. Rebelo, complained that the seizure was illegal and unconstitutional arguing that the said passport which had earlier been surrendered to the High Court on orders of a judge had been released to him by that court to enable him make the trip to Dubai. Besides, that the Commission was acting in breach of a court order and infringing the rights of his client to

travel to a destination of his choice. He added that investigating officers who were attached to this Commission had insisted on recording a statement from his client contrary to the law as in his view his client having been served with an adverse notice under **Section 3** of The Commissions of Inquiry Act no one had the right to demand a statement from him. He could only voluntarily testify on his own behalf and call witnesses in support of his case and no more.

27. Apart from the last issue we did not think the matter called for a ruling as we considered it purely administrative and we advised counsel as much. But as regards the last issue we ruled through the Chairman in the following terms:

> "Let me cut you short. Let me remind you of the rules of this Commission. One of the rules says that no one should make a statement prejudicial to the proceedings of this Inquiry, particularly statements out there, where we have no opportunity of asking anybody questions on what he or she has said. Secondly, personally, I do not like dealing with administrative matters here. I would rather we deal with administrative matters where they belong. I would not like to spend a lot of time here dealing with matters to do with witness summons, notices and utterances made out there.
>
> I will not comment on the issues you have raised and my colleagues agree on that. The reason for this is that the whole idea of an open Inquiry is for purposes of evidence. There are so many matters we transact in chambers. The fact that we do not sit here, does not mean that we are having a holiday, enjoying ourselves. We do a lot of work outside this hall. You should understand that all these masses of documents do not just come. Somebody has to do something to avail them.
>
> The third point I want to make is that the Commission can call on anybody to make a statement. The fact that a person has been served with an adverse notice does not mean that person cannot be asked to make a statement on various matters which have been raised here or are likely to be raised here. It is to give that person an opportunity to make some statement. The citation and the terms of reference were published in the Kenya Gazette. They were in the newspapers for everyone to know. Let me tell you that whoever we have asked to make a statement must make it. That is a command. We know what we are inquiring about. The terms have been published and I do not want us to feel hamstrung in any way in what we are doing.

> The fourth point I want to make is that the time we have at our disposal is quite limited. I will ask whoever is involved in our inquiry to bear that in mind, more particularly because each of us has a regular calling. The resources in this country are not elastic and we have to bear that in mind so that we have to do the very basic thing we must do so as to be able to produce a report according to the terms of reference within the shortest time possible. We have been asked to do a particular assignment and once it is over, we will revert to our respective positions."

28. We thought that the matter had ended. However, shortly later the Commission was served with a Chamber Summons which was filed as Misc. Criminal Application No.534 of 2003, in which the Commission was named as first respondent, with the Attorney General, Commissioner of Police and Principal Immigration Officer as the 2nd, 3rd and 4th respondents, respectively. In a nutshell, this was an application by Mr. Pattni seeking amongst other orders, an order that the respondents or each of them do forthwith deposit his passport in court; that he be permitted to travel out of jurisdiction; that the respondents and each of them be barred, either by themselves or by their agents, servants or officers from in any manner whatsoever preventing, detaining, delaying or hindering his travel out of the country. For undisclosed reasons, but we believe it was because the application was strenuously opposed, the applicant withdrew the application.

29. But the matter did not end there. Wilfred Karuga Koinange, Goldenberg International Limited, Kamlesh Mansukhlal Damji Pattni and Job Kilach, subsequently took out proceedings in the High Court seeking leave to commence contempt proceedings against this Judicial Commission of Inquiry for alleged disobedience of the High Court orders in **High Court Misc. Civil Application No.359 of 2003**.

30. In the meantime the Hon. Mr. Justice Aganyanya, the vice-chairman of this Commission was suspended as a judge after a Tribunal was appointed by the President under **Section 62** of the Constitution, to investigate alleged misconduct by him as a judge. This move meant that he ceased to act as vice-chairman and commissioner, his appointment

having, in our understanding, been based on his status as a judge. Further proceedings of the Commission stalled for about two weeks. The remaining two commissioners could not legally continue on their own. It is our view and we so recommend that to obviate such eventuality in future citations in commissions should designate a quorum. It should be recognized that the Chairman or any of the commissioners may, due to perfectly legitimate reasons, be prevented from attending the inquiry. The remaining commissioners should, in our view, not be incapacitated by such non-attendance.

31. There were also, two previous interruptions because of two major events at the Kenyatta International Conference Centre. The first event was a National Schools Music Festival which is traditionally held at the Conference Centre annually in the month of August. The second event was an International Women Aids Conference. Because of those two events we had to adjourn our proceedings as the venue of our proceedings was to be used by the organizers of those events.

32. Mr. Nzamba Kitonga, S.C, was appointed by the President under **G.N. No.7593 of 29th October, 2003**, to replace the Hon. Mr. Justice Aganyanya, both as a Commissioner and as a Vice-Chairman of this Judicial Commission. No sooner had he started sitting than the Commission was faced with a further interruption. Dr. Kamau Kuria, one of the four Assisting Counsel made an informal application for either the Chairman, or the whole body of commissioners to disqualify themselves from further participation or that the Chairman and the Commissioners cease interfering with the work of the Assisting Counsel. The application was peculiar. Peculiar in the sense that learned Counsel, by that application was suggesting that the Commission had no right to direct the assisting counsel on who and when to call persons as witnesses. As we were of the view that the application was mischievous, we had no hesitation in dismissing it. But it was not until after some time had been lost.

As we think the ruling might be important for future Commissions we reproduce it here:-

"JUDICIAL COMMISSION OF INQUIRY
INTO THE GOLDENBERG AFFAIR

RULING

Dr. Kamau Kuria, one of the four Assisting Counsel to this Judicial Commission of Inquiry, made an application as we understand it either for the Chairman to disqualify himself or for the whole Commission to disqualify itself or thirdly for the Commission to stop interfering in the duties of assisting counsel. As the application is against us we have duly warned ourselves of the possible danger of straying from the path of objectivity and treading on the path of emotion.

Dr. Kuria dealt with certain occasions during the proceedings when witnesses were stood down, or refused to be stood down and when a particular witness was not heard as requested.

Several authorities were referred to us in support of the informal application but these are of course irrelevant since there is no accused or defendant before us and our proceedings are not adversarial but inquisitorial. That is to say we are mandated to inquire into certain matters and the commissioners are the inquisitors. Besides The Commissions of Inquiry Act Cap 102, of The Laws of Kenya is clear on the matters in issue and there is therefore little, if any, necessity, to go outside it.

The appointment of the Judicial Commission of Inquiry by the President specifically states that he directs "The Commissioners to hold an inquiry" into the matters set out. Thereafter counsel were appointed to assist the said Commission.

The Rules and Procedure of the Commission set out in G.N. 1566 of 2003 state that "(g) The Counsel assisting the inquiry will present evidence relating to the inquiry referred to in the Terms of Reference of the Inquiry."

The question of what evidence is selected to be presented to the inquiry at any given time and in what order can be answered by referring to the provisions of The Commissions of Inquiry Act. Section 9 therefore vests the power to regulate proceedings in the Commissioners. Section 10 of the same Act vests the power in the Commissioners to summon and examine witnesses. As the main issue in the informal application before us relates to this latter section we consider it essential to reproduce it as is material.

> "10(1) Every Commissioner shall have the powers of the High Court to Summon Witnesses and to call for the production of

books, plans and documents, and to examine witnesses on oath." **(Emphasis supplied).**

In view of that clear provision of the law the submission by Dr. Kuria that either the Chairman or the Commissioners are interfering with his work is a red herring. The power to call and examine witnesses is given to the Commissioners. However, by commonwealth tradition and by settled practice in this jurisdiction the appointing authority appoints counsel to assist the commissioners in presenting the evidence. This is a practice of expediency rather than a requirement of the law. There is no provision in the Commissions of Inquiry Act, relating to the appointment or duties of Assisting Counsel.

We earlier alluded to rule (g) of The Rules of This Commission which deals with the duties of Assisting Counsel. It should be recalled that these rules were made by us, and rule (g) in effect delegated the duty of presenting evidence to the Assisting Counsel. The Commissioners did not, by promulgating that rule divest themselves of the discretionary power vested in them to call and examine witnesses. We the Commissioners having delegated the power to present evidence to the Assisting Counsel, it will be absolutely absurd for anybody to suggest that by directing them as to how to exercise the powers we ourselves delegated to them amounts to interference. In some jurisdictions assisting counsel are appointed by and are subject to the commissioner or commissioners where as here, they are many. In our jurisdiction, however, although as we stated earlier assisting counsel are appointed by the same authority appointing commissioners, their role in our case, is not spelled out. That is why, as we stated earlier, we made rule (g), above to provide that assisting counsel would present evidence. It should be noted that the term used is "present." The selection of the evidence to be presented and the order of presentation is in the absolute discretion of the commissioners. The assisting counsel are only exercising delegated powers and no more.

Moreover, even from a common sense standpoint assisting counsel by their description are merely assisting. They cannot at the same time be said to be in charge or to have an agenda different from that given to the Commissioners. By that token Dr. Kuria should not be heard to complain that he feels frustrated by being directed on how he should assist the Commissioners. He can only feel frustrated if he has an agenda which runs counter to what he has been asked to do by the Commissioners. If that be the case, then he is the author of his own frustration because by resisting what the Commissioners would like him to do he would be trying to usurp powers and authority which he does not have.

Clearly Dr. Kuria's application is preposterous, lacks in merits and was, in our view, made with a view to annoy. The relevant law empowers the Commissioners to control the conduct of proceedings of this Inquiry, and we shall do precisely that. The same law mandates us to call and

examine witnesses and we shall do just that using those of the assisting counsel who are willing to diligently perform their duties as assisting counsel. We swore to make a full and faithful Inquiry of the matters referred to us without fear, favour or ill will, and to present a Report without delay. We have hitherto and intend hereafter to do likewise. The informal application is accordingly dismissed.

Dated and delivered at Nairobi this 5th day of November, 2003.

S.E.O. BOSIRE
.....
CHAIRMAN

NZAMBA KITONGA
.....
VICE-CHAIRMAN

P. LE PELLEY
.....
COMMISSIONER"

33. There was a lull for some time. Proceedings went on unimpeded. But on 12th August, 2004 Mr. Pravin Bowry, for Mr. Kulei, successfully applied to be allowed to raise certain issues which in his view touched on the conduct of two assisting counsel, to wit Dr. Khaminwa and Dr. Kuria. In his view, and to quote him, "in the interest of justice and for the protection of the integrity of all concerned I ask that we move the venue to a form of proceedings in camera." We had to hear him in camera on the details of the matters he wanted to raise against the Assisting Counsel. Eventually we ruled that those matters could be raised in public. But this never came to be. Both assisting counsel and Mr. Bowry noisily traded accusations in the hall and thus forced us to exclude them from attending further proceedings in the hall under **Section. 3** of The Commissions of Inquiry Act.

34. The two assisting counsel moved to the High Court under High Court Misc. Application No 1415 of 2004 for orders that the commission allows them back. The High Court obliged and granted interim orders. However, we did not think, in view of the orders, that we thereafter had residual power to control proceedings at the hall. Consequently we adjourned sine die pending the final determination of that application.

The order was generally not well received by members of the public. Their view was our proceedings should not have been interrupted. Either because of this or other reasons the applicants discontinued their suit. Thereafter we resumed our public proceedings.

35. The last interruption to our public hearing has already been considered under the sub-head on procedure.

36. We wish to conclude on this sub-head that while the parties who originated the various suits were within their constitutional rights to do so, with tremendous respect to them, the suits were clearly unnecessary and ill motivated. We also think that in future, subject to what we recommend hereafter, the Commissions of Inquiry Act, should be suitably amended either to exclude Judges of Appeal and above from conducting public inquiries or limiting the type of judicial review applications which may be brought where such Judges are presiding to obviate embarrassment as happened on several occasions in the course of this Inquiry where judges of the High Court made orders requiring their senior to comply. Appointment of a judge is personal to him. His seniority is personal to him and by his being appointed to be a Commissioner does not thereby relegate him to a junior position. He retains his position until his appointment in that position ceases. What happened in our case clearly offends the doctrine of precedence.

37. We also think that the time has come when the appointment of sitting Judges to conduct public inquiries should be reconsidered particularly inquiries with political implications. It cannot be gainsaid that such issues are emotive and often generate violent public debate. At times uncivil language is used. It is sometimes argued that Judges are more independent and are unlikely to be influenced in favour of one political persuasion or another. The appointment of a Judge does not however, depoliticise an inherently political issue. The tendency will be that those disagreeing with a report or decision of the Judge will seek to

discredit the same by critising the Judge and perhaps ridiculing him. We saw this when Hon. Muite and two assisting counsel did not agree with one of our rulings. We have commented on it elsewhere in this report. They turned against the Chairman and made a personal attack on him accusing him of bias merely because the ruling went against their wishes. Such attacks if repeated are likely to expose Judges to ridicule and contempt.

38. For instance one of the Assisting Counsel, Dr. Kuria did not hesitate to contemptuously talk about two of us in a speech he delivered on 17th September, 2003 during the Robert F. Kennedy Memorial, Human Rights Award, Laureate. This is what, in pertinent, he said:

> "The members of the Kenya Commission are three. Two of them are High Court and Court of Appeal judges who were appointed by former President Moi who did not believe in the independence of judges. The third member is an old conservative attorney from one of the country's oldest law firms. In colonial Kenya it served colonists.
>
> The Commission is assisted by four counsels. Two of them Mr. Waweru Gatonye and Mrs. Dorcas Oduor were appointed by President Kibaki on the advice of Attorney-General Wako who served former President Moi loyally. The appointment was made on March 28, 2003 when the new government wrongly thought that it could get competent legal advice from that Attorney-General. The other two assisting counsel Dr. John Khaminwa and I, are human rights attorneys who were detained by former President Moi because of asserting the independence of the Kenya Bar, were appointed assisting counsel on March 28, 2003 after President Kibaki concluded that there was a likelihood of the Moi appointed judges manipulating the Commission to defeat its legal objective and consequently counsels(sic) who would assert the independence of counsel were needed." **[http//www.rfkmemorial.org/human_rights/laureates]**

39. It is immaterial whether or not what he said is true. He has portrayed us as not being dependable merely because the Chairman and Hon. Mr. Justice Aganyanya were appointed by the former President, Daniel Arap Moi. He gives the source of his information as the current President, His Excellency, Mwai Kibaki, who incidentally is the appointing authority of this Judicial Commission of Inquiry. As we stated earlier there may not be any truth in what he says. His belief or perception may be taken as true. Thus the credibility of the Judges concerned is adversely affected.

40. The other argument against the appointment of Judges to head public inquiries is the increasing tendency of suing Judges conducting public inquiries. Apart from forcing a Judge into a legal dispute in which he has no personal interest, it exposes him to ridicule and possible pecuniary liability by way of costs as happened both in High Court Miscellanous Civil Application Nos.1415 of 2004 and 1279 of 2004 in which we were individually ordered to pay costs. Besides the Judge who eventually will deal with the matter is likely to be embarrassed. These are some of the reasons normally cited for granting statutory immunity insulating Judges from suits on things done in the discharge of their judicial duties. That immunity does not, however, extend to applications for judicial review which are concerned with the decision making process rather than the merits or otherwise of a decision. In this inquiry not less than four suits were brought against us. A judge should not be made to worry about the outcome of a suit which he has no personal interest as that is likely to undermine his independence in future matters.

41. The third point is that inquiries on matters with a political implication are normally protracted with the result that a Judge is likely to be kept away from his regular calling for long. In some cases a Judge is appointed to participate in a public inquiry when he has several partly heard cases. The affected litigants or accused persons are unlikely to appreciate that the Judge concerned is engaged elsewhere in a matter which in some cases could be more urgent than his own. The delay in the finalisation of the case will generally be blamed on the Judge.

42. Finally, perceived deficiencies in a report, whether procedural or substantive are likely to follow a Judge back to the bench more so because in this country we do not have any system of appeals or otherwise through which the Judge could be vindicated.

43. We recommend that before the issue is finally settled, no sitting Judge should be appointed to head or participate in a public inquiry unless the Chief Justice has first satisfied himself that the nature of the intended public inquiry has no political implication and signified his consent to the appointment.

[E] GOLDENBERG AFFAIR

44. The Goldenberg Affair centred on two companies; Goldenberg International Ltd, and Exchange Bank Limited, which companies had common shareholders and directors. They were Kamlesh Mansukhlal Damji Pattni and James Kanyotu. They were also the promoters of the two companies. Little was known of the former. He was then a young man of about 25 years of age and who held a British Passport. He was the son of a gold jewellery dealer at Mombasa. Pattni testified that he moved to Nairobi from Mombasa, sometime in 1987 and with his elder brother they established similar business along Dubois Road styled Manorama Limited. Later they relocated to Mageso Chambers. It was while doing business at the said place that Goldenberg International Ltd and Exchange Bank Ltd, were conceived and promoted.

45. Mr. Kanyotu, on the other hand was then the Director of Intelligence within the Kenya Police force. He was a well known public figure although nothing of his private life was known. The evidence before us does not explicitly show how the two came to know each other intimately so as to have become shareholders and directors of the two companies. Mr. Pattni testified that they met at some shop coincidentally and were introduced to each other by a mutual friend, Mr. Veljibhai Gami.

46. So what was the Goldenberg Affair? In a nutshell it was a series of business deals or alleged business deals revolving round various economic schemes to wit, Export Compensation, Pre-shipment Finance, Retention Accounts, Forex Cs, Spot and Forward Contracts, cheque kiting and outright theft. The transactions were allegedly either illegal or irregular and were regarded as fraudulent. Later on in this report we will

deal exhaustively with each of the schemes. But first we will briefly discuss the incorporation of the two companies which we said were at the centre of the Goldenberg Affair.

[F] GOLDENBERG INTERNATIONAL LTD

47. The company was first registered on 11th July, 1990 with a nominal capital of Kshs.100,000 divided into 1,000 shares of Kshs.100 each. The Memorandum and Articles of Association was signed by James Kanyotu and Kamlesh Mansukhlal Pattni, with one share each, and as the only directors and shareholders. The objects for which the company was incorporated as shown in the Memorandum and Articles of Association are wide ranging and cover every conceivable economic activity. However those relevant to our inquiry are basically covered in Article 3(a) and (b), namely:

> "3 (a) To carry on the business of import and export in any or all types of minerals, gold, silver, diamonds, precious and semi-precious stones ... in Kenya to all PTA countries, Europe, India and other parts of the world.
>
> (b) To prospect, explore, open and work claims or mines and raise dig and quarry for gold, silver, mineral ores ... diamonds, precious and semi-precious stones ... in Kenya and in other parts of East Africa,"

48. We have no evidence at all that the company ever engaged in any mining activity of gold and diamonds. Likewise, apart from the two subscriber shares, we have no evidence that any other shares were allotted or paid for and the records of the Companies Registry show no return of allotments.

49. It is interesting that although Mr. Kanyotu was the Director of Intelligence and a director in First American Bank then, he described himself in the Memorandum and Articles of Association as a farmer. Whether or not by describing himself as such he wanted to conceal his identity is not clear, because as at that date we have evidence that public servants were free to engage in business and to hold directorships in

private companies. Goldenberg International Ltd, was registered as a private company (see **Exht. 41**).

50. It is not clear from the evidence before us when, before its letter to the Minister dated 8th October, 1990 (**Exht. 22**) the company started trading. We will revert to this letter later on in this report.

[G] EXCHANGE BANK LTD

51. Application for a licence to transact banking business has to be made through the Central Bank to the Minister. The regulations of CBK show that application can be made before the incorporation of the company to be used for that purpose. All that the regulations require in that regard is a proposed name which has been approved by CBK and a reservation of that name from the Registrar of Companies, together with the proposed memorandum and articles of the company to be formed. (Regulations on Lincensing of New Institutions **(Exht. 13).**

52. For Exchange Bank Ltd the application was forwarded on 15th August, 1991 to the Treasury and this was accompanied by information that the proposed capital of 40 million was deposited with Transnational Bank Ltd (**Exht. 14 pg. 35**). The proposed shareholding of the bank of 40 million was to be owned 25% by Pattni, 25% by James Kanyotu, 25% by Mrs Daksha Rana and 12.5% each by Bhailal Patel and Rohit Damji.

53. Mr. Mbindyo noted on the letter on 21st August, 1991 that the application had been approved by the Minister under the name of Exchange Bank Ltd. (incidentally it is indicative of Pattni's megalomania that he first wanted the bank to be called Republic National Bank (Kenya) Ltd (**Exht 14 pg. 41**).

54. On 21st May, 1991 Mr. Mbindyo notified the promoters of the Minister's approval and asking for the necessary licence fee (**Exht. 14 pg. 30**). On 23rd August, 1991 Mr. Mwangi, Deputy Director of Banking

Supervision notified the Permanent Secretary Ministry of Finance of the approval and payment and requested the issue of a licence. This was forwarded on 26th August, 1991 (**Exht. 14 pg. 25**) as acknowledged by Exchange Bank on 19th October, 1991. The licence was in fact dated 1st August, 1991 (**Exht. 14 pg. 27**) but there is no indication that it was handed over before the approval of the Minister as set out above.

55. Since the regulations allowed it, it was not unreasonable to obtain the necessary banking licence before incurring the expense of forming the company, particularly since in the terms of the licence it should have been formed with an authorised capital of Ksh.40 million and stamp duty paid on that amount.

56. Exchange Bank Ltd was then formed on 1st October, 1991 (**Exht. 14 pg. 24**) and the certificate was apparently received by EBL on 18th October, 1991. Instead of the capital agreed to with CBK and the Minister, the company was formed with a nominal capital of 1 share each of Kshs.1000/- taken by Pattni and James Kanyotu.

57. A statement of nominal capital of Kshs.40million was filed on 1st October 1991 but this is not an issue of share capital. For this to happen the share capital has to be paid up by the persons to be issued with the shares and a return of allotments made to the Registrar of Companies (Companies Regulations Form 213). This was never done and apparently CBK never insisted on seeing that the bank had the proposed capital. The nominal capital of the bank was increased on 28th July, 1992 and 28th August, 1992 but on no occasion was there a return of allotments of shares filed.

58. The proposed shareholding of Daksha Rana and Bhailal Patel and Rohit Damji as set out above in the application seems to have vanished without trace. That a bank can operate without capital is indicative of the laxity of bank supervision by CBK at the time.

59. The bank did not start operating until 4th June, 1992 when the first entries were made in its account books (**Exht. 90 pg. 1**) and it was authorised as a depository under the Exchange Control Act on 30th July, 1992.

60. Mr. J.D. Kabeberi who was appointed liquidator of EBL stated that he found no register of members of the company and no share certificate counterfoils (**Exht. 181 pg. 2**). Nevertheless he admitted that he did not inquire into this nor did he attempt to get in any of the capital which should have been paid up by the shareholders.

61. Before we consider in detail the operations of these two companies we consider it imperative to sketch out the political and economic situation in the country before and after these companies were incorporated.

CHAPTER I

ECONOMIC AND POLITICAL SITUATION BEFORE 1992 GENERAL ELECTION

62. By a Constitutional amendment which introduced **Section 2A** of the Constitution, Kenya became a one party state with KANU as the only **de jure** and **de facto** political party. The amendment merely affirmed a **de facto** single party position which existed at the time. During the general election of 1983, which was soon after the attempted coup of 1st August, 1982, we had a **de facto** single party state. There were fundamental changes to the election procedure in the 1988 general election. Secret ballot was dropped, queue voting was introduced and a 70% vote for unopposed candidates was introduced. The death of the then Minister for Foreign Affairs, Dr. Robert Ouko under what appeared to be political circumstances, including what was perceived as suppression of political dissent added to the issues which were constantly being raised against the government. These changes raised serious concern not only among a cross-section of Kenyans, but also among multilateral and bi-lateral donors. Smith Hempstone, the then American Ambassador to Kenya openly criticised the government of Kenya for those changes, moved the local and International Press to shift international opinion against the country with the result that Kenya could not be given the benefit of the doubt where the country was deliquent on donor conditionalities. Coincidentally, the Berlin Wall came down, and the West shifted its attention more to East Germany. Communism was no longer a serious option for Kenya. Kenya ceased to be a valued partner to bilateral donors and the Bretton Woods Institutions, notably the World Bank and International Monetary Fund (IMF).

63. All these changes and turns of events coincided with an economic downturn in the country. Foreign reserves in the country were dwindling. A witness, professor, T. Ryan, a professor in Macro-Economics, and who for a long time worked in various capacities in the Ministry of Finance,

testified that the economic slump was due to various factors. Chief of those, he said, was macro-economic instability. There was a high turn over of economic managers in the Ministries of Finance and Planning. There were no clear economic policies on key aspects. The political policies of the government scared off both multilateral and bilateral donors who, over the years, gradually reduced their donor support and investment. Consequently, the government increasingly fell back on local borrowing, with the result that its overseas debt servicing became irregular.

64. The credibility of the government's political and economic policies was lost. The government was put under extreme pressure from both the World Bank and the IMF to change its macro-economic policies, more particularly on the aspect of market controls. The two Institutions demanded that the market be liberalized. These institutions increasingly interfered with formulation and implementation of economic policies in Kenya. For instance whatever economic proposal the government came up with was subject to approval of the World Bank and IMF. Hence the various economic schemes which the government later adopted, and which we shall discuss later in this report, were either adopted at the behest of these two institutions or with their express approval. In addition the two institutions did not favour protective economic policies and pressed for the repeal or removal from various local legislation of all manner of controls. Top on the list of those legislations were the **Price Control Act Cap 504 Laws of Kenya** and **Exchange Control Act, Cap 113 Laws of Kenya**. The economic policies in place at the time leaned towards the protection of certain local industries and regulation of the exportation of foreign exchange out of the country to ensure that limited foreign exchange reserves were not depleted below a certain limit.

65. It was argued then, and Prof. Ryan in his testimony before us concurred, that these protective economic policies adversely affected the country's balance of payments and terms of trade. Consequently as the

years went by the country heavily depended on both domestic and foreign borrowing to balance its budget. As a result the value of the Kenya shilling in relation to major currencies drastically dropped and inflation sky rocketed. This downward slide continued. In November 1991 the Bretton Woods Institutions and major bilateral donors unilaterally suspended further financial support to the country and pegged further support to good governance of the country as interpreted by them. They imposed stiff conditions which included liberalization of the economy,through the removal of various controls and the introduction of investment and trade incentives. Some of the other conditions were of a political nature.

66. In the meantime there was increased and sustained pressure locally for the re introduction of multiparty politics. Several rallies were held around the country clamouring for multiparyism. Some of these rallies were violently dispersed by the police leading to riots and loss of life and destruction of property. Exhibit 35C has some graphic details of such events.

67. The economic and political situation in the country was generally thus at the time Goldenberg International Limited and Exchange Bank Limited, came into the picture. But before we leave this section we propose to have a short summary on the role of the Bretton Woods Institutions in order to have a fuller picture of the background to the Goldenberg Affair.

[A] THE ROLE OF THE BRETTON WOODS INSTITUTIONS

68. The Bretton Woods Institutions are basically the International Monetary Fund (IMF) and the World Bank. They are some of the United Nations (UN) specialized agencies. The UN is made up of about 184 countries. These countries are jointly responsible as to how these two institutions are financed and run. Each country, for instance, has a quota as to how much it should contribute to the institutions. These

contributions depend on the strength of each country's economy. The quota also determines the voting rights of each country.

69. Although decisions of the two institutions on loans to its members are supposed to be based on economic factors, over the years political considerations have increasingly, albeit unofficially, had a bearing on their decisions regarding lending to certain countries. For instance in early 1990's the decisions of IMF and World Bank were largely influenced by the attitude of the USA towards Kenya. As we stated earlier its ambassador to Kenya, Smith Hempstone, was highly critical of the political policies of Kenya and his sentiments were supported by his country. USA has the highest quota in the financing of both the institutions. Its attitude to Kenya clearly shows that economic and political factors cannot be separated in dealing with lending to individual countries by the institutions.

70. Below is a short statement in *the website http:/1www.imf.org/external/pub/ft/exrp/what.htm* at page 24 which spells out the role of the two institutions.

> "The World Bank and IMF make support available to governments in the development of their strategies, but without directing the outcome. World Bank and IMF management realize that this requires a shift in the organizational cultures and attitude both in these organizations and in partner institutions. This shift is taking place. By coordinating early and maintaining open lines of communication with country authorities – particularly by providing available diagnostic information – the World Bank and IMF can ensure that they help countries in a timely and comprehensive way.
>
> Each institution must focus on its areas of expertise. Thus, World Bank staff take the lead in advising on the social policies involved in poverty reduction, including the necessary diagnostic work. The IMF advises governments in the areas of its traditional mandate, including promoting prudent macroeconomic policies. In areas where the World Bank and the IMF both have expertise – such as fiscal management, budget execution, budget transparency, and tax and customs administration – they coordinate closely.
>
> Because the PRSP provides the context for IMF and World Bank concessional lending and debt relief, the strategies are critical for the two institutions. Participating countries

> send the final strategy to the Executive Boards of both the IMF and World Bank for endorsement. The Executive Boards of both institutions also receive a World Bank-IMF staff assessment, with an analysis of the strategy and a recommendation on endorsement. The strategies need not be fully in accordance with staff recommendations to be endorsed. This process assures the Executive Boards – and the international community – that the strategies, while perhaps attracting broad domestic support, also address difficult or divisive issues in an effective way."

71. In practice however, the position was different. On 6th December, 1991 a week after the two institutions had frozen aid to Kenya, at a meeting of The Organization For Economics Co-operation and Development (OECD) in Paris, ministers from rich countries endorsed the link between aid and democratization. This was notwithstanding protests from a World Bank official that the Bank's statutes barred such linkage. This is what he said:

> "There is an increasing tendency to use International Institutions as a political instrument. This is something that we as an institution must resist" (Olivier Lafourcade – director of the Bank's Eupean office in Paris.) – See Exhibit 138M.

72. It was such an attitude which made Kenya vulnerable to further dictation from the two institutions regarding the implementation of various economic programmes and schemes under the World Bank's Export Development Programme. It was a programme which was intended to help Kenya expand exports to enable it earn more foreign exchange for economic prosperity.

[B] ECONOMIC REFORMS – POLICY MATRIX

73. In his budget speech delivered to the National Assembly, on 7th June, 1990, the then Vice President and Minister for Finance Prof. George Saitoti outlined various measures the country would undertake to promote production of industrial and other non-traditional exports. The aim was to have and maintain a realistic exchange rate, ensure that export producers have secure and easy access to imported inputs through the Export Compensation Scheme and by extending to commercial banks pre-shipment credit secured by export bills and to discount such bills at

the Central Bank of Kenya. Export processing zones would be established to attract foreign investment and to stimulate industrial growth and exports. All these and several others were part of an Export Development Programme which the country had negotiated with the World Bank. All these measures were part of Sessional Paper No.1 of 1986, which emphasized liberalization of the market in Kenya.

74. In **Sessional Paper No.1 of 1986** Kenya had said it would have a mixed economy, embracing socialistic and capitalistic principles, government role would not be participatory but merely supervisory and that the market would be liberalized. The Government would adopt a policy of District Focus to promote rural development. It should be noted that the government by formulating Sessional Paper No.1 of 1986 was attempting to address a foreign exchange shortage in the country. The policies in the paper were quite attractive to the donors more particularly the Bretton Woods Institutions. These policies were however dependent on donor support which was slowly dwindling. It is with this background that we have to look at the policy of the 1990-1991 budget speech.

75. Export Compensation Scheme would be reformed by accelerating payments to exporters and expand eligibility, there would be easy access to duty free inputs. A Pre-shipment Finance Scheme would be in place by December, 1990 to meet working capital needs of exporters through a CBK facility for rediscounting private financial paper. Commercial banks would allow pre-shipment Finance Scheme loans to exporters "against confirmed and irrevocable letters of credit or confirmed and verified export contracts" to rediscount with CBK the accommodation bill created from the transaction.

76. The Governor of CBK, Eric Kotut, reiterated this policy in the meeting of CBK Board held on 29th August, 1990 suggesting that the CBK was gearing towards the implementation of the policies. Whether it was coincidental or otherwise GIL was incorporated after the June, 1990

budget speech and two or so months later submitted an application to the Permanent Secretary Treasury, for various necessities under the Export Compensation Scheme. That application as we shall see later was partially processed, but was superseded by an identical one, but which was addressed to the Minister. We consider it now appropriate to look at the application minutely.

[C] GOLDENBERG INTERNATIONAL LIMITED'S APPLICATION

77. We earlier sketched a short background regarding the incorporation of Goldenberg International Limited and its sister company Exchange Bank Limited. On the face of it one would think that the idea of starting these two companies was the original thought of the promoters. However certain background facts to the incorporation of the two companies and the subsequent applications submitted respectively to the Permanent Secretary, Treasury, and The Minister for Finance suggest the incorporation was part of a scheme involving other people as well.

78. As we stated earlier Goldenberg International Limited was incorporated on 17th July, 1990. On 8th October, 1990 one of its directors and shareholders Kamlesh M. Pattni submitted an application on behalf of the company to the Minister for Finance, who also doubled up as the vice-president of the country, for three necessities:

i. Sole rights to export diamond jewellery and gold out of Kenya for a period of 5 years with the option of an extra 5 years.

ii. 35% Export Compensation on diamond jewellery and gold exports in order to effectively compete with smugglers of those commodities.

iii. Because it hoped to handle cash transactions of at least Kshs. 200,000 monthly it needed to own a financial company to reduce security risks, and provide an efficient working environment. It would also reduce their operation expenses. The proposed name for the financial institution would be Goldenberg Finance Ltd.

79. A careful look at the contents of the application reveals that it was not meant to be a serious application but for a purpose other than serious

business. Why do we say so? Firstly, the application opens with a categorical statement regarding Kenya's mineral wealth, and in particular diamond supply. The opening paragraph reads thus:

> "Kenya has a lot of mineral wealth which is not being exploited properly. Among its mineral wealth, Kenya has a reasonable supply of Diamonds and gold. A reasonable amount of gold is mined in Pokot and Kerio Valley while the source of Diamonds is also available. Most of these Diamonds and Gold are bought by many jewelers and other businessmen who have smuggled these precious minerals out of Kenya as a form of siphoning their wealth overseas. Despite the abundant amount of Gold and diamonds being bought in Kenya no amount is seen to be officially exported to earn Kenya the badly needed Foreign Exchange."

80. If we pause there, evidence was adduced before us that no diamonds are mined locally, and gold supply is limited. Mr. Pattni, under whose hand the application was made testified as much, but argued that he was referring to smuggled diamonds and gold. Be that as it may, the fact is that no diamonds were mined in Kenya but nonetheless it was falsely stated that some were mined here. The Vice-President and Minister for Finance, was then Prof. George Saitoti. It cannot be said that he did not know that Kenya did not have diamonds as a mineral resource. He had held the post of Minister for Finance for long. Neither him nor the then Permanent Secretary in that Ministry, Mr. Charles Mbindyo, raised the issue. Both of them read the application, discussed it before the former endorsed remarks on it signifying his approval.

81. The second reason why we say the application was a mere ruse is the manner it is said to have been presented to the Minister and his handling of the same. On this the evidence of Prof. Ryan and Mr. Mbindyo is crucial. In September, 1990 Mr. Mbindyo testified that he received an application identical to this one but which was addressed to him as the Permanent Secretary, Treasury. It was presented to him by Mr. Kamlesh Pattni, who was then accompanied by his co-director Mr. Kanyotu. After informing his Minister of the application he referred the same to the Financial Secretary, Mr. Ali. This fact was confirmed in the cross-

examination of the witness by Mr. Nowrojee on behalf of the Minister, and supported by the unsworn statement of Mr. Kanyotu. The application to the Minister was presented to him before Ali, had evaluated the earlier application to Mr. Mbindyo. Both Mbindyo, and Prof. Ryan testified that they were called to the Minister's office and in the presence of Mr. Kanyotu, the Minister informed them that the application had been approved by the government. Mr. Mbindyo testified that he was then asked to communicate the approval to the applicant and take any other necessary steps towards implementing the approval. The handwritten remarks on the top of the application attributed to the Minister support that position. The remarks are as follows:-

> "P – S
> As discussed approval is granted save for the monopoly.
> Liaise with the Governor.
> Sign
> 19/10/90"

82. Clearly the application was not processed as it was supposed to be. We were not shown any approval other than the one we have reproduced above. The Minister by acting on this second application without due regard to the earlier one, in effect blocked what his Permanent Secretar had sought to do, namely, have the application evaluated.

83. In his evidence before us Kamlesh Pattni stated that before he presented his aforesaid application to Hon. Saitoti, he had earlier presented the same to His Excellency Daniel Arap Moi, the then President of this Republic, who had endorsed his approval on it. Mr. Pattni testified that he was conducted to the President's Kabarnet Gardens home by Mr. Kanyotu on a date he could vividly remember. It was there that he presented his application. He was categorical that on that occasion he gave the President a sum of Kshs.5 million in Kshs.100/= notes in a suit case in effect to grease his palms in order for him to grant him the approval he needed. Initially we had no reason to disbelieve him. However we called evidence from CBK on whether Kshs.5 milion in Kshs.100/= notes could fit in a large suitcase. Likewise we asked the proprietor of the shop, namely Nyals, from where Mr. Pattni said he

bought the suitcase used, whether indeed Pattni had bought a suitcase from them. It transpired that Kshs.5 million could not fit into a large suitcase and could not possibly have been easily carried by a single person. The proprietors of Nyals denied having ever sold a suitcase to Mr. Pattni or ever having dealt in the business of selling suitcases or briefcases. The story was clearly incredible. Besides, evidence was tendered which suggested that on the day Mr. Pattni said he visited the President, the latter could have been on an overseas trip. In view of the above evidence we did not attach any weight to Mr. Pattni's story. Additionally Hon. Saitoti in his press statement (**Exht. 179B Pg.182**) states that he evaluated GIL's application in pursuance of government policy on the matter. There is no suggestion in the statement that he was directed by any person or group of persons to reach his decision.

84. The third reason is that the Ministry of Finance, had earlier received a similar application from a company known as Aurum Ltd. The application was addressed to His Excellency The President Hon. Daniel T. arap Moi. That application was later transmitted to the Ministry of Finance for necessary action. The request made in the application was, firstly, that the company be granted an enhanced rate of export compensation. Secondly, that it be given exclusive rights to export Gold, but not diamonds. It was acknowledged by Mr. Mbindyo that the application had not been processed by his Ministry by the time he left the Ministry. This was despite the fact that the company previously had a licence to export gold and gold jewellery and had earned the country substantial foreign exchange **(see Exht. 35B – pg. 22)**. Besides, the fact that Goldenberg International's application was largely couched in like manner as that of Aurum Ltd shows that GIL could have been aware of Aurum's ideas, and its application was therefore improperly put on a fast track.

85. Fourthly, Goldenberg's application came at a time when there had been a lot of behind the scenes activity on the issue of mineral exports. It appears to us to have been opportunistic. Aurum Ltd's application was

dated 24th January, 1987. [**Exht. 35B pg.1**] Prior thereto the company had been granted a licence towards the end of 1985, and by his letter to the Chief Secretary, dated 3rd November, 1986 the Commissioner of Mines and Geology then, Mr. Owayo penned that the company had earned the country Kshs.276 million within one year. The letter was in effect seeking to discredit another company, Jewelrama Ltd, which was unlicensed but which was allegedly illegally trading in gold jewellery. Later on by his report dated 23rd November, 1987 Mr. Owayo did a comprehensive report on Gold Mining, Gold Trade and Gold Exports which in a way was favourable to Aurum Ltd. It would appear to us that he was trying to make up a case for monopoly and an enhanced rate of export compensation for Aurum Ltd. It should be noted that Aurum Ltd's application was still awaiting a decision by the Ministry of Finance.

86. Later on by his letter dated 29th February, 1988 to his Permanent Secretary, Mr. Owayo alluded to newspaper articles on mineral trade in Kenya, and more particularly gold trade. In the article, his proposal for, among other things, enhanced export compensation was suggested as a solution to problems facing gold exports in Kenya. In this letter too, Mr. Owayo appears to us to have been making up a case for Aurum Ltd as he concluded the letter thus:

> "If you approve, then the contents of this letter should be used to brief the Hon. Minister as well as the Office of the President on the matter."

87. In his evidence before us he conceded the point. It is also clear from his letter to the Minister For Lands and Settlement Ref. CONF.N/5/X/55(**Exht. 35B pg.20**) that Mr. Owayo was close to the company as he wanted it assisted to get a plot of land in Nairobi.

88. The Minister For Finance was the authority who could deal with the issue of enhanced export compensation. The Permanent Secretary Ministry of Natural Resources did oblige. By his letter dated 2nd March, 1988 he briefed Mr. J.T. arap Leting, Permanent Secretary/Secretary to the Cabinet, Office of the President. Thereafter Mr. Leting addressed a

letter to each of the Permanent Secretaries in the Ministries of Finance, Office of the President, Environment and Natural Resources, Commerce and the Solicitor General, requiring them to meet and discuss problems facing the Gold Industry in Kenya. The meeting was held on 12th May, 1988 and came up with three suggestions which clearly were in line with Mr. Owayo' proposal. Ministry of Environment and Natural Resources, the Attorney General's Chambers and Ministry of Commerce were mandated to work towards suitably amending the law to accommodate the proposed changes. No action was taken on those recommendations. The law has remained unchanged in that regard.

89. In early 1989, Hon. John Keen, who was then an Assistant Minister of State in the Office of the President addressed an undated note to Saitoti, in effect suggesting that gold exporters be granted a subsidy in order to compete favourably with smugglers. It was curious that he showed interest in this field since the issue was not within his docket as Assistant Minister. In his evidence before us he testified that he was provoked to do the note because he had read a newspaper article on the matter. He also stated that he wrote after he had had a chat with Mr. Hezekiah Oyugi, who was then a Permanent Secretary in the Office of the President in-charge of internal Security. Curiously Oyugi did not tell him anything about the meeting of 12th May, 1988 in which he, Oyugi, represented his Ministry. Oyugi's presence at the meeting of 12th May, 1988 was curious. Besides, although he was the senior-most public servant in the meeting an officer much junior to him chaired the meeting. He must have had some undisclosed interest in the outcome of the meeting.

90. Mr. Keen's proposal was evaluated by Prof. Ryan, and in his memo to the Minister he thought the proposal was equivalent to a devaluation of the Kenya shilling and advised that it be rejected.

91. By 30th March, 1990, Aurum Ltd, had not been granted any licence. The Commissioner of Mines and Geology in his letter to the company dated 31st May, 1990 acknowledged that an inter ministerial decision was awaited. (see **Exht. 35 – pg. 44**). That decision never materialized.

92. In his budget speech of 7th June, 1990 Saitoti was silent on Aurum Ltd's proposals and also the issue that recommendations of an inter-Ministerial Committee had not been made available either to him or any other person. Instead he stated that the Export Compensation Scheme would only "be expanded and supplemented with an import duty exemption scheme." (**Exht. 79D pg. 11**).

93. Then come July, 1990 Goldenberg International Limited was incorporated. It soon thereafter lodged its application dated 8th October, 1990. That application was rushed through, approved and the company was assisted to start operations. We found no justification for this, nor was there any justification for the failure or delay in acting on Aurum Ltd's application. Besides the Minister did not act in accordance with his Budget Speech of 7th June, 1990. He granted 35% export compensation and exclusive rights to GIL. Mr. Mbindyo testified that technical evaluation of the application and a sessional paper for consideration by the cabinet were necessary. But none was sought nor was any cabinet approval given. In absence of those, he said, the company was irregularly licensed. We agree. Besides we think that the way Goldenberg International Limited's application was handled by the Minister was both opportunistic and calculated.

94. Fifthly, the events subsequent to the approval of Goldenberg's application clearly showed that there was a superior force behind the application by Pattni. Mr. Owayo suddenly changed his position. Previously he had been supporting Aurum Ltd, but in his letter to the Permanent Secretary, Treasury dated 13th February, 1991, he offered suggestions on how to enforce a monopoly in favour of GIL. The Ministry

of Finance approved defacto monopoly through administrative and licensing measures despite the fact that the Minister had declined to grant GIL a monopoly. Mr. Owayo did not mind this.

CHAPTER II

ACCEPTANCE AND IMPLEMENTATION OF GIL'S PROPOSALS

EXPORT COMPENSATION SCHEME

[A] THE LAW

95. According to Prof. Ryan, this scheme started in 1974. During that year the country faced an acute shortage of foreign exchange. He said, that the shortage was due to a combination of factors chief of which was the first oil crisis. The country's trade deficit rose considerably. It was his evidence that the **Local Manufactures (Export Compensation) Act, [Act No.9 of 1974]**, was an attempt to encourage manufacturing by improving quality of manufactured goods for export and to address the consequential problems of the oil crisis. This coincided with a wide range of expansionary economic programmes the government had initiated. As a consequence there were many problems among them an increase in the deficit and import tariffs. This legislation was an attempt to address those problems. The enactment made it possible for an exporter who had brought in foreign exchange through exports to get a refund of taxes paid to facilitate those exports. There was however, a condition attached, namely, that eligible products had to have a 30% domestic value added to it. Emphasis shifted from traditional commodities to non-traditional ones, for instance, shoes – textiles and plastic items.

96. The Local Manufactures (Export Compensation) Act (Cap 482) defined "eligible goods" as goods originating in Kenya. Goods originating in Kenya were defined in the Act as those goods which:

> (a) have been produced wholly in Kenya; or
> (b) have been produced in Kenya and the total value of imported materials, or materials of undetermined origin, which have been used at any stage in the manufacture of the goods does not exceed seventy percent of the ex-factory value of the goods.

97. The definition does not cover work expended in the production of the goods, only the value of imported goods which was to be taken into account in assessing the 70% required.

98. The Act imposes further pre-conditions for eligibility. Goods which have received a remission, rebate or refund of duty under the Customs and Excise Act, are ineligible. Compensation for gold and precious stones could only be paid when the goods were physically examined and certified prior to exportation. Thereafter the foreign currency had to be received by an authorized dealer, usually a bank, within 90 days of the date of payment and evidence of this payment was necessary. In the absence of evidence of receipt of foreign currency as set out a penalty of 3% a month became payable. The Exchange Control Act was effectively repealed by the Finance Act 1993 with effect from 1st September, 1993. Foreign currency received in Kenya from tourists or other services was not eligible for purposes of export compensation.

99. The scheme was to be administered by the Department of Customs & Excise. This was a department under the Ministry of Finance. Compensatory payment was at a rate fixed by Parliament but which the Minister had power to vary by order. The Minister also had power to include or exclude any goods from the list of eligible items. As at the date GIL made its application to the Minister for Finance, the compensatory rate was 20% of the value of the goods exported. Gold and diamond jewellery were then on the schedule of eligible goods, but not gold, whether unwrought or refined.

[B] ACCEPTANCE OF GIL'S PROPOSAL

100. We earlier stated that we would consider in detail GIL's letter dated 8th October, 1990. As we found no other basis, other than the letter itself upon which the Minister acted to approve GIL's proposal, we propose to reproduce the letter in full.

"Date: 8th October 1990

The Vice-President and Minister for Finance,
Office of the Vice President and Ministry of Finance
P.O. Box 30478
NAIROBI

Dear Sir,

RE: DIAMOND JEWELLERY AND GOLD EXPORTS FROM KENYA

EXPORTS OF DIAMNOD JEWELLERY UNDER TRARIF NO.7116.20.00
SITC NO.897.332.00
EXPORTS OF GOLD IN SEMI-MANUFACTURED FORM UNDER
TARRIF NO.7108.13.00 SITC NO.971.013.00

Kenya has a lot of Mineral Wealth which is not being exploited properly. Among its Mineral Wealth, Kenya has a reasonable supply of Diamonds and Gold. A reasonable amount of Gold is mined from Pokot and Kerio Valley while the source of Diamonds is also available. Most of these Diamonds and Gold are bought by many jewelers and other businessmen who have smuggled these precious minerals out of Kenya as a form of siphoning their wealth overseas. Despite the abundant amount of Gold and Diamonds being bought in Kenya, no amount is seen to be officially exported to earn Kenya the badly needed Foreign Exchange.

As seen from the various Newspaper reports (cuttings of which are attached herewith) from Kenya, London and India, it is very clear that a huge amount of Gold and Diamonds are being smuggled out of Kenya. Hence causing loss to the country of a huge amount of Foreign Exchange.

After a long investigation and study of the Gold and Diamond market in Kenya and taking into consideration the vast smuggling of the same, our Company has hereby come up with a strong proposal of officially exporting the Gold and Diamonds after buying and manufacturing them here in Nairobi.

Our Company has a capacity to buy Diamonds which are in large supplies here in Kenya. As is known world Wide, Diamonds are the most precious and expensive minerals in the world market and hence a large Foreign Workshop for manufacturing Diamond jewellery by skilled artisans. We have a ready and unlimited export market for this Diamond jewellery in Europe. In the same workshop the Gold will be worked upon and be semi-manufactured for export.

We wish to export the Diamond jewellery and Gold officially through Central Bank of Kenya as per the flow chart attached which explains our plan in a short form.

The amount of Gold we expect to buy and handle monthly will be about 100Kgs per month in the first month and

gradually increase to 400 Kgs per month by the sixth month (all explained in the attached proposal). Our Company also expects a good supply of Diamonds every month.

This means a Foreign Exchange earning of approximately 1.2 Billion Kenya Shillings equivalent, which approximately equals 50 Million US Dollars per annum for the first 1 Year and possibly a larger amount in the succeeding years as the company grows with time.

Some of the problems our Company will face due to the smugglers are as follows:-

1) Due to the lucrative differences between the official and black market rate of Kenya Shilling, the smugglers would have an upper-hand and would present an unfair competition to our company. They would continue to smuggle out these diamonds and gold through their own channels, thus converting their Kenya Shillings into Foreign Exchange for their own benefit and therefore, causing the country huge loses in the badly needed Foreign Exchange.

2) If many people are allowed export licences than this will create a chaos with many exporters rushing in to buy Gold and Diamonds, and exporting it at undervalued prices. While some would make their foreign exchange remittances in small parts over a long period. This process will create a chaos in foreign exchange earnings whereby the Government will not earn substantial amount in Foreign Exchange. It would be cumbersome for the Government to follow up several remitters than just one. Our Company will guarantee fortnightly (15 days) bulk remittances of fixed amount, a constant check on which can easily be maintained by Central Bank of Kenya. The present Gold and Diamond market is not vast enough allow several exporters.

Our Company would be grateful if it could be granted the following necessities which it considers very important to over-come the above problems due to smugglers and to guarantee constant earnings of Foreign Exchange for our country with minimum hinderances:-

1) The granting of Sole rights to export of Diamond jewellery and Gold out of Kenya for a period of 5 years with an option of extra 5 years.

2) <u>The granting of 35% export compensation</u> on our Diamond jewellery and Gold exports so as to give us a fair chance of buying of the Gold and Diamonds against the competition from smugglers.

3) Due to numerous cash transactions on daily basis and a turnover of more than Two Hundred Million Shillings (Kshs.200,000,000/=) every month, it would necessitate our

Company owning a Finance Company namely Goldenberg Finance Ltd. It will be situated on the same business premises as Goldenberg International Ltd. thus reducing security risks during cash transit and will provide for us efficient working conditions without having to bear very high interest rates as charged by other lending institutions.

Sir, our Company hereby assures you that it is competent enough to handle the buying and exporting of total Gold and Diamond market in Kenya. Our Company shall prove this and its worth in the progress of its first quarter which can be witnessed by your Ministry and the Central Bank of Kenya.

Thanking you.
We remain
Yours faithfully,
Sign.
K.M. PATTNI
CHAIRMAN"

101. We have already made general observations on the letter. In view of those observations why did the Minister consider it prudent to approve GIL's proposal? We will examine a few documents in order to try to answer this.

102. In his Budget Speech of 1982/1983 budget, the then Minister for Finance Hon. Arthur Magugu suspended the Export Compensation Scheme arguing that it had been used as a vehicle of fraud against the government by some exporters; and that it had very limited impact on export promotion. But the suspension was for a limited period. By his speech of 7th June, 1990, Saitoti emphasized that the expansion of the scheme supplemented with an import duty exemption scheme would act as stimulus to export promotion. We were, however, unable to find a reason for change of government thinking. Nor were we able to find measures the government had instituted to check the fraud Hon. Magugu had pointed out which prompted the government to suspend the scheme.

103. Saitoti could have, if he thought that it was desirable and essential to do so, proposed to Parliament a variation of the rate of compensatory payment under the scheme, but he did not do so. Had he

done so it would perhaps have been included in the Finance Bill for approval by Parliament.

104. The second document is the memo from Mr. Mbindyo to the Minister dated 28th January, 1991. The background to this document is short. The Department of Customs and Excise found it difficult to accommodate the extra 15% of Export Compensation in claims made to it by GIL pursuant to the Minister's approval of their proposal. The Local Manufactures (Export Compensation)Act, then allowed a maximum of 20%. So customs proposed an amendment to the 1st schedule of the Act to accommodate GIL's claims. However the Attorney General through the Chief Parliamentary Counsel, Mr. A.H. Buluma, said that was not possible unless Parliament amended the Act on the issue. The A-G's response is contained in Buluma's letter to the Commissioner of Customs and Excise, dated 11th January, 1991. It was after this letter that Mr. Mbindyo's memo to Hon. Saitoti was written. Mr. Mbindyo penned thus:

> **"VP/MF.**
> **I refer to the subject of ex gratia payment of 15% on exports of diamond jewellery and gold by M/s. Goldenberg International Limited. As you know you agreed to authorize an ex gratia payment of 15% to Ms. Goldenberg International Limited on exports of diamond jewellery and gold by them. I request your permission to pay them the 15% ex gratia payment each time they produce evidence of exportation of the above two items and full remittance of their Foreign Exchange earned.**
>
> **This will be carried on while arrangements are being made to legally formalize the 35% export compensation to M/s Goldenberg International Limited for the exports of the above two items.**
> **Sign.**
> **(C.S. Mbindyo)**
> **28th January, 1991."**

105. This memo was placed before the Minister. All he did was to endorse on it that it was in order. We earlier stated that Mr. John Keen had made proposals in line with GIL's proposals to the same minister. The Minister quite properly sought and obtained a technical evaluation from Prof. Ryan to the effect that if implemented the proposal would amount to a devaluation of the Kenya Shilling. So as at the date GIL's

application was placed before the Minister, he was aware that it would not be prudent to approve GIL's proposal. Besides he was made aware that a statutory amendment was necessary before a variation of the rate of compensatory payment, to a particular individual, or in respect of particular goods only, could be introduced.

106. It should also be noted that the **Restrictive Practices Monopolies and Price Control Act, (Cap 504)** was enacted in 1989, and commenced on 1st February, 1989, and was brought into force by Hon. Saitoti. The preamble to the Act states that it is "An Act of Parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes."

107. The policy of the legislation is clearly to promote competition and for as many people as possible to engage in any given economic activity. The Act was apparently enacted during Hon. Saitoti's tenure as Minister for Finance. He was therefore aware of this policy. The Act does not, however, expressly empower the Minister to allow or not to allow a monopoly. What is however clear from the Act, is that it was within his powers to effect the stated government policy of encouraging competition. When we consider the testimony of Mr. Pattni he denied ever having been told that his company had not been granted a monopoly. That must be so because Mbindyo's letter to GIL, dated 1st November, 1990 which communicated the Minister's approval is clear on that. Mr. Mbindyo stated, in pertinent part, as follows:

> **"I refer to your letter dated 8th October 1990... . since you have undertaken to provide through legal means substantial foreign exchange to the country; H.E. the Vice President and Minister for Finance has agreed, on experimental basis, to grant your company the necessity number (1) and (2) as requested in your letter ... However, he does not find it necessary to allow the necessity number (3) at present....."**

108. It should be recalled that necessities (1) and (2) related to enhanced export compensation and exclusive rights in the export of gold

in semi-manufactured form and diamond jewellery. Mr. Mbindyo in his evidence stated that although the Minister had on 19th October, 1990 declined to grant GIL, a monopoly, he later called him and instructed him that monopoly would be granted administratively. The file note in **Exht. 179A pg. 247** brings this out.

The relevant part of that document reads as follows:

> "The decision to pay additional 15% ... was purely administrative. Since the law under which export compensation payments could not accommodate the 15% top up, a decision was made by VP/MF to allow the additional 15% to be voted as public expenditure to be approved and appropriated through Parliament. This was done during F/Y 1991/92 and 1992/93 when the 15% refund was discontinued."

109. The third document we look at is a memo from Professor Terry Ryan dated 2nd August 1991. Although the document was written long after the Minister had approved GIL's proposal, nonetheless it shows in a way that as at the date he granted his approval he was aware he was acting outside his powers as Minister for Finance. As the memo summarises literally all the misgivings against the proposal and its approval, we reproduce it in full: (**Exht. 91B Pg.102**)

> **"GOLD EXPORT**
>
> **Further to our conversation of Thursday 1st August, I think it would be good for us to try and sort out the gold question. For summary purposes:-**
>
> 1. Folio 42 Goldenberg request ten year monopoly on export, 35% export compensation and establishing a private finance company.
> 2. Folio 42/1 V.P. approves except Goldenberg monopoly.
> 3. Folio 44 approval to Goldenberg of monopoly and 35%, but this is stated as being on an experimental basis, so it is not clear that this grants the ten year monopoly.
> 4. Folio 56 Commissioner of Mines and Geology supports the monopoly but seeks amendments to Cap 309 and is informed that a meeting between the Central Bank and Treasury and MENR would be necessary before this.
> 5. Folio 57 a copy of a Goldenberg letter to KCB seeking a two hundred million shilling export facility and offering security of, among other things, 23 Mercedes Benzes which are company cars!
> 6. Folio 59 Goldenberg exercises their monopoly to exclude another trader.
> 7. Arum request an export licence for ten years without monopoly guaranteeing $40 million a year and proposing to export more than Goldenberg

I am sure that we should have the meeting between Central Bank and MENR to review this whole situation since I consider that the monopoly is illegal, without the Minister explicitly excluding Goldenberg from the provisions of the Restrictive Practices, Monopolies and Price Control Act. By giving 35% export compensation in Kenya shillings, I realise we are getting foreign exchange but the equivalent devaluation is vast, furthermore, I think that the export compensation infringes not just the spirit but also the letter of the Export Compensation Act.

Given that this compensation, together with the commitment of exporting gold to the value of US$50 million per annum, confers a mark up value on the international price of gold of roughly Shs.500 million per year it does not surprise me that the Company has a fleet of Mercedes Benzes. Nor, let it be noted, that ten of them at least are less than two years old, judging by their number plates. This suggests that a non-negligible amount of foreign exchange is being used by this Company.

T.C.I. RYAN
2nd August 1991."

110. There are remarks on it which need to be noted. The Permanent Secretary to whom it was addressed was Mr. Mbindyo. He marked the note to the "VP/MF" – viz Vice President and Minister for Finance, who was then Hon. Saitoti. All the Minister did was to write "NOTED". This was despite the concluding remarks in the last two paragraphs which explicitly pointed out that the monopoly and 35% compensation granted to GIL were illegal, and that there was no financial vote from which the additional 15% compensatory payment would be met.

111. The last document we consider is the ministerial statement on Gold and Diamond Export dealings made on 18th June, 1992 by Assistant Minister For Finance Mathias Keah. At page 294 of the Parliamentary Hansard of that day, [**Exht. 99 pg.2**] the Assistant Minister categorically stated as follows:

"Mr. Speaker Sir, in October, 1990, a new company called Goldenberg International Ltd, presented proposals showing that with export compensation it could export gold and diamond jewellery worth yet an unimagined value of Kshs. 1.2 billion. The government decided to exploit this new potential by giving Goldenberg International Ltd. a chance to prove their proposal. In giving the new company this chance, however, the government established that it would be necessary to commit Goldenberg International Ltd. to a minimum target annual export earnings which was at US$50 million.

> The government was at the same time aware that [if] it gave export rights to other dealers, Orum [sic], included, competition would arise for the acquisition of the commodities. If, therefore, Goldenberg International Limited were to fail to achieve the set target, the company would blame the Government for their failure. At the same time, the identification of the anticipated potential of gold and diamond jewellery exports would have also failed. It was, therefore, decided to give Goldenberg International Limited the sole rights."

112. We think that Parliament was misled on this. The same Assistant Minister lied to the same August House in his answer to Hon. Jilo Falana's question by Private Notice. [**Exht. 38**]. Copies of documents were supplied. However the fraud was not stopped. GIL's proposals were not given any technical evaluation before approval was given. When eventually, Prof. Ryan evaluated their proposal, he rejected it outright. We refer to an internal memo from Mr. Njeru Kirira to the Permanent Secretary, Treasury, dated 2nd December, 1991, in which he gave a detailed evaluation of GIL's proposal. The evaluation passed through Prof. Ryan, who was his immediate superior officer. Prof. Ryan appended his remarks in the following terms: [**Exht. 91B pg.66**]

> "This matter is clearly one that benefits one body and nowhere is there justification for such favouritism [which they now seek extended] nor how the body was chosen. The argument that Kenya gets forex is illegitimate when we consider the cost which is much higher than the compensation rate..."

113. The VP/MF saw those remarks and those of Mr. Kirira which were critical of the whole proposal. Mr. Kirira's conclusion on the matter was that additional export compensation and monopoly were not only illegal but also against GATT rules.

114. It should be noted that this evaluation came slightly more than a year after the proposal by GIL had been approved, and was not solicited by either the Minister or the Permanent Secretary in the Ministry of Finance. Besides, notwithstanding the strong objection voiced by the two technocrats, the payments and exclusive rights accorded GIL were not discontinued . Clearly the Minister appeared resolute in continuing with the scheme. So the remarks in Parliament by Mr. Keah were clearly a red

herring. We find no evidence that his then Permanent Secretary, Mr. Mbindyo, took any steps to advise the Minister against approving GIL's proposals. In his evidence he stated that he did so but this is not evident from his conduct then and subsequently. Prof. Ryan and Mr. Njeru Kirira were officers under him and they happened to be the technocrats in the field. Yet there is no evidence that he ever backed them in their resistance against the proposals by GIL.

[C] IMPLEMENTATION OF GIL's PROPOSALS

115. The final approval by the Minister of GIL's proposal was given by 19th October, 1990. On 1st November, 1990, Mr. Mbindyo, addressed two letters bearing the same date to GIL communicating the approval and the way forward. Both letters bear the same reference and folio numbers, viz CONF/153/01. In his evidence before us Mr. Mbindyo explained that of the two letters one was drafted by him with the assistance of the Governor of the Central Bank (CBK) Mr. Eric Kotut. The governor allegedly proposed the format and the parties to whom it would be copied. The VP/MF also saw the letter and approved the format. The letter reads as follows: **[Exht. 91B pg.149]**

"M/s. Goldenberg International Ltd;
P.O. Box 54662
NAIROBI

Dear Sir,

RE: EXPORT OF –

(a) GOLD IN SEMI-MANUFACTURED FORM – TARIFF NO.7108.13.00

(b) DIAMOND JEWELLERY – TARIFF NO.7116.20.00

The Vice-President and Minister for Finance has agreed to allow your request of officially exporting of the above two items by your company so as to earn a great deal of Foreign Exchange to our country as per your letter dated 8th October, 1990.

By copy of this letter you are requested to get in touch with the:-

(1) Director of external trade so as to get export license fon the above two items.

(2) Commissioner of Mines and Geology so as to get the buying and trading license for Gold and Diamonds.

(3) Commissioner of Customs and Excise so as to facilitate the requirements for smooth exports of the above items.

(4) Governor of Central Bank of Kenya so as to facilitate the necessary requirements for smooth remittances of foreign exchange earned through the exports.
Thanking you.

C.S. MBINDYO
PERMANENT SECRETARY/TREASURY."

116. Incidentally, at the bottom of the letter it shows that it was copied to P.S, Ministry of Commerce, Commissioner of Customs and Excise and the Commissioner of Mines & Geology, but not the Governor of CBK:

117. Mbindyo, stated in his evidence that the second letter of the same date as the above one was written by him after he had fully reflected on the matter and wanted in effect to cover himself in what he considered to be an irregularly approved weighty and sensitive matter. As the addressee, references and date are the same, with the above letter we will only reproduce the body of the letter. It reads: **[Exht.91B Pg.147]**

"I refer to your letter dated 8th October, 1990 on the above subject. We have now had the opportunity to deliberate on the matter at great length. Your request touches on the field strongly believed to be operated illegally on large scale through smuggling. It is also a delicate field. However, since you have undertaken to provide through legal means substantial foreign exchange to the country; H.E. the Vice-President and Minister For Finance has agreed, on experimental basis, to grant your company the necessify number (1) and (2) as requested in your letter under reference, so as to overcome the problems you would face due to smugglers of the above two items. However, he does not find it necessary to allow the necessity number (3) at present.

The above two necessities (1) and (2) are in particular granted on the grounds that your company will execute an agreement with Central Bank of Kenya, guaranteeing a minimum annual earnings of (US Dollars Fifty Million) US$ 50 million through exports of the two items.

By copy of this letter you are requested to execute an agreement with the Central Bank of Kenya to this effect. I will separately brief the CBK."

118. The letter was copied only to Mr. Eric Kotut, Governor, Central Bank of Kenya. Mr. Mbindyo testified that both letters were written after lengthy and detailed consultations with the VP/MF and the Governor at a meeting of the three people, in the Minister's office. In that meeting he allegedly raised various serious impediments to the implementation of the scheme as approved. Even after the consultation he was still sceptical regarding the implementation of the scheme within the then existing legal frame work. In his view it was unworkable and hence his second letter which in effect was intended to make the project become a cropper. He conceded that the second letter was a departure from what had been approved and argued that this came about because of discussions he had with the Minister and the Governor in which the approval of GIL's proposal was varied. Clearly Mr. Mbindyo did not tell us the whole story by reason of the manner in which the scheme was implemented.

119. It was Mr. Mbindyo's evidence that at their tripartite meeting, the VP/MF stated that the Governor would be the one to implement the proposed project . But what does the law say on the issue? To appreciate this we need to consider the respective roles of the Treasury, the Central Bank the Commercial Banks, the Commissioner of Customs, the Department of Mines and Geology and the exporter.

(i) Role of Treasury

120. The Treasury, qua Treasury, is mentioned both in Sections 6 and 7 of the Local Manufactures (Export Compensation) Act. Section 6 provides that an application for compensatory payment shall be made to the Commissioner for Customs through the Treasury or a person appointed by the Treasury or an appointed dealer as the case may be "in the prescribed form." Under Section 7 the Treasury or a person appointed by it or an appointed dealer has to be satisfied that an export has taken

place of eligible goods as required by Section 5 of the same Act, before forwarding the claim to the Commissioner of Customs & Excise for compensatory payment.

121. Section 5 aforesaid as it was in October, 1990, provided, inter alia, that compensatory payment would only be made if the exportation is completed, foreign currency in respect of the exportation has been received in Kenya by an authorized dealer or that payment has been made, or settlement effected in accordance with a bilateral agreement between Kenya and any other government.

122. From the foregoing it is quite clear that it was the duty of the Treasury to oversee the proper administration of the scheme, whether it acted directly or it appointed any other party to do so on its behalf.

(ii) The Exporter

123. It was the duty of the exporter to ensure that he prepared and processed eligible goods for export and that he possessed the relevant licences. Processing meant filling the relevant export entry forms, customs declarations and other related documents; packaging and loading the goods on board a vessel or vessels for carriage to the intended importer, after complying with legal requirements.

(iii) Commercial Banks

124. These were the appointed dealers of Forex under the Exchange Control Act. The Minister for Finance appointed the commercial banks to receive foreign currency on behalf of CBK. Section 2 of the Exchange Control Act defines "authorized dealer" as a person for the time being authorized by an order of the Minister to act for the purposes of the Act as an authorized dealer in relation to gold or, as the case may be, foreign currency. Proceeds of export were payable by an importer through his or its commercial banks which in turn remitted the money to the

commercial bank of the exporter. The exporter's banks were duty bound to sell the foreign currency to the CBK. The exporter's commercial bank in turn paid the exporter the local currency equivalent.

(iv) Department of Mines & Geology

125. We received evidence to the effect that it was the duty of the Department of Mines and Geology not only to licence miners and dealers of mineral jewellery but also to assay those items before being sealed for export. This requirement is not contained in the Local Manufactures [Export Compensation]Act. Dealings in precious metals are dealt with under the Trading in Unwrought Precious Metals Act, Cap 309 and diamonds under The Diamond Industry Protection Act Cap 310 Laws of Kenya respectively. The role of this department was therefore only complementary to that of Customs & Excise Department.

(v) The Central Bank of Kenya

126. The bank was the ultimate recipient of Foreign Exchange earned from eligible exports. Mr. Mbindyo, testified that VP/MF told him in the presence of the governor of the Central Bank, that the export compensation scheme would be administered by the Governor. But we do not have any formal appointment of the Governor or any other person in that regard to handle issues relating to export compensation. The two letters from the PS Treasury, respectively dated 1st November, 1990, copied to among other people the governor wanted GIL to enter into an agreement with CBK to earn the country a minimum of US Dollars 50 million, per year, and to facilitate smooth remittances of the foreign exchange.

127. The CBK was required by Exchange Control Notice No.13, to endorse in the CD3 form receipt of proceeds of export in foreign currency before an exporter could present his claim for compensatory payment to the Department of Customs.

(vi) Customs & Excise

128. Customs and Excise is and has always been a department in the Ministry of Finance. Under Section 6 of the Local Manufctures [Export Compensation]Act, the department is the one to effect compensatory payments. An application for payment was supposed to be made through the Treasury, and payment would only be made if Treasury certified not only that an export had taken place but also that foreign currency had been received for the same. It was also the duty of the department to inspect and seal the gold and related goods for export. Being a Department under the PS Treasury its role is clearly part of Treasury's mandate.

[D] GOLD AND DIAMOND JEWELLERY EXPORTS

129. To be licensed as an exporter of gold and diamond jewellery or precious stones for that matter one was required to have a dealer's licence which was issued by the Department of Mines and Geology. We earlier talked about GIL being granted de facto monopoly through the administrative process. Mr. Evans Samuel Osumo a warden of mines during the period 1990 to 1994, testified that GIL was the only licensed company to deal in diamonds, during that period. During the same period GIL was the only company licensed to export gold.

130. We received evidence that gold and diamond jewellery were on the list of eligible goods under the Export Compensation Scheme. Exports of eligible goods followed a set procedure. We will deal with that procedure later, but first we will consider the issue of availability of gold and diamonds in Kenya.

(i) Availability of Gold and Diamonds in Kenya

131. Gold and diamonds are precious minerals of high value. Evidence was adduced, which is uncontroverted that Kenya does not produce any diamonds at all. We received evidence that none was

officially imported during the relevant period of this inquiry. What it then means is that whatever diamonds, if at all, were used for the making of diamond jewellery must have been smuggled into the country. Indeed Mr. Collins Owayo, who was then the Commissioner of Mines and Geology conceded as much. Likewise Mr. Owayo conceded that gold supplies in Kenya are in small quantities and a large quantity of it was smuggled into the country. GIL was one of the parties responsible for smuggling gold from Bunia in Zaire. On two occasions gold which GIL was smuggling into the country was impounded at Wilson Airport after official hours. On both occasions the company brought into the country large amounts of gold respectively, weighing 31kgs and 32 ½ Kgs. This was ironical because GIL had sought exclusive rights to export gold and diamond jewellery with a view to stopping smuggling. Yet it was itself engaged in smuggling even after being guaranteed exclusive rights in the export of Gold and Diamond jewellery.

132. It is now important to consider the annual Economic Survey reports to see the position of gold and diamond supplies in the country during the relevant period. When GIL came into the picture there was a sudden rise, at least on statistics, of exports from this country. Infact the economic survey for 1993 showed that exports doubled over the previous year rising from K£1,772 million in 1992 to K£3,618 in 1993. Of the exports 53,325 grams of jewellery and precious metals were included, 45,200 grams of which were exported to, mainly, the United Arab Emirates. Their total value was Kshs.4,732,158,319.

133. Anthony Simiyu Muchanga, an economist and stastician in the Ministry of Finance, testified that these figures were abnormal as related to jewellery and precious minerals. They were completely outside the normal trend because, for instance, in 1991 the value of exports on this head was Kshs.1,546,950,381. They were to one country viz Switzerland. And in 1992 the value of such exports was Kshs. 9,648,650,165. The exports were to Switzerland and United Arab Emirates. These figures on being found to be abnormal were excluded

from annual surveys for 1991, 1992 and 1993 because although they appeared on Customs Monthly Trade Reports, verifications of the exports was difficult. Besides, although overall there was apparently an increase in exports the balance of payments showed a widening deficit against the country. Besides in 1994, the exports dropped to Kshs. 455 million, and in 1996 it was a paltry sum of Kshs.16 million in comparison. The same upward trend was observed in respect to gold.

134. The trend observed above clearly shows that the increases reflected were not or could not possibly be genuine. If they had been, such great and sudden increases in the exports of gold and diamond jewellery would not have been noted. It was not disputed that there were no recent discoveries of gold and diamonds in the country. In view of that a question arises as to whether indeed the purported exports were genuine.

(ii) Procedure for Export of Eligible Goods

135. We earlier reproduced two letters from Mr. Mbindyo to GIL instructing the company what it was required to do before it could commence operations as an exporter. One of the conditions it was given was that it sign an agreement with CBK guaranteeing a minimum annual earning of US$50 million in convertible currency. In pursuance of that CBK addressed to the Chairman GIL, a letter Ref. EC 51/2/03C dated 5th December, 1990 as follows:

> "5th December, 1990
> The Chairman
> Goldenberg International Ltd
> P.O. Box 54662
> NAIROBI
>
> Dear Sir
>
> RE: EXPORTS OF:-
> (a) GOLD IN SEMI MANUFACTURED FORM TARIFF NO.7108.13.00
> (b) DIAMOND JEWELLERY – TARIFF NO.7116.20.00
>
> We refer to your letter dated 8th November, 1990 to H.E. The Vice-President and Minister for Finance on export of gold and diamond jewellery.

You have since received from the Ministry of Finance their letter ref. Nos. CONF 153/01 of 1st Novermber, 1990 and amongst other things granting you the sole rights to export the above commodities and export compensation at the rate of 35%. You will observe that in consideration of the above rights you are expected to guarantee minimum earnings of US$50 million per annum paid in convertible currency. Accordingly, Central Bank of Kenya would wish to draw your attention to the following procedures which you will adhere to in this business:-

1. You will complete C3 forms for each consignment. The forms are obtainable from the bank which will be receiving the export proceeds on your behalf.
2. The commodities you are exporting will be assessed by the Commissioner of Mines and Geology who will confirm the value declared on the CD3 form.
3. The CD3 forms will be returned to your bank which will give an appropriate pre-shipment endorsement when it is satisfied that the proceeds of sale have been received through an authorized dealer in Kenya in advance or within the period stipulated under the laws.
4. You will obtain from the Customs the exports entry and subsequently surrender the copy (B) of CD3 form to he Customs who will forward it direct to the Central Bank of Kenya.
5. Your bank will surrender copy (C) of the CD3 form when the proceeds of the export are received. In this regard, it will be necessary for your bank to obtain a specific acknowledgement of the copy [C] from the Central Bank. Considering that the export compensation being granted is on a special basis, your bank shall ensure that the claim is accompanied by the acknowledgement obtained from the Central Bank.
6. It is suggested that you familiarize yourself with export procedure as per Exchange Control Notice No.13.
7. Please confirm your understanding of these procedures and your undertaking to earn a minimum of U.S$50m by signing and returning the duplicate copy of this letter.

Yours faithfully,

CENTRAL BANK OF KENYA
EXCHANGE CONTROL

c.c. P/S Office of the VP & Ministry of Finance
Commissioner of Mines & Geology
Commissioner of Customs & Excise"

136. This letter sets out the procedure GIL was expected to follow closely before it could receive compensatory payments under the Local

Manufactures [Export Compensation] Act. The conditions set out in the above letter were to be applied side by side with Exchange Control Notice No.13. Among the salient aspects of that notice was that payment for exported goods had to be made in Kenya in an approval manner within 3 months from the date of the export; that the exporter was obliged to obtain from his commercial bank CD3 forms, complete the same as well as Customs Entry and commercial documents all which were then to be lodged with the exporter's commercial bank. The Notice also set out what the roles of the various persons concerned would be

137. It was contended before us on behalf of Mr. Pattni that Exchange Control Notice No.13, was invalidated by Exchange Control Circular No.4/87/13 dated 29th September, 1987. Prima facie that would appear to be so. However, considering that the CBK expressly included its terms in its agreement with GIL, it follows that with regard to GIL, Exchange Control Circular No.4/87/13 was superseded.

(iii) Processing Gold and Diamond Jewellery For Export

138. Exports had to have at least a 30% local content. There had to be a manufacturing process to add to the goods that 30% plus local content. So an exporter after processing the goods had to identify a person to export the goods to; agree with him on the price and the place where the export would be sent to, the vessel to carry it and terms of payment. For gold and diamond jewellery or any other precious minerals, the goods would be exported in a special box. Evidence was tendered before us that the box would be sealed at the exporter's premises by an officer from Mines and Geological department in the presence of, among other people, a customs officer. It was then left with the exporter until shipment. It is at that stage that the export is valued by an officer from Mines and Geological Department. The valuation was intended to ensure that values of exports were not exaggerated in order to earn a higher compensatory payment. And sealing was to obviate tampering with goods already valued.

139. We were taken through the procedure for sealing gold and diamond jewellery for export. A simple tin box was used, and it was clear to us that the sealing was not tamper proof. A simple lead seal was used in place of the special tamper proof steel seal available. The box could be cleverly opened and the contents removed or replaced. That was the more so because at no other time thereafter would the box be opened to verify its contents. Evidence was adduced that from the exporter's premises the box would be sent to the port of exit under guard and would be accompanied by the exporter or his nominee to the country of destination. The argument in support of the foregoing arrangement was that gold and diamond jewellery were items of high intrinsic value with a high risk of theft or robbery. So the valuation and sealing of the commodities at the exporters' premises was to minimize such risk. But as it will emerge in due course this was a vehicle for fraud.

(iv) Whether GIL Exported Gold and Diamond Jewellery

140. We have already set out in general terms the procedure for handling exports. We also alluded to the fact that the alleged exports of gold and diamond jewellery were mainly or almost exclusively to two countries namely Switzerland and United Arab Emirates. It is important to note that between 1990 and the later part of 1993 only GIL was granted an exporters licence to export gold. It was also the only company within the same period with an exporter's licence under the Diamond Industry Protection Act Cap 310, Laws of Kenya which incorporated an exporter's licence. These are the licences which gave GIL exclusive rights. So when we consider the quantity and value of diamond jewellery exports for the year 1990 to 1993, they relate only to GIL. Below is a chart which shows the Quantity and Value of Diamond jewellery Exports between 1989 and 1994.

Year	Quantity (Grams)	Value (Kshs)	Value per Gram (Kshs)	Destination
1989	Nil	Nil	Nil	-
1990	1,751.00	154,250.00	88,092.52	Switzcrand

1991	12,297.90	1,547,958,401.00	125,871.77	Switzerland
1992	62,480.90	12,335,939,141.00	197,435.36	Switzerland, UAE
1993	19,050.00	4,602,198,253.00	241,585.21	UAE
1994	Nil	Nil	Nil	-

141. Exports to Switzerland are, according to the documents before us only to two companies, namely, Solitaire Bahnhofstrasse, 8023, Zurich, and Servino Securities Inc., Route De Suisse 9, CH –1295 Mies, Geneva, Switzerland. Bernard Antoine Metzger testified that the address for Servino Securities is in fact the address for the printers of a publication in Geneva Switzerland known as Swissness 1000, which he was the publisher. It was a publication with information about leading consumers and companies in Geneva Switzerland. The printers of the publication, he said, were Ayria SA. Route de Suisse 91295 Mies. It was his evidence that the name Servino Securities Inc. does not appear in that publication nor had he ever heard of it before. He denied he had had any business dealings with Kamlesh Mansukhlal Pattni, although he admitted he had business dealings with his brother Rohit Pattni.

142. We went through several documents relating to purported exports to Servino Securities Inc. of gold and diamond Jewellery and took the witness through each one of them. We also showed him a copy of a letter purportedly written by Bernard Metzer on behalf of Servino Securities Inc., dated 7th January, 1992 addressed to GIL, setting out the conditions upon which his company would be prepared to purchase diamond jewellery from GIL. The witness denied having ever dealt with GIL, or having ever corresponded with it and more particularly that he had written or signed the said letter. There were other correspondence attributed to him, all which he denied knowledge and authorship. All in all he denied having had any business or other dealings with GIL, except installing IT network at its premises at View Park Towers. He never spelt his name as Metzer. Also the abbreviation Inc. is not used by Swiss registered companies. The abbreviation there is S.A for Societe' Anonyme.

143. What was Kamlesh Pattni's response to this evidence? The response of Mr. Pattni came out more vividly when he was cross-examined by Mrs. Murgor, for CBK on the issue. The cross-examination went on as follows:-

"Murgor: My Lords have asked you about Mr. Bernard Metzger. What was his role in all of this?

Pattni: My Lords, he was known to my uncle Mr. Niru. He was living in Switzerland. We just asked him if we could use his address just the way we did DPN and others.

Murgor: Why did you need his address?

Pattni: To Keep confidentiality of our diamond purchases. They did not want their names to be revealed.

Murgor: But his name was on the applications for pre-shipment finance. What was his address for?

Pattni: We needed a representation there. It is just like when I took representations of DPN trading. That is what we used at the beginning when we were dealing with diamond trade. But after all these betrayals, one would never trust anybody.

Murgor: This is the address that the local commercial banks used when they made inquiries on the existence of Servino Securities?

Pattni: Yes. You are right.

Murgor: When anybody would call enquiring about the existence of Servino Securities, Mr. Metzger would be on the other side of the phone to answer and say it is the importer of all the alleged gold and diamond exports?

Pattni: He was there in the beginning before he moved to Kenya. He was in Switzerland in 1990 and early 1991, then he moved here later after our business relations grew.

Murgor: So, his role was to cheat local banks that Goldenberg was exporting gold and diamond jewellery to Servino Securities and to confirm to them that he was indeed the exporter (importer). Is that what his role was?

Pattni: Not actually. It is only when the publicity started, that is when the banks inquired. Before that, there was nothing like anybody ringing. It was just basically an address.

Our company Servino was registered in Panama. Our banking and all the transactions took place there.

Murgor: You are aware that various local banks ... did inquire from their own correspondent banks on the existence of Servino Securities and they were told that Servino Securities did not exist?

Pattni: In Switzerland, no. It did not.

Murgor: Therefore, when they made inquiries into the existence of Servino Securities, Mr. Metzger would be at the other side of the phone to confirm that Servino Securities existed. Was his role not to cheat any innocent inquirer into the existence of Servino Securities?

Pattni: In the beginning yes, he was there and we used his address... Basically the whole thing was to safeguard against business rivalry, secrets and partners. As I explained earlier, a consignee has got nothing to do with export compensation. Our agreement with the Government was to have US$50 million sold to Kenya per year. Our agreement with the Government was not that the consignee has to be exactly so and so."

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144. This was a clear admission by the Chairman of GIL that what was presented as exports to Servino Securities Inc. were indeed no genuine exports. There was no company in Switzerland by that name and there were no exports to it. So the contracts and orders which were exhibited before us and marked as exhibits 100 and 100B were all false and the documents concerned forgeries since they were intended to convey a false impression about themselves. We will deal with Mr. Pattni's argument that these false deals were intended to defeat rivals and to preserve secrecy, later in this report. So if the documents were all false can it be said that there were exports to Servino Securities Inc.? Mr. Pattni testified that Servino Securities Inc. is a Panamian company owned by GIL. We have no evidence that any gold or diamond jewellery was ever received by any other party as purchaser. In view of that, and Mr. Pattni having not adduced such evidence, and bearing in mind that the matter

was one peculiarly within his own personal knowledge, we have no basis at all for finding that there were genuine exports.

145. Likewise, Mr. Pattni expressly conceded that there were no exports to Solitaire as the alleged company was in fact a pseudonym for GIL. He testified that Solitaire is a Panamian company created for the consignee. As in the case of Servino Securities Mr. Pattni testified that Solitaire was created to protect his company, viz GIL from business rivalry and consignees. It was his evidence that the alleged exports to Solitaire are not true. This is what he said on that:

"Chairman: My understanding is, even where it shows that the export is to DPN, it is not true?

Pattni: No, it is not, my Lords.

Chairman: Even where it shows that it is to Duty-Free Shop in Dubai, it is not true?

Pattni: No, it is not. To answer you on that one, look where I started. I did not with DPN on my first entry. I started with Solitaire!

Chairman: That is right.

Pattni: I started with Servino. Why did I change later? Because it is cheaper to fly to Dubai, and it is nearer. Why should I fly all the way to Switzerland? Why should I book a flight to Switzerland?

Chairman: What about Engelhard?

Pattni: My Lords, to Engelhard, we sent gold. That is a refinery which is in London. Engelhard is a reputable refinery whose credentials I will present to the Commission. I explained to you that gold is traded on the world market. Diamonds are traded in secret markets....

Chairman: So, as to anything diamonds, whatever destination is shown here, is all false?

Pattni: For diamonds, the destinations were all Psedonyms, my Lords.

Chairman: It is all false?

Pattni: Yes, my Lords."

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146. The CBK Board Minutes from 1990 to 1994 at no time indicate that any significant gold and diamond jewellery were exported. In fact such exports are not even mentioned. In view of this it can be inferred that if there were any exports of the items the foreign exchange was not remitted to Kenya.

147. It is of interest that Pattni never alleged that he exported any industrial diamonds. The trade in industrial diamonds is in fact larger than that in gem diamonds. The process of cutting as many gem diamonds as Pattni alleged he did, would have left a considerable residue of industrial size diamonds pieces which would have fetched not inconsiderable sums. This consideration gives support to our finding that there was no processing of diamonds.

148. This then deals with all purported exports not only to Servino Securities and Solitaire, but also to DPN and World Duty Free Ltd Dubai. In view of Mr. Pattni's admission, we do not consider it necessary to go through all documents relating to the exports because that will not take us very far. However, we will have to delve in great detail into payments for the purported diamond jewellery exports to understand from where the money originated. That is the more so in view of Mr. Pattni's statement that diamond merchants wanted their consignments to go through airports where once the aircraft takes off, the courier of diamond jewellery would hand over the consignment to the owner in the aircraft. It would not be sent to the destination shown on the documents. Besides he said, money would change hands either there and then or it would be paid in advance before delivery of the consignment.

149. Before we consider whether there were any payments for the purported exports it is important to comment on three other companies, namely DPN Trading Co. Ltd, World Duty Free Ltd – Dubai and Engelhard.

150. DPN Trading Co. Ltd, has as its major shareholder, Mr. Ketan Somaia. He testified before us that the company is based at Dubai and deals in Industrial Hardware. He denied his company ever had any dealings with GIL or World Duty Free. It was also his evidence that the company has never dealt in diamond or Gold jewellery. Mr. Pattni confirmed to us that indeed GIL did not export any gold or diamond jewellery to that company.

151. As for World Duty Free Ltd, it was also a Dubai based company in the United Arab Emirates. It is among the companies to which, according to export documents before us, diamond jewellery was exported by GIL. Mr. Pattni conceded that his company did not export any diamond jewellery or indeed any jewellery to it, and the company's name was only used as a pseudonym of GIL. It then follows that the documents relating to that company in Exhibit 55 are all false and in fact forgeries as they intend to give a wrong impression about themselves. This is also the case with the documents relating to Servino Securities, Solitaire and DPN.

(v) Remittance of Export Proceeds

152. We earlier alluded to the procedure for processing exports which were eligible for compensatory payment under the Local Manufactures (Export Compensation)Act. We also alluded, in general terms, to the requirements of Exchange control Notice No.13 which stipulated the export procedures and payments. We wish to revert to it, more particularly paragraph 2(b), namely the sub-heading Commercial Banks Obligations. The paragraph reads as follows:

> "2 (b) On receipt of completed CD3 forms from an exporter, the bank shall endorse Box 24 only when the following conditions are fulfilled:
>
> (i) The exporter has established an account for purposes of receiving export proceeds and the bank will be the recipient of the said proceeds.
>
> (ii) CD3 forms are fully and properly completed.

(iii) Terms of payment are acceptable to the bank and that the proceeds will be received within three months from the date of exportation."

153. Paragraph (e) of the same notice provides that in case of advance payments the exporter's bank shall include a certificate to that effect in the CD3 C forms and that the money was received in an approved manner.

154. As we stated earlier Hon. Saitoti granted exclusive rights to GIL to export gold and diamond jewellery, on 19th October, 1990. By that date GIL had opened a bank account with First American Bank of Kenya pursuant to a board resolution made on 8th August, 1990. Mr. Kamlesh Pattni was indicated as the sole signatory to the account which was assigned No 105018066. Francis Nzioka, the Operations Administrator of the bank, at the time, testified that GIL had its first export in December, 1990 to Solitaire, Bahnhofstrasse, 8023, Zurich, Switzerland. The relevant CD.3 form was No.543313 and the alleged export earned US$ 773,319. The importer's bank was given as Bank Paribas Switzerland. The money was remitted by Telegraphic Transfer but there was no indication given in the telex as to the remitter of the money. Below is a tabulation of other transactions which followed.

LIST OF FOREX TRANSACTIONS THROUGH FIRST AMERICAN BANK

CD 3 NO.	RECEIVED AMOUNT/ REMITTED TO CBK	MODE OF PAYMENT	TRANSMITTER OF TELEX	DATE OF RECEIPT/ CREDIT TO GIL	DATE SOLD TO CBK/ CBK 240/166
543313	*$773,319	TT	BP	17/12/90	19/12/90
543314	*$226,681	TT	BP	17/12/90	19/12/90
543315	*$76,579 *$202,347 *$210,012 *$500,000	TT TT TT TT	 BP BP	15/1/91 8/1/91 14/1/91 14/1/91	17/1/91 11/1/91 *22/1/91 *22/1/91
543316	*$455,521 *$489,000	TT TT	 BP	30/1/91 24/1/91	* 4/2/91 *28/1/91
543317	*$123,421 *$100,000 *$200,000 *$567,029 *$200,000 *681,625 *343,783 *500,000 *667,450 *386,600	TT TT TT TT TT TT TT TT TT TT	 BP BP FCI BP BP BP BP BP FCI	15/1/91 23/1/91 25/1/91 22/1/91 15/1/91 07/1/91 07/1/91 07/1/91 08/1/91 19/12/90	17/1/91 23/1/91 *31/1/91 *24/1/91 *11/1/91 *11/1/91 *11/1/91 *11/1/91
543318	$465,103 $29,628 $500,000	TT TT TT		8/1/91 7/1/91 7/1/91	11/1/91 11/1/91 11/1/91
543319	$314,155 *$681,625	TT TT	 BP	7/1/91 7/1/91	11/1/91 11/1/91
543320	*DM 15,000 *$79,000 *FF 14,200 *$144,000 *$500,000 *$200,000 *$300,000 *$390,000	Cash Cash Cash Cash TT TT TT TT	 FCI/BP FCI/BP FCI/BP FCI/BP	8/2/91 8/2/91 8/2/91 11/2/91 7/2/91 8/2/91 11/2/91 11/2/91 7/2/91	*12/2/91 *12/2/91 *12/2/91 * 11/2/91 * 8/2/91 *8/2/91 *20/2/91 *20/2/91 *20/2/91 *20/2/91 *24/1/91

	*$200,000	TT	FCI/BP	7/2/91	*18/2/91 *18/2/91
	*$200,000	TT	FCI/BP	14/2/91 12/2/91 12/2/91	* 18/2/91
	*$100,000	TT	FCI/BP	12/2/91	
	*FF 5,320	Cash			
	*SFR 1,020	Cash			
	*GBP 3,100	Cash			
543321	*$60,200 *$40,000	Cash		14/2/91	*19/2/91
	*$9,000	Cash		14/2/91	19/2/91
	$11,500	Cash		19/2/91	1/3/91
	*$30,000	Cash		18/2/91	1/3/91
	*$306,614	Cash		18/2/91	1/3/91
	*$600,000	TT	FCI/BP	12/2/91	*25/2/91
	*$98,340	TT	FCI/BP	11/2/91	*25/2/91
	*$200,000	TT	FCI/BP	14/2/91	*25/2/91
	*$400,000	TT	FCI/BP	15/2/91	*25/2/91
	*$148,000	TT	BP	20/2/91	*4/3/91
	DM 50,700	Cash		12/2/91	19/2/91
	*DM 11,900	Cash		20/2/91	1/3/91
	*FF 3,700	Cash		14/2/91	18/2/91
	GBP 750	Cash		19/2/91	20/2/91
	SFR 5,000	Cash		14/3/91	14/3/91
	*DM 3,100	Cash		28/2/91	1/3/91
		Cash		19/2/91	
543322	300,000	TT	FCI/BP	6/3/91	*14/3/91
	*$350,000	TT	FCI/BP	26/2/91	4/3/91
	*$225,000	TT	BP	26/2/91	4/3/91
	$200,000	TT		25/2/91	4/3/91
	*$977,500	TT	BP	22/2/91	* 4/3/91
	*$200,000	TT	BP	20/2/91	* 4/3/91
543532	*$160,000	TT	BP	8/3/91	*11/3/91
	*$300,000	TT		6/3/91	*7/3/91
	*$405,050	TT	BP	4/3/91	*7/3/91
	*$75,000	TT	BP	5/3/91	*7/3/91
	*$620,160	TT	FCI/BP	28/2/91	* 4/3/91
	*$11,950	Cash		8/3/91	*19/3/91
	*$28,300	Cash		5/3/91	*19/3/91
	*$52,350	Cash		11/3/91	*19/3/91
	*DM 325	Cash		4/3/91	*19/3/91
	*GBP 175	Cash		4/3/91	*19/3/91
	*GBP 1,745	Cash		1/3/91	*19/3/91
	*FF 1,450	Cash		4/3/91	*19/3/91
	*SFR 14,950	Cash		1/3/91	*19/3/91
	$1,000	TT		12/3/91	*14/3/91
	*DM 86,850	Cash		11/3/91	*19/3/91
	*$230,800	TT	FCI/BP	26/2/91	4/3/91
	*$36,900	Cash		21/2/91	1/3/91
543533	*$98,000	TT	FCI/BP	25/3/91	*25/3/91
	$2,110	Cash		20/3/91	*25/3/91
	*$2,160	Cash		21/3/91	*25/3/91
	*$38,040	Cash		21/3/91	*25/3/91
	$2,140	TC		20/3/91	19/3/91
	*$66,033	Cash		18/3/91	*25/3/91
	*$500,000	TT	FCI/BP	14/3/91	
	*$7,865	Cash		14/3/91	*19/3/91
	*$200,000	TT		14/3/91	
	*$20,000	Cash		13/3/91	*19/3/91
	*$43,100	Cash		8/3/91	* 19/3/91
	*$250,000	TT	FCI/BP	8/3/91	* 14/3/91
	*$38,752	Cash		12/3/91	*19/3/91
	DM 7,200	TC		20/3/91	*13/5/91
	*DM 32,000	Cash		8/3/91	*19/3/91
	DM 17,170	Cash		20/3/91	*25/3/91
	*GBP 5,700	Cash		12/3/91	* 19/3/91
	GBP 240	TT		20/3/91	*22/4/91
	SFR 2,180	Cash		20/3/91	*25/3/91
	SFR 4,200	TC		20/3/91	*18/4/91
	IL3,500,000	Cash		20/3/91	*25/3/91
	$700,000	TT		21/3/91	*25/3/91
	*$650,000	TT	BP	8/3/91	* 11/3/91
	*$20,000	Cash		4/3/91	*19/3/91
	$55,050	Cash			* 19/3/91
543534	*$235,845	TT	FCI/BP	4/4/91	4/4/91
	*$176,500	TT	FCI/BP	4/4/91	4/4/91
	*$185,150	TT	FCI	26/3/91	*5/4/91
	*$12,000	TT	FCI/BP	21/3/91	*25/3/91
	*$61,900	Cash		3/4/91	*5/4/91
	*$34,900	Cash		4/4/91	*5/4/91
	*$29,055	Cash		3/4/91	*5/4/91
	$79,000	TT		8/4/91	
	*$36,410	Cash		27/3/91	*2/4/91
	*$6,000	Cash		28/3/91	*2/4/91
	*$6,236	Cash		2/4/91	*5/4/91
	*$26,773	Cash		22/3/91	*2/4/91
	*$17,685	Cash		25/3/91	*2/4/91
	*$16,040	Cash		28/3/91	*2/4/91
	*$700,000	TT		28/3/91	*5/4/91
	*IL11450000	Cash	FCI/BP	3/4/91	*5/4/91
	*IL 1650000	Cash		23/3/91	*2/4/91
	*IL47100000	Cash		25/3/91	*2/4/91
	GBP 215	Cash		28/3/91	*2/4/91
	GBP 550	Cash		28/3/91	*2/4/91
	DM 2,140	Cash		28/3/91	*2/4/91
	FF 4,640	Cash		25/3/91	*2/4/91
543535	*$8,600	Cash	FCI/BP	8/4/91	*10/4/91
	*$39,982	Cash	FCI/BP	8/4/91	*10/4/91
	*$9,700	Cash	FCI/BP	10/4/91	*15/4/91
	*$36,875	Cash		12/4/91	15/4/91
	*$32,460	Cash	BP	9/4/91	*15/4/91
	$14,800	Cash	BP		*15/4/91

	*$54,800	Cash		16/4/91	*19/4/91
	*$25,700	Cash		15/4/91	*19/4/91
	*$98,000	TT		10/4/91	*15/4/91
	*$323,000	TT		10/4/91	*15/4/91
	*$206,000	TT		12/4/91	*19/4/91
	$121,000	TT		8/4/91	
	*$179,500	TT		18/4/91	19/4/91
	**$ 423,250	TT		18/4/91	*19/4/91
	*GBP 700	Cash		8/4/91	*19/4/91
	*GBP1, 650	Cash		16/4/91	* 19/4/91
	*IL50,250,000	Cash		16/4/91	*19/4/91
	*IL19,150,000	Cash		15/4/91	*19/4/91
	*DM 15,980	Cash		16/4/91	*19/4/91
	*SFR 6,300	Cash		16/4/91	* 19/4/91
	*$3	Cash		12/4/91	*22/4/91
	*$200,000	TT	BP	8/4/91	8/4/91
543536	*$34,948	Cash		18/4/91	*19/4/91
	*$56,499	Cash		18/4/91	*19/4/91
	*$13,202	Cash		19/4/91	*22/4/91
	**$600,000	TT	BP	18/4/91	*19/4/91
543537	**$900,000	TT		18/4/91	*19/4/91
	*$2,810	Cash		19/4/91	*22/4/91
	*GBP 720	Cash	BP	19/4/91	*22/4/91
543538	*$1,634	Cash		7/5/91	*10/5/91
	*$26,260	Cash		6/5/91	*10/5/91
	*$7,182	Cash		2/5/91	*7/5/91
	*$4,240 -	Cash		3/5/91	*7/5/91
	*$58,063	Cash		30/4/91	*7/5/91
	*$7,719	Cash		30/4/91	*7/5/91
	*$12,975	Cash		24/4/91	*26/4/91
	*$18,200	Cash		23/4/91	*24/4/91
	*$59,380	Cash		22/4/91.	*24/4/91
	*GBP 680	Cash		7/5/91	* 1 0/5/91
	*FF 6,100	Cash		7/5/91	*10/5/91
	*IL45200000	Cash		6/5/91	*10/5/91
	*GBP 460	Cash		3/5/91	*7/5/91
	*DM 49,660	Cash		30/4/91	*7/5/91
	*GBP 1,115	Cash		30/4/91	*7/5/91
	*SFR 5,170	Cash		30/4/91	*7/5/91
	IL-9850000-	Cash		30/4/91	*775791
	*IL18500000	Cash		3/5/91	*7/5/91
	*IL14050000	Cash		24/4/91	*26/4/91
	*DM 2,700	Cash		22/4/91	*24/4/91
	*IL12650000	Cash		22/4/91	*24/4/91
	*$70,000.00	TT	FCI/RNB	6/5/91	*10/5/91
	**$500,000	TT	BP	18/4/91	*19/4/91
	*IL39280000	Cash		7/5/91	*10/5/91
543828	*$69,300	Cash		9/5/91	*14/5/91
	*$62,160	Cash		17/6/91	17/6/91
	*$32,200	Cash		21/5/91	15/5/91
	*$43,212	Cash		15/5/91	* 1 0/7/91
	*$87,000	TT	FCI/CL	26/6/91	*10/7/91
	*$168,000	TT	FCI/CI	9/7/91	*10/7/91
	*$200,000	TT	FCI/NY	3/7/91	*21/6/91
	*$92,000	TT	EB	19/6/91	*14/5/91
	*$82,000	TT	FCI/RNB	8/5/91	15/5/91
	*DM 11,000	Cash		15/5/91	*10/5/91
	*DM 18,670	Cash		7/5/91	*10/5/91
	*SFR 29,590	Cash		7/5/91	*27/6/91
	*GBP 35,000	TT		20/6/91	

155. Clearly, although the various remittances are shown as relating to various CD3 forms, the telex messages did not have those details. Mr. Nzioka, testified that those details were supplied by the exporter, namely, GIL. Hence letters like this one reproduced below: **(Exht.147 Pg.16)**

"LN/12.3/CBK March 12th, 1991

The Principal
Exports Division
Exchange Control Office
Central Bank of Kenya
NAIROBI

Dear Sir,

Re: CD3 Final Return for Goldenberg International Ltd
In accordance with the Exchange Control Notice No.13, we submit the following CD3 forms together with original credit

advices, copies of telex advices, CBK 166-6 and specifications:-

CD3 NOS.	Ref:
543313	GIL/1101/90
543314	GIL/1102/90
543316	GIL/1107/90

Kindly acknowledge receipt of the enclosed (3) CD3C forms on copy of this letter.

Yours faithfully
Sign
Authorized signatory

Sign
Authorized Signatory"

156. Remittances of the foreign exchange to the CBK were effected on 19th December, 1990 for the first two CD3 forms, while the money for the third form was remitted in two tranches to CBK on 28th January and 4th February, 1991 respectively.

157. It is also clear from the above table that from 12th February, 1991 some of the purported proceeds of exports were remitted to the bank in cash by the exporter. That was contrary to Exchange Control Notice No.13, aforesaid, which required remittances to be effected by the importer's bank. The last observation we would like to make is that in some cases remittances were by instalments and in more than one hard currency.

158. Besides there is an observation which the bank itself made, namely, that in almost all the exports, payment was made before the exports. Incidentally most of those payments were in cash. We appreciate that Exchange Control Notice No.13 did permit advance payments. However, such advance payment could only be properly made with the prior approval of the exporter's commercial bank. In the instances we have referred to no such approval was sought or obtained before the payments. The bank improperly and irregularly accepted the money. It is also clear from the manner the remittances and payments were made, that they did not support any genuine exports. Had that been otherwise the relevant importer's details and export documents would have each time accompanied the remittances. Besides, the importer's commercial

bank would have been the one to remit the money with full particulars of the export details.

159. First American Bank seems to have entertained doubt as to the genuiness of the purported exports. By its telex dated 11th April 1991 addressed to Swiss Bank Corporation, Zurich, Switzerland, it inquired about SOLITAIRE BAHNHOFSTRASSE, 8023, ZURICH in the following terms:- (**Exht.147 Pg.231**)

> "As well as receiving your opinion on the general standing we would appreciate receiving the names of the directors/management of the company.
> Please respond soonest by telex or fax (333868) for my attention.
> Best regards.
> Allan F. Dixon
> GENERAL MANAGER OPERATIONS."
> **[See Exht. 147- Pg.231]**

The response came on 12th April, 1991 as follows:

> "A company of this name is not registered in Zurich and unknown to us. No telephone line in this name. We are unable to trace it with the address given (8023 is not a street number but a zip code).
> The only company of this name in Switzerland is Solitaire Investment AG., CH-8200 Schaffhasen, which is not our client."

160. With the foregoing evidence Mr. Kamlesh Pattni properly conceded that Solitaire did not exist in Switzerland. His defence was that it is a Panamanian company used as a pseudonym. But even this is clearly not true. The name was given to deceive. No exports of any kind were made even using that name as a pseudonym. This emerges clearly from the correspondence between First American Bank and CBK. In its letter dated 26th April 1991 to the Manager 1st American Bank of Kenya CBK returned several CD3 forms to that bank and required it to attach currency declaration forms relating to them, an explanation as to the relationship between the attached remittances (T.TS) and the invoices, an explanation as to the relationship of the T.TS which had no reference to amounts received, and an explanation as to why invoices were raised in Kenya Shillings.

161. The response of the bank was curious. It appears in its letter to the CBK dated 2nd May, 1991 (**Exht. 147 pg. 177**). It is curious because it adopts fully GIL's explanations in its letter to the Exchange Controller through First American Bank dated 29th April, 1991. (**Exht. 147 pg.178**) As this letter gives what we consider to be a clear picture of GIL's dealings, we will reproduce its body in full:

> "Dear Sir
> RE: CD3 C FORMS NOS.543536, 543535, 543532, 543322, 543534, 543537, 543319, 543317, 543318, 543315, 543320, 543321, 543313, 543314 & 543316
> A/C GOLDENBERG INTERNATIONAL LIMITED
> ---
> We hereby refer to your letter ref EC3/6/04C/2304 dated 26/4/91 to First American Bank of Kenya.
> We hereby have the following explanations for the relevant questions asked by yourselves:
>
> a) We do not have the currency declaration forms relating the currency deposits made as these are cash payments by our various clients who on their visits to here in Nairobi pay us cash for various jewellery purchases they do here and from our agent in Europe upon the receipt of cash we arrange for the shipment of their goods or the goods released to them in Europe.
>
> Being a new company we have not been familiar with currency declaration forms and upto recently we had not even received our licence. As cash currency is the easiest form of value confirmation we shall be receiving cash currency from our smaller European clients which we shall be depositing through our Commercial Bank to yourselves.
>
> As we shall be receiving our cash sells (sic) proceeds from Europe sometimes through mail, air courier services, etc. it shall be difficult for us to provide the currency declaration form in our cases, as we are trying to boost the Foreign Exchange earnings for our country. Our company is bound to sell our products to all sorts of small, medium and big clients which will bring in all sorts of Foreign earnings in form of Telegraphic Transfers, Cash deposits, Foreign Bankers drafts, Foreign Cheques, Travellers Cheques, etc. Our company is in the process of vast expansion by opening showrooms and more offices in Mombasa and Nairobi which shall see Foreign Exchange earnings in wider ranges.
>
> Hoping that you understand our being problems which shall be systematize latter on. We request maximum support from yourselves so as to help our company generate even greater amount of Foreign Exchange earnings for our country.

b & c) The relationship between the attached remittances and the invoices is through our Foreign agents reference of sells which have been shown in each telexes received as payment information GIL/001/01 upto GIL/051/91 as the sells of our products is done through our agent in Europe. The remittances have been coming with regards to the references of various sells being done through our Europe agents. This references have been GIL/001/91 upto GIL/051/91 up-to-date.

We have hence forth instructed our Europe agents to change the system and all further remittances from May 1991 bear CD3 Number and Invoice Number for which each remittances received.

Please excuse us being a new company, we had not been aware of particular procedures but we are trying to learn and systematize ourselves according to your requirements and procedures.

(d) The invoices are being raised in Kenya Shillings instead of convertible currencies because at the time of our meeting with our agent in Geneva, Switzerland, we were having an argument about which exchange rate is to be used while invoicing to them, this is the rate at the time of buying or at the time of exporting or at the time of them receiving the goods or the rate at the time of their selling of the goods on our behalf.

Due to these argument we came to an agreement of invoicing them the Diamond Jewellery in Kenya Shillings due to the above points mentioned and the Gold in Convertible Currencies i.e. US Dollars due to the gold being sold on forward bases on Bullion Market while still being physically in our possession. Due to the above factors a 2 year contract was signed between us and our agent agreeing on various policies. As our exportation and remittance cycle is not going to take longer than 15 to 30 days.

We hereby request you to allow us to carry on with our Invoicing procedure with our agents so as not to make us retard in our forward March of expansion and earnings of far much greater volume of Foreign Exchange for the benefit of our country.

Hoping that the above explanation given will suffice, we hereby once more request for your full corporation in helping our Company's plight of earning much more Foreign Exchange for our Country.

Thanking you in advance for your kind
understanding for the above.
We remain,
Your faithfully,

Signed
K.M. PATTNI
EXECUTIVE CHAIRMAN

---

c.c. FIRST AMERICAN BANK KENYA LTD
P.O. BOX 30691
NAIROBI."

162. Its case, in a nutshell was that it wanted some leeway to deposit with its bankers locally cash in foreign currency which it would then disguise as proceeds of export. Later we shall show that GIL engaged in currency dealings locally and the money received was channeled to overseas bank accounts, and in some cases it found its way back allegedly as proceeds of exports. GIL found the procedure under Exchange Control Notice No.13 limiting and hence its request to receive cash from Europe directly.

163. The explanation given in para (d) above for invoicing in Kenya Shillings is ludicrous and cannot possibly be true. The Kenya Shilling was not at that time a convertible currency; banks abroad did not have conversion rates for shillings and could not make any conversion. All dealings internationally were in convertible currencies and exporters and importers were well accustomed to invoicing or being invoiced in those currencies. The question raised whether the rates should be at the time of sale or of receipt is totally irrelevant and had no bearing on the currency to be used.

164. First American Bank must have been so embarrassed by GIL's dealings that it asked GIL to bank elsewhere. After First American Bank rejected GIL as its customer, the latter moved to Citibank, Nairobi, and there opened a current account, in March 1991, through which it would receive its purported export proceeds. And no sooner had they opened that account than they requested to deposit cash as proceeds of export. The reaction of the bank is contained in its letter to GIL dated 8th September, 1991. The letter appears at **Pg.24 of Exht. 159** and reads as follows:

"September, 8, 1991
Goldenberg International Ltd.

P.O. Box 54662
NAIROBI
Attn: Mr. K.M. Pattni

Dear Sir
RE: FOREIGN CURRENCY CASH: RECEIPT FOR EXPORT PROCEEDS

We wish to refer to the subject of depositing cash foreign currency over our counters to offset your exports proceeds without the relevant exchange control document e.g the foreign currency declaration.
We wish to advice you that we have been informed by the Central Bank of Kenya that you enjoy no special conditions as far as accounting for foreign exchange is concerned. Kindly therefore ensure that all foreign currency deposits are accompanied by proper documentation.

Yours faithfully
Grace Tole (Mrs)
Manager"

GIL handled through Citibank transactions relating to 25 CD3 forms. The table below shows, in general terms those transactions:

CD3 NO.	AMOUNT DECLARED (US$)	AMOUNT RECEIVED (US $)	EXPORT COMPENSATION PAID (KSHS)
623927	790,848	790,848	42,48,925.80
623928	829,797	829,797	4,472,854.80
623929	968,925	968,925	5,332,028.65
623930	888,517	901,559	4,967,540.00
623931	1,085,034	1,103,800	6,066,230.80
623932	1,060,173	1,074,000	5,927,242.00
623933	1,022,126	1,022,350	5,714,520.00
623934	1,072,752	1,072,752	5,997,563.00
623935	791,280	791,280	4,428,933.00
623936	918,505	933,618	5,318,530.00
657614	1,246,148	1,263,800	7,225,689.60
657615	1,651,668	1,663,916	9,577,064.80
657616	1,670,281	1,702,200	9,770,492.35
657617	1,102,007	1,131,100	6,446,498.60
657618	1,534,521	1,579,800	9,042,134.40
657619	705,075	705,550	4,087,480.00
657620	604,845	616,650	3,567,714.00
657621	666,064	667,100	3,860,771.20
657622	644,765	648,765	3,735,305.60
657623	1,575,007	1,620,470	9,207,302.00
657705	1,246,148	1,376,365	7,284,831.80
657706	1,251,668	1,278,325	7,317,101.00
657707	1,270,281	1,314,895	7425910.20
657708	1,206,666	1,244,690	6,871,112.40
657709	678,165	678,180	3,851,977.20
TOTAL	**26,481,266**	**26,980,735**	**151,745,753.20**

165. Remittances to GIL account with Citibank Nairobi relating to the aforesaid CD3 forms was transmitted by Telegraphic Transfer from Citibank Corporation Bank, Zurich, Switzerland through Citibank, New York on account of Solitaire for the benefit of GIL. The export documents

which were exhibited show the supposed importers as Servino Securities Inc. of Switzerland and Engelhard Sales Ltd of England. We earlier found that the former did not exist. However, we received evidence that the latter company existed but it is doubtful whether GIL exported the goods shown on the documents as alleged. Mr. Kamlesh Pattni testified before us that there were indeed sales to that company and showed us copies of telexes from the company to GIL showing various payments into some account and transfers to KCB. Exhibit 166 which is a statement by Farooq Mungai, has a table showing inward remittances to KCB for the benefit of GIL but CD3 numbers are not shown. That then means that the sales to Engelhard had nothing to do with export of eligible goods under the Local Manufactures (Export Compensation)Act. There was an attempt in **Exht. 166A** to assign CD3 numbers to certain remittances, but in absence of CD3 numbers we cannot possibly say that there were exports under the Export Compensation Scheme. The fraudulent nature of assigning CD3 numbers to remittances from Engelhard is clearly shown at **pg. 57** of **Exht. 166A** which comprises export documents and some remittances. That page shows a remittance in which Engelhard was the originator. But it would appear that at the request of GIL CD3 No.659347 was assigned to it. The amount remitted was US$365,374.35. In the inward remittance sheet prepared by KCB appearing at page 27 of **Exht. 166**, the remitter is shown as Engelhard Sales Ltd, but the CD3 form number is shown to have related to remittances by Solitaire and relates to amounts totalling US$550,000

166. As in the case of First American Bank, GIL would arrange for transfer of money without accompanying export documents relative to it and later supply CD3 forms. There are two cases in point.

167. On 23rd October, 1991 GIL addressed a letter to the Manager Citibank, in the following terms:

> "The Manager
> CITIBANK
> P.O. Box No.30711
> NAIROBI

Dear Sir,

RE: FOREIGN REMITTANCE RECEIVED ON 18/10/91 FOR US $368,000

This is to inform you that remittances received on 18/10/91, for US $ 368,000/- pertains to CD3 No.657705 and 657706.

Date	US$	CD3 Number
18.10.91	236,110	657705
18.10.91	131,890	657706
	368,000	

Kindly amend your records accordingly and do the needful.
Thanking you,
Yours faithfully
For Goldenberg International Ltd
Signatory
G.S. MURITHU
ACCOUNT MANAGER"
[Exht. 159 – Pg.553]

168. The bank duly complied and wrote to CBK and additionally indicated that the amount had earlier been wrongly advised at the time of the sale contracts of the forex with CBK. That was not true because GIL did not want any straight deal. Had the deal been straight the remittance should have been accompanied by CD3 form and invoice numbers. In **Exht. 159B at pg. 606**, the point has been brought out clearly. An officer of CBK Nairobi, remarked on a letter to it similar to the one we have referred, as follows:

> "Receipt acknowledged of CD3 form No.657707 and a credit balance of US$ 78670 against CD3 form No.657708 noted, however, CD3 and invoice nos. should be quoted on all remittance advices for future submissions."

Even with these clear instructions GIL did not comply.

169. Kenya Commercial Bank Ltd, is another commercial bank where GIL had a bank account, to wit account No.22971416 which it opened in May 1991 at KCB's Moi Avenue Branch. Mr. Farooq Mungai, a manager with KCB, testified that the understanding of his bank was that the procedure for telegraphic transfers of money was that the relevant telex show among other things, the name of the remitter, the name of the beneficiary, the amount of money involved, the CD3 forms particulars and the commodity exported. Indeed that is what CBK told GIL was the position. It was his evidence that of the CD3 forms it received from CBK it

gave 40 of them to GIL between May 1991 and February, 1992. GIL used 33 of those in its remittances through KCB and 5 in remittances through PostBank Credit. GIL made 87 remittances by Telegraphic Transfer, but none of them complied with the procedure for remitting money by telegraphic transfer. Invoicing was in Kenya shillings, CD3 form Nos. were not indicated, and some of the remittances were made through PostBank Credit instead of direct to KCB.

170. From the foregoing it is clear that although in its letter dated 8th October, 1990, which we reproduced earlier, GIL had promised that everything would be done legally, in practice that was not so. Abnormal exports were recorded, but no rise in foreign exchange earnings. From what we have demonstrated, there were no real exports nor any return to the country from purported gold and diamond jewellery exports. In consequence the conclusion must inevitably be reached that there were no exports, and that the foreign exchange shown to have been remitted had nothing to do with any exports. Later in this report we will show that the foreign exchange which was received had indeed been transmitted from Kenya into overseas bank accounts and then thereafter remitted back into the country with a view to claiming export compensation. The money had already been counted in some other economic activity and could not therefore affect our balance of payments position. Mr. Owayo was therefore not correct when he stated in his evidence before us that GIL had achieved what he and the company had set out to and recommended should be done. Whatever benefits GIL's operations achieved they did not translate into any economic gain to Kenya.

(vi) Effect of Licence Granted by CBK to GIL

171. In order to assist foreigners including tourists who brought foreign currency legally into the country for the purposes of their stay often in the form of travellers' cheques, arrangements were made by which certain hotels, lodges and tourist-oriented businesses were allowed to

accept payment of foreign currency in exchange for goods or services. Such a licence was in the form in which it was granted to GIL and because it is important it is set out in full **(Exht.111A Pg.64)**.

C.B.K. 133

THE EXCHANGE CONTROL ACT

(Cap. 113 Laws of Kenya)

PERMISSION *to accept foreign currency, cheques, or travellers' cheques in payment of whole or part, for goods or services provided has been granted to:*

Messrs. M/S Goldenberg International Ltd

Address P.O. Box 54662 - Nairobi

This Authority expires on 8-4-92

Central Bank of Kenya
Exchange Control

No 9401

Date of Issue April 8, 1991

GPK 5423—2m—11/86

172. Firstly goods or services have to be provided by the licence-holder and payment made in respect of those goods and services. Secondly Exchange Control Circular No.7 is quite specific about what happens thereafter **(Exht. 111A pg.66)**.

Paragraph 5 reads:

> **For the convenience of travelers, however, certain airlines, hoteliers and travel agents have been authorized to provide cash exchange facilities for visitors in urgent cases at the current rate of exchange, but they are under the obligation to offer all foreign currency that comes into their possession in this way to an authorized dealer within forty-eight hours.**

173. So the money could only be for goods and services rendered and has to be surrendered within 48 hours. This was strictly in accordance with the Exchange Control Act since anyone having foreign

exchange had to surrender it to an authorized dealer under Section 4 of the Act. Authorised dealers were banks gazetted under the Exchange Control (Authorised Dealers)Order.

174. GIL was never an authorized dealer. Mr. Benjamin Kamunya Karuru who was in charge in CBK of issuing of such tourist industry licences made a statement [**Exht. 157**] and gave evidence. He said that there should have been a licence given by the Ministry of Tourism and Wildlife. The application by GIL contained the statement that it was going to make US$50,000,000 a year as a reason for its requiring the licence. Obviously this was disingenuous at best, since it had no intention of engaging in tourist activities nor in making its money through tourism. When Mr. Kamunya had explained to him the nature of GIL and who its officers were he agreed that the licence should never have been issued **(Hansard Pg. 12364]**

175. It was therefore illegal for GIL or its agents to buy foreign currency from the public using this licence. This licence was used by Rehmat Khan as his authority to buy foreign currency from the public.

176. When EBL was formed and granted a banking licence it was also licensed as an authorized dealer and the general exchange control regulations applied to it.

177. Rehmat Khan testified and Pattni confirmed this, that he bought from the general public foreign currency which he later sold to Exchange Bank and the proceeds were credited in the account of Shimba Kay with Exchange Bank which was being operated by I. Patel. He was the operations manager of the bank. In some instances the money was sent overseas and deposited in Exchange Bank nostro accounts there. He testified that Messrs. Indubhai Patel, I.C Patel, Vaju Pattni and one Netto were effecting the transfers. He testified that he brought into Exchange Bank foreign currency daily at an average rate of Kshs.3,000, 000 worth

in US dollars. The money would be transferred to an account known as "RATAN" in London which was being operated by Mr. Kamlesh Pattni. A lot of money in Kenya shillings was necessary to pay for the foreign currency being paid in. Mehmood Rehmat Khan was not alone in this business. There were many other people bringing in foreign currency. They were also purchasing forex Cs which they would in turn sell to Exchange Bank for the benefit of GIL. ShimbaKay account in Exchange Bank was basically opened for that purpose, as it did not appear to be used otherwise. The account holder was fictitious. Mr. Khan testified that he knew one of its operators as Indubhai Patel, who was the operations manager of the bank. That such a senior officer was operating the account clearly suggests that it was a secret account for dealings which were not above board. A lot of money went through that account. As we said earlier much of the money in foreign currency was transferred overseas. As we shall see later some of that money was transferred back as export proceeds.

178. It should be recalled that Exchange Control Notice No.13, stipulates, among other things, that proceeds of exports be received in Kenya through the exporter's commercial bank. It should also be recalled that CBK in its letter to GIL dated 5th December, 1990, which we reproduced earlier, made receipt of proceeds of export through an authorized dealer a condition for GIL to be entitled to compensatory payment. GIL opened several bank accounts in several banks and through them it channeled large sums of forex. This, we think, was purposely intended to cover the trail of the sources and movement of the money, some of which, as we stated earlier, was purchased locally.

179. We would like to point out that apart from the foreign exchange dealer's licence which GIL obtained, the liberalization of the forex market by the introduction of Forex Cs did create an opening for GIL to obtain foreign exchange which it took out of the country.

180. In addition to the foreign currency and Forex Cs, Mr. Khan testified that with the assistance of his brother they would buy gold for GIL. He said he did not deal in diamonds but directed anyone with it to GIL in Nairobi. We believe this was the gold GIL processed and sent to Engelhard Sales Ltd, of London for purification and assaying. It was not being exported in the normal manner but through a security firm known as Brambles Security Courier **(See Exht. 154J pgs. 14, 15 and 16).**

181. Finally it is our view that CBK did not act properly when it licensed a private company like GIL to deal in foreign currency during the exchange control regime. Other than hotels and certain other institutions which were handling tourists only financial institutions would properly be licensed to deal in foreign currency. Be that as it may, because GIL had a lot of money in foreign currency, it sought to deposit cash in its local bank accounts as proceeds of exports for purposes of claiming export compensation. That way the company was able to defeat the object of the export compensation scheme, namely, to increase foreign exchange receipts. Instead the company made money fraudulently from these false deposits disguised as proceeds of eligible exports.

(vii) Compensatory Payments

182. The Local Manufactures [Export Compensation] Act, according to Philip Muli Mulili, a retired Deputy Commissioner of Customs & Excise, replaced The Local Manufactures [Import Duty Refund] Act. Compensatory payments were intended to enable exporters to compete in the world market. Exporters who paid duty for imported inputs to their products would get compensation for the duty paid. According to Mr. Mulili, initially export compensation payments were from revenue of the Department of Customs & Excise. As the amounts payable were low the department had no difficulty meeting all claims. However, when GIL came into the picture the rate of compensation went up, amounts payable

soared, the claims were numerous and as a consequence they could not be met from revenue alone.

(viii) Compensatory rate

183. We earlier outlined how GIL came into the field of exportation of gold and diamond jewellery. Their letter of 8th October, 1990, requested for and they were granted a 35% compensatory payment even though the Local Manufactures [Export Compensation]Act, at the time allowed a maximum of 20% of the value of the exports. Hon. Saitoti who granted the enhanced rate was aware of this limitation. The Treasury was the one, under the law, to administer the scheme.

184. Mr. Njeru Kirira, who was a senior economist in the Ministry of Finance, in his memo to Prof. Ryan dated 18th September, 199.. on Duty/Vat on gold, diamonds etc [**Exht. 179A-pg. 84**] expressed the following view on compensatory payments for those items:

> **"The second issue on payment of export compensation has to do with what the exporter is being compensated for. Since there is no evidence that any duties (sic) has been paid on gold, there is then the issue of government credibility with regard to these payments. Unless exporters can prove they paid duty, the payment turns out to be a direct subsidy, the next question is whether the government should subsidize this type of goods."**

185. There was neither a legal nor economic basis for the enhanced rate of export compensation. But the Ministry of Finance went ahead and settled claims by GIL at the rate of 35%.

186. Mr. Mbindyo, the then Permanent Secretary in the Ministry of Finance, testified before us that he had reservations about the economic benefits which would be derived from the scheme and hence wrote to GIL telling them that the enhanced rate granted to them would only be on an experimental basis. But experimental or not the rate granted was not within the existing legal framework, and this, as we stated earlier in this report posed problems, more particularly when Mr. Buluma affirmed what

the legal position was. The Ministry of Finance, instead of abandoning the enhanced rate addressed a letter to the Commissioner of Customs and Excise as follows:-

"25th January, 1991

Mr. Francis Cheruiyot
Commissioner of Customs and Excise
P.O. Box 40160
NAIROBI

EXPORT COMPENSATION – DIAMOND JEWELLER – TARIFF NO.7116.20 AND GOLD TARIFF NO. 7108.13.00 FOR M/S. GOLDENBERG INTERNATION LIMITED

As you are well aware, the Treasury has vide my letter dated 19th December, 1990 to you given M/s Goldenberg International Limited a 35% export compensation for diamond jewellery and gold exported by them...
In our view this is a sound investment decision. Therefore while arrangements are being made to legally formalize this decision, it has been decided that you immediately compensate Goldenberg International Limited by paying the current 20% as required by the law with effect from November, 1990 and the extra 15% will be dealt with by this office after your confirmation that you have paid the initial amount. This procedure is necessary so as to earn a great deal of untapped Foreign Exchange through the exports of the above two items.
You must, however, confirm that the 15% is an accurate charge on the actually exported items. You are further required to process their export documents and export compensation claims each time they are presented to you, without any delays whatsoever. Your personal attention to the latter is necessary so as to reap maximum benefits out of this arrangement.

C.S. MBINDYO
PERMANENT SECRETARY/TREASURY."

187. The Letter was copied to GIL. It should be noted that prior to writing that letter Mr. Mbindyo had obtained Hon. Saitoti's approval through a memo dated 28th January, 1991[see **Exht. 90B pg. 140**]. What is curious is why Mr. Mbindyo wanted the Commissioner of Customs to personally attend to the matter and why he considered it a matter of extreme urgency. We surmise that pressure was being exerted from some quarter.

(ix) Export Compensation Payments

188. Customs Department could only make payment after the CBK had endorsed on CD3 C forms that it had received proceeds of the relevant export in foreign currency. For CBK to do so it had to satisfy itself from export documents that an export had taken place.

189. The Commissioner of customs in most cases, personally became involved in payments to GIL of export compensation. It is in evidence that a customs officer would from time to time go to GIL's premises to seal items for export after they had been assayed by an officer from the Department of Mines and Geology. We also received evidence to the effect that after the sealing the box carrying the items would be left in the custody of GIL and was not, thereafter subjected to any further examination. Export documents show that such boxes were always accompanied in-flight to the consignee. Whether such boxes ever left GIL premises is doubtful in view of what we stated earlier. That notwithstanding each time GIL presented to Customs Department its claim for compensatory payment under the Export Compensation Scheme they would be paid by that department the statutory 20% compensation and a letter would be addressed to the Permanent Secretary, Treasury, to pay the extra 15% to bring the total to 35%.

190. Customs Department would work out both the 20% and the 15%, pay the 20% portion and submit the latter part to Treasury to pay. It is important to note that within Treasury a problem arose as to the vote to be charged. Initially the Permanent Secretary would direct that payment be made without indicating the vote or account to be charged. His staff apparently decided to pay the additional 15% out of the vote item, "CUSTOMS REFUND" which soon ran out of funds. (see **Exht. 179B – Pg.41**). It is interesting that the vote was exhausted at the beginning of the financial year 1991/1992, and Mr. Mbindyo instructed his officers to continue paying and later the over expenditure would be regularized

through the supplementary estimates. The effect of those instructions was an overdrawing of that account. Thus GIL continued getting payment purportedly under the Export Compensation Scheme, but in actual fact it was being paid a windfall. The additional 15% was described as Ex gratia **(Exht. 91B pg. 140)** by Mr. Mbindyo. Hon. Saitoti described it as "a bonus incentive". (see **Exht. 179B pg. 182**). Whichever description it is given the payment was nothing but a payment without any legal or economic basis. It was a mark-up without any justifiable basis. As the payment was to be out of public funds the project was fraudulent. No wonder Prof. Ryan in his memo to the Permanent Secretary Treasury, which we reproduced earlier, dated 2nd August, 1991 was critical of the scheme.

191. The extra 15% payments were later placed before Parliament in the supplementary estimates of 1991/1992, disguised as Customs Refunds and were approved. Although that was so various witnesses who testified before us conceded that the payments were irregular and that they were improperly described as such, as no duty had been paid which could legally be refunded. As we found earlier GIL had not exported eligible goods to have been entitled to make any claim for compensatory payment. Eligible goods had to have an imported component on which duty had been paid. The total payment on the head of the extra 15% was about Kshs.255,769,740/= (**Exht. 179B – pg. 182**).

192. In a press statement dated 17th June, 1999, [**Exht. 179B pg. 173**] Hon. Saitoti states that his decision to approve the 15% extra payment was legal and in accordance with government policy arrived at by several government ministries after extensive and long consultations and research. (**Exht. 179B – pg. 182**). We have already discussed in detail the question of the acceptance by the government of the Export Compensation Scheme. We wish to add here that there was no government policy in that regard. The scheme as approved and implemented by the Minister for Finance was illegal.

193. The 20% export compensation paid was Kshs.1,179,612,151/= (**Exht.50**). The 15% payment totaled about Kshs. 254,600,350.00. The total paid was Kshs. 1,433,212,501.00.

[E] GIL'S INITIAL DEALINGS WITH CBK

194. Hon. Saitoti's approval of GIL's application dated 8th October, 1990, was communicated officially to the Governor of the Central Bank of Kenya, Mr. Eric Kotut, by Mr. Mbindyo by copy of his second letter to GIL dated 1st November, 1990. The last paragraph of that letter is material. It reads:

> "By copy of this letter you are requested to execute an agreement with the Central Bank of Kenya to this effect. I will separately brief the CBK."

195. Under the sub heading "Procedure for Export of Eligible Goods" we reproduced the agreement which sets out what GIL was required to do. The agreement was signed by Mrs. Jacinta Mwatela, on behalf of CBK. According to her evidence, Mr. Pattni signed on behalf of GIL, and that the agreement incorporated the main provisions of Exchange Control Notice No.13.

Paragraph 5 of the agreement stipulates that:-

> "Your bank will surrender copy (C) of the CD3 form when the proceeds of the export are received. In this regard, it will be necessary for your bank to obtain a specific acknowledgement of the copy (C) from Central Bank. Considering that the export compensation being granted is on a special basis, your bank shall ensure that the claim is accompanied by the acknowledgement obtained from the Central Bank."

196. The paragraph was essential as it was the only way CBK would have been satisfied that foreign exchange had been earned by each export. But after signing the agreement GIL addressed a letter to the Exchange Controller, dated 9th April, 1991 requesting for the waiver of that paragraph. It argued that compliance with it would cause delay in the purchase of new stocks. It also stated that it was experiencing financial constraints "due to our huge volumes." This request was refused. Coincidently on 8th April 1991, GIL was granted by CBK a licence to

accept foreign currency. That was strange as there was no justifiable basis for this. The rejection of GIL's request notwithstanding GIL did not adhere to the terms of its agreement with CBK. Its returns to CBK through First American Bank relating to CD3 form Nos. 543313 – 543321, were returned for non-compliance with paragraph 5, above.

197. In the meantime it would appear that certain developments had taken place. As we stated earlier GIL had been granted a licence to accept foreign currency for goods sold or services rendered. An argument had arisen between Mrs. Mwatela and her senior, the Exchange Controller on the meaning of the phrase "Approved Manner". The matter reached the governor, who held a discussion with the two and Mr. Riungu, who was then the Chief Banking Manager, which prompted Mrs. Mwatela to address a memo to the Exchange Controller, dated 7th May, 1991. As the memo appears to us to spell out CBK's subsequent attitude to GIL, we will reproduce it in full:

> "THE CONTROLLER
> M/S GOLDENBERG INTERNATIONAL LTD
>
> **Following the meeting in the Governor's office on 7/5/91, the following decisions were taken regarding CD3C returns by M/s Goldenberg International.**
>
> **While checking the returns, the Division should concern itself with satisfying the need that payments were received in an approved manner. Approved manner was defined as ..... sold to an authorised dealer.**
>
> **Consequently, where cash receipts are involved, our concern should be the documentation to support foreign cash deposited with the banks who in turn sold to Central Bank identifying the beneficiary and the CD3 forms covered.**
>
> **It was observed that the cash receipts currently being used to support the CD3C returns met that criterion namely Customer deposit slips reflecting the beneficiary and CD3 form numbers and form CBK 240 indicating that the commercial bank concerned sold the funds to Central Bank the beneficiary and CD3 form numbers.**
>
> **Where direct remittances from overseas are involved, the evidence that the funds were received and the beneficiary credited accordingly and that the commercial banks sold**

the funds to Central Bank is adequate. On the basis of this, the Division should accept the returns.

I hope this understanding is correct. Please confirm so that I may use it to advise the rest of the signatories to ensure that No delays are experienced when checking on these and future returns.

Signatory
J.W.MWATELA(MRS)

7th May, 1991" [**Exht. 72 pg. 57**]

198. Paragraphs 2 and 3 of the memo are particularly significant. As at the date of this memo, GIL had received the licence to accept foreign currency. As we stated earlier it used the license to purchase foreign currency from members of the public. The money received would fall into the category of money received in an "Approved Manner" as GIL had a licence to receive it. As long as there was documentation to support cash deposited with its commercial banks locally, GIL would be entitled to claim export compensation and CBK would issue its acknowledgement on form CD3C accordingly. It is curious that the Exchange Controller, Birech Karuna, confirmed the position as correct. He appended his remarks on the memo as follows:

"Mrs Mwatela
I confirm your understanding of this discussion.
Sign
7/5/91"

199. CBK had been compromised. It ceased to tally the remittances with the export documents and to enforce the Exchange Control Notice No.13, and its agreement with GIL. The Governor knew a relaxation to the terms of the notice would be disastrous, but nonetheless allowed it. We say so advisedly. Mrs Mwatela who had drawn the terms of CBK's agreement with GIL had a discussion with him with two other senior officials of the bank. It was her evidence that she explained her position, but she was overruled. Our position is fortified by what later followed.

200. In a later memorandum, dated 14th November, 1991, addressed to the Exchange Controller [**Exht. 72 pg. 59**], Mrs. Mwatela, observed that: GIL had changed bankers several times, they had sustained pressure on

the Exchange Control to urgently handle their cases, that apart from returns made through Citi Bank, those made through CBK were accompanied by requests for the amendment of sale contracts in foreign department, vague remittance instructions were continually being received without invoices or CD3 numbers, that KCB was continually relying on GIL to provide information while selling the funds to CBK, some of the purported exports were ineligible for export compensation, for instance gold bars 99.7% purity and that GIL was still invoicing in shillings, and finally shipping documents were unsatisfactory. She sought guidance from the Exchange Controller, who simply remarked:-

> **"Mrs Mwatela**
> **We talked. Please bring the discrepancies to their notice and require them to cease working on incomplete information. Warn them we will stop dealing with them if they don't conform."**

201. The breaches of the exchange control requirements were flagrant. Yet the Exchange Controller's reaction was oblique and indecisive. One would have expected that CBK would rescind the agreement with GIL, or at least reject all returns. The Exchange Controller's conduct, like that of the governor was suggestive that he supported GIL's misfeasances.

202. If we digress a bit, Mr. Mbindyo testified that before he wrote his two letters, both dated 1st November, 1990, he had held a meeting with his Minister, Hon. Saitoti, with the governor of the Central Bank, Eric Kotut. In that meeting Mr. Kotut categorically stated that he would administer the Export Compensation Scheme. Considering that the Treasury like CBK, deliberately overlooked relevant aspects of the matter, it can be inferred that there was an understanding among the three persons to flout regulations and the law for an agreed purpose. All the three persons are educated, were holding senior positions and were knowledgeable regarding the operations of their respective portfolios.

203. Eventually through administrative manoeuvres David Ngure Waiganjo was solely assigned to accept and deal with returns relating to GIL's exports. Those who were critical of GIL's deals were sidelined.

Acceptance and approval of those returns was thereafter as a matter of course.

204. Through the administrative manoeuvres the CBK assisted GIL to combine claims under the pre-shipment scheme with those under the Export Compensation Scheme. Besides as GIL had a licence to accept Foreign currency it became difficult to distinguish proceeds of exports and foreign currency received otherwise. We earlier stated that both schemes were part of the Export Development Programme which was the brainchild of the IMF and World Bank. These were laudable programmes and at the same time they had potential for abuse. Later in this report we will discuss in detail the pre-shipment finance scheme. For now we wish to state that the scheme was started in November, 1990, shortly after GIL's application to the Minister for Finance was approved. These two schemes were closely related. Pre-shipment finance was financial assistance by way of loans extended to an intending exporter to enable him prepare his goods for export. Not every export was eligible for export compensation. Pre-shipment finance, however covered a wide range of products than export compensation. On the other hand export compensation was payable after the export of eligible goods was concluded. As we stated earlier in this report it was compensatory in nature for import duty paid for components of the item or goods exported.

205. It should be observed that CD3 forms were not needed under the pre-shipment scheme. An irrevocable letter of credit or a firm contract was all that was needed in the scheme to show an export was intended. Hence the need to retire the facility within 3 months as it was hoped that within that period the intended export would have taken place. But GIL introduced CD3 forms into the scheme. This was an attempt to circumvent the requirement of an export letter of credit "established and received by the handling local bank from the importer's bank or ... a firm export contract ..." [**Exht. 91A pg. 91**]. By introducing CD3 forms into pre-shipment, GIL succeeded in causing confusion between proceeds of export

and pre-shipment finance, and was able to use them through double dipping, to get more money from CBK. Besides GIL was able to get pre-shipment finance as well as export compensation without exporting anything. The Wabuti Committee, in its first report to the Governor of CBK dated 12th June, 1995, [**Exht. 122 Pg.17**] observed:

> "In this issue of export compensation and ex gratia payment it would appear justifiable for one to suppose that the basic understanding would be that the exporter, after earning foreign exchange out of export proceeds, would avail the money to the country. What, however, has not been clear all along is whether an exporter, no matter in what peculiar circumstances he/she may have been placed, could be allowed to enjoy pre-export financing facility as well as retention account facility and at the same time be allowed to receive export compensation and ex-gratia payment."

206. GIL was a special person. It was allowed enhanced export compensation even when the law did not permit it, the payment was fraudulently redesignated, initially as ex gratia and ultimately "Customs Refund," for its sake, it flouted all procedures, regulations and even the law with impunity but was shielded by those who should have tramelled it. We however, think that in an appropriate case, an exporter could be eligible for both pre-shipment finance and export compensation. However, in the circumstances as have emerged, GIL was not entitled to either of them.

207. We consider it now appropriate to consider, in detail pre-export finance, and other schemes as relate to GIL.

CHAPTER III

OTHER SCHEMES IN THE GOLDENBERG AFFAIR

(A) PRE-EXPORT FINANCE

208. In 1990 the World Bank negotiated with Kenya an Export Development Project, part of this was pre-export finance by which exporters of non traditional exports could be assisted in preparing their exports.

209. It should be noted that the resulting circular No. 8/1999 was entitled "Central Bank of Kenya Re-Discounting Facility For Pre-export Bills of Exchange". The facility was to be available on a bill drawn and payable in Kenya currency either with or without a letter of credit issued by a commercial bank to finance production expenses for the exporter provided that he had a firm export contract or order. The bill had to be endorsed by the bank. Thereafter, the Central Bank re-discounted the bill at 85%. The credit so obtained was at low rate of interest about 16.44%.

210. Mr. Kotut initially objected to the manner of implementation on the grounds that this left too much discretion on the commercial banks. This is an indication that Mr. Kotut was well aware that there had to be checks to ensure that applications for pre-export finance were in respect of genuine exports and that the conditions set out for payment had been met. When Mr. Kotut was overruled, he accepted the position but did not put any extra safeguards in place to deal with his objections. A certificate from a senior executive of the commercial bank that the transaction was genuine might have had some effect (if not on EBL).

211. Mr. F. Lukorito was a senior superintendent in the Development Division of the Banking Department of CBK. On 21st January, 1992 (**Exht. 120A pg. 39**) he raised concerns about the facility with the then Chief Banking Manager, Mr. A. Riungu. Mr. Riungu refused to take action and in his memo of 24th January, 1992 in reply, he stated:

> "it is expected that commercial banks will have complied with the provisions of the Banking Act particularly part III which limits lending to any one customer. It was also expected the banks would have taken precautions to guard against default before accommodating their customer.
>
> Incidentally, under the guidelines regulating this facility, banks are required to satisfy themselves that they are financing a pre-export activity. In this regard they should possess certain documents including confirmed export orders.
>
> I would wish to believe that before the banks extend the facility, they are therefore satisfied with the genuineness of the export order and through correspondent arrangements, with the ability of the buyer to pay." (**Exht. 120A pg. 40**)

212. Much of the responsibility for the subsequent irregularity must be placed with the Central Bank and the Governor. It is clear that finance was to be provided only for the preparation of the individual export named in bills and the contract and not for any other purpose. It is further clear from the circular which adds that repayment has to be made on completion of delivery of the goods before maturity or on payment by the importer before maturity.

213. In ordinary circumstances, this would have been a good way of assisting Kenya exporters and so helping the foreign exchange position of the country. From the start GIL was the largest beneficiary of the facility and drew down payments through Trust Bank, NBK, Delphis Bank, Post Bank Credit and EBL.

(i) Trade Bank Ltd.

214. It appears that almost from the start the potential of the scheme for fraud was realised, and there were three groups which took advantage through Trade Bank. The first of these is that associated with Mr. Alnoor Kassam who is credited with bringing the bank down when he fled the country in April 1993. The amounts due by the companies associated with Mr. Kassam at liquidation were:-

1.	Empire Holdings Ltd	543,526,181.50
2.	Holding Resort Ltd	298,340,098.25
3.	Hasanti Ltd.	161,937,527.00
4.	P. W. Hault	5,176,598.85
5.	Diners World Travel	6,542,826.05
6.	Insight Computers	1,381,469.60
7.	A Kassam	95,336.00
	TOTAL	**1.017,000,037.25**

The amounts due by the Spiro Voula Rousalis group were:-

8.	Blue Sea Products (K) Ltd	416,753,817.50
9.	SVR Holdings Ltd	303,489,531.50
	TOTAL	**720,243,349.00**

Finally there is a group of apparently unrelated companies which at liquidation owed substantial sums. These are:-

10.	Yaya Centre Development (K) Ltd	824,369,520.00
11.	Nyanjugu Investments Ltd	7,242,328.95
12.	Kenya Trading & Commercial Co. (Ahmed S. Dahir)	35,697,236.55
13.	Fish Processors	38,062,273.00
14.	Miritini Ltd.	4,503,698.50
15.	Kenya Cold Storage (1964) Ltd	63,921,022.50
16.	Chesilyot Enterprises	1,507,489.65
17.	Exotic Fields	13,867,130.15
18.	Kensoma Ltd.	3,168,762.00
19.	Gem Souvenir	105,958.15
20.	Coastal Aquaculture Ltd	119,096,791.10
21.	Lockeed Importers & Exporters Ltd	84,406,034.55
22.	Nexus Enterprises Ltd	41.636.169.65
23.	P. W. Hault	5,176,598.85
24.	Business Mgt. Consultants	3,558,575.25
25.	Kenya Trading and Commercial Co.	32,938,478.00
26.	Oriental Exim	63,682,775.75
	TOTAL	**1,342,940,841.00**

215. There are some discrepancies between these figures given to the Commission by Mr. Ngatuny in his evidence (**Exht. 145**) and those given in the report made to the Governor of CBK on 22nd June, 1993 (**Exht.**

138X), but these are of no real consequence. All the amounts set out should have been repaid at the expiry of the time-limit concerned and the question whether any of the companies was engaged in any genuine trade is not relevant to that duty to repay. Those in the first two categories were certainly all fraudulent because of the facts that the loans were not repaid and that no export of any nature was shown.

216. Blank letter heads of the supposed importers were found in the bank in respect of all companies of Kassam and Rousalis, and many of the other companies listed. There were no confirmed letters of credit or contracts and the bank took no security for the various facilities. Finally there was no evidence of receipt of proceeds of any export.

The report to the Governor (**Exht. 138X**) states at page 7:

> **"Appendix III contains an analysis of the CD3 forms for exports of various goods. It can be seen that the same CD3 form was found at the Trade Bank and at the Development Division while a CD3 form bearing the same number but for a totally different transaction, complete with customs entry, was found at the Exports Division. We believe that the CD3 forms found at the Exports division are the genuine ones wile those at the Bank and the Development division are forged.**
>
> **According to the information obtained from the senior management of the Bank, Trade Bank was introduced to the use of the facility by CBK management in a bid to help the bank to improve its liquidity. This happened at the time the bank was acquiring Yaya Centre and at the same time paying off H.Z & Co's liability to Pan African Bank. Thus the Bank started to use the scheme initially for the purpose of liquidity improvement. However, from round about August 1992 it was used to fund accounts which were either overdrawn or used as conduits to take money out of the bank".**

Finally at page 18 it states its conclusion as follows:

> **"Based on our findings, it is our opinion that the facility (pre-export finance) was grossly misused by the exporters, the senior management of the bank and its principal shareholder, Mr. Alnoor Kassam.**
>
> **Further, although minimum red-tape was required for this facility, CBK did not correlate the documentation obtained by its various departments relating to the utilization of the financing by the Bank and its customers. Had this happened, the loss incurred would have been substantially reduced as the fraud would have been discovered earlier".**

217. This confirms what is stated above about the lack of any adequate safeguards. This procedure was of course open to other persons claiming pre-export finance.

218. The total payment of pre-export finance of Kshs. 3,080,184,230/- should have been repaid with penalty interest and so this was a loss to CBK.

(ii) National Bank of Kenya

219. Mrs A.M. Aura, a former employee of National Bank of Kenya gave evidence (her statement is at **Exht. 155**).
The bank received applications for pre-export financing from GIL. These were processed notwithstanding that GIL had not banked with the bank previously. The usual requirement of the bank that credit would not be granted to a customer until he had banked with the bank for 6 months was waived.

220. There were troubles with the applications from the start. The first application in January 1992 was a letter apparently signed by Servino Securities but there was no proper sale contract, no letter of credit from the buyer's bank abroad and no documents verifying the sale. Nevertheless the application was still forwarded. We have stated our reasons why purported exports to Servino Securities were not in fact exports. The first application was for Kshs. 229,630,900/-.

221. An extension of time for repayment by GIL through the bank was rejected. A second application was for Kshs. 265,916,550/-. It was agreed between GIL and the bank that repayment of the first payment together with interest could be made out of proceeds of the second application (**Exht 155 pgs. 16 & 18**). The documents on the second application were as deficient as those for the first, but they were accepted by CBK.

222. On maturity this amount was repaid by money received locally from EBL and Post Bank Credit. There was therefore no loss to CBK of pre-export finance money through NBK. The question of where the money used by EBL and Post Bank Credit came from is a different matter.

(iii) Post Bank Credit Ltd.

223. Mrs A.M. Muoki, the liquidator of Post Bank Credit gave evidence (**Exht. 142**). From back 1992 the bank received documents including recycled documents in the names of Trade Bank and NBK. Pre-export finance was paid through the bank to GIL between 19th March, 1992 and 2nd April, 1993 to a total of Shs 1,354,776,192/- (**Exht. 142 pg. 11-13**).

224. Similar payments were made through the bank between 4th September, 1992 and 8th March, 1993 to China Trade Agencies (K) Ltd a company which Pattni admitted was his. The amount was KShs. 384,295,815/- (**Exht. 142 pg 18**). The liquidator estimated the loss to CBK from these transactions at KShs. 104,295,815/- being the opportunity cost of the lending @ 17% p.a. when the average market rate was in the region of 30% p.a. (**Exht. 142 pg. 99**).

225. A total of KShs. 111,731,409/- was paid to GIL through Post Bank Credit in respect of export compensation. As set out this was not legally obtained and was a loss to the Treasury. (**Exht. 142 pg. 99**). At the time of the collapse of the bank a total of KShs. 989,670,704/- was owed to the bank by GIL and three related companies, Panther Investments Ltd, China Trade Agencies (K) Ltd and Nyamangu Holdings ltd. As these were not repaid, they constitute a loss to Government (**Exht. 142 pg. 100**).

226. In addition the bank received documents concerning the proposed export by Panther Investments Ltd to London of hides and skins and live cattle, sheep and goats! This would clearly have been illegal at the time. Invoices were in Kenya currency which was not then

convertible and any genuine trade would only have been in convertible currency. This company was admitted to be Pattni's and his driver Augustine Mwasame was a guarantor! **(Exht. 141A pg. 21)**

(iv) Delphis Bank Ltd.

227. The bank handled two transactions for GIL, the first of which was for Kshs. 185,816,680/- on 16th January, 1992. Original bills duly endorsed were received by the bank. The transactions were expressed to be with Servino Securities. After the deduction of interest and commission, the net amount of Kshs.174,787,185/- was disposed of by a cheque in favour of Dolphin Investments Ltd.

228. As set out above purported exports to Servino Securities were not in fact exports. On 23rd April, 1992 GIL asked for a facility of KShs. 323,146,200/- and the bills were discounted through CBK. Again the contracts were supposedly with Servino Securities and the amount was paid as follows:-

	Kshs.
- Inter Marketing and Trade Africa	41,000,000/-
- Consultants and Marketing Services Africa Limited	67,000,000/-
- Goldenberg International Ltd	50,000,000/-
- Kenya Commercial Bank	64,000,000/-
- Cash withdrawn	4,000,000/-
- Interest/Arrangement fees	41,255,214.70
- Payees not known as cheques not available	38,500,000/-

229. The facility was retired by a payment from KCB in Kenya Shillings of Kshs.324,146,2000/- and not in foreign currency. It was not shown how the money was repaid on maturity and there was no evidence of any payment of foreign currency.

(v) Trust Bank Ltd

230. The liquidator of Trust Bank Mr. C.K. Nduru was unable to trace any documents concerning pre-export financing for GIL except for a schedule (**Exht. 146A pg. 220**) setting out the amounts paid at KShs. 342,214,650/- on 26th June, 1992. This is confirmed by the documents prepared by Mr. M. Smith (**Exht. 78 pgs. 1 & 2**) where the exact figure is given against the notation that this sum was never credited to any account in EBL. These sums were repaid through EBL between 5th August 1993 and 20th August, 1993.

(vi) Exchange Bank Ltd.

231. The first pre-export receipts through EBL show that they were posted on 26th June, 1992 before EBL started operations as a bank. This was the commencement of the use of the pre-shipment facility in EBL. From the evidence it is clear that the amounts that were drawn down were at all times for the benefit of GIL and related companies, whether or not they, or other apparently unrelated companies applied for the funds. On 12th August, 1992 Marine Cargo Services Limited applied for Kshs. 282,538,225/- and Kshs. 52,700,000/= (**Exht. 78 pg. 14**). The two amounts were subsequently credited to an account by the name of Durley House. These funds despite being applied for in the name of Marine Cargo Services Limited, and for a different purpose, were eventually credited to the account of GIL. Other applications were made in the name of China Trade Agencies Limited, Seville Limited the amounts of which were placed in the Durley House Call deposit account for a period of 11 days.

232. On 24th August, 1992 (**Exht. 78 pg. 15**], five sets of Bills were raised by African Fishing Industries Limited, Malindi Exporters Limited, African Seaproducts Limited, Karibuni Exporters Limited, Cultural Exporters Limited. In the case of all five companies and all thirteen bills

the total amount of Kshs. 425,191,960/45 was credited to Durley House Call Deposit and later transferred to Seville Investments on 30th August, 1992 (**Exht. 78 pg 46**).

233. All the Bills of 24th August, 1992 were surrendered and the amount debited to GIL (**Exht. 78 pg. 159**).

234. Panther Investments Ltd and China Trade Agencies also applied for and obtained pre-shipment finance from CBK, but once again the proceeds were credited to the account of GIL. Other companies, namely, Pwani Trading Agencies Limited, Farmutex Limited, and Marine Cargo Services Limited applied for preshipment facilities on 3rd September, 1992 and 7th September, 1992 (**Exht. 78 pg 82**). On 8th September, 1992 it can be seen from the records that the proceeds were then transferred to the GIL Call deposit account and then on to the GIL Main Account. The Bills originally raised by Pwani Trading Agencies on 2nd September, 1992 and those originally raised by Famutex Limited on 7th September, 1992 were surrendered and the amounts debited from the GIL account (**Exht. 78 pgs. 88, 89, 92 & 93**).

235. From the manner in which the funds were applied it is clear that the various companies were used to access funds from the CBK, and did not in fact use the proceeds for their own exports. The proceeds were immediately transferred to three accounts in EBL namely GIL Main Account, Seville Investments and Durley House, for the benefit and use of GIL and its associated companies.

236. The documents produced show that the applications for the facilities in themselves were highly irregular. For instance the various applications of 22nd September, 1992 (**Exht. 78 Pgs. 83, 101 and 101 back**) were supported by invoices which were also used in applications made on an earlier application on26th June, 1992, (**Exht.78 Pgs. 2 and 3,3(back), 4 and**

5). Despite the irregularities one signatory Mr. Sisenda of Development Division signed all the CBK vouchers.

237. Surrender of the Bills was often undertakne after the date of maturity, sometimes after inordinately long periods. The period of the Bills was limited to 90 days, but at the various points of retirement it can be seen that the Bills had been outstanding for as long as 175 days as seen at page 184. At pages 170 and 174 the second voucher shows that the Bill remained outstanding for 169 days. This was irregular considering that the maturity date was provided for and it was the responsibility of the CBK officials in the Development Division to raise the vouchers debiting the EBL account with the amounts due on the date of maturity, or applications should have been made for the maturity date to be extended as was seen in the case of NBK (**Exht.155 Pgs. 10 &11**) and after which it was the prerogative of the CBK to accept or reject the application for an extension.

238. Further irregularities emerge from the fact that when repayments were made by EBL to CBK no reference was made to the surrender of the Bills in relation to any foreign exchange. There is no evidence to show that the amounts surrendered to CBK were in respect of export proceeds, or that the amounts were in respect of CD3 forms that were to be retired at the same time as was the case when NBK and Delphis Bank were attempting to surrender pre-export Bills as against CD3 forms (**Exht. 155 as compared with Exht. 78 pg. 162**).

239. By the time the Pre-Export facility was stopped on 9th March, 1993 Exchange Bank Ltd on behalf of GIL and associated companies had drawn an amount of Kshs. 7,716,639,809/45 and by 2nd April, 1993 GIL had outstanding Bills of Kshs. 4,445,853,052/90.

240. Further from the available evidence GIL had been irregularly advanced through various commercial banks a total of Kshs.

8,360,121,657/=. The second stage of the abuse was that GIL and its associated companies made repeated applications for credit to different banks giving the same documentation in support. This must have originated from a large copying exercise which produced the same sets of documents to the various banks. From this it is quite clear that there could have been no genuine financing of exports through this system and in view of our findings elsewhere that no or very few genuine exports took place the money was fraudulently obtained and the losses to the Central Bank should have been recovered.

241. It is not possible to assess the extent to which the banks were at fault in allowing payments against copy documents, nor is it necessary to go into this in detail because of the overall fraudulent nature of the transactions. None or few of the sets of documents complied with the requirements of the scheme, whether originals or copies.

242. **Appendix "L"** sets out the analysis of the applications to the various banks and shows the regular flow of documents and money. It also shows the occasions on which pre-export finance was applied for and obtained after it was alleged that the goods had been exported and export compensation paid.

243. The amounts were repaid out of proceeds of other money obtained by Pattni and GIL as set out elsewhere.

244. The pre-export financing scheme was legally ended on 9th March, 1993 by Circular No. 1 of 1993. Nevertheless payments continued to be made until 4th April, 1993. **Exht. 78 pgs. 194/195** show Kshs. 487,869,572/- credited to GIL on 10th March, 1993, Kshs. 658,164,267/- on 11th March, 1993, and Kshs.202,370,917/- on 22nd March, 1993 (**Exht. 78 pgs. 194/195**). How did this come about? The circular was issued by the then Chief Banking Manager, Mr. Joseph Mumelo. He died some while ago but his cautionary statement was produced (**Exht. 114B**). In it he

stated that when applications continued to come through EBL he refused to approve them but had to do so after being told to by the Deputy Governor, Mr. Riungu who quoted the Governor and higher authorities and apparently after a visit by Pattni.

245. Mr. Riungu does not appear to have commented on this allegation, possibly because no one brought it up while he was giving evidence. It does not appear reasonable that Mr. Mumelo would issue the circular of cancellation and then immediately flout it without instructions from his superior. The only one he actually named as speaking to him was Mr. Riungu.

246. By a circular of 26th March, 1993, Mr. Mumelo advised banks that outstandings under the facility would attract interest of 5% above the Treasury bill rate. This meant that from being cheap finance, the money became expensive. The money was repaid out of Pattni's subsequent dealings with CBK.

(B) RETENTION ACCOUNTS SCHEME

247. This scheme was introduced by Exchange Control Notice No.38. [**Exht. 93**] Like the pre-shipment scheme, this scheme was intended to help exporters expedite their exports without having to queue up at the CBK for Foreign Exchange allocation. The scheme was part of the liberalisation of Exchange Control within the then ongoing economic reform programme of the Government of Kenya.

248. The effective date of the scheme was 20th August 1991. All authorised banks were by Exchange Control Circular No.3/92/38, designated authorised dealers for purposes of the retention accounts. Authorised banks were required by Exchange Control Notice No.38 to be satisfied, "from documentary evidence provided, that proceeds of sales of goods qualify for retention and that receipt has not been unduly delayed."

249. The purposes for which the funds could be used by the account holder of a retention account were restricted to the import of goods and related services, business travel, advertising and marketing expenses, international debt service (verified by CBK), and remittance of post-tax dividends of foreign owned enterprises. Although that list was not exhaustive it meant that in other cases CBK approval was necessary. One was not allowed to use money in a retention account for the purchase of Forex Cs. They were however allowed to retain the money for an indefinite duration.

250. Authorised banks were allowed to sell foreign currency originating from retention accounts to clients for approved purposes. Such foreign exchange could also be bought and sold by authorised banks at market determined exchange rates in the interbank market as long as the counterparty was an authorised bank and provided the authorised banks made a daily return to the CBK on the quoted buy and sell rates in the interbank market at the close of business of any given day.

251. We have stated elsewhere in this report that GIL did not maintain any known retention account in any of the local commercial banks. A Price-Waterhouse Report **[Exht. 60 -2.3.9]** however states that GIL had a retention account with Exchange Bank. The money which was credited into that account did not at all relate to exports. In view of this it is doubtful whether the account was indeed a retention account in terms of Exchange Control Notice No.38. Besides at Pg.15676 of the Hansard report Pattni admitted that GIL moved money from Exchange Bank Ltd to Gold Trust Bank Rwanda using a non-existent account. The total amount was Kshs. 4.1 billion worth of foreign exchange. This clearly shows that GIL could transfer money at will using its sister company Exchange Bank on the pretext that it was money held in a retention account. GIL however maintained offshore accounts which were at times described as retention accounts. Through such accounts GIL was able to retain out of the

country large sums of money in foreign exchange. Under Exchange Control Notice No.38, Retention accounts were to be held in local commercial banks, and not in offshore commercial banks. Furthermore foreign exchange was at times used by GIL to buy Forex Cs contrary to the above notice.

252. In the Board minutes of CBK of its 243rd meeting held on 26th August, 1992 the governor made the following pronouncement:

> "The recent announcement in the opening of Foreign Exchange Retention Accounts for non-traditional exports was aimed at encouraging exporters to expand and to declare their receipts. The Scheme offered the holders of the accounts an opportunity to sell foreign exchange to all who required it and to take advantage of the premium given in the Forex-c market. This scheme had been well received and would enable the economy to achieve a break through in the area of foreign investment, repatriation of dividends etc and were it not for other payments such as debt, the scheme could be extended to all other exports."

253. Clearly the statement was incorrect in two respects. Authorised banks and not account holders were permitted to sell the foreign exchange in retention accounts. Secondly, foreign exchange "originating from or eligible for the retention accounts" could not be used in the purchase of Forex Cs. We believe this statement by the governor was a discreet way of circumventing the Exchange Control Notice No.38 regarding that restriction.

254. The management of this scheme as also the Forex – Cs scheme, which we shall turn to hereafter, contributed to the mess in the money market and the economy as a whole. The scheme was used for personal not national benefit. As the country had no control over money in these accounts, it lacked the capacity to access foreign aid, and it had nothing to show it had any foreign exchange reserves. As a consequence the President moved in to stop the scheme as a corrective measure. Controls were re-introduced. Exchange Control Circular No.38 was first cancelled altogether on 22nd March, 1993 by Exchange Control Circular No.4/93/35 [**Exht.141 pg.68**]. Then Exchange Control Circular No.38 was

reissued in a revised form on 14th May, 1993 [**Exht. 141 pg. 76**]. This provided for the retention only of 50% of the proceeds of sale. All this no doubt contributed to the confusion and was certainly ignored by EBL.

(C) CONVERTIBLE FOREIGN EXCHANGE BEARER CERTIFICATES (FOREX CS)

255. Convertible Foreign Exchange Bearer Certicicates (Forex Cs) were introduced by Legal Notice No. 513 in October 1991. It was in effect a tool for legalising, for example, illegally acquired foreign currency. As a result of the introduction of Forex Cs, Exchange Control Notice No. 7 was amended on 11th November, 1991 by Exchange Control Circular No. 6/91/7 to remove the requirement for Foreign Currency Declaration. As a consequence, one needed not declare the source of foreign exchange being brought into the country. Forex Cs gave a right to obtain foreign exchange at the current rate of exchange (**Exht. 175A pg. 3**] The transfer of the certificate was to be by simple delivery, and would be bought from the holders in Kenya Shillings on a willing-seller, willing-buyer basis at the going market price or any other negotiated price.

256. Forex Cs were to be issued by the CBK or authorised dealers. Payment for their initial issue was in convertible foreign currency in travellers cheques issued outside Kenya or remittance from abroad in favour of the issuing office by way of telegraphic transfer, demand draft or any other acceptable mode. The downside of these certificates was that no register of ownership was maintained. Consequently it was impossible to trace any given certificate. This was the more so because the certificate was to be encashed at the office of issue by whoever was in possession of it, at any time after the date of purchase. A premium was payable dependent on the length of time the certificate had been held which was nil for the first year, and a rising rate thereafter.

257. How the foreign exchange to be received was to be dealt with is not clear. On 21st November, 1991 Mr. Kilach the Financial Controller

CBK wrote a memo to the Manager Foreign Department (**Exht. 175A pg. 14**) dealing with the accounting entries to be made. He stated (**at pg.15**).

> "It is our understanding that all collection will be invested appropriately outside the reserves available for our use, and that interest on investment will also be maintained separately".

258. He went on to say that registers of the cumulative liability should be maintained. It is not easy to appreciate how the scheme could be of benefit to the economy in these circumstances, particularly since the Forex C certificates did not guarantee that the holder would obtain on encashment the rate of exchange which was paid when the certificate was obtained. The right to receive foreign exchange at a later date was to obtain it at the rate then obtaining. Certainly this set up was not followed. Mr. M'Mithiane, the ex CBK employee who gave evidence on Forex Cs said in his statement (**Exht. 175 pg. 3**).

> "Once the foreign currency was received by Central Bank it was an injection to the country's foreign exchange reserves."

259. Abuses of the system were noted as early as June and July 1992 (**Exht. 175A pgs. 20-27, 33 & 36**). Export proceeds where compensation had been paid were not eligible, nor were payments through NGOs, foreign governments, institutional bodies nor inward investment by foreign investors. Nevertheless they were allowed to obtain certificates and so benefit by selling them on. By February 1993 the shortage of foreign exchange was such that the decision was taken to suspend the Forex Cs in March. In a memo dated 27th October, 1993 (**Exht. 175A pg. 51**) Mr. J.J. Bii had this to say to the Director Foreign Department:

> "Due to the shortage of foreign exchange that the country was experiencing because of the withdrawal of donor funds and the falling prices of our major exports such as coffee and tea abroad, the Central Bank could no longer sustain the repurchase of the Forex-C instruments. Trading in the instrument was suspended in 19/2/93."

260. As we can now see the shortage in foreign exchange was not only for the above reasons but was seriously exacerbated by the drain

caused by activities of Pattni, GIL and EBL as detailed elsewhere in this report of the enormous sums of money transmitted abroad by them.

261. In order to minimise damage, first the National Bank of Kenya was used to buy up Forex Cs in order to prevent their remaining a drain on the reserves. This they did and the removal was at a reasonable cost.

262. There were abuses in CBK. Certain encashed bearer certificates were stored instead of being shredded. Retired Forex Cs were at times not marked "CANCELLED" as required by the relevant Exchange Control Circular. Some might have gone into circulation as their validity was not destroyed on surrender. Besides as there was no register there were about Kshs. 2 billion worth of certificates unaccounted for. It is quite possible that a number of certificates were issued without the production of foreign exchange. Evidence was adduced that some of such certificates were recovered from the desk of Mr. Kilach at the CBK. In addition Forex Cs were used to export large sums of foreign exchange into off-shore bank account (**Exht. 89-89c and 90c**).

263. The operation of Forex Cs was brought to an end on 21st March, 1993 by a presidential announcement. Controls were thereafter reintroduced. By this time the rate of inflation was high (**Exht. 91C**). This was because money supply was high, largely as a result of the operations of GIL and EBL the exchange rate skyrocketed and foreign exchange was very scarce.

264. Although the introduction of Forex Cs was initially well received by the donor community particularly the World Bank/IMF and some exporters, it created problems to the CBK. That was observed by the Governor of CBK, Mr. Kotut in Minute No. 1873 in his speech to the Board of Directors of the bank in their 243rd meeting. He said, in pertinent part, as follows:

> **The introduction of the Forex Cs had proved very successful as pressure on Central Bank for foreign exchange was**

much less. However, as other Central Bank's Accounts for receipt of foreign exchange were having little income, the bank had to borrow from the Forex Cs Account to meet urgent commitments such as the payment for oil. It was therefore, proposed that the Central Bank should discreetly enter into the Forex Cs market through the Commercial Banks as brokers but in such a manner as not to shake the market.
This would be similar to the Open Market Operations on the domestic scene and would result into a movement of foreign exchange from the Forex C Account into the Bank's regular Account."

265. CBK entered the Forex C market. However, due to internal malpractices CBK was paying a premium above the official exchange rate and thus incurred heavy losses. This adversely affected the strength of the shilling, as much local money was injected into the market. Inflation galloped and quite against what the governor had wanted to avoid, the money market was shaken. When the Forex Cs were removed it was realised that whenever the Forex Cs were retired, they were not being marked "Cancelled" as was required by clause 1.3 (iv) of Exchange Control Circular No. 5/91/35 (**Exht. 141 pg. 46**) which stipulated that:

> "(iv) The certificate used for repurchase will be marked 'cancelled' and returned to the Central Bank of Kenya with the order to purchase the required foreign currency (together with the encashment certificate)."

266. The effect of this was that some retired Forex Cs were recycled with the resultant loss of foreign exchange by CBK. It should be noted that on 19th October, 1993 the official exchange rate was abolished and there remained only market rates. From that date Forex Cs ceased to bear any cash value since they only allowed the purchase of foreign currency at a time when foreign currency was available at the same rate.

267. After March 1993, EBL had been buying Forex Cs at between 2/- and 4/- a dollar. Between 18th August, 1993 and 13th September, 1993 CBK bought Forex Cs of face value $132,588,000 from EBL at 15/- a dollar giving the shilling equivalent of KShs. 1,988,820,000/- (**Exht. 175A**

pg. 54). At a meeting with commercial banks in November 1993, CBK agreed to pay a premium of 10/- a dollar (**Exht. 175 pg. 6**). There was no reason why the price of 15/- should have been paid to EBL. On this figure the totally unjustifiable payment to EBL was KShs. 662,940,000/-.

268. Finally, after 19th October, 1993 when the Forex Cs had become worthless, CBK paid the liquidator of EBL at 10/- a dollar on 6th and 24th December, 1993 a total of KShs. 189,145,000/- (**Exht. 175A pg. 54**).

CHAPTER IV

FINANCIAL DEALINGS

(A) MOVEMENT OF MONEY BY GIL OUT OF AND INTO KENYA

269. We earlier stated that we would look at how GIL was moving money from Kenya to offshore accounts and transferring some of it back as proceeds of export. Mr. M. Smith testified before us and took us through individual transactions of such movements. What emerged was, that GIL with the complicity of its sister company Exchange Bank opened various bank accounts offshore. The bank accounts were often in the name of Ratan, Solitaire, Orlando or Exchange Bank. It is common knowledge that banks which were dealing in foreign currency would open offshore accounts which in banking circles are known as nostro accounts. Exchange Bank opened such accounts with Citibank Switzerland, Citibank London, Euro paische Iranische Hendels Bank AG. Hamburg, Equatorial Bank, Citibank New York among others. It should be recalled that Ratan, Orlando, and Solitaire are pseudonyms for either GIL or Kamlesh Pattni. But how did this money end up in these accounts?

270. We earlier alluded to the evidence of M.R. Khan. He testified, inter alia, that he was buying foreign currency from the general public either in cash or in Forex Cs and he would sell the same to GIL. He was depositing the money in a Shimba Kay account with Exchange Bank. He would be paid in Kenya Shillings either by cheque drawn against that account or in cash withdrawn from the same account. At times he would bank the foreign currency in one of these overseas accounts directly. Mr. Khan was at one time also purchasing traveler cheques which along with cash, are described in bank documents as "cash letters."

271. GIL had a network of people and banks locally through which it would obtain foreign currency. Apart from M.R. Khan there were also, Bhupendra Kumar Shah, J.M. Waigura, and firms like Nyamangu Holdings, Shah Munge & Partners and Dyer & Blair. **Exhts. 90 – 90AA** show

massive dealings by GIL with various individuals and firms. Some of the deals are described as "diamond vouchers" disguising the deals as diamond purchases. They could not possibly have been for genuine diamond purchases as they all listed the same grade (or a very few grades) of diamonds. However they were purchases of either foreign currency, forex Cs or travellers cheques. Mr. Smith testified before us that he examined all those vouchers and other documents, and in his opinion these vouchers refer to foreign currency in cash. The printed documents headed 'Diamond Voucher' refer to "Carrates" and "Price per Carrate". This is not a word used in the diamond trade. The word used is 'carat". Furthermore the clarity and colour are all given as VSI and White, which is quite impossible. At page 16083 of the Hansard, Mr. Smith had this to say as to how the deal worked:

> **"What they are doing is paying people cash here for money that is already offshore; that had been transferred into their accounts. They are not transferring money out of this country. They are paying shillings here for currency that is already outside the country."**

272. But there were instances where foreign currency was bought locally either in cash, Forex Cs, Travellers Cheques and sometimes as Foreign Exchange Allocation (FEAL). GIL would then somehow find a way of transferring this money through local commercial banks into their nostro accounts of correspondent banks overseas. Once the money was in a foreign account it would be dealt with in any way deemed appropriate by GIL. Some of the money somehow found its way into foreign accounts in cash. There are several instances when, for instance, M.R. Khan deposited in cash, large sums of money in foreign currency in Ratan account, in U.K. There were also other cash deposits in that and other bank accounts offshore which were operated by Mr. Pattni, or his agents, for example one Jiwa of Concrete Enterprises. He had an account with Barclays Bank Edgeware, London. Likewise firms like Nyamangu Holdings, had a way of moving foreign exchange from Kenya offshore on behalf of either themselves, or GIL. The money eventually ended up with GIL. Mr. Smith had this to say of the purchases of foreign exchange by GIL from that firm:

> "... [it] does not seem to have any connection [with Pattni] other than the fact that he purchased dollars from them. They appear to have their own channel of moving money through Postbank Credit... Whether it went to Tokyo, New York or London, it all ended back in the Concorde Enterprises account."

273. GIL held accounts with many local banks, among them, ABN Amro Bank, National Bank, Delphis Bank, KCB, Post Bank Credit, Indo Suez Bank, Exchange Bank, First American and Trade Bank. Mr. Smith testified that through these local banks GIL transmitted foreign exchange to the overseas accounts and the same would be credited in the foreign accounts we mentioned earlier. In some cases it was not possible to know immediately for whose benefit the transfers were effected. On this Mr. Smith said:

> "There are monies here which just appear in London and as we have seen, the ledgers from them have vanished but you can see that when they bounce or are rejected in London, then they are put in Seville Investments and Shimba Kay accounts. So, it is obvious that the money was coming from their accounts to London in the first place."
> **[Hansard pg. 4098]**.

274. The total amount of money in Kenya Shilling GIL spent on purchases of Foreign Currency outside Exchange Bank, according to Mr. Smith was Kshs.6,089,483,890.05. The foreign currency purchased was as follows:

Amount		Bank to which it was sent
i.	US$ 3.5M.	Union Bancaire Privee
ii.	US$ 55,311,500	Citibank Switzerland
iii.	US$ 34,400,000	A & Z Grindlays, Switzerland
iv.	US$ 16,505,000	A & Z Grindlays, London
v.	US$ 60,900,000	Equatorial Bank (Rattan A/C)

Exchange Bank itself transferred to offshore accounts:

i. US$ 170,746,185
ii. STG £ 1,886, 024
iii. DM. 2,381,700

275. The US dollars transferred agrees with what was purchased locally. The slight difference was explained to have been used to cover charges for effecting the transfers. Exhibit 90CC has a summary of Exchange Bank's remittances of funds offshore as shown below:

"Foreign Exchange Summary

	US$	UKP	DM
1) To Exchange Bank Nostro Accounts			
Remitted from Central Bank	170,746,185	1,886,024	2,381,700
Remitted by Commercial Banks from Nairobi	40,333,915	2,178,094	1,037,655
Remitted by Englehart	3,331,896		
J. Kanyotu	30,000		
Cash Letters	7,095,863	452,589	
Transfers	2,057,197		(3,388,060)
Transfers	5,795,075	(3,853,220)	
	$	£	DM
2) To Other Banks			
On FD Vouchers Exhibit No.	171,516,599		
On SLD vouchers Exhibit No.	27,190,000	1,950,000	
On vouchers Jan-Jun 93 Exhibit No.	35,510,604	1,890,000	
3) Forex Cash Purchased	8,716,161		
(Total sent offshore)	472,323,495	4,503,487	31,295
Remitted to Central Bank of Kenya	341,113,553	1,084,000	31,295
Monies not returned	$131,209,942	£3,419,487	0
Missing Documents			
Seen documents	282	71.39%	
Unseen documents	113	28.61%	
Total	395	100%	
	$	£	
Value of seen documents	234,217,203	3,840,000	
Value of unseen documents at estimated average value of seen documents	93,852,993	1,538,723	

276. Item (2) is a summary of exhibits 90J, 90K, 90M while Item (3) is a summary of Exhibits 89 –90D, 90Q, R and S.

277. As can be seen from the table, there are certain documents which Mr. Smith could not trace. Mr. Kalove for GIL submitted that in absence of those documents the summary cannot be said to accurately reflect money which is unaccounted for by GIL. To that Mr. Smith had this to say:

"Mr. Smith: My Lords, I think the counsel has misunderstood what I have said. I am missing documents on money going out. I am not missing any document on money coming back." **[Hansard Pg.16242]**

278. Besides Mr. Smith stated that all daily vouchers and postings for Exchange Bank were available. Consequently no document was found missing which would explain the whereabouts of the high figure of US$131,209,942 and S£3,419,489.

279. It is quite clear that the unaccounted item would be higher if the missing documents of money taken out were to be found and their details included. GIL had a well co-ordinated system where once the money was received in any of the off shore accounts, it would be transferred to any of the other accounts, but ultimately it would end up at Citibank, New York. Mr. Smith had this to say about that account:

> **"My Lords, because when we move from here to the Equatorial Bank accounts and the Citibank in New York, you will find that Citibank was really the main collecting bank for remitting it back to Central Bank of Kenya where you will see the remittances come in and how they are treated when they are received."**
> **[Hansard Pg.4094]**

280. In most cases the remittances from Kenyan banks was to Citibank, either Hamburg, or London or Equatorial Bank, London. There Exchange Bank held about two or more bank accounts, and the documents seem to designate them as retention accounts. It should be recalled that the retention account scheme did not allow retention accounts to be held overseas. They were to be bank accounts held in commercial banks locally purposely for receiving proceeds of exports. By describing those foreign accounts as "retention" accounts, it was another way GIL was disguising its business operations. Be that as it may GIL would then redirect the money from those accounts via Citibank New York and sometimes through the Federal Reserve Bank to either CBK or

Exchange Bank for the benefit of GIL. The remittance would invariably be accompanied by separate instructions that the money was part of proceeds of exports and one would find certain CD3 form numbers quoted. On this we cite an example of such messages which appears in Exhibit 87 page 50 and repeated at P.4107 of the Hansard:

> "TELEFAX MESSAGE
> FROM: Equatorial Bank Pls.
> 10 Bucklersburg House
> Walbrook London EC 4N. BEL
> Telex: 887145 Equator B.
> Phone: 071-236-0666[10 lines]
> Fax: 071-236-0799
> TO: Exchange Bank Ltd.
> For the Attention of: Mr. Vaju Pattni
> Number of page including this one: 1
>
> Message: We confirm having credited your account No.137723201 with USD 962,432/= (Nine Hundred Sixty Two Thousand Four Hundred Thirty Two only) which could you please pay to your customer 'Goldenberg International Ltd. No.500001' By order of one of our clients. Value 4th January 1993 Ref. CD3 No.848056 for US Dollars 828, 626/= CD3 No.848057 for US Dollars 134,466/=.
>
> From: Equatorial Bank Plc
> Department: Settlements.
> ..."

281. Price Waterhouse report also states that even money in a Ratan account could be transferred to an Exchange Bank Ltd, nostro account, and would also be treated in like manner as above. It is quite clear from the bank documents for Exchange Bank Ltd that remittances to offshore accounts would be transmitted back to Kenya disguised as proceeds of export. Mr. Smith testified on this, in pertinent part, as follows:

> **"I would say that these export proceeds which export compensation was claimed in this particular case, was definitely for money that had been exported and then imported."**
> **[Hansard Pg.4107]**

282. Mr. Smith was referring to the CD3 forms in the above quoted telex message. To exemplify the issue further at **Exht. 87A pg. 308**, appear instructions regarding a remittance from Equatorial Bank PLC, London. The USD 4 million reflected originated from Shimba Kay Account with

Exchange Bank. It was transferred to Citibank New York by Exchange Bank. Equatorial Bank PLC confirmed those instructions in the following manner:

> "Exchange Bank Limited A/C Number: 111/- 157723-201
> P.O. Box 28442 A/C Type : Current Account
> NAIROBI Currency: US Dollars
> Kenya Sequence No. 1111KL2200010
> East Africa Date: 15OCT.92
>
> The following transaction was credited to your account today.
>
> | Type | Particulars | Amount | Value Date |
> |---|---|---|---|
> | Credit | A/C Goldenberg Int. - Retention A/C CD. 816775/816777 | 4,000,000 | 15OCT.92 |
>
> This advice does not require an authorized signature provided it bears a sequence No."

Subsequently Citibank New York account was debited and the debit note reads:

> "Debit Citibank, New York, by US dollars 3,200,000 for Goldenberg International retention account against CD3 No.816795 for US $2,190,113; 816780, for US $273,286 at 35.7055 giving a total debit of US$ 114,257.6000." **[Exht. 87A pg. 253]**

283. The corresponding credit appears at **Exht. 87A pg. 254** and shows, inter alia, that the money originated from Citibank, Switzerland and was transmitted as earlier stated. The fax reads as follows:

> "To: Exchange Bank Limited
> Viewpark Towers Branch
> NAIROBI – KENYA
> From: Citibank (Switzerland]
> Date: Zurich 23-Nov-1992
> Currency Amount USD/3'200'000'00
> ...
> Please credit USD 3,2000.00 without any charges for us.
> To your Viewpark Towers Branch.
>
> Favour: Goldenberg International Ltd
> Retention Account 50001
>
> Order: One of our clients
> Reference: Attention Mr. Vaju Pattni ...
> CD3 Number 816795 for USD. 2,190,113
> CD3 Number 816796 for USD 738,286.

We cover you through Equatorial Bank PLC London via
Citibank, New York.
Regards
TRF/DaneSchmidt."

284. The money has gone full circle and is back in Kenya but designated as proceeds of export. No retention account was held by GIL with Exchange Bank. **Exhibit 79** had the full list of accounts held by GIL and associated companies in Exchange Bank and none of the accounts is designated as a retention account. Besides there is no account shown with the Number 500001. This then means that it was a secret account operated by Mr. Vaju Pattni on behalf of GIL. What does this portend? GIL was taking advantage of the various schemes of the Export Development Programme to defraud the country not only of the limited foreign exchange but also of local currency. Prof. Ryan testified before us that the Export Compensation Scheme was clearly going to lead to payment of local currency from the exchequer, and it did. GIL used pre-export finance to purchase foreign currency locally. Such money whenever it was received from CBK was disbursed to people like M.R. Khan, who would use it to purchase foreign currency locally. The foreign currency would then be exported mainly to Switzerland and it would then be imported through London and New York. Export Compensation would then be claimed on the basis of that money which would be disguised as proceeds of exports. Incredible!! There were no exports nor was any foreign currency earned. If anything, through that process a lot of money was exported out of the country.

285. GIL through those transactions earned not only export compensation, and ex gratia, but also income from variations in the exchange rate and interest from lending the money to other banks through the inter bank market.

286. We next deal with the exchange rate gains made as a result of the different rates of exchange allowed to GIL every time the circle was completed.

(B) EXCHANGE RATE GAINS TO GIL

287. Evidence was adduced before us that CBK fixed the buying and selling rates of foreign exchange between it and commercial banks. This was generally referred to as the official rate. Apart from these rates, there were also the inter-bank market rates which were generally contractual. Dealers relied on the official exchange rate in deciding whether or not to buy or sell foreign exchange from or to the CBK. Dealers of foreign exchange during the Exchange Control regime were generally the commercial banks. However, as we stated elsewhere in this report GIL was granted a licence to accept foreign exchange. Besides Exchange Control Notice No.7 of 6th May, 1988 on Purchase of Foreign Currency from the public, relaxed the requirement of currency declaration forms. It states, in pertinent part, that:

> **"... authorized dealers should not turn away residents or non-residents of Kenya wishing to exchange foreign exchange for Kenya shillings."**

288. Likewise Exchange Control circular No.6/91/7 dated 11th November, 1991 addressed to all Banks, Customs Department, Hotels and others authorized to accept currency, waived the requirement for currency declaration forms (CD) for the purpose of receiving or encashing foreign currency from visitors to Kenya or returning residents. The three instruments gave GIL the authority to accept foreign currency either in cash, travellers cheques or Forex Cs.

The introduction of Forex Cs opened the way for it to take foreign exchange offshore on either of two pretexts.

(i) Forex Cs as we stated earlier were intended to attract investors into the country so that they would bring their money and invest it either in treasury bills, which were attracting high interest rates, or in local enterprises. Whatever incomes which were earned could be remitted out of the country. The Forex C, was a convenient instrument for taking the money out of the country as on surrender the investor was allowed to take away his money along with the interest/dividend earned. GIL through Exchange Bank

exported large sums of foreign exchange on the pretext that it was for various investors. In actual fact that was not so. Forex Cs gave a right to foreign exchange and the right to export the foreign currency on the face of the certificate. Pattni in his evidence on this stated:

"Forex –C is like an official licence to repatriate the amount you hold on Forex-C." **Hansard P.113580**.

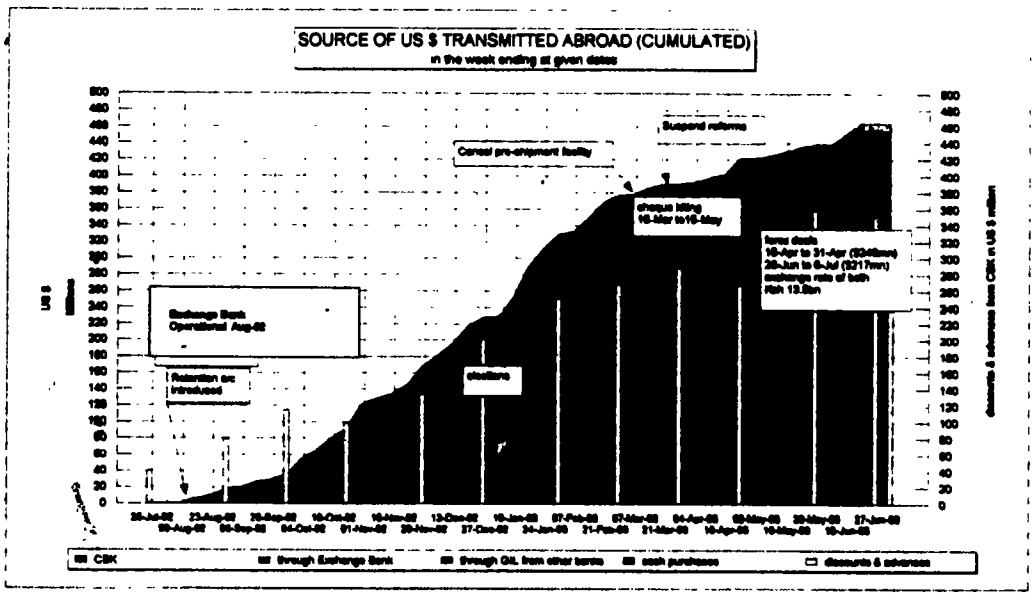
Indeed Price Waterhouse Report **[Exht. 60 – paragraph 2.3.4]** clearly shows that GIL was doing precisely that.

(ii) That there were business people who according to Pattni, were selling diamonds to GIL who needed payment overseas. We earlier stated that no diamonds were actually imported and a reference to diamonds in exhibits was merely a reference to foreign exchange.

289. Through this procedure GIL transferred a large amount of foreign exchange to its off-shore accounts or the off-shore accounts of its sister company, Exchange Bank Ltd. Exchange Control Notice No.38 on Retention Accounts [**Exht 93. pg. 5**] allowed CBK to sell foreign exchange at the official exchange rate for a limited range of uses only. Evidence was adduced before us that GIL was fraudulently allowed to buy from CBK foreign exchange at the official exchange rate and thereafter exported it offshore and later transmitted it back into the country. GIL through Exchange Bank Ltd. resold some of this exported money back to CBK but at a much higher exchange rate and thus made huge gains.

Here below is a chart showing sources of US dollars transmitted abroad.

CHART 4



290. Mr. Smith in his evidence gave detailed summaries in exhibits 89, 89A, 89B, 89C of the various transactions in relation to that and came to the conclusion that GIL made about Kshs.5,824,516,525.79 gain from them as follows:

(i)	The Period Sept-Nov.1992	Kshs.1,875,590,033.50
(ii)	December 1992	Kshs. 848,422,426.76
(iii)	Jan. 1993	Kshs.1,465,753,171.66
(iv)	Feb 1993	Kshs.1,368,951.370.68
(v)	March 1993	Kshs. 48,596,782.73
(vi)	April 1994	Kshs.217,202,740.45
		Kshs.5,824,516,525.79

291. Mr. Pattni in his evidence denied this was the net gain from exchange rate gains. He stated that every sale of Forex-C attracted a premium payment and that all that GIL got was about Kshs.2.75, at most, per dollar. The difference was a premium. This is what he said:

> **"The margin was between Kshs.1 and Kshs.2 per dollar. It is not what has been perceived here that the margin was Kshs.20 or Kshs.18. That is where Mr. Melville Smith has not taken into account the premium paid for Forex C. But Price Waterhouse has taken that into account."**

292. That is neither here nor there. The premium was passed on to CBK to pay. Mr. Joseph Mailo Oyula, a Financial Secretary to Treasury testified before us that CBK was paying a premium in foreign exchange transactions in the inter-bank market. He said:

> **"During that period [1992/93], the CBK was buying currency from the inter-bank markets at a premium above the official exchange rate. As a result of those transactions where the bank was buying foreign currency at a higher premium, the bank incurred a loss of Kshs.7.6 billion during that year, on that specific transaction." [Hansard Pg. 6324].**

GIL through Exchange Bank used the gains to purchase Treasury Bills and thus made yet more money.

293. Why did the deals on foreign exchange start around September, 1992 and not earlier? It should be recalled that although Exchange Bank was granted a licence on 1st August, 1991 to operate as a bank it did not start operations until mid-1992. The deals we have talked about could not be possible without a bank which was willing to engage in irregular and fraudulent deals. Besides such deals would be impossible without the complicity of some staff of the CBK.

294. According to Mrs. Jacinta Wanjala Mwatela, Director Financial Markets at CBK two exchange rates could not possibly be harmonized. CBK could not properly sell foreign exchange at the official rate but buy at the inter bank rate which is normally higher. That the two rates were allowed to apply, she said, was clearly a mistake by the Foreign Department of the CBK.

295. It should, finally, be noted that the gains were not only to GIL, but also to some of its associated companies like Seville Investments Ltd and Durley House. We however, hasten to add that although that was so, eventually the money ended up in GIL account.

(C) CHEQUE KITING

296. At the time when pre-export finance was discontinued Pattni and GIL had large amounts to repay, and they were not able to do so by applying for further pre-export finance as they had done in the past.

297. At about the same time 17th March, 1993 Pattni took control of Pan African Bank Ltd and his employee Nadir Akrami became managing director of that bank. Simultaneously, a calculated scheme called cheque kiting was put into operation.

298. Put simply where a bank credits a customers' account with an instrument such as a cheque or bill of exchange, there is an immediate credit in that account even though the instrument is not cleared until later. In the mean time the customer can use that credit balance for his own purposes even though the instrument is later dishonoured or (as usually happened with GIL) was replaced by yet another instrument.

299. This allowed very large sums of money to come into the hands of GIL and EBL without in fact any funds being produced. One of the uses of this procedure was to allow the on-lending of the non-existent money to other banks overnight for enormous amounts of interest which at that time could exceed 70%. It should be explained that "overnight" could be a misnomer in some instances since where the credit was on a Friday it was available until the following Monday (or Tuesday if a bank holiday intervened).

300. This whole scheme revolved around changes in banking practice at CBK. Between 17th March, 1993 and 20th April, 1993 CBK accepted customer cheques from commercial banks outside the cheque system and credited them on the same day. These were then presented to the clearing house on the following working day when the cheques would be debited. Between 20th April, 1993 and 15th May, 1993 CBK gave direct

credit for bankers' cheques presented by commercial banks. These again were debited on the next working day. **(P.W Report to CBK Exht. 60).**

301. This is so contrary to proper practice and produced such an enormous volume of interest against non-existent money that we enquired how it was allowed to happen. The evidence of the Governor, Mr. Kotut was quite unequivocal.

> "Cheque kiting and direct credit were illegal and so concealed. They did not come to my attention". **(Hansard pg. 789).**

302. That this was illegal is of course correct since in substance it allowed commercial banks to borrow extremely large sums of money from CBK with its concomitant effect on inter alia, money supply. Section 36 of the Central Bank of Kenya Act allowed CBK to grant loans or advances for fixed periods not exceeding 6 months to banks which pledged credit instruments or government securities as security. Subsection (2) to that section as added in 1996 merely stated the obvious corollary which is that CBK could not otherwise extend credit directly or indirectly to commercial banks.

303. Mr. Marambii commented on cheque kiting at some length in his statement but did not go so far as to say who might have been responsible for allowing it to happen. Mr. Ndirangu then an Assistant Principal in the banking section of the banking division of CBK merely commented that certain banks were in the habit of bringing cheques in at 5 p.m. to assist with their liquidity problems.

304. Mr. Ndirangu produced circular No. 4 of 1993 dated 7th May, 1993 and signed by Mr. Mumelo (**Exht. 121/17**). The main purpose of the circular as set out in the first paragraph was to deal with banks which failed to meet the required cash ratio and to impose a penalty for such failure. It also prohibited overdrafts in the accounts maintained by banks with CBK. The second paragraph stated that:

> "Direct credits/debits of a commercial bank's account at CBK shall be effected only on the basis of transactions between the commercial bank and the Central Bank itself i.e. transactions arising from currency, foreign exchange, government securities, clearing house settlements and inter-bank transactions which are debited/credited into the bank's account on the same day. No cheque settlements will be permitted in the inter-bank."

305. Although this was principally an attempt to deal with the liquidity of banks, if it had been immediately implemented it would have brought cheque kiting to an end. The practice however continued until Mr. Mumelo sent a circular dated 17th May, 1993 to the banks. Mr. Mumelo stated that he had sent a copy of circular No. 4 to the Governor. Mr. Riungu claimed to have assisted in the drafting of this circular.

306. The late Mr. Joseph Mumelo recorded a cautionary statement on 13th July, 1993 (**Exht. 143 pg. 5**). He said:

> "On 15/4/93.... I discovered that through Pan African Bank, Post Bank Credit and Transnational had exchanged 18 kite cheques to about Kshs. 10 billion. This worried me and I immediately telephoned the Governor and briefed him on the phone on what I had discovered. I followed this up the next morning 16/4/93 at about 8.30 by showing him the cheques involved. The Governor only told me casually that I should talk to the Chairman of EBL, Mr. Pattni".

307. He also said he reported this to Mr. Riungu. He further stated that on the same day he received an abusive telephone call from Mr. Joshua Kulei as a director of Transnational Bank in which he told him to stop hurting the bank. Notwithstanding the report, the kiting continued.

308. There seems to be some conflict of evidence here, and it may be that Mr. Mumelo did not have access to the actual documents or their dates while he was making his statement. Nevertheless, both he and Mr. Riungu say that they kept the Governor informed, as it was of course their duty. It must be borne in mind that there was no way of testing the statement of Mr. Mumelo who could not give evidence. Nevertheless, as is apparent throughout, everyone who should have reported to or consulted the Governor, Mr. Kotut says that he did so, and there is little more than a denial from Mr. Kotut.

309. What was the money so obtained used for? The Price Waterhouse report to CBK of 16th July, 1993 (**Exht. 60**) estimates at page 12 that the interest foregone by CBK was Kshs. 588 million. Of this potential earning GIL only made Kshs.94.8 million. At the time therefore GIL needed the money for other purposes. This mainly was to pay for Pan African Bank Ltd, clear its overdraft of Kshs.4.5 billion with CBK and to obtain the title deeds to the Grand Regency Hotel (for simplicity this will be refferd to as such throughout this report although it assumed this name later).

310. When cheque kiting came to an end and when the object set out was achieved both Pan African Bank Ltd and Post Bank Credit Ltd were allowed to go into liquidation.

311. Details of the history of Pan African Bank Ltd and the involvement of CBK in the transactions will be gone into separately. The banks involved in the cheque kiting were Panafrican Bank Ltd, Delphis Bank Ltd, Transnational Bank Ltd, Trust Bank Ltd and EBL. In all these banks the accounts involved were either GIL accounts directly or those of associated organisations or accounts of non-existent organizations run by Pattni and GIL. Details of these accounts and the signatories to them (including Pattni's drivers) are at **Exht. 79.**

312. A survey of the cheque kiting dealings is set out in **Appendix "M"**. This is Mr. M. Smith's assessment which we accept. The end of cheque-kiting necessitated another source of funds for Pattni and GIL, and this leads us to the next series of transactions which were the dollar sale contracts.

(D) DOLLAR SALE CONTRACTS

313. During this period, there were four different kinds of contracts for dealing in foreign currency. There were spot and forward contracts for

the sale of foreign currency and spot and forward contracts for the purchase of foreign currency. Under a spot contract, the date of the transaction was immediate and under a forward contract the date for concluding the transaction was a fixed date in the future, and the rate at which the sale or purchase was to be effected was set out in the contract. These forward contracts required the consent of the Governor.

314. The contracts with which we will now deal were spot contracts by which the commercial banks agreed to sell dollars to CBK. As shown, while CBK honoured its part of the contracts by paying the agreed amount of Kenya shillings; the commercial banks did not honour their part by producing the agreed foreign exchange which should have come on the date of delivery in these contracts.

(a) The 15th April 1993 Contracts

315. On 15th April, 1993 both EBL and Pan African Bank entered into sale contracts to sell foreign exchange to the CBK. The details of the two foreign exchange contracts were as follows:-

SR NO.	CONT-RACT NO.	CONT-RACT DATE	BANK	AMT US$	RATE	AMT IN KSHS.
1	A090031	15/04/93	PAB	38,000,000	45.5335	1,730,273,000
2	A090030	15/04/93	EXCHANGE BANK LTD	46,000,000	45.5335	2,094,541,000
			TOTAL	**84,000,000**		**3,824,814,000**

316. The contracts were spot contracts and the date of delivery of the contracts was 15th April, 1993. On the same day the Kenya Shilling equivalent was credited to the accounts of both EBL and Pan African Bank. The vouchers showing that the shillings were credited to these accounts on the contract date are to be found at (**Exht. 114A pgs. 12 to 22**)

The Pan African Bank contract was reversed on 31st May, 1993 by CBK debiting that bank with the shilling amount which had been paid. The EBL contract was reversed on 21st June, 1993 in the same way.

(b) The 26th April 1993 Contracts

317. On 26th April, 1993 further foreign exchange sale contracts were entered into between CBK and Delphis Bank, EBL, Pan African Bank and Transnational Bank, as follows:-

	CONT-RACT NO.	CONT-RACT DATE	BANK	AMT US$	RATE	AMT IN KSHS.
1	A073482	26/04/93	Delphis Bank	19,000,000.00	59.5804	1,132,027,600.00
2	A061913	26/04/93	Transnational Bank Ltd	19,300,000.00	59.5804	1,149,901,720.00
3	A090037	26/04/93	Exchange Bank Ltd	28,500,000.00	59.5804	1,698,041,400.00
4	A033759	26/04/93	Pan African Bank	26,500,000.00	59.5804	1,578,880,600.00
			TOTAL	**93,300,000.00**		**5,558,851,320.00**

Again these were spot contracts and foreign currency should have been delivered on the same day. Details for each bank are set out below.

(i) Delphis Bank

By a letter dated 26th April, 1993 (**Exht. 56 pg. 55**) GIL wrote to Delphis Bank as follows:-

> "We have remitted US$ 19 million (US Dollars Nineteen Million only) to your account with Standard Chartered Bank, New York, being proceeds from our exports. Please sell the amount to Central Bank of Kenya today".

318. In their haste to enter into the contract, a contract No. 090033 and dated 26th April, 1993 was entered into between CBK and Delphis Bank. It will be noted that Contract Series Numbers A090033 is the contract series given to EBL. In effect Exchange Bank Ltd drew up the contract for Delphis Bank (see **Exht. 56 pg. 53**). The specifications for the contract are to be found at (**Exht. 56 pg. 51**), and there it provided that the source of the funds was the "inter-bank".

319. This contract was actually received by Central Bank of Kenya on 26th April, 1993. Realizing the mistake, another contract No. 073482

was prepared and signed, again a spot contract for the same day. The contract provided that delivery was to be on the same day. This meant that both shillings and dollars were to have been delivered on the same day. In fact, **(Exht. 56 pg. 49)**, the shillings were delivered to the Delphis Account. No dollars were delivered to the CBK.

320. On 28th April, 1993 **(Exht. 56 pg. 48)** Delphis Bank then wrote to the Manager Foreign Operations, CBK informing them that the funds could not be delivered at Federal Reserve Bank, New York but would instead be delivered to the CBK account with American Express Bank, London. At this point the contract should have been reversed for non delivery, and change of material circumstances, like the place of delivery of the dollars. Despite the non-delivery, and change of material circumstances, CBK did not reverse the contract.

321. On 10th May, 1993 Delphis Bank then wrote to the Manager, Foreign Department, **(Exht. 56 pg.47)** and requested him to confirm that the amount had since been delivered to American Express, London. On 11th May, 1993 EBL wrote to Delphis Bank **(Exht. 56 pg.46)** advising it that arising from the contract for the sale of US$ 19,000,000 sold to CBK on 26th April, 1993 the contract specification S166 which had previously indicated that the funds under the contract had been sourced from the inter-bank should now be amended to reflect that the foreign exchange sold was now in respect of the alleged export proceeds, and the CD3 form Numbers 863790, 863791, 863792 and 868161 should now accompany the remittance.

322. EBL requested a copy of the CBK 166S and amendment letter so as to enable them submit the CD3 forms to CBK. Such returns to the CBK, were for the purpose of making claims for export compensation. On 12th May, 1993, Delphis Bank accordingly advised the Manager Foreign Department to amend as requested by EBL. **(Exht. 56 pg.45)**.

323. On 21st May, 1993 EBL again wrote to Delphis Bank, requesting it to cancel and withdraw the amendment. (**Exht. 56 pg.43**) From the Delphis Contract for US$ 19,000,000, it is clear that at all times EBL and GIL deliberately entered into a course of action meant to mislead CBK that they had dollars to sell to CBK. The dollars and shillings were to have been delivered on the same day, but from the evidence it is clear that the shillings were irregularly delivered whilst no dollars were delivered. It is clear that as no dollars were delivered on 26th April, 1993, GIL in its letter (**Exht. 56 pg. 55**) lied that it had remitted US$ 19 million to Delphis Standard Chartered New York account. It in fact had no dollars to sell.

324. It is clear from the contract specification CBK 166S, that the foreign exchange was "interbank" funds, not export proceeds, and therefore amendment of the Central Bank of Kenya 166S to specify that these were export proceeds remitted as against the CD3 forms was false. It is clear that the contract was a spot contract, where the delivery was to be on the same day or within 48 hours. There is no indication that the amount was to have been outstanding for 60 days.

(ii) Transnational Bank Ltd

325. In the case of Transnational Bank, again a contract was entered into on 26th April, 1993 in similar circumstances to that of Delphis Bank. GIL wrote to Transnational Bank Ltd advising them that they had remitted US$ 19.3 million to their account with Citibank N.Y. being proceeds from their exports. How was it possible for GIL to remit export proceeds to TNBL when there was no contract at that time with Transnational Bank Ltd and no place of delivery specified?

326. Mr. Wanjihia for Central Bank of Kenya and Mr. Sheikh for Transnational Bank Ltd entered into a contract for the sale of foreign exchange to CBK, for delivery of the shillings and the dollars on the same day. (**Exht. 154UU**). This in effect meant that Transnational Bank Ltd already had the dollars and therefore they were available for sale to CBK.

327. In the same letter, GIL requested Transnational Bank Ltd to sell the amount on the same day and transfer the proceeds to their account No. 031-147-658 with National Bank of Kenya. GIL was therefore to be the beneficiary of the shillings credited to the account of Transnational Bank Ltd by CBK.

328. The supporting vouchers (**Exht. 114A pg. 36**) show that the account of Transnational Bank Ltd was credited by CBK on the same day. There was no delivery of dollars to CBK. In a letter dated 30th June, 1993 (**Exht. 154UU pg.4**) Mr. Pattni wrote to Transnational Bank Ltd on behalf of Goldenberg International Ltd advising them that they did not in fact export, and so no dollars were in effect delivered. He requested Transnational Bank Ltd to debit the GIL account at Transnational Bank Ltd and reverse the foreign exchange sale contracts of US$ 19.3 million.

329. It is clear from the evidence relating to the Transnational Bank Ltd contract for the sale of US$ 19.3 million foreign exchange to CBK that Mr. Pattni and GIL deliberately lied about the existence of foreign exchange to CBK. It is clear that, based on this lie that the Kenya shilling equivalent to US$ 19.3 million was delivered by the CBK to Transnational Bank and on to GIL no dollars existed and therefore no dollars were delivered to CBK.

(iii) Exchange Bank Ltd

330. The contract for US $28,500,000, [**Exht.114 pg.22**] was entered into on 26th April, 1993 as between Mr. Wanjihia of CBK and Mr. Taheri of Exchange Bank Ltd. The contract was for delivery on the same day. The shillings were delivered on the same day but no dollars were delivered. This contract was reversed on 30th June, 1993 [**Exht. 89C pg.5**]

(iv) Pan African Bank

331. The Pan African Bank contract of 26th April, 1993 was for US$26,500,000 and the shilling amount credited on the same day. This contract was reversed on 30th June, 1993 [**Exht. 114A Pg.57**]

(c) The 28th April 1993 Contracts

332. On 28th April, 1993 three foreign exchange contracts were entered into between CBK and Exchange Bank Ltd, Pan African Bank and Postbank Credit Ltd as follows:-

SR NO.	CONTRACT NO.	CONTRACT DATE	BANK	AMT US$	RATE	AMT IN KSHS.
1	A090039	28/04/93	EXCHANGE BANK LTD	14,600,000.00	59.1382	863,417,720.00
2	A033760	28/04/93	Pan African Bank	26,700,000.00	59.1382	1,578,989,940.00
3	A072573	28/04/93	POST BANK CREDIT	29,300,000.00	59.1382	1,732,749,260.00
			TOTAL	70,600,000.00		4,175,156,920.00

333. The Contract No. 090039 for Exchange Bank Ltd (**Exht. 154QQ pg. 175**) was between Mr. Wanjihia of Central Bank of Kenya and Mr. Taheri of Exchange Bank Ltd. The contract was for delivery of dollars the same day. This contract was reversed on 30th June, 1993 while the Pan African Bank contract for US$ 26,700,000 was reversed on 21st June, 1993 and the Post Bank Credit contract for US$ 29,300,000 was evidently reversed and a payment of the shilling amount of KShs. 1,732,749,260 paid by EBL to Post Bank Credit on 30th June, 1993 (**Exht. 142 pg. 98**).

(d) Investigation and subsequent action

334. On 31st May, 1993 Mr. Otondo of Posting and Reconciliation department, Central Bank of Kenya wrote to the Manager Foreign Department. (**Exht. 114A pg. 155**)

> **"To date the Posting & Reconciliation Section has had no evidence of delivery of the following major sales of foreign exchange by the undermentioned commercial banks.**

SELLING RECEIVING BANK	VALUE DATE		FOREX AMOUNT	BANK
Pan African Bank	15-4-93	USD	38,000,000	Federal Reserve
Exchange Bank	"		46,000,000	"
Pan African Bank	26-4-93		26,500,000	Amex Bank
Delphis Bank	"		19,000,000	"
Exchange Bank	"		28,500,000	"

Transnational Bank	"		
Exchange Bank	28-4-93	19,300,000	"
Postbank Credit	"	14,600,000	"
Pan African Bank	"	29,300,000	"
		26,700,000	"
		USD 247,900,000	

You have already given guidance that we put in our claim for USD 29,300,000 with the Manager of Postbank Credit Limited under liquidation. There is evidence of receipt of USD 15,000,000 at Amex Bank so far although we are yet to know by whose order.

Please give your guidance regarding the other outstanding amounts."

335. By this time the Manager was Mr. Kilach who had taken over from Mr. Wairagu on 20th May, 1993. From the evidence no response was received to the memo.

336. Meanwhile, on 7th June, 1993 Delphis Bank wrote to the Foreign Department, CBK (**Exht. 56 pg. 42**) to establish whether the dollars had been received by CBK. They provided a breakdown of various fragmented amounts that were supposed to have been received by the CBK in both their Federal Reserve Bank and American Express Bank accounts. Their request was that CBK confirm that the contract had been settled. At (**Exht. 114 pg. 12**) Mr. Otondo then goes on to state that all the 7 contracts were reversed more than a month later, 3 of them on June 21st, 1993 and 4 on June 30th 1993 and the shilling amounts were recovered. He further states that:-

> "The dates 21st June and 30th June are significant for it is on the same days that these reversals were effected, that the CBK entered into a total of eleven (11) spot sale transactions amounting to US$ 210 million equivalent to Kshs. 13.5 billion all with EBL for delivery to the new CBK account and another at Bank Indosuez Sogem Aval Limited London".

337. When Mr. Otondo gave evidence on the matter of the US$247 million (**Hansard pgs. 7160 to 7162**) he stated clearly that where there was non delivery on a contract there should have been a reversal of the transactions. In his testimony he stated that it was the responsibility of the dealers to reverse the transaction. The dealers were required to prepare the vouchers for the purposes of effecting reversals. Mr. Otondo

stated further that the dealers did not seem concerned about the transactions despite the fact that these contracts had been outstanding for over 56 days.

338. In a memo to the Manager Foreign Department dated 29th June, 1993 (**Exht. 114A pg. 156**), Mr. Otondo stated:

> "We wish to refer to our memo dated May 31, 1993 (copy attached) regarding non-delivery of about USD 247,900,000 purchased by the Central Bank in some nine transactions for delivery on15th, 26th and 28th April, 1993. The dollars were initially supposed to be received in our account at the Federal Reserve Bank, New York (Fed reserve). It later transpired, however, that the bulk of the deliveries i.e. USD 163,900,000 were to be received at our new account with American Express Bank in Poole, UK (Amex).
>
> Some of the funds expected to be delivered at Amex and/or Fed reserve are apparently no longer expected and so reversing entries have been received from the Dealer Section as follows:-

Selling Bank Reversed	Forex Amount	Value Date	Date
Pan African Bank	USD 38,000,000	15-4-93	
31-5-93			
"	" 26,500,000	26-4-93	
21-6-93			
"	" 26,700,000	28-4-93	
"			
Exchange Bank	" 46,000,000	15-4-93	
"			
Delphis Bank	" 19,000,000	26-4-93	
"			
	USD 156,200,000		

> We have further been advised to raise penalty interest for the days in default i.e. between value date and date of reversals".

339. According to Mr. Otondo, the entries had finally been received from the Dealers Section, reversing the transactions. It is therefore, clear from the evidence that, the dealers had to prepare the vouchers reversing the transactions, and without the vouchers, the transactions could not be reversed. From the vouchers and the contracts, it is clear that the dealer

who consistently signed on behalf of CBK was Mr. Wanjihia. According to Mr. Wanjihia:

> "Monthly reconciliations of all accounts were prepared by this section for the MFD, who in consultation with the Governor would instruct the action to be taken on the outstanding or undelivered items". (**Exht. 152 pg. 5**)

He further goes on to state under non-delivery of USD 247,900,000 that:-

> "We used to report the non delivery of the dollars everyday to the manager who always told us that the governor was following up. It is to be noted that we could not debit the accounts of these banks without authority from the governor through the MFD.
> Authority to reverse these contracts and recover the shilling was obtained in June and we recovered the shillings. At the same time fresh contracts were received this time all by Exchange Bank Ltd. The total in dollars was the same USD 210 million but the shilling amount was more because the shilling had been devalued". **(Exht. 152 pg.7)**

340. This is confirmed by Mr. Otondo in his evidence when the Vice Chairman asked whose decision it was to reverse the entries. (see **Hansard pg. 7058).** Mr. Otondo's response was that Mr. Wanjihia would discuss the matters with the Manager Foreign Department. He stated that it would be unlikely for Mr. Wanjihia to reverse the entries without discussion with the MFD.

341. In further evidence he stated that the MFD would be responsible for such a decision as the MFD was the one who was responsible for the management of the foreign reserves of the bank. He also stated that even the Governor would know from the daily postings in the books.

342. Mr. Kilach who had taken up the position of the MFD on 20th May, 1993 states in his statement (**Exht. 151 pg. 9**) that he reported the matter to the Governor, upon advice from Mr. Otondo. He admits in his statement that he did not do a formal letter to the Governor, so there is no evidence to support his contention that he reported the matter to the Governor, particularly as the Governor has denied it.

343. The actions of Mr. Kilach and Mr. Wanjihia were unacceptable and contrary to regulations, particularly because as between them, no remedial action was taken then to reverse the entries in the books of the CBK where billions of shillings continued to remain outstanding and due to CBK from the five banks.

344. It is clear from the evidence that Mr. Wanjihia was involved in crediting the accounts of the banks with the shillings, on the delivery dates. It is also very clear that Mr. Wanjihia continued to credit the accounts of EBL on three separate occasions, on 15th April, 1993 26th April, 1993 and 28th April, 1993 with the full knowledge that the banks had already defaulted in the deliveries of the earlier contracts. It is also clear, that despite the non-deliveries, he did nothing to raise any vouchers with which to reverse the transactions. Mr. Otondo stated that he had advised him of the outstanding contracts but he must have known of these. Mr. Kilach did not take any remedial action to reverse the entries even though he was well aware of the fact that the transactions had been long outstanding. As Manager Foreign Department it was Kilach's responsibility to safeguard the foreign reserves of CBK, which he completely failed to do.

345. The involvement of Mr. Wanjihia and Mr. Koiyet is shown by their letter dated 12th July, 1993 (**Exht. 114A pg. 32**) where they confirmed that the Contract No. 073482 had been fully delivered, despite having been involved in and had effected the reversals of the contract on 21st June, 1993.

346. How did this come about and was anyone more senior concerned? In his evidence (**Exht. 154 pg. 106**) Pattni states when dealing with Pan African Bank :

> "After reducing the overdraft in Pan African Bank Account No. 2 to 3,322,229,946/05, Mr. Taheri met

> Mr.Kotut who agreed to provide advance Kenya Shillings through foreign contracts. Their discussion was on how much foreign exchange was expected in 60 days period and we had anticipated at least over US Dollars 80 m. So Kotut allowed release of Kenya Shillings in advance through the foreign exchange contracts as follows (the two contracts of 15/4/93)"

(Pattni then continued to deal with Pan African Bank and election expenses).

347. There is of course no written support for this allegation and Kotut denies any such agreement. As has been shown efforts were made to hide the non-delivery or at least delay it in the realisation that the dollars had not been received. Presumably, none of that would have been necessary if the Governor had actually sanctioned the procedure. His possible involvement will have to be considered when all the schemes and dealings which passed through CBK are examined.

(e) Losses caused by the dollar sale contracts

348. The payment of the shillings under all these dollar sale contracts should have been reversed immediately the dollars were not produced certainly within 48 hours. Instead the recipients were allowed to keep their ill-gotten gains for considerable periods. Upon reversal when it finally happened interest should have been charged.

349. The question of the rate of interest which should have been charged on the reversal of these contracts was raised by Mr. D.O. Otondo in his Memo to the Manager Foreign Department, Mr. Kilach dated 29th June, 1993 (**Exht. 114A pg. 156**). This was summarised by Mr. Otondo in his statement (**Exht. 114 pg. 23**) as follows:

> "Essentially it (the memo) addressed the vexed issue of interest to be charged on late and/or non-delivery of foreign exchange sold by the commercial banks to CBK. I took exception to the fact that banks defaulting in delivering foreign exchange sold to CBK were being charged about 3.5% to 3.75% p.a, the then ruling Federal Reserve Bank discount rate, when such banks could invest the shillings obtained from CBK at, say the CBK discount rate of about

65% p.a. I copied the memo to Mr. Wanjihia and Mrs Mwatela.

Mr. Wanjihia came up with the following remarks:
Mr. Otondo discuss with MFD in line with the points raised in your memo to him.

I proceeded to discuss the memo with the MFD Mr. Kilach, and then made the following note:

Note for the file.

Discussed with Manager Foreign Department and instructed to proceed and raise entries following the old practice while the matter is pursued further with appropriate authorities.

I then made a further note.

Mr. Wanjihia came over to further stress that the charges be made as per old practice and that they be raised today. I informed him that I had discussed with MFD and we were already obeying instructions given 30/6/93".

(These memos are at **Exht. 114A pg. 160**)

350. We have considered this matter and can see no justification whatsoever for the practice set out. Since much of the money received had in fact been invested in Treasury Bills at, or about, the rate of discount mentioned, there was a totally unjustifiable loss to CBK. This is supported by the fact that the correct rate was charged to Delphis Bank Ltd.

(f) Losses Quantified

351. Delphis Bank Ltd was debited Kshs. 112,416,630/- being interest @ 65% p.a, so there was no loss on this transaction.

352. Transnational Bank Ltd. held Kshs.19.3 million from 26th April, 1993 to 30th June, 1993 that is to say 66 days. The bank was charged Kshs.4,797,750/- interest on 12th July, 1993 (**Exht. 154Z pg. 8**). This charge was for 43 days and not 66 and was only at the rate of 3.35% instead of the 65% which should have been charged. This is

Kshs.135,152,830/- and is the loss to CBK which should be recovered from Transnational Bank Ltd.

353. The liquidator of Post Bank Credit Ltd Ms Muoki stated (**Exht. 142 pg. 98**) that the bank had had the Kshs.1,732,749,260/- set out above for 63 days and should therefore have been charged Kshs.194,400,225/- interest at a rate of 65% p.a. This should have been passed as a debit to the bank's No. 2 account. As this was not done this is the loss on this transaction.

354. The losses in respect of the Pan African Bank and EBL contracts are set out in the following table:-

Ex	Bank	$ amount	Interest charged	Rate/days	Correct days	Interest@ 65%	Net Loss
143/24	Pan African Bank	38m.	3,903,127/-	3.72/45	45	142,665,710	138,760 583
114A/57	"	26.5	9,526,730/-	3.71/50	54	151,824,330	142,297,600
114A/52	"	26.7m	9,255,830/-	3.73/54	54	151,832,980	142,577,150
	EBL	46m			65	242,450,300	242,450,300
114A/22		28.5m	112,477/-	3.35/43	65	196,554,100	196,441,623
114A/46		14.6m	2,954,151/-	3.25/35	63	96,868,370	93,914,211
						TOTAL	**956,441,211**

Therefore the total loss to CBK on these transactions was Kshs.1,281,196,516/-.

(E) US $ 210,000,000 CONTRACTS – AMERICAN EXPRESS BANK LTD & BANQUE INDOSUEZ SOGEM AVAL LTD LONDON

355. These contracts were for the payment of US $ 210 million and although this amount was roughly equivalent to Sh.13.5 billion they must be considered separately from the non-delivered foreign exchange contracts referred to in the previous sections. This is because they were intended to take over from those contracts which because of their nature had to be replaced. The amount of the two contracts was probably selected to be the amount needed to replace the amount of the previous

contracts and so extend the time by which GIL and EBL enjoyed the government's money without any payment by them. The persons without doubt involved in the contracts were Mr. M. Wanjihia and Mr. J. Kilach from 20th May 1993.

356. On the other side it is clear that the main player was Mr. Taheri. It was he who arranged for the contracts with the banks in London, facilitated the whole matter and paid for the necessary legal opinions required by the banks in view of the unusual circumstances of the transactions. He was the driving force, and this leads to the question of the reasons behind the contracts.
Pattni is his statement (**Exht. 154 pg. 118**) states.

> "Mr. Taheri briefed me on his meeting with the Governor and how they had agreed to replace the old foreign exchange contracts with new ones for US $ 210m"..

357. Mr. Taheri travelled to London came back and finally did manage to help CBK with the window-dressing facility they wanted. The reason given for the form of the contracts was so that CBK could show the amount of US $210 million as its reserves. Mr. Kotut denied any knowledge of the transaction and since there is no specific documentary evidence linking him to the opening of the accounts, the question of his involvement or otherwise will have to be considered together with the overall evidence concerning his actions in the bank.

358. Nevertheless Kotut's statement in evidence that any such arrangement was unnecessary and not apt to deceive the IMF/WB is probably correct. No evidence has been produced to us showing that any monetary targets had been set for Kenya by IMF/WB nor that it was their habit to do so. That organisation has access to enormous amounts of information and it cannot be seen how a sudden unexplained rise in Kenya's foreign exchange reserves of this amount would have passed unnoticed and without query. In fact the question was almost

immediately raised of why Kenya was sitting on these reserves in view of its then current position.

359. In a short time IMF/WB were asking why if Kenya had these resources of dollars it was not using them. In fact GIL and EBL, far from assisting CBK, were setting up a mechanism to keeping the 13.5 billion which they had obtained through the non-delivered foreign exchange contracts in a manner which made it difficult to discover the fraud. This involved among other things, the production from London of two statements, one showing the credit of dollars and the other the corresponding debit. One statement could be produced and the other suppressed. The transaction was of no immediate and no long-term benefit to Kenya, and it would have been apparent that this was so from the beginning. Whether, notwithstanding the untrue reason given for the contracts Mr. Kotut was involved or had knowledge of the contracts and their true nature would not be apparent on the record. There is no documentary evidence of the involvement of Mr. Kotut, other than the authority to open a single account given retrospectively, and in view of the unbelievable nature of Pattni's evidence on the point, Mr. Kotut's involvement is not proved by him. The involvement of Kilach and Wanjihia in these illegal transactions is however fully disclosed and neither has any justification for the complaints made about their subsequent treatment.

360. It is also useful at this stage to point out that the negotiations by the next Governor, Mr. Cheserem and Pattni were concerned with the repayment of the equivalent of this $210 million only. He was obviously not aware (as who was?) of the full extent of the dealings of Pattni, GIL and EBL. In (**Hansard pg. 11770**) Mr. Cheserem stated:

> **"I do not know what he (Pattni) is talking about here because I told him that he was the Chairman of that bank, he did not deliver the US $ 210 million, I wanted the shillings back"**

Khaminwa said: "That was all?"
"That was it, my lords. That was when meeting the officials."

This is the background of the agreement entered into between Pattni and Mr. Cheseren and which will be dealt with in full later.

(a) American Express Bank Ltd London

361. The former CBK employee, D.O. Otondo gave evidence that although there was no register of accounts held by CBK abroad there were about 100 current accounts with banks abroad. He believed that these were too many and served no useful purpose. Nevertheless a new account with American Express Bank Ltd London was authorised by Kotut on or about 27th April, 1993 after a request from Wairagu. **(Exht. 114A pg. 5)**

362. Mr. Riungu was lobbied by Amex to allow the opening of the account **(Exht. 138F pg. 119)** and the bank was well-known to Pattni and Taheri who both maintained accounts there (see **Pattni's statement Exht. 154 pg. 120**). There were separate subsidiary accounts for various currencies and between their opening and 31st August, 1993 were used apparently for speculation on foreign exchange rates. This does not appear to have been connected to Pattni, GIL or EBL.

363. By a letter dated 16th June, 1993 Kilach and Wanjihia notified American Express Bank Ltd that Mr. Mr. Clarence S. Di Lima had been nominated to collect all mail in respect of CBK accounts with Amex. Amex refused to agree. Who was Clarence S. Di Lima? **(Exht. 131B pg. 46)**

364. In the records of Equatorial Bank London is the record of payment of St£ 5,500 from Pattni's account to an account of Clarence Stanislaus Di Lima on 7th February, 1993 **(Exht. 90U, pg. 40)**. Mr. Di Lima was therefore an associate of Pattni or had some business relationship with him.

365. When investigating the dealings, Mr. Marambii obtained a statement from Mr. A.E. Joslin an employee of Amex Bank given with the permission of his superiors. The documentation for the trading accounts was signed by Kilach and Wanjihia although no consent had been given for these accounts.

366. A statement of account voucher No. 00128228 dated 30th June, 1993 and which showed a credit balance in favour of CBK of $110 million, was shown by Amex to be false and no such money had ever been received on behalf of CBK. The date is of course the end of the government financial year. How this was obtained is not clear on the evidence but it was used to give a false impression of the foreign exchange reserves held as at 30th June, 1993. Mr. Cheserem and Mr. Marambii only discovered the non-existence of these dollars in August 1993.

367. There is also the question of a letter produced by Amex Bank showing a request apparently by CBK to hold back confirmation of balances as at 30th June, 1993 because the bank's auditors were being changed. This letter was dated 26th July, 1993 (**Exht. 131A pg. 169**). The letter (and a similar one to Banque Indosuez Aval Ltd (**Exht. 131 pg. 167**) appear to be on CBK note-paper, and although we are not experts in handwriting, the signatures appear similar to admitted signatures of Kilach and Wanjihia. These letters were obtained from the banks in London by Mr. Marambii while he was investigating there. Kilach in his statement (**Exht. 151 pg. 14**) merely states that the letters were forged, but of course he did not give evidence. Wanjihia in his statement **(Exht. 152 pg. 11**) also said that the letters were forgeries and had nothing to do with his department. He said that they must have been prepared by someone else with something to hide. In his evidence to the Commission when cross-examined, he could produce no reason why anyone else should wish to hide the transactions. That someone else should want to hide the transactions on this account opened and operated by Kilach and

Wanjihia, and to do so without their knowledge, is beyond the bounds of credibility. It is also an admission that there was something which needed hiding.

(b) Banque Indosuez Sogem Aval Ltd, London

368. The request to open an account with this company was made on 17th June, 1993 by Kilach who was now Manager, Foreign Department. No reason for the request was given. The Governor's approval was dated 18th June, 1993 although the account had been opened on 10th June, 1993. The request to open the account was dated 8th June, 1993 and was signed by Kilach and Wanjihia.

369. The evidence is clear that the arrangement with BIA was brokered by Taheri. He travelled to London and arranged for a credit and debit. He paid for the legal fees arising on the arrangement. The agreement was sent to Pattni for approval and not to CBK (**Exht. 131A pg. 53**). The agreement was quite clear that there was an amount of US $100 million credit but a contra-liability of the same amount which cancelled it out. This is consistent with the statement of Riungu where he alleged that he met Pattni and briefed Kotut on the terms. He stated (**Exht. 138F pg. 118**):

> **" A reputable bank abroad would deposit dollars abroad for account of CBK. CBK would in turn deposit shillings equivalent to the dollars in its books in Kenya in account of the overseas bank. On maturity of the deposits, CBK would repay the dollars and the overseas bank would repay the shillings. There was an understanding that none of the parties – CBK and the overseas bank would use the money in the deposits. In my view, the proposal looked harmless as Kenya had nothing to lose in monetary terms."**

370. Pattni in his statement to the Commission (**Exht. 154 pg. 119**) said that Riungu had told him that the Governor had approved the reversal of the old foreign exchange contracts (all undelivered) and had discussed the $210 million window-dressing with Indosuez and Amex. In

his statement under inquiry (**Exht.138E pg. 5**) Pattni said that Riungu had requested him:

> **"to assist in achieving certain monetary targets set down for them by IMF/World Bank by arranging a back to back deposit of US$210 Million of foreign exchange receipts and the sale of Treasury Bills amounting to Kshs. 25 billion. The back to back deposit was to be done with the cooperation of any good foreign bank. The purpose of this was a book entry to boost the reserves of foreign exchange of the country for a temporary period coinciding with the inspection/study of the finances of the country and the CBK by the IMF/World Bank. This would be achieved by CBK showing deposit in their books as part of the reserves of foreign exchange held with the banks abroad by the CBK".**

371. This calls into question the involvement or otherwise of Kotut in the whole arrangement and this will be discussed later in the light of all the evidence on various transactions, but from the facts as they now appear no part of this arrangement was meant to help CBK. It was designed to help Pattni deal with the undelivered foreign exchange contracts on which the commercial banks were being forced to pay. This will become apparent when it is shown how the money from these contracts was used.

372. We must now deal with what happened consequent upon the opening of these accounts with Amex and BIA. On 10th June, 1993 five spot sale contracts were entered into ostensibly for the sale by EBL to CBK through BIA of a total of $100,000,000 (**Ex 154 QQ pp. 278, 282, 286, 290 & 294**). This in spite of the fact that EBL had put no money with BIA. The contracts were expressed to be between Wanjihia and Taheri, and in the circumstances are clear evidence of fraud on their part. There was no intention on either side that the dollars would be produced on that day. That these documents were produced by Pattni when there was apparently no record of them in CBK is also significant.

373. On 25th June, 1993 five spot sale contracts were entered into ostensibly for the sale by EBL to CBK through Amex Bank again in spite

of the fact that EBL had placed no money in Amex Bank. (see **Exhts. 154 QQ pgs. 301, 304, 307, 310 and 313 produced by Pattni**). There is a further contract (**Exht. 154 QQ pg. 221**) which apparently is part of the five above since it is between the same parties. It is dated 28th April, 1993 but stamped received by CBK on 31st May, 1993. It appears that there may have been a confusion (either inadvertent or deliberate) over the date. These six spot contracts totalled $108,450. The five contracts of 25th June, 1993 were expressed to be between Wanjihia and Ms Zein, but the one allegedly of 24th April 1993 was expressed to be between Wanjihia and Taheri.

374. The concious involvement of Kilach in these transactions is shown by the following further evidence. Mr. D.O. Otondo was from 1990 to September 1993 Senior Superintendent of the Foreign Department CBK and was in charge of the Posting and Reconciliation Section, basically the book-keeping and accounting section for the Department. (see his statement **Exht. 114**).

375. It was when he received two conflicting statements from BIA that he telexed them for an explanation and was told that there was no credit of $100m. When he tried to reconcile the account of Amex Bank he found that there were seven and not three such accounts in various currencies. These were being operated by Kilach and Wanjihia without documents being forwarded to his section for posting. The reconciliation he produced is at **Exht. 114A pg. 102.**

376. His attempted reconciliation as at 31st March, 1993 is at **Exht. 114A pg. 144.** This contains the following handwritten statements:-

> **"Mr. Wanjihia: You will remember you stopped our enquiry to Amex and promised to come back to us; we still cannot apply these credits.**
> **Signed 6th July 1993**
> **NB: Do we raise penalty interest on the entries reversed on 30.6.93 as was the case with earlier reversals?**

His reply:

"Mr. Otondo: You must have received the statements to enable you reconcile. Signed 8th July, 1993"

To which I retorted:

"Statements received, of course but we are unable to relate to entries in the ledge.
Signed 8th July, 1993"

Mr. Wanjihia then simply returned the draft reconciliation statement without further comments.

377. The Kenya shillings paid by CBK as a result of these fraudulent transactions were credited to the account of GIL with EBL on 30th June, 1993 in respect of the $110 million and on 9th July 1993 in respect of the $ 100 million. The total paid was Kshs. 13,525,311,000/- (**Exht. 90G pg. 1**). At about the same time, the previous dollar contracts which had not been delivered were reversed as we have dealt with above (see **Exht. 114A pg. 156**).

378. What happened after the appointment of M. Cheserem as governor on 1st August, 1993 is best narrated by Mr. R. Marambii who became Chief Banking Manager on the same date.

His statement is as follows:

I learned of the non-existent USD 210m one afternoon in early August 1993 in the Governor's office.
He had called me there to inform me of his disappointment at aLetter that Mr. Kilach and Mr. Wanjihia had written to AMEX and BIA two of CBK correspondent banks in London **(pg. 167-170A]**
The Governor was also thinking aloud as to why if CBK had so much Foreign Exchange overseas it was not selling it to the Government to clear the arrears that existed in the foreign loans repayments.
He told me that he was surprised that Kilach had assigned himself the role of hiring and firing CBK auditors.
He did not show me the letter but he went on to explain that he had received the letter from CBK auditors, indicating that the auditors were about to be changed.
The auditors had in turn received the letter from one of the correspondent banks in reply to their audit query.
The governor appeared not to be aware of such a letter or any intention to change CBK auditors and was therefore visibly upset.

> He called Mr. Kilach also to his office while I was there and asked him to state clearly whether CBK had any money at AMEX and at BIAL London, to which Mr. Kilach replied that there was no money.
> The Governor then ordered Mr. Kilach to go back and reverse the necessary accounting entries in CBK books.

Kilach and Wanjihia did not reverse the spot contracts set out above by which payment had been made for the non-existent $210 million

379. There existed a set of forward purchase contracts dated 19th April, 1993 for the purchase of dollars by EBL in the future. These were entered into between Wanjihia and Taheri for EBL. These were for the purchase of dollars at future dates at rates which would have given an enormous profit to EBL due to the inflation and consequent decline in the value of the shilling which was taking place. The contracts required the approval of the Governor which they never received. They must have been intended as a further line of obfuscation and to delay and impede investigation.

380. What Kilach and Wanjihia did on 9th August, 1993 was to purport to sell those contracts back to CBK at much reduced rates, although of course, no dollars had ever been paid over and so there was nothing to redeem. Secondly they could not have been in any doubt that what they were doing was wrong, since the reversal of purchase contracts could not possibly have been what they were told to do, which was to reverse sale contracts.

381. The 22 contracts are in **[Exht. 131A between pgs. 172 and 237]** together with the purported reversals. The loss to CBK from the use of the reduced rate is set out at **Exht. 131A pg. 171** at Kshs. 3,638,151,046/-. Marambii stated:

> "On 10/8/1993 Mr. Kamlesh M. Pattni signed an undertaking to pay back CBK Kshs. 9.9 bilion which Mr. Kilach had misled the Bank into believing that it was the equivalent of USD 210m, causing CBK a loss of Kshs. 3.6 billion as explained above. Mr.Kilach signed the

agreement on behalf of CBK on 15/8/93 (**Exht.31A pg. 240**)".

This was although Kilach had no authority to sign contracts binding CBK. Mr. Marambii then stated:

> "On 22/09/1993 I noticed the above reversal fraud and debited EBL account with the exchange loss in order to complete the book
> entry needed for a proper reversal. I did not debit the account with the amount of interest, because it did not have the needed funds to cover even the principal amount reversed. To do otherwise would
> have been anticipating unreasonable profit for CBK."

382. While this was undoubtedly a prudent decision when considering only the position of the accounts of CBK, it had consequences for the liquidation of EBL and the statement of its accounts in the liquidation. It is clear that a very much larger sum should properly have been shown as being owed to CBK by EBL.

(F) PAYMENT OF KSHS. 5.8 BILLION FROM TREASURY TO GIL

383. Starting in April 1993 a total of Kshs.5.8 billion was paid to GIL on the strength of 3 letters signed by Dr. W. Koinange, the Permanent Secretary to the Treasury and dated 19th April, 1993 28th June, 1993 and 8th July, 1993.

384. The admitted facts are that the letters were signed by Dr. Koinange and found their way to Mr. T.K. Werunga who was at the time Assistant Principal in the Banking Division of the Banking Department of CBK. Mr. Werunga passed a photocopy of the letter to a clerical officer, Mr. Muraya with instructions to carry out Dr. Koinange's instructions. This was although the CBK banking division did not have a specimen signature of Dr. Koinange. There was of course no need for one since the Permanent Secretary is not the accounting officer for the Treasury; the Financial Secretary is. One week after the debiting of the PMG main account, Mr. Werunga debited the PMG DEP account and credited the main account on the alleged instructions of Mr. Oyula.

385. On the same day, 19th April, 1993 with the knowledge of Mr. E.K. arap Bii, then the General Manager, Kenya Commercial Bank Ltd the payment of 1.8 billion was received by KCB and again on the same day this amount was forwarded as follows:-

NBK	Kshs.	430,000,000
Post Bank	Kshs.	500,000,000
Transnational	Kshs.	400,000,000
Delphis	Kshs.	470,000,000
Total	**Kshs.**	**1,800,000,000**

386. All these sums were then credited to GIL. The transactions were not recorded in the books of KCB. The authority to KCB for the payment of these sums was Pattni. A similar procedure was followed on the two subsequent transactions.

On 1st July, 1993 the following sums were paid through KCB :-

Delphis Bank	Kshs.	1,400,000,000
EBL	Kshs.	1,421,080,943
Total	**Kshs.**	**2,821,080,943**

On 7th July, 1993 the payments were:

Delphis Bank	Kshs.	600,000,000.00
EBL	Kshs.	561,574,368.55
Total	**Kshs.**	**1,161,574,368.55**

These three payments total **Kshs. 5,807,050,379.00**

All the payments were received by GIL. Mr. Werunga kept certain documents concerning the transactions at home and only passed them to Mr. Marambii when he started inquiring into the transactions.

387. In view of the attempt by Pattni (detailed below) to justify the payments by reference to export compensation, the following facts have to be borne in mind.

The rates of payment of export compensation were:-

a) 20% to 15th January, 1992
b) 18% to 1st February, 1993
c) 10% to 23rd April, 1993 when gold and diamonds were deleted from the schedule to the Act.

The 15% over and above these payments (which was always illegal) was in fact terminated in February 1992 [**Exht. 91A – Pg.15**].

388. The attempted explanations given by Dr. Koinange for this payment are riddled with inconsistencies. In his statement he said:

> "In March 1993, I recall reading a statement in the local press attributed to my then minister Hon Musalia Mudavadi in which he was quoted as stating that Goldenberg International had earned Kenya 9 billion shillings from the export of Gold and Diamonds. I recall soon thereafter receiving a letter from one Kamlesh Pattni of GIL claiming that export compensation amounting to 2.1 billion had not been paid to his company. Since this was the first claim I was handling I decided to request an update on the matter from Mr. Francis Cheruiyot Commissioner of Customs. I contacted Mr. Cheruiyot by telephone. Mr. Cheruiyot was not prompt. When he finally reverted to me he confirmed that a substantial amount was still owing to GIL. I asked him why the necessary documentation had not been forwarded to Treasury to keep us in the picture. He had no answer but he promised to send me a schedule of pending payments, which he eventually did on the 19th April 1993. (**Exht. 105 pg. 61**). At the time I understood that the claim by GIL related to past claims prior to legal notice no. 88 of April 1993. I had been in the Treasury team that drew the attention of the new Minister Hon. Musalia Mudavadi, to the fact that export compensation had not been legally cancelled by any gazette notice. He proceeded to de-gazette Export Compensation in April 1993.
>
> Sometime in early April 1993 I received a telephone call from Prof. Mbithi who was then head of the Civil Service and Permanent Secretary in the President's Office. He told me that the President wanted the Treasury to pay immediately to GIL 5.8 billion export compensation, which was being withheld. I told Prof. Mbithi that Treasury could not afford such an amount, as we would further overdraw the Ministry's P M G account, which was the only possible source of funds. He instructed me to consult with the Governor of the Central Bank and find a way of sorting out the problem. I called the Governor of the Central Bank of Kenya, Mr. Eric Kotut and sought his advice on how we could comply with the presidential directive. I later walked over to the Central Bank building and discussed the matter with Mr. Kotut. The Governor advised me to give him time to find a way round the problem. On 19th April 1993 the Governor telephoned me and informed me that he had found a solution. I invited him to my office for further discussions. While in my office the Governor drafted the text of a letter which he told me if I sent to him the Central Bank would use to effect payment. The draft was in his own handwriting, save for the opening word "please" which I inserted as matter of courtesy. I gave the letter to my secretary who typed it. I then signed the letter. (**Exht. 104 pg.1**). Mr. Kotut then used my telephone to summon Mr.

> Eliphaz Riungu the deputy governor to my office. He explained to him that the government required me to make a substantial payment and I required the assistance of the Central Bank to do so. He then handed the letter to him and instructed him to comply. He told Mr. Riungu that the matter was confidential and utmost care was to be taken. Mr. Riungu left with the letter. I did not follow up the matter with the Central Bank once my letter was dispatched"

389. Why Dr. Koinange should feel obliged to investigate a matter not of his direct concern merely because of a report in the press is not readily explicable. That there was a telephone conversation with Prof. Mbithi is admitted by that gentleman, although he was rather vague in his evidence. He stated **(at pg. 7823)**

> "In the Mombasa season basically September, the Head of State phoned me. He told me he had been looking for Dr. Koinange because of something urgent to do. He told me: "Find him and tell him to transfer the 5.8 billion through the CBK" He told me that it was urgent and it must be done by 5 p.m..... I passed on the message to Dr. Koinange."

390. The date is obviously a difficulty, although without any papers having passed over his desk and bearing in mind the lapse of time this is possibly not inexplicable, but he could have conflated two transactions.

391. Next there is the question of the request to Mr. Cheruiyot. Dr. Koinange alleges that Mr. Cheruiyot confirmed that a substantial amount was still owing to GIL. In fact the letter to which he refers, dated 19th April, 1993 from Mr. Cheruiyot [**Exht.105 pg. 1**) reads:

> **Export Compensation**
>
> "As instructed, the outstanding export compensation vouchers which are held by our accounts section total upto Kshs. 1,475,243,855/70.
>
> We are still receiving fresh claims and the officials of GIL have stated that as far as they are concerned, the total amount outstanding is about Kshs 1.8 billion. We have asked them to give us details on how they have arrived at their figure.
> The details of the vouchers held by our accounts section are listed in the attached schedule. (our emphasis).

In no way is this a statement that the sum mentioned or any sum was in fact outstanding nor does it bear any relation to the amount to be paid.

392. When Pattni gave evidence he tried to justify the whole KShs. 5.8 billion as export compensation. However in his statement (**Exht. 154 pg. 79**) he tied this up to the KShs. 4.8 billion allegedly spent on the 1992 election. His statement that EBL was "under pressure to repay the money it had borrowed" was correct to the extent that it had borrowed from CBK by failing to pay up on its foreign exchange spot contracts. He produced a schedule which added up to Kshs. 5,805,718,864/- (**Exht. 154P pgs. 90-91B**). This contained a figure of KShs.1.6 billion in respect of alleged interest for which there was no justification at all.

393. In addition Pattni in his evidence admitted that the amount he was claiming was based at all times on a total of 35% for export compensation. His attitude was that he had a contract with Government to pay him that amount and he was not concerned whether there was a legal way of doing it. This was typical of his contempt for the law.

(a) Legality or otherwise of the payments

394. We were given considerable evidence on Treasury and other regulations to show how these payments were incorrectly done, and while this is correct, we do not think that we need to set the evidence out in detail. The legal and constitutional position is as follows, and we consider that this has to be set out at length since an understanding of the financial workings of the constitution is basic to a democracy.

395. The English revolution of the 17th century removed the right of the king to raise taxation without Parliament's consent. The American Revolution was set off in large part by the attempt of the British Government to tax the American colonists without the consent of their legislatures. In the United States Constitution, the right to pass money bills is vested in the House of Representatives, and in Britain it is in the House of Commons.

(b) Kenya Constitution

396. By section 48 only Parliament can pass a money bill, which is one for the imposition of taxation or for imposition of a charge on the Consolidated Fund or any other fund of government or for the issue of payment from any of such government funds. By Section 99 all revenues have to be paid into the Consolidated Fund, from which no money may be withdrawn except as may be authorised by the Constitution or under an Act of Parliament including an Appropriation Act or a vote on account under Section 101.

397. Authorisation of expenditure by Section 100 is by Appropriation Act leading to payment under separate votes for the services required as voted for by Parliament. By Section 103 debt charges of government and by Section 104 the salary of constitutional officers are charged on the Consolidated Fund. By Section 105 the Controller and Auditor-General has to satisfy himself that all withdrawals from the Consolidated Fund are authorised.

(c) Exchequer and Audit Act (Cap 412).

398. Section 5 of this Act was quoted to us as authority for the payment made by Dr. Koinange. The section reads:

> "5. (1) No expenditure involving a charge on the Consolidated Fund shall be incurred, and no sums due to the Consolidated Fund shall be remitted, without the general or specific authority of the Treasury.
>
> (2) Notwithstanding any general or specific authority which may have been given by him, it shall be within the discretion of the Minister to limit or suspend any expenditure so authorized if in his opinion the exigencies of the financial situation render such limitation or suspension necessary".

399. This is therefore not authority for any payment, and is merely a restriction on payment and a statement that the Treasury must know of

payments out of the Consolidated Fund. In no way therefore can this section be said to allow all the constitutional safeguards to be overridden by a single person.

400. None of the provisions of the Constitution were complied with in making the payment of the Kshs.5.8 billion and it was therefore both illegal and unconstitutional. In fairness to Dr. Koinange it should be set out that in his evidence he did finally acknowledge the illegality of his actions.

401. Money paid illegally and unconstitutionally is of course recoverable subject to any defences such as limitation where applicable. Those involved in the payment are those who come within the ambit of this, and include anyone who conspired with another to effect the payment. In addition money illegally obtained can be traced into the hands of those receiving it knowingly, and even into the hands of those who did not have knowledge, but gave no consideration for its receipt. These therefore certainly include Dr. Koinange and Pattni personally and as director of GIL and EBL. Mr. Werunga is also implicated and knew that the transaction was suspect.

402. The involvement of others is not quite so straightforward. Dr. Koinange says that he involved Kotut in the payments and that it was Kotut who drafted the letters. Kotut denied this on oath. As we see it, it would have been extremely unusual for the P.S. Treasury to make payments which would normally be made by CBK without involving the Governor. This will have to be considered in our assessment of all the evidence concerning Kotut's involvement or lack of it in various happenings.

403. Finally, there is the question of the President. Mbithi as we have set out says he passed on a message from the President to Dr. Koinange although all the facts do not seem to fit. Dr. Koinange said that

the message he received was that the President wanted the Treasury to pay Kshs.5.8 billion as export compensation. It is possible the message was not as specific as that. It is also possible that it was. There is no clear evidence that the President asked for money to be paid which was not in fact due to Pattni or GIL, and it would certainly have been possible for Dr. Koinange to tell the President that the money was not due. However he did not do so. Elsewhere in this report we have discussed the respective roles of the former President and Dr. Koinange and we do not need to repeat it here.

404. Whatever the position of the President, the payment could not be considered as a government project since the government of Kenya included Parliament at least as far as money matters are concerned.

405. Whether any of the persons mentioned above were guilty of theft has to be considered although this is not something on which we can come to any final conclusion.

406. Stealing is defined as the taking fraudulently and without claim of right of anything capable of being stolen, or the fraudulent conversion to the use of any person other than its owner of any property. Anyone who takes property does so fraudulently if he intends to deprive the owner of it permanently. (Penal Code s. 268).

407. Money is capable of being stolen. In this instance there was an intention to deprive the owner (CBK or Government of Kenya) of the money permanently. The persons doing so did not make any claim of right in themselves, that is to say they did not believe or pretend to believe that the money was due to them. Whether they had any genuine belief that the money was legally due to someone else (Pattni or GIL) is a matter which a criminal court would have to consider. Firstly, it should have been apparent that there was no legal claim to the money in the manner in which it was paid out. Secondly, as set out above, Dr. Koinange

purported to rely on a letter from Customs which cannot be interpreted to be a statement that any money was actually due. All the foregoing has to be considered against what emerges in the discussion of Treasury Bills to which we now turn.

(G) TREASURY BILLS

408. Treasury Bills are short dated government debt paper. Their maturity dates do not exceed one year. They are sold by CBK on behalf of the government. They are of two types, the first one being ordinary whose purpose is to raise short term money for the Treasury to meet a budgetary deficit. The second type are known as Open Market Operation (OMO) bills, whose purpose is monetary policy operations.

409. OMO bills are generally bought through the Registrar National Debt. Whenever CBK wants to reduce liquidity in the economy it sells these bills to commercial banks. When it wants to increase liquidity it buys bills back from the banks. A Treasury Bill like a cheque, is a negotiable instrument, and a transfer of ownership may therefore be by endorsement.

410. Omo bills were sold by auction and could not be rediscounted. CBK was required to hold them until maturity **(Hansard – pg.16856)**. But on 22nd April, 1993 OMO bills worth Kshs.4,248,000,000 were bought before advertisement. The banks concerned were Delphis, Pan African Bank and Exchange Bank and the money went to GIL. The bills were redeemed at full value before their respective maturity dates and no penalties were raised. This was quite unjustifiable in view of the high interest being paid at the time. Ms. Kagane, testified that penalties were leviable at the discretion of CBK.

411 Special issue Omo bills started to be issued in about April 1993. These were not advertised but were sold to selected parties, mainly EBL.

412. When the special issues were started a special account known as "Treasury Bill Special Account" was opened to take care of the excess liquidity in the banking system. It was in the nature of a suspense account. Whenever an issue was due for redemption the PMG account was debited with the full amount of the particular issue, and the money was credited in the Treasury Bills Special Account to meet each holder's claim. (**Hansard – Pg.16866**). So when OMO bills worth Kshs.4,248,000,000 were rediscounted, it meant that PMG account was debited with that sum and the bank accounts of commercial banks concerned with CBK were credited with the respective face values of their bills. Ms. Kagane testified that this step was unusual and cost the CBK Kshs.216.1 million. Had the usual penalties for premature redemption been charged CBK would have earned that amount. Here below is a tabulation of the bills which were prematurely redeemed:

Special Number	Bank	Amt in M. Shs.	Date Purchased	Maturity Date	No. of Days	Status
001224) 001225) 001226) 001227) 001228)	PAB	250	15/4/93	28/4/93	13	SI
007698) 007699) 007700) 007701) 007702) 007624) 007823) 007822) 007821) 001193) 001194) 002144) 002145)	PAB	430	13/4/93	5/5/1993	22	SI
001237) 002155)	PAB	150	15/4/93	13/5/93	28	SI
007790) 007793) 007898) 007899) 001239) 001240) 002176) 002179)	PAB	580	15/4/93	26/5/93	43	SI
007770) 007778) 007785) 007786) 001238) 001275)	EBL	90	15/4/93	28/4/93	6	SI
007704) 007707) 007829) 007830)	EBL	80	14/4/93	20/5/93	28	SI
007897) 001241-42) 002181-83)	EBL	520	15/4/93	28/5/93	36	SI
007626-30)	EBL	50	22/3/93	19/6/93	58	SI
014403-5) 009053) 007637) 007764-7) 001147-51) 002087-91)	EBL	848	7/4/93	19/6/93	58	SI
002151-52) 001221-23)	DBL	350	15/4/93	28/4/93	6	SI
001230-36) 002153-57)	DBL	900	15/4/93	13/5/93	21	SI
	Total	**4,248**				

413. Ms. Kagane also testified that some of the holders of the bills did not take back their money upon maturity of their respective OMO

bills. Instead they rolled them over in order to earn interest. Interest rates rose fast from about 23% in April, 1993 to about 70% in August 1993.

414. In his statement to the police dated 27th August, 1994 Dr. Wilfred Koinange, a former Permanent Secretary in Treasury, (**Exht. 137A pg.1**), states that the 15% ex gratia payment made to GIL was discussed in Treasury and CBK and that a decision was taken to regularize the "situation and method of payment through Treasury Bills was adopted. On that basis instructions were issued to the Central Bank through 3 (three) secret letters to effect the payments."

415. Dr. Koinange's remarks in a way agree with the evidence of Mr. Oyula, a former financial secretary in the Ministry of Finance, who testified that:

> "My Lords I said earlier that around November in that year (1993), the Accountant General, Mr. Kibunja, had instructions from the PS to get the amounts reflected in the debit note transferred from Deposit Account to the Consolidated Fund Services (CFS) Public Debt Account under Treasury bills interest account." [**Hansard – Pg.6288**].

Later still the witness said:

> "My Lords, it was now shown as Government interest on Government borrowing, which was not the true position.
> ...
> My Lords, you are showing that the Government had paid interest on a borrowing that never existed. Here, the account that was affected was the account on interest on Treasury bills, which anybody, looking at figures, would think that the Government paid huge interest on the Treasury bill borrowing which was not the correct position." [**Hansard Pg.6289**].

416. The witness further testified that the Accountant General called him, instructed him that a decision had been made to transfer from Deposit account to CFS Public Debt account, a total of Kshs.3,982,655,311.00 and that he should accordingly give effect to it. The witness testified that he complied but made a written protest as follows:

Dr. W. Koinange
P.S.

I was asked by Mr. Kibunja to transfer the following debits which are appearing in our Deposit Account to CFS account.
Debit for Kshs.2,821,080,943
Debit for Kshs.1,161,574,368
We have done this but the effect of this transfer will be a high expenditure reflected under CFS account.
I hope you must have discussed this before arriving at this decision.
Submitted for your information please.

J.M. OYULA
PRINCIPAL ACCOUNTS CONTROLLER
29-11-1993" **[Exht 107A Pg.171]**

417. We note that the money was part of the Kshs.5.8 billion paid discreetly out of PMG account to GIL via the Kenya Commercial Bank Ltd. We earlier stated that special issues commenced around April, 1993. It was during the same month that payment of the Kshs.5.8 billion commenced. We think that special issues were started and rolled over several times to raise interest to meet the illegal payment of the Kshs.5.8 billion. They created an opening for taking out money from CFS account without having to seek Parliamentary authority and the approval of the Controller and Auditor General.

418. Ms. Kagane in her statement to the commission states that the Deputy Governor, Mr. E. Riungu, had directed that she liases with Mrs. Mochache of Audit department of CBK to advise on how book keeping at CBK would be kept to conceal the non-levying of penalties for premature redemption of certain OMO bills. Ms. Kagane further testified that Mrs. Mochache and herself declined to do so on the ground that doing so would be tantamount to false accounting. In his minute to the Chief Banking Manager, dated 26th April, 1993, Mr. Riungu implies that CBK had made a mistake in issuing the bills for periods he considered long. So in his view the books needed to be adjusted to reflect the correct position. This is what he noted down:

"CBM
We were to issue short dated bills which are more marketable to banks. These particular ones were to mature

on 22.4.93 and books were to be adjusted to reflect the maturity date.
Sign
26/4/93" **[Exht. 170 – Pg.16]**

419. It is significant to note that after that note the Development Division of CBK under which National Debt department fell, often wrote memos to the latter requiring it to issue short dated OMO bills which on maturity would be rolled over. In other instances the memo would require the National Debt section to cancel the bills on maturity and re-issue others of the same amount to mature on certain given dates. **(see Exht. 170 pgs. 5 and 6)**. The motive was to earn as much interest as possible, presumably to meet the debit of Kshs.5.8 billion in the PMG account, as earlier on stated.

420. Why were the special issues introduced when they were? The answer is supplied by Dr. Koinange, the PS Treasury at that time. The basis of his remarks is a letter to him from the then governor of CBK, Mr. Eric Kotut, dated 9th March, 1993. **[Exht. 137c]**, whose body reads as follows:

"GOVERNMENT OVERDRAFT AT THE CENTRAL BANK
I wish to refer to the recent discussions with IMF regarding the Government overdraft at the Central Bank. It was agreed that the Government will maintain an overdraft of not more than Kshs.500 M. at the Bank, and that any excess over this amount will be taken up by the Central Bank in Treasury Bills and Bonds. The discount rate to be applied will be the highest accepted at the tender preceding the conversion of the overdraft into bills or bonds.

Yours Sincerely,

Sign.
E.C. KOTUT
GOVERNOR."

On this issue Dr. Koinange testified as follows:

"We had already agreed that the government should not withdraw more than Kshs.500 million in their account. Knowing that we were very unlikely to be able to live within that limit, we had given the CBK a mandate for them to issue Treasury Bills without advertisement and that is how that was going to be resolved."
[Hansard – Pg.8981]

421. The secret withdrawal of Kshs.5.8 billion has to be seen in that light. To deal with the excess liquidity there had to be a mopping up operation. Hence the issuance of these bills which as we stated earlier were limited to commercial banks. To succeed, high interest rates had to be offered to the few favoured banks. This point came out clearly when Mr. Gatonye, one of the assisting counsel, cross-examined Dr. Koinange. The cross-examination proceeded as follows:

"Gatonye:	And one of the main ways you went about mopping up the operation was to give very high interest rates; so that people would buy treasury bills and that way, remove excess liquidity from the market. Is that true?
Dr. Koinange:	That is true.
Gatonye:	In doing so very high interest rates were given?
Dr. Koinange:	Correct
Gatonye:	Sometimes it reached 82 per cent ?
Dr. Koinange:	Correct. **[Hansard – Pg.9059 – 9060]**

422. According to Dr. Koinange it was CBK to determine when the bills would be issued as it maintained the PMG and other government accounts. So, the CBK would issue the bills whenever it realized that the government had overdrawn its account beyond the Kshs.500 million. Apparently the amount of the issue would be determined by the extent of the overdraw.

423. It is noteworthy that later on at a meeting with the Former President, at State House, Mombasa, which was also attended by among other people, the Governor of CBK, Mr. Cheserem, and the Minister for Finance, Hon. Mudavadi, Dr. Koinange rehashed the genesis of the special issues. In the notes he used to brief the former President, Dr. Koinange has penned in pertinent part as follows:

> **"In 1993 the only exporter [of Gold and diamond jewellery] was complaining and demanding payment of 15 per cent and interest of the unpaid amount. After consultation with Central Bank of Kenya, it was decided the best way of effecting payment would be through Treasury Bills. This for the Treasury/Government, had the following advantages. There was no cheque that would be issued to the company.**

> The amount was to be absorbed in the loss accruing from excess liquidity mop up operations. It would, in the transfer of bills, help the National Bank of Kenya and Transnational Bank which were in major financial problems then. It was decided to use a big bank with great volume movement to avoid drawing attention. On that basis, Kenya Commercial Bank was chosen. Instructions were issued by Treasury to CBK to effect nine and KCB..." **[Exht. 137D Pg. 109]**

424. The notes are incomplete and we do not know, and Dr. Koinange was unhelpful in indicating what else he stated in his notes. But what is clear is that there was anticipated loss in special issues operations or at least engineered loss to conceal the debit of Kshs.5.8 billion in the PMG account.

425. In conclusion, we think that the special issue bills were started when they did for two main reasons. First, to mop up excess liquidity in the economy caused by the injection of Kshs.5.8 billion into the economy. Secondly, to open a way for accounting for the Kshs.5.8 billion which was irregularly and unconstitutionally taken out of PMG Deposit account. In the course of the scheme GIL made huge sums of money from the government using government money which had been irregularly and unconstitutionally paid out of CFS account. The P.S. Treasury Dr. Koinange, the Governor and his deputy Mr. Riungu, were personally responsible for this. In view of what we have stated above, Dr. Koinange's assertion that he was ordered by the former President to pay out the Kshs.5.8 billion is doubtful. He and the Governor of CBK, among others both in Treasury and CBK, were the economic managers. If as he said the issue of the payment of Kshs.5.8 billion was discussed and a decision was reached to pay it out in a discreet manner it is only fair that they bear the responsibility for the illegal payment.

(H) PAN AFRICAN BANK LTD

(a) Formation and shareholding

426. What happened in and to this bank is central to a large area of our investigations, so we attempt to set out its story. The bank was

incorporated on 24th December, 1981 as a private company and was licensed as a bank shortly thereafter. The subscribers were S.M.W. Charania of Mombasa and Mohammad Aslam of Nairobi. Although Mr. Charania held shares in 1982, he appears to have dropped out before 1987, and the company together with Pan African Credit & Finance Ltd and Pan African Building Society were part of the large group of companies owned by the Aslam family.

427. The shareholding of the company was split into management and ordinary shares, the ordinary shareholders having no right to notice of company meetings nor any say in the management of the bank. In July 1983 there were 8,750 management shares, the majority held by Plaza Investments Ltd an Aslam family company, and there were 5 ordinary shareholders. On 2nd January, 1986 there was filed a Return of Allotments detailing allotments made on 12th February, 1985. The return shows the allotment of ordinary shares to:

"Mr. Hedam (Businessman)	P.O. Box 40530, Nairobi	5,000
Mr. Abraham K. Kiptanui Comptroller)	P.O. Box 40530, Nairobi	1,000

These two persons continued to be recorded as shareholders in the Annual returns of 1986, 1987, 1988, 1989, 1990 and 1993 (the returns for 1991 and 1992 are missing). The total issued share capital in 1993 was 50,249 shares of 2,000/- each, so their share capital was only slightly over 10% of the issued capital.

428. In the annual return for 1993, stated to be made upto 31st January, 1993 and filed on 24th March, 1995 the management shares held by Plaza Investments Ltd and Kimya Investments ltd totalling 24,249 are shown as having been transferred on 17th March, 1993 to Pansal Investments Ltd and M.H. da Gama Rose. This will be seen to be important in the context of the question whether the bank was actually sold to Pattni's company on the date in question.

429. Mr. Mohammed Aslam was the executive chairman and managing director of this bank from its incorporation until his death on 18th December, 1991, when Ahmed Raza Aslam took over until 10th February, 1992 when G.W.W. Cunningham was appointed statutory manager. Subsequent changes will be dealt with later.

(b) Pan African Credit & Finance Ltd.

430. This company was in fact incorporated earlier than Pan African Bank Ltd, on 26th June, 1980. The subscribers were H. Da Gama Rose and S.B.R. Shah. On 21st August, 1981 S.M.W. Charania, C.J. Kirubi and Mohammad Aslam were appointed Life Directors. On 6th February, 1981 4,500 management shares were issued to Plaza Investments Ltd and Charania Holdings Ltd. The company also had ordinary shareholders.

431. The situation remained substantially unchanged until 1st August, 1989 when Pan African Bank Ltd acquired all but 2 of the 12,000 management shares and all but 250 of the 8,000 ordinary shares, and thereby the company became formally a subsidiary of Pan African Bank Ltd. Mr. Mohammad Aslam continued to be a director till his death when Ahmed Raza Aslam took over.

A notification of change directors filed on 19th July, 1993 recorded that with effect from 17th March, 1993 all the directors resigned and were replaced by Nader Akrami, Bupesh Rana and Mukesh Vaya all associates of Pattni. Nader Akrami gave his other directorships only as Pansal Investments Ltd. This again bears on the sale to Pansal.

(c) Uhuru Highway Development Ltd

432. In 1978 Uhuru Highway Development Ltd was incorporated as a private company and on 6th April, 1983 the company was issued with Title to L.R. 209/35/4. It appears that Mr. Mohammad Aslam wanted to

go into the hotel business and in March 1983 Pan African Bank agreed to buy the shareholding then owned by Rose -Tip Investments Ltd in the company. The transfer was effected on 27th April, 1983.

433. An agreement for the construction of a hotel on the above property to be known as Le Meridien, Nairobi was executed on 18th September 1986 between Mohammad Aslam as the new executive chairman of the company and Societe des Hotels Meridien for the latter to assist in the design, construction, equipment and decoration of the proposed hotel.

434. At an ordinary general meeting of the company held on 12th February, 1985 the fully paid up capital was set out as follows:-

Mohammad Aslam	1020
H.E. Daniel arap Moi	800
C. Kirubi	80
W. Murungi	60
G. Lindi	40
Total	2000

The President's share was therefore 40% of the capital.

435. There is still a mystery surrounding Uhuru Highway Development (UHDL). The company file was not produced before us nor is it apparently now available in the Companies' Registry. Mr. Pattni produced two share certificates (**Exht. 154G pgs. 3 & 4**). The first in its unaltered form is certificate No. 6 for 180 shares of Kshs.200/- each dated 4th September, 1986. The certificate was originally made out in the name of H.E. Daniel Toroitich arap Moi, the box number shown being 40350, Nairobi. The name has a line through it, and above it is written Hotel Enterprise & Development Management Ltd. There is a signature alongside this alteration which appears to be of the person who signed the original certificate as Secretary. There is no date on the alteration.

436. The second certificate is marked No. 9 for 80,000 shares in the company dated 13th March, 1989 in favour of H.E. Daniel Toroitich arap Moi and it is altered in the same way as the certificate above. It

should be noted that Hotel Enterprises and Management Ltd was apparently incorporated on 16th March, 1993.

(d) National Oil Corporation of Kenya Ltd

437. From at least 1989 Pan African Bank was involved in financing oil imports of National Oil Corporation of Kenya Ltd (NOCK) a wholly owned government body.

438. The letters of credit issued by NOCK for the payment for imports of crude oil were guaranteed by the Kenya government. In addition deposits were received from many government agencies including the NSSF.

439. The bank made loans to various individuals and groups including large amounts to related companies. Many of these were contrary to the prohibition of advances to officers and associates, and some of them exceeded the permitted limit of borrowing, at that time of 100% of the capital and unimpaired reserves of the bank (**Banking Act Section 10**).

It was largely NOCK and the unauthorised lending which brought the bank down.

(e) Death of Mohammad Aslam

440. Mr. Aslam died on 18th December, 1991. Before his death construction of Le Meridien Nairobi had began. UHDL used loans from Pan African Bank for that purpose. The borrowing by UHDL had increased before Aslam's death until it was over Kshs.360,000,000/- an amount which was wildly over the limit allowed by section 10 of the Banking Act (about 4 times over in fact).

441. NOCK was not paying on its letters of credit and the government was not paying on its guarantee although CBK allowed the bank to run an overdraft. The size of the CBK overdraft caused concern in

November, 1991 when Mr. G. Ongaya of Bank Supervision Dept. on 28th November, 1991 informed the Governor of what he was trying to do (**Exht. 143B pg. 6**). By letters of 29th November, 1991 and 27th December, 1991 the bank set out the position to NOCK.

442. The trading account had been continually overdrawn since March 1991. The level of overdraft of NOCK was such that the bank had had to allow temporary overdrafts to NOCK in order to avoid default on the letters of credit and the bank had as a result incurred penalty debits from CBK.

443. By a letter dated 2nd December, 1991 the Chief Manager of Pan African Bank wrote to Head Office **(Exht. 145B pg. 36**) setting out the position of UHDL. This was that the overdraft was at KShs 258 million, 200 million above the agreed limit. Although a draft legal notice signed by Professor Saitoti and dated 31st July, 1987 was produced by Mrs Mwatela (**Exht. 145B pg. 20**) we have confirmed that this was never published, and accordingly the bank continued to be bound by the borrowing limits in the Banking Act.

444. The lending of the bank was set out by G.W.W. Cunningham (**Exht. 145B pg. 47-58**). This shows illegal lending to persons or connected groups in excess of 100% of the capital and reserves of the bank totalling KShs. 1,220,000,000/- and to shareholders, directors and their associates totalling KShs 1,138,926,000/-.

445. By memoranda dated 29th November, 1991 and 20th December, 1991 (**Exht. 145B pgs. 107 & 105**) the chairman of the bank was told of the increasing financial difficulties which showed an overdraft with CBK of KShs. 250 million and a total shortfall of KShs. 650 milion. The position of the bank as at 31st March, 1992 was set out by the auditors Kassim-Lakha & Co in their report of 16th March, 1993 (**Exht. 145B pg. 113**) as follows:

> "During the period (the 15 months to 31/3/92) the company made a loss of KShs. 815,256,000/- and the share capital and unimpaired reserves show a deficiency of KShs 683,311,000/- at 31/3/92. In the absence of any evidence of fresh capital injection to comply with the minimum capital requirements under the Banking Act, the company is insolvent and unable to continue its operations as a going concern".

446. The legal effects of this state of affairs were several. Firstly as the bank had no capital or unimpaired reserves, it could not legally lend money (Banking Act, Section 10). Secondly, the bank being unable to pay its debts should have been wound up under the Companies Acts 219. For a company to continue to trade while insolvent exposes directors, officers and managers to penalties which may include being made responsible for the debts of the company (Companies Act, ss 323, 324, 325). The obvious and the only legal course was liquidation.

447. Instead, on 10th March, 1992 Mr. Cunningham was appointed statutory manager of the bank and its subsidiaries by a letter signed by Mr. Kotut, the then Governor of CBK. Apparently no approval of the appointment was obtained from the Minister as was required by Section 34(2) of the Banking Act. The statement of the liquidator of the bank Mrs. L.A. Wambete was as follows (**Exht. 143 pg. 15**)

> "The bank's statutory management policy was to continue lendings to Uhuru Highway Development Ltd. The object was to create a high value asset with high returns that would liquidate the company's debt with the bank".

448. This was because the hotel was still not completed and is certainly true as Cunningham continued to complete the hotel using funds obtained from CBK through the overdraft of Pan African Bank with CBK. He was certainly encouraged and pressured to do so by Kilach right up to the time of his removal.

449. On 15th February, 1993 Kilach wrote to Cunningham (**Exht. 138K pg. 118**) as follows:

> "As you are aware we are all anxious to complete the UHDL project and get it out of our way ..... In your capacity as PAB Manager (you have) played the overseer role in the UHDL =project...."

Pattni made a complaint against the management by Cunningham but this is not our concern as will become apparent when the source of the funds going into Pan African Bank is considered.

(f) The take-over of Pan African Bank Ltd

450. There is considerable disagreement in the evidence before us about how and at whose insistence the take-over of the bank was initiated. Pattni in his statement (**Exht. 154 pg. 92**) makes two totally inconsistent allegations in his opening paragraph. He said:

> "The issue of Pansal Investments came into being and my knowledge again during the 1992 General Election time (i.e. Dec. 1992). It was first mentioned to me by Mr. Eric Kotut during one of our usual meetings by the pool side at my Kitsuru home some time in August 1992".

He then went on to make allegations about how he was forced to agree to the take-over.

451. Mr. Kotut interestingly had nothing to say about the bank in his statement to us (**Exht. 138**). His advocate in his final submissions to us tried to make out that questions of the bank and its take-over were outside the terms of our reference.

452. In his oral evidence to the Commission (**pg. 9457**), Mr. Kotut denied having asked Pattni to take over the bank and denied knowledge of the investors in Pansal. Pattni's evidence is much "improved" by his knowledge of what happened subsequently. On the other side it is difficult to see how the Governor could be ignorant of the details of the take-over of a bank which had obviously been of concern to CBK.

453. The question is however not one which we have to come to any final conclusion on. This is for the reason that Pattni went into the

deal for Pan African Bank with his eyes open. His main purpose was to acquire the asset of the Grand Regency Hotel and he has not wavered in that. He stated definitely to us that he owns the hotel and this is his major objective. It is one of the few assets which cannot be and has not been removed from Kenya. On 11th November, 1992 (**Exht. 138K pg. 264**) Kilonzo & Co. advocates wrote to the Governor as follows:

> **Re Pan African Bank Ltd: Uhuru Highway Development Co. Ltd**
> "We refer to the above matters and the discussions held with the undersigned and Mr. Kiptanui on 9/11/1992 and shall be obliged if you can expedite the delivery to us of the necessary financial statements pertaining to the two companies to facilitate further discussions along the lines concerned. It has been mutually agreed that this matter is urgent and accordingly please oblige".

On this letter is the hand-written notation:

> **Mr. Kilach**
> Please supply the requested information to Mr. Kilonzo. 12/11 (**Mr. Kotut's initials).**

454. Had Mr. Kotut not known of the identity of Kilonzo's clients he had only to ask, but the notation clearly indicates prior knowledge of the negotiations.

455. The documents requested were supplied. An agreement dated 23rd January, 1993 was produced by Kilonzo & Co advocates between the Aslam companies and the estate of Mohammad Aslam of the one part and Pansal Investments Ltd of the other part (**Exht. 138K pg. 46**). The signitory for Pansal is Mr. A.K. Kiptanui.

456. A letter dated 23rd February, 1993 from Kilonzo & Co. to Pansal Investments Ltd (**Exht. 138K pg. 39**) recorded agreement reached on further matters and amended certain parts of the first agreement. A further supplemental and variation agreement dated 3rd March, 1993 was also produced between the same parties (**Exht. 138K pg 52**). The signature of Pansal Investments Ltd is Mr. M. Vaya and was witnessed

on 10th March, 1993 which was the earliest date on which the agreement could have come into effect.

457. Pansal Investments Ltd was registered on 10th March, 1993, the subscribers and first directors being Nader Akrami and Mukesh Vaya. The company was therefore in existence when the latest agreement came into force. There is nothing inherently wrong with this situation as agreements are regularly entered into for companies which are not yet formed, although it is common and better practice to refer to a company as being in formation.
This is recognised by Recital 2 of the later agreement which states:

> "2. Pansal was in the course of incorporation at the date of Sale Agreement and has since been formed and is entering into this Agreement (inter alia) to confirm and ratify the said Agreement".

458. Basically the agreement contained in these documents provided for the sale to Pansal the interests of the Aslam family including various companies, including the shares in Pan African Bank. One of the assets sold was the right of Trisis Holdings Ltd in Safariland Club Ltd, Naivasha. All indebtedness of the family to any of the companies taken over was also taken over.

459. The agreement provided for an initial payment of US $ 4million. On 12th March, 1993 Citibank confirmed that it was holding this amount in New York in Exchange Bank's account 36081316 which was a GIL account. On 17th March, 1993 this amount was transferred to the account of Menaker & Hermann account 186-938-61 on the instructions of Shapley Barret & Co advocates and Kilonzo & Co advocates (**Exht. 88B pg. 122-127**).

460. The balance of the purchase price was placed in an escrow account pending the finalisation of the terms of the agreement. The advocates concerned asked Shapley Barret & Co. to hold the funds jointly

with Kilonzo & Co. until they were informed that the obligations under the agreement had been performed, when the funds could be released as directed. On 9th March, 1993 Shapley Barret received 3 cheques totalling Kshs.783,000,000/-. These sums came from Exchange Bank, A/c No. 100141, which was a GIL account. **(Exht. 82 pg. 10]** The confirmation that the funds could be released was received about 19th March, 1993 and payments were made to the vendors on or about 22nd April, 1993 **(Exht. 90X pgs. 21 & 41)**.

461. Notwithstanding the foregoing the following immediate arrangements were made. On 17th March, 1993 Pansal appointed Nader Akrami to be Chairman and C.E.O of Pan African Bank **(Exht. 143A pg. 236)**. On 18th March, 1993 Cunningham's appointment as Manager, Pan African Bank was purportedly terminated by a letter of that date from J. A. Kilach, Director Bank Supervision Department. The letter stated:

> "This (the termination) has been necessitated by the acquisition of Pan African Bank by new investors who wish to assume full control of the management of the bank's affairs".

462. Although there is no provision in the Banking Act detailing how the appointment of a manager is to be terminated, on general principles, this should only be done by the authority which appointed him, that is to say the Governor with the approval of the Minister. This shows the contempt for the law shown throughout by Kilach.

463. On 12th March, 1993 Cunningham wrote to Plaza Investments Ltd discharging all its liability to the Bank **(Exht. 138K pg. 67)** and on the same date as manager Pan African Bank he also wrote to Plaza Investments Plaza Industries, Plaza Mining Industries, Thermit Skyline Allied Oil Services, Skyline Development, Sir Ali Muslim Club and Muslim Girls School similarly discharging their debts.

464. The manager who was subsequently appointed to Pan African Bank Mr. P.H. Shah commented in his report to the Governor dated 9th June, 1993 (**Exht. 138L pg. 214**) as follows:

> "Prior to my appointment, (19/5/93) the Bank's management was under the control of a Mr. N. Akrami, who purportedly represented himself as Chairman and Chief Executive but had not been formally appointed as a director at that time. Mr. Akrami was a representative of the new investors, who had agreed to acquire the entire management shareholding from the Aslam family and others. However, the formalities for transfer of shares and appointment of new directors was not complete at time of my appointment as Manager. It was essential to ensure these were completed as soon as possible to enable the restructuring of the Bank to progress as explained in the following paragraphs. The share transfers have since been registered and the appointment of new directors effected from 17/3/93. These were formalised in July 1993 (share transfer forms and notification of new directors was received by the Bank on 15/7/93).

465. Mr. Kotut admitted in evidence that there was a gap between the removal of Cunningham as manager and the appointment of Mr. Pratul Shah. (**Hansard pg. 9465**) and he appeared to accept that this was improper.

466. Certainly his evidence is that the proposed sale of the bank (he did not appear to know who to) was not completed and never received his approval as Governor. To that extent what was stated by Mr. Shah as set out above was partially correct but the question is whether this was an oversight or whether it was deliberate. It should be noted that very serious financial happenings took place between these two dates of 18th March, 1993 and 19th May, 1993. Could the Governor possibly have been as ignorant as he makes out? Certainly Kilach was fully in the picture and in fact a chief actor in the whole scenario. It is unlikely at the least that he would have so acted independently from the Governor.

467. The financial position of Pan African Bank by 29th March, 1993 was as follows: It had an overdraft with CBK of 4.522.423,000/-. This was acknowledged by Pan African Bank (**Exht. 131A pg. 42**). This

was known to Pattni whose statement (**Exht. 154 pg. 95**) shows his knowledge that the bank was insolvent due to this overdraft with CBK and also that the value of Uhuru Highway Development was negative due to its enormous borrowings.

468. On 30th March, 1993 a sum of KShs. 1.800,000,000/- was paid into Pan African Bank being money which was raised by the cheque-kiting which had started immediately Akrami was placed in control of the bank. From the cheque-kiting a further figure KShs. 2,450,000,000/- was transferred to CBK on 1st April, 1993. Again on 5th April, 1993 a payment of KShs. 1.200,000,000/- was paid to CBK, out of cheque-kiting.

469. On 19th April, 1993 a payment of KShs.3,322,423,947/- was made out of the proceeds of the first two foreign exchange contracts of 15th April, 1993. So it is clear that money belonging to CBK was used for all the payments. (**Exht. 143 pgs. 18, 19 & 20**)

470. Pattni's own statement to the Commission is most illuminating on the question of Pan African Bank. It is clear that he did not intend to pay a penny of legal money for the bank, and from that statement it is clear that he did not do so. Firstly, according to him (**Exht 154 pg. 104 bis**) he expected Kotut to write off the debt to CBK of KShs.4,560,000,000/-. Secondly, he needed KShs.1,800,000,000/- working capital so he was allowed the direct credit facility or cheque-kiting to provide this. KShs. 1,800,000,000/- was paid in through cheque-kiting (**Exht. 154 pg. 105 bis**).

471. After he had reduced the CBK overdraft by KShs. 1,200,000,000/- he needed a further source of income and this was provided as he said through the foreign exchange contracts. (**pg. 107 bis**).

472. Lastly, in order to clear the CBK overdraft he surrendered funds from the KShs. 5.8 billion treasury payment (**pg. 105 bis**). It has to be emphasised that these are all admissions against own interest by Pattni himself and we are therefore entitled to take them at face value and rely on them. In fact we have to do so since every bit of evidence produced to us from all sources confirms that position.

473. It is implicit in Pattni's allegations that this was all done either with the connivance of or at the instigation of Kotut. For this there is little or no direct evidence and because of the view we take of the truthfulness or otherwise of Mr. Pattni, we find it difficult to say that he was telling the full truth. None of this of course affects the fact that the whole transaction for Pan African Bank and Uhuru Highway Development was a massive fraud using CBK'S own money to "buy" these assets.

(I) RECIPIENTS OF GOLDENBERG MONEY AND FUNDING OF 1992 GENERAL ELECTIONS

474. We have in **Appendix "N"** of this report shown some of the recipients of Goldenberg money which we were able to trace. These include payments to various individuals, firms and companies.

475. It is necessary to state right from the outset that some of these payments were perfectly legal and above board in that they were made either arising from services rendered or goods sold and delivered. In other cases the payments were purely transit in nature e.g. from one bank to another or from one party to another through a firm of Advocates.

476. However this Appendix is a necessary summary for two reasons. Firstly for the record in order to give an overall picture of the various known transactions involving Goldenberg monies. Secondly the record will hopefully assist in further tracing and follow up efforts by investigators in future. That is why in fairness to innocent parties the last column of the appendix headed **"REPLYING EXHIBIT"** shows the parties

who have responded to our queries to explain payments made to them. The actual exhibit referred to in the column will be found to contain the explanation.

477. During our hearing of the evidence related to the recipients of Goldenberg scandal proceeds we broadly categorized the recipients into two groups: Primary and Secondary recipients. This categorization has legal significance.

478. A secondary recipient in a monetary transaction does not know that the giver is other than the person from whom he receives the money. The giver is himself not known to and is unaware of the existence of a Third Party who receives the money. Therefore in a situation where A who is not known to C gives money to B who decides to give it to C unknown to A, C is a secondary recipient.

479. Mr. Pattni directly and through his companies were without doubt the initial recipients of all stolen Goldenberg monies which we have discussed at great length. In explanation of the destinations and whereabouts of these funds he produced **Exht. 154P**. This exhibit was a lengthy catalogue of various people to whom he claims to have given Goldenberg monies either directly or in the form of cars. In his testimony before us he stated that these payments were made during the 1992 General Elections. He alleged that he was closely connected to former President Moi, his personal assistant Joshua Kulei, former Vice-President Professor George Saitoti and many other KANU Cabinet Ministers, Members of Parliament and party officials spread all over the country. According to Mr. Pattni, it was agreed between himself and the former President that Mr. Pattni would directly and through his companies finance KANU in the 1992 general elections. A conduit system was then set up whereby Mr. Kulei would write chits at State House. These would be addressed to Mr. Pattni who would then pay money to the persons stated on the chits. At times he would be required to give the person a

vehicle and he would comply. On some occasions Mr. Kulei would allegedly simply telephone Mr. Pattni giving him the relevant instructions and Mr. Pattni would comply.

480. These payments were allegedly recorded in **Exht. 154P** which was a kind of general cash payment register belonging to Mr. Pattni. It was therefore a record evidencing all manner of payments to various persons. According to him some of these persons were being bribed in exchange of favours or were being given gifts. Mr. Pattni testified that he spend well over Kshs.4 billion in election related expenses.

481. He also suggested that the exhibit also contained genuine payments for forex-Cs, gold and diamonds. We submitted this Exhibit to the document examiner whose report (**Exht. 171**) seriously doubted its genuineness. The alleged written chits were not produced to support the contention that Mr. Kulei authorized the payments and car gifts as alleged.

482. But even without these unexplained gaps **Exht. 154P** is of no evidential value at all. The entries are alleged to have occasionally been made by Mr. Pattni himself and in the majority of cases by his brother Sanjay or his assistant Mr. Rezza. These gentlemen did not testify to confirm this allegation. We were unable to trace them. The persons who are alleged to have been given the monies did not sign the relevant entries in the register in acknowledgement. Without such acknowledgement or other supportive evidence it is difficult to conclude that they did infact received the alleged payments.

483. With regard to T-shirts and posters allegedly printed and paid for by Mr. Pattni on behalf of KANU the evidential connection is again missing. The authorization to Mr. Pattni to pay for them allegedly given by Mr. Kulei has not been provided and there is therefore no corroborative evidence to support this contention.

484. Mr. Pattni's contention that he purchased and gave cars to various politicians and KANU campaign functionaries on Mr. Kulei's instructions faced even greater evidential difficulties. Appropriate searches conducted at the motor vehicle registry disclosed that these vehicles were not and were never registered in the name of Mr. Pattni or his companies. But even more confounding is the fact that they were also never registered in the names of the persons to whom he allegedly gave the vehicles. From available evidence there is, therefore no connection between these individuals and the vehicles. Exhibit 154P is startling and spectacular but useless evidence.

485. As for Mr. Pattni's evidence in support of the exhibit we again repeat that Mr. Pattni was given to melodrama, gross exaggeration and at times outright perjury. Furthermore this evidence was selective and tailored to "fixing" those with whom he had a bone to pick. The fact that **Exht. 154P** shows that Mrs. Mwatela was given money by Mr. Pattni is particularly offensive. Mrs. Mwatela was the lone voice at the Central Bank of Kenya which courageously and consistently opposed the fraudulent activities of Mr. Pattni and his accomplices. He himself acknowledged that he never got along with Mrs. Mwatela. There is even evidence which we accept that he threatened to cause her dismissal from the Central Bank.

486. It is therefore ridiculous and absurd to suggest that he would in the midst of all this resentment give her a bribe. Furthermore in concocting this evidence Mr. Pattni did his home work very poorly. At the time he alleges to have given Mrs. Mwatela money at his offices she was immobilized following a road traffic accident during which she broke her legs. There are other examples which we have earlier alluded to which make Mr. Pattni's evidence without corroboration extremely suspect and unreliable. Accordingly his evidence in support of **Exht. 154 P** is worthless.

487. That is not to say that Mr. Pattni did not use Goldenberg monies to finance KANU in the 1992 general election. Indeed owing to his admitted proximity to President Moi, Prof. George Saitoti and many KANU politicians he probably gave KANU financial support. Mr. Evans Ondieki and several other KANU politicians have signed payment chits in **Exht. 154P** acknowledging receipt of money on behalf of KANU from Mr. Pattni.

488. It is not possible to ascertain the amount, nature and extent of such financial support without further evidence. It is also not possible to ascribe such support to particular individuals given the unreliability of **Exht. 154P** and Mr. Pattni's own evidence. But the statement that Mr. Pattni did give financial support to KANU is on the whole possible. However, the documents he produced in support do not justify the Kshs.4 billion he allegedly spend in that regard.

489. The evidence adduced against the alleged secondary recipients of GIL funds does not therefore mean that even if they received such funds they knew them to be stolen or GIL funds.

490. We must now turn to the category of persons whom we earlier described as primary recipients of GIL funds. A primary recipient understands straight away that he has received and is or was in possession of unlawfully obtained money or stolen money and property. In the eyes of the law he is as guilty as the actual thief. He is liable to criminal prosecution as well as to recovery of the stolen money and assets acquired therefrom or stolen property.

491. It is beyond question that Mr. Pattni, his brother Rohit, his associates and employees Akrami, Agostino and his co-director, Mr. Kanyotu received GIL funds which they knew to have been fraudulently obtained, stolen or otherwise unlawfully obtained.

492. Evidence was led on two other fronts to show that Mr. Pattni purchased or endeavoured to purchase properties and businesses from both Mr. Somaia and Mr. Nassir Ali. In respect of Mr. Somaia, Mr. Pattni was endeavouring to purchase shares in various companies in which Mr. Somaia had a controlling shareholding. They included:

(1) Block Hotel Holdings
(2) Block Hotels Limited
(3) United Touring Company
(4) Dolphine Holdings
(5) Dolphine Management Services
(6) Dolphine Investments
(7) Tourist Paradise Investments
(8) Marshals Enterprises Limited
(9) Marshals Investments
(10) Hoodside Limited
(11) Miwani Sugar Company
(12) Delphis Bank Limited
(13) Driscoll Limited
(14) Fifth Avenue Limited
(15) Pendula Finance Limited
(16) Safariland Hotel

493. Subsequently the alleged purchases have become the subject of protracted court proceedings between Mr. Somaia and Mr. Pattni. Similarly Mr. Pattni stated that he purchased World Duty Free Limited from Nassir Ali. But again the alleged purchase has become the subject of protracted court proceedings. Owing to the "sub judice" principle it is not possible for us to comment on these two court disputes.

494. We must however observe that if Mr. Pattni did purchase these assets he can only have done so with the proceeds of the Goldenberg fraud. We questioned Mr. Pattni on his sources of funds prior to the commencement of Goldenberg operations.

495. According to him (**Hansard pgs. 15359 – 15368**) he obtained overdraft facilities of Kshs.200 million from Kenya Commercial Bank and Kshs.50 million from Citibank as his alleged initial contribution to Goldenberg operations. But as he admitted in cross-examination this was clearly not his own money. It was money belonging to the banks which he was using for his operations and repaid using ill-gotten money. Finding that he could not claim that borrowed monies were his contribution Mr. Pattni then stated that his finances were also from his alleged previous exports. Again when we questioned him further (**Hansard pgs. 13369-15371**) he admitted that the so called exports were on paper made to his own companies and it was therefore not possible to verify their genuineness. Mr. Pattni also stated that his own family contributed to the business from savings and from investments in Gibraltar and shares in Lehman Brothers (**Hansard pgs. 15350 - 15354**). But apart from his own word no evidence was tendered to support these assertions. While it is possible that Mr. Pattni may have contributed money to the business from his personal savings and family sources such contribution can only have been negligible.

496. In our view available evidence has shown that Mr. Pattni did not and could not have had funds of this magnitude other than from Goldenberg fraud. Therefore there is no doubt in our minds that any funds paid to Mr. Somaia and any other person could only have emanated from the Goldenberg fraud. Mr. Somaia admitted receiving Kshs.1.4 Billion from Mr. Pattni. [**Hansard Pg. 2800**].

497. Mr. Somaia who is an accomplished businessman with extensive political and business connections in Kenya knew that Mr. Pattni was a purported gold and diamond jewellery exporter. He dealt with Mr. Pattni extensively and both of them admit to have had a commercial and social relationship. Whatever the result of the litigation between Mr. Somaia and Mr. Pattni and Mr. Ali it will be necessary for the Government to address itself to the matter in future. This is particularly

so because this is a matter which can only be properly addressed after the pending litigation is over and we shall therefore say no more about the same.

498. Mr. Rehmat Khan extensively appeared in many financial transactions both with Mr. Pattni personally and at Exchange Bank. The "Shimba Kay" account with Exchange Bank had many entries in his name. He denied knowledge of the operations of this account. In his testimony (**Hansard Pgs. 12876 and 12937**) he stated that his connection with Mr. Pattni and his companies was purely commercial. He stated that he would purchase minerals at the border town of Malaba from foreigners. He would then sell them to Mr. Pattni. But he immediately contradicted himself by also stating that the business actually belonged to GIL and he was some kind of commission agent or employee.

499. He claimed to have purchased minerals at the border post which were smuggled into the country without payment of duties and compliance with customs requirements. He stated that it was not his business to ascertain payment of duty as he purchased the goods on the Kenyan side after their passage through the border and he therefore "assumed" that duty had been paid and customs procedures had been complied with.

500. Mr. Rehmat Khan also stated that he transacted heavily with the Exchange Bank and GIL in Foreign exchange and Forex-Cs. But again he claimed to have no record of such transactions.

501. We found Mr. Khan to be evasive and feigning ignorance. He must have understood the purpose and goings on of the "Shimba Kay" account. He was paying money into that account and was often given cheques drawn against the account. He helped GIL to move foreign exchange off-shore. In our view he was part of a front pretending that GIL was exporting gold and diamonds. He was intricately involved in the

efforts of GIL of falsifying export compensation claims. He must be made to fully account for and to pay such monies.

502. We have stated elsewhere in this report that we held part of our proceedings in camera. In those proceedings we received affidavit evidence showing that the late Vice-President Hon. Michael Kijana Wamalwa when he was an opposition member of Parliament received Kshs.978,000/= from Kuber Sales Agency Limited. This company is owned by Mr. Pattni. The money was paid in cheques i.e. cheque No.001387 dated 10th January, 2003 in the sum of Kshs.88,000/=, cheque No.001394 dated 2nd February, 2003 in the sum of Kshs.450,000/=, cheque No. 001400 dated 10th February, 2003 in the sum of Kshs.200,000/=, Cheque No.001428 dated 19th March, 2003 in the sum of Kshs.110,000/= and Cheque No.001432 dated 31st March, 2003 in the sum of Kshs.130,000/. The Cheques were drawn in the names of Khaminwa and Khaminwa Advocates and Albert Khaminwa respectively. According to Dr. Khaminwa, Hon Wamalwa was indebted to a certain company and the firm of Rachier & Company Advocates had initiated legal recovery processes against him on behalf of that company. To forestall this Kuber Sales Agency Company Limited paid the above sum totaling Kshs.978,000/= to the firm of Rachier & Company Advocates through Hon. Wamalwa's lawyers M/s Khaminwa & Khaminwa Advocates. Hon. Wamalwa did not testify. As at the date when this matter arose he had already died. Had he been alive he would probably have had a good explanation for these cheques. Dr. Khaminwa's evidence was received because most of the cheques were in his firm's name.

503. The late Hon. Jaramogi Oginga Odinga also received Kshs.2 million from Mr. Pattni. This was in 1994. According to newspaper reports produced before us (**Exht. No. 154GG**) and the PAC report [**Exht. 38A**] Hon. Oginga Odinga readily admitted that he received the money from Mr. Pattni. Like Hon. Wamalwa, Hon. Oginga Odinga had died by the time evidence on this money was given. The circumstances under which the

money was given are unclear. In view of that we do not wish to say more on the matter.

504. Mr. Arthur Abongo Ndegwa testified before us. He was an officer in the Department of Mines and Geology. In 1991/1992 he oversaw the so called assaying of the alleged gold and diamond export by GIL. He set out to elaborately show how he examined the gold and diamond exports. In the light of all the evidence which we have received it is clear that the evidence was totally untrue. But it transpired that he was given a "loan" by Exchange Bank Limited to purchase a house. He admitted that he never repaid the "loan". Yet the loan was fully repaid for him by Mr. Pattni through Exchange Bank Limited. Mr. Ndegwa insisted that he was not aware of the payment. Yet he was not himself making efforts to repay the loan. Infact he did not make any repayment of the loan. Mr. Ndegwa's conduct was disgraceful and pathetic. Since he has freely admitted not to have repaid the money to Exchange Bank Limited any records showing that he repaid are falsified and fraudulent. We think that the house was purchased for him as a bribe to assist GIL in its illegal dealings. Mr. Ndegwa should be investigated in connection with bribery and abuse of office.

505. Panther Investments is a private company with Mr. Pattni and Mr. Philip Moi as shareholders and directors. Ample evidence has been adduced to show that it made false pre-export finance applications and helped GIL to receive export compensation monies. Indeed so audacious were its claims that they involved such ridiculous alleged export items of **"pangas",** camels and cows. Mr. Philip Moi through his counsel Mr. Billing went to great lengths to dissociate himself from the company by showing that he had resigned from the same on 1st March, 1990 (**Exht. 65 Pg. 33**) while the claims in question were made in 1992. Nevertheless it turned out that the alleged document of resignation was registered on 20th April, 1995 (**Exht. No. 65**).

506. This would in effect mean that at the material time when the false claims were made by Panther Investments Limited Mr. Philip Moi was a Director and Shareholder of the company. As directors they should be made to account for and possibly repay for fraudulent pre-shipment finances paid to Panther Investments Limited.

507. Mr. Muzahim Salim Mohammed is a Nairobi businessman and specifically a car dealer. Muzahim made serious bribery allegations against several staff of this Commission including the Chairman, a Commissioner, Joint Secretary and one assisting counsel. In dealing with his matter we have cautioned ourselves that such allegations, which were later found to be false by the Kenya Anti-Corruption Commission; should not in any way influence us in our findings. We have it in evidence that Muzahim was a long time friend and business associate of Mr. Pattni. They eventually fell out under very acrimonious circumstances but that is not relevant to this enquiry. What is relevant is that during their friendship Mr. Muzahim received colossal amounts of money from Mr. Pattni and his associated companies.

508. According to Mr. Smith records at Exchange Bank Limited (**Exhts. 81G & 82**) clearly show that Mr. Muzahim received a total of Kshs. 199,420,850.00 from Mr. Pattni, GIL and other Pattni associated companies. While cross examining both Mr. Smith and Mr. Pattni his lawyer Mr. Nyauchi hinted that Mr. Muzahim sold some motor vehicles to Mr. Pattni.

509. He was served with an adverse notice concerning the money paid to him but he did not appear before us as a witness. Nor did he offer any reasons for his failure to do so. In view of this we think his role in the Goldenberg Affair should be investigated and he be made to account for the money.

510. Mr. Pattni gave evidence to us that he gave the sum of Kshs. 20,000,000/=to Multiphasic Company. A question was raised alleging that this company is closely associated to Hon. Paul Muite. But Pattni denied this. He was shown newspaper clips in the past where he alleged that Hon. Muite had extorted Kshs. 20 million from him (**Exht. 154GG**). But he adamantly stated that that was a different matter unrelated to GIL or to the said company. In evidence no reason was given as to why Mr. Pattni should give this company Kshs. 20 million. It had not sold any goods to him and it had not rendered any known services. No director of the company or any other representative appeared before us to explain why the company would receive this amount from Pattni. Nor did Mr. Pattni explain his change of mind from what he had declared through the media. We think that this was GIL money and the circumstances and the suspect manner of the payment indicate that the parties were aware that this was Goldenberg money. The company was served with an adverse notice. No officer of the company however, appeared to explain the payment to it. Hon. Muite had initially expressed a wish to testify on this, but later changed his mind arguing that in view of Mr. Pattni's evidence it was no longer necessary to do so. We think it is necessary that further investigations be undertaken to determine who the directors of the company were at the material time and why the payment of Kshs.20 million was made to it.

511. Lima Limited is said have received Kshs.6,300,000.00 from GIL [**Exht. 81D**] According to records availed to the Commission by the Companies Registry the shareholders and directors of this company are Hon. Kipyator Nicholas Kiprono Biwott, Hon. Gideon Kipsielei Moi, Mr. Tasneem Ashraf and Mr. Vaizman Aharoni. Despite a request by the Commission neither the company nor the above named people bothered to explain what this payment was for. The money should be recovered either from the company or the said people as the case may be.

512. Kshs.1,500,000.00 (**Exht. 154D Pg. 108**) was wired to Mr. Mark Too. Mr. Pattni confirmed this to be GIL money. This was not disputed by Mr. Too. The reason given for the payment is that it was harambee money. In view of the harambee culture in the country we think that receipt of the money was innocent.

513. Direct payments were also made by Mr. Pattni to Mr. Evans Ondieki (**Exhts. 154p and 154D**). Mr. Pattni explained that this was GIL money given to Mr. Ondieki for the 1992 election campaign for KANU. Mr. Ondieki did not deny these payments or explain them in any other way.

Mr. Philip Moi received Kshs.1,421,384.00 from Mr. Pattni (**Exhts. 81G and 82**) in unexplained circumstances.

514. Similarly Mr. Gideon Moi did receive Kshs.8,000,000/= from Mr. Pattni (**Exhts. No. 81G and 82**). Mr. Gideon Moi through his advocates denied knowledge of the payment. But in the face of a clearly documented cheque such a flat denial is not useful to him. The payment has not been explained.

515. We have evidence (**Exhibit No. 142**) that M/s Mutula Kilonzo Advocates received Kshs.7,000,000/=. They tendered an explanation (**Exht.185 Pg. 19**). The explanation was to the effect that they have no recollection of the payment or what it was in respect of. They also said that they cannot trace the same in their records. Although this was a large payment it is most probable that it could not be traced in their books or there is no recall on their part regarding the same. This is because we received evidence that some cheques due to Messrs:- Hamilton Harrison & Mathews Advocates, were cashed through an account which had no connection with the firm. The matter should be investigated further and the money be possibly recovered from the firm of Advocates if it is shown that indeed the firm received the money.

516. Messrs Habib Omar Kongo, Geoffrey Mecha and Professor George Eshiwani received Kshs.4,448,000.00, 750,000.00 and 12,000,000.00 respectively (**Exht. No. 142**). Like the other payments discussed above these monies were drawn from the Steadfast account described by Mr. Pattni as the election account. The monies were then paid out through K.S.K.P. account. The payments were made between 1st November 1992 and 24th December 1992. It is possible that the payments were made in connection with the 1992 KANU election campaign.

517. Similarly during this period Mr. Chris Kirubi allegedly received Kshs.5,000,000.00 (**Exht. No. 81G**) and Mr. Said Hemed Said Kshs.4,000,000.00 (**Exht. No. 81G**).

None of these payments were explained by the recipients although Mr. Pattni was categorical that the payments were related to the election campaign. While Pattni alleged that he spent Kshs.4.8 billion on the 1992 elections, the figures he produced in Exhibits 142, 154D and 154P as added up by Mr. Mutula Kilonzo came to only Kshs. 1,047,089,976/=. This Pattni admitted to in cross-examination (**Hansard pg. 15650**). His only explanation, and one which cannot be accepted, is that his documents were stolen from him. If the payments had existed, there would surely have been other financial trails left by them. In conclusion therefore, there is no possibility even in Pattni's own evidence that he spent Kshs.4.8 billion on the election, a figure which he used to try and justify his further depredations. Mr. Pattni was not an election candidate and to the recipients he had no visible direct interest in the election. It is necessary that further investigations are carried out to establish the reason for the payments. If it is established that indeed the money was paid towards KANU campaigns, then the party should be made to refund the money.

518. A payment of Kshs.3,375,000.00 was made to M/s Ombija Wasuna & Co. Advocates (**Exht. 81B**). The firm of Advocate did not explain this payment. It is necessary that it either explains the payment satisfactorily or it pays the sum in question to the Government.

519. We received evidence that GIL and/or Mr. Pattni operated foreign bank accounts during the period 1992/1993 and subsequently. These included:-

Equatorial Bank PLC
Addys to Buclersbury House Walfbrook
London EC4N8EL
Name Ratan (US Dollar)
Account No. 1111-134945-200

Equatorial Bank PLC
London
Name Ratan (Sterling)
Account No. Sterling 134945201 SORTCODE 609385

Citibank Switzerland Geneva
Name Solitaire
Account No. 0/3/337530/001

CBI – TDB Union Bancaira Prince
Account 143127/MR. KMUSH and 143128

Albaraka International Bank
Name Ratan Enterprises

Banque Paribas (Suisse) S.A. Geneva
Account No. 06350M
Account Name Ratan

ANZ Grindlays Bank (London)
Account Name Orlando
Account No. 01-1190729

ANZ Grindlays – Switzerland Orlando
Account No. K 3247/BTEY

Commercial Bank of Dubai Ltd.
Current Account No. 0308001076
Account Kamlesh Mansukhlal Damji Pattni

Name Shearson Lehman Bros London
Account No. 618-04635-029
Name: Kamlesh M. Pattni

520. Mr. Pattni confirmed the existence of these bank accounts in his evidence. He confirmed that they were used to convey and transact GIL funds. In addition we have it in evidence that GIL funds were used to purchase shares, bonds, stocks and other securities in London by Mr. Pattni.

521. It is not clear to us as to what became of these accounts and securities. But the evidence is a clear pointer that GIL illegally acquired funds did find their way to foreign bank accounts. It is possible that some of the funds still exist either in same bank accounts or in other bank accounts. It is also possible that the funds exist in converted form e.g stocks, shares, bonds, various securities and in the form of real assets off-shore. As it was not possible to trace these during the lifetime of the Commission we recommend that further investigations and efforts to trace them be made for their recovery and return to the government of Kenya.

522. We have endeavoured to discuss some of the payments made out of GIL funds. Many other payments remain unexplained. As observed earlier some of the payments were and could be perfectly legal. Some of the payments have been satisfactorily explained. Others were either not explained at all or were unsatisfactorily explained. With the benefit of available records we recommend that further investigations be carried out to establish the recipients and whether or not the money was properly obtained.

CHAPTER V

EXPOSURE, PREVIOUS INVESTIGATIONS AND AFTERMATH OF THE GOLDENBERG AFFAIR

(A) EXPOSURE AND PREVIOUS INVESTIGATIONS OF THE GIL AFFAIR

523. Between November, 1990 and June 1992 GIL operated with little, if any, particular complaint or concern from the general public and the government. However, on 2nd June, 1992, Hon. Jilo Fulana, MP, raised in Parliament a question by Private Notice to the Minister for Finance. The question was three pronged. Firstly, why had GIL been granted a monopoly in the gold and diamond jewellery exports for about two years. Secondly, how much money in foreign exchange the government had earned through the company for the period 1990 and 1991. Thirdly, whether gold and diamond jewellery itemised on CD3 form No.543534, and licence No.746 of 30th January, 1991, had actually left the country. Nagin Pattni testified before us that he supplied the relevant information and material to enable Hon. Falana raise the question in Parliament.

524. The answer was given by Assistant Minister Office of the Vice-President and Minister for Finance, Hon. Keah. The answer to the first part of the question was clearly a lie. His answer was that the monopoly was given to GIL in 1991 simply because it had shown that during the two months it had operated in 1990 it had done better than 78 other companies in similar business put together. This and the other answers given by the Assistant Minister on the question neither satisfied Falana nor the other members of Parliament, who then demanded a better answer. **[Exht. 38]**. Thus GIL's operations came to the limelight.

525. The Controller and Auditor General later raised the issue in his report which the Public Accounts Committee examined and questioned

the persons concerned among them Mr. Pattni.[**Exht. 38A**]. This committee was outsmarted by Mr. Pattni and nothing useful came out of their inquiry. This is how, the committee chairman of the PAC, Hon. Oginga Odinga, concluded the matter after interviewing Mr. Pattni and soon after visiting his place of business.

> "Chairman: You can see that Mr. Pattni is a very prominent businessman in Kenya. Even me I got very surprised when I got into that building. We thank you. Mr. Pattni, carry on with your business. Business is always like that; very many people are jealous of you and that is why they come to pressurize you and go round accusing you all over the world and so on. Now you can see that our committee is not like that. It is not interested in such things. We wanted to satisfy ourselves ... You know I never knew you before but you assisted me when I was in difficult situation and I am most grateful to you. You carry on your business."

526. In its report to Parliament the PAC made, in impertinent part, the ollowing recommendation:

> "While the committee deplorers the payment of extra 15% Export compensation which was brought to Parliament and approved under the Customs Refund item, although it had been meant for Export compensation, the committee find that their hands are tied in that the amount so paid had received Parliamentary approval.
>
> In view of the foregoing the committee recommends that all the parties concerned should adhere to their contractual obligations and, accordingly, all the outstanding export compensation claims lodged by the company before the abolition of export compensation should be settled as soon as practicable."

527. The payment was not effected. Hon. Musalia Mudavadi, the then Minister for Finance strenuously objected to the implementation of that recommendation. That part of the report was amended before adoption. Clearly, Parliament was unable to delve deep into the Goldenberg Affair. The reasons for this is basically its incapacity to conduct in-depth inquiry into a complicated issue as this one. Secondly the general scope of its mandate is limited.

528. In the meantime the LSK filed in court a private criminal prosecution charge against several individuals. Likewise Hon. Raila Odinga did the same. As at the date Parliament adopted the report of PAC, these cases were still pending. Eventually LSK case was terminated by the court on application by the AG. [**see Exht. 95 Pg.21**] and the AG. entered a nolle prosequi against the case by Hon. Raila Odinga on technical grounds.

529. Meanwhile international media reports alleged fraud involving GIL [**see Exht. 94A**] which were promptly denied by the then Minister for Finance Musalia Mudavadi [**Nation of 27th March, 1993**]. This was of course while the issue was under investigation by the PAC. Ironically the Minister, who had recently joined the Ministry, told Parliament that Kshs.9.4 billion worth of foreign exchange had been earned by GIL through the export compensation scheme. That notwithstanding it is paradoxical that he terminated the scheme on 15th April 1993. [**Exht. 94**].

530. It is noteworthy that contemporaneously David Sodera Munyekei, a former CBK employee, contacted two members of Parliament, Hon. Anyang Nyong'o and Hon. Paul Muite, and supplied them with copies of documents showing that CBK was condoning malpractices by GIL both in export compensation and pre-shipment Finance and also that GIL was being allowed to operate the two schemes even though they had already been stopped. [**Hansard 6940 and also Daily Nation Newspaper of 23rd April, 1993**] Munyekei was really a whistle blower, and his action cost him his job.

531. Sometimes in or about May 1993 Mr. Kotut instructed a firm of auditors, Price Waterhouse to conduct an audit of several banks, and more specifically, EBL, Delphis Bank, Post Bank Credit, National Bank and Trade Bank. The auditors' report took sometime to be ready. However when eventually it was delivered to CBK governor Kotut had already left the CBK and had been replaced by Mr. Micah Cheserem. The

report [**Exht. 60**] made significant revelation of the fraudulent activities of GIL and Exchange Bank, and formed a good basis for a forensic audit of Exchange Bank and GIL, by Mr. Smith. It gave some insight to what in fact is the Goldenberg Affair.

532. Mr. Kotut resigned as governor of CBK in or about the end of July 1993.The new governor, Mr. Micah Cheserem discovered the fraud concerning the US$ 210 million, and demanded an explanation from all concerned within CBK and also from Pattni on behalf of GIL and EBL. As a result, Pattni wrote a letter dated 10th August, 1993 countersigned on behalf of CBK on 15th August, 1993 (**Exht. 150 pg. 11**). This acknowledged EBL's indebtedness of just under Kshs. 10,000,000,000/-.

533. This is the amount which Kilach misled CBK into believing was the equivalent of US$ 210 million (see above) and thereby understated the amount due by Shs 3.6 billion (Marambii's statement (**Exht. 131 pg. 32**).

534. A letter from CBK to Pattni of 3rd March, 1994 (**Exht. 15A pg. 13**) dealt further with payment and provided in part for payments of Kshs. 100 million on 3 March, 1994 Kshs 2billion on 31st March, 1994 and Kshs. 400 million on 15 April, 1994. Although the first payment was made, the cheques for the second two payments were not met (statement of Mr. Cheserem (**Exht. 150 pg. 4**)

535. On 29th September, 1994, two letters were signed by the governor to Pattni and were signed by Pattni on the same day. The first (**Exht. 131B pg. 225**) dealt only with the debt arising out of the US$ 210 million. The second (**Exht. 151B pg. 227**), dealt also with the 5.8 billion due to Treasury. As stated by Mr. Cheserem, he was only dealing with the defalcations of which he was aware. As it is, the agreements were not complied with.

536. Even the new governor was made to believe that the government owed GIL Kshs.2.1 billion in export compensation. The governor was however cautious not to give GIL credit for it.

537. In the meantime pressure continued to mount both from within and from the donors for the prosecution of the perpetrators of the Goldenberg Affair. This prompted the Minister For Finance, Hon. Musalia Mudavadi, to issue a press statement and to address letters, one to the controller and Auditor General requiring him to urgently conclude the audit of 1993/94 accounts and, the second, to Mr. N.N. Arap Too, Director of CID requiring him to commence criminal investigations of alleged irregular payments of Kshs.5.8 billion made between April, and July 1993 allegedly as export compensation after the scheme had been terminated [**Exht. 94**].

538. In the proceedings of PAC for Thursday 23rd March, 2000 [**Exht. 95**] the Hon. the Attorney General has set out in detail the history and problems of the ensuing criminal proceedings against various people, among them Dr. Koinange, Mr. Pattni, Mr. Riungu, Job Kilach and Michael Wanjihia. Exhibits 59, 126A & B, 131, 136, 182 and 183 show the several Goldenberg related matters, criminal and civil which were presented to the courts. A lot of judicial time has been spent on these cases and not much has so far been achieved by them. Be that as it may what is significant is that until then not much had been unraveled about the Goldenberg Affair.

539. Reading through the PAC proceedings above reveals that the PAC members and even the AG. were not fully clear about the details of the Goldenberg Affair for the period before 1993, and the payment of Kshs.5.8 billion. They were referring to it as export compensation. But as we have reported elsewhere, as at the date the payments were effected the money was not described as export compensation. The payments were discreet and clandestine. There were no supporting documents which

then implies that those who were making the payments as well as the recipients of the same knew they were not entitled to the money, or that whatever purpose the payments were made it was not a lawful purpose.

540. Mr. Micah Cheserem, for some reason must have considered the Price Waterhouse Report [**Exht. 60**], unsatisfactory or incomplete, because he instituted his own investigations through a committee he appointed under the chairmanship of A.K. Wabuti. Their report is quite detailed. It details, the activities of GIL and Exchange Bank as they affected the CBK. Police investigations relied quite heavily on it. We too found it and the Price Waterhouse report useful and were among documents we relied on in our inquiry.

541. We earlier stated that the donor community were among the people or groups of people who loudly complained about the activities of GIL and Exchange Bank Ltd, and in fact they themselves or a majority of them suspended further assistance to Kenya unless issues relating to economic governance were resolved. The main problem relating to economic governance was the Goldenberg Affair. This issue was specifically raised by the IMF mission to Kenya of August 1997. A year or so later the government, in a letter dated 27th July, 1998 signed by the then Minister for Finance, Hon. Simon Nyachae and the Solicitor General of the time, Hon. Mr. Justice A. Ringera, [**Exht. 179B – pg. 183**] gave a report to Mr. Michael Camdessus, Managing Director, IMF, on the issue, relying on police investigations on the matter and a legal opinion by the solicitor general to the AG., on the matter. [**Exht. 179C Pg.92**].

542. According to that report there was insufficient evidence to criminally prosecute Hon. George Saitoti, Charles Stephen Mbindyo, Collins Yuda Achieng Owayo, Eric Kotut, Francis Cheruiyot, Job Kilach, among others. The report was silent on those whose cases were pending in court. The government concluded that civil proceedings to recover whatever moneys that had been illegally or irregularly paid out of

government accounts were either statute barred or were not recoverable for various legal reasons.

543. In general terms those were the circumstances as at the date this Judicial Commission of Inquiry was established. In view of the evidence which was presented to us and the conclusions we have come to so far, it is important to re-evaluate the roles of the various people in the Goldenberg Affair.

(B) THE ROLE PLAYED BY VARIOUS PEOPLE IN THE GOLDENBERG AFFAIR

544. We have considered all the schemes and known financial deals in which GIL was involved. No doubt the planning of the Goldenberg Affair was meticulous, the execution calculated and the returns enormous. The plot started in the Department of Mines and Geology, in the Ministry of Environment and Natural Resources. Information on minerals and particularly gold is confined to a few. Besides in 1986, Gold exports, through Aurum Ltd, earned the country well over Kshs.280 million. Not many questions would be asked even if a few irregularities were committed.

545. From the analysis of the evidence it is clear that Mr. Owayo's relentless campaign for enhanced export compensation, and for the licensing of one or a few people to engage in gold trade was not motivated by a desire to increase this country's foreign exchange. He was making up a case for Aurum Ltd to be the sole exporter of minerals (jewellery) and for the payment to it of enhanced export compensation. He took his campaign right up to the Head of the Civil Service, and Secretary to the Cabinet who organized a meeting to discuss the issue. The meeting which was held on 12th May, 1988 approved Mr. Owayo's proposal and agreed on the way forward. The law could be amended to accommodate the proposal. Thereafter, there was no follow-up and the law was not

amended. Nothing happened for over two years, except that Mr. Owayo continued with his campaign without much success.

546. The manner GIL's application was presented and handled suggests that within the public service there were at least two groups jostling for control of the gold trade. One group was supporting Nagin Pattni, and we take it that it was the group behind the meeting held on 12th May, 1988. The second group is the one which was behind GIL's application. Mr. Keen's intervention has to be seen against that background. It was unsolicited, and came at a time when recommendations had been made for the amendment of the law to accommodate the proposals of the meeting of 12th May, 1988 but before GIL's application was presented to Hon. Saitoti. GIL was nowhere in the picture at the time. No evidence was adduced before us to show that any attempt had been made before then by either the company or any of its promoters for a licence. We infer that Mr. Kamlesh Mansukhlal Pattni, must have been fished out and asked to incorporate GIL for purposes of its application dated 8th October, 1990. Clearly its application was opportunistic.

547. Hon. Saitoti, as Minister for Finance had the power to deal with applications relating to the establishment of banks and financial institutions and on matters touching on restrictive practices and monopolies. GIL's application was therefore properly presented to him. He, however, handled the application as if he had been waiting for it. We have discussed the issue elsewhere. Suffice it to state that he knowingly and illegally allowed GIL an enhanced rate of export compensation contrary to the provisions of the Local Manufacturers [Export Compensation) Act. Besides, it was clearly an abuse of his powers as Minister, not to have subjected this application to technical evaluation as he did others. He argues that the decision he arrived at was a government decision and that the matter had been evaluated by the meeting of 12th

May, 1988. That cannot possibly be true, as GIL was not in existence in May, 1988.

548. GIL's operations and activities in the various schemes and financial dealings would not have succeeded without the support and encouragement of both Commissioner of Mines and Geology, Customs and Excise, and commercial banks. Its hub of operations was the export compensation scheme. GIL purported to have a processing plant for gold and diamonds among other minerals, and that it would export large quantities of gold and diamond jewellery to various people overseas, and through those exports earn this country substantial foreign exchange.

549. We earlier set out the procedure for the export of those commodities under the export compensation scheme. We came to the conclusion that GIL with the assistance of staff of the Departments of Mines and Geology, and Customs and Excise falsified records to show gold and diamond jewellery had been processed and exported when in fact that was not so. We received evidence to show that those who were shown on the export documents as importers were either non-existent or were known companies but which had not dealt with GIL at all. A little gold was exported, but not under the Export Compensation Scheme. Consequently, GIL obtained export compensation and ex gratia payments through false pretences. All those who assisted the company must have done so knowing that no exports were made. All the money GIL received as export compensation and ex gratia is all recoverable. Likewise all alleged earnings by GIL and associated companies are recoverable.

550. On the basis of the evidence we received several people were mentioned as having either aided or abetted GIL's activities. The people range from the former President Daniel Arap Moi, Vice-Presidents George Saitoti and Musali Mudavadi, Permanent Secretaries Mbindyo, Dr. Koinange and Magari, Governors of the CBK, Kotut, and Cheserem, Deputy Governor, Mr. Riungu, and several other people, human and

corporate. We will now consider their alleged involvement on the basis of the evidence before us.

Hon. Daniel Arap Moi

551. Those who mentioned him with particularity were Kamlesh M. Pattni, the proprietor of GIL and Exchange Bank, among several other companies, Prof. Mbithi, a former Permanent Secretary in the office of the President, Head of the Civil Service and Secretary to the Cabinet; Dr. Koinange, Mr. Magari and Mr. Kipkulei former Permanent Secretaries in the Ministry of Finance at different times.

552. Pattni's evidence was that Moi was a co-shareholder in GIL and Exchange Bank Ltd, through a nominee, a former Security Intelligence Director James Kanyotu. His shareholding had not been discussed between him and Pattni, but the latter testified that the issue was discussed between him and Mr. Kanyotu. Pattni however conceded that no shares were issued to Moi. Pattni used to approach him for assistance from time to time. It was then that Pattni would tell him:

> "Mzee Tuko Pamoja" [**Hansard Pg. 15893**], meaning Your Excellency we are partners.

553. Elsewhere in this report we dealt with Pattni's testimony regarding the initial licensing of GIL to engage in gold and diamond jewellery exports. Mr. Pattni testified on that aspect, that in the company of Mr. Kanyotu, he went to see Moi at his Kabarnet Garden residence where he paid him an inducement sum of Kshs.5 million so that he would approve his proposal. We rejected that evidence on the basis of other evidence and on a demonstration we held in the hearing hall. Kshs.5 million in Kshs.200/= notes could not all fit in a large size suitcase. We disbelieved Pattni that he went to the former President's residence as alleged by him.

554. Mr. Pattni also alleged that on several occasions he approached the former President to seek his assistance whenever Customs and Excise and Treasury were either unwilling or slow in settling his claims respectively for 20% export compensation and 15% ex gratia payments. Mr. Pattni's evidence on this has to be considered alongside the evidence of Mr. Mbindyo, Prof.Mbithi, Mr. Magari and Dr. Koinange.

555. Mr. Mbindyo's evidence did not touch on Moi. He was the Permanent Secretary, Treasury when GIL was licensed. He never saw any document endorsed by Moi to signify his approval of GIL's proposal in mineral exports. Mbindyo was succeeded by Mr. Magari on 27th October, 1991 about a year after GIL started its operations. His first contact with the former President concerned a claim of Kshs.2.6 million by GIL allegedly being export compensation. In actual fact it was the 15% ex gratia and not export compensation. Mr. Magari testified that he declined to authorize payment arguing that it was not payable. Thereafter Pattni and Kanyotu came to see him to persuade him to approve payment, but he still refused. Mr. Kanyotu threatened that he was going to report him to the President who would thereafter telephone him at a particular time. Mr. Magari testified that the President indeed telephoned him at about 9.30 p.m. through the hot-line. After what Mr. Magari considered as insulting remarks and a short exchange, the former President apologized and asked whether notwithstanding all the witness had said the Kshs.2.6 million would be paid. The witness then continued his evidence as follows:-

> "I told him it was not going to be possible to pay because the law remained unamended to allow the 15 per cent. True, there were some administrative or legal problems the Customs and Excise Department had with Goldenberg International Limited. His reply was that, the law had been amended in June before I was appointed as the Permanent Secretary in October. I insisted, "No", he shouted and said, "Yes, it had been amended according to the Vice-President an Minister for Finance, Prof. George Saitoti." I told him that if he really wanted to convince himself whether the law was amended, he should consult the Attorney General, Mr. Amos Wako. After that argument he said: "Okay, even if it were not amended, is there a way you can effect this payment tomorrow?" My Lords, I told him: "Yes, Sir,

subject to the following conditions." One, there was a draft amendment Bill at the bed of that file [GIL file at Treasury] and on which there was a covering letter for me to sign and forward the Bill to the Attorney General for publication. I had not signed the letter because I did not believe in giving monopoly to one individual or a particular company. So, I told the former President that the first condition was to forward that Bill ... The second condition is this; I told him because I do not believe in the monopoly being given to Goldenberg International Limited, I would prefer that the Minister signs the forwarding letter to the Attorney General. He said: "Agreed." He told me further ... Prof. Saitoti would be there at exactly 7.00 a.m. to sign the document.
My Lords, the third condition I told him was that I doubted whether Parliament would ever pass such a law which was, in my view, discriminating and anti-competition because we were awarding extra compensation to one company. I suggested to him that he may have to do a lot of campaigning with members of Parliament for them to pass that condition. He agreed ..."
[Hansard - Pgs. 3578 and 3579]

556. There was a fourth condition, viz, that the effective date of the amendment would be backdated to the following day. Hon. Saitoti allegedly arrived at 7 a.m. the next day, took the GIL file, the Draft Bill and the covering letter which had been duly amended to make Saitoti the signatory of the letter. Thereafter, the witness effected the payment of Kshs.3,576,540/= on 31st October, 1991.

557. From the aforequoted statement a question arises as to what the former President had been told by Mr. Kanyotu if indeed the latter talked to him. If one reads through all the statement by Pattni on behalf of GIL, his theme at that time was that his company was bringing in foreign exchange for Kenya to meet the country's urgent need for it. The country was desperate as we have stated elsewhere in this report. It should also be recalled that Pattni outsmarted the PAC when he led the committee to his premises, showed them some equipment and made them believe that the company was exporting large quantities of gold and diamond jewellery. It is possible that the former President had been told that Mr. Magari was in a way sabotaging a scheme which was beneficial to the country.

558. There is, however, an alternative explanation. The former President, from the questions he is alleged to have asked was quite briefed on the activities of GIL. The issue of amending the law had been raised during Mbindyo's time. GIL was allowed to continue with its alleged exports pending the amendment of the relevant law to provide for the additional 15% export compensation. A payment of 15% ex gratia in the meantime was proposed allegedly by Arthur Buluma. The law was not amended nor was the 15% ex gratia payment terminated. It then follows that if Mr. Magari is to be believed then the former President was breaching the law when he asked Mr. Magari to pay. But Mr. Magari testified that as at this time there were moves to regularize the payment to GIL, of the additional 15% ex gratia. The payment was administratively redesignated as "Customs Refund" even though it was not a customs refund. Mr. Magari admitted that he was party to the redesignation. Besides he continued making the payments disguising them as customs refund even when he was fully aware that the conditions agreed upon between him and the former President had not been fulfilled.

559. Under cross-examination by Mr. Mutula Kilonzo he explained that he was complying with the former President's order to pay. We earlier quoted verbatim his testimony on the circumstances preceding the payment of Kshs.3,576,540/= but nowhere did the witness say he had been ordered to pay. If anything the former President asked him if there was a way payment could be made notwithstanding the provisions of the law which barred payment. The payment was by mutual agreement on terms. Mr. Magari's statement in that regard was as follows in answer to a question whether he ever told the former President the actual sum that he was authorizing payment:

> "No My Lords. I did not tell him [former President] because to me it was understood in the following manner. The day he ordered that this be paid, we agreed that the law will be put in place to regularize it. So I did not have to go back to him. The Minister was supposed to ensure the law was regularized an I did not have to go back to the former President." **[Hansard - Pg.5883]**

560. Later on in answer to another question whether the payments he authorized were legal the witness said:

> "Yes, my Lords. The total figure of over Kshs.30 million was authorized by me to be paid not illegally but in the specific understanding that the law was to be amended as per my agreement with the President then." **[Hansard - Pg.5883].**

561. Mr. Magari relied on paragraphs 5 to 8 of the Government Financial Regulations, as authority for what he said. The regulations deal with " Verbal Authority to Pay" and the relevant portion reads as follows:

> "Verbal or very graphic authority for making any payment should only be regarded as provisional pending the necessary written authority. This applies to accounting officers and their subordinates. It is the responsibility of the officer concerned to ensure that he immediately receives written confirmation of the verbal authority."

562. Assuming that the above provision applies no written confirmation was ever sought. Nor did Mr. Magari put a note in the relevant record on this. That it was raised at the time it was suggests that it was self-serving.

563. Our view is that it is possible Mr. Magari was telephoned as he said. It is also possible he wasn't; moreso because he routinely made several payments to GIL totaling about Kshs.29,075,289.20 **[Exht. 76 and Hansard Pg. 5883]** without compulsion. Besides several memos were addressed to the witness by among others, Prof. Ryan, and Mr. Njeru Kirira seeking his guidance on how to deal with the extra payments to GIL, but the witness did nothing. He conceded as much under cross-examination by Mr. Mutula Kilonzo **[Hansard Pgs. 5886 - 5888].** His subordinate officers have documented their objection to payments of ex gratia saying it was neither legal nor justifiable. In our view Mr. Magari's evidence has to be regarded with caution.

564. Then we come to the evidence of Prof. Mbithi. At all material times he was the Permanent Secretary Office of the President, Head of the Civil Service and Secretary to the Cabinet. He gave evidence that he is a prophet. He was appointed to the above post in the civil service on 28th October, 1991, long after GIL was licenced to conduct export trade in gold

and diamond jewellery. It was his evidence that GIL was a government project, but at the same time he said that in a meeting of Permanent Secretaries, it was described as a clever scheme by private individuals to harvest gold from Rwanda, Zaire, Central Africa and Somalia, to bring it to Kenya for processing for export with a view to earning the country foreign exchange [**Hansard, Pg.7823**]. Through such a scheme the said individuals would earn export compensation. The witness further stated that Dr. Koinange, who was then the Permanent Secretary to the Treasury praised the scheme.

565. With regard to Moi his evidence was that the former telephoned him and required him to get in touch with Dr. Koinange and "tell him to transfer the Kshs.5.8 billion through the Central Bank of Kenya ... by 5 p.m." The witness did not however, indicate to whom the money would be transferred and for what purpose. He said that he talked to Dr. Koinange and the latter appeared to understand what the payment was for. He admitted having received copies of the letters to the Governor of CBK from Dr. Koinange [**Exhts - 104**] instructing the former to debit PMG account with the Kshs.5.8 billion. Such letters were always copied to him but he did not bother to inquire why the debits were being made. [**Hansard - Pgs.7840-41**]. The witness was categorical that he believed Dr. Koinange was a competent man and therefore knew what he was doing or was supposed to do. That statement is telling. The witness did not care to find out why such a large sum of money was being paid out. There was nothing apart from the figure to relate it to the Kshs.5.8 billion, he said the former President had instructed him to tell Dr. Koinange to transfer. The whole object of copying such letters to the Head of the Civil Service would be lost if assumptions as those the witness said he made were to be adopted. We do not think the witness was being particularly truthful on this.

566. Likewise we do not think the witness was truthful when he said that he consulted the former President on how to respond to letters

which were addressed to him by the Controller and Auditor-General. That is particularly so because the tone of his letters was personal to him and suggests that he himself was in favour of moving the staff from the office of the Controller and Auditor General, to the Auditor-General (Corporations) and other government departments [**Exht 123(A)**]. It should also be noted Exht. 123A relates to events after the Goldenberg Affair, viz May 1994. By this time audit of most of GIL's operations had been concluded.

567. Prof. Mbithi resigned when he was transferred from Office of the President to the East African Co-operation at Arusha. In his evidence before us he stated that while he did not dispute the former President's power to transfer him as he did, he nonetheless detested any transfer without ample notice. He said it was immoral to transfer a person without notice and his transfer in that manner made him bitter against the former President. At the time he was giving evidence before us Prof. Mbithi was visibly unhappy with the manner he said the former President had treated him. Like Mr. Magari's evidence we will act on his evidence with caution in view of what we have stated.

568. As for Dr. Koinange, we have already discussed his evidence as it touches on the former President. We do not find it necessary to repeat it here. Suffice it to state that like Mr. Magari he did not make any note to show his objection to the payment of Kshs.5.8 billion out of the PMG account without following the correct procedure. His subordinate officers at least noted down their objections as indeed they were obliged to do. In view of that we have nothing adverse to say against them and their evidence is believable.

569. Mr. Kipkulei became the Permanent Secretary Treasury after Dr. Koinange. About four months after he took over he addressed a letter dated 25th August, 1994 instructing the governor CBK to treat the three letters from Dr. Koinange on Kshs.5.8 billion as cancelled and requiring

him to reverse the instructions in the three letters. He later attended two meetings, one at State House Mombasa which was chaired by the former President, and which was attended by Hon. Musalia Mudavadi, Micah Cheserem and Dr. Koinange, among others. The second one was at State House Nairobi at the prompting of the former President. Among those who were at the meeting was Mr. Pattni. Hon. Saitoti chaired that meeting.

570. Mr. Kipkulei testified that he attended the second meeting because he was asked by the former President to do so. The witness said he was at State House, Nairobi, to see the President. The President met him in the office of the Controller of States Houses, and after exchanging greetings the President told the witness:

> "Hi, Ben, there is a meeting upstairs, which might discuss affairs of the Treasury. Why do you not go in.?"**[Hansard – Pg.18172]**

The meeting was discussing money which was allegedly due and owing to Mr. Pattni. Mr. Pattni wanted payment.

571. The evidence by this witness is that the former President was aware of that meeting and asked the witness to attend it. How did he come to know the meeting was there and the matters under discussion? The implication is that he had sanctioned it. This is the more so because the meeting was at State House and chaired by the Vice-President , Hon. Prof. Saitoti.

572. Augustine Kiptoo Cheserem installed a hotline at the residence and offices of Mr. Pattni situated respectively at Parklands and 14th Floor of View Park Towers. The line was installed on 19th August, 1992, but on 14th May, 1993 the facility was withdrawn. It was restored briefly on 20th July, 1993 but only for three or so days. **[Exht. 186]**. Dr. Koinange testified before us that hot lines were restricted lines and that only the President would decide who to have a hotline. **[Hansard – Pg.9045]**. Mr. Mbindyo described a hotline as being like a trap. So he rarely used it.

573. Pattni admitted he had a hotline which he was using to communicate with the former President. The implication is that the former President had authorized that Pattni be given a hotline and also that he knew and approved Pattni's activities. Mr. Cheserem in his statement states that the then Managing Director Posts and Telecommunications Corporation, Kipng'eno Arap Ngeny, had authorized him to install the line. Ngeny did not refute this statement either through another statement or oral evidence. He was represented at the hearing by Mrs. Violet Barasa, but there was no request made by her to cross-examine Mr. Cheserem on his statement.

574. There is no doubt that Pattni often had audience with the former President. Mr. Kipkulei, testified as much. However, the evidence is indeterminate as to who actually authorized either Mr. Ngeny or any other person to install the hotline at the residence and office premises of Mr. Pattni. It is possible the former President did. It is also possible somebody else did.

575. On the question of the President's knowledge or otherwise of the US$210 million there is the evidence of Mr. Reuben Marambii whom we have accepted as a witness of truth. He stated [**Exht. 131 pg. 32**] that Mr. Micah Cheserem took him to Mombasa to brief the President who according to the witness clearly had no knowledge of the transactions. According to him, the President's comment was "basi nyinyi waafrika mnapatia wahindi pesa?" [You African have given Indians the money].

576. The last piece of evidence we want to look at relates to alleged destruction of a security intelligence report allegedly touching on Nagin Pattni, Moi and his son Gidion. Those who testified on this aspect were Inspector James Gitau Mukuria, Mrs. Eddah Wangari Mburu and Paul Mwangangi Mutisya. Mr. Mutisya testified that on instructions from Mr. Chris Lati under whom he worked as a security intelligence officer, he

inquired about Nagin Pattni's involvement in GIL; his alleged fictious export deals of gold through GIL and his alleged links with opposition politicians like Paul Muite. In carrying out his assignment he used three officers, namely, Inspector Kisya, PC Mukuria and PC Kavulunze. These officers reported back that they arrested Mr. Nagin Pattni, placed him in police cells, interrogated him and gathered information that:

[1] He is a dealer in precious stones

[2] He had done some research as to how much gold and diamonds were mined locally. His findings were that there was little gold in the country but no diamonds.

[3] His report was stolen by one of his associates and sold to Mr. Kamlesh Pattni.

[4] Kamlesh Pattni later teamed up with Mr. James Kanyotu to form GIL.

[5] No association between Nagin and Paul Muite or any other opposition politician.

577. A report with the foregoing information with a recommendation that further investigations be carried out on Kamlesh Pattni and James Kanyotu was handed over to Mr. Lati, the then Provincial Special Intelligence officer Nairobi. Mr. Mutisya who initially received this report did not state this, but Mr. Mukuria testified that the report also mentioned the names of Gidion Moi, and the former President as having been involved in the fictitious exports of precious stones through GIL. Mr. Mukuria was given to exaggeration during his testimony and we have considered his testimony with caution. This is the more so because Mrs. Mburu testified before us that she could not find any record referring to the above report, whether at provincial level or at the NSI headquarters. It was further her evidence that had such a report been submitted to the provincial registry, details of it would have been noted in a register in which all such reports were entered.

578. The other reason why we had to treat Mr. Mukuria's evidence with extreme caution is that he testified that he understood their instructions to be that they would intimidate Mr. Nagin into silence [**Hansard Pg. 8130**]. Mr. Nagin was one of the whistle blowers on GIL's fraudulent deals. If Mr. Lati had intended that Mr. Nagin be silenced and no more, then one would not have expected a report on that to be documented and filed. It would serve no useful purpose.

579. In general the evidence against the former President other than the evidence of Mr. Kipkulei is of the nature which in ordinary judicial criminal proceedings would be termed as accomplice evidence. There was documentary evidence adduced which showed signatures attributed to the former President. The documents are secondary evidence and we have our reservations about their authenticity. Ours are judicial proceedings in that this commission was designated a judicial commission of inquiry. We must therefore be guided by judicial principles. In view of that, accomplice evidence may only be acted upon if upon careful examination it cannot be but true or the evidence is amply corroborated.

580. The evidence we have outlined above even if we believed it, it would show that the former President intervened on behalf of Mr. Pattni so that he could be paid what he, Pattni, said was due and owing to him. That in itself without more is not evidence of wrongdoing, unless evidence were available to show that he knew the money was not due or that the payment had no proper basis, but nonetheless directed payment to be made. Mr. Magari testified that he told the former President that the payments were against the law. He however, nullified that by adding that the President inquired whether the payments could be made that law notwithstanding to which Mr. Magari answered in the affirmative. Mr. Magari was the man who would know and therefore who would advise on the legality or otherwise of payments. Having done so, it cannot be said, assuming his evidence on Moi is true, that Moi did anything wrong in that regard.

581. On the other side of the coin is the evidence showing that Messrs. Mbindyo, Magari and Dr. Koinange authorized the payment of ex gratia to GIL. There is the possibility that what they said against Moi was an attempt to extricate themselves from blame by shifting blame elsewhere. None of them registered his objection to the payments as their subordinate officers repeatedly did.

582. The foregoing notwithstanding the Goldenberg Affair lasted for about two and half years. We have shown that the Export Compensation Scheme did not earn this country any Foreign Exchange as there were no known, or if any, very limited exports, under the scheme. Yet the country was repeatedly told that GIL had earned millions of shillings worth of foreign exchange through the Export Compensation Scheme. We doubt whether the former President, as the Chief Executive Officer of the country, was completely unaware of that. Inflation spiraled upwards and the cost of commodities soared. Foreign exchange reserves dwindled to the extent that the country could not import essential oil to run industries. There were other indicators which would have put him on notice regarding the activities of GIL and its associated companies. Yet the impression being created is that the former President had no idea at all about all this. To establish the extent of his involvement, if at all, more investigations would be necessary.

Hon. George Saitoti

583. Hon. Saitoti was the Vice-President and Minister for Finance at the time GIL came into existence. He granted the company exclusive rights to engage in gold and jewellery export trade and allowed it additional 15% export compensation notwithstanding the fact that this was ultra vires the Local Manufactures [Export Compensation] Act. Elsewhere we have explained why in our view his action was deliberate and calculated. He says that he relied on the decision of an inter-

ministerial committee meeting held on 12th May, 1988 but even if that was so, the meeting did not recommend the enhancement of export compensation without amending the law. If anything that meeting clearly mandated certain ministries and government departments to work out modalities for implementing their decision which would include the amendment of the relevant law. The meeting, in pertinent part, recommended as follows:-

> **"Min.3/88 REMEDIES**
> Three suggestions were made:
> (a) either (i) ...
> [ii] that the Minister for Finance grants a 20% special subsidy over and above the 20% export compensation to gold exporters.
> [b] that an amendment of Brokers Act Cap 527 be effected to bring goldsmiths under the purview of the trading in Unwrought Precious Metals Act, Cap 309.
> (c] ...
> The meeting felt that suggestion (a) would not provide a solution to the problem. On suggestion (b) he Ministry of Environment and Natural Resources was asked to work with the Attorney General's Chambers and the Ministry of Commerce for an amendment." **[Exht 29 Pg. 9]**

584. What GIL was granted by Hon. Saitoti as Minister for Finance was a 15% subsidy. He could not call it a subsidy because doing so would be against the GATT Rules. Besides this was a proposal the committee had specifically rejected.

585. Besides as we stated elsewhere in this report, on several occasions officers in the Ministry of Finance repeatedly advised the Permanent Secretary and the Minister on the impropriety and illegality of the ex gratia payments but to no avail.

586. Hon. Saitoti defended GIL in Parliament and outside Parliament each time the Goldenberg issue arose arguing that the company earned the country foreign exchange. He also contended that the 15% ex gratia payment had been recommended by the late Mr. Arthur Buluma, the then Chief Parliamentary Legal Draftsman, provided it would later be regularized through Supplementary Estimates. But Parliament

was not told this. Instead, the expenditure was disguised as Customs Refund and approved as such.

587. Besides, Parliamentary approval of the expenditure as a customs refund does not cure the illegality of the payment of the 15% ex gratia. The argument that because the payment was designated ex gratia, then there was no breach to the Local Manufactures [Export Copmpensation] Act is a red herring. The designation of the payments as ex gratia, was a ploy to circumvent the above Act. The approval given to GIL's proposal was not that it would be paid ex gratia, but additional export compensation. Whether it was subsequently called ex gratia or customs refund, those were moves to conceal the illegality, and in our view as Parliament does not have power under the law to pardon illegality, it still stands. The only way Parliament could possibly have gone round this was to amend the relevant law retrospectively to cover all past illegal payments.

588. Almost all GIL's operations were during Hon. Saitoti's tenure as Minister for Finance. As Minister for Finance he was also answerable to the Cabinet and Parliament on matters touching on CBK and the Department of Customs and Excise. These and Treasury were the centres of GIL's operations. He left the Ministry of Finance in or about March 1993 and soon thereafter GIL's network started crumbling. That was because his successor brought to an end structures on which GIL's operations thrived. As we have stated elsewhere in this report, Pre-Export Finance, Retention Accounts and Forex Cs were discontinued in or about April, 1993. Exchange controls were removed gradually about the same time. All these are telling about the role of the Minister for Finance in the implementation and management of various monetary and economic policies in the country. It is also telling that as soon as Mr. Kotut left as Governor of CBK, GIL's activities ground to a halt. It can reasonably be inferred that those who replaced them were not ready to play ball with Mr. Pattni. It can be reasonably inferred too that Hon. Saitoti and Mr. Kotut

supported the activities of GIL. That is the more so considering Hon. Saitoti's conduct whenever issues about the additional export compensation were raised by staff of the Ministry of Finance. Whether Hon. Saitoti should face appropriate criminal charges arising from his own actions should be considered.

Hon. Musalia Mudavadi

589. Hon. Mudavadi became Minister for Finance on or about February or March 1993 and replaced Hon. Saitoti. On 9th March 1993 he issued a press statement to say that GIL had earned the government Kshs.9 billion worth of foreign exchange[**Hansard Pg.8844**]. The statement was most likely prepared for him as he was then new in that Ministry. We say so advisedly because shortly later he caused an audit to be conducted by Price Waterhouse, a firm of auditors, on several banks which had close links with GIL. He also discontinued the Export Compensation Scheme, Pre-shipment Finance Scheme, Retention Accounts and Forex Cs. It is however, noteworthy that the Kshs.5.8 billion debited from PMG account with CBK was during his time as Minister for Finance. Likewise cheque kiting occurred during the same period. Dr. Koinange however, testified that he did not notify the Minister of the debit which according to him was supposed to be discreet. We also have evidence that Hon. Mudavadi almost single handedly opposed the payment to GIL of Kshs.2.1billion which had been recommended by the PAC. In the circumstances, it is our view that whatever role he might have played in the Goldenberg Affair was innocent.

Mr. Charles Mbindyo

590. It should be recalled that Mr. Charles Mbindyo carried out Hon. Saitoti's instructions regarding the approval of GIL's proposal to be allowed sole rights and extra export compensation for gold and diamond jewellery exports. It should also be recalled that Hon. Saitoti's written approval did not include monopoly. [**Exht. 91B - Pg.161**]. Hon. Nyachae and

Mr. Justice Ringera in their report in effect exonerated Hon. Saitoti stating that whatever he did was in accordance with recommendations of public officials and committees appointed by the government to look into the matter. [**Exht. 179B - Pg.183**]. But the evidence before us shows otherwise. Mr. Mbindyo was then the Permanent Secretary Treasury. His evidence and that of Prof. Ryan was that Hon. Saitoti declared to them that it was a government decision to licence GIL. The government officials did not therefore include Mr. Mbindyo, Prof. Ryan or any of the Treasury officers.

591. Mr. Mbindyo was however party to the decision to pay ex gratia and for allowing GIL to have exclusive rights in the exports of gold and diamond jewellery. In his evidence he stated that this was on an experimental basis. He remained in the Treasury as Permanent Secretary until November, 1991. The so called experiment continued even after he left the Treasury. Besides his evidence was that GIL would operate within the then existing legal framework. However, payment of ex gratia was not legal. Nor was the treatment of the payments as customs refund. This was pointed out to Mr. Mbindyo by both Prof. Ryan and Mr. Njeru Kirira, who were officers under Mr. Mbindyo at the Treasury. [see **Exhts. 91B-Pgs. 66, 102** among others]. Mr. Mbindyo did not register his objection on payments of ex gratia or the sole rights extended to GIL. Both Prof. Ryan and Mr. Njeru Kirira were the technical people in the field and therefore knew better. Yet, neither the Minister nor the PS, Mr. Mbindyo, heeded their advice. Mbindyo could not properly refuse to act on the Minister's instructions even if they were not proper. According to Financial Regulations, he was expected to comply but register his objection to it as Prof. Ryan and Mr. Njeru Kirira did. That he did not register his objection the inference to draw is that he approved and supported the Minister's illegal actions.

Mr. Magari

592. In the course of our discussion on the possible role of the Former President, Daniel Arap Moi, in the Goldenberg Affair, we extensively dealt with the role of Mr. Magari. He admitted in evidence

having authorized various payments to GIL by way of ex gratia. He also admitted he was aware the payments were against the law to wit, The Local Manufactures [Export Compensation] Act. His defence was that he had been ordered by the former President to pay the money. He, however, admitted under cross-examination that he made the payments conditionally. None of the conditions he had imposed were satisfied and yet he continued making further payments. Besides he did not indicate in writing his objection to the payments. His argument was that he feared for his life. Clearly this argument is a red herring considering the exchange the witness said he had with the former President, reproduced elsewhere in this report.

593. Mr. Magari conceded he authorized various payments of the additional 15% ex gratia. He admitted under cross-examination that when he did so he was not under any compulsion to pay but argued that the alleged order of the former President to him to pay was still operating in his mind. It is, however, doubtful whether this was so. On 14th November, 1991 when the former President is alleged to have telephoned Mr. Magari and allegedly ordered him to effect certain payments to GIL, Mr. Magari had earlier the same day signed a voucher authorizing a payment to the company of Kshs.2,682405/=[**Exht. 76 - pg.1**]. In view of this it is possible that his story that he had been ordered by the former President to make payment was given by him to extricate himself from blame for his own actions.

594. Besides, according to Mr. Cheruiyot a Commissioner of Customs and Excise then, Mr. Magari telephoned him on the night of 14th November, 1991 at about 9.30 p.m and told him that the former President had complained about the former, but that he, Magari, had defended him. He did not elaborate. Mr. Cheruiyot believes that Mr. Magari by telling him that, was trying to instil fear in him so that thereafter he would not raise objection to payment of claims to GIL. Additionally, Mr. Cheruiyot lamented that on several occasions he wrote letters to Mr. Magari, seeking

guidance on what to do about claims by GIL but the latter never replied any of them.

Dr. Koinange

595. Like Mr. Magari, Dr. Koinange effected various payments to GIL as ex gratia. His argument was that his predecessors in office as Permanent Secretary, Treasury, made the payments and he did not see why he would not do it [**Hansard Pg.8787**]. It was also his evidence that the activities of GIL were a government project [**Hansard Pg.8846**]. Yet he did not show any basis for coming to that conclusion. Prof. Mbithi also called it a government project.

596. In addition to the payments of ex gratia Dr.Koinange by three separate letters to the governor of CBK, a total of Kshs.5.8 billion was debited from a PMG account with CBK and credited into a KCB account with CBK. His authority for doing so, he said was a telephone call from Prof. Mbithi which the latter admitted. According to Prof. Mbithi he acted on instructions from the former President, Daniel Arap Moi. The instructions were that the money be urgently transferred, and at any rate not later than 5 p.m. the next day. The transfer was not effected on that day and all the money was not transferred in one tranche. It was split into three. Besides, Dr. Koinange wrote to the Commissioner of Customs & Excise to supply details of all money due and owing to GIL as export compensation. So according to Dr. Koinange the payment he was required to make was a debt due to GIL as export compensation. Indeed in his first letter to the governor dated 19th April, 1993 the amount transferred agreed with the amount the Commissioner for Customs & Excise had advised him was due together with an amount which was in dispute between GIL and the Customs & Excise Department. Why he had to include the disputed amount is curious.

597. Dr. Koinange's defence in our view holds no water, more particularly when his conduct subsequently is taken into account. We

earlier stated that Dr. Koinange was one of the people who, along with Kamlesh Pattni, faced criminal charges relating to GIL's activities. He admitted having given his properties in June 1997 to secure repayment by Guerlain Investments Ltd, of a loan of Kshs.40 million from City Finance Bank Ltd. Guerlain Investments Ltd, was one of the Pattni Companies. The properties given were L.R. No.7752/48 Nairobi which was registered in the name of Dr. Koinange and his wife. Another property was L.R. No.330/143, Nairobi registered in the name of Dr. Karuga Koinange. A third one was L.R. Mainland North 1/2915 L.R No.1554, Mombasa registered in Dr. Koinange's name. **[Hansard Pg.9396 -8]** Dr. Koinange's explanation was that Mr. Pattni had approached him and told him he was in financial problems. He believed him and gave him the properties as security for the Kshs.40 million borrowing by his company. **[Hansard - Pg.9398** and **Exht. 137E]**. The loan was not repaid. At one point Dr. Koinange made a payment of Kshs.2 million instalment on Pattni's behalf and eventually he repaid the loan to redeem his property. **[Hansard Pg.9399]**.

598. Exhibit 137F, relates to another transaction in which Dr. Koinange secured another debt on behalf of Mr. Pattni. Dr. Koinange used the same properties after they had been discharged to secure a loan by Pattni from Glad AK Fine Arts Limited. Dr. Koinange was the only guarantor. This money was also not repaid.

599. The above incidents clearly show that Dr. Koinange and Mr. Pattni were very close for him to have sacrificed his assets for Pattni's sake. Indeed Mr. Pattni admitted he got the assistance from Dr. Koinange but added that he was trying to recoup some of the money he had earlier given to Dr. Koinange.

600. In our view Dr. Koinange was not only aware of GIL's activities, but he also actively assisted it. He must also have benefited from it. He has not to date claimed that money from Mr. Pattni. The

money involved is not small. Whether Dr. Koinange should face appropriate criminal charges should be considered.

Mr. Cheserem

601. Mr. Micah Cheserem became governor of CBK in July 1993, and replaced Mr. Kotut. One of the allegations against him was that he knowingly destroyed documents relating to the activities of GIL and Exchange Bank in order that their evil activities would not come to light. The main witness on this was Abdul Karim Wabuti. His evidence in chief was that Mr. Cheserem pressurized him to destroy the documents even though they were less than four years old, the minimum period which the regulation allowed before a document could be destroyed. The witness outlined the procedure for the destruction of documents as follows. The head of the division or department would write to the governor listing the documents intended for destruction. He would also give reasons to show that the documents were no longer needed. The letter had to have the details of the documents and seek the governor's approval for their destruction.

602. Regarding the documents whose destruction Mr. Cheserem is accused of ordering Mr. Wabuti to destroy the latter testified as follows:

> " I asked governor Cheserem: Sir, I am going to write a memo and you will authorize me to destroy those documents. He said: "No, no, no. These are your documents. You go and authorize" I said: "But then somebody has to write to me." He said: You have so many officers, they can write to you and you authorize." ... So I had to go to on of them; Mrs. Sunkuli: ... I had to approve and sign the memo and then she had to sign. So from there we went and destroyed the documents." [**Hansard – Pg.7607**].

Later on in cross-examination the witness stated:

Mr. Chairman:	Whose duty was it to identify those documents which were supposed to be destroyed?
Mr. Wabuti:	It is the division concerned my Lords.
Mr. Chairman:	Did you do that?

Mr. Wabuti:	Yes, my Lords, that is why we said these CD3 forms contain also documents of Goldenberg. We started shifting these documents and trying to find out this. This delayed the destruction.
Mr. Chairman:	Whose decision was it to determine this one must go and this one must stay?
Mr. Wabuti:	It was mine, my Lords. **[Hansard – Pg.7797]**

603. From the foregoing , notwithstanding the evidence of Mrs. Gitonga, that Mr. Cheserem was responsible for the destruction of documents relating to GIL, it is clear that Mr. Cheserem was not to blame. In fact Mr. Wabuti was categorical that the instructions he got were to destroy all documents "which were of no use any further" [**Hansard – Pg.7798**]. Mrs. Gitonga's evidence on this aspect was that Mr. Cheserem instructed her and those in her department to destroy all documents relating to GIL, including correspondence. However, as she operated under Mr. Wabuti, and the latter having admitted that he is the one who decided which documents were no longer needed, her evidence is inconsequential.

604. The other complaint against Mr. Cheserem was by Mr. Wabuti who stated that Mr. Cheserem made him lose some of his retirement benefits. We think that this is a personal matter. We do not lose sight of the fact that part of our terms of reference is to identify those who suffered loss as a result of the Goldenberg Affair. We can see no such connection and we fear that if we comment on that we might prejudice personal claims such people may be having against individuals or corporate bodies.

Mr. Collins Owayo

605. Collins Owayo, was during the material times the Commissioner for Mines and Geology and the head of the Department of Mines and Geology within the Ministry of Environment and Natural

Resources. His evidence was that he realized there was a lot of smuggling of minerals out of the country, and in his view the situation could only be arrested if one or a few companies were granted sole rights to export these minerals and their products in order to effectively compete with smugglers. He particularly singled out Aurum Kenya Ltd, whose major shareholder and managing director was Nagin Pattni, as one of the companies to be considered. He lobbied for the company to be given sole rights and in addition to be granted an additional 20% export compensation under the Local Manufactures [Export Compensation] Act. It should be recalled that the maximum compensation which was allowed under that Act, was 20%. So Mr. Owayo was in effect recommending a 40% export compensation.

606. A turning point came when instead of Aurum Kenya Ltd, being granted sole rights and additional export compensation, Hon. Saitoti gave GIL the rights. Additional export compensation was however limited to 15%. We have already discussed this issue. What is significant is that Mr. Owayo shifted his support from Aurum to GIL.. He declined to licence other companies in the gold and diamond jewellery exports in order to give full effect to the sole rights given to GIL. He designated one officer, from time to time, to be assaying GIL's exports before they were sealed for export. Mr. Ndegwa one of such officers and he admitted this and also, in effect, that a house was bought for him by GIL. Although he denied this, our view is that Mr. Owayo, colluded with GIL to defeat the object of the Export Compensation Scheme. That is particularly so because as we stated earlier in this report there were no mineral exports by GIL under the scheme. If there were any, they were insignificant. His department is the one which supplies data of mineral exports to the Kenya Bureau of Statistics in the Ministry of Planning and yet the annual surveys for the years 1991 and 1992 show there were no gold or diamonds produced **[pages 114 and 120 respectively]**. Nor were they among the exports for the period 1990 to 1994. **[Exht. 7A** -]. What does all these portend? Mr. Owayo and his men were falsely indicating in the CD3 forms for that

company that they had assayed certain minerals and mineral jewellery. If this was otherwise they would have supplied data of the quantities exported and their values. In absence of that data Mr. Owayo and also Mr. Ndegwa owe the country an explanation. Otherwise if they do not supply any they should face appropriate criminal charges.

607. Evidence was also adduced by Mr. Cheruiyot, the then Commissioner of Customs and Excise, among others, that Mr. Owayo was at Wilson Airport one evening trying to assist GIL to have smuggled gold from Bunia, Zaire released. He denied this but we believe the evidence against him.

Philip Muli Mulili

608. Mr. Mulili was the Deputy Commissioner of Customs and Excise under the Commissioner, M. Cheruiyot. He was a long-serving and very knowledgeable officer. He gave the Commission considerable assistance in beginning its understanding of many of the issues involved particularly where his department was concerned. As he gave evidence early on he had to give much evidence and sustain a long cross-examination, some of it about matters which were not his responsibility. He came through all this very well.

609. The most important part of his evidence concerned the Local Manufacturers' Export Compensation Act and the goings on which led to the payment of 35% compensation to GIL. Where the decision to pay this amount was notified to the Treasury, it was Mr. Mulili who queried its legality. It was he who wrote to Mr. Buluma of the Attorney-General's Office (**Exht. 50 pg. 75**) and obtained his opinion, and informed Mr. Mbindyo, the Permanent Secretary Treasury of the illegality. He again called this to the attention of the next Permanent Secretary Mr. Magari (**Exht. 50 pg. 60**) and he took up the illegality of the invoicing by GIL in shillings rather than in the foreign currency concerned.

610. He rejected claims for irregularities, but after intervention by Pattni he had to make the payments required and to make them immediately. It is difficult to see what more he could have done in his position.

611. Finally, he was not totally candid to the Public Accounts Committee when it was investigating Goldenberg, but his responsibility for this was for less than that of CBK and he apparently felt that he had some duty to try and protect his department.

Mr. Francis Chelelgo Cheruiyot

612. Francis Chelelgo Cheruiyot (Mr. Cheruiyot], was Commissioner of Customs and Excise. The Department of Customs and Excise was basically concerned with the administration of the Export Compensation Scheme. In a nutshell the department's duty was to ascertain whether eligible goods under the scheme had been exported and thereafter pay the 20% export compensation. The department of Customs and Excise commendably refused to pay the additional 15% export compensation. Their position was that the extra percentage was not covered by the relevant law. Legal Notice No.143 of 4th June, 1992 [**Exht. 5**] paragraph 4(i) spells out the role of the Customs & Excise Department. It reads as follows:

> "(i) No eligible goods in respect of which the claim for compensatory payment is to be made, shall be loaded on aircraft, vessel or vehicle departing to a foreign port unless:
>
> (a) the goods (other than gold) have been entered, examined (if the proper officer so wishes) and released for export by the proper officer, or
>
> (b) the gold (non-monetary), other precious and semi-precious metals or stones and articles thereof, in manufactured or semi-manufactured form, have been produced to the proper officer together with all the supporting documents for physical examination, certification and application of the customs seal prior to release for export."

613. A proper officer is any customs officer and any officer above him. A physical examination at the port of exit was envisaged. However, no such examination ever took place. Mr. Pattni admitted as much, arguing that doing so would have exposed the gold, and the gold and diamond jewellery to security risks. Hence the arrangement to have the items examined and assayed at GIL's premises. The Commissioner of Customs through his officers allowed this arrangement. We have stated elsewhere in this report that no gold and diamond jewellery were exported under the Export Compensation Scheme; or that if any was exported it was of insignificant quantities as there was no one the Commissioner of Customs and Excise designated to do a physical examination at the port of exit, who would have ensured that the goods left this country. Apart from Mr. Pattni no other witness testified that he was present when GIL was loading its consignments on board of an aircraft, vehicle or ship. Even Mr. Pattni qualified his evidence by saying his company used courier services at times, and at times the consignment would be accompanied by either himself or his nominee.

614. From this it is clear that the Commissioner of Customs and Excise, who happened to be Mr. Cheruiyot, did not ensure that an export took place. Besides, by allowing a physical check of goods for export to be examined at a place other than the port of exit, he thereby created an opening for flouting safeguards for ensuring there were exports.

615. We earlier stated that Customs and Excise department declined to pay to GIL export compensation at the enhanced rate of 35%. Thereafter Mr. Mbindyo, instructed the Commissioner of Customs & Excise by letter dated 19th December, 1990, in pertinent part as follows:

> "while arrangements are being made to publish an appropriate Legal Notice to formalize this decision, you are hereby requested to grant an export compensation of 35% to M/s. Goldenberg International Ltd on the export of the above two items." **[Exht. 50 – pg. 78]**

616. But that was also not acceptable to the department. The department's problems started when it sought advice from the Permanent Secretary, Treasury on the issue [see **Exht. 50 - Pg.71**]. The Permanent Secretary, Mr. Mbindyo, then gave the following guidelines:

> "As you are aware the Treasury has vide my letter dated 19th December, 1990 to you given M/s. Goldenberg International Limited a 35% export Compensation for Diamond jewellery and gold exported by them ...
> In our view this is a sound investment decision. Therefore while arrangements are being made to legally formalize this decision, it has been decided that you immediately compensate Goldenberg International Limited by paying the current 20% as required by the law with effect from November, 1990 and the extra 15% will be dealt with by this office after your confirmation that you have paid the initial amount ... You are further required to process their export documents and export compensation claims each time they are presented to you, without any delays whatsoever. Your personal attention to the latter is necessary so as to reap maximum benefits out of this arrangement."

617. The Commissioner of Customs has immense powers, and the law does not envisage that he would be subject to direction by the Permanent Secretary, Treasury on operational matters even though the Department of Customs & Excise falls under him. Yet Mr. Cheruiyot succumbed to pressure from the permanent secretary, and in the process ended up acting on his whims. He in effect ceded part of his powers to the Permanent Secretary. Thereafter Mr. Cheruiyot would write to the Permanent Secretary, Treasury seeking his guidance on what to do in almost all issues relating to GIL. For instance, by his letter to the Permanent Secretary, dated 13th November, 1991 he sought guidance on exchange rate and invoicing of exports in Kenya Shillings. He was directed to effect payments notwithstanding the fact that invoicing in Kenya shilling was contrary to the Local Manufactures [Export Compensation)Act. [See **Exht. 50 - Pgs. 53 an 60**] By his letter dated 9th October, 1991 to the Executive Chairman GIL Mr. Cheruiyot clearly knew he was not legally supposed to pay. **[Exht. 50 pg.63]**. Exhibit 91(B) page 15, shows the response of the commissioner to the Permanent Secretary's directive to pay. He penned:

"Further to my letter ... and my subsequent discussion with you on this matter, I have accordingly instructed my accounts section to continue effecting payment on the claims as per your directive. This is inspite of the internal auditors remarks."

618. The Internal Auditor had declined to allow payment because he wanted to be satisfied as to the source of the gold intended for export notwithstanding the fact that the Commissioner of Mines and Geology had certified the gold to be eligible for compensatory payment.

619. Mr. Cheruiyot, to say the least, was performing his duties as Commissioner of Customs and Excise with fear, and depended on directives from Treasury on every action and step he took on GIL matters regardless of whether they were proper or improper, legal or otherwise. It is for that reason that he ordered the release of gold smuggled by GIL from Bunia, Zaire, without duty being paid. He thereby aided and abetted the wrongs that were committed.

Elphas Riungu

620. Mr. Riungu was involved with GIL ever since it started dealings with CBK. He was then Chief Banking Manager of the bank In February, 1992 he was elevated to the position of Deputy Governor, a position he held until he left the bank slightly over a year later. The evidence before us shows that on 16th November, 1990, at the request of the governor, Mr. Kotut, Mr. Riungu met the proprietor of GIL, Mr. Kamlesh Pattni. Mr. Riungu testified that Mr. Kotut had asked him to meet Mr. Pattni, discuss with him GIL's proposals and thereafter indicate how the company's proposals would be implemented. After meeting Mr. Pattni, Mr. Riungu did a memo to the governor [**Exht. 111A - Pg.85**] in which he recommended, among other things, that GIL be allowed to deal with CBK, but its activities to be monitored "... through the CD3 form. If you agree, attached is a draft letter which could be sent by Exchange Control." The draft letter is reproduced elsewhere in this report and was eventually

signed by Mrs. Mwatela who was then attached to Exchange Control Section.

621. It should be recalled that GIL's application to the Minister for Finance, dated 8th October, 1990, had sought three necessities. The one which concerned CBK was the enhanced export compensation. In the draft letter we have referred to above CBK was to monitor receipts of export proceeds through CD3 forms. Until GIL came into the picture, it was not usual for CBK to deal with customers of commercial banks directly. By his proposal that CBK would monitor GIL's dealings through CD3 forms Mr. Riungu opened the door for CBK to deal directly with customers of commercial banks instead of the banks themselves.

622. It was Mr. Riungu who handed over to Mrs. Mwatela, GIL's letter to the Minister dated 8th October, 1990, along with Mr. Mbindyo's letters to GIL conveying the Minister's decision, which had been copied to among other persons, the governor. Mr. Riungu's memo to the governor was also included.

623. As soon as GIL started its dealings with CBK, problems arose regarding the interpretation of a phrase in the Exchange Control Notice No.13 on receipts of proceeds of export. The relevant provision was to the effect that export compensation would only be paid if the exporter showed that proceeds of exports had been received in an "approved manner". We have discussed this issue elsewhere in this report. But the point we would like to emphasize here is that when Mr. Riungu was called upon to give his opinion on the matter he sided with the governor and the Exchange Controller that as long as foreign currency in cash had been sold to CBK, it was not necessary to relate it to any CD3 form. Mrs. Mwatela who was directly supervising GIL's operations at the exchange control department did not share their view for one main reason. That interpretation opened the way for foreign currency earned or received

otherwise than through exports to be treated as proceeds of exports and thus become eligible for export compensation.

624. It should be recalled that the draft letter which accompanied the memo to the governor had as one of the conditions, that the claim for export compensation had to be accompanied by an acknowledgement from CBK that proceeds of export had been received in an approved manner. A copy of CD3 form would be attached to provide particulars of the exporter, the importer, their respective commercial banks, the export and proceeds of the export in foreign currency. The interpretation given to the phrase "approved manner" meant that all that although necessary, would be done as a formality as the interpretation had in effect overruled clause 5 of the draft letter.

625. Mr. Riungu was also involved with some irregularity in the administration of pre-shipment finance scheme. The scheme was terminated in March 1993. However, we have evidence that the scheme continued after the effective date of termination. In his charge and caution statement to the police the late Mumelo, has stated that after the scheme was brought to an end, he refused to approve new applications for pre-export finance. The Deputy Governor, Mr. Riungu, however, directed him to continue approving the same. In his evidence before us Mr. Riungu did not comment on this to refute or accept Mr. Mumelo's assertion. We note that the new applications for pre-export finance were from GIL or GIL related companies.

626. Evidence of another incident which shows Mr. Riungu's leaning in favour of GIL was given by Mrs. Mwatela. At one point in time Mr. Pattni felt that Mrs. Mwatela was acting against the interests of his companies. He approached her at her office and threatened to report her to then President of the Republic of Kenya. She however rebuffed him. As soon as he left Mrs. Mwatela received a telephone call from Mr. Riungu inquiring "what did you do this time?" **[Hansard – pg. 6627]**. The tone of his

voice, she said, showed disapproval of her strict approach to her work particularly on GIL's matters.

627. Mr. Riungu also featured in the Retention Accounts Scheme. The circular introducing the scheme was released by him on 21st August, 1992, a Friday [**Hansard Pg. 6661**]. Mr. Riungu invited comments on it from members of staff before it would be published. The complaint against him is that he allowed the staff about an hour to scrutinize the circular and give their comments on it. There was no justification for the urgency and it would appear to us that he did not want the staff to identify weaknesses in the scheme. We have stated elsewhere that the scheme denied CBK access to foreign currency which was in the retention accounts and the country was not able to show the foreign reserves it had. That was because the scheme allowed exporters 100% retention of proceeds of exports in retention accounts. Besides we also indicated that because the retention accounts scheme allowed a contractual exchange rate, there were two reigning exchange rates consequent upon which CBK lost a lot of money. In all these GIL was the major if not the only beneficiary. According to Mrs. Mwatela, the foregoing weaknesses were brought to the attention of Mr. Riungu but he published the circular without any amendments.

628. In our discussion on treasury bills we indicated that Mr. Riungu was concerned that the non-levying of penalty interest for GIL's premature retirement of OMO bills had come to light within the bank. Ms. Kagane testified before us that Mr. Riungu instructed her to liaise with Mrs. Mochache of Audit Department to manipulate the accounts to conceal that fact. [**Exht. 170 - Pg.16**]. Both ladies declined. Why would Mr. Riungu want to assist GIL? Our view is that he knew exactly what was happening and that he was aiding and abetting a fraud.

629. We earlier discussed the transfer of Kshs.5.8 billion out of PMG account. Mr. Riungu admitted in evidence that he was called to treasury

where he met the governor, Mr. Kotut, in Dr. Koinange's office. The latter was the Permanent Secretary, Treasury. He was given Dr. Koinange's letter dated 19th April, 1993 [**Exht. 104**] with a request to help in mopping up the resultant liquidity payment of the money on the letter would entail. Mrs. Bretta Ndululu Mutunga, the Permanent Secretary's then secretary confirmed she saw Mr. Riungu at her boss's office and that she is the one who telephoned him to come. Mr. Kotut denied this but we think that his denial is of no consequence.

630. Mr. Riungu also admitted he received a second similar letter but for a different amount of money. The second letter bore the date 28th June, 1993, but the transfer of the money was expected on 30th June, 1993 but it wasn't effected. Mr. Riungu testified that it would have been suicidal to do so. His evidence on this was as follows:

> "I instructed him [Mr. Werunga] not to make payment on that day 30.6.93, because it would have been more or less suicidal .Figures would have gone haywire and exceeded our set target." [**Hansard – Pg.10502**]

631. Tom Kilalya Werunga, confirmed the instructions and that he was told by Mr. Riungu to treat the payment with secrecy. The letters which authorized payment were deficient. They did not have details of the beneficiary of the money, the purpose for the payment and the author was not the person who normally operated the PMG account. All these Mr. Riungu admitted in evidence that they were essential details, and yet he authorized payment. He must have known who and where the intended beneficiaries were. It should be recalled that the money ended up in GIL account and some of it was used by GIL to purchase special OMO bills.

632. Finally, concerning the Kshs.13.5 billion Mr. Riungu testified that the CBK needed to enter into a back to back arrangement with a reputable foreign bank with a view to showing that the country had ample foreign exchange reserves. The idea was to hoodwink donors, particularly IMF and World Bank. It was not clear to us what a back to back arrangement entails. According to the explanation we got, the reputable

foreign bank would open an account in the name of CBK and indicate a reasonable credit balance. CBK would in turn open an account in its books showing that the foreign bank had a credit balance of Kenya shillings equivalent to the foreign currency in the foreign bank account in the name of CBK. The arrangement would last up to 30th June, 1993 or soon thereafter, the date CBK was expected to meet targets set by IMF/World Bank.

633. The foreign bank which was chosen was Banque Indosuez Aval. Officials from that bank met with Mr. Riungu, had discussions with him and some agreement was signed between the parties. We have discussed this issue elsewhere in this report, where we have shown that the arrangement if anything, was meant to benefit GIL and Exchange Bank, and not the CBK or the country. In our view Mr. Riungu was a key player in the Goldenberg Affair and actively and knowingly supported its illegal operations.

Mr. Eric Kotut

634. Between January 1990 and July 1993 Mr. Eric Kotut, was the governor of the CBK. In matters of economic policy formulation and management, we think he is the second person to the Minister for Finance. It is therefore no wonder that in the CBK board minutes, matters of economic policy formulation and implementation dominate the discussions. We will sample a few of these as relevant to our inquiry.

635. In its meeting held on 29th August, 1990 in Mombasa, the board discussed the issue of incentives aimed at increasing exports, namely pre-shipment finance, Manufacturing-in-Bond etc. **[Exht. 187-Pg.141]**. Pre-shipment finance was introduced later that year under the Export Development Programme. **[See Governor's Report – Exht. 187 – Pg.155]**. And at page 158 of the same exhibit, the governor announced his intended plan to introduce Foreign Exchange Bearer Certificates. (Forex Cs). Forex Cs were introduced in October, 1991.

636. In April 1991 the board was asked by the governor to approve the introduction of the Open Market Operations Scheme [**Exht 187 - Pg. 172**] on an experimental basis using Treasury Bills, and confining the scheme to commercial banks. The board approved the proposal and appointed 2nd May 1991 as the commencement date.

637. In its meeting held on 5th July, 1991 the board was briefed by the deputy governor about the decrease in net foreign assets by about Shs.2 billion, and also that the Structural Adjustment Programmes did not appear to be fully understood by some treasury staff.

638. In its meeting of 26th March, 1992, the governor noted that government borrowing had exceeded the limit permitted under S.48 of the Central Bank of Kenya Act. The Board, on 27th May, 1992 approved the opening of an account entitled "Exchange Bank Limited" in the Banking Division of CBK. In the meeting of 26th August, 1992 the board noted that foreign exchange earnings were mainly from tourism and traditional exports and not gold, that Forex Cs had eased pressure on CBK for foreign exchange; the governor announced the introduction of the Retention Accounts Scheme in which " ...the holders of these accounts [were offered] an opportunity to sell foreign exchange to all who required it and to take advantage of the premium given in the Forex C Market." In addition the governor reported to the Board that CBK had little money in the Foreign Exchange receipts accounts, with the result that CBK had to borrow from Forex C account to meet urgent commitments, such as payment for oil. Certain members of the board raised a concern that there was the possibility that forex Cs were being used to drain foreign exchange. At the conclusion of that meeting the Permanent Secretary to the Treasury Dr. Koinange, registered his personal appreciation for the support he had received from CBK and particularly the governor, and the governor reciprocated. [**Exht 187 - Pg.267 et seq**].

639. In February 1993, the Board noted that Forex Cs were being used as a vehicle for capital flight [**Exht 187 - Pg.299**], that direct advances to the government would not be allowed to exceed Kshs.500 million, and that to maintain that target, excess amounts would be converted into treasury bills the proceeds of which would be regarded as government deposits. [**Exht. 187 - Pgs. 316 - & 327**] It was admitted that this procedure was decided upon in order to show that the target set by the IMF was being adhered to while excess borrowing was in fact being allowed.[**Pgs. 315 - 316**].

640. In all the matters we have alluded to above, the governor was Mr. Kotut. He was fully informed of what was happening in the CBK and the country concerning the economy. Any economic schemes which were started by CBK had to receive the approval of the CBK board which was chaired by him. The board monitored the performance of each scheme. For instance on 6th August 1993 it was noted that there were miscellanous receipts of Kshs.30,417 million in May 1993, because of a lot of inter-bank transactions between CBK and Exchange Bank and that some foreign currency which had been purchased forward from Exchange Bank did not materialise. We note that by August 1993, Mr. Kotut had left and Mr. Cheserem was the governor. However these were matters which took place in May of that year and on which we think governor Kotut must have been aware before he left.

641. We have given the foregoing information to show the working of the CBK. The governor reports to the board the activities of the bank on a monthly basis and also on the success or failure of the economic policies the country is pursuing; and further the success or failure of the policies the bank is pursuing. To do this effectively he must of necessity know what is happening on the ground.

642. With this background in mind, we consider the role of Mr. Kotut in the Goldenberg Affair. Mr. Kotut was among the first people to be notified about GIL's proposal with a request to assist the company to

realize its objective. GIL was to enter into an agreement with CBK regarding the former's undertaking to earn a minimum of US$50 million. Mr. Riungu testified before us that on Mr. Kotut's instructions he met Mr. Pattni, discussed GIL's proposal with him and concluded that the proposed agreement was not necessary.

643. The evidence before us shows that Mr. Kotut was operating through officers under him, with the result that not much is documented regarding his role. We earlier discussed how through Mr. Birech Kuruna and Mr. Riungu Mr Kotut discreetly caused a decision to be made which fundamentally relaxed rules relating to the identification and monitoring of proceeds of exports. Both he and Mr. Riungu knew the effect such a decision would have but nonetheless pursued it. We have shown elsewhere in this report that because of that decision a lot of foreign exchange was bought locally and treated as proceeds of exports and export compensation was paid on it.

644. Mr. Kotut's role in GIL affairs was always silent until early 1993, more particularly in March 1993, when Pre-export Finance Scheme was stopped by bank circular No.1 of 1993. Applications for pre-export finance from GIL continued after that and payment effected through the approval of the Deputy Governor, Mr. Riungu, who said he did so on the instructions of the governor Mr. Kotut [**Exht 114 -pg.3**]. Mr. Kotut denied this, but in our view his denial is incorrect. About the same time certain commercial banks were running large overdrafts with CBK. These were Post Bank Credit, Pan African Bank, Trans National Bank, and Trade Bank. According to Mr. Mumelo, who was then Chief Banking Manager, both the governor and his deputy arranged for the opening of an account No.2 to conceal the overdrawn position of these banks. The total overdrafts were to the tune of Kshs.10 billion. Mr. Mumelo in his statement to the police [**Exht. 114B**] stated that he prepared a print out showing the overdrawn position of those banks, but this did not go well with Mr. Riungu who asked him to hide it. Mr. Kotut on his part was

unwilling to guide Mr. Mumelo on what to do about the overdrafts and curiously asked him to talk to Mr. Kamlesh Pattni because he argued, most of the cheques which were responsible for the overdrafts originated from Exchange Bank.

645. Soon thereafter at the request of Mr. Riungu a circular was issued to all commercial banks saying that cheques from them would not be allowed at the CBK counter and that from then onwards they would not be allowed overdrafts. The circular was released on 10th May 1993, and it was intended to bring to an end cheque kiting which had commenced in or about early April 1993. According to Mr. Mumelo, Mr. Kotut had inquired from him whether Mr. Pattni had banked a cheque for Kshs. 3 billion. He checked and confirmed that indeed Mr. Pattni had done so. In his evidence Mr. Pattni stated that cheque kiting was sanctioned by Mr. Kotut. It would appear to us that the stoppage of the pre-export scheme necessitated the commencement of cheque kiting as GIL had lost the source of cheap finance. Cheque kiting was a stop-gap measure while looking for an alternative source of funding.

646. Mr. Kotut of course denied having sanctioned cheque-kiting or having made any inquiry about the banking of a cheque for Kshs.3 billion. He likewise denied having made it impossible for Mr. Mumelo to enforce the circular stopping overdrafts to certain commercial banks. It is, however noteworthy that Mr. Kotut transferred Mr. Mumelo and replaced him with Mr. Kanga. When Mr. Kanga attempted to enforce the circular he was promptly transferred as well, implying that the governor was unhappy with that action.

647. Both Mr. Mumelo and Mr. Lukorito, alleged that the governor and his deputy, Mr. Riungu, were close friends of Mr. Pattni. Mr. Kotut denied having ever met Mr. Pattni at the CBK premises or at all, but the denial is inconsequential considering the fact that as chief executive of CBK, several irregular things were happening intended to benefit GIL and

Exchange Bank, but he did nothing to stop them. His explanation was that he was either out of his office most of the time due to other assignments, or that the matters in issue concerned operational aspects of the bank which he had no direct personal responsibility. He said he was concerned mainly with broad policy issues. What emerges from the evidence is that Mr. Kotut avoided taking decisions on matters touching negatively on GIL or Exchange Bank.

648. We earlier discussed the issue of foreign exchange being received in "an approved manner". Mr. Kotut dodged the issue and shifted responsibility to other officers. It is also in evidence that at one time when Mrs. Mwatela sought his protection from intimidation by outsiders like Pattni and one Kipsang, among others, Mr. Kotut was not decisive in the matter. He laughed off some of the issues she raised and avoided dealing with irregularities which she pointed out on GIL's export documents. The evidence on this aspect went as follows:

"Mrs. Mwatela: My Lords, his reaction to what he actually saw, as I indicated earlier, he did not address himself to the numbers [on CD3 forms]. I indicated that he laughed at the example that I used to illustrate my difficulty. When I asked: 'Does the Queen of England wear this kind of jewellery?'
...

Chairman: ... I was going to ask whether he laughed at the joke or at the figures? Whether he thought that they were abnormal?

Mrs. Mwatela: My Lords, I do not want to speculate on what he laughed at but I would imagine that if the figures concerned him the way they concerned,(me) probably, he would have been giving me some sense of direction on them to the effect that I needed to follow the matter up.

Chairman: Assuming he did not know what was happening. You earlier stated that your seniors were behaving in a way which told you very little ... in the sense that what you expected them to do or say is not what they said. They did something else ... in your mind, when you looked at the Governor, was he as concerned as he ought to have been?

Mrs. Mwatela: My Lords, I did not get that impression."
[Hansard Pg. 6631 –2]

649. Apart from the foregoing Mrs. Mwatela testified that she specifically and personally notified the governor, Mr. Kotut, that the implementation of Goldenberg proposal was becoming difficult [**Hansard Pg.6619**]. He did nothing about it.

650. Mr. Kotut eventually admitted that he was vicariously responsible for the actions of all staff except cases of a criminal nature. In this respect the provision of the Penal Code should be borne in mind. Under the Interpretation and General Provisions Act (Cap 2) the Central Bank of Kenya is a body corporate. Section 23 of the Penal Code provides:-

> "23. Where an offence is committed by any company or other Body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission."

651. The evidence before us does not support Mr. Kotut's position. We earlier set out various issues which were discussed by the CBK Board. They related to both operational and policy matters of CBK. For instance on 12th February, 1993 the CBK board noted that Forex Cs were being

used as a vehicle for capital flight [**Exht 187- Pg.299**]. Mr. Kotut chaired the Board meeting of that day. Incidentally the deputy governor was also in attendance. GIL used that vehicle and exported a lot of foreign exchange out of the country. The governor and his deputy knew this but did nothing to check the situation.

652. We heard Dr. Koinange, Mr. Werunga, Mr. Riungu and Mrs. Bretta N. Mutungi regarding the transfer of the Kshs.5.8 billion out of the PMG account. Mr. Kotut denied being involved in this. However all these witnesses testified that Mr. Kotut was in Dr. Koinange's office on 19th April 1993, when the first letter authorizing the transfer of Kshs.1.8 billion was drafted. Mr. Riungu testified that he was given the letter in the presence of Mr. Kotut and that infact it was Mr. Kotut who had called him there. This evidence clearly shows Mr. Kotut was at Dr. Koinange's office on 19th April, 1993 and approved the transfer of the Kshs.1.8 billion from the PMG account to a KCB account. We do not believe him when he denies having had any role in the matter.

653. Elsewhere in this report we sketched out Mr. Kotut's role in PAB sale, we find no necessity of repeating it here.

654. Finally we observe that it is unthinkable that massive frauds as we have shown could possibly take place at the CBK without its Chief Executive Officer knowing.

Mr. Tom Kilalya Werunga

655. Mr. Werunga was an assistant principal in the Banking Division of CBK. He acted on the three letters from Dr. Koinange which authorized the transfer of money from the PMG account [**Exht 131B pg.114**]. It was his evidence that the Deputy Governor, Mr. Riungu, gave him a copy of the first letter with instruction to act on it which he did. It was also his evidence that he was instructed to treat the transaction with extreme

confidentiality. Initially PMG account was debited. Later however on the instructions of the then Accounts Controller at Treasury, Mr. Oyula, account DEP 7 was debited. Authority to debit was shown on the relevant voucher as having been "By Order of Treasury."

656. The second of the three letters above bears the date 28th June, 1993. The instructions in it were that PMG account be debited with a sum of Kshs.2,821,080,943/= which would be credited to KCB account with CBK. As with the case of the first letter Mr. Werunga testified that the original was shown to him by Mr. Riungu on 1st July, 1993. The instructions from Mr. Riungu on the letter were similar to those he gave with regard to the first one. Mr. Werunga passed the entries on the same day.

657. Mr. Riungu admitted having instructed Mr. Werunga to pass the entries regarding the first and second letters but alleged that he acted on the instructions of the governor.

658. The third letter dated 6th July, 1993, was handled differently. Mr. Werunga got it direct from Dr. Koinange. The latter called him to his office through his secretary and handed over the original letter to him with instructions to act on the letter in like manner as the previous two letters. Dr. Koinange admitted he had called Mr. Werunga and gave him instructions as alleged, but added that he did so because he could find neither the governor nor his deputy.

659. Mr. Werunga testified that he acted on the three letters even though he did not think the payments were regular. He should therefore have declined to effect payment. Alternatively he should have reported the matter to the police. That he did neither he thereby aided and abetted the theft of the money.

660. Besides, later two of the letters in original form, and the third in copy form were recovered from Mr. Werunga's home together with the original vouchers which effected the transfer of the money. His explanation was that the then Director of CID, Mr. Noah Arap Too, instructed him to keep the letters safe pending further investigations on the matter by him. Mr. Werunga further stated that he was instructed to keep the documents "for my own protection". **[Hansard Pg.8508].** It is noteworthy that Mr. Werunga was holding the original documents and kept them beyond the reach of CBK which ordinarily was supposed to have them. Even after his transfer from Nairobi to Eldoret he still retained them. He must have known that the transactions to which the documents related were not lawful. Otherwise why did he retain the documents even after his transfer? The usual practice when a person leaves a department, section or even organization is to hand over to the in-coming person which Mr. Werunga did not do. His explanation is clearly untenable.

661. In August 1994 he was given the opportunity of early retirement as he says as an alternative to being dismissed. He took the retirement and he possibly improved his story, but in any event it appears to have had nothing to do with GIL or our terms of reference.

Mr. Joshua Chelelgo Kulei

662. Mr. Kulei was personal assistant to President Moi. Two main people mentioned his name in connection with GIL. The first was Mr. Mumelo in his inquiry statement to the police. Mr. Mumelo stated that on 16th April, 1992, Mr. Kulei telephoned him at the CBK. He was concerned that Mr. Mumelo's activities at the CBK were undermining the operations of TransNational Bank (TNB) in which he was both a shareholder and director. According to Mr. Mumelo, Mr. Kulei threatened him with dire consequences if he persisted in doing what he was doing. Mr. Mumelo had by then produced data to show the overdrawn position of various commercial banks including TNB and drawn a circular which

discontinued any further overdrawing by any commercial bank. Mr. Mumelo later died and he did not therefore testify before us in order that his allegation could be tested in cross-examination.

663. Bikassy Mandeko Bijos, a Congolese musician testified he entered into an agreement with Mr. Kulei, as nominee of the former President, Daniel Arap Moi, for his Saka Saka Band International, to provide musical entertainment during campaigns preceding the 1992 General Elections. He was also to compose a song about the 1992 elections in praise of Moi and KANU. He fulfilled his part of the bargain, but he has not been paid so far. Because of the non-payment he has suffered injury and damage and blames Mr. Kulei. It was further his evidence that Mr. Kulei controlled all the campaign funds from KANU for the 1992 General Election, that Kulei's secretary Janet gave him a note to Mr. Pattni to give him a car which he used with his band during the election campaigns, that after the campaigns he returned the vehicle on instructions of Mr. Kulei and that because of failure by Mr. Kulei to pay him he could not provide appropriate medical treatment to his wife nor could he meet her medical bills. She eventually died. His household property and musical instruments were attached for non-payment of rent, and several musical cassettes he made in praise of Moi and KANU, remained unsold. Mr. Bijos's claim is clearly a personal issue and we do not think it proper to deal with the issue as Mr. Bikassy is free to sue for his money, his claim being based on contract.

664. Mr. Pattni was the third witness against Mr. Kulei. His evidence was to the effect that large sums of GIL money and motor vehicles were given to Mr. Kulei for KANU's campaigns in the 1992 first multiparty general election. Mr. Pattni testified that he was not claiming the money and motor vehicles from Mr. Kulei but merely wanted to show how much money he had spent in the 1992 general elections on behalf of and for the benefit of KANU at the request of the former President, Daniel Arap Moi.

665. Mr. Kulei did not testify. He, however gave the Commission a long and detailed statement particularly responding to the evidence of Mr. Smith. The statement preceeded Mr. Pattni's testimony, but his counsel, Mr. Bowry, did cross-examine Mr. Pattni at great length on his evidence.

666. Mr. Smith's testimony indicated that Mr. Kulei received Kshs.10 million from GIL for a purpose which had not been disclosed. Mr. Kulei in his statement explains that the money was paid to him as rent for premises owned by his company, Chemusian Co. Ltd. which were leased to Exchange Bank and attached copies of a tenancy agreement, correspondence relating to it and also an agreement for sale of furniture after the tenancy terminated.

667. Mr. Kulei denies in his statement having any knowledge of the cheque made out to Milling Corporation which was allegedly banked in his bank account. He states that he is unable to get any details, either of the cheque or account through which it was encashed.

668. Mr. Kulei also denies having been a signatory of a bank account of a company associated with Mr. Pattni, called Dallah Investments. He described as a forgery a signature attributed to him as one of the officials of that company.

669. Mr. Kulei, however, admitted he and one Sajaad were assigned by the former President to deliver a letter to the head of state of the United Arab Emirates which he delivered alone because Mr. Sajaad was taken ill. While there he met Mr. Pattni with another letter to the same head of state of the United Arab Emirates. Mr. Pattni requested that he deliver that other letter as well but he declined to do so as the contents were similar and because he doubted the authenticity of the letter.

670. There is an incident which allegedly took place one Sunday afternoon which connects Mr. Kulei to GIL. Mr. Nagin Pattni met Mr.

Kulei at the home of Hon. J.B. Kangwana. Mr. Nagin was invited there by a mutual friend, Mr. Mayesh. While there Mr. Kulei joined them. He became very angry when Nagin was introduced to him. He allegedly threatened Nagin to "leave this nonsense" [**Hansard 1791**] about exposing GIL and concentrate on his business. Mr. Kulei said he knew Nagin was fighting GIL and wanted its activities exposed, but promised to assist Nagin to get a licence to export gold and gold jewellery, although without any compensatory payment, provided he desisted from exposing GIL. If all this is true, Mr. Kulei could not react that way unless he had interest in the affairs of GIL. Clearly he wanted GIL to continue with its fraudulent activities, otherwise he would not have had any reason to be angry with Nagin.

671. Mr. Kulei denied he was concerned with the day to day affairs of State House or the President's diary. He denied having ever escorted Mr. Pattni to see the former President at State house. If ever he did so, he says, he has no recollection. He, however, admitted Micah Cheserem is his brother-in-law but denied he had any role in his affairs.

672. We have discussed elsewhere Mr. Kulei's alleged involvement in the giving out of various motor vehicles and money to various people and organizations for 1992 KANU election campaigns and we do not find it necessary to repeat it here.

673. In conclusion, Mr. Kulei's involvement in the Goldenberg Affair was not direct. We however have no doubt that he supported the activities of GIL and possibly benefited from it. He was represented during the inquiry at least from 27th May, 2004. His counsel was supplied with the hansard record for the period prior to that. However, Mr. Kulei did not comment about some of the incidents we have referred to. In view of this, further investigations as to his involvement should be undertaken.

Elijah Arap Bii

674. He was the General Manager of Kenya Commercial Bank Ltd, when Dr. Koinange arranged for the transfer of Kshs.5.86 billion out of the PMG account with the CBK. As we found earlier the money was paid out of that account and credited into the KCB account with CBK. There was no indication for whose benefit the money was transferred. However, the money ended up with GIL. Mr. Pattni gave written instructions as to how the money would be applied and those instructions were complied with by Mr. Bii. How did Mr. Bii know the money belonged to GIL?

675. Mr. Bii explained that he was telephoned by Dr. Koinange and informed that the government wanted to effect certain payments through his bank. His response was that as the government was one of KCB's customers he had no objection. Later Dr. Koinange briefed him that disbursal instructions would be given by Mr. Pattni on behalf of the beneficiaries of the same which was done and the money was split, it was credited into the various accounts of certain commercial banks and eventually it ended up in a GIL account with EBL. Mr. Bii testified before us that GIL had a bank account, with KCB, but the money was not credited directly into that account implying that the whole idea was to confuse the trail the money followed. It is also noteworthy that he kept the three transactions secret from his bank implying that the transactions were not to be known by his bank and were therefore fraudulent.

676. The above process was repeated three times because the Kshs.5.8 billion was not moved in one tranche, but three. Clearly Mr. Bii, a seasoned banker, knew the money was being moved fraudulently. Otherwise he would have asked why the money was not credited directly into a GIL account with KCB. Mr. Bii relied on oral instructions he allegedly obtained from Dr. Koinange to effect the transfer of the money to third parties implying that he was made fully aware that the money was being transferred to GIL. Otherwise as a seasoned banker he would not have acted on verbal instructions on who the beneficiary of the money was

and duly effected payment on its instructions. That he did so he thereby aided and abetted the theft of the money.

Mr. Edward N. Nambisia

677. Mr. Nambisia was a Customs Officer frequently involved in the exportations of GIL. Although Mr. Nambisia stated that it was the duty of customs to verify the exports, he agreed that he never knew when or how the exportation was carried out. In his evidence (**Hansard pg. 7222**) he said:

> "However, from Customs Department we only needed one officer just to go because basically it was just witnessing of verification by the experts who are the Mines and Geology Officers".

678. From this it is clear that there was no independent checking of any sort and Customs Officers need not even have been present- they left it all to Mines and Geology. This obviously made the schemes of GIL easier to carry out.

Mr. Michael Wanjihia

679. Mr. Michael Wanjihia was Assistant Principal in the Foreign Department of CBK until 18th August, 1993. He was under the Manager, Foreign Department. He signed the totally incorrect letter dated 12th July, 1993 to Delphis Bank Ltd stating that the US $ 19 million had been received from the bank. (**Exht. 56 pg. 11**). At that time he must have been aware that no dollars had been received and the contract had in fact been reversed.

680. On the non-delivery of US $ 247,900,000 he was aware of the non-delivery but merely stated that it was for the Manager, Foreign Department to reverse the entries (**Statement Exht. 152 pg. 7**).

681. Mr. Wanjihia was also involved in the two contracts for US $ 210 million with American Express Bank and Banque Indosuez Aval. He

signed the documents together with Mr. Kilach. He appreciated that under the contracts as signed there were in fact no dollars due to CBK. He merely stated (**Exht. 152 pg. 10**)

> "there was no movement of funds. I did not understand the need for such an arrangement, but as a dealer, I found that CBK was not losing anything and since the agreement has been reached by my seniors they knew better what they were doing. So I countersigned the agreement for the deposits".

682. The question came before us of the correspondence between CBK and AMEX and Indosuez Aval. On 22nd June, 1993, Mr. Riungu wrote to Amex confirming that Mr. Wanjihia and Mr. Kilach were authorised signatories of CBK (**Exht. 141B pg. 54**). On 23rd June, 1993, Mr. Wanjihia wrote to Amex that all forex messages were to be sent to himself (**Exht.131C pg. 10**) and on 2nd July, 1993 he wrote to confirm that all correspondence should be sent by confidential courier to Mr. Kilach (**Exht. 131C pg. 10**). The letter mentioned a conversation, and it was agreed to by the recipient. Mr. Wanjihia admitted in evidence that these letters were from him (**Hansard pg. 11999**). His exact words may be something of a give-away since they were "I can own up to those two".

683. What we have next is a letter of 26th July, 1993 (**Exht. 131A pg. 167**) purportedly sent by Mr. Wanjihia to Banque Indosuez Aval stating as follows:

> "We expect that our Internal Auditors will be changed by the end of this week. Accordingly we kindly request you not to forward the balance confirmations as at 30/6/93 as requested by our earlier letter. Those may be forwarded to our new auditors instead.
>
> We shall advise you the details of our new auditors as soon as they are appointed."

684. The letter is apparently signed by Mr. Wanjihia. It is to be noted firstly that 30th June, 1993 was the end of Government's financial year so that a statement was essential for audit purposes. Secondly, that the letter was obtained from Banque Indosuez Aval when enquiries were made

from them at a later date. Mr. Wanjhia flatly denied the letter and said it was a forgery. In his statement (**Exht. 152 pg. 11**) he stated:

> **"that letter was a forgery and must have originated from a party that wanted to hide something and most likely EBL because they were the only ones who had failed to deliver the dollars."**

He came up with nothing better in cross-examination.

685. This statement does not bear examination. EBL and Pattni knew that the contracts were self-cancelling and that therefore they did not have to deliver dollars. The cover-up was arranged in CBK. It is also beyond belief that Banque Indosuez Aval could have forged the letter on CBK notepaper. Therefore, taken together with the admitted letters ensuring that all correspondence and documents came to Mr. Wanjihia or Mr. Kilach, this denial cannot be correct.

686. It is therefore apparent to us that Mr. Wanjihia was knowingly part of the attempted cover up of these more than dubious transactions. His dismissal by CBK was fully justified. Whether criminal charges should be brought against him should be considered.

Mr. Job K. Kilach

687. Mr. Kilach became Financial Controller CBK in July 1990 and was transferred to become Director Banking Supervision Department in August 1992 and he was then transferred to Manager Foreign Department on 20th May, 1992. His involvement with the dollar sale contracts and the US$ 210 million contracts is set out above under the analysed (10) Dollar Sale Contracts and (11) US$ 210,000,000 contracts.

688. It was he who should have reversed the dollar sale contracts after there was non-delivery and he was so informed by Mr. Otondo [**Exht. 114A Pg. 155**]

689. In respect of the US$210,000,000 contracts, his participation is set out. He signed letters to Amex and to Banque Indoduez Aval in the full knowledge of the nature of these dealings. His complicity is fully proved and his dismissal accordingly justified. Whether criminal charges should be preferred against him should be considered.

Mr. James David Kabeberi

690. Mr. Kabeberi is an accountant who was on 23rd October, 1993 appointed the liquidator of Exchange Bank Ltd. He gave evidence that he never found the general ledgers of the bank, nor a register of members together with the share certificate counterfoils. Nevertheless he did not investigate the shareholding of the bank.

691. It is clear from what we have set out about Exchange Bank Ltd above that there should have been serious questions raised about the capital and the bank and claims made for the capital which should have been and was apparently in fact never forthcoming.

692. Finally no serious enquiry seems to have been made into the claims of certain alleged creditors including Uhuru Highway Development Ltd. Its claim seems to have been taken for granted and Shs. 53 million paid to it **[Hansard Pg. 18231]**

H.Z. & Company Ltd, Yaya Towers Ltd and The Hon. K.N.K. Biwott

693. Evidence was given before us concerning the payment by the Deposit Protection Fund Board of KShs. 600,000,000/=, which involved Trade Bank Ltd, Pan-African Bank Ltd and Liabilities of H.Z. & Co. Ltd.

694. We have anxiously considered this matter but we have to conclude that since no moneys of Goldenberg were involved, the matter is outside our terms of reference and that therefore we cannot enquire into

it. Besides some of the matters touching on these are pending before courts while others have been the subjectmatter of concluded litigation.

Kamlesh Mansukhlal Pattni

695. Mr. Pattni has been shown to be the instigator of everything with which this Commission has been concerned. He was the promoter of Goldenberg International Ltd and its shareholder and director at all times. While his relatives and associates played some role in the company he alone was fully responsible. It was in fact his alter ego and he treated it as such. By section 23 of the Penal Code he was responsible criminally for everything done by that company. Mr. Pattni was also the promoter, shareholder and director of Exchange Bank Ltd and everything we have just said about his relationship with GIL applies to his relationship with EBL.

696. From the beginning, Mr. Pattni was responsible for everything which went on, from his first introduction by Mr. Kanyotu to the Treasury, and the application for special treatment for his proposed exports. It is impossible to avoid the conclusion that he knew and intended what was to follow from that application.

697. The manner in which the alleged exportation was set up was such as to show that the conspiracy to defraud the Treasury, the CBK and Kenya Government, was in his mind from the beginning.

698. A series of documents alleging exportation to a series of companies in Europe and the Middle East was put in place. Mr. Pattni was quite prepared to stand by these as being genuine and in fact he had so alleged during all the years since.

699. It was only when investigators found and brought before the Commission, Mr. Bernard A. Metzger (witness 22) that this card-house began to topple. Mr. Metzger was a Swiss businessman. He showed that

there was not and could not have been a company Servino Securities Inc. registered in Switzerland, and that the address given for it was the address of the printer of a book written by Mr. Metzger.

700. The name appended to the documents produced for export was spelled Metzer which is an impossible misspelling of Mr. Metzger's name. He could not have and did not sign any documentation with such a name. This irrefutable evidence which Pattni did not challenge, taken together with serious doubts about the existence of other alleged consignees such as Solitaire led Pattni to attempt a way of getting round the fact that his deceptions had been unmasked. He therefore gave evidence before us that his real consignees demanded absolute secrecy and still require such secrecy. Their representatives met him on the aircraft, the boxes were opened and the diamonds handed over in the aeroplane. The complete impossibility of such a scenario and the fact that it was invented to get over the situation which had arisen shows that there was no truth in it at all and that Pattni was capable of and did commit the crime of perjury by giving such evidence before us.

701. The corollary of this evidence is that Pattni had to admit that all the documents which alleged export to Servino Securities Inc, Solitaire etc were not correct, and the conclusion is therefore that these were forgeries which Pattni produced or authorised.

702. As the claims for export compensation and pre-export financing depended on the claim to export to those non-existent people, such claims were all fraudulent and the obtaining of money by these means was theft. Besides in his statement to the Commission which he confirmed on oath, Pattni made the following allegations:-

703. Firstly, he stated that he met Kanyotu in March 1990 (**Exht. 154 pg. 2**) and that Kanyotu told him that because of the opposition of Kirira and Ryan there was no chance of obtaining 35% compensation unless it

was taken to President Moi (**pg. 5**), so he prepared a brief, GIL was ready and by the end of August, Kanyotu said it was time to meet Moi (**pg. 5**). The meeting allegedly took place in September, 1990.

704. The only comment Prof. Ryan had made was on a proposal of John Keen in 1989, and Njeru Kirira stated that he did not learn of the 35% until January 1991 (**Exht. 102 pg. 8**). The statement of Pattni therefore cannot be true.

705. Secondly, Pattni stated (**Exht. 154 pg. 2**) that in March 1990 he read that the country faced an embargo from donors. It was not in fact until November 1991 that the donors cut off funding and Prof. Ryan gave evidence that this was a great shock to the Treasury. Again this statement of Pattni's cannot be true.

706. Thirdly, Pattni stated (**Exht. 154 pg. 18**) that he took a letter of 8th October 1990 to Prof. Saitoti who read it and commented that monopoly would bring a problem as other people had applied including Paul Lu. In fact as Mr. Mbindyo explained (**Exht. 179 pg. 163**) Mr. Lu's application was on 8th January 1992 well after the date of the alleged conversation with Prof. Saitoti. It can be seen therefore that Pattni's statement was embellished by his knowledge of the evidence given before us, although it was not always expertly done.

707. Pattni is therefore shown conclusively and largely on his own admissions and documents, to be a perjurer (one who gives false evidence on oath) a forger, a fraudster and a thief.

James Kanyotu

708. Mr. James Kanyotu was Director of Intelligence from January 1965 until January 1992. As such on his own admission he had direct access to the President as principal advisor to the President and the

Government on issues of national security and intelligence. He had also to report on threats and potential threats to national security. He was therefore well positioned to know what was going on in Kenya. In his statement (**Exht. 185 pg. 98ff**) he details the economic condition of Kenya and the fact that the draining of foreign exchange was of concern to him by reason of its probable effect on the security and stability of the country.

709. The facts of Mr. Kanyotu's involvement with Pattni and the Ministry of Finance are not seriously in dispute. It is clear that Pattni chose him as a person who would be seen as most influential if associated with him. Mr. Kanyotu then introduced Pattni to the Treasury and stated that this was the sum total of his involvement.

710. When Pattni formed GIL and EBL he asked Mr. Kanyotu to one of the two promoters of these two companies. It is obvious what Pattni wanted from the association but it is altogether more problematic to decide why Mr. Kanyotu went along with this and lent his name to the companies. He states (**Exht. 186 pg. 108**)

> **"Mr. Pattni requested if I could assist him firstly in the incorporation of the company, and later the bank, as according to him a minimum of two directors and share-holders were required."**

In his submissions to us, Mr. Regeru for Mr. Kanyotu stated:

> **"Having agreed to participate in the incorporation of GIL merely to ensure the formal requirements of the law as appertains to minimum members was met, Mr. Kanyotu's role ... was that of a nominee".**

711. It is of course correct that two promoters are required for the incorporation of a private company but this in no way explains why Mr. Kanyotu should have been one of them. Any two persons can form a company and the companies could have been incorporated with Pattni and his brother or wife (or even his driver) as promoters.

712. What happened subsequently in respect of the two companies, GIL and EBL is not in dispute, and is shown by the statement of Mr. Kanyotu, the evidence of Pattni and the documents produced to us. No attempt was made to involve Mr. Kanyotu in the working of these companies nor was he ever made a shareholder by the allotment of shares to him whether as a nominee or as a principal. It seems that Pattni was quite content with having Mr. Kanyotu's name on the incorporation documents of these companies. It must have been that Pattni considered that this was of advantage to himself even if Mr. Kanyotu did nothing further.

713. Pattni alleged in his statement (**Exht. 154**) that Mr. Kanyotu was to be a nominee shareholder for the President and that 50% was agreed. However, in cross-examination by Mr. Mutula Kilonzo (**Hansard pg. 15893**) he agreed that he never discussed the question of shareholding nor of any nominee with the President. It is clear therefore that Mr. Kanyotu was never designated as a nominee of the President.

714. Certain incidents of Mr. Kanyotu's alleged subsequent involvement were put before us. On the smuggling of gold from Bunia Mr. Kanyotu said that he had no recollection of it, but the person he was alleged to have talked to, Mr. S.N. Gachanja stated that there was no attempt by Mr. Kanyotu to influence the release of the gold.

715. But the question we pose is why did he call Mr. Gachanja inquiring about Mr. Pattni? This was not the only time he showed interest in the affairs of GIL. He was either doing so because he was one of the directors and shareholder of the company, or for some reason he was providing security cover for it.

716. It is also noteworthy that he met Nagin Pattni and Nassir Ibrahim Ali at the Serena Hotel, Nairobi in connection with the affairs of GIL.

Nagin testified that in the course of that meeting, Mr. Kanyotu was asking searching questions about GIL and Nagin himself. It should be recalled that he asked Mr. Gachanja searching questions as well; namely, whether Pattni was at Wilson airport, what problems he was facing, and how Mr. Gachanja intended to deal with Pattni's problem. Mr. Kanyotu was then the Director of National Security Intelligence, and such questions would solicit information which would help him to strategize. National Security Intelligence was then a department within the Kenya Police Force, and if his questions had been innocent, he must have gotten enough information which would have allowed him to take steps to have charges framed against Pattni and his accomplices. However, he did not take any action and that is surprising if indeed as Nagin Pattni stated, **[Hansard pgs. 1721-23]** he was truly shocked on learning about the fraudulent activities of GIL.

717. Next there is the evidence of Mr. Magari who was P.S. Treasury. He gave evidence that Mr. Kanyotu came to his office after a meeting attended by Pattni and asked him to make payments requested by Pattni, and that when Magari refused he threatened to report him to the President.

Magari's answer in cross-examination (**Hansard pg. 5819**) was as follows:

Regeru:	**So there was a third meeting ... You said that he threatened you?**
Magari:	**Correct, he threatened to report me to the Head of State.**
Regeru:	**What did he tell you in actual words?**
Magari:	**He said that if I did not make the payments, he would see the President over it.**
Regeru:	**Was there anything like "you will be in hot soup" or that kind of thing?**
Magari:	**Yes of course. He implied so.**

anticipated that an importer may wish to bring in inputs into the country for the manufacture of its product. In such a case the importer would have to pay taxes on the imported inputs. Under the Scheme 10% of the foreign exchange earned would be sufficient to reimburse the importer for taxes paid in respect of the inputs. In constructing the Scheme account was taken of the fact that the 10% reimbursement could be met by the customs department without significant losses in revenue collection because the overall foreign exchange earned would mitigate against any such loss. The rate of 10% was later adjusted to 20% presumably taking into account the customs department's ability to pay and without compromising overall revenue collections.

723. It has been seen that GIL in its proposal pursued compensatory payment at the rate of 35 % even though it was illegal. This meant that the Treasury had to pay the additional 15%. Other policy compensatory factors such as the generation of enhanced foreign exchange earnings were not taken into account. On the contrary it has been established that no foreign currency was received arising from the scheme because in the first place there were neither gold nor diamond exports made under the scheme.

724. The proposal was therefore a double tragedy for the government in that it ended up paying both the normal 20% compensation and the enhanced 15% compensation in exchange for nothing.

725. This meant that revenue collection from the public coffers was used to pay the 35% Export Compensation at the expense of other projects which the government would ordinarily undertake with such revenue collections. In 1990 alone the 15% ex gratia payments increased expenditures to over Kshs. 100 million.

726. The negative economic impact of the Goldenberg Affair the country was so massive that its effects continue to be felt to date. Firstly

718. It is to be borne in mind that Mr. Kanyotu did not come to give evidence before us and denied the incident in his statement. But nevertheless we only have it that Mr. Magari interpreted what was said as a threat, although on the face of it, it was only an indication that Mr. Kanyotu would report the conversation to his superior.

719. Mr. Kanyotu allowed his name to be used as a promoter of GIL and EBL when it was not necessary for him to do so. Nor of course was it illegal for him to do so and in his statement he said that he considered the proposals put forward by Pattni (proposals which found favour in other parts of government) to be worth supporting. From the foregoing it is clear that Mr. Kanyotu was knowingly involved in GIL's activities.

(C) ECONOMIC, SOCIAL AND RELATED EFFECTS OF THE GOLDENBERG AFFAIR

720. The Goldenberg Affair and its attendant schemes was in the stated reasoning of its sponsors and proponents supposed to attract large foreign currency earnings into the country. It will be recalled that from the initial GIL proposal an annual minimum return in Export earnings was predicted at US Dollars 50 million. This figure was itself plucked from the air. The recipients of the proposal did not bother to make any assessment as to how the alleged gold and diamond jewellery exports would attain this figure in foreign currency earnings.

721. It has on the contrary been established that the export compensation scheme and the other attendant authorised and unauthorised illegal schemes resulted in colossal losses to the Kenyan exchequer with devastating effects on the country.

These negative effects may be examined as follows:

1. Effects on money supply and inflation

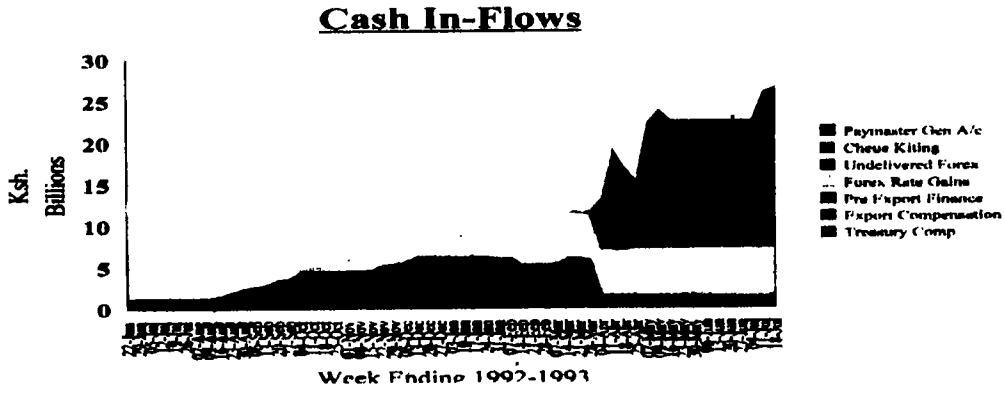
722. In its conceptualization the Export Compensation Scheme

because of the ad hoc and arbitrary manner in which the additional 15% ex gratia payments had been imposed upon an already strained economy it meant that this extra expenditure had not been included in the June 1990 budget therefore causing what Prof. Ryan has described as **"further unanticipated pressure on the fiscal structures".** Indeed this is confirmed by the evidence of Mr. Charles Mbindyo who explained the struggle by Treasury officials to include these payments in the supplementary estimates concealed as **"customs refund".**

727. The effect of this unanticipated pressure was to decrease revenues while expenditure correspondingly increased thereby occasioning a budget deficit. As we stated earlier this led to borrowing by the government to plug the resultant hole. But even the government's ability to borrow was restricted. Foreign funds were no longer available in view of the suspension of donor aid to Kenya at the time. The other alternative was to seek commercial loans but these were very expensive. Accordingly to close the gap occasioned by GIL ex gratia and other fraudulent payments the government resorted to increased domestic borrowing from Central Bank beyond the set ratio. This was described to us as printing money. Professor Ryan testified that domestic borrowing in the 1991 budget increased interest payments by 54% or Kshs. 3.7 billion.

728. Secondly according to Prof. Ryan (see **Exht. No. 91**) the ex gratia payments and increased domestic borrowings came from the Paymaster General account at Central Bank. This led to some increase in money supply. This to some very limited extent influenced fiscal fluctuation in the country by raising the cost of imports and exerting pressure on the price of domestic goods. The amount of money GIL got through export compensation was relatively small. Much of its receipts were, from pre-export finance, Forex rate gains and undelivered Forex. Below is a chart on cash in flows marked "A" showing graphically sources of funds for GIL. Increased money supply triggered inflation to the extent that between June 1990 and June 1991 inflation rose from 11.6% to 18.6%

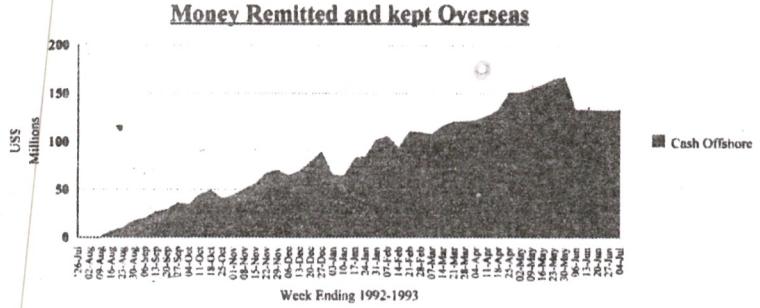
"A"



729. Overdrafts improperly granted to weak banks also contributed enormously to existing pressure leading to even greater increases in money supply, the onset of rapid inflation and the colorally fall of the shilling.

730. Exchange Bank was licensed in August 1991 but it did not start operations until mid 1992. The export of Foreign Exchange by GIL thereafter accelerated. Availability of foreign exchange dwindled with the resultant further weakening of the shilling. As we have stated elsewhere in this report a lot of foreign exchange was remitted overseas, some of it was transmitted back as proceeds of exports but a greater part remained offshore. Below is a chart marked "B" done by Prof. Ryan showing the remittances. The shilling became an object of contempt in serious financial transactions to the extent that contracts as leasing of up market houses involving foreigners were negotiated in dollars. The 1992 general election only served to further escalate an already degenerating situation.

"B"



731. As we stated elsewhere in this report the excess liquidity in the economy was mopped up through the sale of special OMO Bills in the weekly auction market. The bills had to be sold at high interest rates to encourage the public to buy them so that the mopping up operation could succeed. Interest rates rose to about 80%. The Bills auctioned increased by 400% as at March 1993.

732. But this also meant that the Government had to divert more public funds in debt servicing at the expense of other priorities.

733. Apart from the charts we have referred to above, Prof. Ryan produced several other charts which are together reproduced at full size in **Appendix "P".**

(2) Other Related Economic Effects

734. Despite the foregoing analysis the wider economic implications of the Goldenberg affair are probably better understood in tangible down to earth human terms as follows:

(a) The Goldenberg Affair occasioned an increase in domestic borrowing by the government and therefore diverted credit from the private to the public sector. This meant that apart from private economic enterprise being severely restricted, the government's bill in local debt servicing went up. 40% of National revenue went to service its National debt. There was little revenue left for general economic development of the country.

(b) The situation was compounded by the fact that the highly attractive interest rates offered on Treasury Bills deflected banks from their core role of supporting private sector enterprise to the role of financing the government. While this was good business for the banks it made credit for the private sector too costly and inaccessible to a large percentage of Kenyans. Interest rates on mortgages and bank loans rose to hitherto unprecedented levels.

(c) With the diversion of public funds to debt servicing not much money remained to finance normal public expenditure. Public hospitals had limited medicine, schools had acute shortages of learning materials. Government vehicles could not move due to lack of money to purchase spare parts and fuel. Government officers including the police could not move to effectively attend to their duties. In short virtually all public and related activities stagnated. The overall picture of the economy was bad (**Exht. 91**)

(d) Owing to the credit squeeze which adversely affected many businesses, industries and the decline in farming activity many people lost their employment. The years 1992 onwards to date heralded a period of mass sackings by way of redundancies.

Secondly it meant that there were limited opportunities for the prospective employees coming into the market from schools, colleges and other educational and training institutions. (**Exht. 91**)

(e) Commercial activity and production was also affected by the acute shortage of foreign exchange. Goldenberg as already observed was a fraudulent scheme with no capacity to generate foreign exchange. Prof. Ryan testified that it merely triggered a downward slide in the value of the Kenya shilling against the dollar. Between August and December 1992 the dollar rate rose from Kshs. 9.25 to Kshs. 16.29. The cost of imported inputs likewise increased. In consequence production costs went up leading to a general soaring - up of price levels thereby fuelling inflation.

735. Finally it has been noted the fraudulent and speculative activities of GIL and Exchange Bank involved other Banks particularly Delphis Bank, Trade Bank, Pan African Bank and Post Bank Credit. In

the wake of the GIL scam many of these banks collapsed. While it may not be entirely correct to attribute their collapse to the activities of GIL, Exchange Bank and their associated companies certainly their activities significantly affected the liquidity of these banks, fiscal discipline and ethical banking behaviour on the part of their managers. This is confirmed by the evidence of the statutory managers appointed to the banks (see Exhibit 131B) who were able to relate the operations of these banks to the Goldenberg scam.

736. Apart from its adverse effects on the economy the Goldenberg Affair stands out as one single incident which drastically affected our various institutions of state and the management of our public affairs.

(3) Effects on Government Institutions

(a) Parliament

737. The Kenya Parliament is a creature of section 30 of the Kenya Constitution which defines Parliament as the National Assembly and the President. This definition is important because ordinarily the majority of Kenyans refer to the National Assembly as Parliament and the President as separate and distinct entities. In reality the President is one segment of Parliament while the National Assembly is the other segment of Parliament. It is the two segments together which constitute Parliament.

738. Sections 99 to 103 of the Constitution set out in elaborate detail the manner in which public funds are to be administered under Parliamentary control. Because of these elaborate constitutional and statutory provisions one would have expected that a scandal of the Goldenberg infamy would immediately have come to the attention of Parliament and would therefore be arrested before unleashing the damage which it caused. But this was not to be.

739. Goldenberg and its related scams first came to the attention of the National Assembly through a question by private notice by Hon. Jilo Falana an later when the Controller and Auditor General laid his Audit report before the Parliamentary Public Accounts Committee for the year 1990/1991 in 1992.

740. In the Audit report Mr. D.G. Njoroge as the Controller and Auditor-General advised the Committee that Parliament had through 1990/1991 supplementary estimates approved payment of the illegal 15% Export Compensation by Treasury to GIL as customs refund. From then on the Goldenberg payments continued to feature regularly in the deliberations of the Public Accounts Committee.

741. But as most members of Parliament were not able to analyse such documents for various reasons the PAC was unable to forensically audit the payments to establish their illegal nature.

742. Firstly quite a number of the Members of Parliament particularly in 1992 were not sufficiently financially literate so as to be able to analyse such complex financial documents.

743. Secondly it is not possible even for a sufficiently literate person without an economic, financial or accounting background to comprehensively analyse and appreciate such complex financial documentation. Such documentation is normally written in complex financial and accounting jargon. It is also expressed in civil service bureaucratic jargon which is not understood by many. That is why words like "customs refund" were able to conceal very serious mischief.

744. We recommend that a research unit be established in Parliament if one is not already in place to analyse and scrutinize all proposals made to Parliament and simplify all those proposals and their implications so as to make them more understood by all parliamentarians.

745. Evidence was given before this Commission that Mr. Pattni had developed rapport with some members of parliament through making various financial donations to them. He personally admitted making such donations to several members of parliament and leaders of political parties. While it is true that without further evidence the so called donations may not constitute a bribe they portray a dangerous facet in parliamentary proceedings where such gifts and donations could be used to influence the propriety of contributions by members of parliament in parliamentary proceedings

(b) Central Bank of Kenya

746. The Central Bank of Kenya is a banker for commercial banks, and a regulator of the money market. In addition it supervices the operation of commercial banks to provide stability in the money market and the economy in general.

747. The advent of GIL and Exchange Bank Ltd. greatly undermined the authority of CBK and weakened its oversight role. Some officers of CBK who questioned the propriety of financial transactions relating to the two companies were threatened or victimized, rules were bent or interpreted in a slanted manner to accommodate the two companies; and in some cases clear rules were ignored purposely for the benefit of the two companies. The result of this was the soaring of inflation and the consequential weakening of the Kenya shilling, the dwindling of foreign exchange reserves to the extent that at some point the government was unable to pay for its oil imports; several commercial banks collapsed with the result that several depositors in those banks lost their money and the country lost a lot of money because controls under the Exchange Control Act were either relaxed or neglected.

(c) The Controller & Auditor-General

748. The role of the Controller and Auditor-General in relation to parliament is also relevant to the Goldenberg Affair. The Controller and Auditor General was required under the Exchequer and Audit Act Chapter 412 of the Laws of Kenya to audit government expenditure, prepare and present to parliament an Audit report in respect of every financial year. This report is crucial for the conduct of parliamentary investigations into the government's expenditure. The report forms the basis of deliberations by the Public Accounts Committee which finally makes its report to the whole House. This report enables the house to scrutinize and make observations with regard to expenditure by the government.

749. It will be seen that there is a chain link in the work of the Controller and Auditor General, the Public Accounts Committee, Parliament and Government expenditure. It is this interlinkage which enables parliament to assert its constitutional role of monitoring government expenditure. If the chain is broken then parliament's capacity to enforce its constitutional mandate becomes severely hampered.

750. On 17th May, 1994 through a letter (**Exht. 123A**) Professor Philip Mbithi the then Head of the Civil Service and Secretary to the Cabinet suddenly and without explanation withdrew critical members of the staff of the Controller and Auditor-General. Despite the protestations of Mr. Njoroge that this action amounted to interference with the Constitutional mandate of his office and the independence of his office Prof. Mbithi adamantly refused to rescind this most unreasonable action.

751. Consequently the auditing capacity of the Controller and Auditor General was seriously undermined. Thereafter a trend emerged wherein his annual reports were in arrears resulting in a backlog. Mr. Njoroge surmised that the transfer of some of his staff and their replacement with

those he thought were less experienced had something to do with GIL. On the evidence before us we cannot categorically so conclude.

752. Prof. Mbithi testified that he was directed by the former President to effect changes in the staff in the Department but considering what Mr. Njoroge stated concerning him, we have reservations. Mr. Njoroge testified that Prof. Mbithi was uncompromising, he did not want to discuss the issue, and rudely instructed Mr. Njoroge to comply [**Hansard – pg.7918-19**]. Whether the instructions emanated from the former President or from Prof. Mbithi on his own the Constitutional authority and mandate of both the Controller and Auditor-General and Parliament was undermined.

753. It is obviously due to the personal tenacity and acumen of Mr. D.G. Njoroge that despite the disablement of his office he was still able to continue to unravel and trace the Goldenberg scam activities after May 1994. He must be commended. The present Government has admirably provided that he should be the sole judge of what staff he requires for that purpose (Public Audit Act 2003). However since this Act like any other is capable of repeal or amendment, the provisions of Sections 34, 35, 36 and 37 of that Act should be placed in the Constitution.

(d) The Police

754. Mr. Pattni's influence in government circles had evidently become extensive. He had members of GSU Police Unit guarding his residence. He often influenced the arrest and sometimes dismissal of some government employees. Although Mr. Pattni was involved in many illegal and irregular actions, the V.I.P treatment he was receiving made it impossible for him to be arrested and prosecuted. It was not until GSU officers were withdrawn through the influence of Mr. Micah Cheserem that some action was taken against him. Otherwise the police appeared helpless in matters touching on him.

755. We do not know the extent to which Mr. Kanyotu was involved in shielding Mr. Pattni against arrest. We also do not know whether or not the former President had a hand in it considering that he could have authorized for Pattni to have hotlines installed, one in his office and the other at his residential premises.

756. If the Kenya police force had been truly professional and independent all the suspects in the Goldenberg scam would have been apprehended and prosecuted at once. Our view is that it is political interference and the fear of victimization which have made the Goldenberg scandal remain alive to date.

(e) The State Law Office

757. On completion of investigations most complex cases requiring prosecution by lawyers would ordinarily move from the police to the State Law offices i.e. the Office of the Attorney General.

758. Section 26 of the Constitution of Kenya reposes upon the Attorney-General the power to prosecute any person as he may deem fit. The Section also gives him the power to take over any prosecution instituted by any other person or body and either continue or terminate the same.

759. The Attorney-General is also given the power by the Constitution to direct the Commissioner of Police to conduct investigations relating to any matter and to thereafter file a report with the Attorney-General. This section is deliberately included inorder to enable the Attorney-General to receive professional investigative advice from the police so that he can make informed decisions on whether to prosecute or not.

Section 26 in part reads as follows:-

"26. (1) There shall be an Attorney-General whose office shall be an office in the public service.

(2) The Attorney-General shall be the principal legal adviser to the Government of Kenya.

(3) The Attorney-General shall have power in any case in which he considers it desirable so to do so –

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority.

(4) The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offence or alleged offence or suspected offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation.

(5) In the exercise of the functions vested in him by sub-sections (3) and (4) of this section and by sections 44 and 55, the Attorney-General shall not be subjected to the direction or control of any other person or authority".

The section protects the Attorney-General against interference from any other person or authority in the exercise of his powers.

760. The reason for giving the Attorney-General such wide prosecutorial powers as well as independence and security of tenure is to enable him to undertake his constitutional mandate without fear or favour. In this way his decision on whether to prosecute or not would be professional and based purely on questions of evidence, the law, and public policy. There should be no room for political interference.

761. The first case relating to the Goldenberg scam was filed not by the Attorney-General but the Law Society of Kenya. At the time there was a public outcry for the prosecution of Goldenberg suspects. The Goldenberg affair had been the subject of the proceedings of the Public Accounts Committee and had received wide media coverage. We received evidence which shows that the records were always available in the various government offices for all to see. But interestingly we did not receive any evidence to show that the Attorney-General moved to order police investigations into the affair. We can therefore only conclude that no such action was undertaken.

762. Elsewhere in this report we stated that the late Mr. Buluma Chief Parliamentary Counsel in the Attorney-General's office advised the Treasury against payment of the 15% additional Export Compensation because it was illegal. He also advised against the notion that the additional 15% Export Compensation could be paid on "ex gratia" basis while awaiting the amendment of the Local Manufacturer's (Export Compensation) Act.

763. It is not clear whether Mr. Buluma's advice was given after consultation with the Attorney-General or he acted on his own. Unfortunately with the passing away of Mr. Buluma the truth will never been known.

764. Several years after this incident the Attorney-General's office was faced with the task of undertaking the prosecution of Goldenberg suspects. We have already alluded to the failure on the part of that office to order any investigations relating to the Goldenberg scam. However we found no evidence to suggest that such failure was due to the fact that the concept of 15% ex gratia payments was previously known to that office. This was at most a coincidence.

765. The police had in the meantime commenced investigations upon the insistence of Mr. Cheserem. We have already observed that the investigations and consequent prosecutions were selective.

766. But even before such prosecutions could commence the Law Society of Kenya had launched its own private prosecution. This was private prosecution No.1 of 1994 Law Society of Kenya Vs Eric Kotut, Charles Mbindyo, Collins Owayo, Dr. Wilfred Koinange, Francis Cheruiyot and Kamlesh Pattni (Exhibit No.118A). The Attorney-General moved swiftly to join himself in this prosecution as Amicus curae. He objected to the prosecution on the ground that he was to undertake his own prosecution and consequently the Law Society of Kenya was a busy body without any locus standi to prosecute the Goldenberg scam. This submission was upheld by the court and the private prosecution was dismissed.

767. Then Hon. Raila Odinga undertook his own private prosecution No. 107 of 1995 (**Exht. No.179c**) against Prof. Saitoti, Dr. Wilfred Koinange, Mr. Pattni and Mr. Charles Mbindyo among others. Once again the Attorney General moved swiftly to take over and terminate this prosecution. There now remained only his own prosecutions. These prosecutions in effect involved nine criminal cases namely:-

NO.	COURT FILE NO.	EXH. NO.	PARTIES	
			COMPLAINANT	ACCUSED
1.	2271/94	126A	Republic of Kenya	Kamlesh M.D. Pattni, Eliphaz Riungu and Lazarus Wanjohi Wairagu
2.	2348/94	126A	Republic of Kenya	Job Kilach & Michael Wanjihia Onesmus
3.	4053/94	126A	Republic of Kenya	Kamlesh M.D. Pattni, Eliphas Riungu, Lazarus Wanjohi Wairagu, Job Kilach & Michael Wanjihia Onesmus
4.	1902/95	126A	Republic of Kenya	Kamlesh M.D. Pattni & Charles S. Mbindyo
5.	2208/95	126A		Kamlesh M.D. Pattni, Wilfred Karuga Koinange,

			Republic of Kenya	Eliphas Riungu, Michael Wanjihia Onesmus & MS Goldenberg International Ltd.
6.	1474/97	126A	Republic of Kenya	Kamlesh M.D. Pattni, Wilfred Karuga Koinange, Eliphas Riungu, Michael Wanjihia Onesmus & MS Goldenberg International Ltd.
7.	9438/98	126A	Republic of Kenya	Kamlesh M.D. Pattni & Bernard Kalove
8.	392/99	126A	Republic of Kenya	Kamlesh M.D. Pattni
9.	741/99	126A	Republic of Kenya	Kamlesh M.D. Pattni & Goldenberg International Ltd.

768. The common denominator in all these cases is that none of them was ever concluded from 1994 when they were instituted to 2003 when this Commission was formed thereby leading to the termination of the cases.

769. Out of the nine cases Criminal Case No. 1902 of 1995 and No. 392 of 1999 were withdrawn. The reasons for the withdrawal were not stated. Out of the remaining seven cases only Criminal Case No. 1474 of 1997 proceeded to hearing. It was not completed. In all these cases the record shows reluctance on the part of both the Attorney-General's officers and counsels for the accused persons to proceed. Many needless applications for adjournment were made and granted. The parties seemed to move in circles and at a snail's pace speed. There was in short extreme lethargy in the prosecution of these cases.

770. The nine cases were treated by the Attorney-General's Chambers as follows:-

(i). Criminal Case No.2271 of 1994

Republic vs Kamlesh Pattni, Eliphas Riungu and Lazarus Wanjohi was withdrawn and consolidated with Criminal Case No. 4053 of 1994.

(ii). Criminal Case No.4053 of 1994

Involved the same persons with the addition of Job Kilach and Michael Wanjihia. This case never proceeded to hearing. A nolle prosequi was

entered on 24/2/2003 when the proceedings of this Commission commenced.

(iii). Criminal Case No. 2348 of 1994

This is the case in which Job Kilach and Michael Wanjihia appeared. It was withdrawn and consolidated with Criminal Case No.4053 of 1994 stated above.

(iv). In Criminal Case 1902 of 1995

Mr. Charles Mbindyo was charged alongside Mr. Pattni. The case was withdrawn and consolidated with Criminal Case No. 2208 of 1995.

(v) In Criminal Case No. 2208 of 1995

The accused persons in this case were Kamlesh Pattni, Dr. Wilfred Koinange, Eliphas Riungu, Michael Wanjihia Onesmus and Goldenberg International Limited. The case was withdrawn on 16th July, 1997 following a prohibition order made by the High Court.

(vi) Criminal Case No. 1474 of 1997

Involved the same persons listed in No.5 above. This is the only case which proceeded. It was stopped following the High Court prohibition order. A Nolle prosequi was eventually entered on 24th February, 2003.

(vii) Criminal Case No.9438 of 1998

Involved Kamlesh Pattni and Bernard Kalove. It never proceeded to hearing and it was also stopped by the prohibition order of the High Court.

(viii). Criminal Case No. 392 of 1999

Involved Mr. Pattni alone. It never proceeded to hearing. A Nolle prosequi was entered on 24th February, 2003.

(ix). Criminal Case No. 741 of 1999

Was filed against Mr. Pattni and Goldenberg International Limited. It never proceeded to hearing. A Nolle Prosequi was entered on 24th February, 2003.

771. Initially these cases were brought against Mr. Pattni, Mr. Riungu and Mr. Wanjohi. Later Mr. Kilach and Mr. Wanjihia were enjoined. But it was not until much later that Mr. Mbindyo and Dr. Koinange were enjoined.

772. It is also notable in these cases that other important suspects like Dr. Koinange and Mr. Charles Mbindyo were brought in after the Law

Society of Kenya and Hon. Raila Odinga had included them in private prosecutions. Evidently the Attorney-General was spurred into action by the private prosecutions.

773. But even after charging the suspects which it had selected the Attorney-General's office appears to have proceeded with the cases in a most haphazard and lethargic fashion.

774. To demonstrate this point let us look at the manner in which the criminal cases proceeded:-

On 2nd June, 994 Kamlesh Pattni, Eliphas Riungu and Lazarus Wanjohi were charged in Criminal Case No. 2271 of 1994. But this case was withdrawn and consolidated with Criminal Case No.4053 of 1994. On 7th June, 1994 Job Kilach and Michael Wanjihia Onesmus were charged in Criminal Case No.2348 of 1994. But on 6th October, 1994 this case was withdrawn and consolidated again with Criminal Case No.4053 of 1994 which we have referred to above. On 22nd May, 1995 Messrs Kamlesh Pattni and Charles Mbindyo were charged in Criminal Case No.1902/1995 but on 19/6/1995 this case was withdrawn and consolidated with Criminal Case No.2208 of 1995. In this latter case they were joined on the same 19th June, 1995 by Messrs Kamlesh Pattni, Dr. Koinange, Eliphas Riungu, Michael Wanjihia Onesmus and Goldenberg International Limited as co-accused persons. But similarly this case did not proceed and it was withdrawn two years later on 16th July, 1997.

On the same day 16th July, 1997 the same persons except Mr. Mbindyo were again charged in Criminal Case No.1474 of 1997. On 17th February, 1999 Mr. Pattni was charged alone in Criminal Case No.392 of 1999. On 22nd March, 1999 Mr. Pattni was charged with Goldenberg International in Criminal Case No.741 of 1999.

775. Despite the misleading appearance that many cases had been filed the cases which actually remained on record were Criminal Case Nos. 4053 of 1994, No.392 of 1999, No.741 of 1999 and Criminal Case No. 1474 of 1997. Out of these three cases only Criminal Case No.1474 of 1997 proceeded to hearing. It proceeded in a slow manner until 7th July, 1999 when it was stopped vide High Court Miscellaneous Civil Application No.322 of 1999. It was stopped along with the other three above mentioned cases. The High Court case itself eventually proceeded to the Court of Appeal vide Court of Appeal Civil Application No.301 of 1999.

776. An examination of the framed charges in the aforegoing cases reveals that most of them were in many respects the same. They related to the same offences and the same accused persons. It is not clear why the office of the Attorney-General had to bring several cases against the same accused persons.

777. There was also a further negative effect of creating needless delays through the chaotic situation caused by these many cases. It has been seen for instance that charges would be filed in 1995 only to be withdrawn in unexplained circumstances in 1997. In other cases a charge would be filed with some accused persons but leaving out others. Eventually the case would also be withdrawn to consolidate it with another one with the other accused persons.

778. On the face of it this was a pointless merry go round resulting in serious delay. In this scenario it is not surprising to note that although the Attorney-General commenced Goldenberg related prosecutions in 1994 it was not until 1998 that the hearing of only one case commenced. The others as we have noted did not proceed to hearing.

779. The delays and the multiplicity of cases gave Mr. Pattni and other accused persons the perfect excuse to lodge High Court Miscellaneous Civil Case No. 322 of 1999 and Court of Appeal Civil

Application No.301 of 1999 in which they complained that the delays and the many cases had the manyamong other things prejudiced them and violated their constitutional rights.

780. By September, 1999 these Criminal Cases were still pending and one was part-heard before Mrs Unita Pamela Kidula, Chief Magistrate. Mr. Bernard Chunga was the Director of Public Prosecutions and was personally prosecuting the Goldenberg cases including the part-heard case. Amidst the prevailing chaos which we have discussed above a further twist occurred on 13th September, 1999.

781. The then President Moi appointed Mr. Chunga to the position of Chief Justice and Mrs. Kidula to the position of Director of Public Prosecutions which was formerly occupied by Mr. Chunga. This was a strange and curious reversal of roles. In our view The President should have known and understood the critical role of these two lawyers in the hearing and prosecution of at least the part-heard Goldenberg case.

782. He must have understood that his action would completely disrupt those proceedings and would after seven years of waiting mean that the case would need to be commenced afresh. It is of course speculative to imply that the President's appointment of these officers was meant to derail the Goldenberg prosecutions. However this was nevertheless the effect particularly in relation to the part-heard Criminal Case No. 1474 of 1997.

783. We have given an outlay of the manner in which the State Law office dealt with the Goldenberg scam. We have noted that it engaged in ostensibly selective prosecutions. There is no cogent evidence however to enable us to state with any degree of certainty whether these actions and omissions were designed or coincidental. They could have been caused through sheer negligence and inattention. They could also have been part of an orchestrated cover-up intended to aid and abet the culprits of the

Goldenberg scam or to subvert the cause of justice. It is therefore necessary that further investigations be undertaken to determine the exact role and intent of the officers concerned.

784. Mr. Bernard Chunga was at the material time the Director of Public Prosecutions. By virtue of his office the duty to undertake Goldenberg prosecutions befell him. He presumably made the relevant decisions regarding who to charge and who not to charge. He oversaw the decisions to withdraw, consolidate and to bring various charges at different stages. He was also responsible for the conduct of the trials. Mrs. Mwatela testified (**Hansard Pgs. 6694 - 6695**) that Mr. Chunga even went to the extent of suggesting what she should write or should not write in her statement. According to her he specifically told her not to mention "Mr. Kanyotu nor where Mr. Pattni was heading to" (**Hansard Pg. 6762**). This shows that he was fully involved in the finer details of the trials and that he engaged in selective prosecutions. It could also be suggestive of professional misconduct, and abuse of office. Nevertheless he did not appear before us and this made it difficult for the Commission to determine whether and to what extent Mr. Chunga acted under the directions and with the authority of the Attorney-General or any other person. The recommended further investigations will also unravel this.

(f) Judiciary

785. The Goldenberg Affair had its own impact on the Judiciary. We have already dealt with the criminal cases filed in the courts by the Attorney-General and private prosecutors. We have also observed the dismal progress made in the prosecution of those cases. The courts did make their own contribution to the progress or lack of progress in Goldenberg related cases. In addition to these criminal cases 42 Goldenberg and Goldenberg related Civil Cases were filed in the High Court at Nairobi as follows:-

NO.	COURT FILE NO.	EXHIBIT NO.	PARTIES		POSITION
			COMPLAINANT	ACCUSED	
1.	HCCC1508/99	148C	KRA & Kennedy Ngumbau Mulwa	Kamlesh M.D. Pattni	By consent KRA restrained. Case pending full hearing
2.	HCCC 1509/99		Guerlain Investment Ltd.	KRA & Kennedy Ngumbau Mulwa	Injunction granted. Matter pending full hearing
3.	HCCC 732/99		Kamlesh M.D. Pattni	KRA	Injunction issued
4.	HCCC676/03		Kenya Duty free Co. Ltd.	KRA & Commissioner of Customs & Excise	Stay orders in place
5.	HCCC1829/02		Mombasa Sea port duty free Ltd	KRA & Commissioner of Customs & Excise	Hearing on 24th September, 2004
6.	HCCC1422/02		Mombasa Sea port duty free Ltd.	Commissioner General, KRA & Commissioner of Customs & Excise	Matter has not been fixed for hearing
7.	HCCC1043/99		Charles Kariuki Githungo-Receiver of World Duty free Ltd.	Commissioner General, KRA & Commissioner of Customs & Excise	Matter SOG on 19th July 2001
8.	HCCC10/98		Republic	Commissioner General, KRA Ex-parte the Receiver Kenya Duty Free Complex	Applicant May 2000 a
9.	HCCC1126/01	183	National Industrial Credit Bank	Tourist Paradise Investments Ltd. And Gitari Njau	Matter pending hearing of the main suit
10.	HCCC878/01		Kamlesh Pattni	Dolphin Holdings and Others	On 25/9/2003 file transferred to Milimani and suit still pending
11.	HCCC663/03		Kamlesh Pattni, Goldenberg International Ltd & others	Attorney General	On 23/6/2003 file ordered be placed before the CJ for Constitutional hearing
12.	HCCC1111/03		Kenya Anti-Corruption Authority	Kamlesh M.D. Pattni and 16 others	Matter referred to CJ for appointment of another bench on 7.6.2004
13.	HCCC29/95		Uhuru highway Development Ltd.	Central Bank of Kenya, Exchange Bank Ltd. (in voluntary liquidation) & Kamlesh M.D. Pattni	Appeal filed in High Court
14.	HCCC589/99		Uhuru highway Development Ltd.,Kamlesh Mansuklal Pattni, Pansal Investments Ltd., Grand Hotels Management Ltd	Central Bank of Kenya, Deposit Protection Fund Board & Joseph Kittony	Stay of execution for 14 days granted by Aluoch J on 11/12/2000
15.	HCCC MISC 10/98	182	Receiver, Kenya Duty Free Complex	Commissioner General, KRA	Application for Orders of certiorari granted
16.	HCCC MISC 441/00		Rambo Kenya Ltd	Grand Regency Hotel	Application for leave to institute suit granted

17.	HCCC MISC660/00		Julius Nyaribo	The Receiver Manager, World Duty Free	Application for leave to institute suit granted
18.	HCCC MISC663/00		Charles Kabanga Muthike	Grand Regency Hotel	Application for leave to institute suit granted
19.	HCCC MISC730/00		Grand Regency Hotel	Essential Manpower Consulting Services	Application for leave to institute suit granted
20.	HCCC MISC33/01		Siegfried Loeper	Grand Regency Hotel	Application for leave to institute suit granted
21.	HCCC MISC477/01		Joseph Emojong	Grand Regency Hotel	Application for leave to institute suit granted
22.	HCCC MISC631/02		National industrial Credit Bank	United Touring Company Ltd.	Application stood over generally
23.	HCCC MISC435/03		Amber Enterprises	Grand Regency Hotel	Application for leave to institute suit granted
24.	HCCC MISC796/03		Archer & Wilcock & Kairu Advocates	Uhuru Highway Development Ltd.	Application for leave to enjoin stood over generally
25.	HCCC MISC874/03		Christopher M. Chege, United Touring Company Ltd. & Nyali Beach Hotel.	Gitari T. Njeru	Application for leave to commence contempt proceedings fixed for hearing on 16.3.04 and receiver to remain in place pending determination of suit.
26.	HCCC MISC2/04		Moses Muthaura	Block Hotels Ltd. Block Hotels Staff Savings Credit Co-operative Society Ltd.	Application for transfer of suit stood over generally
27.	HCCC 298/98		Kamlesh Pattni Welfare Foundation	NSSF, Regent Management Ltd. & El-dima Ltd.	Suit marked as settled subject to payment
28.	HCCC 354/98		City Finance Ltd.	AEBHA Properties Ltd., Kamlesh M.D. Pattni, Sanjay Vaya & Augustine Okori	Suit pending
29.	HCCC 418/98		Kamlesh M. D. Pattni	Nasir Ali Ibrahim	Suit pending
30.	HCCC 642/98		Kamlesh M..D. Pattni, Wemount Holdings SDN	Central Bank of Kenya	Suit pending
31.	HCCC MISC 262/00		Mount Kenya Sundries Ltd	Grand Regency Hotel	File transferred to High Court Central Registry
32.	HCCC1399/00		Mr. Siegefried Loeper	Grand Regency Hotel	Suit discontinued
33.	HCCC1982/00		Francis AOL Oiro t/a Ralemo Agencies	Grand Regency Hotel	Application for leave to institute suit granted
34.	HCCC2000/00		Francis AOL Oiro	Grand Regency Hotel	Application for injunction dismissed

35.	HCCC117/01		Kamlesh M.D. Pattni	Ketan Surendra Somaia, Dolphin Holdings Ltd. Management Services Ltd., Tourist Paradise Investments & Dolphin Investment Ltd.	File transferred to High Court Central Registry
36.	HCCC13601/01		Prime Capital & Credit Ltd.	Aebha Properties Ltd., Sanjay Vaya, Elias Mnyanya Mbuisi & Kamlesh M.D. Pattni	Suit fixed for hearing on 11th May 2004
37.	HCCC1126/01		National Industrial Credit Bank Ltd.	Tourist Paradise Investment & Gitari T. Njeru	File transferred to High Court Central Registry
38.	HCCC1433/01			Ketan Surendra Somaia, Dolphin Holdings Ltd. Dolphin Management Services Ltd. Miwani Sugar Company (1989) Ltd., Vamossa Associates Incorporation, Dolphin Investment Ltd., Andrew Gregory, Abdul Zahr Sheikh Harvleen Gaochoke & Samuel Onyango	Suit discontinued by the Plaintiff
39.	HCCC669/03		Kenya Commercial Bank & Christopher Mwangi Chege	Block Hotels Ltd., Block Hotels, Nyali Beach Hotel Ltd. & United Touring Co. Ltd. & 3 Others	Suit fixed for hearing on 18th May 2004
40.	WC3/01		Guilders Bank	Tourist Paradise Investments Ltd.	Mention on 19/2/2004
41.	WC32/01		National Industrial Credit Bank Ltd.	Block Hotels Ltd.	Fixed for hearing on 22/6/2004
42.	33/01		NIC Bank	United Touring Company Ltd.	Fixed for hearing on 22/6/2004

786. In the Kenya Court of Appeal at least two Civil Appeals and one application were also filed as follows:-

NO.	COURT FILE NO.	EXHIBIT NO.	PARTIES		POSITION
			APPELLANT	RESPONDENT	
1.	Nairobi Civil Appeal No. 27/03	59	United Touring Group (K) Ltd., Block Hotels Ltd. & United Touring Group Ltd.	Kamlesh M.D. Pattni, Ketan Surendra Somaia, Dolphin Holdings Ltd., Dolphin Management Services Ltd., Dolphin Investment Ltd., Tourists Paradise Investments Ltd., Marshalls (EA) Ltd., Marshalls Enterprises	Appeal dismissed. No orders to cost, 13.10.03

				Ltd., Marshalls Investments Ltd., Woodside Ltd., Delphis Bank Ltd., Driscoll Investment Ltd., Fifth Avenue Ltd., Pendula Finance Ltd.	
2.	Civil Appeal 108/99 (Arising from HCCC 589/99)	131E	Uhuru Highway Development Ltd.	Central Bank of Kenya, Exchange Bank Ltd. (in voluntary liquidation) & Kamlesh M. Pattni	Appeal dismissed with cost. 24.8.2000.
3.	Civil Application No. NAI 140/95 (Arising from HCCC 29/95)	131E	Uhuru Highway Development Ltd.	Central Bank of Kenya, Exchange Bank Ltd. (in liquidation) & Kamlesh M. Pattni	Application dismissed with costs to 1st Respondent CBK 14.7.95.

787. The first eight cases related to Tax matters. We have already received evidence and noted that it was a major strategy of Mr. Pattni and his companies to either not pay any Tax at all or to pay as little tax as possible. This meant under declaring his income and that of his companies. This involved declaring unusually low profits or grossly inflated expenses. In either case the income would be deliberately depressed so as to attract as little tax as possible.

788. With time this attracted the suspicions of the Income Tax Department which upon investigations in several cases concluded that Mr. Pattni and some of his companies had either wrongly paid very little tax or none at all. The Department then moved in a bid to attach his assets and those of his companies. Mr. Pattni moved to court under certificate of urgency to obtain orders of injunction stopping the seizure of his assets. In most of these cases such orders were granted. There was no further attempt either by Mr. Pattni or the Income Tax Department to proceed with the hearing of the substantive suits.

789. Mr. Pattni and his associated companies used the court process in the High Court in order to stop attempts to recover tax from him. The temporary order as the one Pattni obtained were meant to preserve the status quo until the main suit is heard and decided. In the case of Mr. Pattni and his companies neither him nor the Income Tax

Department took steps to have the main suits heard. For Mr. Pattni he had no reason for his failure to prosecute his suits. We infer that he filed them purposely to prevent the tax authorities from recovering tax due and owing.

790. It is possible that some officers within the Income Tax Department were acting in collusion with Mr. Pattni and his agents to deliberately undermine and derail efforts of recovering taxes from him by using the court system. It is also possible that this could have been the result of negligence and gross dereliction of duty on the part of the officers concerned. Whatever the case it is a matter which raises very grave concerns.

791. Besides tax cases Mr. Pattni and companies he was associated with also filed various Civil Suits. Like in the tax cases these suits were in the majority of cases accompanied by applications under certificate of urgency seeking either a preventive or an enabling injunction. Once again the modus operandi was such that as soon as such injunctions were obtained the suit would pend indefinitely. In other suits the losing party would proceed to the Court of Appeal on appeal. Again once orders would be made but no further action would follow.

792. In yet other instances the parties would both in the High Court and in the Court of Appeal bring so many applications that the main suit or appeal would completely stall. None of the cases by or against Pattni and his companies has ever been concluded – because of such applications. It is quite clear that Mr. Pattni is not interested in any Goldenberg related cases being concluded.

793. The Goldenberg Affair serves to illuminate in real terms the institutional, structural and procedural weaknesses prevailing in our court system and how a party can effectively exploit them to defeat the very purpose of the system of administration of Justice.

(D) PERSONS ALLEGEDLY ADVERSELY AFFECTED BY GOLDENBERG

Mrs Elizabeth Amolo Opondo

794. Mrs. Opondo was a Revenue Officer of the Customs and Excise Department. On 22nd October, 1991 while she was pregnant she checked the luggage of passengers from Bunia and found the gold being brought in. A week later, she was arrested by the police at home and charged with corruption together with Jonathan Kute Esuguma, Lucy Wanjiku Ngugi and John Mwathei Mbole all of whom had been present at the Customs desk on the 22nd. All were released on bond. She was interdicted at work. The charge was finally withdrawn a year later. Mrs. Opondo was thereafter promoted in her employment. **(Hansard pg. 1821)**

Mr. Naginchandra O.J. Pattni

795. Mr. Nagin Pattni was the owner of Aurum Ltd which was ousted from the gold trade in circumstances already described. When he tried to bring out the goings on of Mr. Kamlesh Pattni, the following things happened:

796. On 31st August, 1993 police officers who included J.O. Mukuria were ordered to arrest Mr. Nagin, search his office and house and arrest him and take him to Gigiri Police Station and interrogate him on matters relating to Goldenberg because as he said he was talking too much about matters which did not please the government.

797. This was done and Mr. Nagin was detained at Gigiri Police Station from 31st August, 1993 to 2nd September, 1993 and he was interrogated during this time.

798. All these actions were clearly illegal as there was never any allegation that Mr. Nagin had committed any offence nor was he charged with one. **(Hansard pg 922)**

Mr. Njeru Kirira

799. Mr. Kirira was Deputy Secretary and Head of the Fiscal Division in the Ministry of Finance. He was among those who objected to the special concessions given to GIL. The last action which he recorded concerned the termination of the 15% payment to GIL on 14th January, 1992. He was transferred out of Treasury on 28th February, 1993 and transferred to the Ministry of Tourism. When he was asked to return to Treasury in 1996 he refused.

800. Mr. Kirira is of the opinion that his treatment resulted from his stand against GIL, but in view of the lapse of time set out above, it is difficult for us to draw any such connection. **(Exht. 102 pg. 22)**

Mr. David S. Munyakei

801. Mr. Munyakei was a clerk in CBK. In April 1993 when Mr. Munyakei considered that government was not telling the full story concerning GIL and the country's finances, he passed information to MPs including Mr. Paul Muite and a story appeared in the Nation on 23rd April, 1993.

802. Mr. Munyakei was arrested and charged with communicating confidential documents to unauthorised persons and was remanded. On 29th September, 1993 CBK discharged him paying him 3 months salary in lieu of notice. Since there is no legislation protecting the employment of whistle-blowers his dismissal was technically legal.

Mr. Dixon Abel Otondo

803. Mr. Otondo was employed by CBK and he continued to be employed up to August 1997. He had queried many of the goings on which we have set out above.

804. He was arrested on 23rd July, 1993 when investigations started but was released the next day. He was transferred from Foreign Department to the Development Division. This was apparently not a demotion and he continued in his employment with CBK until retirement.

Mr. Abdul Karim Wabuti

805. Mr. Wabuti was employed by CBK. In 1995 he prepared a report on GIL for the Governor. He blamed the Governor, Mr. Cheserem for the manner of his retirement. On the merits of this, we can make no comment but certainly it had nothing to do with GIL or our terms of reference.

Mr. Tom Kilalya Werunga

806. Mr. Werunga was an Assistant Principal in the Banking Division of CBK. He was involved in the payments of 5.8billion set out above. In August 1994, he was given the opportunity of taking early retirement, as he says as an alternative to being dismissed. He took the retirement and he possibly improved his story, but in any event it appears to have had nothing to do with GIL or our terms of reference.

Bikassy Mandeko Bijos

807. He is a Congolese musician who testified before us that he was hired by Mr. Kulei on behalf of the former President, Daniel Arap Moi, to compose songs in praise of the former President and KANU during the election campaigns preceeding the 1992 general elections. His complaint before us was that he was not paid for services he rendered. Elsewhere in this report we have stated that the claim appears to us to be of a personal nature. He is quite free to sue for the recovery of his money.

World Duty Free Co. Ltd

808. The Commission was asked to consider whether the disputed acquisition by Pattni of World Duty Free Co. Ltd was in pursuance of a cover-up of irregularities of Goldenberg. Firstly we cannot go into the

question of the legal issues which are still before the High Court. It is however not disputed that Pattni has made every effort to take this company over. The only mention of World Duty Free Co. Ltd was as an importer of diamonds allegedly exported by GIL. However Pattni in his evidence made it clear that this was not the correct position but that he used World Duty Free as a substitute for his "real" importers who according to him required anonymity.

809. It is not therefore at all likely that Pattni saw his attempted purchase as any sort of a cover-up. The overwhelming probability is that he saw this company as a real money-spinner and so obviously a target for him. It also had the attraction of dealing largely in foreign currency. It was never even suggested to him that his motive could have been a cover-up.

Mr. Francis W.W. Lukorito

810. The queries raised by Mr. Lukorito concerning pre-export financing have been set out above. On 19th August, 1992 he was arrested, beaten and injured by the police. He believes that the arrest was because of his stand against the financial irregularities which were going on, and certain organs of government prevented him ever being re-employed. He stated that he was told by the late Mr. J.W. Mumelo while he was in prison, that his troubles arose from his stand (**Exht. 120B**). Nevertheless, he very honestly stated that the police did not appear to be interested in his work at CBK but merely in his connection with the late Masinde Muliro. Although it must be a matter for suspicion, it has not been proved his arrest was as a result of anything happening in his employment.

811. The actions of CBK are however open to considerable question. A letter dated 21st August, 1992 two days after Mr. Lukorito's arrest, purported to interdict him under rule 6.35 (b) of the staff regulations. This allows them to interdict an employee when he has been lawfully arrested by the police. Since no attempt was made to ascertain whether

his arrest was lawful (as it clearly was not), there was therefore no reason for interdiction. Thereafter, the interdiction was lifted on 7th July, 1992 but Mr. Lukorito was neither taken back into employment nor was his salary paid. On 14th September, 1994, he was forced to take early retirement and which was to take effect on 8th July, 1993 which was quite improper.

812. We recognize that the limitation period for any claim against CBK has expired but in the circumstances, we recommend that CBK do pay to Mr. Lukorito all unpaid salary for the period 21st August, 1992 to 14th November, 1994 together with reasonable interest thereon.

(E) COMMENDATIONS

813. 102 witnesses testified before us. There are several others who gave statements to investigators and assisting counsel. We thank all those who agreed to record statements. We additionally thank all those who agreed to and testified before us. Their respective statements and pieces of evidence assisted us greatly in our work. There are however, some witneses whom we think deserve special mention. These are:

Mr. Reuben Mbaine Marambii

814. Mr. Marambii is the Managing Director of National Bank of Kenya. He was brought in from the banking sector on 1st July, 1993 to be Chief Banking Manager at CBK. He remained in this post for 5 years. He was brought in to assist in turning the bank round and together with the new Governor, he did so very successfully. He was also a part of the team sent to London to investigate the USD 210 million contracts. Mr. Marambii gave us excellent evidence and assisted us greatly in our task.

Mr. Melville Smith

815. Mr. Melville Smith is a forensic accountant who by enormous efforts unraveled much of the history and dealings of Exchange Bank Ltd. Without his knowledge and hard work, our enquiries could not possibly have got off the ground. The exhibits produced by him run from number 78 to 90 DD bound in 7 large volumes, and he gave evidence before us for 18 days. This has been the bedrock of our investigations and Mr. Smith deserved all praise for it.

Professor Terrence C.I. Ryan

816. Professor Ryan is an economic consultant who has been associated with the Government of Kenya since 1962. Because of his scholarly background and expericence in various Ministries over the years and by reason of his clarity of thought and ability to express himself to laymen, he was of very great assistance to us in understanding the world and Kenya as it was both before and after the effects of Goldenberg on the economy of Kenya and generally. He gave evidence before us for 15 days and our debt to him is considerable.

Jacinta W. Mwatela

817. The role of Mrs. Mwatela in CBK has been set out above from pg. 84. Her stand against what was happening and her attempts to have proper steps taken, notwithstanding the pressure brought on her by Pattni showed her to be a competent most admirable and conscientious employee. Mrs. Mwatela gave excellent evidence before us which helped us to understand what had gone on. She certainly deserves her new appointment of Deputy Governor of CBK.

CHAPTER VI

CONCLUSION AND SPECIAL RECOMMENDATIONS

818. We have come to the end of our inquiry. It was a daunting and challenging exercise. That notwithstanding we conducted the inquiry faithfully, impartially and fully within the scope of the law. Our findings are set out in the preceding part of this report. It now behoves us to make certain general recommendations on various matters arising from the inquiry.

[a] The Deposit Protection Fund Board

819. Evidence was given to us which showed that the Deposit Protection Fund Board had paid out enormous sums of money to Trade Bank Ltd and without adequate security. In accordance with our terms of reference we consider whether the current legal position is such as to provide adequate safeguards against possible abuses.

820. The Board is established by Section 36 of the Banking Act (Cap 488). Its functions are to hold, manage and apply in accordance with the Act the Deposit Protection Fund and to levy the contributions to the Fund which are provided for. Surprisingly the Board has no legal say in the amount of the contributions to be levied from institutions since this is reserved to the Minister with the approval of the Central Bank (Section 37).

821. The members of the Board are the Governor of the Central Bank as Chairman, the P.S, Treasury and 5 members appointed by the Minister in consultation with the Central Bank to represent the interests of institutions [See Section 36 (4)].

822. At the time with which we are concerned the Board had power to lend money to institutions (See Section 41). The reason for this was given in the section. It was to "reduce or avert threatened loss to the Fund." Under this section sums far in excess of any possible loss to the Fund were lent to Trade Bank and without proper security. This section was repealed in 1994 and therefore there is now no threat of any loans being made, but it does show up some of the inconsistencies in the positions of the Board and CBK as will appear.

823. Secondly and most importantly where an institution (which means a bank, a financial institution or a mortgage finance company) becomes insolvent CBK appoints the Board as liquidator of the institution; and this supersedes the liquidation provisions of the Companies Act.

824. The legal effect of such an appointment is to create an immediate potential conflict of interest, since the Board has the duty of paying out to all depositors in the institution of a sum fixed at present at a maximum of KShs. 100,000/-, whereupon it becomes a creditor of the institution in place of the depositors, at the same time as it is the liquidator.

825. We recommend that the appointment of a liquidator be made by CBK whereupon there would be no conflict and the Board could take the position of an ordinary creditor and concentrate on the protection of its funds as far as possible.

826. The winding up of any institution should proceed on commercial lines with a committee of inspection of the major creditors (including where appropriate the Board) which committee would be required to provide the finance for any necessary litigation (as is the case with other companies).

827. In such circumstances the Board should be reconstituted as an independent body, the Governor still sitting on it but the other members

being elected by the bankers possibly through the Kenya Bankers Association. They are of course the institutions who provide all the funds. The Board should then also be entrusted with fixing the amount of contributions to be levied since it would have a good idea of what its likely outgoings will be should one or more banks collapse. We therefore recommend this.

[b] The Central Bank of Kenya

828. As we have set out above, the basic constitutional provisions contained in Part 7 of the Constitution (Sections 99 to 105) are well-thought out and consonant with democratic control over how tax revenues are spent. They should on no account be interfered with.

829. Since we started our enquiries Parliament has passed the Government Financial Management Act (5 of 2004) although it is not yet in force. The controls already instituted by CBK together with the new Act should go far towards seeing that the abuses of the Goldenberg period never recur. Nevertheless, laws are not enough. Continued training of staff and the knowledge among them that constitutional and institutional safeguards cannot be overridden also need to continue to be emphasise.

830. At several places we have commented on the lack of supervision of banks by CBK during the period into which we have been enquiring. The position of Exchange Bank Ltd was glaring and there was no attempt to ensure that that bank had in fact any paid up capital at all, as apparently it did not. Few other weak banks were adequately supervised. Several amendments to the laws have been made in order to attempt to rectify the position. The one substantial area where undesirable political influence may still be exerted is the licensing of banks and in the cancellation of licences. At present the consent of the Minister is required

for the licensing of any institution (Banking Act Section 5) and for the revocation of a licence (Section 6). These powers should be given to CBK.

831. The First Schedule to the Act sets out the criteria by which among other matters, fitness to manage banks is judged. This is provided for by Section. 4(4) and the power to amend it is vested in the Minister. This should also be given to CBK.

832. Finally, it should be made quite clear that a bank which loses its licence does not thereby cease to be a bank nor does it cease to be subject to the Banking Act. In general the new and much stricter controls over banks and institutions need to be maintained if progress is to continue. We were given a very well thought out critique of the position of the Central Bank of Kenya by its present Governor Mr. A.K. Mullei. We agree with the recommendations contained therein and we have placed the letter as **Appendix "Q".**

833. We have stated elsewhere in this report that one of the weaknesses noted in the operations of the Central Bank of Kenya is the quality of information availed to the Board of the Bank by the Governor as its Chairman. At times the information given to the Board was so vague and imprecise as to raise questions as to whether the Board Members properly understood what policies the Governor and the Management of Bank were pursuing or whether the Board understood the magnitude and far reaching effects of some of its decisions. To avoid a situation of this nature we recommend:-

(a) That the Governor should as a matter of policy give the Board detailed and specific information on any matter placed before it for discussion or a decision.

(b) That Board members should be alive to the onerous responsibility and trust bestowed upon them, in overseeing the operations of the Bank.
To achieve this the Central Bank Act should be suitably amended to make the Directors of the Bank individually accountable for decisions of the Board in

the same way Directors of Limited Liability Companies are.

(c) We note that under Section 12 of the recently enacted Public Audit Act 2003 all State Corporations are required to prepare and submit their accounts to the Controller and Auditor-General for audit. Section 17 of the same Act allows the Controller and Auditor-General to report to the Minister of Finance and to the National Assembly through a special audit report immediately any matter which he feels requires attention which comes to his notice in the course of an audit of a State Corporation without having to wait until the submission of his annual report.

These enactments enable the Controller and Auditor-General not only to audit but have constant oversight and monitoring functions over the financial affairs of State Corporations.

834. However Section 20(b) of the Public Audit Act excludes the Central Bank of Kenya from the audit and financial oversight functions of the Controller and Auditor-General by limiting his authority only to those statutory bodies and State Corporations which he is by law required to audit. The Central Bank of Kenya is one such body which is outside his audit control because under Section 2 of The State Corporations Act Chapter 446 of the Laws of Kenya the bank is specifically excluded from the definition of a State Corporation.

835. Section 54 of the Central Bank of Kenya Act requires the bank to submit to the Minister of Finance its annual report, balance sheet and profit and loss account as certified by auditors appointed by the Bank and approved by the Minister. This Section has made it possible for the bank to be audited by private audit firms.

836. The Controller and Auditor-General can only audit the bank under Section 56 of the Act when he is directed to do so by the Minister.

837. Arising from our Inquiry we believe that the Central Bank of Kenya is too important and critical to the economic and national affairs of the country to be left outside the audit and financial oversight functions of the Controller and Auditor-General.

838. We therefore recommend the amendment of all relevant laws so as to empower the Controller and Auditor-General to audit the accounts of the Central Bank of Kenya and to give him oversight audit functions over the financial affairs of the Bank.

[c] Ex Gratia Payments

839. When evidence was given before us concerning the manner of payment of the 15% export compensation, it was shown that this had been classified as an ex gratia payment. This was an attempt to pay a debt allegedly due from the government to GIL contrary to the law and financial regulations.

840. Payments of debts by the government is done under clear legal provisions and regulations or by order of court. In ordinary negotiated contracts there would be a budget line for it. However in situations as where action is taken against the Attorney General on behalf of the Government and a judgment obtained, there is often no budget for it and no legal way for the accounting officer of the responsible department to make payment. For such claims Section 21 of the Government Proceedings Act Cap 40 Laws of Kenya should be suitably amended to provide that such payments be made out of the consolidated fund. In all other cases the relevant government financial regulations should be amended to specifically provide under what circumstances shall payments be made by way of ex gratia and from what fund. Otherwise it is our view and we so recommend, that under no circumstances should the government make a payment as ex gratia.

[d] Income Tax Cases

841. The manner in which court cases concerning income tax are dealt with was shown to be unacceptably lax. There appeared to be no check on what happened to court cases after they were filed. We recommend that the Kenya Revenue Authority report regularly to the Attorney-General or the Permanent Secretary, Ministry of Finance on all income tax cases and appeals, explaining what has happened to them.

[e] Recommendations on Procedure

842. In the course of our inquiry we encountered several problems. Some of these could be avoided in future commissions if:

(a) the quorum for Commissions could be fixed in the appointing instrument.

(b) the right of Commissioners to remuneration under Section 17(1) of The Commissions of Inquiry Act, is included in the commission.

(c) a Witness Protection Bill is passed. When discussing the sacking of Mr. David S. Munyakei we noted that there is no legislation in Kenya protecting the employment of persons who reveal the shortcomings of governments or corporations (commonly known as whistle blowers). There is such legislation in Britain and the European Union and we recommend similar legislation here.

[f] Proceeds of Crime

843. Much of our report has dealt with how the proceeds of crimes committed have been moved around the world. Many countries have passed legislation attempting to deal with the passing of criminal money around the world in attempts to disguise its provenance (popularly referred to as money-laundering). It is of great importance that international attempts to deal with this scourge should be assisted whole-heartedly by Kenya and that a Proceeds of Crime Act should be passed urgently.

[g] Prosecutions and further Investigations

844. One of the general requirements in our terms of reference was to establish all persons, public or private, who were involved in the alleged irregular claims and payments to GIL and or Exchange Bank Limited, and the extent of their responsibility, and to recommend the prosecution or further criminal investigations against any persons who may have committed offences related to those claims and payments. We found that certain persons featured prominently in the Goldenberg Affair and we have said as much in this report. Others played minor roles. In yet other cases there were individuals whose roles could not be determined with particularity owing to the legal limits inherent in an inquiry of this nature.

845. For those whose specific roles could not be established, we recommend that at the discretion of the Attorney General further investigations be undertaken against them to determine their respective roles, if any, in the whole scam, and whether they were in any way, involved in any wrong doing. Those falling in that category include:

(a) H.E. Daniel Arap Moi
(b) Mr. Joseph Magari
(c) Mr. Joshua Kulei
(d) Multiphasic Co. Ltd

846. Regarding those persons whose acts or omissions are, in our view, contrary to the law, and are criminal in nature, we have agonized over whether or not to recommend prosecution. We have, however, decided against such recommendation as there are many imponderables on what the Attorney General considers before deciding to prefer criminal charges against any person or group of people. In view of that we will list names of those who in our view were in one way or another, responsible for those acts and omissions for the attention of the Hon. Attorney General for any possible criminal or civil action.

847. These include:

(a) Mr. Kamlesh Mansukhlal Pattni
(b) Mr. James Kanyotu
(c) Hon. Prof. George Saitoti
(d) Mr. Charles Mbindyo
(e) Dr. Wilfred Karuga Koinange
(f) Mr. Collins Owayo
(g) Mr. Arthur Ndegwa
(h) Mr. Eric Kotut
(i) Mr. Francis Chelelgo Cheruiyot
(j) Mr. Elphas Riungu
(k) Mr. Elijah Arap Bii
(l) Mr. Tom Kilalya Werunga
(m) Mr. Michael Wanjihia
(n) Mr. Job K. Kilach

[h] Conclusion

To conclude we set out herebelow the summary of the financial implications of what we have found on the basis of the evidence before us. The figures do not at all represent every loss, but merely a minimum of what the country lost through the Goldenberg Scam.

Total export compensation paid:	1,433,212,501/-
Pre-export credit finance owed to Post Bank Credit Ltd by Goldenberg and related companies and not repaid at the time of the bank's collapse:	989,670,704/-
Loss on redemption of Forex Cs:	852,085,000/-
Exchange rate gains – through EBL (Exht. 141 pg. 26):	5,824,516,525/-
through Pan African Bank:	366,847,000/-
Cheque kiting interest:	94,800,000/-
Interest on undelivered dollar contracts:	1,281,196,576/-
Undelivered $210m contracts (Exht. 90G):	13,525,000,000/-
Payment from Treasury (Exht. 90G):	5,807,050,378/-
Total	**27,079,578,684/-**

Notes:

There was also a loss of Shs 3,080,184,230/- through Trade Bank Ltd in respect of pre-export financing which was not repaid. This was within our terms of reference and was a loss to Government although it was not related to Goldenberg.

The following amounts of money were transferred abroad and not returned. This gives one a good idea of the scale of what Goldenberg and Pattni were able to salt away, but we have not placed them in the figures above.

Money transferred abroad and not returned:		
(a)	on existing documents	6,089,483,890/-
(b)	on missing documents – estimated loss	4,294,553,720/-
	Total	**10,384,037,610/-**

APPENDIXES

APPENDIX "B"

SPECIAL ISSUE

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

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Vol. CV—No. 22 **NAIROBI, 24th February, 2003** **Price Sh. 40**

GAZETTE NOTICE No. 1238

THE COMMISSIONS OF INQUIRY ACT

(*Cap.* 102)

JUDICIAL COMMISSION OF INQUIRY

Citation

A JUDICIAL COMMISSION to inquire into allegations of irregular payments of export compensation by the Ministry of Finance to Goldenberg International Limited, popularly known as the "Goldenberg Affair" and into payments made by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims and other related matters.

Now therefore, in exercise of the powers conferred upon the President by section 3 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, do direct the commissioners to hold an inquiry at Nairobi with immediate effect. The terms of reference shall be:

(a) To inquire into the origins of, the acceptance and the implementation by the Government of the proposal to award export compensation in respect of exports of gold and diamond jewellery under the Local Manufactures (Export Compensation) Act (Chapter 482 of the laws of Kenya);

(b) To inquire into allegations of irregular payments of export compensation under the Local Manufactures (Export Compensation) Act to Goldenberg International Limited, being a percentage of the value of gold and diamond jewellery allegedly exported from Kenya by the said company, with a view to establishing—

(i) whether in fact any gold or diamond jewellery was exported from Kenya and if so, how much and to whom;

(ii) whether the amount of gold or diamond jewellery exported was processed through Customs as required;

(iii) whether there was a declaration and remittance of the alleged foreign currency earnings;

(iv) whether the alleged foreign currency earned was cleared and remitted to the Central Bank of Kenya and if so, how much;

(v) the circumstances and grounds upon which the compensation was claimed and paid to Goldenberg International Limited;

(vi) the actual amount of export compensation paid to Goldenberg International Limited, including but not limited to KSh. 5.8 billion, and whether any of the said amount was paid to third parties and if so, the identity of such third parties and the amounts paid to them.

(c) To inquire into the alleged payment of US$210 million (KSh. 13.5) billion) by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims with a view to establishing—

(i) whether the equivalent in Kenya shillings was paid to Exchange Bank Limited and/or Goldenberg International Limited and if so, how the money was utilised; and

(ii) whether any or all the money was paid to third parties and if so, the identity of such parties and the amounts paid to them.

(d) To establish all persons, public or private, involved in the alleged irregular claims and payments to Goldenberg International Limited and/or Exchange Bank Limited and the extent of their responsibility.

(e) To inquire into and investigate any other matter that is incidental to or connected with the foregoing.

(f) To recommend—

(i) the prosecution of further criminal investigations against any person or persons who may have committed offences related to such claims or payments;

(ii) ways, means and measures that must be taken to prevent, control or eradicate such schemes or frauds in the future;

(iii) any reimbursement and/or compensation to the Government by any person and the extent of such reimbursement or compensation; and

(iv) any other policy or action that may conclusively deal with the "Goldenberg Affair"; and

in accordance with section 7 (1) of the said Act, to report thereon as soon as reasonably practicable.

And I direct that—

Justice Daniel K. Aganyanya,
Peter Le Pelley, Senior Counsel,

shall be the commissioners and that Justice Samuel Elkana Onderi Bosire, a judge of the Court of Appeal, shall be the chairman of the said commission and Justice Daniel K. Aganyanya, a judge of the High Court of Kenya, shall be the vice-chairman.

And I do appoint—

William Ouko,
Dan K. Ameyo,

to be the joint secretaries of the commission, and further, I do appoint—

Waweru Gatonye,
Dorcas Agik Oduor,

to be counsel to assist the said Commission.

And I do direct that, in the performance of its task, the commission shall receive views from members of the public and receive oral/or written statements from any person with relevant information, and may—

(a) use official reports of any previous investigations into the said payments;

(b) use any investigation report by any institution or organization into the payments; and

(c) commission reports from experts in any relevant areas.

And I do direct that in accordance with the provisions of section 10 (1) of the said Act, the commissioners shall summon any person or persons concerned to testify on oath and to produce any books, plans and documents that the commissioners may require.

And I do direct that after its commencement, the said inquiry may be held at such times and in such places as the said commissioners may, from time to time, determine and shall be held in public or in private as the said commissioners may, from time to time, determine.

And I do direct that the said commissioners shall execute the said inquiry with all diligence and speed and make their report without undue delay.

And I do command all other persons whom it may concern to take due notice hereof and to give their obedience accordingly.

Dated the 24th February, 2003.

MWAI KIBAKI,
President.

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APPENDIX "A"

SPECIAL ISSUE



THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

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Vol. CV—No. 22 **NAIROBI, 24th February, 2003** **Price Sh. 40**

GAZETTE NOTICE NO. 1237

THE COMMISSIONS OF INQUIRY ACT

(*Cap.* 102)

APPOINTMENT OF JUDICIAL COMMISSION OF INQUIRY

IN EXERCISE of the powers conferred by section 3 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, being of the opinion that it is in the public interest, do appoint a commission of inquiry to inquire into allegations of irregular payments of export compensation to Goldenberg International Limited, popularly known as "the Goldenberg Affair" and into payments made by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims, to be headed by—

Justice Samuel Elkana Onderi Bosire, a judge of the Court of Appeal, as the chairman; and

Justice Daniel K. Aganyanya, a judge of the High Court of Kenya; and

Peter Le Pelley, Senior Counsel,

as the commissioners; and

Justice Daniel K. Aganyanya,

as the vice-chairman; and

William Ouko,
Dan K. Ameyo,

to be the joint secretaries of the commission; and

Waweru Gatonye,
Dorcas Agik Oduor,

to be counsel to assist the Commission

Dated the 24th February, 2003.

MWAI KIBAKI,
President.

APPENDIX "C"

TEXT OPENING SESSION - CHAIRMAN

The Chairman: The Hon. Mr. Justice Aganyanya, Commissioner Peter Le Pelley (S.C), Hon. Attorney-General, the Chairman of the Law Society of Kenya, Assisting Counsel, ladies and gentlemen. As Chairman, and on behalf of the other members of the Judicial Commission of Inquiry appointed by His Excellency the President of the Republic of Kenya, Hon. Mwai Kibaki, to inquire into the Goldenberg affair and related matters; I take this earliest opportunity to assure His Excellency the President that we shall discharge strictly in accordance with our oath this very important, sensitive, challenging and daunting task which he has entrusted to us.

The Goldenberg affair has been in the news for over a decade and has had a chequered history. We understand that Parliament, through a committee or committees of the House, and also individuals, by way of research, have tried to unravel the issue. The courts too have tried through the judicial process to unravel this conundrum. But as yet, we as a Judicial Commission of Inquiry are unaware of their respective findings. It cannot be gainsaid that the Government, the private sector and indeed, the public in general are anxious that the Goldenberg affair be unravelled and conclusively dealt with. That His Excellency the President thought it fit to establish this Judicial Commission of Inquiry is an important milestone and a crucial step in that direction. The citation of our assignment is:-

> "To inquire into allegations of irregular payments of export compensation by the Ministry of Finance to Goldenberg International Limited, popularly known as the Goldenberg affair, and into payments made by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims and other related matters."

In a nutshell, and without setting out in detail the terms of reference, it is clearly our duty to, *inter alia*, identify whether and if so, how much money was paid out by the Ministry of Finance and the Central Bank of Kenya allegedly as export compensation and, or export retention money, or whatever the reason given for the payment to Goldenberg International Limited or any other person legal or natural and the justification or basis for the payments; those who effected the payments, those to whom such payments were made, and related matters; and to make recommendations as to the recovery thereof and any possible criminal prosecution, or further investigations against any, or all persons who, in our opinion and according to received evidence, merit such action.

The practice of an independent judicial commission of inquiry is now well settled in this country. We would like to assure everyone that in keeping with such practice and our oath and responsibilities as members of an independent Judicial Commission of Inquiry, we shall, by God's grace and with an open mind, boldly and without delay tackle the issues enumerated in our terms of reference and in accordance with the Commissions of Inquiry Act, Cap.102 of the Laws of Kenya, under which this Judicial Commission of Inquiry was established, and with all diligence and speed make a full dispassionate and faithful inquiry into the matters entrusted to us and, thereafter, without undue delay make our report.

As required of us by the aforesaid Act, we have already published the rules for the conduct of our Inquiry. I would like to advise all those who will appear before us either as persons adversely mentioned, or as counsel for any of such people, to whom we shall give due notice, to familiarise themselves with the said rules beforehand. The rules have been published in the *Kenya Gazette* under Gazette Notice No.1566 of 2003. I would like to warn that it will be in contempt of this Judicial Commission of Inquiry for anyone to make public statements that may affect, prejudice or compromise its position.

Finally, I would also wish to appeal to those with information relevant to our Inquiry not to hesitate to come forth and see the Joint Secretaries, who will guide them on what to do. Where it is not reasonably practicable to meet them personally, we shall soon publish in the print media details of the Commission's postal, telephone and e-mail address hopefully for easier and more affordable contact with them. As we shall be progressing with the Inquiry, we shall, as necessary, give further directions.

I will now call upon the hon. Attorney-General, A.S. Wako, Esq. who appears as *amicus curiae*, to address this Commission of Inquiry.

APPENDIX "D"

TEXT OPENING SESSION – ATTORNEY GENERAL

The Attorney-General (Mr. Wako): Hon. Justice Samuel Elkanah Onderi Bosire, Judge of the Court of Appeal; who is also the Chairman of this Judicial Commission of Inquiry into the Goldenberg affair; the Vice-Chairman, hon. Daniel K. Aganyanya; Judge of the High Court of Kenya, Commissioner Peter Le Pelley, Senior Counsel; it is my greatest pleasure, privilege and honour to appear before you as *amicus curiae* in this Judicial Commission of Inquiry established by His Excellency the President in the exercise of the powers conferred on him by Section 3 of the Commissions of Inquiry Act, Cap.102 of the Laws of Kenya. I do so in accordance with the rules of procedure made by yourselves for the conduct and management of the proceedings which were duly published *vide* Gazette Notice No.1566 of 14th March, 2003.

My Lords, what has become known as the Goldenberg affair, or Goldenberg scandal, or the Goldenberg scam, has been and still remains the most emotive concern in the minds of Kenyans. One can think of no other matter which has engaged the time of all organs of Government; the Executive, the Legislature and the Judiciary, as much as the Goldenberg affair. Nothing in the public perception has come to epitomise corruption as the Goldenberg affair. The evils of corruption and the devastating negative effects on the society are well known. The cost of opportunity lost in terms of economic and social development, in terms of creating national ethics of transparency and accountability, hard work and the spirit of entrepreneurship cannot be over-estimated. The Goldenberg affair became, in the words of that British dramatist and novelist, Dodd Smith, "the dear octopus, whose tentacles we never quite escape." Kenyans want to escape from this octopus so that Kenya can be a vibrant state with a free and democratic system of government that enshrines good governance and the rule of law, and where there is an equitable framework of economic growth and equitable access to national resources. The tentacles of the octopus have to be cut. That is why, among your terms of reference, there is a general power under which you can make recommendations on any policy or action that may conclusively deal with the Goldenberg affair.

My Lords, Commissioners, you have been appointed to inquire into allegations of irregular payments of export compensation to Goldenberg International Limited in respect of fictitious foreign exchange claims. In this regard, you are to inquire into the origins of, the acceptance and implementation by the Government of the proposal to award export compensation in respect of gold and diamond jewellery under the local Manufacturer Export Compensation Act.

As far as we can tell, the idea of export compensation began by a report entitled: "Brief on gold mining, gold trade and gold export from Kenya", compiled by the Commissioner of Mines and Geology, dated 3rd November, 1987, which recommended, among other things, to increase compensation for gold and gold products from 20 per cent to 40 per cent. This was followed by setting up of an Inter-Ministerial Committee to look into the problems facing the gold industry. It appears, also, that the Ministry of Environment and Natural Resources undertook a study which concluded that the Kenya Government pays a special export bonus to *bona fide* exporters of approximately 18 to 20 per cent, over and above the 20 per cent export compensation paid under the law. It then appears, and these are the facts which you will have to go into, that on the strength of these recommendations, on 8th October, 1990, Goldenberg International Limited wrote a letter to the Vice-President and Minister for Finance entitled: "Diamond Export from Kenya", in which the company requested to be granted the sole rights to export diamond, jewellery and gold out of Kenya for a period of five years with an option of extra five years. It also requested to be granted 35 per cent export compensation on diamond and gold export, and that, due to the ensuing numerous cash transactions on a daily basis, the company be allowed to operate a financial company namely, Goldenberg Finance Limited. The Vice-President and Minister for Finance gave approval to the request save for the request on monopoly.

The next stage is the implementation, and here, differences began to emerge among public officials on how it should be done. It was proposed that the increase in the rate of compensation be done by a legal notice signed by the Minister for Finance. Under the signature of the late Arthur Buluma, the then Chief Parliamentary Counsel, the Office of the Attorney-General advised that to do so in the manner proposed would be *ultra vires* the local Manufacturer Export Compensation Act. Furthermore, he advised that Section 3 of the Act enacted a rate of compensatory payment to all eligible goods exported from Kenya. Therefore, different rates of compensatory payments cannot be made for different goods. He further advised that if they wanted to proceed in the manner proposed, then Section 3 of the Act would have to be amended. Some senior officials in the Treasury, Central Bank of Kenya and Customs Department are on record as having opposed the proposal on merit. However, the Treasury did accept and, in fact, directed the Commissioner of Customs to immediately compensate Goldenberg International by paying the current 20 per cent as required by law with effect from November, 1990. The extra 15 per cent was to be dealt with by the Ministry of Finance after confirmation from the Customs Department that they had already paid the initial amount. Goldenberg International continued claiming export compensation at 35 per cent. The Customs Department paid him 20 per cent and with receipts received, the company would then proceed to the Treasury where they would be paid the extra 15 per cent. The issue of the extra 15 per cent continued to be debated within Treasury. It appears that on or about 9th January, 1992, it was withdrawn.

In terms of Paragraph B(4) of your Terms of Reference, you will need to inquire into the circumstances surrounding the payment of Kshs5.8 billion to Goldenberg International which was made well after this 15 per cent compensation was withdrawn and, indeed, well after the basic 20 per cent had been revoked by a legal notice. It also became an issue as to whether Goldenberg International was, in fact, entitled to claim the 20 per cent export compensation which could lawfully be claimed under the Act. This can only be lawfully claimed if certain conditions are fulfilled. It became an issue as to whether those conditions had actually

My Lords, Commissioners, this is a public inquiry, I want to appeal to the Press to give the proceedings of this Commission adequate coverage which is fair and accurate.

My Lords, Commissioners, let me express my wish for this Commission to be known in the public domain as the Bosire Commission. It is a practice in the Commonwealth that Commissions derive their names from the names of the Chairman. Since we are a member of the Commonwealth, I pray, my Lord, Commissioners, that it be so ordered that this Commission be known as the Bosire Commission.

The Chairman: Very well. It is so ordered.

The Attorney-General (Mr. Wako): I thank you, my Lords. To conclude may I on my own behalf, thank you most sincerely for allowing me to appear before you as *amicus curiae*. My Lords, Commissioners, as *amicus curiae*, as a friend of this Judicial Commission of Inquiry, this Commission is at liberty to call upon me at any time should it require my assistance in any manner. In that capacity, I am at your Lordship's disposal to render to the Commission the support required to enable your Lordships to effectively discharge your duties in accordance with the terms of reference of this Commission.

Thank you.

been fulfilled. This became the subject matter of reports by the Controller and Auditor-General for the years 1990/91, 1991/92 and 1992/93. These reports were laid before Parliament. Parliament, through the Public Accounts Committee (PAC), investigated these reports of irregular/fictitious payments to Goldenberg International in 1990, 1991, 1992 and 1993. There were also, if I may add, a number of questions asked in Parliament over the issue. These allegations also reached me and in July 1993, I exercised my constitutional powers under Section 26 of the Constitution and directed the Commissioner of Police to investigate the allegations. The investigation reports received formed the basis of my criminal prosecutions which have been on going in court. Therefore, the issue of whether gold and other minerals were exported, and if so, the quality of gold exported, whether exports were properly processed through Customs Department, whether the foreign currency earned was actually remitted to Kenya, and if so, how much was actually remitted to Kenya, are issues which are well covered in your Terms of Reference.

It is also important to note that the Minster for Finance by Legal Notice No.88 of 1993 dated 15th April, 1993, terminated all export compensation on gold, jewellery, precious metals, stones, *et cetera*. It is also important to note that what is called the goldenberg affair, I think, goes beyond the issues touched on under the Export Compensation Scheme. That is also covered under your terms of reference. There is that payment of 210 million dollars. It will be up to you, again, to investigate the circumstances of those payments, how they were processed and who received them.

My Lords, Commissioners, the public wants to know the truth about the goldenberg affair. Allow me to quote from a book on the report on Public Inquiries, and I agree with the sentiments expressed herein entirely. The book talks about Canada, but this also applies here in relation to your appointment. It says:

> "The Government has appointed public enquiries because they have responded to diverse pressures, particularly from the public, including the need for independent scrutiny of controversies, including in depth research into increasingly complex matters."

So, the sentiments expressed here apply to you also in that the public has been frustrated about the goldenberg affair, the Government wants you to be that independent body which will scrutinise all the controversies surrounding the goldenberg affair, and in that process, also have an indepth analysis of all the issues.

Why has the public felt frustrated? The public has felt that they may never know the full extent of the affair. There have been perceptions rightly or wrongly that the prosecutions which were on going did not disclose the full extent of the goldenberg affair and it may very well be that there are some people who ought to have been prosecuted. As you know, my Lords, a prosecution depends on investigations. However much you may suspect that somebody has committed a crime, you cannot prosecute that person unless you have in your possession an investigation file on which there is provable adequate evidence to successfully prosecute that person. That perception has been there. Consequently, I think they have felt that whatever goes on there, we shall never know the full extent of the goldenberg affair. The public has witnessed almost ten years of the cases in court dealing not with substantive matters of the goldenberg affair, but peripheral important legal issues; constitutional applications were made to stop this, to do that and so on. Therefore, the courts have been engaged in dealing with important legal applications, important to the rights of the accused, but the public cannot understand why we cannot go immediately into the substance, into the disclosures of what the goldenberg affair is all about. Parliament has also been frustrated as much as the public because it could not continue dealing with this matter through the PAC because of the *sub judice* rule.

The hope of your appointing authority, His Excellency the President, the Government and the people of Kenya, is that through this Judicial Commission of Inquiry, the truth about the goldenberg affair will be unearthed and we shall be able, through your recommendations, to conclusively deal with this matter and move on as a nation.

His Excellency the President has given you wide terms of reference because he has great confidence in the integrity and industry of each one of you. I, personally, share the President's trust and confidence in you, my Lords, Commissioners. I hasten to congratulate you on the appointment. In congratulating you I want also to take this opportunity to congratulate the Joint Secretaries; Messrs. William Ouko and Dan Ameyo, and the Assisting Counsels Mr. Waweru Gatonye and Ms. Dorcas Agik Oduor, for their respective appointments to serve this nation in this important task.

It is now, indeed, my honour and pleasure to submit to you the legal instruments constituting your commission. I have with me here the instruments of issuance and the appointment of the Commission and the instrument of citation which goes along with it. I lay them before you, my Lords, for the record.

(The Documents were laid before the Commission)

My Lords, Commissioners, permit me to give the Government's assurance that your Commission will be assisted and facilitated in every respect. The Government will ensure that you are not in any way handicapped in the discharge of your duties.

My Lords, Commissioners, let me also take this opportunity to appeal to all persons and, in particular, public officials and civil servants of whatever rank who may have had anything to do with the origin, the acceptance and the implementation of the Gold Export Scheme or anything under the terms of reference of this Commission to volunteer, come and truthfully give evidence before this Commission.

APPENDIX "E"

TEXT OPENING SESSION – LAW SOCIETY OF KENYA

The Chairman of the Law Society of Kenya (Mr. Ahmednassir Abdullahi): My Lord, Justice Samuel Bosire of the Court of Appeal of Kenya; my Lord, Justice D. Aganyanya of the High Court of Kenya, Commissioner Peter le Pelley, Senior Counsels, the hon. Attorney-General, my Learned friends, distinguished guests, ladies and gentlemen; the Law Society of Kenya is honoured to be invited to make a statement at the opening ceremony of this Commission of Inquiry. As the Law Society of Kenya, we hereby register our utmost satisfaction with both the idea behind this Commission of Inquiry and its membership.

My Lords, my I recall for the record that the Law Society of Kenya first asked the Attorney-General as early as 1993 to prosecute all the parties that were behind the Goldenberg scandal. Repeated requests to the Attorney-General yielded no positive results. The Law Society of Kenya, conscious of the huge public demand for judicial redress over the Goldenberg matter, took the decision to represent public interest by drafting four charges against the persons suspected of being the principal players of the Goldenberg scam. The Law Society of Kenya sought leave of the court to privately prosecute the case, and the Attorney-General applied to the court to be enjoined in the proceedings as *amicus curiae*.

My Lords, as history shows, once he was so enjoined, the Attorney-General, in the supporting affidavit filed in court and sworn by Bernard Chunga, the then Chief Public Prosecutor was opposed to the application by the Law Society of Kenya and stated that the hands of the Attorney-General were tied by what he termed: "Lack of an investigation report disclosing evidence sufficiently sustainable in court to prove criminal charge". He further said that the Attorney-General had insisted that he be furnished with evidence relating to the intended private prosecution against the principals in the Goldenberg scandal.

My Lords, the Law Society of Kenya was taken aback by the position of the Attorney-General and his opposition to the intended private prosecution. The then Chairman of the Law Society of Kenya, Dr. Willy Mutunga, in a replying affidavit stated the position of the Law Society of Kenya as follows:-

> "Protracted delays in these proceedings leading to mention followed by mentions, adjournments followed by adjournments and eventually dramatic withdrawal of all the cases by the Attorney-General will result".
>
> My Lords, I think history has vindicated the position of the Law Society of Kenya.

My Lords, history recalls also that the Attorney-General then signed a preliminary objection that the Law Society of Kenya had no *locus standi*, and the same was upheld by the presiding Magistrate Uniter Kidullah who said in her ruling:

"The only knowledge the Law Society of Kenya seems to be acquiring is that relating to stealing from clients and telling them to pay exorbitant fees on the pretext that so much is needed for the trial magistrate or Judge".

So much water has passed under the bridge, but the public demand for judicial settlement of the Goldenberg scam remains strong today as it was when the public first learnt of it. We have given the above background in order to express the expectation of the Law Society of Kenya and the general public with regard to this scam and also to inform those who are guilty of this scam and their protectors that their time probably is up. For ten years, the Attorney-General has failed to make any meaningful prosecution to solve the criminal aspect of the Goldenberg cases, and to call a spade a spade, we must admit that his weak action to prosecute and big omissions not to prosecute stand for or provide, in the opinion of the Law Society of Kenya, a monumental example of how not to excise the constitutional function of an Attorney-General.

My Lords, the previous Government, through the Attorney-General, exhibited pathological fear not to solve the Goldenberg case, and the Law Society of Kenya welcomes this Commission that will hopefully provide answers to the thousands of questions that remain unanswered over the Goldenberg scam. For the last ten years, the Goldenberg cases, whether civil or criminal, have jammed the congested corridors of our judicial system. Case after case often came to our courts usually on the same issue, but at times leading to different results. The cases have muddled the jurisprudence of our courts. For those of you who were students of jurisprudence of the Goldenberg cases, you will recall that initially during the tenure of hon. Chief Justice Cockar, the decision of the court went one way and the Central Bank won most of the cases. However, when the late Justice Chesoni assumed the office of the Chief Justice, the jurisprudence of the courts went the very opposite direction, and the Central Bank lost most of cases, notwithstanding the fact that the Judges remained the same and the facts were constant. Justice Chunga's tenure as the Chief Justice was a mere continuation of Justice Chesoni's tenure in so far as those issues are concerned.

My Lords, it is our hope as the Law Society of Kenya that this Commission will do a good job in the discharge of its mandate and we hope that it will solve the metrics of deceit and deception that surrounded the factual quagmire and the legal conundrum.

My Lords, in this regard, the Tribunal as part of its mandate must address, in the view of the Law Society of Kenya, three issues: First, it will be wrong for the Commission to see the Goldenberg issue just as an economic crime. Yes, it is an economic crime, but that is just one facet of the puzzle. The economic aspect and how it ruined our economy is very important, but we must not lose sight of the broader picture.

My Lords, secondly, we must appreciate and investigate why the Government, despite its enormous resources and legal powers failed to prosecute the principals of this crime. The role played by the office of the Attorney-General which in a way led to the formation of this Commission of Inquiry, must in our view be appreciated, addressed and investigated.

My Lords, thirdly, it is the view of the Law Society of Kenya that you must consider why the courts initially ruled in favour of the Central Bank and then continued to rule against it for the past eight years when the facts have remained constant. At a proper stage, the Law Society of Kenya will seek to participate in this Inquiry.

With those few remarks, I thank you for giving the Law Society of Kenya and me an opportunity to state the above. I assure you of my members' full support of this challenging assignment. May I wish you the best of luck. Thanks, and God bless the Commission.

APPENDIX F

GAZETTE NOTICE NO. 1566

THE COMMISSIONS OF INQUIRY ACT
(Cap. 102)
JUDICIAL COMMISSION OF INQUIRY

RULES AND PROCEDURES

This Commission of Inquiry has been convened pursuant to its appointment to inquire into "the Goldenberg Affair", as stated in Gazette Notice Nos. 1237 and 1238 of 2003.

The Commissioners make the following rules for the conduct and management of the proceedings of the inquiry under section 9 of the Commissions of Inquiry Act.

(a) The Attorney-General appears as *amicus curiae*.

(b) Subject to section 9 of the said Act, the Commission of Inquiry shall sit daily, at 9.00 a.m. from Monday to Friday.

(c) The Commissioners may direct that the public shall not be admitted to all or to any specified part of the proceedings of the inquiry, and subject to any such direction, the inquiry shall be held in public, but the commissioners may exclude any person or class of persons from all or any part of the proceedings of the inquiry if satisfied that it is desirables so to do for the preservation of order, for the due conduct of the inquiry, or for the protection of the person, property or reputation of any witness in the inquiry or any person referred to in the course of the proceedings thereof, and may, if satisfied that it is desirable for any of the purposed aforesaid so to do, order that no person shall publish the name, address or photograph of any such witness of person or any evidence or photograph of any such witness or person or any evidence of information hereby he contravenes such an order shall without prejudice to section 121 of the Penal Code, be guilty of any offence and liable to a fine not exceeding five thousand shillings.

(d) Without the leave of the commissioners, no evidence shall be adduced in public to the inquiry concerning or relating to any matter prejudicial to the security of the State or the Head of State.

(e) Any person who is in any way implicated or concerned in any matter under inquiry shall be entitled to be represented by any advocate.

(f) Any other person who desires to be so represented may, by leave of the Commission, be so represented.

(g) The counsel assisting the inquiry will present evidence relating to the inquiry referred to in terms of reference of the inquiry.

(h) The counsel assisting the inquiry will warn witness that after examination-in-chief they may also be cross- examined by him.

(i) The commissioners may summon any person or persons to testify on oath and may call for the production of books, plans, and documents that the commissioners may require.

(j) Any person who is any way implicated or concerned in any matter under inquiry may adduce material evidence on his behalf in connection with the matter under inquiry.

(k) The commissioners may call for any further evidence on any point relating to any matter before them and may recall any witness for further examination.

(l) Evidence shall be adduced by question and answer method.

Dated the 5th March, 2003

S.E.O. BOSIRE,
Judge of Appeal/Chairman
Commission of Inquiry into the Goldenberg Affair

APPENDIX G

LIST OF PERSONS SERVED WITH ADVERSE NOTICES

1. M/S GOLDENBERG INTERNATIONAL LTD.
2. MR. KAMLESH MANSUKHLAL DAMJI PATTNI
3. MR. JAMES KANYOTU
4. M/S EXCHANGE BANK LIMITED
5. M/S FIRST AMERICAN BANK
6. M/S KENYA COMMERCIAL BANK LTD.
7. M/S NATIONAL BANK OF KENYA LTD.
8. M/S DELPHIS BANK LIMITED
9. M/S THE EAST AFRICAN STANDARD LTD.
10. HON. PROF. GEORGE SAITOTI
11. HON. MUSALIA MUDAVADI
12. MR. CHARLES MBINDYO
13. MR. ERICK KOTUT
14. MR. JOB KILACH
15. MR. LAZARUS W. WAIRAGU
16. MR. ONESMUS WANJIHIA
17. MR BIRECH KURUNA
18. MR. ELIPHAZ RIUNGU
19. M/S DAKSHA B. RANA
20. MR. ROHIT DAMJI
21. M/S PANTHER INVESTMENT LTD
22. DR. WILFRED KARUGA KOINANGE
23. MR. ARTHUR ABONGO NDEGWA
24. MR. COLLINS OWAYO
25. MR. FRANCIS CHERUIYOT
26. MR. DAVID WAIGANJO NGURE
27. MR. ELIJAH ARAP BII
28. MR. H.H. NJOROGE
29. MR. MICHAEL SISENDA
30. MR. MICAH CHESEREM
31. H.E. DANIEL TOROITICH ARAP MOI
32. MR. KANJI DAMJI
33. M/S TRANSNATIONAL BANK LTD
34. M/S TRUST BANK LTD
35. M/S POST BANK CREDIT LTD
36. M/S PANAFRICAN BANK LTD.
37. M/S TRADE BANK LTD
38. HON. GEDION MOI
39. MR. PHILIP MOI
40. MR. MEHMOOD REHMAT KHAN
41. MR. MUZAHIM S. MOHAMMED
42. MR. ABRAHAM KIPTANUI
43. MR. JOSHUA KULEI
44. HON. NICHOLAS BIWOTT
45. MS JUNE MOI
46. MR. JARED KANGWANA
47. HON. MUTULA KILONZO
48. MR. PAUL MUTISYA
49. MR. MARTIN NGINGA KAVULUNZE
50. MR. MUKESH VAYA
51. MR. AUGUSTINE OKORI MWASAME
52. MR. SIMION KURIA KANYINGI
53. MR. JAMES NGIGI MBURU
54. MR. JOHNSTONE MUTHAMA
55. MR. BHUPESH HARSHADBARJ RANA
56. MR. KETAN SOMAIA
57. HON. FRANKLIN BETT
58. MR. BENARD METZGER
59. M/S CITIBANK N.A.
60. MR. JAMES KABEBERI
61. MR. BHAILAL PATEL
62. M/S M.M. CHAUNDRI ADVOCATES
63. M/S KILONZO & CO./ SHARPLEY BARRET & CO. ADVOCATES
64. M/S HAMILTON HARRISON & MATHEWS ADVOCATES
65. MR. PHILIP OCHIENG
66. MR. GEOFFREY ASANYO
67. MR. SIMON MAUNCHO
68. MR. TOM OPENDA
69. MR. BERNARD CHUNGA
70. MR. JOSEPH KAMAU
71. MR. JOHN HALAKE
72. MR. ONYANGO JEMASAI
73. MR. MICHAEL CHERWON
74. MR. JAMES OGUNDO
75. MR. PAUL SOKANO OLE LEGUME
76. MR. BHARAT SHAH
77. INSP. MURAGE
78. MR. JOSEPH KAHORA WAIGURU
79. MR. STEPHEN NJAGI KARANJA
80. SGT. PETER KAROKI
81. MRS ZEIN NADIA
82. MS NAOMI NKATHA OMOLO
83. MR. FRANCIS CHAHONYO
84. MR. WILLIAM RUPIA
85. MR. ERIC ANANDA
86. MS HAMIDA BANA
87. MRS JACINTA W. MWATELA
88. M/S H.Z. GROUP OF COMPANIES
89. M/S CRESCENT CONSTRUCTION CO. LTD
90. M/S MULTIPLE HAULIERS
91. HON. ARTHUR K. MAGUGU
92. MR. HORATIUS DA GAMA ROSE
93. M/S KAREN ROSES
94. M/S LIBRA HOLDINGS LTD.
95. M/S COMPUTER APPLICATIONS LTD.
96. M/S POP IN (K) LTD.
97. M/S SOIN DEV. LTD.
98. MR. S.K. GICHURU
99. M/S SAVANNAH DEV. CO. LTD.
100. M/S KAIRU ENTERPRISES LTD.
101. M/S KWETU COFFEE ESTATE LTD.
102. M/S EXPECO AGENCIES
103. M/S EXPRESS MERCHANDISE LTD.
104. M/S MANGESOI LTD.
105. M/S PEPONI PROPERTIES
106. M/S UHURU HIGHWAY DEV. LTD.
107. M/S SAFARILAND CLUB
108. M/S NICHU INVSTMENTS LTD.
109. M/S BAZAAR EMPORIUM LTD.
110. M/S ESKIMO INVESTMENT LTD.
111. M/S JASOP LTD.
112. M/S PLAZA MINING LTD
113. M/S PLAZA INDUSTRIES
114. M/S KIMILILI INVESTMENTS LTD.
115. M/S CORONATION BUILDERS (1974)
116. M/S BELMONT TRADING CO. LTD.
117. M/S BENDERA COFFEE ESTATE LD.
118. M/S MWAJA HOLDINGS LTD.
119. M/S BANHILL INVESTMENT LTD.
120. M/S PARKVIEW INVESTMENT LTD.
121. M/S KENYA AIRWAYS LTD.
122. M/S RUARAKA SPORTS CLUB
123. M/S HABIB A.G. ZURICH
124. M/S MIDDLE EAST BANK LTD.
125. M/S NATIONAL CEREALS AND PRODUCE BOARD
126. M/S MAK-OIL PRODUCTS
127. MR UDAY DESAI
128. MR. HITESH PATTNI
129. M/S NYAMANGU HOLDINGS
130. MR. PETER MIGWI KARINGU
131. MR JOSEPHAT N. MURIGI
132. MS CATHERINE NJERI KIMANI
133. M/S THORN TREE CHEMIST
134. M/S TAPTOK LTD.
135. M/S PEMOKA AGENCIES LTD
136. M/S AMETEX (K) LTD.
137. MR. SHAMPTON K. KIRIUNGI
138. MR. JOHN K. CHERUIYOT
139. M/S NZOIA SUGAR CO. LTD.
140. M/S SOLOLO OUTLET GROUP
141. M/S CAPITAL COMMUNICATIONS LTD
142. MS ALICE CHEPKURUI NGOK
143. M/S CHESILIOT ENTERPRISES LTD.
144. MR. ELIUD MATU WAMAE
145. M/S FISH PROCESSORS LTD.
146. M/S WILCO AGENCIES
147. M/S KAWI FREIGHTERS
148. MR. WILFRED K. YEGO
149. M/S WILGO AGENCIES
150. MR. SAMUEL K. YEGO
151. HON. GIDEON NDAMBUKI
152. M/S ORENTIAL EXIM
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817. LAWRENCE NYAGA
818. JAMES MAINA
819. PETER MUGENDI
820. JOHN KINYUA
821. HUMPHREY MWANGI
822. WILSON NJIRU NJERU
823. JOAN NY AGA
824. GODFREY MUCANGI
825. GIOKU MURIUKI
826. TITUS NDAMBUKI
827. M.GORDON
828. PETER APIMA
829. FRANCIS MUGO
830. HENRY N. SERETI
831. MESHACK NJERU
832. PETER NGANGA
833. LABAN MIRITI
834. AIRO TOM'OTIENO
835. SILA JOEL OBWA
836. OCHIENG JOSEPH
837. ELIJAH ISIYE
838. KARIUKI ANDREW
839. IMBA TU JOSHUA
840. INDULI PATRICK ISOSO
841. ELIAS KASUMBI
842. LABOI ELIAKIM AMBAR
843. PHYLIS WAMBUI
844. SAMUEL AMODO
845. ABDALLAH ASHA WAMAITHA
846. FATUMA ALI
847. E. TERESA K.
848. KAZUMRI J.MAWIA
849. KITHUA JOSPHAT
850. KINYA SAMSON
851. KATHAMBI VIRGINIA KAMAU
852. SINGH ISSACK OTIENO
853. SHABBAN SOPHIA
854. MACHARIA KABURIA
855. MOHAMMED ABDALLAH
856. NJERU SUSAN MUTHONI
857. MUTUGI STEPHEN MURIITHI
858. NJAGI BANCY GICHUGU
859. JOSEPHA T NDWIGA
860. DAVID MBOGO
861. SAMWEL NJUE
862. NJERU KITHURE
863. NJAGI THAIRI
864. NJERU IRERI
865. AMOS NJERU KIONDU
866. ANTONY NYAGA
867. JOSPHAT NJOKA
868. DAVID K. NJERU
869. JOSEPH K. MUSYOKI
870. ALFRED NJAGI
871. JOSPHA T NJERU
872. STEPHEN IRERI
873. DAVID IRERI
874. DANIA KITHAKA
875. MA'CAKI NJERU
876. MBUTHI MWITHIGA
877. PATRICK M. NTAMBURI
878. MBARU NJEKE
879. HENRY NJIRU
880. DAVID NY AGA
881. PIUS IRERI
882. JOSEPH NDABARU
883. PAUL KANIARU
884. KANGOVIU ELIUD NJUE
885. EPHANTUS NJOROGE N.
886. JOHN MUANA
887. GABRIEL M. MUGOH
888. NJERU GICOVI SALESIO
889. PETER NJIRU REVEREND
890. WANJALA MARY
891. VIRGINIA NJAGI
892. PATRICK KARIUKI
893. NYAGA AGAPI
894. ADEMA DAVID KUGORIGO
895. JOSEPH GITONGA
896. LAWRENCE MAINA
897. ANTONY EKANDERI
898. JOSEPH NDWIGA
899. JOHN KIBOI
900. JOSEPH NZIGA N.
901. NANCY ARUA GINA
902. MARY M. ONESMUS
903. AGNES C. NGAI
904. MWANGI KIMANI
905. NJUE NJERU
906. PETER N. NJIRU
907. ABIUD NJAGI
908. NDWIGA PALAMUNAS
909. MOHAMED OMARI NDERITU
910. KAMAU VIRGINIAH GACHAMBI
911. ESTON NGIRI NJERU
912. ESIYE TERESIA KA VERE
913. NJIRU NY AGA
914. DISHON GEORGE KARIUKI
915. NDIURA SAMUEL KARANGI
916. NGUNA HAMTON MWANIKI
917. ELIZABETH RWAMBA
918. KARIUKI ZACHARIA
919. GITHENGI SAMSON
920. NJAGI HANOX
921. MARGARET NJIRU
922. KARIUKI ANDREW
923. MARY MUSILU
924. BOREE RUSTUS NGARI
925. NJERU FELISTA
926. HEZEKIA SAMSON NJIRU
927. NDWIGA DANSON
928. JOSEPH MUTUA
929. GICHOVI MBUGI
930. JOHN NJUUE GA TUKIA
931. CYRUS NJIRU MUNYI
932. EPHANTUS M. NJAGI
933. FRANCIS M. NJERU
934. JAMES MURIUKI KIMWEA
935. JAMES GICHOVI KIURA
936. FELLISA WANJIKU NJIRU
937. JAMES KIVUTI MIRITHI
938. MOSES MUCHANGI MUGO
939. JOSEPHA T KARIUKI NJIRU
940. JAMES KARIUKI LUKA
941. JACOB MARIMBA NJAGI
942. DORIN KAKENDO
943. SICARY GICUKU8 NJUE
944. STANLEY MUKUNDI NYAGA
945. ALBERT NJERU NTHIGA
946. SAMUEL MURIITHI NJERU
947. JOHN KINY A NGUU
948. ALEX NJAGI
949. FAMEX KARIUKI
950. DAVID NJERU JONAH MUNYI
951. MUTESIA MBUKU
952. JOSEPH NYAGAH MUNYI
953. JOHN NJERU TOMAS
954. NYAGAH ANDERSON NJAGI
955. EUSTACE N. PAUL
956. CYRUS MURIITHI NJAGI
957. SIMON NJOKA
958. JAMES NDWIGA
959. ISAIAH NICODEM MBOGO
960. SHIMBA NJERU M.
961. NJERU MARGARET WARUE
962. STANLEY ALFRED KARIUKI
963. KA THANDE MURUARIU
964. ONDATI JOHN MBAGARE
965. MOCHACHE THOMA ORINA
966. ORONYI JOHN MOKAYA
967. NYAGA MARY WANJIRU
968. NJAGI PETER MURIUKI
969. TURINGAIGUA BERNARD MATI
970. NYAGA BETH GICUGU
971. NYAGA AGNES KARIUKI
972. NJERU CATHERINE GICUKU

973. NJAGI NANCY WAMBUGU
974. IRERI KELLEN MUTHONI
975. MATUZI TAMBITHA
976. MUGO JAMES MURITHI
977. KIURA PETER NJERU
978. NY AGA MOSES PETER
979. NJAGAIH JOSEPH
980. NYAGAH MORTON
981. NY AGA MOSES PETER
982. JOSEPH NJIRU
983. GABRIEL MBOGOH
984. JANE GUMUNRI CICUMU
985. JAME GETHI
986. JANE KARIMI
987. SICILIA WAMBETI
988. JUSTUS NYAGA NJIRU
989. PETER KIURA NJAGI
990. BEDAN KIRA NJUE
991. JACOB NJERU
992. MUKONO MUTHAZA
993. JAMES KARIUKI NYAGAH J.
994. BENNY IRERI NGOCI
995. LINCON MUTURI
996. CHARLES M. ASA Y
997. CHARLES O. GISORE
998. ANDREW MANOTI
999. EMILIO KINYUA GACORI
1000. CHARLES NJERI NY AGA
1001. RUTEERE NJERU
1002. MOSES NDWIGA MUCANGI
1003. JOSHIA MWANIKI NDEGE
1004. SIMON IRERI
1005. JOHN MBOGO SIMON
1006. JUSTIN MUCHANGIIRERI
1007. JULIUS MURRITHI NGAGA
1008. MUGAMBI MBAKA
1009. TIMOTHY MURIITHI NJERU
1010. MOSES MURIITHI MUGO
1011. JOSEPH MUSENDI NJIRU
1012. MOSES MURIITHI
1013. BEDAN NJERU
1014. JOSEPH MITCHANGI
1015. ROBERT MUTUA
1016. ISAAC MUNYI
1017. KIARAGO NY AGAH
1018. KIVUTI NJIRU
1019. BENARD IBWAGO
1020. PETER MWANIKI
1021. JOHN MUGHONYARA
1022. CHARLES N. NTHUMBI
1023. DAVID N. JOHN
1024. JAMES N. UKIRU
1025. PATRICK KIVUTI
1026. THOMAS MWANIKI
1027. STEPHEN M. IRERI
1028. STEPHEN NYAGA
1029. SAMUEL NJAGI
1030. JOHN KA THURI
1031. PETERSON MURITHI
1032. DAVID NJERU
1033. THOMAS M. NY AGA
1034. JOSEPH N. NJAGI
1035. KIDWIGA NY AGA
1036. MAGAMBI MBAKA
1037. JOSEPH MUNYI
1038. LINCON NJUE
1039. STEPHEN NJUE
1040. KATHURI NYAGA
1041. SAM NJIRU
1042. JOHN KARIUKI
1043. RUFAS MUCH IRA
1044. SAMUEL NDWIGA
1045. CHRISTOPHEN NYAGA
1046. MOSES MURITHI
1047. JOHN MUKUNDI
1048. MURITHI NGUU
1049. JOHN MUTHEE
1050. PATRICK NJERU
1051. ALBERT GATHEE
1052. MOSES NYAGA
1053. JOHN MUCHIRA
1054. KENEDY NJAGI
1055. WILSON NYAGI
1056. DANSON NDWIGA
1057. LEONARD MATI
1058. JAMES MBOGO
1059. JOSEPH NJUKI
1060. LINCOLN NJAGI
1061. NJUERU MWANIKI
1062. JAMES KIARAGO
1063. SILAS NJAGI
1064. NYAGA NJIRU
1065. FRANCIS NJAGI
1066. JERALD MUNYI
1067. JOSHIA NJERU M.
1068. SIMON MUGO
1069. GEOFRY NJERU
1070. KAUNJU NGIRISEN
1071. ANDREW NJERU
1072. KAIVUNGA GACHIRIGWA
1073. MUGO NGAIRE
1074. JOSEPH NDWIGA NJERU
1075. NYAGA MBARIO
1076. MBIRIA KANJOVI
1077. NGWIGA NJERU
1078. NJUE NYAGA
1079. MOSES KA THURI
1080. JOHN MUGO
1081. PETER MW ANIKI
1082. PA TIRIKI GICHOVI
1083. MOSES MAGIRI
1084. NJIRU KIARAGO
1085. WERUMA CONSETER
1086. SALESIO NDWIGA
1087. MUNYI GEORGE
1088. NYAGA JOSHIA NJIRU
1089. KIURA J. GICHONI
1090. NJERU KARIUKI
1091. KARIUKI MURIUKI
1092. EJIDIO MUREITHI NJIRU
1093. NJIRU M. KAGWA
1094. GAKUNGA NY AGA
1095. NJIRU PETER
1096. CHEGE LIVESTER MBOGO
1097. NDERIJOEL MWANIKI
1098. NJOKI SIMON GICHOVI
1099. MURIUKI JOHN
1100. NJIRU NY AGA
1101. T ASICHU PETER MBOGO
1102. CHEGE MUREITHI
1103. NJIRU FRANCIS NJUE
1104. NJIRU HARISON NJUE
1105. NYAGA FRANCIS NDWIGA
1106. NJOKA SILVESTER NJERU
1107. MWARIRE JAMES
1108. NJERU NJIRU
1109. JAMES MREMA ODHIAMBO
1110. JAIRUS N. MONY ANGI
1111. CHARLES RATEMO
1112. MAKOKHA H. ANDETE
1113. BONVENTURE A. AWORI
1114. WASIKE DIFINA ACHIENG
1115. CHARLES O. ONGERI
1116. DAVID NY ARIBO
1117. KEFA O. NY ARIBO
1118. DANIEL OTUNGU
1119. AMOS OMARE
1120. JOSEPH GEKONGE
1121. SAKAN JOSEPHINE NGESA
1122. JOSELINE K. INGATI
1123. J. K. NJAGI
1124. BIT A KIDANYUA
1125. GICHIRI S. KIARIKI
1126. MAKIDIA H. CHORE
1127. M'MURIITHI J. KARAN I
1128. MOSES MASAI CHIKAMAI
1129. KARURI ANTONY WANGAI
1130. SAMMY M. NDIGIA
1131. OPONDO DAVID ONYANGO
1132. GILBERT OINGA
1133. JEREMIA KARIUKI
1134. NYA6A-FRANCIS NDWIGA
1135. SAMSON KARIUKI
1136. DAN ODONGO ODEYO
1137. PAUL MAINA MWANGI
1138. CHARLES WABOMBA SIMIYU
1139. PATRICK ODHIAMBO OKECH
1140. DAUDI LAGANJI
1141. AGREY ODEYO OGOLA
1142. JEAL OUMA ODEYO
1143. CHITERI JACKSON ERICA
1144. OCHIENG JOSEPH O.
1145. BHONNYOH BEN A.
1146. MOURICE OTIENO CLENDO
1147. ADHIAMBO MARGARET JIM
1148. NJUGUNA W. BENJAMIN
1149. KIOKO PAUL MUNYAO
1150. WERE JUDITH SAINA
1151. L YDIAH NJERI WAINAINA
1152. AKOTH JANE OKELO
1153. OTIENO PAUL ONEGE
1154. CHEGE JACKSON KIHARA
1155. NJERI REHEMA NYOKABI
1156. NY AKENDO SILFANUS MITO
1157. AWUOR JOSEPHAT OTIU
1158. KIMANI J. NJOROGE
1159. OGUTU EVANS RIWO
1160. OCHIENG G. ONGOLO
1161. IRERI KARIA VU
1162. BERNARD NJERU
1163. FRANCIS NJUE
1164. SALESIO MBOGO
1165. P. NJAGI MBOGO
1166. ANDREW NJERU
1167. RACHEL MUTHONI
1168. GICHOVI MBUSI
1169. JOSEPH METHA
1170. JOHN N. DWISA

1171 MURITHICHEGE
1172 FRANCIS NJUE
1173 LEAH MUTHONI
1174 BERNARD GICHOVI
1175 RICHARD GICHOVI
1176. SIMON GICHOVI
1177 JOHANA NY AGA
1178 SIMON JUMA
1179 MACHARIA NJIRU
1180. MICHUMENO NDWIGA
1181. MAGONDU D NJERU M
1182 NY AGA ALEX NJERU
1183 MBUGICHI NJAGI
1184 ASHA MALUKI
1185. ALIMA NZISYO
1186. MWENDE KILONZI
1187 MUTHOSI ALI-ULANDI
1188. KALEE KIEMA
1189 ELIZABETH KANINI
1190 JOSEPH K KINYUNGU
1191 NDIKE MUSYIMI
1192 NGWELE ALI
1193. MAYAYA KIMULI
1194. MWAJUMA MALI
1195 ZUHURA ATH-AN
1196 KANINI MOHAMMED
1197 MAUTA MBITI
1198. ILUVI NGOMA
1199 NYABURA MUI
1200. MUSWII MULI
1201 KAKULI NZALA
1202 KANINI KITHEKA
1203 MARIAM ALI
1204. KA VUU MUNGALA
1205. SYOKAU MUTHIO
1206 KIIMU VEEL
1207. KALENGAA BAKARI
1208. NDUNA AGNES
1209. JULIUS NGUGI
1210 MALA TU NJOKA
1211 REUBEN MAHUTHI
1212 MA THEKA KIMA TU
1213. TITUS MUSYOKA WILLY
1214. KITHUKA MBUNDA
1215. KA VIA MUY ANGA MBAI
1216. BEATRICE M MBUVI
1217. NZUKI KINGAU
1218. MWANZIA MUTHOKA
1219 MBUVI KITONGA
1220 MWIZI MAT ANDI
1221. MUSYIMI KITONGA
1222. ANNAH MBUI MIT AMBO
1223 KIMWELE MUNYITHYA
1224. MUTIU MUII
1225 MBOLUKA KIT AKA
1226. JULIUS KA TAMBO
1227 KA THEKE KITUTU
1228. MUTUA MWANZIA
1229 MUTUA MUTUNGA
1230. WAMBUA MUTINDA
1231. MUSYOKI KALAI
1232. MWANGANGI KALLAI
1233. MUTHANGA NZOKA
1234. JULIUS MUNYOKI
1235. TITUS MALOMBE
1236. FRANCIS KAHUHO
1237. JONATHAN K. KITHUKU
1238. REGINAH ROBERT
1239. BEATRICE K. MUNYAO
1240 PETER M. MUTHU
1241. KIMANTHI KIT AU
1242. RAUL KAKAI
1243. AMOS K. MACHARIA
1244. AUDREY TOM OWITI
1245. KANINI MUTIE
1246. MARYSON MUEMA MUTIE
1247. KITHII WAMBUA
1248. KIMWELE KIVINDYO
1249. KIKWATA MUKUNU
1250. KHAMIS MARIAM HATIBU
1251. HADIJA MOHAMED
1252. ANNAH MUTHUI
1253. ZUHURR ABDALLAH
1254. DAVID KASAU
1255. KALUNDA KISOMO
1256. LENAH MUTUNGA
1257. KILONZO KANGAA
1258. MUNYALO MUNYOKI
1259. JUMA Ali MALANGA
1260. BARAKA FATUMA ,,
1261. MUSA SWALA MUULAK
1262. MUMBE MBUMGU
1263. DAVID MWANTI
1264. MUSYOKA KALI
1265. KASINA SAID
1266. IBRAHIM M. ABDURAHIM
1267. NDUKU MULWA
1268. MARY MITAU
1269. LILLY WAYUANZA
1270 GRACE MIKLI JOSEPH
1271 KAMBUA MUTALANIR
1272 MARY MUTUA
1273 KASYOKA NY AI
1274 ROSE MUNYAO
1275 MULILI MUNYOKI
1276 KALUMU KIV ANDI
1277 MATI MIT AU
1278 MARY SYONGU DAUDI
1279 WANSA MULWA
1280 SELA MITAU
1281 KASYOKA MAUNDU
1282 PETER J MITAU
1283 DAJVD MIT AU
1284 SELA WAMBUA
1285 ESTHER MUTEMI
1286 MUNY A NZAU
1287 KAVATA MUNYI
1288 VATA MUINDE
1289 MBITE KITUMWA
1290 MATHA WANGALA
1291 BENSON MUEKE
1292 KIOKO MUTHUI
1293 RAPHAEL MWEKA MUTHNTHI
1294 JOSEPH MUTHOA
1295 KITONDO MWINZI
1296 ZUHRA NZISA YUSUFU
1297 MBETE NZUSI
1298 KA TUNDUU MANZI NZUE
1299 MARIAM ABDALLAH
1300 NZONZO MWANZUI
1301 TABITHA MUONGA
1302 KITONGA MULI
1303 MWANZUI NDIA
1304 FRANCIS MBULA
1305 MUMBUA MWANZUI
1306 MUSEMBI MBOLE
1307 JANE MWANIA
1308 ESTHER KIOKO
1309 SIMON KILONSO
1310 ANTHONY W DAVID
1311 SYEVUTHA JOSEPH
1312 SAMMY MWANZWIIO
1313 REUBEN KAMUTI
1314 JOHN MA THIMA
1315 JOSEPH KULIMBA
1316 FATUMA SALIM
1317 FATUMA AHMED
1318 MARIA RICHARD
1319 SOFIA SALIM
1320 ALI MOHA'MMED
1321. MWANAIDI JAFFAR
1322 MARIAM NASSUR
1323 FARID BAKARI
1324 SAID SALIM
1325 KYAMBA MUMBI
1326 MWANAHAWA A THMAN
1327 JISELEV A KAMENE
1328 ZAINAB OMAR
1329 MUMIN MAHMOUD
1330 AMINA MAUMOUD
1331 FA TUMA KHAMIS
1332. ZENA SUNDI
1333 MARIAM ATHUMAN
1334 ADAM AYUB
1335 Ali IBRAHIM
1336 AMINA AHMED
1337. HALAKE WAKO
1338 ADAM A YUB
1339 ABDILA TIF ABUBAKAR
1340. RUTH KALUNDA
1341 KITUVA KIMANTHI
1342 KAESA W AMB UA
1343. MBETE MUSYOKA
1344. KANINI KITHOME
1345. KA VEE JOHN
1346 ALEX MWANZI
1347 PATRICK WAMBUA
1348 DOMINIC MWANDWA
1349. TITUS KILONZO
1350 PATRICK MWANZIA
1351 KIASYA MWANIA
1352. MWANZIA MUSEMTEI
1353. MUKUTH KALEVE
1354. MUSILI BENARD
1355 KALUNGU KAUVA
1356. NDUNGU KALA TA
1357. NGUTHU KALATA
1358. KAANGI MUTUA
1359. JOSEPH NGUU
1360. DOMINIC K. MUNY ANZA
1361. SAFARI NGUU
1362 KANINI KITHOME
1363. KAMENA MUTUA
1364. KILO MUTUNGA
1365. PETER MULWA
1366. JEFFERSON K MWALIMU
1367. SAMUEL M. KIEMA
1368 S.M. DENIS

1369. REUBEN KITHITU
1370. GIRIARI ALI
1371. WAMBUA IKAA
1372. ISMAIL IBRAHIM
1373. JOSEPH N MBUVI
1374. SAMUEL M. KYULE
1375. DANIEL S. MUTISYA
1376. JANET NELSON
1377. C.M. MA THEKA
1378. CHARLES M. MUTUNGA
1379. ERASTUS K. MULU
1380. DANIEL M. MAWEU
1381. JOSEPH M. MBITI
1382. NGEI K. MUNY AO
1383. RAPHAEL N. GACHAGUA
1384. ZACHARIAH M. MBUNGULA
1385. MAINGI MALATYA
1386. PHILIP N. WAMBUA
1387. SAMWELI C. BU
1388. GICHAMBA M. KARIUKI
1389. CYPRIAN KINZI MUSYIMI
1390. MOHAMMED K. ABDALLAH
1391. SAFINA HAMISI
1392. RASHID ALI
1393. HALIMA Y AHYA
1394. ZAINA MOHAMED
1395. ASHA H. MWINZI
1396. MARIAM J. KIBE
1397. RAHEMA OMAR
1398. JUMA MATANO
1399. F ARIDA ABDALL
1400. KADOGO MWINYI
1401. JAMILA MWALIM
1402. MARTIN OUMA
1403. BAIKI SAID SHABAN
1404. MUSYOKA KHAMIS
1405. HALIMA A THUMAN
1406. NZAKA NGUU
1407. PAUL MUTEMBEI
1408. ASHA MBUU
1409. AMINA RACHID MWINYI
1410. RASHID MWINYI
1411. HAMISIILUVI
1412. FADHUMA KIMWELE
1413. ALI ISA
1414. ROSE MW AMI
1415. PENINA KITHOME
1416. TOTO SHABAN
1417. MANANIE MUSEMBI
1418. HADIJA ALII
1419. SIMONRATEE
1420. MWALIM MUTINDA
1421. STEPHEN MUVIT A
1422. JOSEPH KITOO
1423. NURU SHAIKH
1424. JAMES KITULYA
1425. PATRICK KITANGA
1426. MWIKY A MUTUA
1427. MW ANAISHA HAMISI
1428. M. JUMA SULEIMAN
1429. HADIJA SAID
1430. AMINA ABDI ALII
1431. PETER BOSHAL KITILI
1432. FATHIYA KAIMJUMEA
1433. RICHARD KAKULA
1434. AMINA SALIM
1435. HALIMA RAMADHANI
1436. MUSYOKA INUVU
1437. JAMIMA M. WAMBUA
1438. RICHARD MUTIA KIVU
1439. KIVINGO MUTIE
1440. HADIJA SWALEHE
1441. SAVINA WANZA
1442. MONICA MBALO
1443. BONIFACE MUEMA
1444. DAVID KISOMO
1445. LUCAS MBOYA
1446. JOSHINAH MUT ANU
1447. JANE WAMBUA
1448. NZELU FREDERICK
1449. MUTINDA FREDERICK
1450. MUKUI AMNA KAUTA
1451. NYERERE MANGONDU
1452. WANZA KELI
1453. SHEUNA MAE
1454. REGINA MUNYIVIA
1455. NAPOLEON MUSYOKA
1456. GICHINGA NYINGI
1457. HABIJAH MBAKARI
1458. KANGESA MARGARET
1459. SAID RAMA THAN
1460. AGNES KIAMBI
1461. KANINI KANYIV A
1462. MUNY ANGA NZOMO
1463. JULIA KA THEMBE
1464. AMINA SHAIKA Ali
1465. KAMENE TERESIA
1466. ELIZABETH MURANGIRI
1467. MWEMA MAWNGANGI
1468. MUTUNGA C. KITOONU
1469. MUMOMULYUNGI
1470. CHARLES KIT AKA
1471. JULIUS NGUNGU
1472. KASEL Y A KIPANDE
1473. MUHAMED
1474. SAID YUSUF WAMBUA
1475. SOFIA KA THINI YUSUF
1476. ASHA MOHAMED
1477. ADIJA MOHAMED ABDALLAH
1478. ABDILLAHI MOHAMED
1479. DHAHABU KAIM MOHAMED
1480. JEDIDA KOKI MUTISYA
1481. SYUMITI MWATHA
1482. MOHAMMED SHEE ABDIO
1483. ABA MOHAMED ABDILLAHI
1484. RICHARD MUSYOKA NZIBE
1485. PASCALINE MUTINDA
1486. ZAINA ABDI MWANGE
1487. SOFIA SAID NASSOI
1488. NASSIN MAE
1489. MUNYWATA SALAH
1490. ISMAIL IBRAHIM
1491. ABDALLA SALIM
1492. KALLILA MALOMBE
1493. KAMANGULU ZAINABU
1494. 121 7 HAMISI
1495. HASINAJAFFER
1496. HABIBA ABDHALLAH
1497. NYILE NDUNGE
1498. MOHAMED YANGA
1499. KAIM JUMA KAIM
1500. FAUZ YUSUF
1501. SAID ABUBAKAR
1502. NZIOKI NGILES
1503. KILONZO REGINA
1504. NGANGA KANZII
1505. Ali REHEMA
1506. MBUVI WANZA
1507. MALOMBE KAVATA KILONZI
1508. MOHAMED SHAINAL MUSII
1509. ADI DAALLABU Ali BWANA
1510. ANNA NYAMAI MWANGA
1511. MAIRI HASSAN
1512. MWANZA DAVID MUKETHA
1513. KILONZO ALIMA
1514. MAKAAL RUKIA
1515. LOKO MUSEMBI
1516. REMADHANI SYAMBA
1517. KAJUMA MOLO
1518. ALI ISSA
1519. JUMAA MATANO
1520. KALII MWANDIA
1521. MWANAISHA OMAR
1522. ADIJA HAFIDHI
1523. KHADIJA ABDI SAID
1524. MWANAHAWA KATWAI
1525. ATHMAN HASSAN
1526. DAMARIS KATIWA
1527. SIMON WAMBUA
1528. TITUS MALOMBE
1529. MWINZI MATANDI
1530. PETER MALAI
1531. FAIZA NASSER
1532. JULIUS KAYAMBA
1533. RODA
1534. HUSSEIN SALIM
1535. OBADIAH W. NYAKA
1536. DAVID M. MASWE
1537. NZAU NDAMBUA
1538. AWDESON MUEKI
1539. FREDERICK SUMBU
1540. BENT A AKINYI
1541. MUTUA MUTUI
1542. DAVID MIT AU
1543. NICHOLAS LOPANU
1544. NY ALO MUTIA
1545. YUNIS MOHAMED
1546. MULAA ESMAIL
1547. KITHOME WILLIE
1548. KIWIA PETER M.
1549. MWILU S. MUORA
1550. YUSUF HIJA WAZIRI
1551. JUMA SADA BARAKA
1552. BENJAMIN MUTUA NGOVI
1553. MUTELA PAUL MULE
1554. MUSYOKA KITEMA
1555. MALII KILUNDA
1556. MWANGU MAKUTHA
1557. MULILI MUNYOKI
1558. MESSRS MURGOR & MURGOR ADVOCATES
1559. MESSRS B. SHAH ADVOCATES

APPENDIX "H"

LIST DOCUMENTS AND EXHIBITS PRODUCED

WITNESS NO.	NAME OF WITNESS & PARTICULARS	DESCRIPTION OF EXHIBITS PRODUCED	EXHIBIT NO.	HANSARD PAGE NUMBER
1	**ODHIAMBO,** MR. JAMES ACTING CHIEF GEOLOGIST OF MINES AND GEOLOGY	Gold production 1985 – 2002	1	77 - 91
		Companies which have been exploring in the past	2	
		Map showing Gold Mining areas in Kenya	3	
2	**SUNKULI,** MRS. ZILPAH EMMA NTEMEL ASSISTANT MANAGER – CENTRAL BANK	CD3 forms from Central Bank (4 papers)	4	91 - 127
3	**MATURU,** MR. EVANS ASSISTANT SECRETARY, MINISTRY OF FINANCE	Local Manufactures Act Cap. 482 booklet.	5	127 - 214
4	**MUCHANGA,** MR. ANTHONY SIMIYU - CHIEF ECONOMIST/STATISTICIAN – CENTRAL BUREAU OF STATISTICS	Economic Survey (1994)	6	214 - 278
		Trade Reports/extracts of Economic Survey 1994	7	
		A table on Kenya's Principal Exports (Extracts) 1989-2000	8	
		Economic Survey (11 books)	9	
		Hansard copy of 2nd November 2002	10	
5	**OKEYO,** MR. EDWARD ALBERT PRINCIPAL ECONOMIST/STATISTICIAN	1. A table of diamonds precious, semi-precious metals	11	279 - 335
		2. Extracts of Trade Reports	12	
6	**ONYANGO,** MR. BARRACK AMOLO UNDER SECRETARY – DEPARTMENT OF MONETARY FINANCE, MINISTRY OF FINANCE	1. Banking Act Cap. 488	13	336 - 539
		2. Correspondence of Application Appraisal Exchange Bank to Treasury File No.EFN 353/0167	14	
		Extracts from correspondence of applications/appraisals from Exchange Bank to Treasury File No.EFN 353/0167	14A	
		Exchange Control Act	15	
		1. Correspondence from Exchange Bank to Treasury File No.EFN 353/0167	16	
		2. Guidelines on Licensing of Institutions	17	
7	**RICHU,** MR. WILLIAM THOMAS KIMANI (Snr. Deputy Registrar of Companies)	Extracts from the Department of Registrar, Registar of Companies' files - Articles of association of Goldenberg International ltd and Exchange Bank Ltd. and registration forms	18	540 - 670 & 1817 - 1954
		A Registrar of Companies file on Goldenberg International	41	
		Statement of increase of nominal capital by Goldenberg International Ltd.	41A	
8	**OSUMO,** MR. EVANS SAMUEL(WARDEN OF MINES, DEPARTMENT OF MINES & GEOLOGY)	1. Metal box used for exporting minerals	19	635 - 922
		2. Documents to be completed before exporting minerals;	20	
		Letter dated 30th of October from Commissioner of Mines to PS/Treasury	21	
		Letter to the V/P dated 8th October 1990 received by Comm. Of Mines on 14/2/1991	22A	
		Letter from Goldenberg International to Vice-President dated 8th October 1990	22	

		Letter dated 1st Nov. 1990 from PS/Treasury to Goldenberg International	23	
		Documents relating to alleged import of Gold from Zaire	24	
		Application for Dealers' Licence in Diamonds by Goldenberg Int. Ltd.	25	
		Application for Dealers Licence in unwrought precious minerals by Goldenberg Int. Ltd.	26	
		Permit for export of unwrought precious metal and trading in unwrought metals	27	
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		Export permits and CD3 forms (small)	28B	
		Bundle of letters on Gold trade dated 14/8/1990	29	
		Bundle of letters on quantity and value of Gold exports 1989-1994	32	
		A draft bill on mining and minerals- 7th draft	33	**968 - 1150**
		Kenya Times Newspaper cutting of Monday 2nd April 1990	34	
9	**MUKURIA,** INSP. JAMES GITAU- POLICE INSPECTOR	Police Occurance Book (OB) of Gigiri Police Station	30	**922 - 968**
		Letter of commendation for work done by Insp. Mukuria	31	
		Statement made by Insp. Mukuria to the Commission in May 2003	129	**8119 - 8146**
		Documents relating to a visit by Insp. Mukuria to Nakuru Police station	129A	
10	**OWAYO,** MR. COLLINS Y.O. (Former Commissioner of Mines & Geology)	Bundle of correspondence on the formulation of policy of additional export compensation	35	**1150 - 1638**
		Extracts of Newspaper cuttings and a Police OB of 22/10/1991 from Wilson Airport Police	35 A	
		The pre-1988 attempt by Aurum Ltd. to secure an increase in export compensation from 20% to 40%	35B	
		Correspondence between Mr. C. Owayo and the Treasury	36	
		Correspondence between Commissioner of Mines and the Treasury	37	
		Extracts from a Hansard Report of 6th, 17th and 18th June, 1992	38	
		Further correspondence b/w Mr. C. Owayo, the Treasury and Goldenberg Intl.	46	**2294 - 2412**
		Bundle of documents relating to licencing of gold by Commissioner of Mines & Geology	47	
11	**PATTNI,** MR. NAGINCHANDRA ODHAVJI JIVANLAL (Businessman/Miner)	Extracts of a Hansard report (PAC) for Friday 17/12/1993	38A	**1643 - 1816 & 2030 - 2293**
		Original proposal made to the Chief Secretary in June 1985 on Gold export compensation by Cornwall Holdings Ltd.	39	
		Newspaper cuttings on the 1989 Budget	39A	
		Memo dated 9th Jan. 1992 from Mr. Njeru Kirira to Vice-President and Minister for Finance on Export compenstion	43	
		Correspondence b/w Mr. Nagin and various Gov't. Ministries on application for export compensation	44	
		Bundle of documents relating to export operations of Aurum Ltd.	45	
12	**OPONDO,** MRS ELIZABETH AMOLO (Snr. Revenue Officer)	Crew manifest of a flight from Bunia, Zaire to Wilson Airport and a High Court charge sheet.	40	**601 - 1162**

13	**GACHANJA,** MR. SAMUEL NJIRAINI (A Farmer and Rtd. Revenue Officer I)	Goods deposit receipts dated 22/10/91	42	**1955 - 2019** **2019 - 2029**
14	**GACHOGU,** MR. NATHAN KANUHI (Currently a Farmer Snr. Preventive Officer)	Nil	Nil	
15	**BOR,** MR. PHILIP KIPSEREM (Principal Chemist, Mines & Geology Dept.)	Statement made by witness and Gold assay report	48	**2413 - 2476**
		Export permit for unwrought precious metal issued to Kamlesh Pattni of Goldenberg Int.	49	
16	**LANGAT,** PC. NAFTALI (Police Constable)	Nil	Nil	**2476 - 2508**
17	**MULILI,** MR. Mr. PHILIP MULI (Retired Deputy Commissioner of Customs & Excise)	Correspondence between Commissioner of Customs and the Treasury	50	**8119 - 8146**
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		Local Manufacturers Export Compensation Act and its amendments since 1974	73	
		Documents effecting transfers of Officers from Customs and Excise Department	74	**3286 - 3569**
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18	**SOMAIA,** MR. KETAN SURENDRA (Businessman)	Affidavit sworn by Mr. J. Kamau on 26th February and 24th April 2003	54	**2710 - 3285**
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		Documents relating to USD19,000,000 transaction between Goldenberg and Central Bank through Delphis Bank	56	
		Madhupaper Int. Ltd. High Court Civil suit No.1263 of 1992	57	
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		Cheque payments to Goldenberg Int. through Delphis Bank	61	
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		Memorandum and articles of associationnof Panther Investments Ltd.	65	
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		Statutory management of Delphis Bank and indebtedness of Mr. Somaia to Delphis Bank	71	
19	**MAGARI,** MR. JOSEPH MBUI (Permanent Secretary, Ministry of Finance)	Payment vouchers for extra export compensation and memos between the PS/Finance and other officers	76	**3569 - 3638**
		Excerpts from chapter 5 & 12 of Government Financial Regulations and procedures	77	
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20	**SMITH,** MR. MELVILLE (Professional Accountant)	Pre-export Finance Bills	78	**3638 -4275**
		Statement made by Mr. M. Smith on Exchange Bank	78A	
		Companies, Directors and accounts associated with Goldenberg International Ltd. at Exchange Bank	79	
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21	**RYAN,** PROF.TERRY C.I. (Economic Consultant)	Statement made by Prof. Ryan to the Commission	91	**4276 - 5124**
		Kenya's economic report Vol.I	91A	
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		A Hansard report of Parliament for the period 5th April 1995 to 19th April 1995	98	
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23	**MWASAME,** MR. AUGASTINE OKORI (Employee of Mr. K Pattni)	Registrar of Companies file on Serville Investments Ltd.	101	
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		Account opening documents for Jewel Sagar	101E	
24	**KIRIRA,** MR. NJERU (Director, Fiscal & Monetary Affairs)	Statement made by witness (Mr Kirira)	102	**5533 - 5651**
25	**OGAMBA,** MR JAMES (Former Employee of the defunct Weekend Mail)	Extracts of the Weekend Mail Newspaper	103	**5651 - 5662**
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26	**BII,** MR ELIJAH ARAP (Former General Manager, KCB)	Document relating to disbursement of Kshs 5 8 billion from Treasury to Goldenberg Int Ltd through CBK & KCB	104	**5662 - 5797**
		Bundle of documents relating to the sale of Golden Beach Hotel	104A	
27	**CHERUIYOT,** FRANCIS CHELELGO (Former Commissioner of Customs & Excise)	Sources of gold & Dr. Koinange's instructions on payment to Goldenberg Int	105	**5921 - 6179**
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28	**OYULA,** MR. JOSEPH M (Financial Secretary, Treasury)	Statement by Witness (Mr Oyula)	107	**6169 - 6319**
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		Documents relating to Financial Regulations	108	
29	**MURANI,** MS GLADYS IGANDU (Chief Licencing Officer, Kenya Civil Aviation)	Documents relating to registration of aircraft No 5Y-ZYS	109	**6478 - 6482**
30	**KIAMBATIE,** MR MISHACK MWEBIA (Internal Auditor)	Documents relating to processing of export compensation	110	**6843 - 6503**
31	**VAYA,** MR SAJAY K.	Nil	Nil	**6503 - 6519**
32	**MWATELA,** MRS JACINTA W.M (Director, Financial Markets, Central Bank of Kenya)	Statement by Mrs. Mwatela to the Goldenberg Commission	111	**6528 - 6583**
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		Bundle of CD3 forms and claims by GIL for export compensation	111B	
		Statement by Mrs Mwatela on 13/5/1995 to the BFID	111C	

		Account opening forms by GIL, correpondence between CBK & First American Bank and CD3 Forms	111D	
		Memos from the Office of the Governor, CBK to various officers within CBK & letters relating to investigations done at CBK & action taken on them	111E	
33	**SHAH,** MR. BHUPENDRA KUMAR	Nil	Nil	**6884 - 6948**
34	**MWABU,** MR. JULIUS NYAGA (Superindenting Geologist)	Statement made by Mr. Mwabu	112	**6892 - 6930**
		Extracts from a Registrar of Mineral dealers from Mines & Geological Dept.	112A	
35	**MUNYAKEI,** MR. DAVID SADERA (Former employee of CBK)	Statement made by Mr. Munyakei and various documents from CBK which were taken to Parliament relating to Goldenberg	113	**6930 - 6999**
36	**OTONDO,** MR. DIXON ABEL (Former employee of CBK)	Statement made by Mr. Otondo	114	**7000 - 7171**
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		Statement made by Mr. Joseph Mumelo on 23/7/1993	114B	
37	**NGONZE,** MRS. MIRIAM TSINGUI (Senior Principal Personnel Officer, OOP)	Statement made by Mrs. Ngonze and an appointment letter of Mr. James Kanyotu	115	**7171 - 7181**
38	**GITONGA,** MRS. REGINA WANJIKU (Former Employee of CBK)	CBK internal Memos and documents relating to destruction of documents, among them CD3 forms by CBK in 1993	116	**7181 - 7270**
39	**NAMBISIA,** MR. EDWARD N. (Former Employee of Customs & Excise Dept.)	Customs & Excise Dept. documents relating to exports of precious metals & Mr. Nambisia's Statement	117	**7220 - 7220**
40	**WARIGI,** MR. GITAU (Columnist, Sunday Nation Newspaper)	A booklet tittled "Fool's Gold, The Abuse of Export Compensation Schemes"	118	**7283 - 7327**
		Sources of references of the booklet (Exhibit 118)	118A	
41	**RUTO,** MR.LIVINGSTONE KIPKOECH ARAP (Former Security Head of the Kenya Airports Authority)	Statement made by Mr. Ruto to the Commission	119	**7327 - 7342**
42	**LUKORITO,** MR. FRANCIS WALIAULA (Former CBK Emloyee)	Statement made by Mr. Lukorito to the Commission	120	**7343 - 7506**
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		Further statement made by Mr. Lukorito to the Commission	120B	
		CBK Staff Rules and Regulations	120C	
43	**NDIRANGU,** MR. JONAH MWANGI (Former CBK Employee)	Statement made by Mr. Ndirangu dated 23/7/93, Internal Memos and payment slips from CBK	121	**7506 - 7597**
44	**WABUTI,** MR. ABDUL KARIM (Retired CBK Employee)	Statement made by Mr. Wabuti, The Wabuti Report and Staff Voluntary etirement documents	122	**7599 - 7803**
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		Agreement by Mr. pattni to repay Kshs. 13.5 billion to CBK, copies of cheques and a record of the PAC Report of 1994	122C	
45	**MBITHI,** PROF. PHILIP MUINDE (Former Head of the Civil Service)	Statement made by Prof. Mbithi to the Commission in Jan. 2004	123	**7803 - 7872**
		Letters relating to postings at the office of the Controller and Auditor General	123A	
46	**NJOROGE,** MR. DAVID G. (Controller & Auditor General)	Statement made by Mr. Njoroge to the Commission	124	**7873 - 7989**
		Bundle of documents relating to the Constitution, Audit Acts and Appropriation Accounts and other documents	124 A	
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47	**KEEN,** MR. JOHN(Retired Assistant Minister)	Statement made by Mr. John Keen to the Commission	125	**7992 - 8056**
48	**HAJI,** MR. MOHAMMED NOOR (Snr. Clerical officer, High Court)	Statement made by Mr. Haji to the Commission	126	**8056- 8076**
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49	**MBURU,** MRS EDDAH WANGARI (Rtd. Employee of the NSIS)	A report on a search of Mr. Mukuria's report and a Circular on H.E. the President to all Provincial Intelligence Officers	127	**8077 - 8093**
50	**MUTISYA,** MR. PAUL MWANGANGI (Rtd. Asst. Director of the NSIS)	Statement made by Mr. Mutisya to the Commission	128	**8093 - 8118**
51	**PESA,** MR. WILSON (Retired Tax Officer)	Statement made by Mr. Pesa to the Commission	130	**8146-8195**
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52	**MARAMBII,** MR. REUBEN MBAINE (Managing Director, NBK)	Statement made by Mr. Marambii to the Commission	131	**8178 - 8475**
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53	**WERUNGA,** MR. TOM KILALYA (Retired Employee of the CBK)	Statement made by Mr. Werunga to the Commission	132	**8475 - 8593**
		Typed original statement made by Mr. Werunga to the High Court	132A	
54	**NDEGWA,** MR. ARTHUR ABONG'O (Ag. Chief Mining Engineer)	Statement made by Mr. Ndegwa to the Commission	133	**8593 - 8701**
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55	**BUTAKI,** MR. LAWRENCE CHELIMO (Rtd. Mines & Geology Officer)	Statement made by Mr. Butaki to the Commission	134	**8622 - 8638**
56	**KOECH,** MR. ANTHONY KIPNGETICH ARAP (Rtd. Assistant Commissioner of Customs)	Statement made by Mr. Koech to the Commission	135	**8638 - 8661**
57	**MWANGI,** MR. JESSEE W. (An Officer of the Judiciary)	Bundle of documents relating to a criminal case against Mr. K. Pattni and Mr. B. Kalove at the Kibera Law Courts	136	**8661 - 8662**
58	**LETING,** MR. JOSEPH T.A. (Former Head of Public Service)	Nil	Nil	**8664 - 8676**
59	**KOINANGE,** DR. WILFRED K. (Former Treasury PS)	Statement made by Dr. Koinange to the Commission	137	**8783 - 9063**
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61	**MUTUNGA,** MR. MRS. HKETTA NDULULU (Retired Civil Servant)	Statement made by Mrs. Mutunga to the Commission	139	10423 - 10454
62	**KOECH,** MR. JOEL KIPCHIRCHIR (Security Officer at KSMS)	Statement made by Mr. Koech to the Commission	140	10454 - 10461
63	**RIUNGU,** MR. ELIJAH (Retired Deputy CBK Governor)	CBK circulars and other correspondence	141	10462 - 10952

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Documents relating to a property No.209/7868 located at Kyuna Estate & contains grant, transfers and other correspondence	154Q	
Transfer documents relating to a vehicle donated by Mr. Pattni towards elections	154R	
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Exercise book containing hand written vouchers for GIL payments	154CC	
Letter by Mr. Pattni's lawyer requesting for Pattni's immunity addressed to the Minister for Justice	154DD	
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Press releases of the Daily Nation and the East African Standard on alleged burning of documents by Mr. Pattni	154GG	
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		Prescribed form for transfer of company shares	154AAA	
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		Details of CD3s and summary of amounts paid to GIL during the time of retention accounts	154CCC	17151 - 17448
		Documents relating to Exchange Bank's Forex Interbank buying and selling to CBK	154DDD	
77	**AURA,** MRS. ANTONINA (Retired employee of National Bank)	Statement made by Mrs Aura and other documents relating to GIL pre-shipment finance through National Bank	155	12224 - 12295
78	**KURUNA ,** MR. TITO KIPRONO BIRECH (Retired employee of the CBK)	Statement made by Mr. Kuruna to the Commission	156	12295 - 12346
79	**KARURU,** MR. BENJAMIN K. (Former employee of the CBK)	Statement made by Mr. Karuru to the Commission	157	12350 - 12371
80	**MUCHENE,** MR. CHARLES (Country Leader, Price Waterhouse Coopers)	Statement made by Mr. Muchene to the Commission on 26/5/2004 and correspondence concerning a special audit report by PWC	158	12371 - 12411
81	**ADEYA,** MR. BENJAMIN W.A.(Citibank N.A. Kenya)	Statement made by Mr.Adeya to the Commission	159	12411 - 12421
		Documents relating to transactions by GIL with Citibank N.A. (Vol. A)	159A	
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82	**LABATT,** MR. MUSA KIPKEMBOI (Employee of Telkom (k) Ltd.)	Statement made by Mr.Labatt to the Commission	160	12684 - 12691
83	**MUKANDA,** MR. PETER MUTUKU (Former employee of Exchange Bank)	Statement made by Mr. Mukanda to the Commission	161	12691 - 12863
		Exchange Bank debit/credit advices and cheaques	161A	

APPENDIX "I"

LIST OF WITNESSES

WITNESS NO.	NAME OF WITNESS & PARTICULARS	HANSARD PAGE NO.
70	**ABOGE,** MR. SAMUEL OWITI (Snr. Asst. Commissioner, Income Tax, KRA)	11614 - 11643
81	**ADEYA,** MR. BENJAMIN W.A.(Citibank N.A. Kenya)	12411 - 12421
77	**AURA,** MRS. ANTONINA (Retired employee of National Bank)	12224 - 12295
26	**BII,** MR. ELIJAH ARAP (Former General Manager, KCB)	5663 - 5797
86	**BIJOS,** MR. BIKASSY MANDEKO (CONGOLESE MUSICIAN)	16462 - 16470
18	**BOR,** MR. PHILIP KIPSEREM (Principal Chemist, Mines & Geology Dept.)	2413 - 2476
88	**BUTAKI,** MR. LAWRENCE CHELIMO (Rtd. Mines & Geology Officer)	8622 - 8638
75	**CHEMWENO,** NO. 62209 SGT. RICHARD (Investigator attached to the Comm.)	12052 - 12055
27	**CHERUIYOT,** FRANCIS CHELELGO (Former Commissioner of Customs & Excise)	5921 - 6179
72	**CHESEREM,** MR. MICA (Former CBK Governor)	11660 - 11829
13	**GACHANJA,** MR. SAMUEL NJIRAINI (A Farmer and Rtd. Revenue Officer I)	1955 - 2019
14	**GACHOGU,** MR. NATHAN KANUHI (Currently a Farmer Snr. Preventive Officer)	2019 - 2029
38	**GITONGA,** MRS. REGINA WANJIKU (Former Employee of CBK)	7181 - 7270
48	**HAJI,** MR. MOHAMMED NOOR (Snr. Clerical officer, High Court)	8056- 8076
98	**KABEBERI,** MR. DAVID (Liquidator Exchange Bank)	18222 - 18242
91	**KAGANE,** EUNICE WANJIRU (Director at CBK)	16841 - 16893
89	**KANYI,** MR. GEORGE GITONGA (Retired Exchange Bank employee)	16692 - 16759
79	**KARURU,** MR. BENJAMIN K. (Former employee of the CBK)	12350 - 12371
47	**KEEN,** MR. JOHN(Retired Assistant Minister)	7992 - 8056
84	**KHAN,** MR. MEHMOOD REHMAT (Businessman)	12867 - 13017
30	**KIAMBATIH,** MR. MISHACK MWEBIA (Internal Auditor)	6843 - 6503
85	**KIMUNDI,** MR. JOSEPH (Rtd. Deputy Commissioner of Police)	13017 - 13057
97	**KIPKULEI,** MR. BENJAMIN KIPKECH (Former PS, Treasury)	18161 - 18228
24	**KIRIRA,** MR. NJERU (Director, Fiscal & Monetary Affairs)	5533 - 5651
56	**KOECH,** MR. ANTHONY KIPNGETICH ARAP (Rtd. Assistant Commissioner of Customs)	8638 - 8661
62	**KOECH,** MR. JOEL KIPCHIRCHIR (Security Officer at KSMS)	10454 - 10461
59	**KOINANGE,** DR. WILFRED K. (Former Treasury PS)	8783 - 9063
60	**KOTUT,** MR. ERIC(Former CBK Governor)	9069 - 9303
78	**KURUNA ,** MR. TITO KIPRONO BIRECH (Retired employee of the CBK)	12295 - 12346
82	**LABATT,** MR. MUSA KIPKEMBOI (Employee of Telkom (k) Ltd.)	12684 - 12691
16	**LANGAT,** PC. NAFTALI (Police Constable)	2476 - 2508
73	**LEKI,** PC MRS EUNICE WANJIRU (Investigator attached to the Comm.)	11817 - 11819
58	**LETING,** MR. JOSEPH T.A. (Former Head of Public Service)	8664 - 8676
42	**LUKORITO,** MR. FRANCIS WALIAULA (Former CBK Employee)	7343 - 7509
19	**MAGARI,** MR. JOSEPH MBUI (Permanent Secretary, Ministry of Finance)	3569 - 3638
52	**MARAMBII,** MR. REUBEN MBAINE (Managing Director, NBK)	8178 - 8475
3	**MATURU,** MR. EVANS ASSISTANT SECRETARY, MINISTRY OF FINANCE	127 - 214
96	**MBINDYO,** MR. CHARLES STEPHEN (Former PS, Treasury)	17450 - 18158
45	**MBITHI,** PROF. PHILIP MUINDE (Former Head of the Civil Service)	7803 - 7872
49	**MBURU,** MRS EDDAH WANGARI (Rtd. Employee of the NSIS)	8077 - 8093
22	**METZGER,** MR. BERNARD A. (General Manager, Transkenya Ltd.)	5168 - 5320
94	**M'MITHIARU,** MR. NTOITHA (Former employee of CBK)	17043 - 17148

4	**MUCHANGA,** MR. ANTHONY SIMIYU - CHIEF ECONOMIST/STATISTICIAN - CENTRAL BUREAU OF STATISTICS	214 - 278
80	**MUCHENE,** MR. CHARLES (Country Leader, Price Waterhouse Coopers)	12371 - 12411
101	**MUIYA,** MR. NTHIWA ALFRED (Official from Registrar of Motor Vehicles)	18250 - 18254
83	**MUKANDA,** MR. PETER MUTUKU (Former employee of Exchange Bank)	12691 - 12863
9	**MUKURIA,** INSP. JAMES GITAU - POLICE INSPECTOR	897 - 967
17	**MULILI,** MR. Mr. PHILIP MULI (Retired Deputy Commissioner of Customs & Excise)	8119 - 8146
87	**MUNGAI,** MR. FAROOQ KAMAU (KCB Manager)	16471 -16610
35	**MUNYAKEI,** MR. DAVID SADERA (Former employee of CBK)	6930 - 6999
64	**MUOKI,** MRS ANNE WANGECI (CBK officer)	10953 - 11175
29	**MURANI,** MS GLADYS IGANDU (Chief Licencing Officer, Kenya Civil Aviation)	6473 - 6483
50	**MUTISYA,** MR. PAUL MWANGANGI (Rtd. Asst. Director of the NSIS)	8093 - 8113
61	**MUTUNGA,** MR. MRS. BRETTA NDULULU (Retired Civil Servant)	10423 - 10454
34	**MWABU,** MR. JULIUS NYAGA (Superintending Geologist)	6892 - 6930
57	**MWANGI,** MR. JESSEE W. (An Officer of the Judiciary)	8661 - 8662
66	**MWARIAMA,** MR. MORRIS MUTHAMIA MORGAN (Former KANU activist & student, KU)	12288-11318
23	**MWASAME,** MR. AUGASTINE OKORI (Employee of Mr. K. Pattni)	5480 - 5530
32	**MWATELA,** MRS JACINTA W.M.(Director, Financial Markets, Central Bank of Kenya)	6528 - 6883
39	**NAMBISIA,** MR. EDWARD N. (Former Employee of Customs & Excise Dept.)	7220 - 7280
54	**NDEGWA,** MR. ARTHUR ABONG'O (Ag. Chief Mining Engineer)	8593 - 8701
43	**NDIRANGU,** MR. JONAH MWANGI (Former CBK Employee)	7510 - 7597
68	**NDURU,** MR. CLEMENT K. (Liquidation Agent, Trust Bank)	11513 - 11548
88	**NGARI,** MR. STEPHEN NGETHE (Retired KCB Manager)	11612 - 16671
67	**NG'ATUNY,** MR. DANIEL LEPARAN (Liquidation Agent, Trade Bank Ltd. In liquidation)	11318 - 11513
99	**NGILA,** MR. JACKSON MUSYOKA (Executive officer Milimani Commercial Courts)	18242 - 18246
37	**NGONZE,** MRS. MIRIAM TSINGUI (Senior Principal Personnel Officer, OOP)	7171 - 7181
95	**NGUKU,** MR. MOSES M.(Employee of the CBK)	17148 - 17149
71	**NJOROGE,** MR. H.H. (Retired CBK employee)	11644 - 11660 12055 - 12089
46	**NJOROGE,** MR. DAVID G. (Controller & Auditor General)	7873 - 7989
90	**NKONGE,** MR. EUSTACE KENT (Former Statutory Manager of Exchange bank)	16749 -16841
69	**NZIOKA,** MR. FRANCIS (First American Bank)	6884 - 6944
1	**ODHIAMBO,** MR. JAMES ACTING CHIEF GEOLOGIST OF MINES AND GEOLOGY	77 - 91
25	**OGAMBA,** MR. JAMES (Former Employee of the defunct Weekend Mail)	5651 - 5662
5	**OKEYO,** MR. EDWARD ALBERT PRINCIPAL ECONOMIST/STATISTICIAN	279 - 335
6	**ONYANGO,** MR. BARRACK AMOLO UNDER SECRETARY – DEPARTMENT OF MONETARY FINANCE, MINISTRY OF FINANCE	336 - 539
12	**OPONDO,** MRS ELIZABETH AMOLO (Snr. Revenue Officer)	601 - 1162
8	**OSUMO,** MR. EVANS SAMUEL(WARDEN OF MINES, DEPARTMENT OF MINES & GEOLOGY)	601 - 1162
36	**OTONDO,** MR. DIXON ABEL (Former employee of CBK)	7000 - 7194
93	**OTUTU,** MR. REUBEN WILLIAM(Former KANU Parliamentary Aspirant)	17019 -17042
10	**OWAYO,** MR. COLLINS Y.O. (Former Commissioner of Mines & Geology)	1150 - 1638
28	**OYULA,** MR. JOSEPH M. (Financial Secretary, Treasury)	6169 - 6519
76	**PATTNI,** MR. KAMLESH M. (Chairman, Goldenberg Int. Ltd.)	12090-12223
11	**PATTNI,** MR. NAGINCHANDRA ODHAVJI JIVANLAL (Businessman/Miner)	1643 - 1816 & 2030 - 2293
51	**PESA,** MR. WILSON (Retired Tax Officer)	8119-8195
7	**RICHU,** MR. WILLIAM THOMAS KIMANI (Snr. Deputy Registrar of Companies)	540 - 670 & 1817 - 1954
63	**RIUNGU,** MR. ELIPHAZ (Retired Deputy CBK Governor)	10586 - 11030
41	**RUTO,** MR.LIVINGSTONE KIPKOECH ARAP (Former Security Head of the Kenya Airports Authority)	7282 - 7342
21	**RYAN,** PROF.TERRY C.I. (Economic Consultant)	4276 - 5165

EX-PARTE)
HONOURABLE JACKSON MWALULU)
KARIRO wa NGUGI)
KEPTA OMBATI)
SANDE OYOLO) ..... **SUBJECTS**
MUTEMBEI MARETE)
JACOB OPIYO)
CYPRIAN NYAMWAMU)
WAMBUA MUNYWOKI)
PAUL THUMGI)

JUDGMENT

The Notice of Motion dated 30th September, 2004 including the supporting statement seeks the following orders.

1. An order of mandamus to compel the first repondent is a Commission of Inquiry appointed by the President of Kenya into what has been generally described as the 'Goldenberg financial scandal Affair and the terms of the Commission are set out in the two Gazette notices exhibited in the application among other exhibits. It is alleged that billions of shillings were irregularly paid as compensation for non existent gold and diamonds and fictitious foreign exchange claims.

2. An order or Mandamus to compel the second, third and fourth respondents to summon the same named persons. The second, third and forth respondents are the Commissioners in the Inquiry, the 2nd respondent being the Chairman of the Commission.

3. An order of prohibition to prohibit the respondents from presenting to the President the Inquiry report and records of the inquiry proceedings until the named persons have testified in the Commission.

4. An order of certiorari to remove to the court for the purpose of being quashed Rule (I) of the Rules and Procedures made by the second respondent vide Gazette Notice 1566/2003 dated 5th March 2003 to the extent that the Rule converts the respondents statutory power to summons witnesses from mandatory to discretionary power.

5. Any other relief and costs of the application.

The Commission was appointed on 24th February 2003 under the Commission of Inquiry Act Cap 102 of the Laws of Kenya and the citation appeared in the same issue of 24th February, 2003 vide Gazette Notice 1238. In this citation of the Commission the President after setting out the scope of the Commission directed the Commission in these words:-

> 'And I do direct that in accordance with the provisions of section 10(1) of the said Act, the Commission shall summon any person or persons concerned to testify on Oath and to produce any books, plans and documents that the Commission may require'

On 14th March 2003 the Chairman of the Commission formulated Rules and procedures for the conduct and management of the proceedings of the Inquiry under s9 of the Commissions of Inquiry Act vide Gazette Notice of 1566. The Rules range from (a) to (l). However for the purpose of the application it is only rule (I) which is relevant and the rule (i) reads!

> **'The Commissioners may summon any person or persons to testify on Oath and may call for the production of books plans and documents that the commissioners may require'**

It is contended that although the commission is just about to wind up its affairs after spending considerable amount of public funds, both the Commission and the commissioners have not summoned witnesses as required under s 3 3 a (ii) and 10. It is further contended that the rule formulated above is ultra vires these sections and also s 9 of the Act and that because of the alleged ultra vires or non compliance the commission which is ongoing would not be able to make a full, faithful and impartial inquiry to conduct the Inquiry in accordance with the directions contained in the commission as required under s 7 of the Commission of Inquiry Act Cap 102.

The applicants' counsel has also drawn this court's attention to the contents of the Oath of office for the Commissioners as required under s 5 of the Act. The court has been urged to note that the contents of the form of the Oath demands that the commissioners discharge and perform the duties entrusted to them by the commission. It is therefore important for us to reproduce here the form of the Oath made pursuant to the commission of Inquiry Regulations L N 217/1970. It is in these terms:-

> **'I ..... having been appointed a commissioner by a commission issued by the President under the commission of Inquiry Act do swear that I will faithfully fully and impartially, and to the best of my ability, discharge the trust and perform the duties devolving upon me by virtue of the commission'**

For the respondents no affidavit in reply was filed. Instead, grounds of opposition dated 8th November, 2004 were filed on 9th November, 2004. Strictly speaking the provisions of Order 53 dealing with judicial review do not contemplate the filing of grounds of opposition and this is a hangover from the civil procedure practice. This court would therefore have been entitled to ignore or disregard the filed grounds see R v COMMUNICATIONS COMMISSION OF KENYA [2001 IEA 199]. However, the learned counsel for the applicant after raising the point did point out to the court that in view of the importance of the subject matter of the application he would be happy if we took into account the grounds and ruled on merit. The grounds relied on are:-

1. THAT this honourable court lacks jurisdiction to grant an order of certiorari as prayed
2. THAT the order of prohibition sought if granted shall amount to correcting the course, practice and procedure of the Judicial Commission of Inquiry into the Goldenberg Affair as laid down by law

3. THAT the honourable court lacks power to compel the Judicial Commission of Inquiry into the Goldenberg Affair to summon witnesses as the commission has a discretionary power
4. THAT an order of mandamus cannot be issued against the 2nd, 3rd and 4th respondents in their individual capacity
5. THAT paragraph 7 of the supporting affidavit is pre-empting and sub-judicial the proceedings of the commission as the same shows that the deponent has already reached a decision on the sponsors, architects, facilitators and beneficiaries of the Goldenberg Affairs
6. The application is based on speculation and inconclusive proceedings of the 1st respondent
7. The 1st respondent has no powers to compel the named persons to testify before the commission of Inquiry

GROUND 1

The learned counsel for the respondents Mr Ombayo did submit that this court cannot have jurisdiction to grant an order of certiorari because the offending rule was published on 24th March, 2003 which is more than one year ago and under Order 53 rules 2 and 7 provide that no application for relief can be entertained by the court outside the 6 moths limit imposed by these rules and also s 9 of the Law Reform Act. In addition the deponent of
the Affidavit does not depone to matters of personal knowledge and also cites
provisions of law and therefore inadmissible under O 18 of the Civil Procedure Rules.

On the other hand the applicants have strongly contended as follows:-

- **That the rule (i) of the Rules formulated by the inquiry contravenes the very commission established the Inquiry because the commission has directed the Inquiry in mandatory terms (as set out above) to summon witnesses. They contend that for this reason rule (i) is ultra vires. The commission itself and is void ab initio. The Inquiry did not have the power to confer jurisdiction on itself to convert what is a mandatory duty under the terms of the commission itself into a discretionary duty. For this reason this court has the jurisdiction and the duty to quash the nullity.**

- **That the Inquiry was obligated to include in its terms of reference the instructions contained in s 3 3 (a)(ii) of the Commission of Inquiry Act and that the Inquiry has not indicated anywhere in its record so far any reasons for departing from the Instructions contained in s 3 (3)(a)(ii) of the Act which reads:**
"that that person shall be given such opportunity as is reasonable and practicable to be present, either in person or by his advocate, at the hearing of the evidence to cross-examine any witness testifying thereto, and to adduce without unreasonable delay material evidence in his behalf in refutation of or otherwise in relation to the evidence"

It is contended that since the commission did not specifically exclude this instruction the Inquiry ought to have adhered to the instruction in executing the commission. It was contended that failure to adhere to this statutory instruction makes rule (i) ultra vires this particular provision and therefore the rule is null and void to the extent of the inconsistency.

- **That this court has by virture of s 60 of the Constitution unlimited jurisdiction to quash nullities notwithstanding any time limit because the Inquiry did not in the first place have Jjurisdiction to act in excess of its jurisdiction in the formulating rule (i). that this court would be abdicating its unfettered constitutional duty under the provisions of the Constitution – see RUSTIN SHALMON KITOLOTO v KENYA REVIEW AUTHORITY HCCC 1969 OF 1996.**

- **That where an act or decision or publications is ultra vires the 6 months terms stipulated for certiorari does not apply and that nullities or back of jurisdiction is not covered by Order 53 Rules 2 and 7. Order 52 rule 2 relied on by the respondents only applies to the specific matters mentioned. The marginal notes b3ear testimony to this.**

- **On the admissibility of the Affidavit Judicial Review is a special jurisdiction and order 18 of the Civil procedure Rules does not apply. The Statement and the Affidavit constitute pleadings in judicial review.**

- **That this court has inherent powers to strike down any ultra vires act, decisions etc. without any restriction and that it would be a Constitutional heresy if this court were to shy away from facing head on illegalities and nullities and for this reason it should not allow the inherent powers from being fettered by restrictions based on time limits in the rules of procedure or in an Act of Parliament.**

- **That the decision making process invoking rule (i) is continuous and ongoing and that there cannot be a time bar in these circumstances. – see TSIKATA v NEWSPAPER PUBLISHING PLC (1997) I ALL. ER 655.**

GROUND 2

The arguments for this is that prohibition would interfere with the course practice and procedure of the Inquiry and that this is not the business of the court and therefore no order of prohibition should issue. It was also submitted that if certiorari does not lie prohibition should also not issue for the same reason, that is lack of jurisdiction and that prohibition cannot survive on its own.

- **The counterargument on this is that the court has jurisdiction to grant both order of certiorari and prohibition since it is necessary for the Inquiry to put in place before it**

only formal judgements, orders, decrees, conviction or other proceedings, of an inferior court or Tribunal fall within the six moths period stipulated see Order 53 rule

2 The act of publishing a rule cannot be said to be a proceeding or any of the orders mentioned in O 53 rule 2 Neither is the decision to formulate the rule a proceeding, judgment, order, decree or a conviction

Order 53 rule 2 which prescribes the time limit does not also include anything covered by the principle of ultravires or any nullities or decisions made without jurisdiction at all

It is therefore clear that the courts jurisdiction or power is not fettered or ousted by Rule 2

Order 53 rule 2 reads -

> **"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act, and where the proceeding is subject to appeal and time is limited by law for bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

a) The position is made even clearly by order 53 rule 7 which requires

> **"that where an order of certiorari to remove any proceedings for the purpose of their being quashed the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion, he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the High Court"**

Under 7 (2) it provides

> **"where an order of certiorari is made in any such case as aforesaid the order shall direct that the proceedings shall be quashed forthwith on the removal into the High Court"**

We agree with the applicants' counsel that this rule only covers the specific matters mentioned and the marginal note clearly says so view In the view of the court the six months limitation only affects the specific formal orders mentioned and nothing else The act of making an ultra vires rule is outside the limitation Purely on the literal reading and interpretation of the above provisions a rule formulated by a commission falls outside the rules and is therefore in the opinion of the court not covered by the six months limitation In fact even in s 9 of the Law Reform Act a discretion is conferred on the rule making authority to impose the six months time limitation and it need not have been couched in mandatory terms

In addition if rule (1) is ultra vires the Commission and the Act as shall appear shortly it is void ab initio and of no effect see DPP v HUTCHINGS [1990] AC 783 House of Lords, where Lord Lowry stressed this important point of principle

> **"The basic principle is that an ultra vires enactment, such as a byelaw, is void ab initio and of no effect".**

We also apply the maxim ex nihilo nihil fit "out of nothing comes nothing"

We hold that nullities are not covered by the six months limitations both on the wording of the rules and as a matter of principle due to the nature of nullities We further hold in line with GITHUNGURI v REPUBLIC [1986] KLR 1 that this court has inherent powers to exercise jurisdiction over tribunals and individuals acting in a administrative or quasi judicial capacity and we would invoke this jurisdiction to quash, nullities and illegalities

Indeed as early as 1928 the English High Court whose powers this court also enjoys by virtue of s 8 of the Law Reform Act and the Administration of Justice Act 1938 (UK) the High Court in England was able to quash a medical certificate pursuant to its judicial review Jurisdiction in the case of THE KING v POSTMASTER GENERAL 1 KB 291 A medical certificate is not one of the specified matters in rules 2 and 7 above

At page 600-601 of the WADES ADMINISTRATIVE LAW 8th Edition the learned author has described the expansion of the remedy of certiorari in these words

> **"As the law has developed, certiorari and prohibition have become general remedies which may be granted in respect of any decisive exercise of discretion by an authority having public functions whether individual or collective. The matter in question may be an act rather than a legal decision or determination such as the grant or refusal of a licence, the making of a rating list on wrong principles, the taking over of a school ... They will lie where there is some [preliminary decision ... The question is whether some issue is being determined to some person's prejudice and the courts ability to intervene has been increased by the new doctrine that decisions which are wholly non statutory may nevertheless be reviewable whenever there is a 'public element.'**
>
> **Yet many cases of judicial review necessarily turn upon the legality of acts as opposed to decisions."**

At pages 603 and 604 (supra) the following is brought out clearly

> **"However null and void a decision may be there is no means established except by asking the court to say so. Lord Dennings successor pointed this out very clearly in the case of the Takeover Panel ... If for example a licensing authority refuses a licence for wrong reasons or in breach of natural**

justice so that its decision is ultra vires and void nothing will avail the applicant except a judicial decision quashing the refusal and ordering a proper determination" see LONDON & CLYDESIDE ESTATES v ABERDEEN DC (1980) 1 WLR 182 AT 189.

It follows therefore the legality of acts or decisions including nullities goes beyond the provision of Order 53 rule 2 and 7 (above) yet the High Court in England has the jurisdiction to grant orders of certiorari and prohibition. We think we have the same powers and even more because we have in additional powers under a written Constitution.

In the English case of SMITH ELLOE RDC [1956] AC 736 it was suggested that an Order that is [patently ultra vires may be impugned outside the six week limitation see also R v SECRETARY OF STATE FOR ENVIRONMENT ex parte 1977 QB 122.

We find that it would be serious abdication of jurisdiction and powers of this court if we were to shy away from quashing a nullity because in essence the doctrine of ultra vires permits the courts to strike out down decisions or acts made or done by bodies exercising public functions which they have no power to make. The courts have a specific mission and a duty to uphold the rule of law. Indeed the doctrine of ultra vires was one of the original pillars upon which judicial review was founded.

4. In the context of an on going Commission of Inquiry such a body can be compelled by an order of mandamus to perform its statutory duties. The decision to summon or not to summon witnesses is being made every other day by the commission as the Inquiry proceeds and the authority of such a decision based on an invalid rule cannot reasonably have a time limit especially where an aggrieved applicant moves the court for a remedy in the course of a public Inquiry's proceedings and before their closure.

5. We find that the summoning or not summoning of witness is a matter that goes or touches in a big way the mandate or the jurisdiction of the Inquiry and therefore no exclusion clause whether procedural or statutory can oust the jurisdiction of this court. Failure to perform an essential preliminary such as summoning witnesses who are concerned goes to jurisdiction and exclusion terms would not be available where there is lack of jurisdiction or excess of jurisdiction and this court must determine the matter. In this case the respondents counsel has admitted that the ten concerned persons have been served with adverse notices and surely s 3, 3(a) ii demands that the Inquiry complies with the entire provisions in respect of such persons.

In the celebrated case of ANIMISTIC v FOREIGN COMPENSATION 1969 2 AC 147 Lord Diplock M R in his well known obitier in O RELLY v MACKMAN referred to ANISMINIC as

> **"A landmark decision which has liberated English public law from the letters that the courts had therefore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction and errors of law committed by them within their jurisdiction. The break through that Anisminic made was the recognition by the majority of this House that if a tribunal ... mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie <u>One into which it was not empowered to inquire and so had no jurisdiction to determine its purported determination" not being a "determination" within the meaning of the empowering legislation was accordingly a nullity</u>.**

We therefore find that in law if a prescription is mandatory and it is not done what is done is invalid and if the prescription is directory, disobedience may be treated as an irregularity not affecting validity.

6. Under the Constitution s 60 we have original and unlimited jurisdiction to deal with illegalities and in addition we have inherent jurisdiction to nullify and quash them. Any statute or rule that purports to take that jurisdiction away or is inconsistent with that jurisdiction is void to the extent of the inconsistency under s 3 of the Constitution of Kenya and it would be abdication of this court's powers to impose on itself any fetters not imposed by the Constitution itself.

This court's jurisdiction must as stipulated in the Judicature Act, be exercised in this order:-

(1) in accordance with the Constitution
(2) written laws
(3) Doctrines of common law and equity as at 12th August 1987

7. <u>SCOPE OF JUDICIAL ORDERS</u>. At page 17 of ADMINISTRATIVE LAW BY WADE 7th Edition the scope of judicial review is stated to be: **"By obtaining orders of the court in the form of mandamus certiorari or prohibition the Crown (read Republic) could ensure that public authorities carried out their duties and that inferior tribunals kept within their jurisdiction. They were essentially remedies of ensuring efficiency and maintaining order in the hierarchy of courts, commissions and authorities of all kinds."**

This Inquiry had a duty under the law to issue summons to the concerned persons. The Inquiry's discretion ceased when they issued the adverse notices.

On the strength of 1 to 5 above (either singly or cumulatively) we do find that we have jurisdiction to grant any deserved judicial review orders and accordingly find that:-

8. Rule (i) of the Inquiry's Rules and Procedure violates the mandatory terms in the commission as set out above and which clearly states:

"I do direct that in accordance with the provisions of section 10(1) of the said Act, the Commissioner <u>shall summon any person or persons concerned</u>."

We further find that the persons concerned must be those with adverse notices as per the Inquiry findings so far.

Rule (i) also violates the instructions contained in s3(a) ii unless the proviso is applicable and in a contentious Inquiry such as the Goldenberg it would be difficult to reasonably and fairly bring itself within the exception and in any event no record has been shown to us that there exists any good reasons on the Inquiry's record. Under 23(3) <u>the Act has directed in mandatory terms how the commission shall be executed in terms</u> of summoning the persons concerned.

We therefore find that the Inquiry did not have the power to make rule (i) in discretionary terms and had no jurisdiction to make the rule in those terms at all and the rule is ultra vires the commission and the Act. With great respect Inquiry which is a creature of the commission does not appear to have directed their mind to the terms of the commission (their creator) on summoning witnesses and this power appears in the very body of the appointing commission. We find that rule (i) is ultra vires the commission and s3 3(a)(ii) of the Act.

Under s7 the Inquiry is specifically and statutorily required to conduct the Inquiry in accordance with the directions contained in the commission. There is a mandatory direction in the commission itself to summon witnesses and which the Inquiry has clearly ignored its own commission.

The underlined words appear in this section and therefore rule (i) is ultra vires s 7 as well. The Inquiry cannot deviate from clear and specific provisions of the commission itself and the Act.

Similarly rule (i) is also in direct conflict with s 9 of the Commission of Inquiry Act which reads in part as under:

"A Commission (or commissioners, if more than one) may make such rules, not inconsistent with any regulations made under s 19 or which the terms of the commission for the conduct and management of the proceedings of the inquiry ...

In addition the Oath prescribed under s 19 and the Regulations made thereunder states that the Commissioners will faithfully fully and impartially and to the best of their ability discharge the trust and perform the duties devolving upon them by virtue of that commission. The president clearly invoked the provision of s 10 when ordering the mandatory summoning of the concerned persons. This appears in the commission itself. Rule (i) therefore violates s 10 of the Commission of Inquiry Act and is ultra vires this section as well. Under s 10 the Commissioners have mandatory duty to summon those who in their opinion are concerned persons. This court would not be interfering with their mandate because they have already formed options and issued adverse notices. We as a court do not have to name names. S 10(2) provides that all summons for the attendance of witnesses or other persons ... shall be in the prescribed form and shall be signed by the commissioners or by one of the Commissioners if more than one.

STATEMENTS AND AFFIDAVIT EVIDENCE

The Commission of Inquiry by virtue of serving adverse notices on some of the persons has specifically applied to itself the direction contained in s 3 3(a)ii. For this reason we find and hold that the inquiry cannot validly receive or admit statements of evidence – from witnesses. Section 10 makes it plainly clear that the only exception to receiving oral evidence is the one set out in s 10(3) where for the reasons set out therein and for sufficient reason to be recorded in the Inquiry the Commission may receive affidavit evidence.

It is therefore outside the ambit of the commission to purport to receive any statements from witnesses.

The respondents did not file any affidavit to demonstrate compliance with this provision for example by exhibiting any summons issued or samples of the summonses issued or to be issued. Since no form of summons have been prescribed or made thereunder and in view of the provisions of section 10 of the Act the commissioners have the powers of the High Court and we find that the summons must be those which the High Court issues under its Criminal or Civil jurisdiction whichever is suitable to the persons concerned. It is not lost to us that in the case concerning the AKIWUMI REPORT, R v ATTORNEY GENERAL ex parte Biwott, I (2000) KLR 668 the ultimate report was successfully challenged before a constitutional court of three also for failure to summon the applicant who was adversely affected.

We are aware that this court in exercise of its judicial review jurisdiction does not and should not sit on appeal of the decisions of the challenged bodies such as this Inquiry. Our concern as a court is in the decision making process see R v JUDICIAL SERVICE COMMISSION ex parte PETER STEPHEN S PARENO, Misc Civil Application No 1025 of 2003.

We find that rule (i) is ultra vires the commission and the specified sections of the Act as outlined above. It is for this reasons null and void ab initio having been formulated in excess of jurisdiction. We find that this is a serious procedural impropriety which could if not rectified touch on the Inquiry's work jurisdiction and the ultimate report. We would also like to observe that the appointment of the Inquiry was anchored on the upholding the public interest in the subject matter of the Inquiry and the public interest is clearly the identification and prosecution of those concerned including the recovery of the billions involved. This court has a duty and responsibility to uphold that interest, the court being the last frontier in upholding the rule of law and the public interest. We are aware that substantial funds and effort have already been expended on the Inquiry so far, but no price is greater than upholding the rule of law and the public interest. Those involved can only achieve this by getting everything right and beyond legal challenge. We see no shortcuts in advancing this. We are of course aware that we do not sit on appeal of any decision of the Inquiry but are only concerned with the decision making process and any procedural impropriety.

We are of the view that the procedural impropriety herein could seriously affect the jurisdiction of the Inquiry and we see immediate need for all concerned to rise to the occasion and put things right in order to uphold the considerable public interest on which the Inquiry was initially anchored and also secure the ultimate report from challenge.

For the above reasons Orders shall immediately issue as under:

1. Order of certiorari removing Rule (i) of the Rules and Procedures as published in the Gazette Notice No 1566 of 14th March, 2003 to this court, which is hereby and forthwith quashed. We further hold that the rule is a nullity and void ab initio.

2. Order of prohibition to prohibit the respondents from presenting the inquiry report to the President until the concerned persons have been issued and served with the summons and the commissioners fully comply with the orders herein.

3. An Order of mandamus to compel the respondents to perform their statutory duty by issuing and serving summons on the concerned persons as stipulated in the commission and sections 3 3 a(ii), s7, s(7) and s 10 of the Commissions of Inquiry Act chapter 102 of the Laws of Kenya.

   This order shall remain in force until full compliance with the Commission's statutory duty described in the provisions herein and in particular with the provisions of s 3 3(a) ii of the Commission of Inquiry Act.

   Pursuant to this order and the order of this court made in Misc 1608/04 on 25th November, 2004 we order that proceedings of the Inquiry shall not close and shall be deemed to be open for the purpose of complying with all the orders made in this judgment.

4. The costs of these proceedings shall follow the event and are awarded to the applicants.

It is so ordered.

DATED and delivered at Nairobi this 26th day of November, 2004

J G NYAMU
JUDGE

M IBRAHIM
JUDGE

M MAKHANDIA
AG JUDGE

I CERTIFY THIS IS TRUE COPY OF THE ORIGINAL.
DATED: 29.11.04
DEPUTY REGISTRAR
HIGH COURT OF KENYA
NAIROBI

APPENDIX "K"
RULING OF COURT OF APPEAL IN C.A. APP. NAI 310 OF 2004

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: OMOLO, TUNOI & JJ.A. & DEVERELL, Ag. J.A.

CIVIL APPLICATION NO. NAI 310 OF 2004 (UR 159/04)

BETWEEN

REPUBLIC ..... APPLICANT

AND

HONOURABLE JACKSON MWALULU
KIRIRO wa NGUGI
KEPTA OMBATI
SANDE OYOLO
MUTEMBEI MARETE
JACOB OPIYO
CYPRIAN NYAMWAMU
WAMBUA MUNYWOKI
PAUL THUMBI .....RESPONDENTS

(Application for stay pending the determination of an appeal from the ruling and order of the High Court of Kenya at Nairobi (Nyamu, Ibrahim & Makhandia, JJ) dated 26th November, 2004

in

H.C.MISC.C. APPLN. NO. 1279 OF 2004)

****

ORDER OF THE COURT

This Court on the issue of our disqualification on 14th January, 2005. We then listed the notice of motion seeking the stay of the orders of the superior court for hearing today. We chose today's date because we thought the other remaining objections could be agreed within the motion itself. It appears we were wrong in thinking that the simple application for stay, the type which this Court hears day in day out, could be completed within the time available today. It is clear to us from Mr Kibe Mungai's

preliminary observation, that there can be no hope of even starting on the motion itself, later alone completing it. We accordingly adjourn the motion to dates to be taken out in the registry and we would recommend to the registry that at least two days be allotted to the motion. Our interim order of stay made on 9th December, 2004 and extended during the subsequent sittings of the court virtually brought to a standstill the proceedings of the Judicial Commission of Inquiry into the Goldenberg Affair. That Commission was instituted by His Excellency the President in order to investigate and report to him on the subject of its inquiry. We cannot endlessly paralyse the operations of the Commission.

Accordingly, on adjourning this matter we now order that while the orders of the High Court shall remain stayed pending the hearing and determination for motion for stay we remove that part of our order barring the Judicial Commission of Inquiry from executing its mandate. That Commission is now free to proceed with its mandate. As we have said we adjourn the motion to dates to be taken at the registry and the costs of today shall be in the motion.

Made at Nairobi this 31st day of January, 2005.

R. S. C. OMOLO

JUDGE OF APPEAL

P.K. TUNOI

JUDGE OF APPEAL

W.S. DEVERELL

AG. JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR

Appendix "L"

Pre-export Finance and Export Compensation Applications to Banks

CD3. E Number	Invoice Number	Value Ksh.	Date of Shipment	Date of PREex Fin	Amount Ksh	Bank	Date of Export Com	Amount Ksh.	Bank
682055	Dl/003/92	71,643,000	15-Aug-92	17-Jan-92	60,896,550.00	National CIT			NBK
682055	Dl/003/92	71,643,000		27-Apr-92	60,896,550.00	Delphis			
682055	Dl/003/92	71.643,000		17-Jun-92	60,896,550.00	Postbank			
682055	Dl/003/92	71.643,000		05-Aug-92	60.896.550.00	Exchange			
682056	D2/004/92	75,508,000	15-Aug-92	17-Jan-92	64,181,800.00	National CIT			NBK
682056	D2/004/92	75.508.000		27-Apr-92	64.181.800.00	Delphis			
682056	D2.004/92	75,508,000		17-Jun-92	64.181.800.00	Postbank			
682056	D2/004/92	75.508,000		05-Aug-92	64,181.800.00	Exchange			
682057	D3/005/92	61,238,000	15-Aug-92	17-Jan-92	52.052,300.00	National CIT			NBK
682057	D3/005/92	61,238,000		27-Apr-92	52.052,300.00	Delphis			
682057	D3/005/92	61,238,000		17-Jun-92	52.052,300.00	Postbank			
682057	D3/005/92	61,238,000		05-Aug-92	52.052,300.00	Exchange			
682058	D4/006/92	61,765,000	15-Aug-92	17-Jan-925	2,500,250.00	National P			NBK
682058	D4/006/92	61,765,000		27-Apr-92	52,500,250.00	Delphis			
682058	D4/006/92	61,765,000		17-Jun-92	52,500.250.00	Postbank			
720653	D5/007/92	52,138,000	15-Aug-92	21-Jan-92	44,317,300.00	Delphis	25-Nov-92	9,384,840.00	Ex Delphis
720653	D5/007/92	52,138,000		25-Jun-92	44,317,300.00	Postbank			
720654	D6/008/92	57,880,000	18-Sep-92	21-Jan-92	49,198,000.00	Delphis	03-Nov-92	10,418,400.00	Ex Delphis
720654	D6/008/92	57,880,000		27-Apr-92	49,198,000.00	Delphis			
720654	D6/008/92	57,880,000		25-Jun-92	49.198,000.00	Postbank			
720654	D6/008/92	57,880,000		25-Jun-92	49.198,000.00	Postbank			
720655	D7/009/92	71,635,000	16-Sep-92	21-Jan-92	60,889,750.00	Delphis			

720655 D7/009/92	71,635,000		25-Jun-92	60,889,750.00	Postbank	28-Oct-92	12,940,812.00	Postbank
720656 D8/010/92	39,955,000	15-Aug-92	21-Jan-92	31,411,750.00	Delphis	25-Sep-92	6,651,900.00	Delphis
720656 D8/010/92	39,955,000		25-Jun-92	31,411,750.00	Postbank			
720403 No Number	39,705,660		13-Mar-92	32,000,800.00	Trust			
633748 D9/013/92	39,705,660		26-Jun-92	32,000,800.00	Exchange			
633748 D9/013/92	39,705,660		06-Aug-92	32,000,800.00	Postbank			
No Number D9/013/92	39,705,660		22-Sep-92	32,000,800.00	Exchange			
633748 D9/013/92	39,705,660	16-Sep-92				01-Oct-92	6,776,640.00	Postbank
720404 No Number	39,067,000		13-Mar-92	33,206,950.00	Trust			
No Number D10/014/92	39,067,000		26-Jun-92	33,206,950.00	Exchange			
633749 D10/014/92	39,067,000	16-Sep-92	06-Aug-92	33,206,950.00	Postbank	01-Oct-92	7,032,060.00	Postbank
633749 D10/014192	39,067,000		22-Sep-92	33,206,950.00				
720405 No Number	31,064,000		13-Mar-92	26,404,400.00	Trust			
633747 D11/015/92	31,604,000		26-Jun-92	26,404,400.00	Exchange			
633747 D11/015/92	31,064,000	16-Sep-92				P		Postbank
729405 D11/015/92	31,064,000		06-Aug-92	26,404,400.00	Postbank			
No Number D11/015/92	31,064,000		22-Sep-92	26,404,400.00	Exchange			
633750 D12/016/92	33,428,000	16-Sep-92				01-Oct-92	6,017,040.00	Postbank
720406 D12/016/92	33,428,000		06-Aug-92	28,413,800.00	Postbank			
720406 No Number	33,428,000		13-Mar-92	28,413,800.00	Trust			
633750 D12/016/92	33,428,000		26-Jun-92	28,413,800.00	Exchange			
No Number D12/016/92	33,428,000		22-Sep-92	28,413,800.00	Exchange			
682059 D13/018/92	50.436.000	15-Aug-92	06-Aug-92	42,870,600.00	Postbank P			NBK
682059 D13/018/92	50,436,000		13-Mar-92	42,870,600.00	Trust			
No Number D13/018/92	50,436,000		26-Jun-92	42,870,600.00	Exchange			
682060 D14/019/92	50,070,000	15-Aug-92	06-Aug-92	42,559,500.00	Postbank P			NBK
682060 No Number	50,070,000		13-Mar-92	42,559,500.00	Trust			
No Number D14/019/92	50,070,000		26-Jun-92	42,559,500.00	Exchange			
682061 D15/021/92	67,705,000	15-Aug-92	06-Aug-92	57,549,250.00	Postbank P			NBK
682061 No Number	62,705,000		13-Mar-92	53,299,250.00	Trust			
No Number D15/021/92	62,705,000		26-Jun-92	53,299,250.00	Exchange			

682062 D16/021/92	32,120,000		06-Aug-92	27,302,000.00	Postbank P			
682062 No Number	32,120,000		13-Mar-92	27,302,000.00	Trust			
No Number D16.021/92	32,120,000		26-Jun-92	27,302,000.00	Exchange			
682062 D16/021/92	32,120,000	15-Aug-92				CIT		NBK
682063 D17/022/92	34,734,000	15-Aug-92	06-Aug-92	29,523,900.00	Postbank P			NBK
682063 D17/022/92	34,734,000		13-Mar-92	29,523,900.00	Trust			
No Number D17/022/92	34,734,000		26-Jun-92	29,523,900.00	Exchange			
682064 D18/023/92	31.333,000		06-Aug-92	26,633,050.00	Postbank			
682064 No Number	31,333,000		13-Mar-92	26,633,050.00	Trust			
No Number D18/023/92	31,333,000		26-Jun-92	26,633.050.00	Exchange			
682064	31,333,000	15-Aug-92				CIT		NBK
682137 D19/028/92	35,947,000		06-Aug-92	30,554,950.00	Postbank			
682137 D19/028/92	66,287,498	16-Sep-92	31-Mar-92	30,554,950.00	National	21-Sep-92	11.931,749.75	NBK
682138 D20/029/92	33,952,000		06-Aug-92	28,859,200.00	Postbank			
682138 D20/029/92	67,540,100	16-Sep-92	31-Mar-92	28,859,200.00	National	21-Sep-92	12,157,218.00	NBK
682139 D21/030/92	62,519,700	16-Sep-92				21-Sep-92	6,469,400.00	NBK
682140 D22/031/92	39,432,000		31-Mar-92	33,517,200.00	National			
682140 D22/031/92	54,928,600	16-Sep-92				21-Sep-92	9,887,148.00	NBK
692141 D23/041/92	38,572.000		31-Mar-92	32.786.200.00	National			
682141 D23/041/92	110,888,000	16-Sep-92				P		NBK
682142 D24/033/92	48,591,000		31-Mar-92	41,302,350.00	National			
754404 D42/92	48,591,000		21-Aug-92	41,302,350.00	Exchange			
754404 G14/044/92	26.314.595	12-Jun-92				14-Sep-92	4,739,627.00	KCB
682143 D25/034/92	43,305,000		31-Mar-92	36,809,250.00	National			
709538 D44/92	43,305,000		21-Aug-92	36,809,250.00	Exchange			

709538	G5/017/92	42,806,263	06-Feb-92				14-May-92	7,705,127.00	KCB
682144	D26/035/92	32,264,000		31-Mar-92	27,424,400.00	National			
754400	D43/92	32,264,000		21-Aug-92	27,424,400.00	Exchange	14-Sep-92	5,192,451.00	KCB
754400	G11/041/92	28,846,950	22-Aug-92						
633742	D27/036/92	71,893,400	16-Sep-92	10Apr-92	61,109,390.00	Post Bank	28-Oct-92	12,806,831.00	Postbank
633742	D27/036/92	71,893,400		29-Jun-92	61,109,390.00	Exchange			
754402	D47/92	71,893,400		21-Aug-92	61,109,390.00	Exchange			
754402	G12/042/92	16,876,191	08-May-92				14-Sep=92	3,037,714.35	KCB
633743	D28/037/92	76,794,620	16-Sep-92	10-Apr-92	65,198,927.00	Postbank	13-Oct-92	13,806,851.60	Postbank
633743	D28/037/92	76,794,620		29-Jun-92	65,198,927.00	Exchange			
709541	D41/92	76,794,620		21-Aug-92	65,198,927.00	Exchange			
709541	G8/026/92	29,370,292	27-Feb-92				31-Aug-92	5,286,652.50	KCB
633744	D29/038/92	61,402,450	16-Sep-92	10-Apr-92	52,192,082.00	Postbank	01-Oct-92	13,052,441.00	Postbank
633744	D29/038/92	61,402,450		29-Jun-92	52,192,082.00	Exchange			
754403	D45/92	61,402,450		21-Aug-92	52,192,082.00	Exchange			
754403	G13/043/92	25,163,255	17-Jun-92				14-Sep-92	4,529,385.00	KCB.
633745	D30/039/92	62,602,580	16-Sep-92	10-Apr-92	53,212,193.00	Postbank	01-Oct-92	11,268,464.00	Postbank
709539	D46/92	62,602,580		21-Aug-92	53,212,193.00	Exchange			
709539	G6/024/92	28,186,063	13-Feb-92				22-May-92	5,073,491.30	KCB
682145	GIL/D24/56/92	42,021,000	01-Oct-92	28-Sep-92	35,717,850.00	Exchange	02-Nov-92	7,653,780.00	Exchange
682145	GIL/D24/56/92	42,021,000	01-Oct-92	01-Oct-92		Exchange	CIT		Exchange
682146	GIL/D25/57/92	48,994,000	07-Oct-92	28-Sep-92	41,644,900.00	Exchange	P		NBK
8I6166	GIL/D26/58/92	53,725,000	07-Oct-92	28-Sep-92	45,666,250.00	Exchange	10-Dec-92	9,670,500.00	Ex Postbank
816167	GIL/D40/59/92	59,382,000	07-Oct-92	28-Sep-92	50,474,700.00	Exchange	18-Dec-92	10,688,760.00	Ex Postbank
816168	GIL/D41/60/92	64,507,000	07-Oct-92	28-Sep-92	54,830,950.00	Exchange	28-Dec-92	11,611,260.00	Ex Postbank
816169	GIL/D42/061/92	60,370,000	07-Oct-92	30-Sep-92	51,314,500.00	Exchange	18-Dec-92	10.866.600.00	Ex Postbank
816751	GIL/D31/046/92	61,459,000	20-Sep-92	14-Sep-92	52,240,150.00	Exchange	10-Dec-92	11,062,620.00	Exchange
816752	GIL/D32/047/92	75,809,000	20-Sep-92	14-Sep-92	64,437,650.00	Exchange	10-Dec-92	13,645,620.00	Exchange
816753	GIL/D33/048/92	57,119,000	20-Sep-92	14-Sep-92	48,551,150.00	Exchange	03-Dec-92	10,281,420.00	Exchange

816754	GIL/D34/049/92	60,768,000	20-Sep-92	14-Sep-92	51,652,800.00	Exchange	P		Exchange
816755	GIL/D35/050/92	70,735,900	20-Sep-92	14-Sep-92	60,125,515.00	Exchange	01-Feb-93	12,732,462.00	Exchange
816756	GIL/D36/051/92	79,524,000	20-Sep-92	14-Sep-92	67,595,400.00	Exchange	27-Jan-93	14,314,320.00	Exchange
816757	GIL/D37/052/92	68,831,000	20-Sep-92	14-Sep-92	58,506,350.00	Exchange	08-Feb-93	12,389,580.00	Exchange
816758	GIL/D38/053/92	72,160,800	20-Sep-92	14-Sep-92	61,336,680.00	Exchange	01-Feb-93	12,988,944.00	Exchange
816759	GIL/D39/054/92	112,246,000	20-Sep-92	14-Sep-92	95,409,100.00	Exchange	18-Jan-93	20,204,280.00	Exchange
816760	GIL/G16/055/92	26,094,996	14-Sep-92				16-Nov-92	4,697,099.25	Exchange
816771	GIL/D43/062/92	74,651,000	07-Oct-92	30-Sep-92	63,453,350.00	Exchange	01-Mar-93	13,437,177.70	
816772	GIL/D44/063/92	70,824,000	07-Oct-92	30-Sep-92	60,200,400.00	Exchange	01-Mar-93	12,748,320.00	Exchange
816773	GIL/D45/064/92	54,500,000	07-Oct-92	30-Sep-92	46,325,000.00	Exchange	28-Jan-93	9,810,000.00	Exchange
816774	GIL/D46/065/92	55,678,000	07-Oct-92	30-Sep-92	47,326,300.00	Exchange	01-Mar-93	10,022,040.00	Exchange
816775	GIL/D47/066/92	61,934,000	07-Oct-92	01-Oct-92	52,643,900.00	Exchange	08-Jan-93	11,050,920.00	Exchange
816776	GIL/D48/067/92	73,162,000	07-Oct-92	01-Oct-92	61,187,700.00	Exchange	06-Jan-93	13,169,160.00	Exchange
816777	GIL/D49/068/92	83,215,000	07-Oct-92	01-Oct-92	70,732,750.00	Exchange	08-Feb-93	14,978,700.00	Exchange
816778	GIL/D50/069/92	67,266,000	07-Oct-92	01-Oct-92	57,176,100.00	Exchange	22-Feb-93	12,107,880.00	Exchange
816779	GIL/D51/070/92	50,384,000	07-Oct-92	01-Oct-92	42,826,400.00	Exchange	21-Jan-93	9,069,120.00	Exchange
816780	GIL/G17/071/92	27,867,528	05-Oct-92				P		Exchange
816781	GIL/D52/072/92	68,765,000	15-Oct-92	19-Oct-92	58,450,250.00	Postbank	28-Jan-93	12,377,700.00	Exchange
816782	GIL/D53/073/92	76,818,000	15-Oct-92	19-Oct-92	65,295,300.00	Postbank	01-Feb-93	13,827,240.00	Exchange
816783	GIL/D54/074/92	66,282,000	15-Oct-92	19-Oct-92	56,339,700.00	Postbank	22-Feb-93	11,930,760.00	Exchange
816784	GIL/D55/075/92	93.515.000	15-Oct-92	19-Oct-92	79,487,750.00	Postbank	14-Jan-93	16.832.700.00	Exchange
816785	GIL/D56/076/92	78,135,000	15-Oct-92	19-Oct-92	66,414,750.00	Postbank	P		Exchange
816786	GIL/D57/077/92	93,282,000	15-Oct-92	23-Nov-92	79,289,700.00	Exchange	20-Nov-92	16,790,757.00	Exchange
816787	GIL/D58/078/92	89,325.000	15-Oct-92	23-Nov-92	75,925,250.00	Exchange	20-Nov-92	16,078,500.00	Exchange
816788	GIL/D59/079/92	75,063,000	15-Oct-92	01-Dec-92	63,803,550.00	Exchange	22-Feb-93	13,511,340.00	Exchange
816789	GIL/D60/080/92	86,385,600	15-Oct-92	01-Dec-92	73,427,760.00	Exchange	02-Nov-92	15,549,408.00	Exchange
816790	GIL/D61/081/92	76,165,000	15-Oct-92	01-Dec-92	64,740,250.00	Exchange	08-Feb-93	13,709,700.00	Exchange
816791	GIL/D62/082/92	74,353,000	15-Oct-92	01-Dec-92	63,200,050.00	Exchange	28-Dec-92	13,383,540.00	Exchange
816792	GIL/D63/083/92	64,126,000	15-Oct-92	17-Nov-92	54,507,100.00	Exchange	21-Jan-93	11,542,680.00	Exchange
816793	GIL/D64/084/92	72,934,000	15-Oct-92	17-Nov-92	61,993,900.00	Exchange	18-Jan-93	13,128,120.00	Exchange
816794	GIL/D65/085/92	76,519,000	15-Oct-92	17-Nov-92	65,041,150.00	Exchange	28-Dec-92	13,733,420.00	Exchange

Note: **Figures extracted from Exhibits 50, 60, 78 and 90A**

Key

P - Ready for payment
Q - Under query
CIT - Claim in transit

APPENDIX "M"

SURVEY OF FINANCIAL DEALINGS BETWEEN CENTRAL BANK OF KENYA, GOLDENBERG INTERNATIONAL LTD, EXCHANGE BANK LTD AND RELATED COMPANIES AND BANKS

(i) Cheque Kiting

The Price Waterhouse report to Central Bank of 16 July, 1993 (**Ex 60**) states:

"Between 18 March, 1993 and 20 April, 1993 CBK was accepting customer cheques from commercial banks outside the clearing system and giving direct credits for these on the same day. CBK would then present these cheques to the clearing house on the following working day at which time the banks on which such cheques were drawn would be debited. This changed on 20 April to a system that between 20 April, 1993 and 14 May, 1993 CBK gave direct credits for bankers' cheques presented by commercial banks. Again the banks on which such cheques were drawn would be debited on the next working day."

Why did Goldenberg get involved in cheque kiting? It is a risky business especially considering the uncertain financial liquidity of the banks concerned. One of the banks concerned, Postbank Credit, was placed into liquidation on 18 May, 1993 and another, Pan African, followed soon after, with Exchange Bank being allowed to go into voluntary liquidation in August 1993.

The interest received by Goldenberg during the period was only some Ksh. 94.8 million, which although large, pales into insignificance when Goldenberg could earn double this amount by overnighting US$ 10 million of CBK's money through New York (as we have shown, as it had done on many occasions earlier in the year. The Price Waterhouse report estimates that Goldenberg should have made at least Ksh. 588 million on the overnight market during this period but they made only 16% of this amount. To understand why Goldenberg took such a risk, for such a negligible return, all the transactions between CBK and Goldenberg must be looked at during the period covered by the cheque kiting.

(ii) Pre-Export Finance and Cheque Kiting

At the end of February 1993, Goldenberg had made some Ksh. 5.8 billion in exchange rate at Exchange Bank on "export proceeds" and had seemingly unlimited access to cheap finance through the Pre-Export Finance Scheme. It was negotiating the purchase of Pan African Bank, whose precarious financial position with CBK had been brought about by funding Uhuru Highway Developments to build what later became known as the Grand Regency Hotel to the tune of some Ksh. 4.5 billion.

However, in March 1993, a World Bank Export Development Project Assessment gave rise to a condition that the Government cease the Pre-Export Finance facility. CBK was instructed to cease Pre-Export financing and recover all loans granted under this facility by the end of March, due to what the World Bank perceived as a misuse of the facility. This presented Goldenberg with a dilemma as it:

(a) held Pre-Export Finance Bills of some Ksh. 4.446 billion drawn by Goldenberg and associated companies which would have to be paid at short notice;

(b) it had just completed negotiations for the purchase of Pan African Bank in order to gain the title deeds of the Grand Regency and needed to clear Pan African's CBK overdraft of Ksh. 4.5 billion;

(c) it was about to lose this cheap source of finance it had relied on in the past.

As stated above the monies that had been gained on forex deals by this time was some Ksh. 5.8 billion and Goldenberg had "exported" all the goods that the Pre-Export finance had covered, so the proceeds of these exports together with the resulting forex gains should have been sufficient to cover these amounts, but it would appear that this sum was no longer available.

Now that the kiting had started, the use of the funds thus created should be followed.

The first time the kited cheques were diverted to Pan African Bank was on 31 March with Ksh. 500 million each from Goldenberg accounts at Delphis and Postbank Credit and Ksh. 800 million from its account at Exchange Bank. The total amount was then held by Pan African Bank as depositors' funds to strengthen its liquidity position.

On the same day with the Pre-Export Finance coming to an end CBK duly debited two bills to Exchange Bank's Account on 31 March, 1993, which totalled some Ksh. 4.5 billion, to the CBK/Exchange Bank account. As there were insufficient funds to cover this transfer, Exchange Bank should have been placed into liquidation. For reasons best known to itself CBK credited Exchange Bank's account with two credit notes for the same amount on this day so that the Bank remained solvent.

The next day, 1 April, two bills for Ksh. 1,967,964,702.20 and 1,968,815,806.75 respectively were debited to Exchange Bank's account. A credit note for the second amount was also raised which meant that Exchange Bank would only have to repay the first bill. To do this Exchange Bank raised a cheque for Ksh. 2.245 billion which it kited into the system.

The following day 2 April, two bills for Ksh. 2,477,888,350.70 and 2,480,231,874.35 respectively were debited to Exchange Bank's account. A credit note for the second amount was again raised which meant that Exchange Bank would have to repay the first bill.

Exchange Bank also knew that the previous day's kited cheques of Ksh. 2.245 billion would have to be repaid. To cover these amounts plus others in the system, Exchange Bank kited a cheque for Ksh. 6.2 billion.

Up until this time kited cheques had been passed through the Goldenberg Account at Exchange Bank. On 8 April an account in the name of Solarium Ltd was opened and all future cheque kiting was carried out in this account.

A cheque from Pansal (the company which purchased Pan African Bank) for a partial repayment of the CBK overdraft on Account No. 2 at Pan African Bank of Ksh. 1.2 billion on 5 April 1993 was paid from its overdraft at Exchange Bank. This overdraft was later cleared by Solarium from its cheque kiting activities. There was a further diversion of kited cheques, this time directly from the Solarium account at Exchange Bank to Pan African Bank of Ksh. 2.355 billion on 19 April, which, with some of the funds from the first transfer, initially used to improve Pan African's liquidity, was used to clear the CBK/Pan African Account No. 2 overdraft on the same day.

To achieve these levels of repayment to CBK, cheque kiting had reached alarming levels (some Ksh. 10 to 11 billion daily) and one source of previously used cheap finance, the Pre export financing facility, had been removed and could no longer be used, so another source of cheap finance had to be found or all four banks involved would collapse once the overnight kited money stopped circulating.

(iii) **Dollar Sales Contracts**

On 15 April, 1993, Goldenberg account at (i) Exchange Bank agreed to sell US$ 46 million to CBK and was duly credited with Ksh. 2,094,541,000.00 and (ii) Pan African Bank agreed to sell US$ 38 million to CBK and was duly credited with Ksh. 1,730,273,000.

On 26 April, 1993, Goldenberg accounts at (i) Exchange Bank agreed to sell US$ 28.5 million to CBK and was duly credited with Ksh. 1,698,041,400.00, (ii) Pan African Bank agreed to sell US$ 26.5 million to CBK and was duly credited with Ksh. 1,578,880,600.00, (iii) Delphis Bank agreed to sell US$ 19 million to CBK and was duly credited with Ksh. 1,132,027,600.00 and (iv) Trans National Bank agreed to sell US$ 19.3 million to CBK and was duly credited with Ksh. 1,149,901,720.00.

On 28 April, 1993, Goldenberg accounts at (i) Exchange Bank agreed to sell US$ 14.6 million to CBK and was duly credited with Ksh. 863,417,720.00, (ii) Pan African Bank agreed to sell US$ 26.7 million to CBK and was duly credited with Ksh. 1,578,989,940.00 and (iii) Postbank Credit agreed to sell US$ 29.3 million to CBK and was duly credited with Ksh. 1,732,749,260.00.

With the receipt of these amounts (some Ksh. 13.5 billion), cheque kiting tailed off and ceased altogether when Mr. Akrami left his position at Pan African Bank on 16 May, 1993, to be replaced by another Central Bank Manager (Pratul Shah), who over the next few weeks allowed the Bank to go into liquidation.

The use of the cheque kiting monies as outlined above would also explain why Goldenberg did not receive the interest as stated in the Price Waterhouse report. As they had used a significant proportion of the money themselves, as outlined above, there was a significantly smaller amount available to lend on the overnight market.

The forex sale amounts were credited at the respective banks to accounts of Goldenberg and its associated companies. The sum total was Ksh. 13.5 billion, more than enough to replace the pre export finance requirement of some Ksh. 4.5 billion as well as the Pan African overdraft, leaving a surplus of some Ksh. 4.5 billion to invest in short term Treasury (T) Bills over the Open Market Oprations (OMO) counter at CBK. The one advantage of investing in OMO treasury bills, rather than the normal weekly auction T Bills issued by CBK, was that whereas weekly issued T Bills were issued in the name of the investor, the OMO T Bills were issued in the name of CBK, making them virtually untraceable bearer bonds. The investment in T bills had to be short-term as the forex transactions could be reversed at any moment due to non-delivery of the contracted foreign exchange to CBK.

There was now the problem of how CBK would account for the non-delivered forex as its financial year end was approaching (30 June). CBK was already showing a loss of over Ksh. 6 billion and the auditors would have insisted on a provision for the non-delivered forex which would have increased the loss to some Ksh. 20 billion.

This was brought home to Goldenberg by CBK reversing the US$ 38 million with Goldenberg at Pan African Bank on 31 May, 1993. On this date CBK debited Pan African's account but Goldenberg, via their account at Exchange Bank, credited the CBK/Pan African account with exactly the same amount, thus saving Pan African Bank from immediate liquidation.

Exchange Bank now negotiated a further contract with CBK for the delivery, this time, of US$ 210 million being coincidentally some Ksh. 13.5 billion. This was credited to Exchange Bank's account in two tranches:

(a) US$ 100 million purportedly from Bank Indosuex-Sogem Aval Ltd. London on 21 June, 1993. On the same day that Exchange Bank was credited with this amount, CBK reversed the contracts of Exchange Bank of US$ 46 million, Pan African Bank's two contracts of US$ 26.5 and 26.7 million and Delphis Bank's US$ 19 million. In the case of the later two banks Exchange Bank transferred the exact amounts to repay the debits.

(b) US$ 110 million purportedly from Amex Bank London on 30 June, 1993. On the same day CBK reversed the two contracts with Exchange Bank for US$ 28.5 and 14.6 million, Postbank Credit's US$ 29.3 million and Trans National Bank's US$ 19.3 million. These amounts again, being covered by Exchange Bank for the other banks.

In both cases the credits, together totalling Ksh. 13.5 billion, were posted to the Goldenberg A/c No. 100001. Although the dollar amounts repaid total to more than the dollar amounts received, the devaluation of the Kenya Shilling in the period meant that the shilling amount was the same as that drawn in April.

CBK charged outstanding interest for the non-delivery by the banks, although each bank had been paid in Kenya Shillings the interest was calculated on the dollar amount using the dollar discounting rate ruling during the period of 3.72%. This method of interest calculation had provided the Goldenberg with very cheap finance. The interest rate if calculated for Kenya Shilling received would have been between 65 – 75%.

The US$ 210 million held in American Express Bank and Banque Indosuex Sogem Aval for CBK was investigated by a Bank of England official, Mr. A. D. Bates. His report for CBK submitted on 18 July, 1994 shows that this amount did not exist as such. Although there were credits to this value at these Banks which had been notified to CBK, there were also corresponding debits to the same value, which had the effect of cancelling each other out giving a nil balance for CBK at both of these banks.

When CBK reversed the entries for the US$ 210 million in August, the debit was not posted to Goldenberg's account but was carried by Exchange Bank thus inducing its own liquidation.

(iv) Conclusion

The cheque kiting was a smoke screen to cover the repayment of the outstanding Pre-Export finance as a consequence of the demand by the World Bank to close the facility and of the purchase of Pan African Bank to obtain the Grand Regency. Once the Kenya Shilling monies from the non-delivered foreign exchange contracts were received, cheque kiting tailed off and the surplus monies, from the sale of non existent forex, were invested in short-term, untraceable, OMO Treasury Bills. When tracing the Ksh. 13.5 billion, efforts should not concentrate on the end of June when it was posted to Exchange Bank, but to April when it was posted to the Goldenberg accounts at Exchange Bank and the other four Banks. The three months thus gained probably provided enough time for the repatriation of all monies obtained overseas or laundered through the local economy into clean assets.

As stated previously, three of the banks concerned in the "smoke screen" were then allowed in a very short time to pass into liquidation.

To the above figure of Ksh. 13.5 billion, additional funds for the gains on foreign exchange to the end of February of some Ksh. 5.8 billion and the outstanding Pre-Export Financing of Ksh. 4.45 billion should be added for tracing. These amounts were obtained between September 1992 and the end of March 1993 and subsequently must have been laundered through other financial outlets as they were not available at the time cheque kiting commenced. In addition, recovery of Ksh. 5.8 billion withdrawn from the P.M.G. account should also be pursued.

APPENDIX "N"

RECIPIENTS OF GOLDENBERG MONEY

A. Primary Recipients Units

	NAME OF RECEPIENT	AMOUNT RECEIVED	EXHIBIT NO.	REPLYING EXHIBIT
1	Goldenberg International Ltd.	35,322,354,287.90	81A	
2	Unigold Ltd.	9,345,446,775.00	81A	
3	Guerlain Investment Ltd.	8,497,476,200.00	81A	
4	Jewel Sagar Ltd.	8,505,152,000.00	81A	
5	Clearing & Forwarding Ltd.	14,712,000.00	81A	
6	Uhuru Highway Development	40,566,295.20	81A	
7	Marine Cargo Services Ltd.	10,316,820.55	81A	186 Pg.81
8	Alvik Joinex Ltd.	7,804,376.00	81A	
9	Supply Centre	1,811,501.00	81A	
10	Wasu Ltd.	2,735,439.00	81A	185 Pgs.26-91A
11	KurKan Ltd.	3,500,000.00	81A	
12	Tradecon Ltd.	1,000,000.00	81A	
13	Ron Chemicals	329,000.00	81A	
14	Shaka Films Ltd.	336,000.00	81A	
15	Bhailal Patel & Co. Advocates (Aebha Properties)	10,529,171.55	81B	90X Pgs.102 - 117
16	M M Chaudry Advocates (Famutex Ltd.)	2,300,000.00	81B	186 Pg. 80
17	Chapley & Barret Advocates (Aebha Properties)	13,196,718.85	81B	90X Pgs.15-26
18	Pandya & Talati Advocates (Marine Cargo Services Ltd.)	248,955.55	81B	186 Pg. 81
19	Mutula Kilonzo & Co. Advocates (Pansal/PAB transaction fees)	2,175,000.00	81B	185 Pg.23
20	Kilonzo&Co./Shapley&BarretAdvo-cates (PAB purchase by Pansal)	783,000,000.00	81B	185 Pg.23
21	Maneker & Herrmann Advocates (PAB purchase by Pansal)	208,000,000.00	81B	185 Pg.23
22	Kaplan & Stratton Advocates (PAB purchase by Pansal)	575,000,000.00	81B	90X Pg.41
23	Hamilton Harrison & Mathews Advocates(Dolphin Man. Services)	1,145,000,000.00	81B	90X Pgs. 29-30
24	Esmail & Esmail Advocates (HZ & Company)	78,461,588.96	81B	90X Pg. 36
25	Rustam Hira Advocates (Halai Developers)	596,839.00	81B	90X Pg. 46
26	Ismail & Ismail Advocates (J.C Kulei & K.Pattni)	26,000,000.00	81B	90X Pg. 36
27	Ombija Wasuna & Co. Advocates	3,375,000.00	81B	
28	Waruhiu & Muite Advocates	49,153.25	81B	

29	Gachora & Co. Advocates	2,400,000.00	81B	
30	A Schofield & Kassamani Adv.	2,944,650.00	81B	
31	Kabaru & Co. Advocates	19,692,000.00	81B	
32	Trust Bank Ltd.	4,321,761,110.25	81C	146 Pgs.5 -7
33	Trust Finance Ltd.	5,600,000.00	81C	
34	Post Bank Credit	7,289,254,551.40	81C	142
35	Transnational Bank Ltd. US Dollars 680,000 - Ratan/Pattni	1,588,525,000.00	81C	90Y Pgs.388-411
36	Delphis Bank Ltd.	5,966,784,285.00	81C	90Y Pgs.126-127
37	Dolphine Investment Ltd.	562,850,000.00	81C	
38	Mutonga Investments Ltd.	130,000.00	81C	
39	Nyamangu Holdings	465,631,600.00	81C	177
40	Pan African Bank ltd.	23,888,526,940.00	81C	143
41	Tourist Paradise Investments Ltd.	9,100,000.00	81C	
42	China Trade Agencies	16,096,390,676.00	81D	
43	Panther Investments	19,046,808,563.00	81D	
44	Pwani Trading Agencies Ltd.	100,000.00	81D	186 Pg. 81
45	Marshalls East Africa Ltd.	10,101,763.00	81D	
46	InterMarket & Trade Africa Ltd.	30,000,000.00	81D	
47	Consultants & Marketing Africa Ltd.	30,000,000.00	81D	
48	United Touring Company	1,600,000.00	81D	
49	Strategic Consultants (Ketan Somaia)	512,000,000.00	81D	90Z Pg.161
50	Miwani Sugar Co.	8,500,000.00	81D	
51	Freight & Shipping Co. Ltd.	510,000.00	81D	186 Pg. 81
52	Instyle Furnishers Ltd.	1,117,000.00	81D	
53	Lima Ltd.	6,300,000.00	81D	
54	Mutonga Construction Ltd.	800,000.00	81D	186 Pg. 81
55	Lyod Masika Ltd.	1,941,970.00	81D	90Z Pg.110
56	Ostrich Company Ltd.	250,000.00	81D	186 Pg. 81
57	Camronic Ltd.	958,750,000.00	81D	
58	ViewPark Towers Ltd.	566,007.00	81D	
59	Katka Island	81,975,000.00	81D	185 Pg.4
60	General & Allied Kenya Ltd.	1,114,000.00	81D	
61	Chemusian Company Ltd.	13,000,000.00	81D	185 Pg.178
62	Karson Murlji & Company Ltd.	1,200,000.00	81D	
63	Manji Construction Company Ltd.	1,600,000.00	81D	
64	Transami Kenya Ltd.	3,600,000.00	81D	90Z Pg.138
65	Mugoya Construction	10,000,000.00	81D	90Z Pg.119
66	National Cereals Board	496,000.00	81D	
67	Milling Cooperation	378,825.00	81D & 154D	154X & 154LL
68	Seaforth Shipping (K) Ltd.	4,654,049.00	81D	

69	Farouk Adam & Co Advocates	1,758,144.00	81D	
70	Maasai Ostrich Farm	1,000,000.00	81D	
71	Kenpoly Manufacturers Ltd.	1,530,000.00	81D	90Z Pg.83 -91
72	Muthama Gemstones	33,680,271.00	81D	90Z Pg.121
73	Kenya Tea Packers Ltd.	5,500,000.00	81D	90Z Pg.97
74	Kenya Airways Ltd.	3,000,000.00	81D	
75	Caltex Oil Kenya Ltd.	4,000,000.00	81D	
76	Booth Manufacturing Africa	2,808,575.20	81D	
77	Crown Paints	1,834,762.90	81D	
78	Power Technics Ltd.	111,705.00	81D	
79	Specialised Power Sys. Ltd.	946,259.00	81D	90Z Pg.143
80	Citimart (K) Ltd.	4,000,000.00	81D	90X Pg. 60
81	Remco Ltd.	10,058,660.50	81D	
82	Athi River Mining	5,385,954.20	81D	90Z Pg.25&26
83	Sietco	16,417,516.00	81D	
84	Brass & Allied	657,736.90	81D	
85	Multiphasic Export Co. Ltd.	15,000,000.00	81D	
86	Victoria Distributors	58,281,383.25	81D	
87	Jambo Biscuits	1,677,277.45	81D	
88	V A Halai & Co. Ltd.	28,059,483.75	81D	
89	Halai Developers Ltd.	562,355.85	81D	
90	Waterways Ltd.	1,750,000.00	81D	
91	Wood Products Ltd.	3,247,149.10	81D	
92	Shamash Brothers	1,480,000.00	81D	
93	Nationwide Elect. Ind. Ltd.	1,159,240.35	81D	
94	E D & F Maw (EA) Ltd.	17,112,375.00	81D	
95	Gen. Aluminium Fabr. Ltd.	1,757,433.00	81D	
96	Diamond Coffee Co. Ltd.	5,277,250.00	81D	
97	Kenya National Trading Corp	6,972,400.00	81E	154W
98	Pattni Brotherhood	170,000.00	81F	
99	St. Patricks House	2,598,750.00	81F	
100	World Vision	6,625,000.00	81F	90W Pg. 21
101	Divine World Missionaries	1,400,000.00	81F	
102	Diocese of Kitui	594,500.00	81F	
103	Missionary of Africa	4,668,900.00	81F	
104	Crescent of Hope	7,800,000.00	81F	
105	Daksha B.Rana	530,000.00	81G	
106	Mukesh Vaya	1,000,000.00	81G	
107	Bernard Metzger	1,050,000.00	81G	
108	Hon. Said Hemed Said	4,000,000.00	81G	
109	Philip Ochieng	250,000.00	81G	

110	Abraham Kiptanui	3,000,000.00	81G	185 Pg. 14
111	S.Mohammed	125,700,850.00	81G	
112	M.S. Mohammed	73,720,000.00	81G	
113	Gideon Moi	8,000,000.00	81G	185 Pg.1
114	Philip K. Moi	1,421,384.00	81G	185 Pg. 16
115	Bharat Shah	10,000,000.00	81G	Verbatim Pg. 6887
116	Bhupendra P.Shah	8,000,000.00	81G	Verbatim Pg. 6890
117	K.M. Pattni	55,702,041.80	81G	
118	Shimba Kay	1,384,405,631.00	84	162 Pg.3
119	Arthur Abongo Ndegwa	2,000,000.00	133A	133 Pg.14
120	Mark Too	1,500,000.00	154D	
121	Habib Omar Kongo	4,448,000.00	154D	
122	Ondieki Evans	18,050,000.00	154D	
123	Geoffrey Mecha	750,000.00	154D	
124	Professor George Eshiwani	12,000,000.00	142	
125	Mutula Kilonzo Advocates	7,000,000.00	142	185 Pg. 19
126	National Cereals Board	5,048,609.00	142	
127	Lima Ltd.	2,860,500.00	142	
128	Transnational Bank Ltd.	1,700,000.00	142	
129	Taptok Kenya Ltd.	200,000.00	142	
130	Standard Chartered Bank Ltd.	500,000.00	142	
131	Mea Ltd.	6,000,000.00	142	
132	Ametek Kenya Ltd.	640,000.00	142	
	SUB-TOTAL	147,546,787,209.71		

B. Secondary Recipients

	NAME OF RECEPIENT	AMOUNT RECEIVED	EXHIBIT NO.	REPLYING EXHIBIT
1	ABN Amro Bank	77,947,015.80	81C	
2	Akiba Loans & Finance Ltd.	482,000.00	81C	
3	Arab Africa Finance Ltd.	20,167,500.00	81C	
4	Bank of India Finance Ltd.	985,000.00	81C	
5	Banque Indosuez (Msa)	9,750,000.00	81C	
6	Banque Indosuez	673,278,728.40	81C	
7	Barclays Bank	18,519,410.00	81C	
8	Biashara Bank (Sayed Aslam Razak)	28,340,500.00	81C	90Y Pg.50
9	Bullion Bank Ltd. (Kshs.12.7 Million - Bharat Shah)	24,520,000.00	81C	90Y Pgs.54&55
10	Bullion Finance Ltd.	4,317,750.00	81C	
11	Central Bank	2,120,917,022.15	81C	
12	Cera Investments Ltd.	2,500,000.00	81C	
13	Citi Bank N A Nairobi	83,585,550.00	81C	159
14	Citi Bank New York	841,446,379.50	81C	

15	Citi Finance Ltd.	51,295,000.00	81C	90Y Pg.81
16	Commercial Bank of Africa Ltd.	23,015,500.00	81C	90Y Pgs.105 - 108
17	Consolidated Bank Ltd.	23,495,898.00	81C	90Y Pg.112
18	Consolidated Finance Ltd.	2,500,000.00	81C	
19	Credit & Commerce Finance Ltd.	328,230,700.00	81C	
20	Credit Kenya Ltd.	128,569,138.70	81C	
21	Dyer & Blair Ltd.	280,005,130.80	81C	
22	East African Building Society Ltd.	170,000.00	81C	
23	Equatorial Finance Company Ltd.	162,850,541.00	81C	
24	Family Finance Building Society Ltd	7,420,000.00	81C	
25	First American Bank Ltd.	184,927,668.25	81C	90Y Pg.148-153
26	Francis Thuo & Partners Ltd.	143,192,389.30	81C	90Y Pg.154-158
27	Grindlays Bank Ltd.	2,851,325,653.15	81C	
28	Guilders International Finance Ltd.	780,000.00	81C	
29	Habib Bank A G Zurich	5,668,462.00	81C	90Y Pgs.163-167
30	Habib Kenya Finance Ltd.	38,714,300.00	81C	
31	Investments & Mortgages Ltd.	50,000,000.00	81C	90Y Pg. 50
32	Kenya Commercial Bank	54,225,500.00	81C	
33	Lake Credit Finance Ltd.	66,742,707.85	81C	
34	Middle East Bank Ltd.	30,755,000.00	81C	90Y Pgs.208-215
35	Mpata Investments Ltd.	1,597,125.00	81C	90Y Pg.219
36	P.C.C. Ltd.	315,571,602.00	81C	
37	Prime Bank Ltd.	36,408,586.25	81C	
38	Prime Capital & Credit Ltd.	266,961,000.00	81C	90Y Pg.296-313
39	Standard Chartered Bank Ltd.	11,396,500.00	81C	90Y Pgs.374-387
40	Standard Chartered Finance Serv.	4,785,900.00	81C	90Y Pg.374
41	Trinity Prime Investment Ltd.	21,500,000.00	81C	
42	Victoria Finance Company Ltd.	8,360,875.00	81C	
43	Transroad Ltd.	2,217,459.00	81D	
44	Kenya Lampshades Ltd.	104,700.00	81D	
45	Philips Kenya Ltd.	318,452.00	81D	
46	MiniGold Ltd.	100,000.00	81D	
47	Kasiwa Ltd.	6,000,000.00	81D	
48	Overseas Trading Company Ltd.	648,767.00	81D	
49	Finance & General Auction Ltd.	9,867,725.00	81D	
50	Electric Contact Ltd.	250,000.00	81D	
51	Woodvale Holdings Kenya Ltd.	165,700.00	81D	
52	Shah Motors Ltd.	1,555,000.00	81D	
53	Silpack Industries Ltd.	267,800.00	81D	
54	Haidery T T & Car Hire Ltd.	2,791,073.00	81D	
55	Kirit	1,176,000.00	81D	

56	TumBul Ltd.	5,500,000.00	81D	
57	African International Airlines Ltd.	3,192,300.00	81D	
58	Associated Motors Ltd.	2,481,800.00	81D	
59	CMC Motor Group	1,531,810.00	81D	
60	Parklands Service Station	960,000.00	81D	
61	Tarrazo Builders Ltd.	125,000.00	81D	
62	Motherland Motors	2,925,000.00	81D	
63	Car Stanyer Gitau & Co. Ltd.	800,000.00	81D	
64	Jirani Agencies	4,350,000.00	81D	
65	General Hardware Kenya Ltd.	800,000.00	81D	
66	Classic Motors Ltd.	1,100,000.00	81D	
67	Hollywood Motors Ltd.	200,000.00	81D	
68	Bruce Trucks & Equipment Ltd.	3,540,875.00	81D	
69	Dhanji Vaghji & Co. Ltd.	1,100,000.00	81D	
70	Car Dealers 1979 Ltd.	1,535,000.00	81D	
71	Triple A. Motors	1,860,000.00	81D	
72	Reuters Ltd.	330,904.00	81D	
73	Sunflag Textiles Ltd.	546,123.30	81D	
74	M K Dealers	83,500,000.00	81D	
75	Warren Concrate Ltd.	200,000.00	81D	
76	Diplomatic Motors	2,455,000.00	81D	
77	Thika Cloth Mills Ltd.	750,000.00	81D	
78	Wrap & Pack Ltd.	2,299,820.00	81D	
79	Eldama Kenya Ltd.	205,022.00	81D	
80	Chemhard Kenya Ltd.	420,000.00	81D	
81	Peer Mohammed Kenya Ltd.	138,040.00	81D	
82	Doshi Ceramics Ltd.	582,549.00	81D	
83	Doshi Hardware	300,000.00	81D	
84	Safidika Ltd	2,231,100.00	81D	
85	Market Service Station	3,015,000.00	81D	
86	Dakawou Transport	100,000.00	81D	
87	Ruaraka Sports Club	500,000.00	81D	
88	Kobil Petroleum Ltd.	382,967.00	81D	
89	Concord Car Ltd.	725,000.00	81D	
90	Lords Pharmacuticals	315,750.00	81D	
91	Mitsuba Auto Spares Ltd.	100,000.00	81D	
92	Auto World Ltd.	1,025,000.00	81D	
93	Camel Trail Safaris	320,000.00	81D	
94	Plysales Kenya Ltd	157,000.00	81D	
95	Express Machinery & Spares Ltd.	603,097.60	81D	
96	Famous Decorators	745,780.00	81D	

97	Patmar Traders (K) Ltd.	167,184.00	81D	
98	Happy Tots Ltd.	13,900,000.00	81D	
99	Biashara Master B&BB	250,000.00	81D	
100	Synresins Ltd.	200,000.00	81D	
101	Pan African Syndicate Ltd. (Msa)	885,600.00	81D	
102	Alba Petroleum Ltd.	53,984,000.00	81D	
103	Nanak Body Builders Ltd.	1,605,000.00	81D	
104	Switchgear & Control	280,000.00	81D	
105	Emco Steel Works (K) Ltd.	200,000.00	81D	
106	Dudley Realtors Ltd.	162,000.00	81D	
107	Guarantee & Discounts Ltd.	287,757.45	81D	
108	Kangere Motors Ltd.	184,200.00	81D	
109	Enterprise Machine Tools Ltd.	565,000.00	81D	
110	Merc Ltd.	7,479,500.00	81D	
111	Samco Ltd.	3,180,000.00	81D	
112	Royce Ltd	22,139,600.00	81D	
113	Text Book Centre	170,000.00	81D	
114	Stellascope Trading Co. Ltd.	400,000.00	81D	
115	Diners Finance Ltd.	210,483.70	81D	
116	Toyo Ltd.	300,000.00	81D	
117	Harban Singh Associates	450,000.00	81D	
118	E A Portland Cement Co. Ltd.	162,700.50	81D	
119	Amratlal Stores Ltd.	145,000.00	81D	
120	Midco International	400,000.00	81D	
121	Kid's Camp	768,000.00	81D	
122	Digitel Communications Systems	339,190.00	81D	
123	Station Square Serv.Station Ltd.	1,380,000.00	81D	
124	Spares & Industries Ltd.	530,000.00	81D	
125	Portway Stores	300,000.00	81D	
126	Davis & Shirtliff	127,500.00	81D	
127	Karachiwalla (Nairobi) Ltd.	145,350.00	81D	
128	Davalal Bhanji & Sons Ltd.	115,000.00	81D	
129	Agile (Kenya) Ltd.	4,650,000.00	81D	
130	Carnaud Metal Box	6,848,000.00	81D	
131	Milligan & Co. Ltd.	199,512.00	81D	
132	M & Y Garage	2,200,000.00	81D	
133	General Cargo Services Ltd.	600,000.00	81D	
134	Khetshi Samat & Bros	215,500.00	81D	
135	Reliable Elect. Engineers Ltd.	111,250.00	81D	
136	Bawa Singh Arjun Singh & Co.	1,829,115.30	81D	
137	M P Shah Hospital	145,800.00	81D	

138	Nimrod Africa Ltd.	131,550.00	81D	
139	Indusrial Automation	1,697,767.50	81D	
140	Integrated Security Services Ltd.	129,000.00	81D	
141	Werrot & Co. Ltd.	841,135.00	81D	
142	Stronghold Constn. Co.	860,948.00	81D	
143	Decora Nova	552,162.90	81D	
144	Lipton Engineering	1,524,300.00	81D	
145	Basco Products	642,000.00	81D	
146	Saam Kenya Ltd.	300,000.00	81D	
147	Despro Polymers	168,000.00	81D	
148	Velji Hirji & Co.	1,500,000.00	81D	
149	M/s Spray Tex	235,951.50	81D	
150	Molecular Maintenance Ltd.	868,518.00	81D	
151	J S Navi	481,676.00	81D	
152	Coronation Builders	788,436.00	81D	
153	Sa..aa Art Promotions	131,000.00	81D	
154	Gallery Watatu	491,000.00	81D	
155	Designplus Ltd.	150,000.00	81D	
156	Kassim Lakha Abdulla & Co.	548,700.00	81D	
157	G D & Bros Ltd.	1,739,000.00	81D	
158	Pretty Blossom	187,209.00	81D	
159	Richfield Eng. Ltd.	257,075.00	81D	
160	J B Emmett Constn. Co. Ltd.	955,099.00	81D	
161	Brollo (K) Ltd.	1,242,509.25	81D	
162	The Garden Centre Ltd.	100,000.00	81D	
163	Aquatronics Ltd.	2,457,500.00	81D	
164	Permanent Secretary -Ministry of Education	3,000.00	81E	
165	Permanent Secretary - Treasury	1,129,000.00	81E	
166	Principal Immigration Officer	110,000.00	81E	
167	Comm. For Mines & Geology	2,065,000.00	81E	
168	Commissioner of Lands	1,461,110.00	81E	
169	Nairobi City Commission	187,410.00	81E	
170	Collector of Stamp Duty	1,523,530.00	81E	
171	Provincial Commissioner	21,450.00	81E	
172	Registrar of Hire Purchase	20,000.00	81E	
173	Customs & Excise Mombasa	9,000,000.00	81E	
174	Kenya Ports Authority	3,617,490.00	81E	
175	T.S. Jandu	2,500,000.00	81G	
176	Premji	200,000.00	81G	
177	Albert S W Rhee	1,000,000.00	81G	

178	Udam Kumar M. Desai	9,312,000.00	81G	
179	Mohammed Haji Abdullah	596,705.00	81G	
180	Bipin Rathod	520,000.00	81G	
181	Manyua Manguye	2,460,000.00	81G	186 Pg. 38
182	Bashir Ahmed chaudhry	9,000,000.00	81G	
183	Haidera	2,580,000.00	81G	
184	Mohammed Sheikh Hajo	15,322,428.00	81G	
185	K. Laxman Chantralia	300,000.00	81G	
186	Mohammed H.S. Noor	2,100,000.00	81G	
187	J.Migunda Alili	1,656,875.00	81G	
188	John Muthii Muriuki	150,000.00	81G	
189	M M Bashir	393,750.00	81G	
190	J. Maina Waiguru	1,771,200.00	81G	
191	Simon Wambua Muli	433,800.00	81G	
192	Omar I. Sheikh Hussein	14,782,067.00	81G	
193	Omar Ibrahim	2,919,720.00	81G	
194	Salahuddin	361,500.00	81G	
195	Mukesh Shah	550,400.00	81G	
196	K.K. Shah	27,658,500.00	81G	
197	S.K. Kuria	13,900,000.00	81G	185 Pg.27
198	M.C. Pandya	680,500.00	81G	
199	Amos Githaiga Gachungi	100,000.00	81G	
200	I.K. Shah	2,153,250.00	81G	
201	Sanjiv Baga	1,125,000.00	81G	
202	John Karinania Gatobu	215,000.00	81G	
203	Dr. M C Dholakia	775,000.00	81G	
204	Mehboob Esmail Jamal	500,000.00	81G	
205	Karim Jamal	687,500.00	81G	
206	Kamal Shah	2,534,000.00	81G	
207	Susan Wangui/Jerioth Wangu	5,000,000.00	81G	185 Pg.27
208	Geofrey Kimaita	800,000.00	81G	
209	Samson Wangiri Mahugu	1,085,000.00	81G	
210	Lionel Switer	44,000,000.00	81G	
211	S C L Patel Somak	200,000.00	81G	
212	Aroon Samani	116,800.00	81G	
213	J.J. Ladha	3,825,000.00	81G	
214	Inder Singh	1,607,400.00	81G	
215	Olivia Ndangire Mulanga	147,440.00	81G	
216	Tom Kosso Mbatha	2,000,000.00	81G	
217	John Ngumi	110,000.00	81G	
218	Francis N. Mirango	1,600,000.00	81G	

219	Peter K. Fairhurst	187,000.00	81G	
220	P R Rao	170,000.00	81G	
221	Charles D.M. Matingi	460,000.00	81G	
222	Juma N. Ogolla/ Rose Mijo	4,437,500.00	81G	
223	Pravin Kumar Pitrola	1,100,000.00	81G	
224	Beatrice Wairimu Mwangi	250,000.00	81G	
225	Ushar Patel	425,000.00	81G	
226	R H Raja	150,000.00	81G	
227	Hon. Moses Wetangula	150,000.00	81G	
228	J D Fatama	135,000.00	81G	
229	Mrs V M Staussi	330,000.00	81G	
230	M P Thakar Singh	335,000.00	81G	
231	George K Kirui	110,000.00	81G	
232	P N Otundo	200,000.00	81G	
233	Fowad Salim Mohammed	1,000,000.00	81G	
234	Dr. Francis Odil	1,520,000.00	81G	
235	John De Boer	780,000.00	81G	
236	F Mohammed/Amrish Karaiya	180,000.00	81G	
237	G K Kinoti	500,000.00	81G	
238	Ashik M Rai	720,000.00	81G	
239	Ismael E Parpia	475,000.00	81G	
240	Henry Njiru Nyaga	329,175.00	81G	
241	Wilson Kimani Kagambo	827,400.00	81G	
242	Jacob Mukame Mahemba	797,400.00	81G	
243	Gatitu Ngunjiri Wachira	850,000.00	81G	
244	Bwelenska Makokha	500,000.00	81G	
245	Patrick Ndwiga Njoka	400,000.00	81G	
246	Vincent Odera Opany	747,400.00	81G	
247	Francis Wambugu Gathiru	400,000.00	81G	
248	Nderitu Gachuru	1,000,000.00	81G	
249	P N Nganga	250,000.00	81G	
250	Mrs. Hinga Ann Mumbi	373,000.00	81G	
251	Lawrence Kariuki Mwangi	410,000.00	81G	
252	P Vanmal	850,000.00	81G	
253	Nital Shah	565,000.00	81G	
254	Vincent M Laswai	6,145,673.40	81G	
255	Issac N Njau	101,500.00	81G	
256	Muhsin Aballa Mbarak	5,928,392.00	81G	
257	Gunner Schultzberg	153,000.00	81G	
258	Albert Codeiro	10,532,750.00	81G	
259	Gabriel Mbogo Mweha	790,000.00	81G	

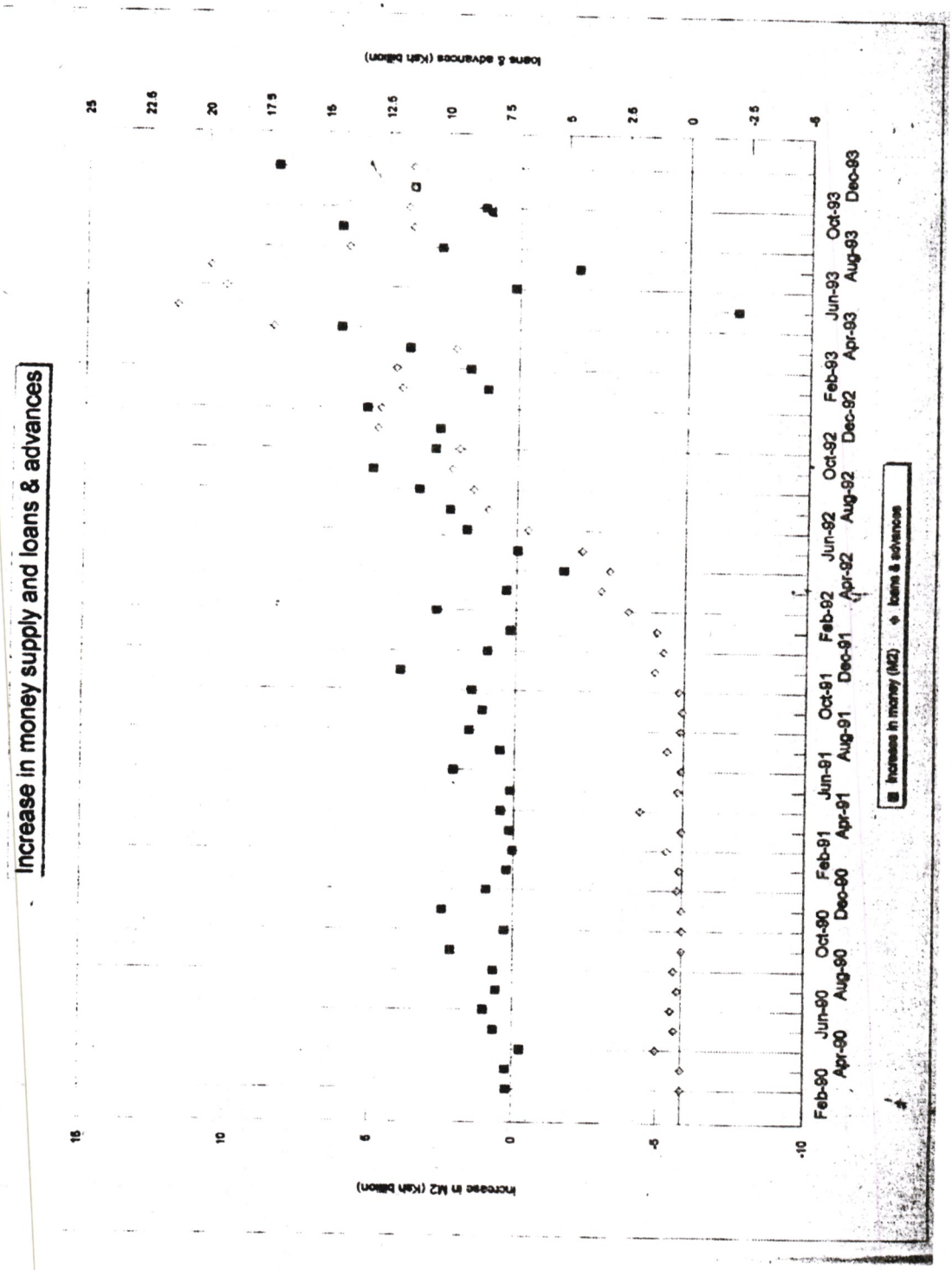
260	Godfrey Kyobe	416,500.00	81G	
261	Alhusein Karim	172,500.00	81G	
262	Andrew Nganga	5,629,190.00	81G	
263	Kiran	200,000.00	81G	
264	Sande Johnnie Paddy	420,000.00	81G	
265	Charles Njendu	168,000.00	81G	
266	Sanjit Pramak	2,700,000.00	81G	
267	Fahmi Abdalla	2,816,208.00	81G	
268	Jitendra S.Danyabal Tailor	973,503.00	81G	
269	Amin Nashir	3,148,000.00	81G	
270	Anduk Mohammed Nazir	240,000.00	81G	
271	Mukulchandra J Patel	100,700.00	81G	
272	Pankaj Kansara	413,000.00	81G	
273	Faiyaz Kurji	7,335,050.00	81G	
274	A S Karim/ F M Kurji	8,514,450.00	81G	
275	Amos Njoroge	480,000.00	81G	
276	Mwamburi Edward Mghanga	1,210,000.00	81G	
277	James Alfred Obita	312,000.00	81G	
278	Poonam Kaur Inder	3,360,000.00	81G	
279	V.D Shah	1,350,000.00	81G	
280	Bharat Bhardwaj	213,325.00	81G	
281	Kantilal Karshandadgharhada	241,868.00	81G	
282	Johnson N. Muthama	5,500,000.00	81G	
283	Ajay S.Tailor	928,609.00	81G	
284	T P Bhatt	272,250.00	81G	
285	Samuel Mwangi Mucina	152,173.00	81G	
286	Harpal Singh Patti	350,000.00	81G	
287	George Mbugua Gachichio	197,827.00	81G	
288	Rajesh Bhundia	2,677,500.00	81G	
289	Jagdish H. Chanhan	225,000.00	81G	
290	Karim Alhussein S	1,648,618.00	81G	
291	Naran M Ratna	875,000.00	81G	
292	Chris Kirubi	5,000,000.00	81G	
293	Lattif Kassam Jiwa	5,922,000.00	81G	
294	Sadrudin Jiwa	9,350,000.00	81G	
295	Sherali Kassam Jiwa	14,049,172.00	81G	
296	B.S. Shah	400,000.00	81G	
297	S D Shah	160,000.00	81G	
298	Harrider Singh Kulal	157,500.00	81G	
299	Mohamed Haji A Sheikh	370,000.00	81G	
300	Salahaddin Ahmed	512,150.00	81G	

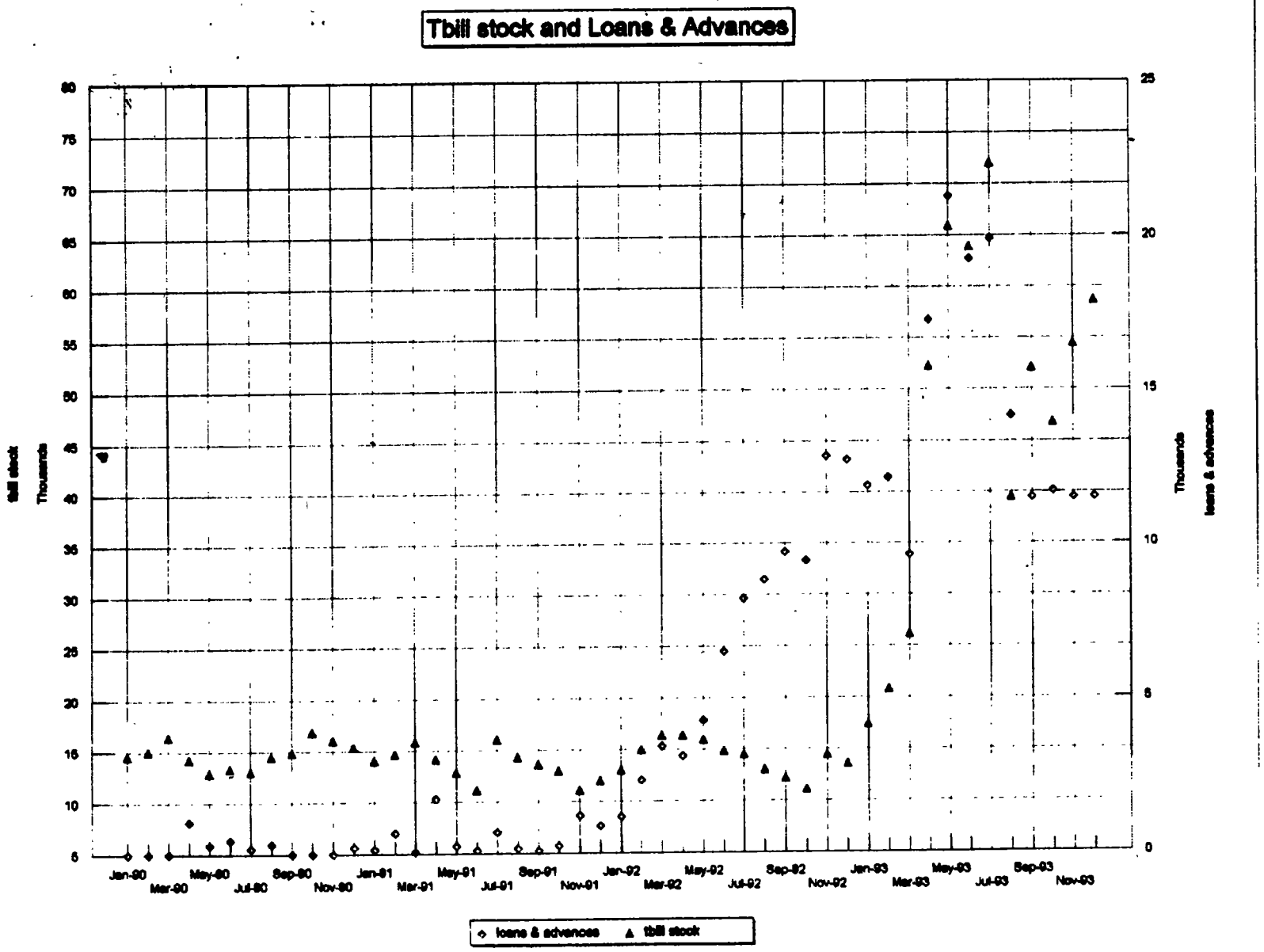
301	Jenifer Burger	146,000.00	81G	
302	Falmo Veikko	740,000.00	81G	
303	Abdul Aziz Mohammed	6,026,325.00	81G	
304	Abdillah S Mohammed	150,000.00	81G	
305	Saifula K. Jina Jeraf	2,800,000.00	81G	
306	Ibrahim M. Osman	1,000,000.00	81G	
307	Mohammed A Maalim	949,000.00	81G	
308	Mohammed O. Abdulle	500,000.00	81G	
309	M.M. Al-Alaamiry	1,320,000.00	81G	
310	Mrs Savita	137,000.00	81G	
311	Sibtain Shivji	217,800.00	81G	
312	Jitendra H. Sanghani	112,678.05	81G	
313	Baba Haji	375,022,876.00	81G	
314	Manesh K. Dhakan	6,558,684.00	81G	
315	Jitedra L Dedhia	23,099,500.00	81G	
316	Suresh L Ghedia	3,281,790.00	81G	
317	B M Kassim	435,000.00	81G	
318	Hassan Haji Abdi Latif	3,676,000.00	81G	
319	Jitendra Govind Rabadia	132,702,610.00	81G	
320	Kantilal Rabadia	287,640.00	81G	
321	Ibrahim Haji Warfa	1,000,000.00	81G	
322	Sayed Aslam Razak	136,979,480.00	81G	
323	R.P Mavji	14,400,000.00	81G	
324	Sul Krishna	46,350,000.00	81G	
325	Nazir Manji	105,215,000.00	81G	
326	Farida Kasule	3,651,000.00	81G	
327	Lemnin Kain	955,500.00	81G	
328	Murji Devshi Gondria	36,130,270.00	81G	
329	Mrs. N. Kaur	63,650,000.00	81G	90 AA Pgs. 40 - 60
330	Equitorial Finance A/c B N Shah	1,000,000.00	81G	
331	Yusuf Hji Ahmed	2,703,897.00	81G	
332	Salah Sharif Ahmed	384,462.00	81G	
333	S. Shah	11,432,000.00	81G	
334	Abdul Majid	550,000.00	81G	
335	M.A. Mohamud	33,369,711.00	81G	
336	M.P. Kethani	10,700,000.00	81G	
337	Chandulal C Shah	250,000.00	81G	
338	Muhsin Abdallah Mbarak	1,311,856.00	81G	
339	Karim AlHussain	309,600.00	81G	
340	Jemal Haji Ahmmed/M A Mahamud	4,581,096.00	81G	
341	Abdul Musa		81G	

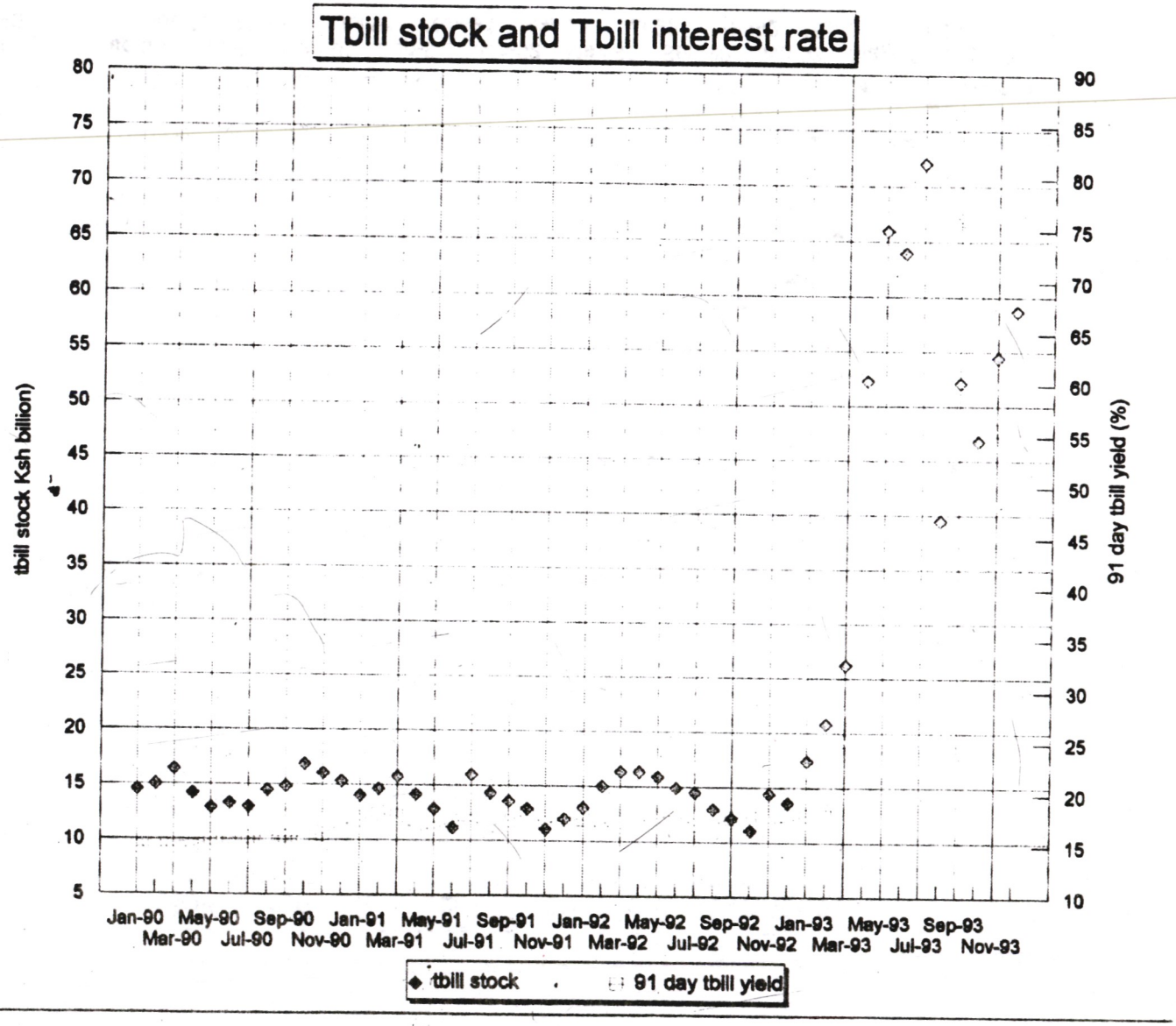
		36,000,000.00		
342	Alio Ibrahim Hassan	3,000,000.00	81G	
343	Nishil Shah	1,064,500.00	81G	
344	Prabhndas Giovihiji Pattni	4,000,000.00	81G	
345	P.K. Mwaura	2,300,000.00	81G	
346	Naeem khan	916,500.00	81G	
347	Adan Intalo Ali	1,950,195.00	81G	
348	Abdinasir Ali Abdulahi	796,826.50	81G	
349	Asha Hansi/Mohammed Mouhe	800,000.00	81G	
350	Yusuf Sharif Abdullahi	817,650.00	81G	
351	J Ruparel	144,000.00	81G	
352	Sanjay Kotecha	885,000.00	81G	
353	B. Kotecha	2,275,700.00	81G	
354	E. K Tallam/ I. C Bartocho	118,199.20	81G	
355	K K Kinuthia	210,501.15	81G	
	SUB-TOTAL	10,736,789,382.45		
	GRAND TOTAL	158,283,576,592.16		

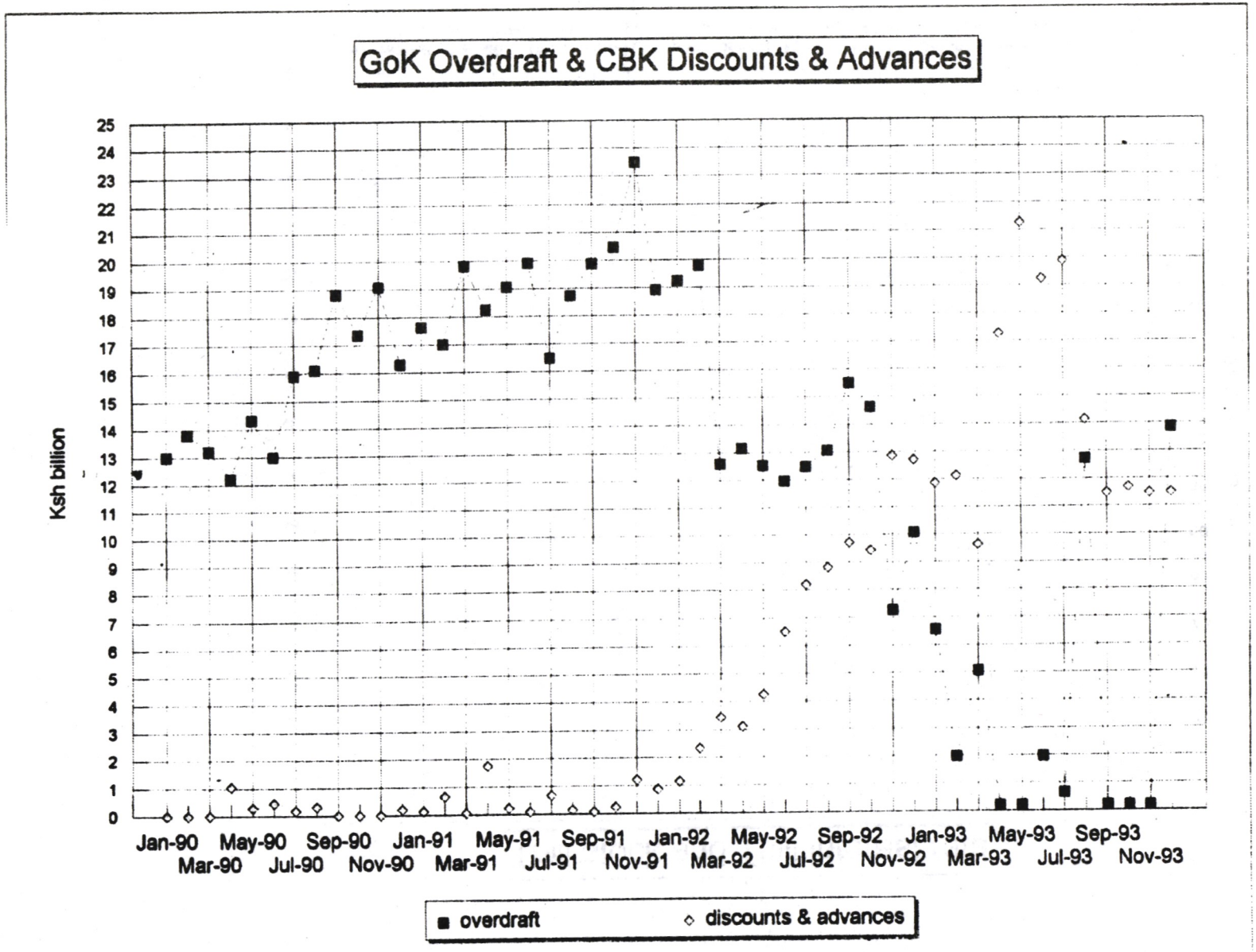
APPENDIX "P"

FINANCIAL GRAPHS

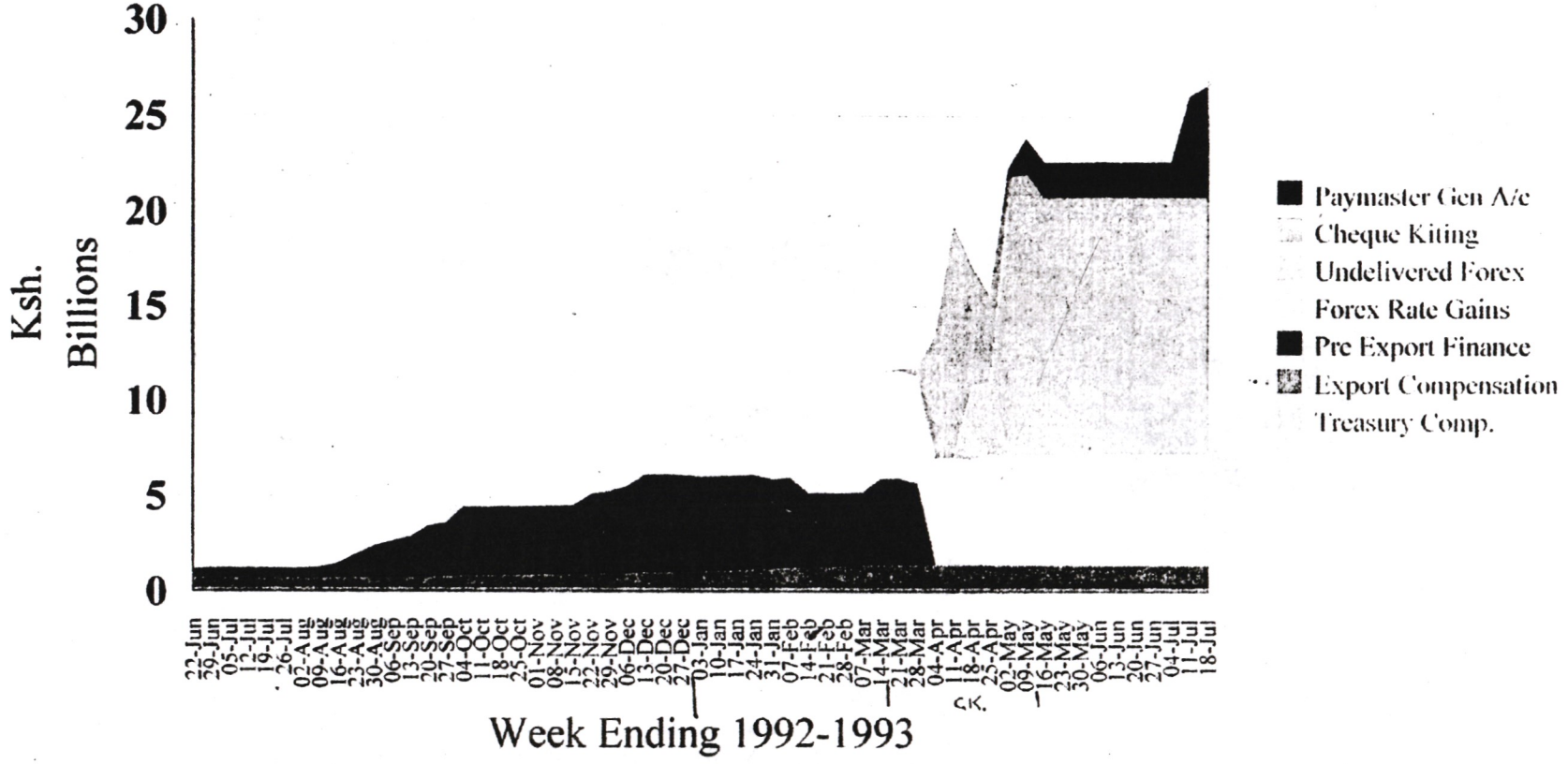


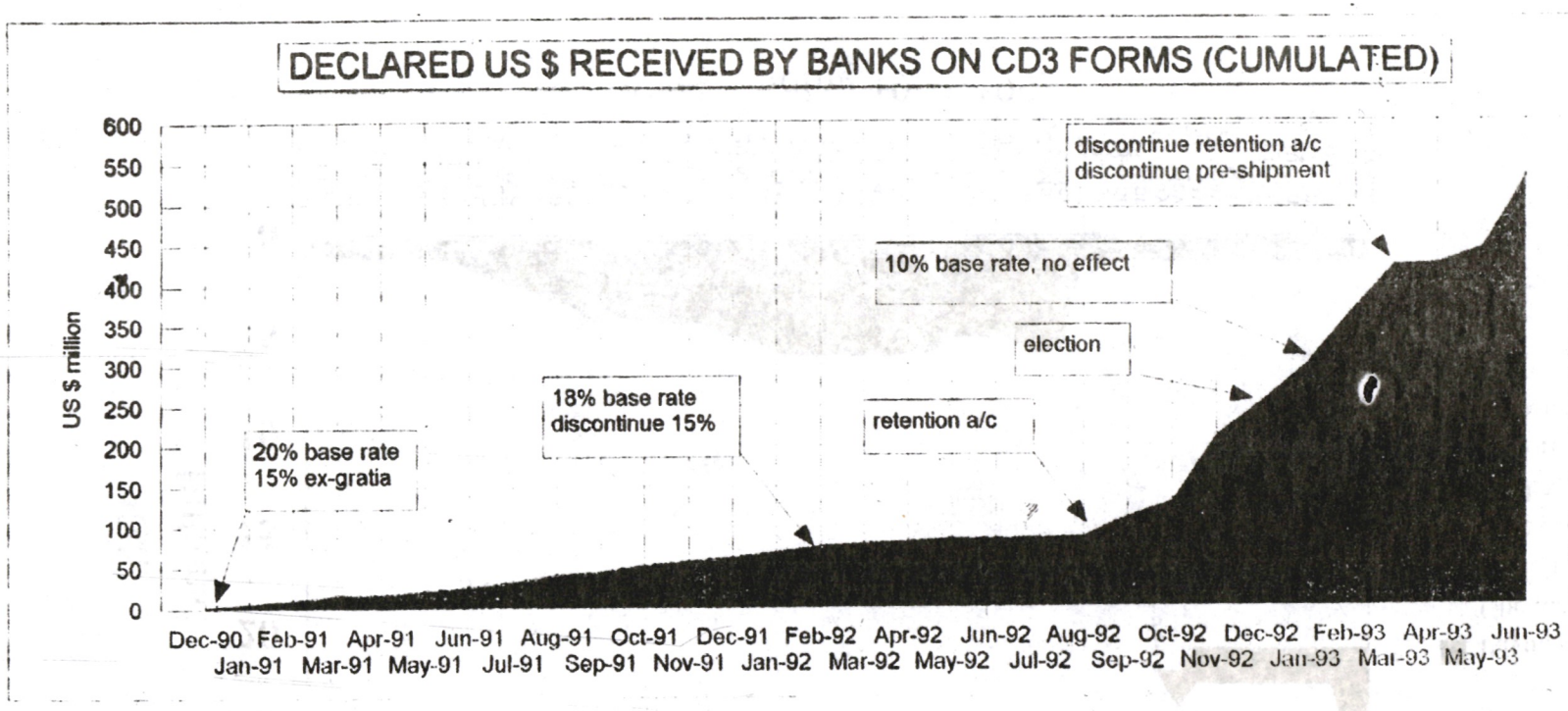

Tbill stock and Loans & Advances
tbill stock
Thousands
loans & advances
Thousands
80
75
70
65
60
55
50
45
40
35
30
25
20
15
10
5
25
20
15
10
5
0
Jan-90
Mar-90
May-90
Jul-90
Sep-90
Nov-90
Jan-91
Mar-91
May-91
Jul-91
Sep-91
Nov-91
Jan-92
Mar-92
May-92
Jul-92
Sep-92
Nov-92
Jan-93
Mar-93
May-93
Jul-93
Sep-93
Nov-93
loans & advances
tbill stock


Tbill stock and Tbill interest rate
tbill stock Ksh billion)
91 day tbill yield (%)
80
75
70
65
60
55
50
45
40
35
30
25
20
15
10
5
90
85
80
75
70
65
60
55
50
45
40
35
30
25
20
15
10
Jan-90 May-90 Sep-90 Jan-91 May-91 Sep-91 Jan-92 May-92 Sep-92 Jan-93 May-93 Sep-93
Mar-90 Jul-90 Nov-90 Mar-91 Jul-91 Nov-91 Mar-92 Jul-92 Nov-92 Mar-93 Jul-93 Nov-93
tbill stock
91 day tbill yield

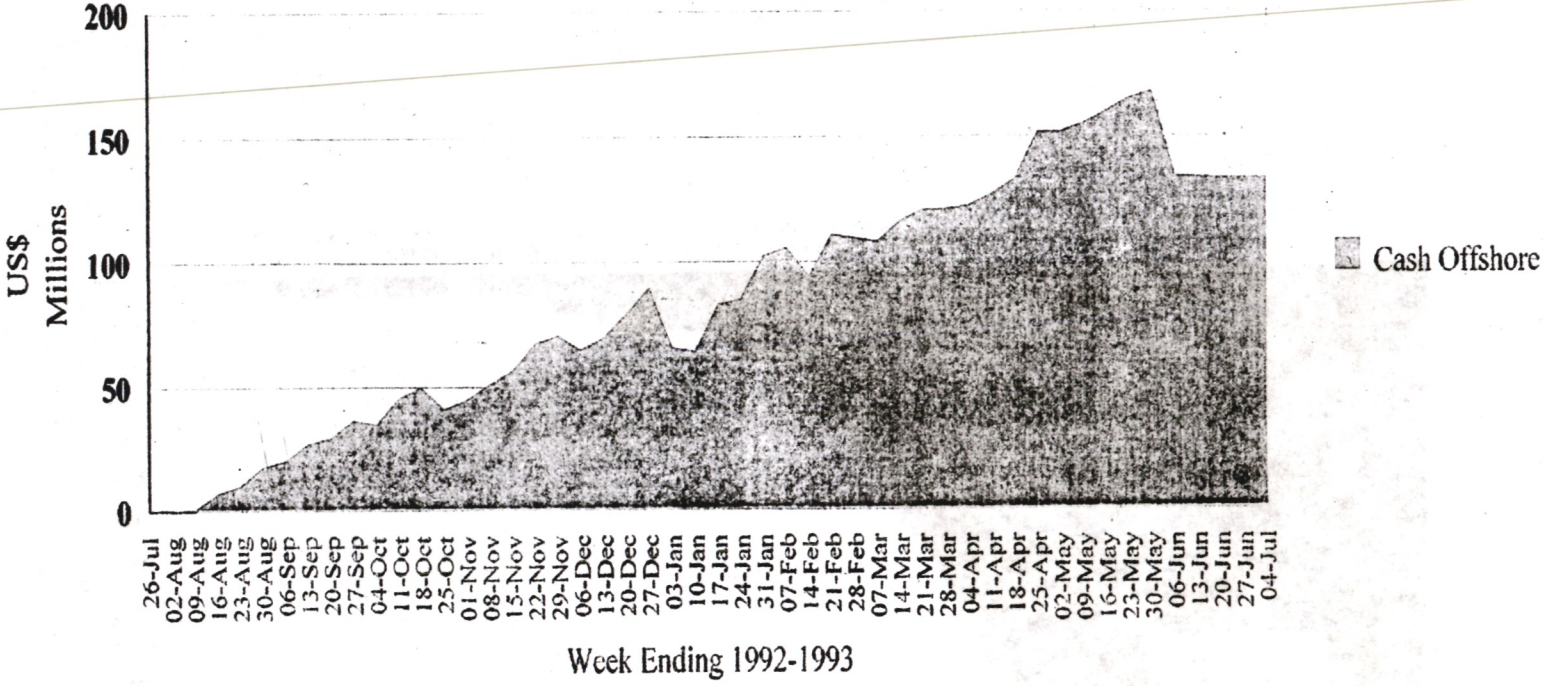

GoK Overdraft & CBK Discounts & Advances
Ksh billion
25
24
23
22
21
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1
0
Jan-90
Mar-90
May-90
Jul-90
Sep-90
Nov-90
Jan-91
Mar-91
May-91
Jul-91
Sep-91
Nov-91
Jan-92
Mar-92
May-92
Jul-92
Sep-92
Nov-92
Jan-93
Mar-93
May-93
Jul-93
Sep-93
Nov-93
overdraft
discounts & advances

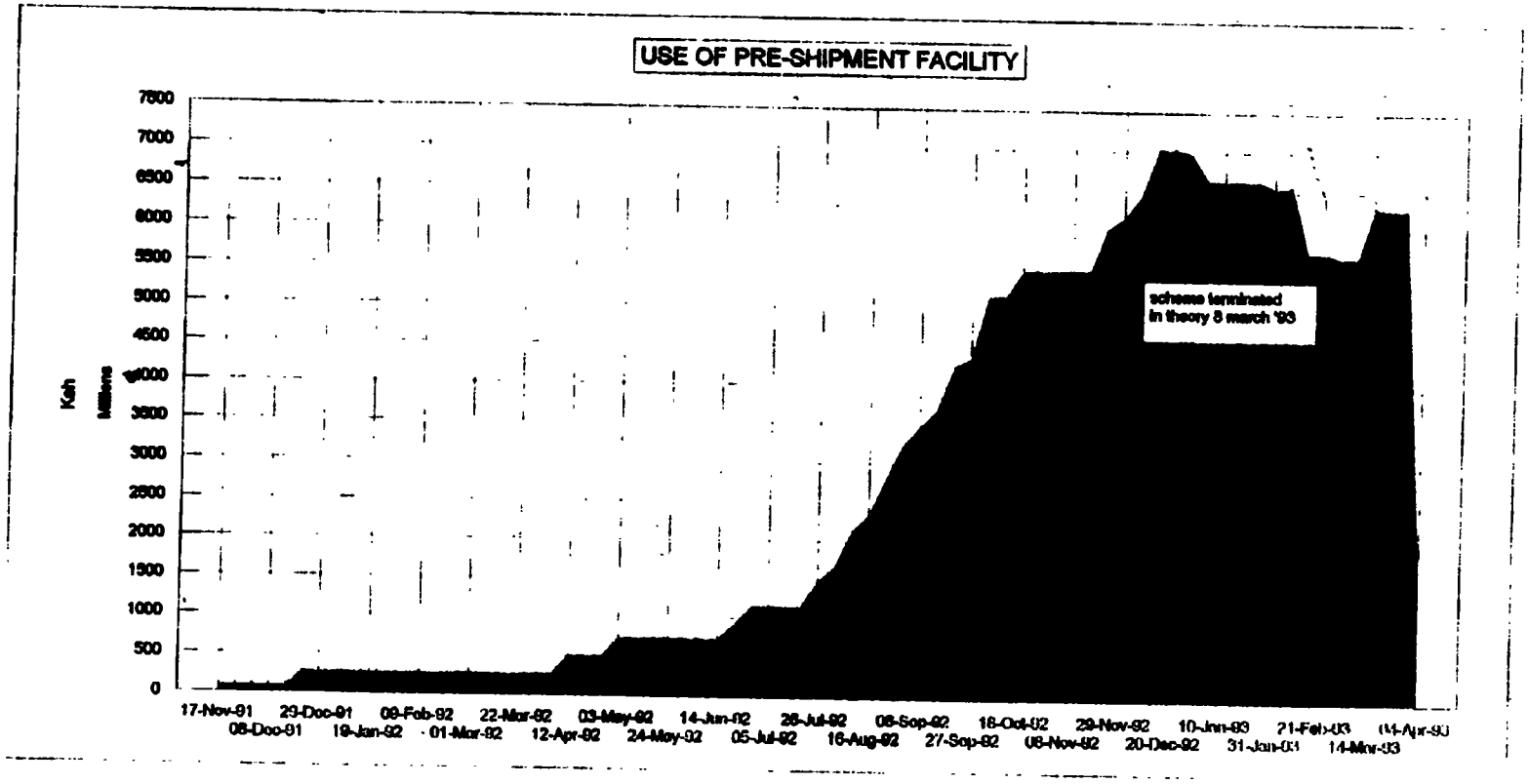
Cash In-Flows

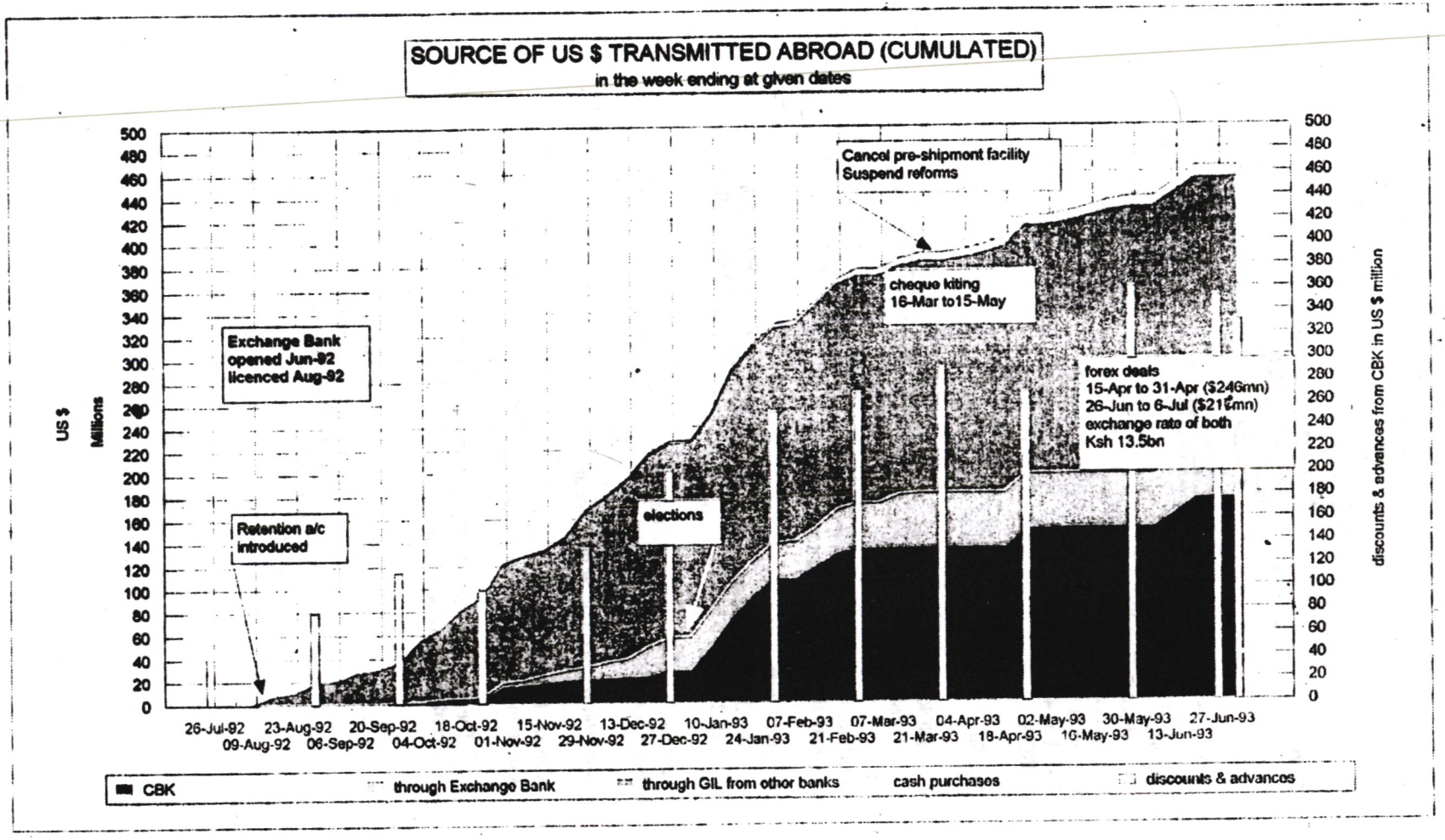



DECLARED US $ RECEIVED BY BANKS ON CD3 FORMS (CUMULATED)
US $ million
600
550
500
450
400
350
300
250
200
150
100
50
0
20% base rate
15% ex-gratia
18% base rate
discontinue 15%
retention a/c
election
10% base rate, no effect
discontinue retention a/c
discontinue pre-shipment
Dec-90 Jan-91 Feb-91 Mar-91 Apr-91 May-91 Jun-91 Jul-91 Aug-91 Sep-91 Oct-91 Nov-91 Dec-91 Jan-92 Feb-92 Mar-92 Apr-92 May-92 Jun-92 Jul-92 Aug-92 Sep-92 Oct-92 Nov-92 Dec-92 Jan-93 Feb-93 Mar-93 Apr-93 May-93 Jun-93

Money Remitted and kept Overseas




USE OF PRE-SHIPMENT FACILITY
Kgs
Millions
7500
7000
6500
6000
5500
5000
4500
4000
3500
3000
2500
2000
1500
1000
500
0
scheme terminated
in theory 8 march '93
17-Nov-91
29-Dec-91
09-Feb-92
22-Mar-92
03-May-92
14-Jun-92
26-Jul-92
08-Sep-92
18-Oct-92
29-Nov-92
10-Jan-93
21-Feb-93
08-Dec-91
19-Jan-92
01-Mar-92
12-Apr-92
24-May-92
05-Jul-92
16-Aug-92
27-Sep-92
08-Nov-92
20-Dec-92
31-Jan-93
14-Mar-93


SOURCE OF US $ TRANSMITTED ABROAD (CUMULATED)
in the week ending at given dates
US $ Millions
discounts & advances from CBK in US $ million
Cancel pre-shipment facility
Suspend reforms
cheque kiting
16-Mar to15-May
Exchange Bank
opened Jun-92
licenced Aug-92
forex deals
15-Apr to 31-Apr ($246mn)
26-Jun to 6-Jul ($21?mn)
exchange rate of both
Ksh 13.5bn
elections
Retention a/c
introduced
26-Jul-92
09-Aug-92
23-Aug-92
06-Sep-92
20-Sep-92
04-Oct-92
18-Oct-92
01-Nov-92
15-Nov-92
29-Nov-92
13-Dec-92
27-Dec-92
10-Jan-93
24-Jan-93
07-Feb-93
21-Feb-93
07-Mar-93
21-Mar-93
04-Apr-93
18-Apr-93
02-May-93
16-May-93
30-May-93
13-Jun-93
27-Jun-93
CBK
through Exchange Bank
through GIL from othor banks
cash purchases
discounts & advances

APPENDIX "Q"

Governor

BANKI KUU YA KENYA

CENTRAL BANK OF KENYA

Haile Selassie Avenue
P.O. Box 60000 Nairobi Kenya
Telephone 226431 Telex 22324

May 11. 2004

Chairman
The Judicial Commission of Inquiry
Into the Goldenberg Affair
Kencom House
P. O. Box 45986-00100
NAIROBI

Dear Sir,

RE: JUDICIAL COMMISSION OF INQUIRY INTO GOLDENBERG AFFAIR - CBK OPERATIONS

We acknowledge receipt of your letter dated March 19. 2004 and wish to respond to the questions raised by you as follows:-

Q1. ARE YOU SATISFIED THAT THE PROVISIONS FOR THE ACCOUNTING AND DISTRIBUTION OF MONEYS VOTED BY PARLIAMENT ARE ADEQUATE?

The accounting procedures at the Central Bank relating to Government funds are described below:-

1. **Government Accounts at the Central Bank**

Central Bank of Kenya holds the following groups of accounts for Government Ministries and Departments:-

1.1 The Exchequer Account to which all Government revenues are credited before being disbursed.

2.2 Recurrent. Development and Deposit accounts: All Government Expenditure is channelled through these accounts, and the fundings are from the Exchequer Account. except for deposit accounts which hold third party funds.

3.3 Special Deposit/Project Accounts: These are the holding accounts for Government Revenue arising from taxes, loans, and grants. Funds from these accounts are first transferred to the Exchequer account, and then disbursed to the relevant Ministry/Department account for expenditure.

2. Procedures for the operation of Government Accounts

2.1 The Bank holds mandate cards for all the Government Accounts. The mandate cards contain the following information:-

- Name of Ministry/Department
- Name and specimen signature of officer to operate the account.
- Approval by an authoriser from the Ministry/Department and an authentication by Accountant General, Treasury.

2.2 Government Ministries/Departments have three different types of mandates for the authorised officers:-

- Authorisers: Usually the level of Permanent Secretary, Chief Accountants and Accounts Controllers.
- Signatories: Officers authorised to operate Government accounts at the Bank.
- Endorsers: Officers authorised to collect cash and other accountable documents from the Bank

3. Disbursement of Voted Government Funds

3.1 The disbursement of moneys voted by Parliament from the Exchequer Account is done by way of Exchequer Issues. These are instructions contained in a letter from the Treasury usually signed by two authorised signatories for purposes of transferring funds from the Exchequer account to the respective voted

Government accounts. The issue quotes the legal reference and gives the following details with respect to the transfer.

- The amount to be transferred.
- The Ministry/Department to be credited.

3.2 A certificate from the Controller and Auditor General confirming that there are sufficient funds in the Exchequer account and that the transfer is within the amount authorised by Parliament must accompany the Exchequer issue.

4. Procedures and Controls at Central Bank of Kenya

4.1 Upon receipt of the Exchequer Issue(s), the letter is forwarded to the "customer mandates and verification section" for verification of signatures and confirmation that the document has been properly executed. The letter is processed only if it is signed by two authorised signatories whose mandates are held by the Bank.

4.2 There must be a certificate from the Controller and Auditor General indicating that there are sufficient funds in the Exchequer account and that the transfer is within the levels voted by Parliament.

4.3 There must be authority from the Deputy Director, Banking Division, to process the document and transfer funds from the Exchequer to the respective voted accounts.

4.4 On weekly basis, the Bank advises the Treasury, copy to the Controller and Auditor General, of the transfers made from the Exchequer account within the week. Copies of the Exchequer issues are also forwarded to the Accountant General and Director, Banking and Currency Department.

5. Bank/Customer Relationship between CBK and Government

So long as the instructions given to the Bank by the Government are proper and there are sufficient funds, the Bank is obliged to honour

the transaction without querying the underlying transactions. To ensure the elimination of irregular or fraudulent payments, it would be necessary to institute stringent financial controls at the Government Ministries/Departments level. This would ensure that all payments instructions to the Bank are proper and authentic.

6. **Q2 ARE YOU SATISFIED THAT THERE ARE ADEQUATE CHECKS AND SAFEGUARDS WITHIN THE BANK TO ENSURE THAT CONTROLS ARE COMPLIED WITH AND THAT IMPROPER PAYMENTS AKIN TO THOSE REVEALED AT THE INQUIRY CANNOT BE REPEATED?**

The following are the checks and safeguards in place to guard against unauthorised payments at the Bank and they are strictly enforced.

6.1 All payment transactions instruments including cheques, vouchers, correspondences, Payment Authorities (PAs) and other forms of payment instruments, must be signed by at least two authorised signatories whose mandates are held by the Bank.

6.2 The authorised signatories must be introduced to the Bank by the authorisers who are usually at the level of a Chief Accountant, Accounts Controller and Permanent Secretary.

6.3 To guard against cheque kiting, the Central Bank does not accept over-the-counter cheque deposits by commercial banks.

6.4 Other than National Bank of Kenya Ltd whose restructuring is being handled by the Government, no bank is allowed to have an overdrawn position in the books of the Bank.

6.5 Banking Division generates Management Report (M2) which is circulated on a daily basis to the Treasury, Governor, Deputy Governor and various Directors of the Bank. The M2 covers the daily financial transactions within the Division.

6.6 In addition, and in order to further enhance the controls, additional reports have been developed largely after the Goldenberg Affair namely:

a) Money Market Report which gives details of transactions involving commercial banks *and overnight loans from the Central Bank is prepared daily and circulated to the Governor, Deputy Governor, and all heads of the relevant Departments. It should be noted that all overnight loans are advanced against Government securities i.e. Treasury bills and Treasury bonds which are properly charged to the Central Bank.*

b) Cash Ratio Requirement (CRR) Report which highlights compliance with CRR is *prepared daily and circulated as in (a)above. Any default on CRR is penalized immediately and persistent non-compliance notified to Director, Bank Supervision for appropriate action.*

c) Government Funds Position Desk Memo which gives details of uncommitted Government Funds *is prepared daily and circulated to the Governor, Deputy Governor and Directors of relevant Departments. In addition, the report is circulated to the PS Treasury, Financial Secretary, and the Accountant General.*

In the event that the Government exceeds its overdraft facility at the Central Bank, a separate report is prepared by the Deputy Director, Banking Division, to the Director, Banking & Currency and copied to the Governor and the Deputy Governor. Upon this notification, the Bank writes to the Treasury to immediately remedy the situation, which in the recent past, it has done promptly.

d) High Value Report which captures details of large cheque payments of Kshs. 10 million and *above is prepared daily and circulated to the Governor, Deputy Governor, and the PS Treasury.*

All the above reports are prepared by the Deputy Director, Banking Division, who triggers action in case of need.

6.7 The controls in Banking Division are constantly reviewed so as to identify areas of weaknesses and take remedial action.

In addition to the foregoing we wish to address the issue of Foreign Payments and the National Debt Office as follows:-

7. Foreign Payments

7.1. Accounting and Distribution of Public Funds

Central Bank as banker to the Government maintains various accounts on behalf of the Government as detailed in paragraph 1 hereabove. Forex payments are transacted vide Payment Authorities (PA's) which are equivalent to cheques. CBK only honours PA's that are properly drawn and signed and on condition that the accounts being affected are properly funded as explained in paragraph 3 above. Like all banks CBK can not question Government instructions to pay unless the said instructions are defective.

7.2 On instructions from Government ministries/departments, the Bank effects foreign payments to settle external obligations against cash balances in the PMG accounts referred to in paragraph 1 above. These payments relate to servicing of external debts, payments of imports of goods and services, contributions to international organisations and payments to Kenya Embassies abroad. The Bank remits over USD 550 million (Shs 43 billion) annually for these purposes with a large proportion being debt service payments.

CBK Act Cap 491 Section 31 states that Central Bank of Kenya ***"shall administer any payments agreement entered into by Kenya, and the Bank shall be consulted by the Government in negotiating any payments agreement".***

While this Section has not been observed in practice, the Bank nevertheless, has made it a requirement for all foreign payments requests made on PAs, that such PAs must be endorsed by

respective Accounting Officers (Permanent Secretaries) before submission to CBK. This requirement is now being enforced by CBK. Likewise, for large commercial payments, the Bank usually insists that a copy of the underlying agreement be submitted together with the PA.

7.3 In order however to strengthen these practices, the CBK is liaising with the Government to ensure that: -

(a) The External loans and Credit Act Cap. 422 is amended to compel GOK to consult CBK in all external loans borrowing.

(b) The Exchequer and Audit Act is amended to make it mandatory for the Accounting officer (Permanent Secretary) to approve foreign payments.

(c) GOK give full disclosure on external payments agreements and external payments it requires the CBK to administer.

8. Checks and safeguards within the Bank in respect of Foreign Payments:

The Bank has introduced checks and safeguards throughout its operations especially in more risky areas such as Foreign Operations Division. Controls that not only provides safety but also enhances efficiency and compliance with applicable laws have been put in place. For example: -

8.1 **Audits:**

All operations are subjected to scrutiny from within and without the Bank.

- Internal Audit Department - examines both system and accounting controls at least twice a year.

- The Bank has constituted an Audit Committee of the Board of Directors to examine all internal and external Audit reports.

- The External auditors - Perform two audits yearly- interim and final. This group ensures that International Financial Reporting Standards have been adhered to. Their report is also submitted to the Audit Committee.

- The Controller and Auditor General examines project accounts annually.

- International Monetary Fund Reviews Bank operations periodically under the Safeguards Assessment programme.

- Operational committees such as Monetary Policy Operating Committee, Investment Committee, Senior Management Committee etc. have been established and meet regularly to ensure best business practice.

8.2 **Management Reports:**

- Various reports such as open markets operations position, daily forex position, forex purchases, deposit placement etc. are generated on daily basis and explanations provided where necessary to ensure correctness of all business undertaken by the Bank.

- Regular reviews of performance are undertaken and significant variations from budgets explained and monitored monthly.

8.3 **Segregation of functions:**

- Operations manuals for every process undertaken by the Bank have been introduced

- There are elaborate procedures of receiving and processing of payments.

- Tasks have been distinguished for performance by different sections/Divisions.

- Appropriate approval limits and authorization have been put in place.

- All forex payments must be approved by the Governor or the deputy in his absence.

8.4 **Staffing:**

- Each member of staff has a personal management job description which ensures accountability.
- Training of key staff on risk management and internal controls is continuously being carried out.
- The Bank ensures that staff are frequently rotated.
- The Code of Conduct has been re-introduced and errant staff disciplined in accordance with laid down staff regulations.

8.4 **Record Keeping:**

- Most functions have been computerised. Authorised users can only access data/files within the scope of operations.
- Computerisation eases storage and retrieval of information recorded in soft copy.
- Policy on retention of primary documents has been put in place.
- Offsite data storage and establishment of a disaster recovery centre now in place.
- Review of systems, processes and procedures regularly carried out.

9.0 National Debt Office - Government Domestic Borrowing

9.1 Central Bank of Kenya through National Debt Office, acts as an agent for the Government's local borrowing function. This is in terms of the Central Bank of Kenya Act Section 4(A)(e) and Internal Loans Act Cap 420 Section 3.

9.2 When the Government is faced with financing shortfalls, the Central Bank of Kenya is asked by the Treasury to undertake borrowing locally through issue of Treasury Bills and Bonds to bridge the financing gaps. The modalities of these instructions are not clearly defined. However, they are always firmed in writing. Amendments to Internal Loans Act have been proposed against which prudential guidelines will be derived clearly specifying the obligations and responsibilities of the principal and those of the agent.

9.3 In discharging the agency function, the Central Bank of Kenya receives instructions from the Treasury in writing on amounts required.

9.4 Debt conversion is not covered anywhere in the Internal Loans Act. In the past, we have seen special bonds issued converting contractor debts into Treasury Bonds. This expands the domestic debt portfolio under the agency. The Bank has addressed this issue with the Treasury, drawing attention for the need to have legal provisions for it. Any additional borrowing from the domestic market should be properly approved by Parliament before requests are presented to the Central Bank for implementation.

9.5 The Government has on various occasions experienced difficulties in funding its accounts to meet redemption of maturing securities. On such occasions, Central Bank is forced to pay on value dates, funds that are not properly authorised in order to safeguard the public confidence in Government instruments. In reviewing the operational guidelines, it is necessary to allow Central Bank to draw on the Government Account to meet those obligations. The rules governing the operations of the Government account need to be harmonised to protect the interests of the Bank as well. The Bank has already stated this position to the Treasury

10. **ARE YOU SATISFIED THAT THE DEPOSIT PROTECTION FUND BOARD IS ADEQUATELY ORGANIZED SO THAT ITS ASSETS COULD NOT BE DISSIPATED IN THE MANNER SHOWN TO THE COMMISSION IN PARTICULAR IN RELATION TO TRADE BANK?**

10.1 Our response as to whether Deposit Protection Fund Board (DPFB) is adequately organized so that its assets could not be dissipated in the manner shown to the Commission in relation to Trade Bank is as follows:

(a) The organisational framework of DPFB is provided for under section 35 of the Banking Act. The following are the key provisions:

(i) Appointment of DPFB as liquidator of an institution is by the Central Bank of Kenya.

(ii) The Governor of the Central Bank of Kenya is the Chairman of the Board of Directors of the Deposit Protection Fund Board.

(iii) The Board's five members are appointed by the Minister in consultation with the Central Bank to represent the interest of the institutions Although not provided for under the law, appointments have been in most cases Chief Executives of commercial banks with representation drawn from large, medium and small banks.

(iv) Authentification of the common seal of the DPFB is by the chairman (Governor) and any other member of the Board.

(v) Employees of the DPFB are on secondment from the Central Bank including the Director in accordance with Section 36 (b) which provides: "The Central Bank shall make available to the Board such facilities and the services of such officers as are necessary for the proper and efficient exercise of the functions of the Board

(vi) As a department of the Bank, operations of the DPFB rely on the Bank to inspect member institutions through the Central Bank's Bank Supervision Department which has the mandate to carry out inspections. The Board can however request for an inspection to be carried out and without the necessary vital statistical information required to make accurate and informed assessments, this provision will continue to be utilised to the benefit of the Board. The DPFB continues to rely on the Central Bank on information concerning member institutions on a complementary basis with the objective of maintaining a stable financial system.

10.2 In the past and in accordance with Section 41 of the Banking Act reliance by DPFB for direction by the Central Bank may have contributed to the DPFB lending funds to Trade Bank Ltd (IL). In view of this, anomaly, a provision was made in the Banking Act to repeal Section 41 which removed the DPFB powers to lend money to distressed institutions.

10.3 **Actions taken to streamline weaknesses noted in the current operations of DPFB**

The Chairman of the Board, has sought technical assistance from the IMF and the World Bank to undertake a review of the DPFB operations and legislative framework which is on going since 29th of March 2004 under the following terms of reference:

i) Study the operations of the DPFB and assess the extent to which the process used by the DPFB to achieve its mandate is the most appropriate.

ii) Examine the proposed DPFB Act and assist in the drafting of an act that will ensure a legal framework that will provide both muscle and autonomy to the DPFB.

iii) Assist in the computerisation of the DPFB operations through introduction of an IT strategy in conformity with best international practice to meet its current and future requirements.

iv) Assist in capacity building within the DPFB with particular emphasis on risk management, liquidation and winding up of institutions.

v) Assess and advise on the extent that DPFB should participate in Banking Supervision functions in determining and advising on the status of member institutions.

vi) Define the relationship between DPFB and lender of last resort (CBK) particularly with regard to the advances by CBK to commercial banks who are member institutions.

11. **With regard to the question as to whether adequate regulations concerning how the recovery of the Deposit Protection Fund debts should be made, it is expected that once the technical assistance review and implementation is finalized, the DPFB will be fully strengthened and secured.**

11.1 DPFB has however over the past few years attempted to cover some of the inadequacies in the law by making provisions as necessary.

The current provisions of laws governing DPFB provide for recovery of any debts owed to the institution in the following manner:

(a) DPFB receives back funds paid as protected deposits in subrogated claims as provided for under Section 39(5) which reads:

"Upon payment of a protected deposit, the Board shall be entitled to receive from the institution or its liquidator, as the case may be, an amount equal to the insolvency payment paid by the Fund on account of its subrogation to the claims of any

customer or depositor".

(b) DPFB can sue and be sued as provided for under Section 36 2(a) and 2(d) of the Banking Act:

Sec. 36 (2) reads:

"The Board shall have perpetual succession and a common seal and shall in its corporate name or in the name of an institution under liquidation be capable of:

(i) suing and being sued, without sanction of the court or a Committee of Inspection;

(ii) taking, purchasing or otherwise acquiring, holding, charging, leasing or disposing of moveable or immovable property;

(iii) doing or performing all such other acts as necessary for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate or a liquidator."

Section 241(1) of the Companies Act Cap 486, Laws of Kenya stipulates the powers of a liquidator. These include the following:

(a) to carry out the business of the Company so far as may be necessary for the beneficial winding up thereof;

(b) to appoint an advocate to assist in the performance of his duties;

(c) to make any arrangement with creditor, or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the

company, or whereby the company may be rendered liable;

(d) to sell the movable and immovable property and things in action of the company by public auction or private contract;

(e) to do all acts and to execute, in the name and on behalf of the company, all debts receipts and other documents, and when necessary use the company's seal;

(f) to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contribution for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration;

(g) to raise on the security of the assets of the company any money requisite;

(h) to take out in his official name letters of administration to any deceased contributory, and to do in the official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company;

(i) to appoint an agent to do any business which the liquidator is unable to do himself;

(j) to do all such things as may be necessary for winding up the affairs of the company and distributing its assets;

(k) the liquidator may apply to court for directions in relation to any particular matter arising under the winding up.

The above illustrates that the DPBF is empowered to recover its debts and meet its obligations.

12. A BRIEF ON CONCERNS ABOUT DEFICIENCIES OR INADEQUACIES THAT MAY HAVE ARISEN IN THE FINANCIAL SECTOR - QUESTION NO. 5

12.1 BACKGROUND

This is a response to question No.5 in respect of deficiencies or inadequacies which may have led the Central Bank not to effectively perform its supervisory role. The brief endeavors to highlight relevant supervisory issues affecting the banking industry over the years and the corrective actions taken. This brief also highlights areas of concern which remains to be addressed to further improve the regulatory and supervisory environment.

12.2 FINANCIAL SECTOR REFORMS IN KENYA

Developments in Kenya's banking system can be divided into six phases with instability characterizing four of the phases. The following is a brief on each of the phases:

12.3 Phase 1: Pre-Independence - Stable Period

The first phase, which was upto 1963, had only a few international banks and the sector was regulated under the banking ordinances. Though the East African Currency Board was at the apex of the banking system, it did not have any banking supervisory powers and the sector remained stable.

12.4 Phase 2: Post-Independence Stable Period (1963 - 83)

This phase, that is, 1963 - 1983 was marked by a stable banking sector. In 1966, following the closure of the East African Currency Board (EACB), the Central Bank of Kenya was established but the supervision of banks by the Central Bank remained a low-key affair. Nonetheless, there was a relatively rapid increase in the number of banks and non-

bank financial institutions (NBFIs). By 1983, there were 14 commercial banks and 9 NBFIs.

12.5 Phase 3: Onset of Instability (1984 - 89)

The period 1984-1989 was marked by increased instability as many weak institutions had been licensed. In 1984 the first NBFI, that is, Rural Urban Credit and Finance Co. Ltd, failed. Two years later, it was followed by closure of two other banking institutions, namely Continental Credit Finance Ltd and Continental Bank of Kenya Ltd. By 1989, eleven (11) banking institutions had failed. These institutions were placed under the official receiver because Deposit Protection Fund Board had not been established. The bank failures were, *inter alia*, due to laxity in licensing procedures, low capital requirements, weak corporate governance, self-serving practices by insiders, high level of non-performing loans and lack of effective supervision.

12.6 Actions taken to address the weaknesses

World Bank assistance was sought to deal with the problem banks and this was granted under Financial Sector Adjustment Credit (FSAC). Several reforms were undertaken which, *inter alia*, included extensive revision of the Banking Act in 1985, 1987 and 1989, which allowed intervention by Central Bank in problem institutions and the establishment of Deposit Protection Fund Board to cushion small depositors. Supervisory capacity of Central Bank was also enhanced through increased staffing, training and improvement of supervisory procedures. Seven insolvent banking institutions and two building societies were restructured under Consolidated Bank of Kenya Ltd and the restructuring entailed conversion of parastatal deposits to equity.

12.7 Phase 4: Accelerated Instability (1990 - 93)

This period was marked by a changed political environment, particularly the advent of multipartyism. Weak banks were licensed on political considerations and financial instability accelerated. 14 banking institutions failed during this

period for political and economic reasons. The institutions already identified to be weak were left to operate although Central Bank had powers to intervene under the amended Banking Act. Central Bank's delay in taking action led to widespread assets stripping. Between April and August 1993, 7 banking institutions were placed under liquidation through Deposit Protection Fund Board while one was voluntarily wound up. Closure of four big banks with their associated NBFIs also occurred during this period. These banks overdrew their accounts in Central Bank extensively and before their closure, considerable macroeconomic instability was evident due to increase in money supply.

The causes of instability during this period, *inter alia,* included; financial indiscipline bordering on fraud by the management of the affected institutions and failure of Central Bank to enforce existing laws and regulations. To restore stability in the sector, the reform actions undertaken, *inter alia,* included the appointment of new management in mid-1993 in the Central Bank and for those banks that were placed under liquidation, legal action was instituted to recover the funds misappropriated. While some success was achieved, progress was slow due to inefficiency in the legal system. A Moratorium was also placed on licensing of new institutions until the situation was back to normal.

12.8 Phase 5: Relative Calm (1994 - 2000)

The period 1994-2000 was relatively calm although there were still some bank failures. Many initiatives, both legal and prudential measures, were taken in an attempt to stabilize the banking sector. The causes of failure during this period included the dominance of weak corporate governance, insider malpractices, weak enforcement of prudential requirements by Central Bank and the High level of non-performing loans. During 1998, five banks were put under statutory management. The main problems were mainly due to reliance on the bearer certificates of deposits whose increased encashment led to a collapse of one bank and the contagion effect led to liquidity crisis in several other banks and in particular the small, weak and under-

capitalized banks. In 1999, one NBFI related to one of the banks was also put under statutory management and was later liquidated.

12.9 Actions taken to address Emerging Problems

To improve stability in the sector, further reforms/actions were undertaken which included amendments to the Banking Act to enhance enforcement powers of the Central Bank through, inter alia, penalties and disqualifying directors who are not "fit and proper", capital requirements were raised substantially, entry requirements made more stringent, Central Bank given some autonomy, conversion of NBFIs to banks encouraged, commercial courts established and to improve corporate governance, periodic seminars for directors, external and internal audits were completed.

12.10 Phase 6: Stable phase (2000 - todate)

During the period 2000 to-date, two banks were put under statutory management. One bank was restructured and re-opened while another one is undergoing restructuring and one was put under liquidation. One building Society is still undergoing restructuring.

12.11 Reforms taken

Recently, several reforms/actions have been taken to improve stability in the banking sector which, *inter alia*, includes more disclosure requirements, tripartite meetings where accounts and disclosures are discussed before publishing of accounts, more frequent on-site inspections, at least once every year, directors to convene special board meetings to discuss CBK's inspection reports and enforcement of penalties.

13 CONCLUSION

The amendments made in the Banking Act over the years have strengthened the Supervisory and Regulatory role of the Central Bank. From the evidence emerging from the Goldenberg Commission so far, it is evident that either the Central Bank

management or the Treasury failed to take the necessary actions stipulated in the law to intervene in weak banks. Enforcement of the law has been lacking at times. Lack of regulatory independence and, particularly licensing and delicensing of banks, has enabled the licensing of institutions on purely political considerations. For the same reasons, weak banks have been left to operate for too long. In order to remove any ambiguity as to who is responsible for the regulatory process, recommendations have been made to the Minister for Finance to amend the Banking Act to transfer powers to license and delicense to the Central Bank. The Bank should have powers to intervene or even close weak institutions without reference to the Minister as this not only takes a long time but gives politically correct managers time to canvass.

We trust that the foregoing satisfactorily addresses the questions raised by you and that there shall be no need for the undersigned to give any oral evidence at the Commission. However, if you require any further written clarification on the issues raised hereof, please do not hesitate to contact the undersigned.

Yours faithfully,

ANDREW K. MULLEI