

REPORT

of the

INDEPENDENT SPECIAL COMMITTEE

appointed by the Board of MTN Group Ltd
to investigate allegations in United States proceedings

by

Turkcell Iletisim Hizmetleri AS

1 February 2013

To the Board of MTN Group Ltd

216 14th Avenue, Fairlands 2195
Johannesburg
South Africa.

We, the undersigned members of an Independent Special Committee which you appointed on 1 February 2012 to investigate allegations made by Turkcell Iletisim Hizmetleri AS in a draft complaint intended to be filed in the United States District Court for the District of Columbia, now have the honour to submit our report.



Leonard Hoffmann
(Chairman)



N Peter Mageza



Jeff van Rooyen

1 February 2013.

Letter from Lord Hoffmann to the Chairman of the Board of MTN Group Ltd

Brick Court Chambers
London SW1A 0PW
31 January 2013.

Independent Special Committee to Investigate Turkcell Complaint

The Independent Special Committee (the “Committee”) of which I have the honour to be chairman was established by resolution of the Board of MTN Group Ltd on 1 February 2012 and asked to conduct an inquiry in accordance with terms of reference which will be found in Appendix 1 of our Report. The terms of reference stipulated that I should personally notify the Board of the Committee’s view that it “has received full cooperation from the Company and access to all individuals, information, documents and facilities as requested and provided for in this charter, and that its investigation has not been the subject of improper interference, influence, or obstruction or impediment” and that I approve the Report.

I have pleasure in being able to state that the Committee is of the opinion that it has received full cooperation from the company and has been given unrestricted access to all individuals, information, documents and facilities which it requested. There has likewise been not the slightest attempt by the company or its management to influence the Committee in its deliberations or Report. This Report has the full concurrence of all three of us. We recommend that, subject to legal advice in relation to the proceedings in the United States, the Report be published.

Yours sincerely,



Lord Hoffmann

EXECUTIVE SUMMARY

1. On 27 November 2005 the Iranian Ministry of Communications and Information Technology (“MCIT”) issued a licence to operate a GSM cellphone system to a company now known as MTN Irancell (“Irancell”). Irancell is controlled by two Iranian public bodies (“Sairan” and “the Bonyad”), which hold 51% of the shares through their joint ownership of Iran Electronic Development Company, and MTN holds the remaining 49%. MCIT had earlier been in negotiation for some 18 months for the grant of the licence to a consortium consisting of the same two Iranian bodies and a subsidiary of Turkcell Iletisim Hizmetleri AS (“Turkcell”), which had first been chosen as provisional licensees, but negotiations had been broken off by 4 September 2005.

2. On 28 March 2012 Turkcell filed a complaint in the United States District Court in Washington DC in which it alleged that MTN had conspired with Iranian officials to oust Turkcell from the successful consortium and take its place by –

(a) promising to use its influence with the South African government to procure the supply of defence equipment to Iran and to support the Iranian nuclear development programme at meetings of the International Atomic Energy Agency (“IAEA”);

(b) bribing Sairan and the Bonyad with payments disguised as sham loans;

(c) bribing an Iranian official, Mr Javid Ghorbanoghli, with a payment of US\$400,000 through a sham consultancy arrangement; and

(d) bribing the then South African ambassador to Iran, Mr Yusuf Saloojee, with a payment of US\$200,000.

3. These allegations rest entirely upon the evidence of Mr Christian Kilowan, who worked for MTN in Iran between May 2004 and November 2007. He has given two statements in arbitration proceedings brought by Turkcell against the Islamic Republic of Iran and a deposition in the United States proceedings against MTN. We have also received evidence in the form of statements by other current and former officers and employees of MTN and South African and Iranian officials.

4. We have not found it necessary to decide whether to prefer the evidence of other witnesses to that of Mr Kilowan because a comparison of his evidence with contemporary documents (mostly written by himself) is sufficient to show that all the allegations are a fabric of lies, distortions and inventions. Most of this report consists of a comparison of what he now says and what he was saying and doing at the time. It shows him to be a fantasist and a conspiracy theorist.

5. We have tried to distinguish clearly in our report between those matters on which we are entirely satisfied and those which we regard as no more than probabilities or possibilities. As will become evident, Mr Kilowan's activities have left many murky areas and loose threads in the story.

6. We are entirely satisfied that there was no conspiracy between MTN and Iranian officials to remove Turkcell from the successful consortium, no promise to procure the South African government to supply defence equipment or support Iran's nuclear policy at the IAEA, and no sham loans.

7. We find that on 4 April 2007 a subsidiary of MTN made a payment of US\$400,000 into the personal account of Mr Mousa Hosseinzadeh, a business partner of Mr Kilowan who had been introduced to him by Mr Ghorbanoghli. We do not know what happened to this money because the evidence of neither Mr Kilowan nor Mr Hosseinzadeh is reliable. The payment was made on an invoice from Aristo Oil International Limited, of which Mr Hosseinzadeh is a director, for consultancy services, apparently countersigned by Mr Phuthuma Nhleko, then Chief Executive Officer of MTN, but there is evidence (including handwriting evidence) to suggest that the signature was a forgery. We are satisfied that neither Mr Nhleko nor Mrs Irene Charnley (until March 2007 the MTN Director with responsibility for Iran), approved a payment which they knew to be intended for Mr Ghorbanoghli.

8. We are entirely satisfied that MTN paid nothing to Ambassador Saloojee and that neither Mr Nhleko nor Mrs Charnley authorised Mr Kilowan to promise him anything.

9. The complaint does not allege any specific acts of corrupt practices against the chairman or members of the Board or senior management of MTN other than participation in the acts alleged against Mr Nhleko and Mrs Charnley. Since we have

found the latter to be false, we find that there is equally no substance in the allegations of participation.

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Chapter 1

Introduction

Terms of Reference

1. We were appointed by a resolution of the Board of MTN Group Ltd (“MTN”) on 1 February 2012 to “investigate certain allegations made by Turkcell Iletisim Hizmetleri AS (“Turkcell”) in a draft complaint provided to outside counsel for the company on 26 January 2012, and any related matters, and to report to the Board on the findings of its investigations, and to advise and make recommendations to the Board as to any actions to be taken in connection with those findings.”¹ Our full terms of reference will be found in Appendix 1. We were authorised to conduct the investigation in such manner as we thought appropriate and MTN’s management was required to provide us with access to all information, documents, records and facilities as we reasonably requested.² We were also authorised to obtain such outside or professional advice as we thought necessary.³ In addition to reporting on the draft complaint, we were asked to make such recommendations as we thought fit about the publication of our report.⁴
2. The draft complaint was provided to MTN by Turkcell’s United States lawyers, Messrs Patton Boggs LLP (“Patton Boggs”) of Washington DC, on terms of confidentiality for the purposes of negotiating a settlement of Turkcell’s claims. No settlement was agreed and on 28 March 2012 a complaint in substantially the same terms (“the complaint”) was filed by Patton Boggs on behalf of Turkcell and its subsidiary East Asian Consortium BV (“EAC”) against MTN and its subsidiary MTN International (Mauritius) Ltd (“MTNI”). We therefore propose to ignore the draft complaint and to deal

¹ Resolution of the Board of MTN, 2 February 2012.

² Appendix 1, Independent Special Committee Charter, paragraph 5.2.

³ Appendix 1, Independent Special Committee Charter, paragraph 7.1.

⁴ Appendix 1, Independent Special Committee Charter, paragraph 5.8.

entirely with the allegations made in the complaint, which will be found in Appendix 2.

Summary of background events in Iran

3. The claims made in the complaint arise out of events which took place in Iran in 2003-2007. We shall describe these in some detail in the course of this report, but for present purposes a brief summary will be sufficient. In October 2003, as part of a programme of privatisation and encouragement of foreign inward investment, the Iranian Ministry of Communications and Information Technology (“MCIT”) invited tenders for a licence to operate a GSM cellphone network in Iran (“the GSM2 licence”)⁵. Tenders were submitted by, among others, a consortium (“the Irancell consortium”) which included a Turkcell subsidiary and Iran Electronic Development Company (“IEDC”). IEDC was jointly owned by a subsidiary of the Ministry of Defence officially called Iran Electronics Industries but commonly known as Sairan (“Sairan”) and a charitable institution called the Bonyad Mostazafen (“the Bonyad”). The Irancell consortium proposed to form an operating company in which Turkcell would control 70.2% of the shares. Another competing consortium (“the MTN consortium”) included MTN and some Iranian partners.
4. On 18 February 2004 MCIT declared that the Irancell consortium was the preferred bidder and MTN’s consortium had been runner-up. The Irancell consortium was declared the provisional licensee but, according to the tender regulations, the grant of the licence was subject to agreement on its terms and compliance with a number of conditions.
5. On 20 February 2004 there was a general election for a parliament to take office in May. The supporters of the government’s policy of privatisation and inward investment lost their majority. Most of the newly elected members were conservatives who objected to foreign control over the GSM2 licence. Negotiations between MCIT and the Irancell consortium as to the terms of the licence were delayed. In September 2004 parliament passed what was known

⁵ The derivation of “GSM2” is explained in paragraph 35.

as the “Single Article Act”, which required its approval for the grant of the licence. In February 2005 parliament passed what was called “the Irancell Act”. This required that 51% of the shares in the operating company should be in Iranian hands and all Board decisions should require the approval of at least 50% of the shareholders.

6. There followed negotiations between MCIT, Turkcell, Sairan and the Bonyad over how to arrange the shareholding and management structure of the Irancell consortium to comply with the Irancell Act. By 8 June 2005 no agreement had been reached. MCIT then applied to the Iranian Economic Council (a government body) for leave to abandon the tender process and start again. On 15 June 2005 the Council gave a decision that MCIT should have 15 days to agree a structure with the Irancell consortium or to establish another consortium. MCIT then gave Turkcell until 20 June 2005 to agree such a structure or be excluded from negotiations. When this deadline passed, MCIT gave Sairan and the Bonyad leave to open negotiations with MTN to form a new consortium. On 24 June 2005 MTN, Sairan and the Bonyad signed two MOUs, each expressed to be conditional upon Turkcell failing to comply with the Irancell Act and meeting its obligations, which provided for a formation of a new consortium.
7. Almost immediately after these MOUs had been signed, Turkcell signified its intention to accept the principles of the Irancell Act and negotiations between the original members of the Irancell consortium resumed. A MOU was signed but progress towards a final agreement then halted. On 15 August 2005 MCIT imposed a new deadline of 4 September 2005. When that passed, MCIT gave Sairan and the Bonyad leave to enter into negotiations with MTN instead. Negotiations were successful and on 27 November 2005 the GSM2 licence was granted to a company now called MTN Irancell, in which IEDC held 51% of the shares and MTN 49%.

The Turkcell allegations

8. We shall deal in detail with the allegations in the complaint which we have been asked to investigate, but for the moment the following summary will be

sufficient. It is alleged that commencing in about June or July 2004, MTN conspired with Sairan and the Bonyad to oust Turkcell from the Irancell consortium and take its place. It gained the support of Sairan and the Bonyad by –

- (a) using its influence with the South African government to procure the illicit supply to Iran of defence equipment and in particular by procuring the South African Minister of Defence to visit Iran in August 2004 and promise to supply Iran with a list of such equipment designated by the code name ‘the Fish’;
- (b) procuring the South African representative at the International Atomic Energy Authority (“IAEA”) to support Iran’s position on nuclear development and in particular to abstain from voting on a resolution on 24 November 2005 to refer the Iranian nuclear programme to the United Nations Security Council;
- (c) corruptly offering Sairan and the Bonyad financial support in the form of pretended loans, never intended to be repaid, for the purpose of enabling them to fund their shares of the money required for the capitalisation of Irancell and the licence fee payable to MCIT;
- (d) bribing one Javid Ghorbanoghli (“Mr Ghorbanoghli”), then a deputy secretary in the Iranian foreign office and head of the Africa desk, with a payment of US\$400,000 through a sham consultancy arrangement;
- (e) bribing one Yusuf Saloojee (“Ambassador Saloojee”), then the South African ambassador to Iran, with a payment of US\$200,000.⁶

Other litigation

9. Arising out of its exclusion from the GSM2 licence, Turkcell (through its subsidiaries) has brought the following legal proceedings:

⁶ Appendix 2.

- (a) An action in 2005 in an Iranian court for an injunction to restrain MCIT from granting the licence to the Irancell consortium as substituted and for damages against Sairan and the Bonyad. This action was dismissed.
- (b) An arbitration begun on 11 January 2008 against the Islamic Republic of Iran (“IRI”) under the Turkey-Iran Bilateral Investment Treaty (“BIT”). We shall refer to this as “the BIT arbitration”. The hearing is due to commence in Paris on 13 February 2013.
- (c) An arbitration begun on 29 April 2008 under the rules of the International Chamber of Commerce (“ICC”) against Sairan and the Bonyad for breach of the shareholders’ agreement made between the parties in September 2004. We shall refer to this as “the ICC arbitration”. The ICC Tribunal dismissed Turkcell’s claims in a final award dated 17 April 2012.
- (d) The United States proceedings with which we are concerned.

Evidence available to the Committee

- 10. All the allegations in the complaint are based upon statements made to Turkcell by Mr Christian Kilowan (“Mr Kilowan”), who visited Iran on behalf of MTN on occasions between May and July 2004 and was employed by MTN as its resident representative there from August 2004 until November 2007. The Committee has had access to Mr Kilowan’s evidence in the form of two witness statements made for the purposes of the BIT arbitration,⁷ and the transcript and video recording of a deposition in the United States proceedings made by Mr Kilowan on 30 April and 1 and 2 May 2012 (“Mr Kilowan’s Deposition Transcript, day 1, 2 and 3”).
- 11. A number of former and current employees of MTN, and South African and Iranian officials were interviewed in relation to the allegations raised in the United States litigation, and notes of those interviews were made available to

⁷ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, and Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings.

the Committee. The persons who were interviewed or from whom statements were obtained are listed in Appendix 3.

12. Messrs Eversheds LLP, who represent the IRI in the BIT arbitration, made available to us the their client's factual witness statements in that arbitration, and the IRI's counsel and solicitors had a meeting with Lord Hoffmann (who represented the Committee). The names of the persons whose witness evidence we were supplied are also listed in Appendix 3.
13. The Committee wrote to each of Mr Kilowan and Turkcell on 19 March 2012 inviting them to provide the Committee with copies of any documentation they considered relevant, and offering to meet with Mr Kilowan and Turkcell. Patton Boggs responded on behalf of Turkcell on 4 June 2012 and provided a set of all the documents that Turkcell were relying upon in the United States litigation, as well as the transcript of Mr Kilowan's deposition. We received a further letter from Patton Boggs on 27 September 2012, setting out a number of matters in support of the complaint.⁸ We trust we have taken all of them into account. The 27 September 2012 letter also says that a committee composed of a majority of MTN Board members "is extremely unlikely to be objective and its conclusions which exculpate MTN would certainly be suspect." As our report is unanimous, we hope that it will be read with the same objectivity which has been urged upon us.
14. In accordance with the general requirements of fairness in public inquiries, Lord Hoffmann wrote to Mr Kilowan on 3 December 2012 (with a copy to Patton Boggs) drawing his attention to a list of points on which the contemporary documents appeared to be inconsistent with Mr Kilowan's evidence or otherwise to cast doubt upon his credibility and inviting his comments or explanations. A copy of the letter is attached as Appendix 9. Mr Kilowan acknowledged receipt of the letter and said that the committee would be hearing from his attorneys. But no such communication has been received.

⁸ Letters from Patton Boggs to the Committee, 4 June and 27 September 2012.

15. Mr Phuthuma Nhleko (“Mr Nhleko”), who was Chief Executive Officer of MTN at the relevant time, provided us with a report by Ms Lourika Buckley, a handwriting expert in Johannesburg, on the authenticity of a signature on an invoice used to authorise the payment of US\$400,000 to Aristo Oil International Limited (“the Aristo Invoice”).⁹
16. We commissioned: (i) an investigation by KPMG of the books and accounts of MTN relevant to certain of the allegations in the complaint;¹⁰ (ii) a paper by Professor Calland of the University of Cape Town on the history of the relationship between South Africa and Iran during the relevant period, particularly in respect of the supply of defence equipment and Iran’s nuclear programme;¹¹ and (iii) a report by Dr Audrey Giles, a handwriting expert in London, on the authenticity of the signature on the Aristo Invoice.¹²
17. Documentary and electronic data in the possession of MTN and others which might be relevant to our inquiry was collected. A report describing the collection of this data is in Appendix 8.

Our approach to the evidence

18. Our conclusions are based almost entirely upon what we consider to be authentic contemporary documents, for the most part reports and e-mails generated by Mr Kilowan himself. We regard the reports which Mr Kilowan made to MTN between the time of his first visit to Iran in May 2004 and about the middle of 2006 as substantially honest and frequently perceptive statements of his personal assessment of the situation on the ground and his contemporary state of mind. The very early reports do tend to stress the desirability of installing him as MTN’s permanent representative in Iran in a way which some might regard as self-serving, but we think he genuinely thought he could advance the interests of MTN and provide useful intelligence. In the reports from late 2006 onwards, other considerations begin

⁹ Appendix 4.

¹⁰ Appendix 5.

¹¹ Appendix 6.

¹² Appendix 7.

to appear, which we shall in due course discuss. When Mr Kilowan made his deposition, he was cross-examined by a representative of MTN on some, but by no means all, aspects of his evidence. We have the benefit of a video recording of the deposition. We are conscious of the fact that neither Mr Kilowan nor Turkcell have had the opportunity to cross-examine any of the other witnesses whose evidence has been made known to the Committee. Nor have we seen them giving evidence. We have therefore decided that we could not reject the evidence of Mr Kilowan merely on the ground that it was in conflict with the evidence of other witnesses. It is only when we have rejected Mr Kilowan's evidence on the ground that it is in conflict with the contemporary documents, internally inconsistent or hopelessly implausible, that we have relied upon the evidence of other witnesses which appeared to us to be supported by the documents or the inherent probabilities of the case.

Membership and Meetings of the Committee

19. The Committee as originally appointed consisted of Lord Hoffmann, Mr N Peter Mageza, Mr Jan H.N. Strydom and Mr Jeff van Rooyen. On 22 June 2012 Messrs Glyn Marais, on behalf of Mrs Irene Charnley ("Mrs Charnley"), objected to the participation of Mr Strydom on the ground that he had been a non-executive director of MTN at the time of the events in question. Although neither MTN nor the Committee had the slightest doubt about the impartiality and objectivity of Mr Strydom, he thought it better to resign than to give any ground for complaint about the independence of the Committee, however unjustified. He accordingly tendered his resignation to the Board of MTN and on 7 August 2012 it was regretfully accepted.
20. The Committee met in person on three occasions, on 27 February 2012, 22 August 2012 and 13 December 2012, three times by videolink, on 21 May 2012, 19 November 2012 and 28 January 2013, and once by conference call, on 24 January 2013. On the first occasion Lord Hoffmann, in accordance with paragraph 3.4 of the terms of reference,¹³ declared that from April 2005 to May 2006 his daughter, Ms Jennifer Hoffmann, had been Chief Executive of

¹³ Appendix 1, Independent Special Committee Charter, paragraph 3.4.

MTN Mobile Money (Pty) Ltd, a joint subsidiary of MTN and Standard Bank of South Africa Ltd. Its activities had no connection with the events under inquiry and she had no knowledge of them, had no subsequent relationship with MTN and returned to the United Kingdom in 2008. Lord Hoffmann and the other members of the Committee did not think this could reasonably be regarded as affecting his impartiality and MTN agreed.

Thanks

21. The Committee is grateful for the support which it received from Messrs Freshfields Bruckhaus Deringer LLP, Messrs Webber Wentzel, Messrs Glyn Marais, and Werksmans Attorneys. We would also like to thank the IRI for making available the evidence it submitted in the BIT arbitration. We appreciate the co-operation of all those who made submissions or gave evidence. Finally, we thank our secretary, Mr Edward Harrison of counsel, who co-ordinated our work.

Chapter 2

Iran

22. In order to understand some of the relevant events which occurred in 2003-2007, it is necessary to know something about the Iranian constitution and the politics of the time.
23. The constitution of Iran adopted after the overthrow of the Shah is based upon the separation of powers. The legislative power is vested in the Islamic Consultative Assembly, which we shall call parliament, directly elected by secret ballot. Its powers are limited by the constitution (for example, article 81 prohibits the granting of commercial concessions to foreigners) and by the requirement that all legislation shall comply with the Islamic religion. All legislation must be sent to the Guardian Council, which consists of six members nominated by the Supreme Leader and six lawyers elected by parliament from a list nominated by the head of the judiciary, for review of its constitutionality. If the Guardian Council considers the statute unconstitutional, it may refer it back to parliament. Parliament may in turn send the legislation back to the Guardian Council for further consideration. However, a deadlock may be broken by a reference to the “Expediency Council”, appointed by the Supreme Leader, which can make a final decision binding upon all parties.
24. Executive power is vested partly in the Supreme Leader, a religious figure chosen by an assembly of experts elected by the people, and partly in the Presidency. The Supreme Leader has power to determine the general policies of the IRI and to appoint and dismiss half the Guardian Council, the whole of the Expediency Council and the head of the judiciary.
25. The President is directly elected for a term of four years and appoints the ministers in his government, subject to parliamentary confirmation. The judicial power is vested in the head of the judiciary, who is appointed by the Supreme Leader for a term of 5 years and who is responsible for the

appointment of judges. Thus the powers of the Presidency are limited by parliament's power to legislate and by the powers of the Supreme Leader.

26. Article 44 of the constitution, which deals with the economy, divides economic activity into a state sector, a co-operative sector and a private sector. In principle, large scale economic activities are allocated to the state sector. They include radio, television, post, telegraph and telephone services.
27. The political history of Iran since the revolution is complicated, not least because there are many issues (e.g. religion, socio-cultural questions of human rights, foreign policy, economic policy) on which there have been differences of opinion, but people who are in alliance on one issue do not necessarily agree on others. For present purposes, all that needs to be explained is the change in support for a programme of economic liberalization which occurred between 2003 and 2006.
28. In 1997 President Khatami was elected by a large majority on a programme which included liberalization of the economy and privatization of some activities which had been monopolies of the state. A majority of the members of parliament elected in 2000 supported this policy. The Third Iranian Five Year Plan was given statutory force in 2000.¹⁴ Article 124 provided in general terms for the involvement of the private sector in telecommunications, which had previously been regarded as exclusively within the public sector. Particular mention was made of a mobile communication network.
29. In 2002 parliament passed the Foreign Investment Promotion and Protection Act ("FIPPA"). This was intended, as its name suggests, to attract foreign investment. FIPPA created a Foreign Investment Board¹⁵ and gave it power to grant Investment Licences to foreign investors for direct investment in "areas where the activity of the private sector is permitted".¹⁶ It guaranteed to

¹⁴ Law of Third Economic, Social and Cultural Development Plan of the Islamic Republic of Iran, approved 6 April 2000.

¹⁵ An agency of the Ministry of Economic Affairs and Finance.

¹⁶ FIPPA, article 3(a).

foreign investors the same rights as local investors, together with the right to repatriate their profits and, after fulfilment of their obligations, their capital.

30. These two laws formed the basis of the invitation to tender for the GSM2 licence, which was published in October 2003. However, shortly after the Irancell consortium had been designated as the preferred bidder, there was a general election which swung the balance the other way. The majority of the members elected were economic conservatives who thought that the programme of privatization and inward investment by foreign companies had gone too far.
31. The new parliament took office in May 2004 and in September 2004, after debates which some thought might result in the abandonment of the entire tender process, it passed the Single Article Act, which made the grant of the licence subject to parliamentary approval. Parliament appointed a Joint Commission to advise on the licence terms which should be regarded as acceptable. Following that advice, Parliament passed the Irancell Act in February 2005. This Act provided that the Iranian shareholding in the company operating under the licence should be at least 51% and that its management decisions should be subject to approval by at least 50% of the shareholders. It was this Act which meant that the Irancell consortium could no longer be constituted as originally agreed.
32. On 2 August 2005 President Khatami's second and last four year term of office expired and he was succeeded by President Ahmadinejad, who supported the conservative majority in parliament. The election had taken place on 17 June 2005 with a run-off on 24 June 2005. Members of Khatami's government showed some anxiety in the last days of his presidency to complete the grant of the licence, or at any rate to put it beyond recall, before he left office.

Chapter 3

Narrative

33. We set out in this Chapter a chronological narrative of those events concerning the grant of the licence which are relevant to our inquiry. This narrative is based upon contemporary documents and undisputed facts. It runs from the date upon which the Iranian government published the invitation to tender until the date upon which the licence was granted. These events are relevant to the allegations of inducing the supply of defence equipment and support for the nuclear programme, as well as the corrupt provision of financial support to the Iranian partners. The alleged payment of bribes to Mr Ghorbanoghli and Ambassador Saloojee took place at a later date and the events relevant to these allegations will be dealt with separately.
34. The narrative should provide a framework against which we can discuss the allegations and in particular Mr Kilowan's evidence in support of them. It will also set out the documents to which we later refer in their proper context.

October 2003: the invitation to tender

35. On 25 October 2003 MCIT¹⁷ published the Regulations for International and National Public Calls for Competitive Bids ("the Regulations") containing its "Terms for the competitive call for bids for the grant of a licence for the implementation and operation of a GSM-type¹⁸ cellular phone system public network in the Islamic Republic of Iran". A licence had previously been granted to the TCI, a state-owned company, for the operation of a cellular phone system but it had not achieved very extensive coverage.¹⁹ The licence

¹⁷ Then called the Ministry of Post, Telegraph & Telephone.

¹⁸ GSM stands for "Groupe Spécial Mobile" or in English "Global System for Mobile Communications", a standard set developed by the European Telecommunications Standards Institute (ETSI) to describe protocols for second generation (2G) digital cellular networks used by mobile phones.

¹⁹ On 27 November 2003 the board of MTN was told that penetration of mobile phones was 3.86%. There was a 12 month waiting list and SIM cards were selling on the black market for up to US\$1,100.

offered to the private sector by the MCIT in 2003 has therefore been referred to as the GSM2 licence.

36. The Regulations provided, in very considerable detail, for the tender process. Applicants had first to make a Qualification Application, showing themselves to be qualified to bid. The shareholders in the prospective operating company had to include a qualifying telecommunications operator having substantial assets and international experience (with at least a 20% shareholding) and Iranian nationals (also with at least a 20% shareholding). The Qualification Application had to be made by 15 December 2003.²⁰
37. The next stage was for applicants who had been declared to be qualified to submit their bids. The bid had to contain technical proposals for the development of the network, a business plan, an undertaking that, if successful, the bidder would pay an up-front licence fee of €300 million and a proposal for the share of the revenue from the licence which would be paid to MCIT. The licence would be awarded to the bidder who offered a share of revenue which had the highest net present value to MCIT.

November – December 2003: the MTN tender

38. Soon after publication of the invitation to tender, a team from MTN went to Tehran to identify suitable Iranian partners. On 5 and 6 November 2003 representatives of MTN had a meeting in Dubai with three persons who had been thus identified: Mr Shervin Pischevar (“Mr Pischevar”) and Mr Hamid Aref (“Mr Aref”), managing partners of a technology investment and incubation company called Darya Omid Noor Ltd (“Darya”) and a Mr M.K. Sarraf (“Mr Sarraf”). They signed a memorandum of understanding (“MOU”), undertaking to co-operate exclusively with each other in applying for the licence until the MOU had been replaced by a shareholders agreement or the licence had been awarded.

²⁰ See the Article 17 of Addendum No 1, amending the timetable in Schedule 2 of the Regulations (9 December 2003)

39. On 27 November 2003 the team's recommendations concerning the GSM2 licence application were put before the Board of MTN. It recommended the prospective partners in these terms:

“Mr. Hamid Aref is the son of the Vice President who is likely to be president from next year. The MTN team saw clear evidence of his ability to call ministers at will, and their desire to make him happy in the light of the forthcoming elections.

Mr. Shervin Pischevar is an ICT entrepreneur. During the MTN visit he clearly showed his ability to pull together meetings, and the fact that these were almost rubber-stamp processes indicates that he has the ability to sell us in advance.

Another well connected individual Mr MK Sarraf, the ex Deputy Minister of the PTT Ministry is also considering involvement in the consortium.”²¹

40. In a paper entitled *How Will We Get the Edge Over Competing Consortium* MTN listed what it saw as its strengths and weaknesses, as well as the means by which they might be exploited or remedied.²² We shall extract those which related to the political relationship between South Africa and Iran. Item 7 was “Leverage Iran – SA’s good bilateral political relations.” It proposed that the company “highlight SA’s position as a non-aligned partner for Iran, e.g. SA’s participation in oil projects. No issue with sanctions...” Action recommended for this purpose was “SA Embassy lobbying in connection with SA political delegation to visit Iran.” This was probably a reference to a forthcoming visit by Ms Phumzile Mlambo-Ngcuka (“Ms Mlambo-Ngcuka”), the Minister of Mineral and Energy Affairs, who was due to make an official ministerial visit to Iran at the end of January 2004.
41. Under the heading “Who is the audience and who is going to deliver the message/action?” it listed the various Iranian officials. There was Dr Masoum Fardis (“Dr Fardis”), the project manager in charge of the tender process at MCIT. Then there were members of the Iranian government – the Minister of

²¹ MTN Group Ltd: Board Meeting 27 November 2003: Iran 2nd GSM Opportunity: Briefing Paper.

²² ‘How Will We Get the Edge over Competing Consortium’, undated.

Telecoms, Minister of Foreign Affairs and possibly the President of Iran (“if we have a message from the President of SA”). The message was to be conveyed by the Minister and the senior MTN party going on the January visit. There was a briefing for the MTN delegation in the form of answers to potential questions, including “Does MTN (SA) present any ‘security risks’ for Iran?” The suggested answer included mention of the “long history of support” between SA and Iran, “with Iran supporting the ANC, and SA now supporting Iran”. A list of 10 bilateral trade agreements was appended. A slide presentation for use with an Iranian audience was created, emphasizing the links between South Africa and Iran.²³

42. The consortium agreement foreshadowed in the Dubai MOU of 6 November 2003 was signed on 13 December 2003, just before the deadline for submitting the Qualification Application. Its membership was slightly different from the people who had signed the MOU. Mr Sarraf, the former communications minister, had decided to join and signed on behalf of a company named Ijad Ertebatat Beinalmelal (“IICCO”) and on his own behalf. Mr Pischevar signed as an individual rather than on behalf of Darya. Mr Aref did not feature on the face of the document. The consortium agreement provided for the incorporation of an as yet unnamed operating company in which the shares would be divided between two subsidiaries of MTN (70% plus one share) IICCO (10%), Mr Sarraf (13 1/3%) and Mr Pischevar (6 2/3% less one share). Each party undertook to deal exclusively with the others until the agreement expired on 31 December 2004.²⁴
43. The MTN consortium duly submitted its Qualification Application before the deadline. Other applicants included the Irancell consortium, led by Turkcell, which we have described in Chapter 1.²⁵
44. In early January 2004, Mr Siyabonga Madyibi (“Mr Madyibi”) went to Tehran on behalf of MTN to, as he put it in his e-mail report of 4 January 2004, “have

²³ *Ibid.*

²⁴ Consortium Agreement between MTN, IICCO, Mr Sarraf and Mr Pischevar, 13 December 2003.

²⁵ Paragraph 3.

meetings mainly with our local partners and with other interested parties with a view of developing and obtaining proper insights on an appropriate lobbying plan.” We again extract those comments which concern the political relationship between South Africa and Iran:

- (a) Our competitors have set in motion plans to involve top government representatives with a view of ensuring favourable government to government relations which would serve to boost their profile with the Iran government.
- (b) MTN’s profile remains low in Iran and although the SA government is viewed favourably there is no indication at this stage that such warm reception for the government will probably translate to MTN.
- (c) There is need therefore to ensure that there is proper co-ordination and a strategy in place that will ensure that MTN gets to benefit from our government’s warm relations with the Iranian government.
- (d) Having made this assessment then a meeting with the SA Embassy in Iran was arranged to assess whether a possibility of direct active government participation in support of the MTN bid can be secured. This would also be a follow up on the letter that was written by our President in support of the MTN bid in Iran. In a meeting with the new Iranian ambassador-designate to SA we have been reliably informed that this letter was warmly received by the Iranian President and a message was passed to the Iranian Minister of Communications to have due regard to this letter and to the strengthening of positive trade relations this bid would have for the two countries.
- (e) In a meeting with the SA Embassy which was also attended by the SA Ambassador in Iran the following were the key outcomes:
 - 1. MTN’s bid still retains unreserved support from the Embassy and from the SA government. ...
 - 3. That both the Minister of Trade and Industry Mr Alec Erwin and the Deputy Foreign Affairs Minister Mr Aziz Pahad had standing invitations to Iran which they are as yet to honour.
 - 4. That the planned visit to Iran by MTN’s top management would be unlikely to receive a top

Iranian government audience if no direct SA government representation was secured. (e.g. it would be viewed as inappropriate for MTN delegation to have an exclusive meeting/audience with the Minister of Communications in Iran wherein the same result could be achieved if government participation could be secured.)”²⁶

45. On 27 January 2004 Ms Mlambo-Ngcuka, the South African Minister of Minerals and Energy, made an official visit to Iran. Mr Nhleko and Mrs Charnley went as part of the Minister’s delegation. On the evening of her arrival the Iranian Minister of Petroleum gave a dinner in honour of her and her delegation. Next day the Minister had a half hour meeting with Mr Adeli, the Deputy Minister of Foreign Affairs, and a rather longer meeting in the afternoon with Mr Motamedi, the Minister of Communications and Information Technology and political head of MCIT. We do not know what they discussed but it seems likely that Ms Mlambo-Ngcuka put in a word for MTN. In the evening there was a return dinner, hosted by Mr Mabude, the South African Ambassador to Iran. After meeting more members of the government the following morning and some tourism in the afternoon, Ms Mlambo-Ngcuka left for Dubai in the early hours of Friday 30 January 2004. One at least of the official dinners was attended by Mr Ghorbanoghli as head of the Africa desk at the Iranian foreign office and by Mrs Charnley.
46. After returning to South Africa, Mrs Charnley wrote a thank you letter to Mr Singh, an official in the Department of Minerals and Energy, saying that the visit “certainly contributed to the increased profile of MTN in Iran” and that her personal assistant would be sending him the mobile phone which he had been promised.²⁷

Turkcell successful

47. The envelopes containing the tender bids were due to be opened on 18 February 2004. On 11 February 2004 Mr Erik van Veen (“Mr van Veen”), a member of Mrs Charnley’s International Business Development (“IBD”) team

²⁶ E-mail from Mr Madyibi to Mr van Veen and others, 4 January 2004.

²⁷ Letter from Mrs Charnley to Mr Singh, 9 February 2004.

who had made visits to Iran to gather intelligence, wrote a paper headed *Strategy Concept Paper Outline: Unsuccessful Iran Licence award*.²⁸ It was an outline of the options which might be open to MTN if its bid was unsuccessful. He noted that the Irancell consortium's bid had a technical defect concerning its bid bond guarantee which MCIT had given it until 15 February 2004 to rectify. It was arguable on the construction of the Regulations that MCIT had no power to do so and should have disqualified the bid. But he advised that it would be impolitic to take this point before the bids had been opened. It should be kept in reserve for a possible legal challenge if the Irancell consortium was successful.

48. On 18 February 2004 the bid envelopes were opened in accordance with the Regulations and the Irancell consortium's proposal for MCIT's revenue share, 28.1%, was found to have the highest net present value to MCIT. The Irancell consortium was therefore designated provisional licensee.
49. The Regulations (as amended by an Addendum No 3 issued in January 2004) provided a brisk timetable for finalization of the grant of the licence to the successful bidder. Within four days of being so designated, the Irancell consortium was to meet representatives of MCIT to agree and initial the Licence Agreement, a draft of which was attached to the Regulations.²⁹ Within 10 days of designation, the successful bidder had to provide a guarantee for payment of the €300 million upfront licence fee.³⁰ If the Licence Agreement had not been agreed and initialled or the guarantee had not been provided within the 10 days period, MCIT was entitled to cancel the award and start negotiations with the underbidder.³¹
50. The provisional licensee had then to proceed with due diligence to obtain a FIPPA investment licence, incorporate the operating company and notify

²⁸ Strategy Concept Paper Outline: Unsuccessful Iran Licence award, 11 February 2004.

²⁹ Article 21.1 of the Regulations.

³⁰ Article 21.2 of the Regulations.

³¹ Article 21.3 of the Regulations.

MCIT that it had done so within 45 days of designation.³² On the 5th day after MCIT had received notification that the operating company had been incorporated, the Licence Agreement was to be signed and the licensee was to pay the €300 million upfront licence fee.

51. Article 10.1 of the draft Licence Agreement attached to the Regulations said that the licensee was required to comply with all applicable legislative and regulatory texts and said that such compliance should extend to “any modifications to the aforementioned texts”. “Law” was defined in article 1.4 to mean “any legislation currently in force or adopted from time to time by the Iranian authorities”. These provisions attained significance at a later stage when, as we shall see, legislation was passed to change the terms upon which a licence could be granted. The licence was to commence on “the Effective Date”, defined in article 1.9 to mean the date upon which the Licence Agreement has been signed and the upfront licence fee has been received by MCIT. Furthermore, the introduction to the Regulations provided that MCIT reserved the right to modify or cancel the tender process at any time without prior notice.³³

20 February 2004: General election

52. Two days after the bids had been opened, there was a general election. The new parliament was overwhelmingly dominated by conservatives who were opposed to the government’s policy of expansion of the private sector, expressed in the Third Five Year Plan. They were not happy about the privatization of the cellphone service and particularly objected to it being controlled by a foreign company. The election result was not altogether a surprise, since the conservatives had won large majorities in local council elections in the previous year. One of the reasons for the haste with which the tender process had been carried through was that the government was anxious to have the licence transaction completed before the new parliament took office in May 2004. In addition, some conservative members were hostile to

³² Article 22.1 and 22.2 of the Regulations.

³³ License for Mobile (GSM) Communications Network and Services, attached to the Regulations.

Turkey, which was perceived in some quarters as having too warm relations with Israel. Conspiracy theories abound in Tehran and there was no shortage of rumours that Turkcell and another Turkish company which had secured a contract to manage Tehran airport had Israeli connections and were a threat to security.

MTN in defeat

53. The question of what to do next was discussed at a meeting of MTN's Steering Committee on 27 February 2004. The Group was presented with a 40 page report dealing with the situation in 11 African and Middle Eastern countries. Top of the list was Iran. It summarised the options as follows:

“Option 1: Turkcell

Continue current lobbying efforts in case Turkcell does not take up its licence.

Payment guarantee for 300m euros is due [from Irancell] by 3rd March

Closure and final payment date is 26th April.

Option 2: Structure BOT (Build, Operate, Transfer) arrangement...

Option 3: Seek privatised stake in TCI (+- 49%).”³⁴

54. On 3 March 2004 Mr van Veen was again in Iran and sent an e-mail report to Mrs Charnley. The background was the local perception that, since the election, the government was going to face political opposition to the grant of the licence to Turkcell, at any rate on the terms proposed:

“Firstly we must be careful not to be overtly pushy in the process of us being here...Our low key, credible approach must be maintained. We must not be seen to be too opportunistic in light of Turkcell's problems. I propose a subtle approach, yet make it abundantly clear to ministry etc that MTN are still very keen, short .and long term in Iran, that our offer and our financial arrangements (ie Payment guarantees etc..) are still lined up and in order, and that we are at their disposal should they wish to discuss

³⁴ MTN Group Ltd, Steering Committee meeting 27th February 2004: Status of international expansion opportunities, paragraph 1.1.

any matters with us.

- Secondly, the political lobbying that we undertook during the bid process is complete. There is no need to another round of intensive lobbying. We just need to cast a gentle reminder - SA Embassy feel quite strongly about this. To this end, we propose the following:
 - The SA Embassy is going to get a letter out of the SA Minister of Telcomms [*sic*] to be sent to the Minister of CIT here. The key messages in that letter will be as follows:
 - MTN came 2nd in the GSM operator bid, but remain committed to Iran
 - We request MoCIT to keep MTN in mind in that regard
 - Mention that we have an ongoing presence in Iran ...
 - It is then important we focus our interactions at a technical levels, rather than politically e.g. Mr Fardis etc who are part of the process.
 - To that end, I am meeting the Director General for Africa Affairs at the Ministry of FA tomorrow afternoon with the SA Embassy. More of a courtesy call but will highlight above key facts (very discreetly)...
- The SA Embassy highlighted that the Minister of CIT here stands to be embarrassed if the Turkcell deal does not come to fruition. Giving him every opportunity to enter into negotiations with MTN is very important should TC not deliver by 8 March and provides the Minister with a way out!”³⁵

55. On 11 March 2004 a paper summarizing the situation in Iran was presented to the Board of MTN:

“1.1.1 Status of the Turkcell licence

There is a strong likelihood that Turkcell’s Iranian partners will not be able to come up with their share of the bid price. If Turkcell is unable, or unwilling, to provide them with the necessary financial support, the license once again may be in play.

³⁵ E-mail from Mr van Veen to Mrs Charnley, 3 March 2004.

The new conservative government [*sic*: parliament?] may place impediments in Turkcell's path with regard to negotiating the final license, obtaining the necessary FIPPA approval, forming the company etc due to political dislike of Turkey. This may again cause the issuing of the licence to be in some jeopardy...We are following up on these developments, together with our Iranian partners. A trip will be made to Iran to finalise the position once it is clear that a real opportunity exists.

1.1.2 Establishment of Iran office

We will be proceeding with the establishment of an office in Iran to develop MTN's presence in the country and to position us as a front-runner for the future opportunities, be it the Turkcell licence, the TCI privatisation or the 3rd GSM licence.

Next steps are:

- To identify a resource to run the office
- Draft a letter to the Minister of Communication thanking him for his assistance and assuring him of MTN's continued interest in Iran...

1.2.1 Conclusions from the bid

The overriding impression gained over the 3 months was that the MoCIT managed a thorough and detailed bid process that was followed strictly through to its conclusion. The process appeared to be transparent and free of political influence. All the other consortia used heavy lobbying in the weeks running up to the bid announcement believing that political influence would be the major factor. There is no evidence that this was the case.

MTN's high quality bid has been noted and has considerably raised MTN's profile in Iran...Greater investment needs to be made in choice of local partners – MTN did not allow itself sufficient time to put together a stronger consortium. MTN need higher level representation in the country well in advance of bids to ensure appropriate political and lobby support is attained. South Africa and more specifically MTN have very low awareness profiles. There is no knowledge of our technological capabilities and achievements. South Africa does enjoy strong political ties with Iran, but these do not translate into favourable awareness...

Strengths

Political profile: MTN's understated and low profile approach was appropriate in this instance indicating credibility and integrity to the MoCIT (who no doubt received many political approaches). This may not have been the right approach if the process had not been clean and transparent.

Involvement of the SA Embassy in Iran from the outset. The Embassy in Iran were effective and supportive.

Weaknesses

Of all the consortia, MTN probably had the weakest local partners. Due to time constraints, MTN was unable to put a stronger consortium together. MTN's partners were not part of the 'established family networks' in Iran and nor were they well funded.

Not enough physical presence in the country in terms of choosing partners, lobbying and gathering political support.

1.4 Proposed way forward

- Begin a search for the building of a powerful, carefully-planned and balanced consortium which will enable us to influence the processes
- Engage the assistance of the SA Embassy and SA Government so as to provide weight at political level...

...MTN will need to establish an office in Iran – perhaps locally registered...which will establish MTN's serious intentions in Iran. The process is likely to be slow at times but we have been encouraged by the reception that MTN has received from the Iranian Government, Local Partners (and potential local partners) and SA government...

To break into the Iranian Telecommunications market will take patience, consistency and perseverance but success will bring great regard to MTN. This will not be the typical licence investigation but it has become clear that we will not be successful by simply making sporadic forays

into a marketplace that requires patience and understanding.”³⁶

56. The “resource” at first identified to run the proposed MTN office in Iran was Mr van Veen, who had been visiting the country and reporting to Mrs Charnley since the beginning of the year. On 7 April 2004 Mr van Veen drafted Mr Kilowan’s job specification, described as a “Mandate to Country Bid Manager”. The mandate, it said, was “primarily to facilitate the investment into a mobile licence opportunity in Iran within a 30 month time frame”. The “key performance areas” were to include:

- “1. Enhancement [of] MTN’s reputation with key stakeholders in Iran. MTN’s reputation must be aligned to MTN’s stated Corporate Brand values.
2. Raising of MTN’s awareness amongst key stakeholders, the media and the public.
3. Facilitation of the privatization process: influence and impact the privatization process so as to be completed within a 12 month time frame.”³⁷

57. Mr van Veen also drew up a budget for the office. However, at some time during April he informed Mrs Charnley that, for family reasons, he did not want to move to Tehran. Mrs Charnley then offered the position to Mr Kilowan instead.³⁸ This appears to have been in the second half of April, because on 22 April 2004 Mr Pischevar was still copying his e-mails to Mr van Veen rather than Mr Kilowan.

Waiting in the wings

58. By then it was beginning to appear that the grant of the licence to the Irancell consortium might not proceed in accordance with the statutory timetable. On 21 April 2004 Turkcell announced its 2003 year-end results. The comments from the Chief Executive included an update on the position in Iran:

³⁶ MTN Group Ltd Steercom Meeting, 25 March 2004: Status of Iranian Opportunity, distributed to the MTN board on 11 March 2004.

³⁷ Mandate to Country Bid Manager: Iran, 7 April 2004.

³⁸ Mr Kilowan’s background and previous contact with Mrs Charnley is described in paragraph 145 below.

“On February 18, 2004, it was announced that the Turkcell-led consortium (“Iracell”) had made the most attractive offer in the nationwide GSM900/1800 license tender in Iran. Accordingly, once the licence agreement is signed and the payment of EUR 300 million in licence fees is made, the consortium will be awarded the first private GSM900/1800 GSM licence in Iran. The signing of the license agreement is expected to take place upon establishment of the local company, a process that is underway.”³⁹

59. Mr Pishevar picked this up and e-mailed it to MTN with the comment “Notice the language regarding Iracell (still setting up company...)”.⁴⁰
60. The delay in completion of the licence was noted by MTN’s legal advisers. Mr Graham Mackinnon of MTN’s legal department looked at Articles 20 to 23 of the Regulations, dealing with the timetable for completion, and on 30 April 2004 reported to Charles Wheeler (“Mr Wheeler”), MTN’s general counsel, and Bruce Cleaver (“Mr Cleaver”), a partner in Webber Wentzel, MTN’s attorneys:

“On my reading of the Regulations they are silent as to what the MCIT is obliged or not obliged to do if Turkcell fails to pay the Up-front License Fee...One thing to remember is that although we are calculating the Compliance Deadline as falling on a date within the next 2 weeks, Turkcell may have procured an extension which they are entitled to do in accordance with Article 22. The only sure way of finding out is to ask the MCIT (Dr Fardis)...As advised to Charles, I spoke to Chris Kilowan today and he said it was unlikely that he would be leaving for Iran today as he did not yet have a visa.”⁴¹

61. Mr Wheeler and Mr Cleaver were apparently planning to go and see Dr Fardis: on the previous day, 29 April 2004, Mrs Charnley’s personal assistant, Lynette Witbooi, had e-mailed Mr Sarraf in Tehran:

³⁹ ‘Turkcell İletişim Hizmetleri A.S. Reports Year-End 2003 Results’, attached to e-mail from Mr Pishevar to Mrs Charnley, Mr Nisbet and Mr van Veen, 22 April 2004.

⁴⁰ E-mail from Mr Pishevar to Mrs Charnley, Mr Nisbet and Mr van Veen, 22 April 2004.

⁴¹ E-mail from Mr Mackinnon to Mr Wheeler and Mr Cleaver, 30 April 2004.

“Irene has asked that I try to call or drop you a note to let you know that Chris Kilowan, Charles Wheeler and Bruce Cleaver will be visiting Iran in the next day or two to assess the current situation around Turkcell.”⁴²

62. Mr Sarraf replied on 2 May 2004:

“Pls be noted that the situation is the same as previous since Turkcell still has time. I will talk in detail to Mrs Irene in regard to above. Regarding [the] Gentlemen’s trip: I think its better for them to postponed their trip when I inform if their trip is related to Turkcell’s matter.”⁴³

63. Mr Wheeler and Mr Cleaver appear to have taken this advice and stayed at home, because on 2 May 2004 Mr Cleaver sent a long e-mail to MTN’s Iranian lawyers, asking a number of questions about when the deadline for completion would expire and whether MCIT had a discretion to extend it.⁴⁴ On 5 May 2004 the Iranian lawyers replied, saying that the last date for compliance would be that day. It was, however, open to MCIT to extend the time. In fact, the general tenor of the advice was that MCIT had a wide discretion as to whether it should cancel the designation of the Irancell consortium and, if it did, whether it should designate the MTN consortium in its place.

64. Mr Kilowan went to Tehran on 6 May 2004, the day after the time for compliance had expired, and stayed until 11 or 12 May 2004. He subsequently wrote a report on the visit. His report is written in the first person plural, but there is no evidence as to who, if anyone, went with him. Some of the time, at any rate, he was accompanied by an official from the South African embassy. The report, in the form of a Power Point presentation, began with an assessment of Turkcell’s position:

“As at Thursday to Monday morning (10/5) the position was [that] Turkcell has met all requirements from their side. ...

⁴² E-mail from Lynette Witbooi to Mr Sarraf, 29 April 2004.

⁴³ E-mail from Mr Sarraf to Lynette Witbooi, 2 May 2004.

⁴⁴ E-mail from Mr Cleaver to Ateih Associates and others, 2 May 2004.

The final agreements are to be signed on Monday 17 May...

[But –]

- On Monday evening our local partners informed us that in discussions at the National Security council there are discussions happening which are aimed at withdrawing Turkcell as winning bidder.
- The reason seems to be that the Government...has developed serious political problems with Turkey.
- Consistent message has been sent to all in government that MTN is ready willing and able to step into Turkcell's place.
- Mr Sarraf has been meeting with his contacts at various levels and have been telling them that we are ready
- In the meeting with Dr Fardis we reiterated our preparedness to act on short notice and our willingness to enter into negotiations. A follow-up e-mail to this effect was sent to him
- Mr Sarraf had a meeting with the Bonyards [*sic*] (one of Turkcell's local partners) to assess whether they will abandon Turkcell
- In the meeting with the Managing Director of Telephone Company of Iran (TCI) (also the special assistant to the Minister of Telecommunications) we explained extensively MTN's experience in Africa, our capabilities and our willingness to deploy our vast experience in the interest of Iran.
- We also had a meeting with the previous Iranian ambassador to South Africa. He was given the same message by us and he told us that he had been instructed by his Minister (Foreign Affairs) and the President to assist MTN to the fullest extent.
- Everybody we spoke to are very excited about the setting up of a permanent presence in Iran.

- It is highly likely that the Turkcell transaction...⁴⁵ It is well within the Ministry's power to delay the final agreement for a few months.
- Delays could:
 - present opportunities to MTN and its local partners to deepen our lobbying efforts;
 - Make Turkcell's local partners uncomfortable and induce them to jump ship to a potentially stronger partner such as MTN
- However:
 - If Turkcell falls into place all is not lost for MTN
- There are other opportunities in Iran that justifies a long term presence in the country.
- These are:
 - The privatisation/listing of TCI (the state fixed line operator)
 - The privatisation/listing of MCI (the state) mobile operator
 - The Third Mobile licence (process will start in 3rd quarter 2005)
 - Provision of MTN SP type services (could be used to establish brand presence)
 - Provision of Infrastructure Services (could be used to establish brand presence)

Iran – Next Steps

- Establish the exact and definitive position on the Second Mobile licence.
- Decide on the nature and form of MTN's presence in Iran
- Compile and obtain approval of the budget for MTN's presence in Iran".⁴⁶

⁴⁵ The text of the Power Point presentation breaks off at this point. Some words have obviously dropped out: in view of what follows, they were probably "will not be completed on schedule" or something to that effect.

65. From this document it appears that Dr Fardis did not encourage any optimism about Turkcell falling out of the race. He said that the Irancell consortium had met all the requirements from its side and that the delay had been caused by many public holidays in April and the slowness of the Ministry of Finance in issuing an investment licence. MTN's Iranian partners, however, appear to have taken a less sanguine view of Turkcell's prospects.

66. MTN then waited to see whether, as Dr Fardis had predicted, the licence to the Irancell consortium would be signed on 17 May 2004. On 18 May 2004 Mr Kilowan, back in Tehran, reported by e-mail that nothing had happened. "Officially there is still a delay at the Ministry of Finance to issue the licence under FIPA [*sic*]...This process can apparently take months."⁴⁷

67. On 21 May 2004 Mr Kilowan wrote a report on his second visit to Tehran. As in his first report, he strongly urged the establishment of a permanent MTN office in Iran. There was some uncertainty about how far the process of finalizing the licence to the Irancell consortium had gone, but it seemed that no FIPPA licence had yet been granted:

"The information available at the moment suggests that the entire transaction is not finalized yet and it would seem that there are various political forces at work to reverse the awarding of the licence to Turkcell."⁴⁸

68. The main source of information was Mr Sarraf:

"While Sarraf is receiving regular updates that indicate that Turkcell is in trouble, I do not think that he is convinced that this necessarily or automatically means that the license will be granted to MTN. With his insights into the workings of the government of Iran he has probably seen to many times how a transaction that seems a foregone conclusion has been jeopardized by the peculiar politics within the government of Iran.

⁴⁶ MTN Iran: Report on Visit, 14 May 2004.

⁴⁷ E-mail to Irene Charnley, 10:58 am 18 May 2004.

⁴⁸ 2nd GSM Licence in Iran and MTN's Long Term Presence There: A Report and Recommendations, 21 May 2004, page 3.

This could also explain why he does not want to focus only on getting the second license to the exclusion of any other activities. As a result he has been in continuous discussions with the Bonyards as well as the Ministry of Defence to find a space for himself should the Turkcell transaction go through.”⁴⁹

69. MTN’s other local partner, Mr Pischevar, seems to have had a taste for drama. With Mr Kilowan back in South Africa, he sent an e-mail to him, Mrs Charnley and Mr Rob Nisbet (“Mr Nisbet”) on 3 June 2004:

“Chris, Rob and Irene,

Yesterday, we received word from two different sources that a decision has been made to reject Turkcell. At the Guardian Council level information has been reviewed that showed certain security concerns related to Israeli ownership in Turkcell. Khatami himself handwrote on the report that if this is true “get rid of Turkcell.”

The same concerns are the reason that the Turkish consortium that was awarded the Airport deal was thrown out. There is also government-to-government tension stemming from Turkey’s cancellation of in [*sic*] important Iran-to-Turkey pipeline project.

A report and analysis was commissioned by a consultant to the Government to analyze whether canceling the Turkcell deal will have a negative impact on Iran. The report said that if Iran has another mobile operator in place before it cancels Turkcell ready to take up the license and roll out service before March 2005, it will have no negative impact. It stressed that the only option is that course.

Due to this information, we believe it is imperative to have the following actions taken :

- 1) A delegation of Government officials and MTN officials (including the CEO) to have high level meetings with Government officials in Iran in June.
- 2) SA Government to IR Government communication, starting with a letter from SA President Thabo Mbeki to President Khatami, reiterating the strong ties between Iran and South Africa, and the

⁴⁹ *Ibid.*, page 4.

importance that South Africa places on the 2nd Mobile license and MTN's standing in it.

- 3) We have been told that the person that has the respect and admiration that can close the deal at a high level is Nelson Mandela. Mr, Mandela was supposed to travel to Iran recently. We have been assured that if Mr. Mandela were to travel to Iran and press for MTN that it will have a material positive affect on our ultimate outcome.
- 4) We believe a letter from MTN asking for information regarding the 2nd License and the passing of the deadlines and its commitment to fulfilling the requirements of the license as the back up licensee.

Again, we need MTN on the ground here ASAP. Please revert back to me as to the course of action we should take.”⁵⁰

70. Mrs Charnley scribbled a handwritten draft reply on this e-mail. She did not take up the suggestion about sending Mr Mandela but said that Mr Kilowan would be sent to Iran at the weekend (probably 12-13 June).⁵¹ On 11 June 2004 Mr Kilowan drafted a presentation entitled *MTN Iran. Objectives Year One*. The objectives were establishing the office (July to September), pursuing MCI RFP and other opportunities (October to December), start positioning for privatization of State telco (January to March), and prepare for third mobile licence (April to June). For each quarter there was a column listing as a parallel objective “Continue pursuing second mobile licence if possible.”⁵² A tactful letter to Mr Motamedi was drafted, asking for a meeting “to discuss progress, and related matters, on the award of Iran’s second GSM licence.”⁵³ Mrs Charnley wrote to President Mbeki, whom she knew from her days as an ANC activist, asking for a meeting. She summarised what, so far as she knew, was happening in Iran and said that MCIT and Turkcell appeared to have failed to reach agreement on the licence.

⁵⁰ E-mail from Mr Pishevar to Mr Kilowan, Mr Nisbet and Mrs Charnley, 3 June 2004.

⁵¹ *Ibid.*

⁵² MTN Iran: Objectives Year One, 11 June 2004.

⁵³ Draft letter from Mr Nhleko to Mr Motamedi, 7 June 2004.

“However, the Ministry has not made any contact with MTN, as the second best bidder... It is apparent to us that support by one’s own government is key to the success of any business venture in the Middle East. Given the positive relationship that exists between South Africa and Iran at a political level, we believe an intervention from your office could spur the Iranian Ministry of Information Technology and Communications to initiate negotiations with us on the licence agreement, following the failure of the negotiations between Turkcell and the Government of Iran... We trust that the President will understand our anxiety for a meeting...”⁵⁴

71. Mr Kilowan went to Iran about 12 or 13 June 2004 and wrote his report in Afrikaans (“On account of the sensitive nature of this report I have drafted it entirely in Afrikaans”).⁵⁵ He gave by way of introduction a summary appreciation of the situation:

“As we all know, the transaction with Turkcell has not yet been completed. At this stage there are many theories but precious few facts. The theories are all reasonable possibilities but it will only be when we have access to the facts that we shall really be able to form a picture of the true state of affairs. This conclusion has been confirmed by my present visit. It is at any rate a fact that the transaction has not been completed. This despite the fact that the period within which everything must be completed has expired. We still therefore have a theoretical chance to be successful. In my opinion there are a couple of things which we on our side have to do to sway things entirely in our direction.”⁵⁶

72. He went into more detail about the situation on the ground:

⁵⁴ Letter from Mrs Charnley to President Mbeki, 21 June 2004.

⁵⁵ “Weens die sensitiewe aard van hierdie verslag het ek dit total in Afrikaans opgestel”.

⁵⁶ “Soos ons almal weet is die transaksie met Turkcell nog nie afgehandel nie. Op hierdie stadium is daar baie *teoriee* en bitter min feite. Die teoriee is almal redelike moontlikhede maar dit is slegs wanneer ons die feite tot ons beskikking het dat ons werklik n beeld kan vorm van wat die ware toedrag van sake is. Met my huidige besoek is hierdie gevolgtrekking bevestig.

Dit is egter ‘n feit dat die transaksie nie afgehandel is nie. Dit desnieteenstaande die feit dat die tyd periode waarbinne alles afgehandel moes wees reeds verstryk het. Ons het derhalwe nog ‘n teoretiese kans om steeds suksesvol te wees. In my opinie is daar egter ‘n paar dinge wat ons van ons kant sal moet doen om sake volledig in ons rigting te swaai.”

“As far as I can establish, the following is the factual situation:

- The transaction with our opposition is not yet completed;
- The relationship between the two countries is not on a very positive basis;
- The government of our opposition is playing a very strong role (more than merely supportive) in the current process. Their Prime Minister is coming here next week with the two objectives of trying to rescue the pipe line and licence transactions.
- The defence company’s political leaders have gone at the highest level above the president to seek help to rescue the transaction. They have been told that it would be possible still to rescue it but it depends on the political leaders of our opposition.”⁵⁷

73. He put forward an analysis:

“It would not be wrong to say that the situation is extremely fluid. From the ministry in charge of the process there is now strong sympathy and a preference for us. It would appear that they have obtained information that there was a leak somewhere which enabled the opposition to amend their bid. At the same time, the two government institutions in our opposition are doing all in their power to rescue the transaction. Their advantage is naturally that they are every day in the country and have free access up to the highest levels. Our man therefore finds it difficult

⁵⁷ “Sover ek kan vasstel is die volgende die feitelike situasie:

- Die transaksie met ons opposisie is nog steeds nie bevestig nie.
- Die verhoudinge tussen die twee lande is nie op ‘n baie positiewe basis nie.
- Die regering van ons opposisie speel ‘n baie sterk rol (meer as bloot ondersteunend) in die huidige proses. Hulle Eerste Minister kom volgende week hierheen met twee doelwitte om die pyplyn en lisensie transaksies te probeer red.

Die verdedigings maatskappy se politieke base het op die hoogste vlak bo die president gaan hulp soek om die transaksie te red. Hulle is gese dat dit moontlik is om dit nog te red maar dit gaan afhang van ons opposisie se politieke leiers.”

to establish precisely what is happening in the process except to be able to say that our opposition is in trouble.”⁵⁸

74. He thought MTN needed a show of government support:

“We must find a way in which we can bring about the physical presence in the country of someone from our highest political rank. So far as I can ascertain, there is a big petrol transaction going on involving two players in this field in South Africa. Both have strong government shareholdings and we can look at how we could use this to move the transaction in our favour.

We cannot just rely on the indication that we only have to wait two months. The opposition’s shareholders are daily in the country busy trying to rescue the situation. But they will become more desperate the longer the process is prolonged and the nearer it gets to next year’s election. I think this could offer an opportunity to do a deal with them.

While we are working with the opposition’s shareholders we must also make a reality of our physical presence. Although we undertook more than a month ago to establish a physical presence, we have apparently still done nothing to make it a reality...”⁵⁹

⁵⁸ “Dit sal nie verkeerd wees om te se dat die situasie geweldig vloeibaar is nie. Vanuit die ministerie wat die proses beheer is daar nou sterk simpatie en voorkeur vir ons . Dit will lyk asof hulle inligting gekry het dat daar erens ‘n inligting lekkasie was wat die opposisie in staat gestel het om hulle aanbod te wysig.

Terseldertyd probeer die twee regerings instellings binne ons opposisie alles in hul vermoed om die transaksie te red. Hulle voordeel is natuurlik dat hulle elke dag in die land is en feitlik vrylik toegang het tot op die hoogste vlakke. Ons man vind dit derhalwe moeilik om presies vas te stel wat aangaan in die proses behalwe om te kan se dat ons opposisie in die moeilikheid is.”

⁵⁹ “Ons moet ‘n manier vind waarop ons ‘n fisiese teenwoordigheid van ons hoogste politieke vlak in die land kan bewerkstellig. Sover ek kon vasstel is daar ‘n groot petroleum transaksie aan die gang van die twee speelaars in hierdie veld in RSA. Beide het sterk regerings aandeelhouding en ons kan kyk hoe ons dit kan gebruik om die transaksie in ons guns te swaai.

Ons kan nie bloot staat maak op die aanduiding dat ons net twee maande moet wag nie. Die opposisie se aandeelhouers binne die land is op ‘n daaglikse basis besig om die situasie te probeer red. Hulle sal egter meer desperaat raak so langer die proses uitrek en hoe nader dit aan die verkiesing volgende jaar kom. Na my mening kan dit moontlik ‘n geleentheid bied om ‘n reëling met hulle te maak.

Terwyl ons aan die opposisie se aandeelhouers werk moet ons ook ons fisiese teenwoordigheid ‘n werklikheid maak. Terwyl ons meer as ‘n maand gelede onderneem het om ‘n fisiese teenwoordigheid te vestig het ons oenskynlik nog niks gedoen om ons fisiese teenwoordigheid ‘n werklikheid te maak nie...”

75. Mr Kilowan ended with some recommendations which included:

“Arrange a meeting with our opposition’s shareholders, preceded by a resolution that we will be willing to include them as shareholders. This meeting can be arranged through the Beta Group which has very close contact with the defence group. We must have the highest level of representation. Invite the head of the Beta Group to come to South Africa as soon as possible.”⁶⁰

76. On 3 and 4 July 2004 Mr Kilowan again visited Iran and wrote a report. He said that the GSM2 license process was stalled at a political level and there was no end in sight:

“Turkcell’s partners in Iran (the Bonyards [*sic*] and ICI [a subsidiary of Iran Electronics Industries – a Ministry of Defence Company]) are still hopeful that the license will eventually be awarded to their consortium but are also looking at other avenues if this does not happen.”⁶¹

77. He had met Mr Mohammad Mokhber (“Mr Mokhber”), the Vice President of the Bonyad:

“I met with the Vice President of the Bonyards [*sic*] on Saturday evening. He reminded me that he had met “Ms Irene and Mr Rob” during the bidding process. Mr Sarraf and Hamed Aref also attended this meeting.

The meeting can be summarised as follows:

- The Bonyards [*sic*] have been working for the last three years at getting the second GSM licence.
- They are putting a lot of effort into ensuring that their consortium does not fail.
- If the consortium fails they are quite prepared to talk to MTN to discuss ways in which they can

⁶⁰ “Reel ‘n vergadering met ons opposisie se aandeelhouders wat voorafgegaan word deur ‘n besluit dat ons bereid sal wees om hulle as aandeelhouders in te sluit. Hierdie vergadering kan gereel word deur die Beta groep wat baie nou kontak met die verdediging groep het. Ons moet hoogste vlak verteenwoordiging het.

Nooi die hoof van die Beta groep om so gou as moontlik na SA to kom.”

⁶¹ Report on Visit over 3 to 4 July 2004, 4 July 2004, page 3.

participate in the “MTN” consortium.

- Irrespective of the outcome of the 2nd GSM licence, they are willing to work with MTN to exploit other opportunities in the Iran telecommunications market.
- MTN was chastised for not listening to Mr Sarraf. Apparently this is a reference to the MTN business plan that was not aggressive enough.
- It was made clear that the Bonyards [*sic*] do not get into bed easily with companies in Iran and to form a working relationship with a company from outside Iran is a big deal. Reference was made to certain companies within Iran with which the Bonyards [*sic*] will not be able to work. I clarified this later and understand this is a reference to the Balli Group.
- The Vice President is prepared to travel to RSA to meet with MTN’s senior people.

My take on the meeting is:

- The Bonyards [*sic*] have put a lot of effort and political clout on the table to ensure that their consortium wins the 2nd GSM licence. It is unlikely that they will take kindly to MTN if MTN is perceived to be doing anything from its side to scuttle “their deal”.
- They are however pragmatic enough to be willing to work with MTN should, through no pressure from MTN, the licence be granted to MTN. I suspect that they will be looking for a deal similar and better to the one that they had with Turkcell.
- There is a very close relationship between Mr Sarraf and the Vice President and therefore any future initiatives that MTN embark upon in Iran will see the Bonyards [*sic*] looking for strong involvement.
- The Bonyards [*sic*] recognize that MTN is a major force in the telecommunications sector.”⁶²

⁶² *Ibid.*, pages 3-4.

78. Mr Kilowan also met Mr A. Vafaei (“Mr Vafaei”), a Vice President of Iran Electronics Industries:

“I was accompanied to this meeting by Mahdi Basadien and the RSA ambassador in Iran, Ambassador Saloojee.

Unfortunately the Vice President: Business Development, Mr Vafaei, is not very close to the 2nd GSM licence process. This is being driven by IEI’s communications subsidiary, ICI. As far as Vafaei is concerned the process is proceeding smoothly and it is largely completed.

He indicated however that they are very keen to explore how MTN and they can work together in the telecommunications field in Iran. They are currently a major infrastructure player in both TCI and MCI and are looking at consolidating that position.

They are also very aware of the proposed privatization of TCI and are also looking at ways in which they will participate in the 3rd GSM licence.

Vafaie [*sic*] requested that we arrange a follow up meeting where MTN will make a more in depth presentation of its capabilities. He will ensure that the senior executives of ICI will also attend that meeting.”⁶³

79. Mr Kilowan left Iran on 4 July 2004 and did not return until 24 August 2004. Meanwhile, Mr Nhleko, Mrs Charnley and Mr Nisbet went to Iran between 19 and 23 July 2004. Mr Kilowan wrote what appears to have been a briefing note for them, dated 21 July 2004 and headed *Consolidated Report on Iran Visits*. It included a passage in the executive summary:

“There are strong indications from more than one source that the Iranian Ministry of Defence is a key player and is looking for some sort of trade with South Africa. This could be of assistance to MTN in relation to the 2nd GSM licence”.⁶⁴

80. On the other hand, in the passage dealing with Sairan, presumably based upon the meeting with Mr Vafaei, there was no reference to a trade with South Africa:

⁶³ *Ibid.*, pages 4-5.

⁶⁴ Consolidated Report on Iran Visits, 21 July 2004, page 3.

“My overall sense is that they are a strong player in the sector and are keen to work with MTN in future developments. They are particularly keen to be part of the 3rd GSM licence process through one of their other subsidiaries.”⁶⁵

81. During their visit to Tehran Mr Nhleko, Mrs Charnley and Mr Nisbet met Dr Fardis, Mr Vafaei, Mr Sarraf and others. Nothing came of the visit. There appeared to be a stalemate in the negotiations between MCIT and the Irancell consortium but no opening for MTN. Soon afterwards the Prime Minister of Turkey arrived on a visit but was unable to secure any concessions for Turkcell. On 28 July 2004 Mr Pischevar sent an urgent and characteristically excitable message to MTN:

“Things are boiling here. We need MTN people on the ground asap...It is over for the Turks here...politically economically for now. We need to exploit this on the ground, in synchrony and full attack mode using local partners, SA government and MTN resources...As soon as Turkish PM's plane takes off from here we need SA Ministers plane to land...”⁶⁶

August 2004: Minister Lekota's Visit to Iran

82. On her return to South Africa, Mrs Charnley wrote to Patrick Lekota, Minister of Defence (“Minister Lekota”), whom she had also known through the ANC:

“I am writing to brief you on the opportunity that the MTN Group (“MTN”) is pursuing in Iran. As we have not met recently, I would like to share with you the challenges which MTN is currently facing...

MTN has visited Iran on a number of occasions to explore ways in which it could turn to its favour the impasse that has apparently arisen between Turkcell and the Government of Iran. From discussions that MTN has held with the South African Embassy in Iran, it seems to us that the Iranian Government wants MTN to enter its telecommunications market and may well award the 2nd GSM licence to MTN if a broader and mutually beneficial trade deal is structured between the South African and

⁶⁵ *Ibid.*, page 5.

⁶⁶ E-mail from Mr Pischevar to Mr Nhleko, Mrs Charnley and Mr Nisbet, 28 July 2004.

Iranian governments...MTN is keen to pursue the GSM licensing opportunities in Iran...and accordingly any form of support from our government would be highly appreciated...[W]e believe it would be very helpful if enquiries could be raised with the relevant Iranian authorities on their expectation for an appropriate bilateral trade deal for them to award the 2nd GSM licence to MTN, if the licence is not awarded to Turkcell.”⁶⁷

83. Mrs Charnley says that about a week after sending this letter, she ran into the Minister and told him that it would be helpful to MTN if he accepted a long-standing invitation to visit Iran. This encounter is undocumented, but by 3 August 2004 it appears that the Minister had arranged a visit. On that date Mrs Charnley wrote to him again:

“It has been brought to my attention that you will be travelling to Iran around the 15th and 17th August.

I am requesting an opportunity for myself and the Chief Executive Mr Phuthuma Nhleko to accompany you on this visit as MTN is exploring new business opportunities in Iran...”⁶⁸

84. During the Minister’s visit the Iranian Minister of Defence, Rear Admiral Shamkhani (“Admiral Shamkhani”), gave the customary dinner in honour. Also present were Dr Ebrahim Mahmoudzadeh (“Dr Mahmoudzadeh”), Mr Nhleko, Mrs Charnley and Ambassador Saloojee. There is some controversy over what the Admiral said during the dinner. The MTN delegation optimistically took him to have said, or claimed that he had said, that MTN should become a member of the Irancell consortium. When they went home they wrote thank you letters to all concerned, proposing immediate negotiations for their entry into the consortium as junior partner to Turkcell. But the Iranians did not take this seriously, not least because it would have required the consent of Turkcell, which they were sure would not be forthcoming. The subject was allowed to drop.

⁶⁷ Letter from Mrs Charnley to Minister Lekota, 26 July 2004.

⁶⁸ Letter from Mrs Charnley to Minister Lekota, 3 August 2004.

85. One letter inviting discussion about MTN's participation together with Turkcell in the Irancell consortium was addressed to Mr Jarrahi, the Deputy Minister of Defence.⁶⁹ On 24 August 2004 Mrs Charnley sent an e-mail to Mr Kilowan, who had just arrived in Iran to set up the permanent MTN office, asking him to arrange a meeting with Mr Jarrahi at which Mrs Charnley and Mr Nisbet could pursue negotiations to "finalise consensus reached around the 2nd GSM license." She added "You should also get hold of a Mr Mahmoudazeh [*sic*] but Mr. Jarahhi is the key."⁷⁰ Mr Kilowan arranged the meeting, which took place on 15 September 2004, but the key would not turn in the lock.

Nuclear Interlude

86. On 27 September 2004 the Iranian representative at the IAEA, Dr Rowhani, went with a delegation to South Africa for talks with President Mbeki. MTN offered to sponsor the delegation's stay in Cape Town. On 16 September 2004, Mrs Charnley had written to Dr Ayanda Ntsaluba, the Director General for South Africa's Department of Foreign Affairs. After describing Rowhani's upcoming trip and offering to pay the costs, she went on to state that the offer was a "gesture and token of our appreciation for your support" that "your department has provided to MTN as we scoured the Middle-East for licensing opportunities."⁷¹ In a letter dated 17 September 2004, Charnley wrote to Dr Mohammed Ali Ghanzadeh at the Iranian Embassy in South Africa, stating: "we understand that Dr. Rouhani will be leading a high level delegation of 10 senior Iranian government officials and will arrive in South Africa on 27 September 2004. MTN has requested the South African government allow MTN to sponsor all the costs of hosting Dr. Rouhani and his delegation on his planned trip to Cape Town, including flights,

⁶⁹ Letter from Mr Nhleko to Mr Jarrahi, 18 August 2004.

⁷⁰ E-mail from Mrs Charnley to Mr Kilowan, 24 August 2004.

⁷¹ Letter from Mrs Charnley to Dr Ntsaluba, 16 September 2004.

accommodation, lunches, dinners and a guided tour.”⁷² Both governments consented.

87. The talks were attended by Ambassador Minty, who afterwards issued a press release:

“President Thabo Mbeki today met with Dr Hassan Rouhani, Secretary of the Supreme National Security Council of the Islamic Republic of Iran.

They discussed wide ranging issues including developments relating to the Nuclear Programme of the Islamic Republic of Iran and its consideration in the International Atomic Energy Agency (IAEA).

South Africa, as a member of the Board of Governors of the IAEA has been active on this issue and believes that a confrontation should be avoided and a solution should be sought urgently. Such a solution should be possible by finding a balance between the rights of NPT members to nuclear technology for peaceful purposes and the need to build international confidence. Towards this end South Africa will be interacting intensively with all parties concerned and work for a satisfactory solution.”⁷³

88. Mr Kilowan accompanied the delegation to South Africa.⁷⁴

26 September 2004: The Single Article Act

89. On 9 September 2004 Mr Kilowan, now permanently installed in Tehran, sent home a report. There were rumours that the entire GSM2 project might be abandoned:

- “Latest rumours are that the Turkcell process has been stalled once more.
- Also potential threat to entire 2nd licence process.”⁷⁵

⁷² Letter from Mrs Charnley to Dr Ghanzadeh, 17 September 2004.

⁷³ Press Release: President Thabo Mbeki met with Dr Hassan Rouhani, Secretary of the Supreme National Security Council of the Islamic Republic of Iran, 29 September 2004.

⁷⁴ Mr Kilowan’s account of the visit is discussed in Chapter 6, paragraphs 263-265.

⁷⁵ MTN: Iran Project Status Report and Further Steps, 9 September 2004.

90. On 26 September 2004 parliament passed what has been called the Single Article Act. It provided that the GSM2 licence and the contract for the operation of the Tehran airport should be subject to parliamentary consent.
91. After the passage of the Single Article Act, there followed a period of uncertainty. Parliament established a Joint Commission to advise on what should be the terms of an acceptable licence. The Commission's debates took place behind closed doors. Rumours abounded. The Minister of Communications, Mr Motamedi, made statements saying that he was confident that a licence to the Irancell consortium would be approved.⁷⁶ On the other hand, as Mr Kilowan and Mr Pischevar had earlier reported, others were saying that Turkcell was politically unacceptable and that the entire process might be cancelled. Everyone waited. On 21 October 2004 Mr Kilowan sent Mrs Charnley and Mr Nkateko "Snakes" Nyoka ("Mr Nyoka"), MTN's international business development manager, a rather despondent urgent memorandum. He said:

"As you would have noticed I made a number of recommendations that we should ideally discuss and then agree on some course of action before I go back to Iran...

I am not convinced that it would serve any good purpose to go back to Iran when it is not clear what MTN's position is on the recommendations I have made.

In my view the following matters need to be decided sooner rather than later:

1. Is MTN going to establish a branch in Iran?
2. Is MTN going to participate in any projects in Iran?

Both the above matters have been discussed before but I have not been given a clear mandate to proceed and any further effort on these matters will essentially be a waste of time, energy and resources in the absence of such mandate."⁷⁷

⁷⁶ E-mail from Mr Pischevar to Mr Nhleko, Mrs Charnley, Mr Nisbet and Mr Kilowan, 20 January 2005.

⁷⁷ Urgent memorandum from Mr Kilowan to Mrs Charnley and Mr Nyoka, 21 October 2004, page 1.

92. In December 2004 there was a meeting of the South African – Iranian Joint Bilateral Commission in Tehran. It divided itself into two working committees: one on Political and Social Affairs, jointly chaired by Mr Ghorbanoghli, as head of the Africa desk, and his South African opposite number, and the other on Technical and Economic Affairs. The latter committee included representatives of six South African commercial enterprises operating in Iran, including MTN, which was represented by Mr Kilowan.
93. The Commission issued a communiqué covering a large variety of subjects. On “Disarmament and Nuclear Waste” it recorded that the parties reaffirmed their commitment to the nuclear proliferation treaty and called for its universal implementation including nuclear disarmament and the inalienable right of all Non-Proliferation Treaty members to use the technology for peaceful purposes. Under the heading “Defence”, the communiqué said:

“Iran and South Africa are currently engaged in a process of identifying areas of possible defence co-operation in the context of the Iran-South Africa Joint Bilateral Commission. These could include

- Technology
- Training
- Procurement

This process should culminate in a MOU on defence co-operation to be signed on a suitable date in the future. In the mean time, both sides will endeavor to do whatever is possible to facilitate the formalization of defence co-operation.”⁷⁸

94. On 26 January 2005 Mr Kilowan sent a “Confidential and Urgent” report to Mr Nhleko and Mrs Charnley:

“The Turkcell agreement is now firmly on the agenda of Parliament. The Executive placed it on the agenda for today but last night the Minister (Motamedi) requested the

⁷⁸ Joint Communiqué of the 8th Joint Bilateral Commission between the Islamic Republic of Iran and the Republic of South Africa held in Tehran from 14 to 15 December 2004 (Corresponding to 24 and 25 Azar 1383), paragraph 1-9-1.

Speaker to remove it from the order roll...The corridor talk is that the Executive pulled the matter...because there is now a strong majority in the joint commission that is pushing for the Turkcell agreement to go the same route as the TAV (airport) contract [which had been cancelled]. There is talk that the government will then simply reimburse Turkcell for the expenses already incurred...At this stage my advice remains that we simply keep a watchful eye on the Turkcell process and make sure that we learn the lessons that will enable us to get an MTN licence through a much smoother process.”⁷⁹

95. By then it had become clear that the Commission would not recommend acceptance of a foreign investor (e.g. Turkcell) having more than a 49% holding in the operating company. Turkcell protested that this was unacceptable and that, if parliament passed such legislation, it might have to withdraw from the project. On 1 February 2005 the irrepressible Mr Pishevar advised MTN that this was the moment to put itself forward:

“I believe it would be prudent to consider writing a letter to President Khatami from the President of South Africa (if that is too much or not possible then a letter from Phuthuma [Nhleko]) reminding him that South Africa and MTN, as the 2nd place winner, would be more than glad to invest in Iran and take 49% ownership.”⁸⁰

96. Mr Kilowan disagreed. On the following day he wrote to MTN:

“I do not agree that we should write any letters to the President or the Minister. Both of them support the Turkcell transaction and we will destroy our political goodwill that we have built up to date if we are seen to be interfering or rejoicing in the demise of a project that both the President and the Minister feel strong about. My recommendation is that we continue with the processes in place at present and that we do not engage in any overt steps to hasten the cancellation of the Turkcell deal.

My sense is that restraint on our part at this juncture will deliver the second licence to us...

⁷⁹ Confidential and Urgent: Quick Update, from Mr Kilowan to Mr Nhleko and Mrs Charnley, 26 January 2005.

⁸⁰ E-mail from Mr Pishevar to Mr Nhleko, Mrs Charnley, Mr Nisbet and Mr Kilowan, 1 February 2005.

Further discussion on the Turkcell matter has been postponed until Wednesday 9 February. In the meantime a lot of lobbying is being done from the Turkcell and Irancell shareholders (and remember that the Ministry of Defence is a key shareholder) to get the transaction approved with as few amendments as possible. It is my understanding that the Ministry of Defence shareholding party agreed to the reduction of Turkcell's shareholding but with the caveat that he was not sure Turkcell would accept it."⁸¹

97. Mr Nhleko replied to Mr Kilowan: "I agree with your proposed position for MTN on the matter. It is wise."⁸²
98. On 16 February 2005 parliament accepted the recommendation of the Commission and passed the Irancell Act, which required 51% of the shares to be in Iranian hands and that all decisions of the board should have the approval of at least 50% of the Iranian shareholders. The law was then referred to the Guardian Council for confirmation of its constitutionality.

February to June 2005: The Irancell Consortium divided.

99. After the Irancell Act had been published, there followed a period of negotiation and bickering within the Irancell consortium over how they were going to comply with it. On 1 March 2005 Mr Kilowan reported on the situation:

"The situation in Iran can be summarised as follows:

- The Guardian Council is still to ratify the decision by Parliament on the shareholding split and other conditions that are to be imposed on Turkcell
- Negotiations between Turkcell and its local partners are being conducted at the highest levels
- Turkcell is trying to do a careful balancing act between not alienating Parliament and is therefore engaged in negotiations and playing for time in the hope that the Guardian Council will reject the Parliamentary decision.
- It is highly unlikely that the Government will turn to MTN in the event that Turkcell walks away from the transaction. Government's preferred course of action seems to go for a

⁸¹ E-mail from Mr Kilowan to Mr Nhleko, Mrs Charnley and Mr Nisbet, 2 February 2005.

⁸² E-mail from Mr Nhleko to Mr Kilowan, Mrs Charnley and Mr Nisbet, 2 February 2005.

fresh tender.”⁸³

100. On 26 April 2005 Mr Kilowan organized a lunch at the newly refurbished residence of Ambassador Saloojee, to mark the launch of the MTN Iran office. He invited Mr Nhleko and Mrs Charnley, saying their presence would contribute to “ensuring that they [the Iranians] all know that Iran is still a priority at the highest levels within MTN. We also need to address the issue of the Third Licence...”⁸⁴

May – June 2005: MTN Returns

101. On 24 May 2005 Mr Kilowan reported on the problems which the Irancell consortium were having in agreeing a structure which would comply with the Irancell Act:

“The Guardian Council has accepted the revised Bill regarding the conditions to be applied to the Irancell licence. Turkcell has ostensibly accepted these conditions but the entire process is locked down in the equity split. Understandably Turkcell does not want to lose [*sic*] control of the entity. At the same time, SAIRAN/ICI seems to have adopted the view that it alone is entitled to the 21% and there are frantic attempts behind the scenes to find the money to support the demand.

The Bonyads are also of the view that they should be given a chunk of the 21% but they are not prepared to pay more. Doubts have been expressed over whether they have the money to even support their current stake.

There are other dynamics that I will discuss in any future face to face meeting. However:

My overall view is that we should not attach any credence to any person or entity that is offering to get us the second licence against payment of a sum of money or any other form of compensation. Nothing, other than time, will unlock this process.

If such an outcome was possible, then Turkcell should not have had any problems with their licence. Remember also,

⁸³ Confidential Memorandum from Mr Kilowan to Mrs Charnley and Mr Nhleko, 1 March 2005, page 1.

⁸⁴ E-mail from Mr Kilowan to Mrs Charnley and Mr Nhleko, 11 April 2005.

both Defence and the Bonyads (shareholders in Irancell) are reporting directly to the Supreme Leader. Even then they could not avoid all the problems that have beset the Irancell licence...

In my view we should now start the preparation for either a renewed second licence process or the third licence process.”⁸⁵

102. Despite the attempts of Dr Fardis of MCIT to broker an agreement, the members of the Irancell consortium were unable to agree on the structure of an operating company which would satisfy the terms of the Irancell Act. On 8 June 2005 MCIT applied to the Economic Council for permission to exit the tender process. The Economic Council gave a decision on 15 June 2005 which gave MCIT 15 days to agree a new structure with the Irancell consortium or to establish another consortium. Dr Fardis wrote to the Irancell consortium putting forward a compromise proposal and giving them until the end of business hours on 20 June 2005 to agree to it. Failing agreement, “the company will be excluded from negotiations concerning the selection of the winner of the Second Operator bid.”⁸⁶
103. Mr Sarraf seems to have picked up a somewhat garbled version of MCIT’s application on 8 June 2005 and sent an e-mail the next day to Mr Kilowan:

“Following to telephone conversation today please be informed that the latest dead line for turkcell is finished and ICT has made decision to get special permit [sic] to start negotiation with four consortium that they were in final short list and they have plan to start negotiation with MTN consortium at the first and finally signed contract with one of them how submit the best proposal close to the previous winner’s proposal and by accepting the new condition which confirmed by parliament. I will inform you about the new steps during the next few days.

Best regards
Sarraf.”⁸⁷

⁸⁵ Highly Confidential Memorandum from Mr Kilowan to Mr Nhleko and Mrs Charnley, 24 May 2005, pages 1-2.

⁸⁶ Letter from Dr Fardis to the Irancell consortium, 15 June 2005.

⁸⁷ E-mail from Mr Sarraf to Mr Kilowan, 9 June 2005.

104. MTN decided that Mr Wheeler, Mr Nisbet and Mrs Charnley should go to Iran to find out what was happening. They were in Tehran about 13 to 15 June 2005. It appeared that if the Irancell consortium was excluded, there might be an opportunity for the MTN consortium to take its place. Mr Kilowan christened the initiative “Project Snooker” and under that name Mr Wheeler, with Mr Kilowan’s assistance, prepared a report (“the Snooker report”).
105. The Snooker report is a lengthy document and only a few excerpts need be given in this summary. First, there is a discussion of the political context, international (“macro”) and within Iran and Turkcell (“micro”) issues. In the macro list, it is said that Iran has for a long time had discussions with South Africa about the procurement of weapon systems and technology. “Up to now SA has not been able to respond positively but after various representations it would seem that there might be a softening of the SA stance. This has been interpreted very positively by Iran.” On the “nuclear issue”, it says that South Africa, like other members of the Non-Aligned Movement, has consistently supported the use of nuclear material for peaceful purposes. “This stance has therefore been supportive of the Iranian position and this has been very well appreciated by the government of Iran.”⁸⁸ There is nothing to suggest that MTN had any involvement in influencing either of these policies.
106. There is a discussion of the position of Sairan in the Snooker report. Negotiations with Turkcell have been long and unproductive and so Sairan has “essentially decided to move the position with Turkcell to closure so that it can choose a new foreign partner...”. They are “very comfortable to have MTN as the foreign partner”. The MTN party discussed with Sairan the legal question of who had power to exclude Turkcell (the answer was MCIT) and whether this would be permitted under the Irancell Act (Sairan thought it would be).⁸⁹
107. What most interested the Bonyad was how much MTN would be prepared to put up to fund their shareholding. They wanted an immediate commitment,

⁸⁸ The Snooker report, pages 2-3.

⁸⁹ *Ibid.*, page 4.

which MTN would not give. But they “made it clear...that they expect a significant funding contribution and very favourable repayment terms.”⁹⁰

108. The Snooker report summed up its conclusions:

“The Iranian partners in Irancell are highly committed to substituting MTN for Turkcell. We have indicated to them that MTN is prepared to consider such a step as long as it is legally permissible...

At the end of the visit there was general and broad agreement that:

- MTN is prepared to substitute Turkcell to the extent that such a move is permissible and possible under Iranian law.
- MTN is prepared to fund the licence fee in certain proportions with clear repayment terms for the Iranian parties.
- MTN will obtain a Board resolution giving Power of Attorney to its representatives to negotiate and if possible reach agreement with the Iranian shareholders of Irancell.
- The joint SAIRAN/Bonyad team will provide MTN with a draft MOU/Pre-Agreement by Monday 20 June for review, amendment suggestions and possible signature when the team comes back.
- Senior executives will come to Iran to commence and hopefully conclude appropriate negotiations.”⁹¹

109. The MTN delegation returned to South Africa on about 15 June 2005. On 20 June 2005 the deadline set by Dr Fardis for agreement among the Irancell consortium expired. According to the decision of the Economic Council, he now had another 10 days to establish a new consortium. So on 21 June 2005 he wrote to Parman Ertebat and IEDC saying that he required a concluded agreement with “one of the winners of the second mobile tender” by the end of working hours on 26 June 2005.⁹² That enabled IEDC to open negotiations with MTN, and Sairan and the Bonyad invited MTN to return immediately to Tehran.

⁹⁰ *Ibid.*, page 5.

⁹¹ *Ibid.*, pages 7-8.

⁹² Letter from Dr Fardis to Parman Ertebat and IEDC, 21 June 2005.

110. MTN then acted quickly. Mr Wheeler prepared a board paper, substantially reproducing the Snooker report, and draft resolutions authorizing MTN to enter into negotiations. Mr Nhleko was at the Great Eastern Hotel in London: the papers were faxed to him on the night of 21 June 2005 and he approved them. They were distributed to the Board the next day and the resolutions were passed. On the same day, Mrs Charnley sent certified extracts from the resolutions to Mr Kilowan for distribution to the Iranian parties.
111. On 21 June 2005 the President of the Bonyad, Dr Forouzandeh, the Vice President Mr Mokhber and the Deputy Minister of Defence Mr Jarrahi, requested an urgent meeting on the following day with Ambassador Saloojee. They said that President Khatami, whose term of office was due to expire in a few weeks, had indicated that the awarding of the 2nd GSM licence had to be finalized before he left office. It was therefore necessary for an MTN delegation to come immediately to Tehran and negotiate with Sairan and the Bonyad. Dr Forouzandeh uttered dire warnings against MTN having any idea that their existing consortium could get the licence and cut out Sairan and the Bonyad.⁹³
112. Mr Kilowan was anxious that MTN should not get caught up in a dispute between Turkcell and MCIT. Turkcell, he said in an e-mail to Charles Wheeler on 23 June 2005, was “making dark statements about protecting their rights”. MTN should get “very strong and solid legal advice on our position in this potential legal mess as we do not want to become the meat in this sandwich.” He added (correctly) that “the best we will be able to do is to turn out an MOU that looks more like a pre-agreement. The SHA and other documents will have to be drafted over the following days and possibly weeks.”⁹⁴
113. Mr Kilowan also wrote a memorandum on a strategy for negotiating with Sairan and the Bonyad. He advised playing hard to get:

⁹³ Minute of the meeting between the South African Embassy and Mostazafan Bonyad/Ministry of Defence, dated 24 June 2005.

⁹⁴ E-mail from Mr Kilowan to Mr Wheeler, 23 June 2005.

- “1. There is no need to be in a rush to reach an agreement with the two parties - and thereby compromising on important points. If the two cannot strike a deal with us, they are out of the picture and will be at our mercy. While we will obviously still give them some shareholding, it will be simply to ensure that we do not have two such powerful institutions as our enemies...

3. We are now in a significantly stronger position than we were last week. We should therefore push very hard for:
 - a. The full 49%. Apparently there has been some discussion from the Bonyads side that they will now offer MTN 40%, between the two of them 40% and some other Iranian entity (which will in effect be under their control) 20%. Our friend’s advice is that we should them [*sic*] to jump in the lake if they come up with this proposal.

 - b. The management of the project given our proven experience, know-how and skill...

 - c. A proper pay back regime for the funding component as both the parties has huge assets but very little cash flow and it is highly doubtful that they will be able to repay their loans, even if repayment only starts after 12 months...

4. We should not meet with them on Friday, but rather use Friday to consolidate our position, gather further information on the capabilities of the negotiating parties.”⁹⁵

114. MTN did not accept this advice. Mr Kilowan says it was based on what he had been told by “a friend” and it is possible that it may have been Mr Pishevar, who may not have been happy at being dropped by MTN in favour of Sairan and the Bonyad.⁹⁶ But there is nothing to show that Mr Kilowan’s advice was not given in good faith. The meeting with Sairan and the Bonyad did take place on 24 June 2005. The MTN team came with a dense ten-page draft MOU which the parties spent some time discussing but which did not appeal to the Iranians. They withdrew and came back with drafts of two brief memoranda of understanding, one to take effect if “MICT substitutes MTN for

⁹⁵ For Your Eyes Only! Urgent Update memorandum, page 1.

⁹⁶ The shareholders agreement between MTN and the members of its original consortium had expired at the end of 2004. See paragraph 42 above.

Irancell Consortium's Operator (EAC)" and the other if "MICT rejects the first winner of the tender and announces MTN Consortium as the winner of the tender" [*sic*]. In the former case, MTN agreed to join the Irancell consortium. In the latter case, it agreed to substitute Sairan and the Bonyad for its previous partners. In both, MTN agreed to accept the Irancell consortium's draft licence agreement and business plan and to fund at least 80% of the project. These memoranda were signed on the same day. They are short, simple, one-page documents drafted in both Farsi and English. The latter version is in a style which suggests that it was drafted by someone not altogether fluent in the language.⁹⁷

115. On the following day, 25 June 2005, Turkcell wrote to Dr Fardis with a proposal for the shareholding and financing of Irancell which they said was in accordance with his earlier compromise proposal. On 28 June 2005 he forwarded the Turkcell proposal to Sairan and the Bonyad. Negotiations were resumed and the former partners, apparently reconciled, signed a MOU on 13 July 2005. They expressed the wish to finalise everything and obtain the licence within two weeks.
116. The result was that in July 2005 the two MTN MOUs of 24 June 2005 appeared to be dead. The Irancell consortium had come together again. On 5 July 2005, Mr Kilowan sent a memo to Mr Nhleko and Mrs Charnley:

"Since Saturday I have had a series of meetings to understand what the situation is and what gave rise to the change in the positions of the Bonyad and SAIRAN. I am in the process of preparing a detailed report and presentation which I would like to sit down and discuss in SA next week. For now I provide a high level summary to keep you updated.

1. SAIRAN and the Bonyad essentially used us to place them in a stronger negotiating position versus Turkcell. When Turkcell was shown the signed letter they very quickly changed their stance. Hence the announcement on Saturday.

⁹⁷ A discrepancy between the two versions gave rise to a difficulty at a later stage: see paragraph 134 below.

2. Notwithstanding the announcement, which essentially covered the areas that are not (and cannot be) in dispute, i.e. the “IranCell Act” and the tender rules and regulations, there is still no agreement on the substantive issues that have proven hugely intractable. In other words, “The Fat Lady is still to sing!”
3. Mokhber, at least (as I still cannot get the SAIRAN people to return my calls) is of the same view. His take on the entire matter is that he told us that if they can reach agreement with Turkcell, then they will do so. If not, then the agreement that we signed would kick in.”⁹⁸

117. Mr Kilowan’s longer presentation (in Powerpoint form) was included in a longer document dated 19 July 2005 and headed *Project Snooker: Review, Analysis, Options and Recommendations*. It examined the political consequences of the election of President Ahmadinejad the previous month. In the section on the “Second Mobile Licence” it said: “Something happened shortly before 2 July 2005 to change the fairly positive position we were in on Sunday 26 June.” The indications that there had been a bona fide intention to enter into an agreement with MTN were listed:

- “Genuine time pressure [i.e. to complete the matter during President Khatami’s period of office]
- MICT went public with Turkcell’s exclusion
- Minister of Defence keen to have MTN on board
 - Contacted SA Ambassador⁹⁹
 - Informed Iran Ambassador to brief MTN accordingly
 - Appointed a dedicated team to negotiate with MTN
- SAIRAN prefer to work with MTN

⁹⁸ For Your Eyes Only! Urgent Update memorandum, page 1.

⁹⁹ See paragraph 111 above.

- Most senior person remained personally involved
- Bonyad preferred to work with MTN
 - Most senior person remained personally involved”.¹⁰⁰

118. So, said Mr Kilowan, what happened? The answer, he thought, lay in Iran’s national security interest. It was reported on 8 July 2005 that Turkcell had agreed a financing deal with Russia’s Alfa Group. Iran and Russia were very close on key defence issues, *ergo*, both the Ministry of Defence and MCIT “understand that it would be in the national interest of Iran to bring Turkcell back into the process” and so “Sairan and Bonyad are simply instructed that they have to accept Turkcell back and walk away from their agreements with MTN (this despite their own personal desire to work with MTN)”.¹⁰¹

119. Mr Kilowan then listed the options for MTN. The first was immediately to “throw in the towel and close shop.” The second was to wait until March 2006 to see if a 3rd licence was announced. If not, then close shop. The third was to decide on a long term presence: to “participate in as many telco projects as possible until 3rd licence is announced. At the same time explore ways to use office to pursue “2nd Wave” opportunities.”¹⁰²

120. Mr Kilowan’s recommendation was that he be “given a mandate to involve 3 Group employees to develop detailed proposals in respect of these two options with presentation scheduled before end of August.”¹⁰³

¹⁰⁰ MTN Iran: Project Snooker: Review, Analysis, Options and Recommendations, pages 17-18.

¹⁰¹ *Ibid.*, page 24. This conspiracy theory, which assumes that the Alfa Group (a privately owned conglomerate) was able to influence Russian foreign policy, sounds like the product of late-night talk between Mr Kilowan and Mr Pischevar. In fact Sairan and the Bonyad had always made it clear that they wanted to conclude the deal with Turkcell and that MTN was their fall-back rather than their preferred position.

¹⁰² *Ibid.*, page 26.

¹⁰³ *Ibid.*

August – September 2005: Turkcell excluded

121. Meanwhile, the negotiations between Turkcell and its Iranian partners were moving slowly and on 7 August 2005 Dr Fardis wrote to the Irancell consortium to tell them that Turkcell could have one week to finalise with the local shareholders “the licence agreement, Articles of Association, shareholders’ agreement, company registration and submission of a bank guarantee of [€300 million]”. If they did not reach agreement within a week, the Iranian partners could have until 4 September 2005 to finalise negotiations with, at their option, Turkcell “or one of the runner up Operators in MCIT tender”. It concluded by saying that if no action was taken by the deadline, “the second mobile operator tender shall be voided.”¹⁰⁴

122. On 15 August 2005 MCIT issued a document called “Enforcement stages and conditions for issuance of addendum to licence of second operator of state mobile phone” which, “to avoid any ambiguity” set out three deadlines:

“17 August 2005: signing of addendum to license agreement by Iranian shareholders possessing 51% of shares.

4 September 2005: Final conclusion of shareholders’ agreement and completion of documents.

21 November 2005: Final deadline for payment of royalty and enforcement of license.”¹⁰⁵

123. The addendum was signed on behalf of the prospective 51% shareholders on 17 August 2005. This produced a strong reaction from Turkcell, who wrote to the Minister and others on 24 August 2005 saying that the terms of the addendum had come as an unpleasant surprise, were unlawful and would be contested in legal proceedings. The turn of events quickly became known and on 26 August 2005 Mr Kilowan wrote to Mr Nhleko and Mrs Charnley:

“...I had a number of meetings close to the process. The situation can be summarised as follows:

¹⁰⁴ Letter from Dr Fardis to the honourable representatives of Irancell consortium, 7 August 2005.

¹⁰⁵ Enforcement stages and conditions for issuance of addendum to license of second operator of state mobile phone, 15 August 2005.

1. The Iranian side...signed the licence agreement on their own as Irancell.
2. Turkcell is taking the view that it has not signed the agreement and hence they are not necessarily bound by the terms of the licence.
3. Turkcell has also not signed the shareholders' agreement and is still holding out for further concessions.
4. Turkcell is getting people's backsides up [*sic*] with its view that it can dictate terms to the Iranians and if they don't get their way then they threaten the government with legal action...
6. It is expected that Turkcell will continue their brinkmanship negotiation style but it is likely that they will fall in line at the last minute...
7. At the same time the entire Iranian side is still very strongly in support of MTN replacing Turkcell. They are however much more careful about how they pursue this objective, thus the lack of contact back to MTN. MTN should not do anything, nor be seen to be rising to the bait that seems to me dangled in front of us in the various news articles."¹⁰⁶

124. Mr Nhleko seems to have been a little skeptical about the alleged support of the Iranians for MTN. He wrote back: "Can you really trust them???? Once bitten..."¹⁰⁷ Mr Kilowan wrote back: "I have the same attitude and am waiting for 3 or 4 September to come and go and see what they do before I place too much reliance on the information."¹⁰⁸

125. On 4 September 2005 Turkcell was still protesting about the behaviour of MCIT and their Iranian partners. They proposed to MCIT an entirely new consortium with different Iranian partners with whom they had signed an MOU but they did not meet the deadline.

¹⁰⁶ E-mail from Mr Kilowan to Mr Nhleko and Mrs Charnley, 26 August 2005.

¹⁰⁷ E-mail from Mr Nhleko to Mr Kilowan, 29 August 2005.

¹⁰⁸ E-mail from Mr Kilowan to Mr Nhleko, 31 August 2005.

September – November 2005: Negotiating the Terms

126. On 11 September 2005, newspapers in Iran carried the story that Turkcell had been excluded from the Irancell consortium and Dr Mahmoudzadeh was quoted as saying that his company was now in negotiation with MTN. It appears that Dr Mahmoudzadeh had that day spoken on the telephone to Mr Kilowan and asked him to invite MTN to send a team of negotiators to Tehran. On 12 September 2005 Mr Kilowan spoke to Mr Nhleko and, for the purposes of obtaining a visa, sent him a formal letter of invitation. Visas were requested for Mrs Charnley, Mr Wheeler and five others. Mr Nhleko appears to have been cautious about the legal proprieties of entering into negotiations, because on 13 September 2005 Mr Kilowan wrote to Dr Mahmoudzadeh:

“I refer to the recent press statements and our discussion about it.

Given the uncertainty about the situation, I have been instructed to request that you please provide us with a formal letter from Irancell Consortium, inviting MTN to replace Turkcell as the Major Telecommunications Operator in the Irancell Consortium.

It would also seem that Turkcell is taking the view that...[the Minister of CIT] has not responded to whatever documents they have given to him...Given this lack of clarity, it would also be important that MTN be given a letter from the MICT that indicates his agreement to MTN replacing Turkcell as the Major Telecommunications Operator.

I can indicate that the MTN delegation is currently finalising their travel and visa arrangements in order to get here as soon as possible. However, the uncertainty is making it very difficult for our senior executives to give a proper picture to the MTN Board...”¹⁰⁹

127. The same day Mr Alireza Dezfouli (“Mr Dezfouli”), the Chief Executive designate of Irancell, and Mr Mokhber sent a letter to MTN attaching the letter from MCIT which had authorised the Iranian shareholders to enter into negotiations with the runner up in the tender if Turkcell failed to meet the 4

¹⁰⁹ Letter from Mr Kilowan to Dr Mahmoudzadeh, 13 September 2005.

September deadline: “In the light of the foregoing, please inform us about your willingness and request for initiating negotiations for MTN entry into Irancell Consortium.”¹¹⁰

128. Mr Kilowan wrote to Mr Dezfouli and Mr Mokhber on 14 September 2005 asking for further confirmation:

“The MTN Group understand the situation to be as follows:

1. The invitation [to] the MTN Group is done pursuant to correspondence from the Ministry of Communication and Information Technology that expressly authorizes the Irancell Company to commence discussions with MTN Group in the event that negotiations with Turkcell are not successfully concluded by 4th September 2005.
2. The MTN Group would be negotiating with the Iranian shareholders of the Irancell Company with a view to signing the Shareholders’ Agreement (with Addenda), Articles of Association and Licence Agreement and such other documents as are necessary to conclude this phase of the project.
3. After agreement on the foundation documents the MTN Group will then be required to make certain payments in relation to the capitalisation of the Irancell Company and provide certain guarantees in relation to the licence fee.

Given its understanding as set out above the MTN Group can indicate that it is ready and willing to enter into the required negotiations and to this end will be sending a senior team to Iran to be arriving tomorrow (Thursday, 15 September) to commence and conclude these negotiations.

We would accordingly appreciate a letter of confirmation from the Ministry of Communications and Information Technology that our understanding of the process delineated here above is indeed correct.”¹¹¹

¹¹⁰ Letter from Mr Dezfouli and Mr Mokhber to MTN, 13 September 2005.

¹¹¹ Letter from Mr Kilowan to Mr Dezfouli and Mr Mokhber, 14 September 2005.

129. Negotiations began with a meeting at 3 pm on 15 September 2005 at the offices of Sairan. Minutes were taken and signed. MTN confirmed the validity of the MOU signed on 24 June 2005. It was agreed that the required documents would be given to MTN by 12 noon next day, 17 September 2005. It recorded that “MTN has fully accepted to fund the project in accordance with the MOU...”.¹¹² Further negotiations took place on 17 September 2005 after MTN had studied the documents. Again, minutes were signed. The framework was the licence agreement and addendum which had been signed by the Iranian partners before Turkcell was excluded and the shareholders’ agreement which had been agreed between the members of the Irancell consortium. The proposal was for the most part simply to substitute MTN for Turkcell.
130. As a result of these negotiations the parties signed a Letter Agreement on the following day. It was just over two pages long and contained, among other things, the following provisions:
- “3. The equity (share capital: 150 Million euros) and licence fee shall be funded by MTN. In other words, MTN agrees to pay one-hundred (100) percent of MTN’s portion of license fee and equity and eighty (80) percent of Iranian shareholder’s portion of license fee and equity. Furthermore MTN and Bank Melli shall be responsible for arranging project financing. All the funding shall be on commercial terms acceptable to all parties...
 5. Regarding the quorum and majority in general meetings, MTN is satisfied with the existing provisions of the shareholders agreements subject to the following:
 - 5.1 The resolutions on the below mentioned issues require the affirmative votes of MTN:
 - Annual business plans and budgets of the Company, including, but not limited to, medium and long term financing;
 - Major acquisitions, partnerships, formation

¹¹² Minutes of Meeting between Iranian shareholders and MTN, 15 September 2005.

of joint ventures or consortiums;

- Discontinuation of business activities;
- Entering into any agreement with persons, individuals or entities that are directly or indirectly related to Non-Iranian or Iranian shareholders;
- Charging the assets of the Company in any manner which could have significant impact on the Company's ability to use or benefit from its assets; in the ordinary course of business;
- Profit appropriations and dividend policy; and
- Approval of the annual accounts.

5.2 The parties agree to amend items (m) and (p) of article 4.01 of the shareholders' agreement in a manner that in the first and second invitations, the general meeting cannot be held without the presence of non-Iranian shareholders or its representative. At the third meeting the presence of any number of holders of the shares shall constitute a quorum. The same formula should be applied to quorum in the board...

7. The cost and expenses incurred by Iranian shareholders, if any, due to the transfer of Irancell's share to MTN shall be compensated by MTN.

8. The cooperation between MTN and Iranian shareholders should be in the line of defensive, security and political cooperation. MTN shall fully support cooperation regarding the aforementioned issues in South Africa."¹¹³

131. On the following day MTN signed a provisional shareholders' agreement. Mr Mokhber, as chairman of the Board of Irancell, and Mr Dezfouli as managing director sent it the same day to Dr Fardis, asking for "the acceptance of MTN International as the 49% shareholder and foreign shareholder in Irancell

¹¹³ Letter Agreement between the Iranian Shareholders and MTN, 18 September 2005.

Telecommunication Services Company.” Dr Fardis endorsed the letter with his acceptance on behalf of MCIT on the following day.

132. After MTN had signed the shareholders’ agreement, as qualified by paragraph 5 of the Letter Agreement protecting their position as minority shareholders, it was necessary to negotiate the terms upon which MTN would acquire its 49% holding and in particular the consideration by way of funding which would be given to the Iranian shareholders. On 21 September 2005 Mr Nhleko sent a memo to Mrs Charnley, Mr Sifiso Dabengwa (“Mr Dabengwa”) (who at the time was MTN’s Chief Operating Officer) and Mr Nisbet headed *Overview and Way Forward – Project Snooker*. He said:

“OPPORTUNITY

Project Snooker still presents one of the most significant “virgin” mobile opportunities in the world...the MTN Group must continue to pursue this opportunity vigorously.

CURRENT STATUS

The signing of the various agreements this week [under duress]¹¹⁴ was to “book our place at the foot of the mountain we still need to scale it to get to the peak”. It was a choice between inheriting an advanced arrangement [Turkcell revenue share and various negotiated agreements] or taking the chance that the window of opportunity may close on us whilst we try to reconstruct the deal and the arrangements from scratch. We chose the former.

RISK AND REWARD

Snooker is “no normal country”. The Ministry of Defence, government controlled banks and companies, together with Government essentially control all commercial activity in the country. Consequently, a conventional mindset, orthodox financial and operational approach to this subject is unlikely to provide us with an outcome that I would feel comfortable to recommend to the board on an investment of over €400 million [license fee and working capital] into Snooker. It is therefore imperative to think laterally on how we can secure the investment, attain financial and

¹¹⁴ We do not think Mr Nhleko meant more than that MTN had been told they must take it or leave it on substantially the terms which had been negotiated with Turkcell.

operational control in a manner that allows us to penetrate the market achieving an acceptable IRR and successfully repatriating profits and dividends.

TIMING

The expectation is that the license fee should be paid within weeks and the operation launched commercially within a six month period. Notwithstanding this requirement we cannot recommend that the licence fee be paid independently of a signed loan agreement with the local partners together with the transfer of our share certificate, capitalization of the Company and the security of project finance. **These pre-conditions must be fulfilled contemporaneously** otherwise we seriously run the risk of finding ourselves in an untenable situation.

PROJECT MANAGEMENT

Phase 1

Finance Structure, project funding and ancillary loan agreements

The Group CFO [Mr Nisbet] should take responsibility for this area, primarily in the following categories:

- Flow of license fee and working capital
- Appropriate security arrangements for funding of local partners together with the loan agreements
- Arranging the project finance

The overall coordination in Phase 1 will be the responsibility of the Commercial Director [Mrs Charnley].”¹¹⁵

The Vote in Vienna

133. On 24 September 2005 the IAEA adopted a resolution declaring Iran to be in breach of the Nuclear Proliferation Treaty. Twenty-two members voted in favour, one against and 12 (including South Africa and other members of the Non-Aligned Movement) abstained. Ambassador Abdul Minty (“Ambassador Minty”), the South African representative at the IAEA, made a speech

¹¹⁵ Memorandum from Mr Nhleko to Mr Dabengwa, Mr Nisbet and Mrs Charnley, 21 September 2005.

explaining why he thought that such a declaration (which could lead to a referral to the Security Council and the imposition of sanctions) was the wrong approach.

October – November 2005: Final Negotiations

134. There followed negotiations between Mr Nisbet and Mrs Charnley on the one hand and Sairan and the Bonyad on the other about the funding of the company and in particular about the loans which MTN was willing to make to their Iranian partners to enable them to subscribe for their shares. The English version of the June MOU had said that MTN would fund 80% of the licence fee and capitalization of the company, but the Iranian partners claimed that the Farsi version said 100%. The minutes of the meeting on 17 September 2005 recorded that this was left to be sorted out in negotiation.¹¹⁶ At first it was agreed, by way of compromise, that MTN would fund 90%, but when it came to it, Sairan and the Bonyad said that they did not have the money for the remaining 10%. They indicated that they would either have to borrow it from a bank or MTN would have to fund the whole of their contributions.
135. The difficulty was that if IEDC was to borrow from the bank to raise its 10%, it would have to pledge its shares in Irancell as security. MTN decided it would be better to lend the whole amount and have the shares as security for the whole of its loan. Mr Jooste, the Company Secretary, explained the position to the Board of MTN in a letter of 7 October 2005:

“Of the initial €60 million funding facility provided by Bank Mellì to the local Shareholders, €53 million has already been utilised to partly pay up the share capital in IranCell (which is currently wholly owned by the local Shareholders). The remaining funds in the facility (€7 million) is therefore not adequate to finance their €30 million share of the licence fee guarantee as previously agreed. However in this regard, Bank Mellì has agreed to advance the facility to the local Shareholders in exchange for all their IranCell shares as security. Management are of the view that this would limit the ability of the project to raise any future project funding facilities should the said

¹¹⁶ Minutes of Meeting between Iranian shareholders and MTN, 17 September 2005.

shares be ceded to Bank Melli. Recourse to the shareholders may still be required by the funders but at least the availability of these shares gives the project a chance of obtaining non-recourse funding.”¹¹⁷

136. Mr Kilowan did not think MTN had done well in these negotiations. On 4 October 2005 he wrote a memo to Mr Nhleko:

“As you are aware the negotiations with the local shareholders can only be described as being highly uneven. You will recall how we spent the whole day on 24 June 2005 discussing a long MOU only to be surprised at (literally) the 11th hour with a 1 and a half page document that you eventually signed in good faith.

When we returned to the table in September we discovered that Dr Mahmoudzadeh had, in respect of the most material point, misrepresented the contents of the Farsi version of that 1 and a half page document. It is now common cause that the Farsi version stated that MTN would fund the project 100%.

Given where we are today one needs to assess whether that was an inadvertent slip up, or merely an overt, at least to a Farsi audience, indication where they want to end up with in the negotiations with us. In my view it is therefore no accident or coincidence that we are today seriously negotiation [*sic*] on how we fund the project 100%.

My biggest concern however, is that we are ill prepared for this negotiation and we also suffer from the additional drawback that our two key negotiators here have the following problems:

- (a) A lack of a deep experience of negotiating from an absolute position of weakness;
- (b) An incomplete, and sometimes a somewhat romanticized, understanding of the social, political and personal factors that drive our negotiating partners;
- (c) A mandate that shifts as we negotiate because we have yet to produce a definitive business plan that will drive a well thought out mandate and hence the negotiating strategies and tactics.

¹¹⁷ Letter from Mr Jooste to the Board of MTN, 7 October 2005.

What follow is my assessment of the situation as of now and some recommendations on how we could proceed to bring these negotiations to a conclusion that might satisfy our Board and shareholders.

ASSESSMENT

- (a) The opportunity remains an exciting and potentially profitable one. We all therefore have a lot to gain by successfully concluding these preliminary negotiations.
- (b) However, a desire to conclude the negotiations and be part of the Second Operator should not blind us to the clear reality that we are not negotiating with honest partners. Up to now we have accepted their bona fides but a full and objective assessment of their conduct to date leads me to accept the warnings that we have been given by friends and foes alike.
- (c) In yesterday's meeting I discovered that they were not telling the truth when they told you that the reason why the Shareholders' Agreement had to be changed at the last moment was that they would face political problems. The SHA that they initially gave us and that was signed and submitted to the MCIT Minister was in fact their last proposal to Turkcell. This was arrived at after more than 6 months of difficult negotiations with Turkcell.
- (d) It has furthermore become clear to me that the only reason why these concessions were made to Turkcell was because key elements within our negotiating partners have been provided with very strong incentives to make these concessions. Political considerations played no role whatsoever. Because we had not offered the same incentives they then had to remove the key concessions (negative control and the appointment of the managing director).
- (e) There is nothing to suggest that they will not continue this modus operandi once we have committed our funds to the project. They have a way of hiding information from us and we also find out things in bits and pieces from third party sources. At the moment and for the foreseeable future there will unfortunately be very little that we can do to change the situation around.
- (f) It is highly unlikely that we will be able to get them to commit to any agreements that tie them down to behave in a commercially acceptable manner. Even where we do have agreements in place I have been warned recently that

they will have very little hesitation in breaching them and when they are addressed on these breaches they will use various stratagems and mechanisms to cast us in the role of villain and a company intent on screwing Iran.

- (g) They have no intention whatsoever to repay the money that they want us to advance to them. While they might enter into an agreement they will try and ensure that there are enough space in the agreements to give them a way out to argue at a later stage that the repayments should be deferred further or they will produce an agreement (one that was signed with some other political element) at that stage that will make it impossible for us to push the issue of repayment except maybe to rely on the local courts.

RECOMMENDATIONS

As a general proposition it will important [*sic*] that you assess coldly and objectively (because that is what they have been doing) whether you can commit MTN to work with these sort of partners. I have now arrived at the conclusion (after more than a year here and after numerous discussions) that the primary reason why they have shifted to MTN is because they have concluded that we are desperate enough for this licence that we will give anything (including giving them a completely free ride) to get the licence.”¹¹⁸

- 137. Despite these forebodings, three loan agreements were signed on 15 November 2005. By Loan 1A, MTN lent Irancell about US\$88 million. Interest was payable at 4% over Libor, and IEDC guaranteed repayment of the loan and pledged its shares in Irancell as security for the guarantee. By Loan 1B Irancell lent the same amount at the same rate of interest to IEDC to enable it to pay for its shares in Irancell. By Loan 3, MTN lent Irancell €300 million to pay the up front licence fee. It was agreed that Loan 3 would be repaid before Loan 1A and that when Irancell declared a dividend, IEDC’s share would be applied in enabling Irancell to repay Loan 1A.
- 138. A further complication appeared when Turkcell commenced proceedings in the Iranian courts against MCIT and its Iranian partners. It applied for an injunction to restrain MCIT from proceeding with the grant of the licence to

¹¹⁸ Memorandum from Mr Kilowan to Mr Nhleko, 4 October 2005.

the reconstituted Irancell consortium and substantial damages against the Iranian parties to their shareholders' agreement of the previous year. (Both claims were subsequently rejected). Sairan and the Bonyad were concerned and they suggested that clause 7 of the Letter Agreement of 18 September 2005 meant that MTN would indemnify them against any liability to Turkcell. Mr Nhleko wrote on 17 October 2005 to Dr Mahmoudzadeh and Mr Mokhber to state MTN's position:

“It struck me that we might not have communicated our understanding of clause 7...

- a. Should MTN face legal action, it will defend itself and pay for such defence;
- b. Should Irancell face legal action it should defend itself and pay for such defence;
- c. Should IEDC face legal action it should defend itself and pay for such defence.”¹¹⁹

139. The Iranians did not at that stage press the point but in November, just before signature of the final documents, they again asked for an indemnity. An unsigned and undated “urgent memo”, probably from Mr Kilowan to Mr Nhleko on about 14 November 2005, says that:

“the local partners have talked themselves into a corner in that...they have told everybody that the deal is done and that there is no turning back with MTN [and] ... that one of the reasons they decided to go with MTN is that we have undertaken to pay for all costs arising out of potential Turkcell litigation...

The position is now that the entire transaction is on a knife edge in that:

- (a) The local partners want to resolve the issue of who will take responsibility for this litigation before they sign anything
- (b) There is no time to do anything else (eg go back to Turkcell) before the deadline of 21 November 2005;

¹¹⁹ Letter from Mr Nhleko to Dr Mahmoudzadeh and Mr Mokhber, 17 October 2005.

(c) Point (b) notwithstanding, their lawyer is saying that it would be better to bring Turkcell back.”¹²⁰

140. MTN agreed to give their Iranian partners an indemnity, limited to US\$15 million, against claims by Turkcell arising out of its being replaced by MTN in the Irancell consortium. The indemnity was signed as part of the package of agreements, including the loan agreements, which were executed on 15 and 16 November 2005 and completed by payments made on 21 November 2005. In the event, there were no successful claims against which Sairan and the Bonyad had to be indemnified. Both the Iranian and the ICC proceedings were dismissed.

Completion

141. The documents signed on 15 November 2005 were delivered to MCIT on 17 November 2005 and on 19 November 2005 MCIT called the guarantee previously given by Bank Melli for the €300 million licence fee. Before making payment, Bank Melli called the counter-guarantee of Standard Bank, which (the intervening period being the week-end) transmitted the funds on Monday 21 November 2005. They were duly paid to MCIT the same day.

142. According to the Enforcement Stages paper issued by MCIT in August 2005¹²¹, if the licence fee was paid and other formalities completed by 21 November 2005, MCIT would “recognize Irancell Company as final owner of licence...”. It gave no specific date as to when the licence would be issued and on 21 November 2005 Irancell was still in discussion with MCIT about some textual details of the licence document. On Tuesday 22 November 2005 Mr Kilowan set out the position in a Powerpoint presentation on Project Snooker that he sent to Mrs Charnley:

“Status Quo”¹²²

- Revised Shareholders’ Agreement Signed

¹²⁰ Urgent memorandum, undated.

¹²¹ Paragraph 122 above.

¹²² Mr Kilowan customarily used the phrase ‘status quo’ to mean ‘current situation’.

- Revised Share Transfer Agreement Signed
- Loan Agreements Signed
- Shares transferred to MTN International (Mauritius) Limited by payment of Share Transfer Tax (US\$3.4 million).
- Upfront Licence Fee: Euro 300 million paid on 21 November 2005
- Licence being edited for correctness and scheduled for signature on Wednesday 23 November 2005
- Licence to be formally issued on Saturday 26 November effective 21 November 2005.”¹²³

143. On the afternoon of 23 November 2005 the text of the licence agreement still appears to have been under discussion, since there is a draft in existence with track changes marked “C. Kilowan 23/11//2005 16:17:00”.

144. The licence was duly issued on 27 November 2005 with effect from 21 November 2005, the day MCIT received the €300 million fee.

¹²³ Board presentation, attached to e-mail from Mr Kilowan to Mrs Charnley and Mr Githiari, 22 November 2005.

Chapter 4

Christian Kilowan

145. The principal, indeed the only, witness in support of the allegations in the complaint is Mr Kilowan. He is a law graduate of the University of the Western Cape, an LLM of the University of the Witwatersrand and an advocate of the Supreme Court of South Africa. He has worked for substantial South African companies. In 1992 he was labour law advisor at AECI Ltd, an old established chemical and mining explosives business in Johannesburg. In that capacity he met Mrs Charnley when she was a representative of the National Union of Mineworkers. They served together for three or four years on a committee which administered mineworkers pension funds. Both then went on to other things; but they met accidentally in 2001 when Mrs Charnley was commercial director of MTN and happened to be looking for someone to run a small subsidiary called Orbicom (Pty) Ltd, which provided satellite signal services. Mr Kilowan accepted and became Chief Executive of Orbicom. Early in 2004 the MTN group decided to sell Orbicom and in April Mrs Charnley invited Mr Kilowan to transfer to MTN and become its regular emissary to Iran, with a view to becoming its resident representative.

Assessing credibility

146. So much depends upon our assessment of the credibility of Mr Kilowan that we propose to express our opinion on that point before attempting a detailed examination of the allegations in the complaint. Of all the persons concerned in the process of obtaining the GSM2 licence, Mr Kilowan is the only one whom we have actually seen giving evidence; not, it is true, in the flesh, but in a video recording of the three days of his deposition in Washington DC.
147. Judges in appeal courts often remark upon the advantage which the trial judge enjoyed of being able to see the demeanour of the witness, rather than merely having a written transcript. We have been able to observe the demeanour of Mr Kilowan and we are bound to say that when we saw the video recordings,

before undertaking any detailed examination of the documents in the case, he created a favourable impression. He appeared fluent, occasionally a little truculent under cross-examination, but generally moderate in his opinions and seemingly unwilling to commit himself to a proposition of which he was not entirely confident. When he did not know, he said so.

148. It was only when we came to compare his evidence with the contemporary documents, and in particular with the reports which he himself was sending from Iran, that we were driven to the conclusion that Mr Kilowan actually has little regard for whether he is telling the truth or not. It became apparent that a number of the most important incidents to which Mr Kilowan deposed with a wealth of circumstantial detail and quotation of direct speech, simply could not have happened. He has a novelist's gift for the striking detail or turn of phrase which brings the scene to life; but he offers these fictions as truth. It is not merely a case of his memory playing him false on some detail after the lapse of seven or eight years. Much of his evidence is either a deliberately distorted version of some innocuous facts or made up from whole cloth. We shall give seven specific examples at this stage, before turning to the allegations in the complaint. Even if one does no more than read the chronological series of his reports from Iran set out in Chapter 3, culminating in a passionate warning against having any dealings with Dr Mahmoudzadeh and Mr Mokhber,¹²⁴ one will find it impossible to reconcile what he was saying and doing at the time with his evidence of the conspiracy which forms the centrepiece of his evidence.

Example 1: The vote at the IAEA and the grant of the licence

149. Perhaps the most dramatic moment in Mr Kilowan's account of how MTN obtained the GSM2 licence comes at the very end, when all obstacles had been surmounted, the licence fee paid and the licence itself was about to be issued. In his first BIT statement, Mr Kilowan says:

¹²⁴ Paragraph 136 above.

“78. Having completed all the required formalities and other steps, we were expecting to sign the second licence agreement, and to receive the formal licence certificate by 20 November 2005. However, on the day it was made plain to us by Dr Fardis that the issue of the licence would be delayed, pending the position taken by South Africa through its representative, Mr Abdul Minty on the question of the referral of the Iranian nuclear file from the International Atomic Energy Agency in Vienna to the UN Security Council in New York. Dr Fardis showed Mr Dezfouli and me a letter that purported to have come from the Iranian Foreign Ministry, in which this requirement was set out. I immediately communicated the message from Dr Fardis’ office to Ambassador Saloojee, who in turn passed it on to the Foreign Ministry of the South African Government. I also informed Mrs Charnley and she indicated that she would get in touch with the South African President’s Office. In the event, South Africa abstained in the vote on 24 November 2005, with the result that the second licence was issued to the Iranian partners and MTN by Dr Fardis on 27 November 2005.”¹²⁵

150. In his deposition direct evidence, Mr Kilowan provides much greater detail:

“Q. When did MTN actually receive the license from the Iranian ministry?

A 27th November 2005.

Q Was there a date earlier that MTN was promised the license by the Ministry of Communication?

A 20th of November 2005.

Q So on November 20, 2005 where were you?

A I was in Iran, and I went with Mr. Dezfoulie to Dr. Fardis’ office to go get the license.

Q And did you get the license on November 20?

A No.

Q What happened?

A When we got to Dr. Fardis’ office he and Mr. Dezfoulie was engaged in a discussion in Farsi. I could see Mr.

¹²⁵ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraph 78.

Dezfoulie was not very happy, so I asked him “what is happening here”? Because all I came for was this one page, the license. And he said, no, Dr. Fardis told him that there is a problem with him issuing the license on the date. I then asked Dr. Fardis “what is the problem?” Dr. Fardis then showed me a letter in Farsi. He said this letter came from the Ministry of Foreign Affairs to him. And they said that he cannot issue this license to MTN Irancell until after the vote at the International Atomic Energy Agency. This was in November 2005.

Q And what did -- when Dr. Fardis explained to you what was in this letter, how did you respond?

A I was very upset. I said but, “you know, this has nothing to do. We’ve complied fully with all the requirements.” There was no condition that said we should wait till after the IAE [*sic*] meeting. I left his office. I called -- first I called Ambassador Saloojee, and I said to him he needs to talk to the president and he needs to talk to Abdul Minty to find out what is going to happen at the IAE [*sic*]. He asked me why. Then I explained to him what happened -- just transpired in Dr. Fardis’ office. He said, “okay, I will see what I can find out.” I then called Irene, and Irene exploded. And she was very unhappy. So I went back into Dr. Fardis’ office. I said “look, we are not happy. We object to this condition,” but he said “look, I can’t do anything. I have an instruction from the Ministry of Foreign Affairs.”

Q Did he explain to you what the Ministry of Foreign Affairs was waiting for?

A Was waiting for the South African vote at the IAEA.

Q And did Dr. Fardis tell you how the Ministry of Foreign Affairs wanted South Africa to vote at the IAEA?

A No, he didn’t tell me.

Q Did you have an understanding of what he meant when the Iranian said a vote at the IAEA?

A Yes, I had an understanding.

Q What was your understanding?

A My understanding was either we had to abstain or we had to vote against -- at that stage the question was whether the Iranian file should be transferred from the IAEA to the

UN Security Council. And so we either had to abstain or vote against it.

Q When you say the Iranian file, is that the Iranian nuclear file?

A That is correct. Yes. So –

Q Had MTN invested money in Iran by November 20, 2005?

A Yes. 450 million euros.

Q You described how you talked to Irene and you went back to Dr. Fardis. What happened next?

A The rest of that week -- well, obviously we didn't get the license on the 20th. And I went to Ambassador Saloojee's house. We had discussions. He was talking to Abdul in Geneva, in Vienna. He was talking to the president's office. Irene was calling me constantly asking me what is happening, asking me to do all sorts of things, which I couldn't do.

Q What was she asking you to do?

A Like I must go and insist that they must give me the license, those sort of things. So -- and she was also -- she said she is also calling the president's office, Thabo Mbeki's office. She is calling Essop Pahad. She is calling Nkosa Dlanani-Zuma [*sic*], the Minister of Foreign Affairs at the time, and -- to say to all of them, "look, you must now help us because the license is not being issued." So that -- from the 20th to the 24th, 25th was a terrible time, because everyone wanted to know from me when will they give the license, and I didn't have any control over that process.

Q Do you know what happened at the IAEA?

A We abstained. South Africa abstained at that particular vote.

Q And do you believe that MTN had any role in shaping that vote?

A No. I -- I would not say that they shaped the vote, but we essentially put a lot of pressure. But I think in the end, President Thabo Mbeki said to Minty he must vote in the best interests of South Africa.

Q Do you know whether there had been any prior votes at the IAEA involving South Africa in the 2005 time period?

A I can't really -- I can't really recall. But this was a critical one. You know, this was shortly after the P5 Plus One presented their proposals, which were rejected by -- by Iran. So that November 2005 vote was a critical vote for the Iranians.

Q And the P5 Plus One, you referred to it before. What is that?

A It's the permanent -- five permanent members of the UN Security Council, plus Germany. So I don't recall that there were any real critical votes before that at the I- -- this one was critical. And the point was that Dr. Fardis, very specifically mentioned, that the granting of the license is linked to the way in which South Africa would vote.

Q This wasn't the first time that the issue of IAEA votes by South Africa had come up in your conversations with the Iranian, was it?

A No, because the issue of the support on the nuclear file was a constant theme since the middle of 2004.

Q Between November 20th and November 24, did you have an impression of what would happen to the MTN license for the second GSM in Iran if South Africa voted against the Iranian interest?

A We would not have been granted that license.

Q And I believe you testified a moment ago that -- well, how did South Africa vote?

A They abstained.

Q And what happened after that?

A On the 25th or the 26th Dr. Fardis' office called me and said we can come and get the license the next day, which was on the 27th of November.

Q And what happened on the 27th of November?

A We were given the license; we signed it and we were given the license.

Q Do you believe that the Iranians conditioned the granting of a license on how South Africa voted at the IAEA?

A Yes.

Q Why do you believe that?

A Because I was told that by Dr. Fardis.

Q Prior to November 20th, who raised the issue of South Africa's position on Iranian nuclear issues?

A When prior? Look, Dr. Rowhani went to South Africa. Motakki went to South Africa. Larijani went to South Africa. Minister Motakki, the Foreign – the Minister of Foreign Affairs. This is all during 2004 and 2005. As I said, the issue of the Iranian nuclear file, South Africa and MTN was a constant and regular theme throughout that period.

Q And the issues were all linked together, South Africa's vote on the Iranian nuclear file and the MTN license?

A Yes. The support of South Africa on the nuclear file. Whether it translated into you should vote in this way or not, but the support of South Africa on the Iranian nuclear file. Because that is what MTN told the Iranians we can deliver. We can deliver support on the nuclear file. So from that point on it was linked, constantly linked.

Q And do you know if Ms. Charnley, in that November 2004 time period that we have just been discussing --

A 2005?

Q 2005. Thank you. I will start again. Do you know whether Ms. Charnley, in -- between November 20th and November 24, 2005, ever spoke to President Mbeki about this issue?

A She told me that she spoke to him or to his office. I'm not sure, but she told me that she was speaking to them.

Q What else did she tell you that she said to the president's office?

A She said that, you know, "these Iranians are crazy. They now don't want to give us the license before the vote."

Q And who at MTN told the Iranians in that '04/'05 time period that MTN could influence the South Africa vote?

A Irene, Irene Charnley.

Q And do you recall her saying it on more than one occasion?

A Yes, to Dr. Mahmoudzadeh mainly.”¹²⁶

151. We have quoted at length from this passage in Mr Kilowan’s evidence because it is striking in its vivid detail. One can visualise the ominous conversation in Farsi between Dr Fardis and Mr Dezfouli; Mr Kilowan’s dismay when told that the licence would be withheld; the consternation and protest in Johannesburg when he broke the news to Mrs Charnley; the appeals for help to the South African representative in Vienna and the President himself.
152. In her BIT statement¹²⁷, Mrs Charnley denies that there had been such an incident. No one had told her anything about the licence being withheld or the IAEA meeting. Dr Fardis denies that he received such a letter or showed it to Mr Kilowan.¹²⁸ Ambassador Saloojee said it would have been totally unacceptable for any government official to call a junior representative of a private company to discuss nuclear issues without having issued a *note verbale* to the ambassador to attend, as the Iranians were punctilious about doing. But all that may be regarded as just word against word. In his second BIT statement, Mr Kilowan reaffirmed his account: “The situation was of considerable concern to all of us. It is not something that I would be mistaken about.”¹²⁹
153. To assess whether Mr Kilowan’s account of what happened in Dr Fardis’s office on 20 November 2005 could be true, it is necessary to examine the contemporary documents. First, the chronology set by MCIT on 15 August 2005 for completion of the licence. The deadline for payment of the €300,000 licence fee was Monday 21 November 2005.¹³⁰ Only after payment of the

¹²⁶ Mr Kilowan’s Deposition Transcript, day 1, pages 290-300.

¹²⁷ Witness Statement of Mrs Charnley, 23 October 2012, BIT proceedings, paragraphs 93 and 94.

¹²⁸ Second Witness Statement of Dr. Fardis, 22 October 2012, BIT proceedings, paragraphs 40 and 41.

¹²⁹ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraphs 93-97.

¹³⁰ See paragraph 122 above.

money would Iran cell be entitled to the licence. The Bank Melli guarantee was called by MCIT on Saturday 19 November 2005 and, after receipt of the funds by Bank Melli from Standard Bank on Monday 21 November 2005, after the South African week-end, the money was paid into MCIT's account on the same day.¹³¹ Mr Kilowan now says that it was received "on 19 November 2005 at the latest."¹³² But the banking records show that it was not received until Monday 21 November 2005.¹³³ There was no way in which Mr Kilowan and Mr Dezfouli would have been able to go round to Dr Fardis's office on 20 November 2005 and collect the licence.

154. Secondly, the crisis of 20 November 2005 has left no trace on the written record. There is no mention of it in any of Mr Kilowan's reports, whether at the time or later. On the contrary, on Tuesday 23 November 2005 Mr Kilowan sent a Powerpoint presentation¹³⁴ which states clearly and unequivocally that the licence fee was paid on 21 November 2005, that the license itself is still being edited,¹³⁵ and that it will be issued on 26 November 2005 (as noted at paragraph 144 above, the licence was actually issued on 27 November 2005).
155. Thirdly, although there was a meeting of the Board of Governors of the IAEA on 24 November 2005, no vote, let alone a "critical vote" took place. Nor does it appear that anything calling for a vote had been on the agenda. There was a general discussion of nuclear verification, with particular reference to a report of the Director-General on North Korea. Under the heading "Nuclear verification: Other safeguards implementation issues", there was some discussion of Iran. No resolution was proposed and no vote was taken.¹³⁶

¹³¹ See Appendix 5, KPMG Report dated 2 August 2012, paragraph 4.7.2.

¹³² Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 94.

¹³³ Appendix 5, KPMG Report dated 2 August 2012, paragraph 4.7.2

¹³⁴ Paragraph 142 above.

¹³⁵ This is confirmed by the tracked version referred to at paragraph 143 above. It was a lengthy document: not the 'one-page' which Mr Kilowan says he went to collect. The latter is a characteristic touch of invented detail.

¹³⁶ Records of the 1145th and 1146th Meetings of the Board of Governors of the IAEA, 24 November 2005.

156. We find it impossible to avoid the conclusion that Mr Kilowan has fabricated the entire story about what happened on 20 November 2005. We agree with Mr Kilowan that it is not something about which he could be mistaken. It must follow that it is deliberately concocted. That is striking enough, but we find it even more remarkable that he should have done so when it was so easily capable of being refuted, not only by the facts on the record but by what he himself said at the time. There is an extraordinary recklessness about his falsehoods.

Example 2: The date of the first visit to Tehran

157. The next example is from near the beginning of the story. When did Mr Kilowan first go to Tehran? In both his first BIT statement and his deposition evidence, he was firm in saying that he went in March 2004.¹³⁷ However, the documentary evidence shows that he only took up residence in Iran at the end of August 2004. Before that, he had made four short visits to the country, on about 6-11 May, 18-21 May 2004, mid-June and 3-4 July 2004. As he said in a “consolidated report” on 21 July 2004, he had been visiting Tehran “on and off” over the past three months and had written a report after each meeting.¹³⁸ The first of these reports was dated 14 May 2004 and described whom he met, what they said, what the gossip was, and so forth.¹³⁹ It was plainly his first report, not least because his next report, which he produced as Exhibit 3 to his deposition, bore the file name “Location: \London Express Name: Report-2ndvisit-Iran.doc” and was dated 21 May 2004.¹⁴⁰

158. In the face of this overwhelming evidence referred to by Mrs Charnley in her BIT statement, Mr Kilowan made a second BIT statement in which he said that he had “revisited the timing of his first visit” and agreed that it was in May 2004. Was this simply a case of faulty recollection after six years? By the time he gave his deposition evidence, Mr Kilowan would have been

¹³⁷ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraph 8, and Mr Kilowan’s Deposition Transcript, day 1, page 39.

¹³⁸ Consolidated Report on Iran Visits, 21 July 2004.

¹³⁹ Paragraph 64 above.

¹⁴⁰ CK00416 in the documents filed with the deposition.

through his story with Turkcell’s lawyers a number of times. He had been interviewed over days in London and Paris; draft statements had been prepared and corrected¹⁴¹ and he had made his first BIT statement on 13 March 2012. In the course of his deposition on 30 April 2012, he produced the report of his first visit and discussed it with counsel at some length. He described it as “a report that I generated for Irene’s consumption in May 2004”.¹⁴² We find it hard to believe that he did not recognize the document as his own record of the very first time he had set foot in Tehran. Although it is not strictly necessary for the purposes of our findings, we shall later offer a conjecture as to why Mr Kilowan claimed to have started visiting Tehran earlier than he did.¹⁴³

Example 3: The origin of the relationship with Mr Ghorbanoghli

159. Mr Kilowan cannot have been merely mistaken in his evidence about the instructions, that he claims to have had from Mrs Charnley, to call on Mr Ghorbanoghli. First, in his first BIT statement:

“7. I was informed by Mrs Charnley that MTN had been told by senior Iranian officials, that it would be to MTN’s advantage were we to establish a presence and build a profile for MTN in Iran. This message had been communicated to her by Mr Javid Ghorbanoghli on her visit to Iran in early March 2004. Mr Javid Ghorbanoghli was Director General for Africa at the Ministry of Foreign Affairs in Iran. In that position he was the most senior Iranian official responsible for all Iranian embassies in Africa and the execution of policies affecting the African continent. Mr Ghorbanoghli had been the Iranian Ambassador to South Africa between 1999 and 2003. Mrs Charnley took this message seriously and asked me to go to Iran on a fact finding mission to establish what the parameters would be if MTN was to establish a permanent presence on the ground there.

9. Because Mrs Charnley had seen Mr Ghorbanoghli as a potential ally for MTN, she instructed me to meet with

¹⁴¹ Mr Kilowan’s Deposition Transcript, day 3, pages. 952-958.

¹⁴² Mr Kilowan’s Deposition Transcript, day 1, pages. 77-83.

¹⁴³ Paragraph 195, below.

him as soon as possible. Within a couple of days of my arrival, we met in his office at the Ministry of Foreign Affairs. My message was that MTN was very interested in the third licence, that we greatly appreciated the information that he had earlier provided to Mrs Charnley, and that we would welcome the opportunity to develop a close working relationship. The meeting was introductory. Mr Ghorbanoghli impressed on me the importance of establishing a presence on the ground in Iran to put MTN's name to the forefront of people's minds, and that we should try to get involved in some projects. We agreed to keep in contact."¹⁴⁴

160. Then, in his deposition direct evidence on 30 April 2012:

“Q And how did you know -- you mentioned you visited with Mr. Ghorbanoghli -- how did you know to visit Mr. Ghorbanoghli?

A I was told by Irene to visit him. I had three telephone numbers in Iran. I had three telephone numbers that are contact numbers. One was for Jeff Travers, one was for Mr. Ghorbanoghli, and one was for Mr. Sarraf.

Q Did Ms. Charnley tell you about her conversations with Mr. Ghorbanoghli before you went to Iran?

A That is correct.

Q What did she tell you about those conversations?

A She indicated to me that he had told her that the third license -- there will be a third license, and that it would be important for MTN to prepare itself in Iran to establish a presence there, and that we should even get involved in some projects in the mobile sector so that people could start associating MTN with a mobile operator and someone who can add value to Iran.”¹⁴⁵

161. Likewise in cross-examination on 2 May 2012:

“Q. In connection with Mr. Ghorbanoghli, what did Ms Charnley say to you and what did you say to her?

¹⁴⁴ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings.

¹⁴⁵ Mr Kilowan's Deposition Transcript, day 1, page 41.

A. Well, she told me that they had a discussion, she and – when she went with the Minister of Minerals and Energy, that she had a discussion with Mr. Ghorbanoghli and he – and they spoke about the license that was being given to Turkcell. And they spoke about the third licence, mobile licence that would be issued and his suggestion that MTN should establish a presence in Iran to prepare for that licence...She would have given me his background, what he's doing, where he is in the – in the Iranian environment. And why he would be a useful ally.”¹⁴⁶

162. And finally, in his second BIT statement, after Mrs Charnley had denied in her BIT statement that any such conversation had taken place:

“Contrary to Mrs Charnley’s denial in paragraph 20 of her statement, I am very clear that before I left for my first visit to Iran she encouraged me to meet Mr Ghorbanoghli at the earliest opportunity, and she indicated that she had earlier been told by him that it would be to MTN’s advantage to establish a presence and build a profile for MTN in Iran.”¹⁴⁷

163. However, if one considers the dates upon which events happened, it is clear the conversation which, according to Mr Kilowan, Mrs Charnley had told him she had had with Mr Ghorbanoghli, could not possibly have taken place in the way he has described. Mr Kilowan says that Mrs Charnley met Mr Ghorbanoghli when she was travelling with the Minister of Minerals and Energy. That much is agreed. Mrs Charnley says she met him at one of the receptions or dinners given in honour of the Minister’s visit. But the visit took place on 27-30 January 2004. At that time, MTN was still hoping to be successful in the GSM2 licence tender. Mrs Charnley had come to Iran to do some lobbying in that respect. The result of the tender was not announced until 18 February 2004. So she could not have spoken to Mr Ghorbanoghli “about the licence that was being given to Turkcell.” No one knew that Turkcell would be the winner. Nor would Mr Ghorbanoghli have been likely at that time to have advised MTN to establish a presence in Iran in anticipation of there being a third licence. If MTN won the GSM2 licence, they would

¹⁴⁶ Mr Kilowan’s Deposition Transcript, day 3, pages 670-672.

¹⁴⁷ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 24.

obviously have to establish a presence in Iran. Mr Kilowan clearly did not mean that Mrs Charnley and Mr Ghorbanoghli were making contingency plans over the canapés against the possibility that MTN might lose.

164. Mr Kilowan’s accounts of his first four visits to Tehran do not suggest that he came with Mr Ghorbanoghli’s telephone number in his address book (another colourful detail) or that Mrs Charnley had established a personal relationship with Mr Ghorbanoghli. In the first report,¹⁴⁸ which Mr Kilowan said was “a report that I generated for Irene’s consumption”, Mr Ghorbanoghli has a walk-on part. After describing meetings with “our local partners” (in particular, Mr Sarraf), Dr Fardis and the managing director of the Telephone Company of Iran, he says:

“We also had a meeting with the previous Iranian ambassador to South Africa. He was given the same message by us [i.e. that MTN intended to set up a permanent presence in Iran] and he told us that he had been instructed by his Minister (Foreign Affairs) and the President to assist us to the fullest extent.”¹⁴⁹

165. Mr Ghorbanoghli denies that he claimed to have instructions from the Minister for Foreign Affairs and the President.¹⁵⁰ He had never spoken about MTN to either of them. Mr Kilowan insists that he did. It seems improbable that he should have said this, but for present purposes, we do not need to resolve this dispute. The call on Mr Ghorbanoghli was arranged according to protocol by the South African embassy and Mr Kilowan was accompanied by two embassy officials. He did not call him up on his cellphone. Finally, the terms by which he describes Mr Ghorbanoghli (by his former office, without mention of his name) in a report “generated for Irene’s consumption” do not suggest that Mr Kilowan thought she would instantly recognise him as the person whom she had designated as potentially MTN’s ally in Iranian government circles. Mr Ghorbanoghli is not mentioned in any of Mr Kilowan’s next three reports.

¹⁴⁸ Paragraph 64 above.

¹⁴⁹ MTN Iran: Report on Visit, 14 May 2004, page 5.

¹⁵⁰ Witness Statement of Mr Ghorbanoghli, 24 October 2012, BIT proceedings, paragraph 18.

166. We therefore consider that Mr Kilowan has invented the story of what Mrs Charnley told him about her earlier contact with Mr Ghorbanoghli. It could not have happened at the time and in the manner he says it did and everything that he wrote or did not write afterwards tends to confirm that it did not happen at all. We shall in due course offer a conjecture about why Mr Kilowan should have made up this story,¹⁵¹ but for the present it can be left as merely another example of the unreliability of his evidence.

Example 4: Mr Kilowan's intimacy with Dr Mahmoudzadeh

167. More central to our inquiry is Mr Kilowan's evidence about his relationship with Dr Mahmoudzadeh. His evidence is somewhat equivocal about whether he met him on his first visit to Tehran (which at first he put in March 2004) or a bit later. In his first BIT statement Mr Kilowan says he met Dr Mahmoudzadeh in March:

"10. ...In March 2004, Mr Sarraf...introduced me to Dr Ebrahim Mahmoudzadeh, President of Sairan (also known as Iran Electronic Industries), and also to Mr Mokhber, at that time the Deputy President of the Bonyad Mostazafan ("Bonyad"). I was aware that both Sairan and Bonyad were shareholders in Iran Electronic Development Company ("IEDC"), a local Iranian partner in the Turkcell Irancell Consortium's successful bid. Between them they held just over three quarters of the shares in IEDC. Sairan was wholly owned by the Iranian Ministry of Defence, and, as President of Sairan, Dr Mahmoudzadeh reported directly to the Iranian Minister of Defence. Mr Mokhber reported to the President of Bonyad, Mr Foruzandeh, who in turn reported to the Supreme Leader, Ayatollah Ali Khamenei. Dr Mahmoudzadeh and Mr Mokhber were thus extremely well connected at the highest levels politically within Iran, and together with Mr Ghorbanoghli they became MTN's principal points of contact in terms of establishing and fostering the right political connections that would help advance MTN's growth ambitions in Iran.

11. The initial meeting that I had with Dr Mahmoudzadeh was introductory and short. He is fluent in English, which greatly facilitated our discussion. He referred me to Mr Vafaei, Vice President for International

¹⁵¹ See paragraph 304 below.

Business at Sairan, with whom I later met I to discuss the problems being encountered with the provision of military equipment purchased from South Africa that had been blocked by the South African Conventional Arms Committee. He was looking to MTN to provide assistance to help resolve the matter.”¹⁵²

168. His deposition evidence was not quite so clear cut. Asked about his first visit to Tehran, he said:

“A. ...Then, also, we agreed at some stage he would take me to the Bonyad to see Mr. Mokhber and also to go and see Mr. Mahmoudzadeh at Sairan. I can’t remember whether it was at that time or a later trip I actually met those gentlemen.”¹⁵³

169. A little later:

“Q. On this first visit, did you meet with this defence ministry company?

A. Yes. I met with – we tried to get a meeting with Dr. Mahmoudzadeh on that first visit. But we had then a meeting with Mr. Vafaei, who was the...deputy president for International Business Development of Sairan.”¹⁵⁴

170. According to Mr Kilowan, Mr Vafaei, plunged straight into a discussion of his problems in purchasing military equipment from South Africa:

“...at the first meeting he complained that, because I was there with Mahdi Basadien and Douw Vermaak, he complained that the South African government has not come through on a purchase they made the year before for military radios. And it was my first time to see this guy. So I said, “really, I don’t know anything about this. I am not from the South African government. I am from MTN.” I said, “yeah, that is fine, but if you, MTN, you know, you should follow up. You should push your government that they must sell these things to us.” I said, “okay, I will -- I will, talk to my people, and they will talk to the government.” But right from the beginning, they were very

¹⁵² Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraphs 10-11.

¹⁵³ Mr Kilowan’s Deposition Transcript, day 1, page 43.

¹⁵⁴ Mr Kilowan’s Deposition Transcript, day 1, page 45.

up front with us about what they saw as MTN would deliver to them.”¹⁵⁵

171. We shall return to this conversation with Mr Vafaei when we discuss the detailed allegations about the supply of military equipment.¹⁵⁶ Mr Kilowan says that at the time that conversation took place, his discussions with Sairan were about how to gain their support in an application for a third licence.¹⁵⁷ But then in mid-May there arrived a new South African ambassador, Ambassador Saloojee. He told Mr Kilowan that he had discussed the question of the licence with Mrs Charnley before coming to take up his post and said that “the focus is going to move from the third licence to the second licence”.¹⁵⁸ Mr Kilowan says that at that time he saw himself as a mere functionary “conveying information back and forth, getting instructions and then coming back to Iran.” So he thought “if that is what they are going to do, tell me what it is that I need to do.”¹⁵⁹
172. This change of direction from above required Mr Kilowan to think about what would move the Iranian government to “take the license from Turkcell, and give the license to MTN.”¹⁶⁰ What could MTN do from its side to achieve this result? He spoke to members of prominent Iranian families.¹⁶¹ He “interacted” with Mr Ghorbanoghli.¹⁶² It was a “huge intelligence gathering exercise”. The conclusion was that Iran was looking for “military partnerships” and “friends around the nuclear issue”.¹⁶³ How could MTN help?

¹⁵⁵ Mr Kilowan’s Deposition Transcript, day 1, page 46.

¹⁵⁶ See Chapter 5, paragraphs 215-217.

¹⁵⁷ Mr Kilowan’s Deposition Transcript, day 1, page 54.

¹⁵⁸ *Ibid.*, page 54.

¹⁵⁹ *Ibid.*, page 59.

¹⁶⁰ *Ibid.*, page 60.

¹⁶¹ *Ibid.*, page 62.

¹⁶² *Ibid.*, page 63.

¹⁶³ *Ibid.*, page 64.

173. On defence, Mr Kilowan says that he was aware that there was a “long-standing invitation to the South African Minister of Defense to visit Iran”. So he recommended to Mrs Charnley that she “look at the possibility of bringing our Minister of Defense to Iran”. On the nuclear issue, South Africa had a well established position of supporting any country “pursuing peaceful nuclear initiatives”. So he and Mrs Charnley decided to “develop a strategy round these two issues” which would “change the...atmosphere around the second license and around Turkcell.”¹⁶⁴

174. By way of commencement of this strategy, Mr Kilowan says that Mrs Charnley encouraged him to assist the Iranians in the investigation of two relatively minor matters of defence procurement: chips for a “Heads-up display” on pilots’ helmets and unmanned aerial vehicles (“UAVs”). We shall also return to these when we discuss the defence equipment allegations in more detail.¹⁶⁵ For the moment, we are concerned with Mr Kilowan’s evidence about his relationship with Dr Mahmoudzadeh.

175. In his first BIT statement, Mr Kilowan says:

“I was instructed by the senior management to give effect to the strategy of replacing Turkcell as the licensee for the second licence and was authorised to take the necessary steps, which were to include continuing my collaborative dialogue with Dr Mahmoudzadeh, Mr Mokhber and Mr Ghorbanoghli.”¹⁶⁶

176. On Mrs Charnley’s instructions, I continued the dialogue on defence cooperation between South Africa and Iran that began in March by engaging on that subject with Dr Mahmoudzadeh and Mr Vafaei.” By July 2004, he says, there was a “well rounded discussion with Sairan and Ministry of Defense”. Asked what that meant, he said in his deposition:

“A Because by now we were talking about either the suggestion of our Minister of Defense going to Iran,

¹⁶⁴ *Ibid.*, day 1, p. 65.

¹⁶⁵ Chapter 5, paragraphs 218-219.

¹⁶⁶ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraphs 24-25.

something that also came from Sairan. So we were talking about how do we [give] flesh to this notion that MTN can help them on defense related matters.

Q Could you be more specific in terms of what the conversations were? What were the Iranians asking for anything in specific? Let's start there.

A Well, remember they started with the issue of the radios in March 2004. There was the Heads-up display issue. There was the talk about the, you know, we have this helicopter, the Rooivalk. I said that "I don't know, this thing looks like something that the Americans built, so I don't know whether we can give it to you." But there were discussions around what is it that we can actually deliver, because we were saying to them "we can deliver." So these were the items that they were talking to us about. Of course, it would still have to go through the normal process, through the South African Embassy in Iran, to the Ministry of Foreign Affairs in South Africa, then from there to the Ministry of Defense. We said to them we can make sure that whatever bottlenecks arise, we can try and attend to.

Q And by "we" you mean?

A MTN."¹⁶⁷

177. Mr Kilowan was then asked who was his interlocutor on behalf of Sairan:

"Q And who were you talking to?

A I was talking Dr. Mahmoudzadeh mainly...

Q Was there anyone else you were talking to?

A Not really. On those issues it was me and Mr. Mahmoudzadeh."¹⁶⁸

178. We put aside the improbable image of Mr Kilowan and Dr Mahmoudzadeh studying a photograph of a Rooivalk helicopter in *Jane's All The World's Aircraft* and Mr Kilowan telling the President of Sairan that it "looks like something the Americans built." The important point is that, according to his evidence, by July 2004 Mr Kilowan was having "well rounded discussions"

¹⁶⁷ Mr Kilowan's Deposition Transcript, day 1, page 92-93.

¹⁶⁸ *Ibid.*, day 1, page 94.

with Dr Mahmoudzadeh, *à deux*, about the shopping list of defence equipment that Sairan wanted to buy from South Africa. He went on to say that he kept “MTN corporate” advised of these discussions.¹⁶⁹

179. In July 2004 Mr Kilowan says that he passed on the request for a visit from the Minister of Defence and the shopping list to MTN:

“So from that point we started discussing with the ambassador in Iran, Ambassador Saloojee; Irene started discussing with Terror Lekota and with the Minister of Foreign Affairs about the possibility of Terror Lekota going to Iran. When he comes to Iran, what is it that he would offer, be able to offer them at an official South African government to Iranian government level. Irene was responsible for those discussions in South Africa. Ambassador Saloojee and myself, we were in Iran at that time. So we were communicating backwards and forwards on when he would be able to come, you know, what would he be able to do, et cetera, et cetera, et cetera. So we started the process of preparing for his visit to Iran. During that process, July, early August, Irene came to Iran. And we had a meeting with Ambassador Saloojee. She then -- they then had a private meeting where I was not present. They had the meeting and then she said to me -- after that meeting she said that Terror is coming to Iran.

Q Terror being?

A Terror Lekota, the Minister of Defense, is coming to Iran. I asked her when. She said it will be sometime in August. He has to see when he would be able to come. And Ambassador Saloojee would be doing the formal invitation, getting it from the defense in Iran and channeling it through normal channels back to Victoria, and so on. I think one week or two weeks later, when I had dinner -- I had regularly dinner at Ambassador Saloojee’s house. We were discussing this. He said that Irene had told him that they can give the fish to Iran.

Q What was the fish?

A Well, his understanding of the fish was that Terror would come, the Minister of Defense, with our Minister of Defense would come to Iran, and he would agree that South Africa will enter into some form of defense cooperation agreement with Iran in terms of which certain

¹⁶⁹ Mr Kilowan’s Deposition Transcript, day 1, page 95.

items they will discuss, which items can be sold to Iran and that will pass through the National Convention of Arms Committee of South Africa.”¹⁷⁰

180. Dr Mahmoudzadeh denies having had any such discussions about defence procurement with Mr Kilowan.¹⁷¹ Dr Mahmoudzadeh and the officials in Sairan have a well developed sense of hierarchy. Mr Vafaei says that he would never allow a previously unknown visitor to see Dr Mahmoudzadeh on his first visit. And Dr Mahmoudzadeh says:

“In this regard, I must first note that, to my recollection, and in no disrespect to him, Mr. Kilowan was not considered by the Iranian partners as an important figure in MTN, and I personally do not recall having any particular discussions with him during 2004-2005. Indeed, I have to say that, in Iran, it would be very unusual for someone in his relative position to be able to have any meeting or dialogue with me. Even after the establishment of MTN Irancell at the end of 2005, my main contact with Mr Kilowan was in Board meetings. The main figures from MTN as far as I was concerned were in fact Ms Irene Charnley and Mr Phutuma [*sic*] Nhleko.”¹⁷²

181. There is a ring of truth about this patrician tone, confirmed by the impression Dr Mahmoudzadeh made on Mr Nhleko and Mrs Charnley. It makes even more improbable Mr Kilowan’s evidence about the conspiratorial talks about the helicopters. But the main difficulty about Mr Kilowan’s story is that the documentary evidence in our opinion shows beyond doubt that before Minister Lekota’s visit in August 2004, he had never met Dr Mahmoudzadeh at all.

182. It must be remembered that Dr Mahmoudzadeh, as President of Sairan, was in the Irancell consortium. So was the Bonyad, although it appears that Mr Mokhber, the vice-president of the Bonyad, was a personal friend of MTN’s local partner, Mr Sarraf. In the report of his first visit to Tehran, Mr Kilowan records the political difficulties into which the Turkcell bid was running and that Mr Sarraf had a meeting with the Bonyad (presumably, Mr Mokhber) “to

¹⁷⁰ Mr Kilowan’s Deposition Transcript, day 1, pages 101-104.

¹⁷¹ Witness Statement of Dr Mahmoudzadeh, 8 October 2012. BIT proceedings, paragraphs 11 and 19.

¹⁷² *Ibid*, paragraph 11.

assess whether they will abandon Turkcell”.¹⁷³ If Mr Kilowan had himself met Mr Mokhber, and even more the President of Sairan, he would surely have said so.

183. On his second visit, Mr Kilowan again saw Mr Sarraf and the managing director of the Balli Group, Mr Alaghband. He records that he was unable to meet a representative of the Irvani family. Again, there is no mention of Dr Mahmoudzadeh. During that visit he sent an e-mail dated 18 May 2004 to Mrs Charnley saying that he was going to meet Mr Mokhber (presumably through the good offices of Mr Sarraf) later that day.¹⁷⁴ But we think that for one reason or another the meeting did not take place, partly because it is not mentioned in the report which he wrote after the visit and partly because the terms of the conversation which he relates in the report of his fourth visit in early July, when he did indeed meet Mr Mokhber, shows that it was the first time they had met.

184. The document which makes it absolutely clear that he had not yet met Dr Mahmoudzadeh is his third report, written in mid-June in Afrikaans.¹⁷⁵ He reported that the Turkcell bid was having severe political difficulties but that Sairan and the Bonyad were trying their best to rescue it. The Turkish Prime Minister was coming to lend his weight to the cause. Hard facts were difficult to come by; “our man” (presumably Mr Sarraf) could only say that “the opposition” (i.e. the Irancell consortium) was in trouble. The process could be prolonged and this put the Iranian members of the consortium in a difficulty because they were anxious to get the licence before the following year’s presidential election. This might give MTN an opportunity to do a deal with them. His recommendation was:

“Arrange a meeting with our opposition’s shareholders, preceded by a resolution that we will be willing to include them as shareholders. This meeting can be arranged through the Beta Group which has very close contact with

¹⁷³ MTN Iran: Report on Visit, 14 May 2004.

¹⁷⁴ E-mail from Mr Kilowan to Mrs Charnley and Lynette Witbooi, 18 May 2004.

¹⁷⁵ Paragraphs 71-75 above.

the defence group [Sairan]. We must have the highest level of representation. Invite the head of the Beta Group to come to South Africa as soon as possible.”¹⁷⁶

185. The Beta Group is a Californian technology and venture capital company. The proposal that its head should be invited to South Africa to arrange a meeting between MTN and Sairan suggests that Mr Kilowan did not think that he was himself in a position to do so. That is hardly consistent with his claim to have been on visiting terms with the President of Sairan.
186. On 3-4 July 2004 Mr Kilowan made his fourth and last visit to Tehran before coming to take up residence there at the end of August. That would have been an opportunity to discuss the impending visit, how far the Minister would be able to satisfy the Iranian shopping list and so forth. There is not a trace of any such discussion in his report of the visit. He records that Mr Sarraf introduced him to Mr Mokhber, who told him bluntly that they had spent three years working to get the GSM2 licence and were putting a lot of effort into ensuring that their consortium did not fail. However, if it did, they were perfectly willing to talk to MTN about joining its consortium. He also, for the first time, and escorted by Ambassador Saloojee and Mr Basadien of the embassy, went to Sairan, where in accordance with protocol he was received by Mr Vafaei. As he presumably went to get wind whether Sairan might “jump ship”, his report records his disappointment because Mr Vafaei (“unfortunately”) said that he was “not very close” to the GSM2 licence negotiations; they were being handled by Sairan’s communications subsidiary ICI and, so far as Mr Vafaei knew, they were a done deal. Mr Vafaei, for his part, says that he recalls asking the MTN representatives at some meeting whether they could help with a long-running contractual dispute Sairan was having with a South African company over military radios which had been refused a licence, but had the impression that MTN did not think they could help. Perhaps for this reason or perhaps because it happened on a later occasion, Mr Kilowan did not include any reference to it in his report.¹⁷⁷

¹⁷⁶ Paragraph 75 above.

¹⁷⁷ Report on Visit over 3 to 4 July 2004, 4 July 2004.

187. Then there is the e-mail Mrs Charnley sent to Mr Kilowan on 24 August 2004 asking him to “get hold of a Mr. Mahmoudzadeh [*sic*].”¹⁷⁸ The indefinite article does not suggest that the name was common coin in conspiratorial talk between them. And indeed, Mrs Charnley says that at that point she had not met Dr Mahmoudzadeh.
188. When it comes to Mr Kilowan’s second BIT statement, the whole story about the arms negotiations in the run up to Minister Lekota’s visit has collapsed. The private meetings with Dr Mahmoudzadeh have vanished. He now says merely that he was present at a meeting between Mr Sarraf and Dr Mahmoudzadeh in May 2004 when Mr Sarraf said that “although MTN had lost the bid, it was still interested in working in Iran”.¹⁷⁹ We doubt the truth even of this statement, since we think that if it had happened it would have found a place in a report. In any event, it is a far cry from the conspiratorial arms negotiations described in Mr Kilowan’s first BIT statement and the deposition. We think that the second BIT statement is an admission by Mr Kilowan that he had made them up. We, at any rate, certainly think that is the case.

Example 5: Mrs Charnley and Minister Lekota

189. The next difficulty we have with Mr Kilowan’s credibility arises from his evidence on the South African side of the alleged arms deal, which he says was negotiated between Mrs Charnley and Minister Lekota. It is commonplace for companies wanting to make large investments abroad to enlist the support of their governments to lobby on their behalf. When the Turkish Prime Minister visited Iran, MTN’s partner Mr Pishevar sent an excited e-mail dated 28 July 2004:

“Things are boiling here. We need MTN people on the ground asap...It is over for the Turks here...politically and economically for now. We need to exploit this on the ground, in synchrony and full attack mode using local partners, SA government and MTN resources...As soon as

¹⁷⁸ See paragraph 85 above.

¹⁷⁹ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 27.

Turkish PM's plane takes off from here we need SA
Ministers plane to land..."¹⁸⁰

190. It appears that the possibility of a meeting between the Iranian and South African Ministries of Defence was first raised as a possibility in June 2004. On 3 June 2004, Mr Pischevar sent an e-mail to Mr Kilowan, Mr Nisbet and Mrs Charnley suggesting that "a delegation of Government officials and MTN officials... have high level meetings with Government officials in Iran in June".¹⁸¹ Following which, Mrs Charnley drafted a letter to Mr Basadien on 9 July 2004 referring to MTN's visit to Iran to "meet with officials from... the Ministry of Defence".¹⁸²
191. On 26 July 2004, just before Mr Pischevar's e-mail of 28 July 2004, Mrs Charnley had written Minister Lekota a letter in formal terms (she wrote a similar one to the Minister for Foreign Affairs) which shows clearly that they could not have been having any discussions at all, let alone about arms.¹⁸³ This letter is quite inconsistent with Mrs Charnley having been in negotiation with Minister Lekota about providing 'the fish' to Iran. In addition, it is inconsistent with any visit by the Minister to Iran having been arranged at that date.
192. Mrs Charnley did not approach Minister Lekota to request that MTN join his delegation to Iran until 3 August 2004, when she wrote him a letter stating:
- "It has been brought to my attention that you will be travelling to Iran around the 15th and 17th August.
- I am requesting an opportunity for myself and the Chief Executive... to accompany you on this visit as MTN is exploring new business opportunities in Iran."¹⁸⁴
193. Mr Kilowan's account of his role in the Minister's visit is also imaginary. It is likely that at some stage Mrs Charnley would have told him that the Minister

¹⁸⁰ E-mail from Mr Pischevar to Mr Nhleko, Mrs Charnley and Mr Nisbet, 28 July 2004.

¹⁸¹ E-mail from Mr Pischevar to Mr Kilowan, Mr Nisbet and Mrs Charnley, 3 June 2004.

¹⁸² Letter from Mrs Charnley to Mr Basadien, 9 July 2004.

¹⁸³ Paragraph 82 above.

¹⁸⁴ Letter from Mrs Charnley to Minister Lekota, 3 August 2004.

would be going to Tehran. But that would likely have been in Johannesburg, where it appears both of them were at the time when the visit was arranged. Mr Kilowan, it will be recalled, places it in Tehran. We quote the passage again:

“[In] July, early August, Irene came to Iran. And we had a meeting with Ambassador Saloojee. She then -- they then had a private meeting where I was not present. They had the meeting and then she said to me -- after that meeting she said that Terror is coming to Iran. ...I asked her when. She said it will be sometime in August.... I think one week or two weeks later, when I had dinner -- I had regularly dinner at Ambassador Saloojee’s house. We were discussing this. He said that Irene had told him that they can give the fish to Iran.”¹⁸⁵

194. This fish conversation has to be fictitious. Mrs Charnley did visit Iran, about 20-23 July 2004, but had not yet approached Minister Lekota about his visit to Iran and Mr Kilowan appears to have still been in Johannesburg. Likewise, Mr Kilowan was not in Tehran between the time the visit was arranged and the time it happened, so that the conversation between him and Ambassador Saloojee over what the Minister would do when he came could not have happened.

Example 6: The conspiracy to oust Turkcell

195. The same inconsistency between Mr Kilowan’s evidence and the contemporary documents is to be found in his account of the alleged conspiracy between MTN, Sairan and the Bonyad to exclude Turkcell from the consortium and include MTN in its place. We said earlier that we would offer a suggestion as to why Mr Kilowan had given false evidence about visiting Iran in March 2004.¹⁸⁶ We think it was an attempt to lend some plausibility to his claim that there was time to hatch a conspiracy with Dr Mahmoudzadeh before August. Mr Kilowan says that after MTN had “delivered” Minister Lekota, Dr Mahmoudzadeh –

¹⁸⁵ Mr Kilowan’s Deposition Transcript, day 1, pages 102-103.

¹⁸⁶ Paragraph 158 above.

“was ecstatic that this is our new partner. This is what he said: “This is our new partner”...The obvious import of that was that they would be excluding Turkcell.”¹⁸⁷

196. There are several difficulties about this conversation. First, there is the sheer improbability of Dr Mahmoudzadeh, who is by all accounts a formal and dignified person, displaying anything which could be described as ecstasy to a middle-ranking MTN employee such as Mr Kilowan. Secondly, there is no trace of any such conversation in a report by Mr Kilowan and it is inconsistent with the tenor of his report of 9 September 2004, the first that he wrote after his return to Tehran on 24 August 2004¹⁸⁸. In that report he said that “latest rumours are that the Turkcell process has been stalled once more” and that there was a “potential threat to the entire 2nd licence process”. The threat came from the new parliament, in which some of the conservative members wanted to scrap altogether the grant of a licence to a foreign company. Thirdly, Mr Kilowan’s account of Dr Mahmoudzadeh’s ecstasy is inconsistent with the fact that on 8 September 2004 Sairan signed the shareholders’ agreement which committed them to the Turkcell consortium and it is inconsistent with the efforts it afterwards made to obtain the licence for that consortium.

197. Mr Kilowan then says of the debates in parliament which culminated in the passing of the Single Article Act on 26 September 2004:

“with Dr. Mahmoudzadeh’s inputs, he was making sure that that legislation would be shaped in a way that it would give us the possibility to eventually move Turkcell out of the licence.

Q So were you collaborating...with Dr Mahmoudzadeh to structure legislation to move Turkcell out of a licence?

A Yes...I would visit Dr Mahmoudzadeh maybe every second week just to discuss updates on what is happening.”¹⁸⁹

¹⁸⁷ Mr Kilowan’s Deposition Transcript, day 1, page 122.

¹⁸⁸ Paragraph 85 above.

¹⁸⁹ Mr Kilowan’s Deposition Transcript, day 1, pages 112-113.

198. This is quite absurd. Neither Dr Mahmoudzadeh nor anyone else in the government of the day had any power to “shape” the legislation of the newly-elected conservative parliament. They were an entirely unknown quantity. So, far from “moving Turkcell out of the licence”, Sairan and the Bonyad were (as Mr Kilowan had made clear in his Afrikaans report in June) doing all they could to save the transaction. Mr Kilowan’s report of 9 September 2004 hardly suggests that Dr Mahmoudzadeh was master-minding the legislative process. And the fortnightly meetings between Dr Mahmoudzadeh and Mr Kilowan have dwindled in his second BIT statement to going with Mrs Charnley to “at least one follow-up meeting with him after Mr Lekota’s visit.”¹⁹⁰
199. Mr Kilowan’s evidence that, in September – October 2004, MTN was deeply involved in a conspiracy with Dr Mahmoudzadeh and Mr Mokhber to supplant Turkcell as a member of the consortium is flatly inconsistent with the urgent memorandum which, back in Johannesburg, on 21 October 2004, he sent Mrs Charnley and Mr Nyoka.¹⁹¹ Here we have Mr Kilowan asking whether MTN has decided to participate in any projects in Iran or whether he is simply wasting his time. This was at a time when, according to his current evidence, MTN had already prevailed upon the South African government to promise the fish and he was deep in conspiracy with the ecstatic Dr Mahmoudzadeh. The contrast could hardly be more stark.

Example 7: Mr Ghorbanoghli offered a bribe

200. We offer one more incident which we think is relevant to our assessment of Mr Kilowan’s credibility. This concerns the occasion on which he says Mrs Charnley offered a bribe to Mr Ghorbanoghli. In direct examination in his deposition evidence he was asked whether it had been his idea:

“Q So were the idea of these payments your idea that you recommended to Irene and Phuthma [*sic*], or was it their idea to recommend to you or how –

¹⁹⁰ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 32.

¹⁹¹ Paragraph 91 above.

A Irene made the -- Irene proposed the payments to Ambassador Ghorbanogly in the house without any prompting on my side. I mean, I must tell you I was actually surprised when she made that promise, because I thought that my house was being monitored, and for her to make this promise in my house was not a good idea. And I told her afterwards, but, you know, she was my boss. So I said, okay. We will have to deal with it in a very sensitive manner. But It didn't come from me, no.”¹⁹²

201. In cross-examination he offered more detail about the bribe incident, describing a conversation he allegedly had with Mrs Charnley prior to the dinner:

“A The key objective of that meeting for Irene, was to say to him, “If you increase your efforts, if you really support us, we will take care of you.”

Q How do you know that was Ms. Charnley's key objective?

A That's what she told me.

Q When did she tell you that?

A Earlier in the day, on the same day.

Q Where did that conversation happen?

A In the car.

Q What did she say to you and what did you say to her?

A She said “You know, we really need to – this guy's doing a lot for us. And we really need to make sure we look after him afterwards. Because, you know, he's not earning a lot. And so, you know, I am going to -- I am going to invite him and I will – I will tell him.”

Q Was anyone else in the car with you?

A The driver.

Q Does he speak English?

A No.

Q Were you speaking English with Ms. Charnley?

¹⁹² Mr Kilowan's Deposition Transcript, day 2, page 357.

A Yes. In fact, I was speaking Afrikaans with Ms. Charnley.

Q Why were you speaking Afrikaans?

A Because the chances of the driver even picking up any English words is totally avoided.

Q And what did you say to Ms. Charnley when she told you that?

A I said: “Well, look, you know, if that’s what you want to do, that’s what you – that you will do”.¹⁹³

202. By the time he was cross-examined, Mr Kilowan had clearly forgotten that on the previous day he had said that he was surprised when the offer was made in his living room, with the additional touch of colour that he feared it might be bugged. Now he says there was a conspiratorial conversation in Afrikaans which gave him advance notice that the offer would be made. It appears that he is making up his story as he goes along.

Conclusions on Mr Kilowan’s credibility

203. We could give many more illustrations, but these should be sufficient to demonstrate why we think that Mr Kilowan’s evidence is wholly unreliable. That does not of course mean that we refuse to believe anything he has said, but we approach his evidence with great caution and, generally speaking, are disinclined to accept anything in dispute unless corroborated by contemporary documentary evidence.

204. We do not know why Mr Kilowan should have come forward to give false evidence, although we later offer some guesses.¹⁹⁴ His early reports from Tehran are intelligent, perceptive and well written. As we have said, his demeanour and conversational style are attractive. It is not in the least surprising that Mrs Charnley chose him to be MTN’s representative in Iran and said that she trusted his judgment.¹⁹⁵ After the licence had been granted,

¹⁹³ Mr Kilowan’s Deposition Transcript, day 3, pages 697-699.

¹⁹⁴ See paragraph 213 below.

¹⁹⁵ Mr Kilowan says (Mr Kilowan’s Deposition Transcript, day 1, page 36) that she told him that he was the *only* person in MTN she could trust. We think this is a characteristic exaggeration. It

MTN gave him a Special Achievement Award of US\$15,000 and a grateful letter of thanks. But then he seems to have become disaffected.

205. Something seems to have provoked the outburst in his memo to Mr Nhleko of 4 October 2005.¹⁹⁶ Besides the patronizing description of his trusted friend Mrs Charnley (and Mr Nisbet), his scathing remarks about Dr Mahmoudzadeh and Mr Mokhber do not fit easily with his claim to have been their intimates in conspiracy over the previous six months. Paragraph (d) in particular, translated into plain English, alleges that Turkcell had been getting a better deal because it had bribed Dr Mahmoudzadeh and Mr Mokhber. MTN was being romantic and naïve because it had not offered similar or better bribes.¹⁹⁷
206. Who were the “friends and foes” who had warned Mr Kilowan against having any truck with the dishonest Dr Mahmoudzadeh and Mr Mokhber? They are unlikely to have included Mr Sarraf, who was a personal friend of Mr Mokhber. But one possibility is Mr Pischevar, whose e-mails to MTN are in a style which suggests that he and Mr Kilowan shared a taste for conspiracy theories. Mr Pischevar had been one of MTN’s original partners who had signed the Consortium Agreement on 13 December 2003. It had bound MTN not to deal with anyone else. But the agreement expired on 31 December 2004¹⁹⁸ and left MTN at liberty to drop Mr Pischevar and form a consortium with Sairan and the Bonyad. He may have had an interest in discouraging them from doing so.
207. There is also evidence that by this time, Mr Kilowan was engaged in secret dealings with Mr Pischevar. For example, in April 2005 Mr Kilowan wrote in an e-mail to Mr Pischevar:

would have been transparent hypocrisy because Mr Kilowan must have known that Mrs Charnley’s first choice had been Mr van Veen. But there is no doubt that she did trust him.

¹⁹⁶ See paragraph 136 above.

¹⁹⁷ Memorandum from Mr Kilowan to Mr Nhleko, 4 October 2005.

¹⁹⁸ Clause 7.1.1 of the Consortium Agreement, 13 December 2003.

“With the loss of Celtel MTN is now looking at other opportunities again. I think now is the opportune moment to progress our various discussions.

Can you please send me your proposal to me for final review and then send it through to all three of the key players. Can you however, urgently, send me your requirements for some sort of MOU between you (MENCA?) and MTN that will ensure you are not left out of the equity side of future deals so that I can bounce that off the players. I have managed to raise the temperature on the Telsim deal and they now want more information.

I suspect that IC is talking to Motorola and we need to find a player that can give us more leverage than Motorola to get her to move. I am also talking directly to the M & A guys (reporting to Rob) and they are quite excited at the possibility of having an inside track...

All in all the failure of the Celtel deal has put us in a much better bargaining position.”¹⁹⁹

208. We do not propose to take time in analyzing this letter in any detail (the first paragraph appears to relate to a project for MTN to acquire telecommunication companies in Turkey, Palestine, Azerbaijan and Libya, with Mr Pischevar’s company having a 2% carried interest, and the second appears to concern a deal with equipment suppliers which Mr Pischevar and Mr Kilowan wished to be cut into) but clearly the “us” in the last sentence is Mr Pischevar and Mr Kilowan and the party against whom they are in a better bargaining position is MTN. Mr Pischevar remains to this day a business associate of Mr Kilowan.²⁰⁰
209. MTN appears to have taken no notice of Mr Kilowan in Cassandra mode. He may have resented this and also seems to have felt that, apart from the Special Achievement Award, MTN had not adequately recognized his achievement. He was not given any executive role in Irancell, the operating company. The right to appoint the Managing Director (Mr Dezfouli) had been conceded in negotiation to IEDC (something which, as we have seen, Mr Kilowan attributed to MTN not having provided sufficiently “strong incentives” to “key

¹⁹⁹ E-mail from Mr Kilowan to Mr Pischevar, 8 April 2005.

²⁰⁰ He describes him as a partner in Mr Kilowan’s Deposition Transcript, day 3, page 834 (“my business partner in HyperOffice.”).

elements within our negotiating partners”)²⁰¹ but MTN had the right to appoint the Chief Operating Officer. Mr Kilowan despised Ms Desai, the woman whom MTN appointed to the job and seems to have made this plain.²⁰² Mr Nhleko’s view, expressed in a confidential memorandum to Mrs Charnley and Mr Dabengwa on 30 January 2006, was that Mr Kilowan was intervening too much in the affairs of Irancell and ought to keep to the MTN branch office in Tehran. That would “hopefully giv[e] Dezfouli and Jyoti a chance to establish a bond and solid working relationship”.²⁰³ We have the impression that 2006 and 2007 were not altogether happy years for Mr Kilowan and that he did not have enough to do. He tried to create a role for himself by proposing various schemes to strengthen the image of MTN in Iran, including the appointment of consultants who would provide him secret intelligence from within the government in return for payments from a slush fund which Mr Kilowan would control, but Mr Nhleko was unreceptive. Towards the end of 2007 Mr Nhleko proposed that Mr Kilowan move to Dubai.

210. On 1 November 2007 Mr Kilowan wrote his resignation letter, with effect from the end of the month. He said that “over the last few months” he had been approached by “a number of local players to pursue various business opportunities in Iran” and “given my personal assessment of future prospects in MTN” he had decided to leave.²⁰⁴ But his plans appear to have been disrupted by the refusal of the Iranian authorities to grant him a right of abode as an independent businessman after MTN had notified them that he was no longer employed. He then moved to Dubai.
211. Mr Kilowan’s relations with MTN were thereafter soured, first by his belief that MTN had conspired with the Iranian immigration authorities not to allow him back into Iran (another conspiracy), and secondly by his unsuccessful

²⁰¹ Memorandum from Mr Kilowan to Mr Nhleko, 4 October 2005.

²⁰² MTN Irancell, Operation Situational Report, November 2006; Memorandum from Mr Kilowan to Mr Nhleko, 20 January 2007; Memorandum from Mr Kilowan to Mr Nhleko, 31 May 2007; Highly Confidential memorandum, 6 June 2007.

²⁰³ Memorandum from Mr Nhleko to Mrs Charnley and Mr Dabengwa, 30 January 2006.

²⁰⁴ Memorandum from Mr Kilowan to Mr Nhleko, 1 November 2007.

attempt to secure payment of money which he said had been promised to Ambassador Saloojee, which we shall consider in Chapter 9.

212. Mr Kilowan, like many conspiracy theorists, believes in circles of influence from which he is excluded, a freemasonry of powerful, important people who can call upon each other for unquestioning assistance. Because Mrs Charnley knew Minister Lekota from the days of the anti-apartheid struggle, he thinks it must follow she could call upon the Minister for favours in adapting South African government policy to help her business interests. Because Mrs Charnley knew President Mbeki and his wife, she must have been able to influence the President's decision as to how the South African representative at the IAEA should vote. A good illustration of this state of mind is Mr Kilowan's account of the 8th Iran-South Africa Joint Commission held in Tehran in December 2004. The South African Foreign Minister and Minister of Health attended. Six South African companies carrying on business in Iran were represented, including MTN, whose representative was Mr Kilowan. A communiqué, for the most part in the usual anodyne terms ("Both sides emphasized the importance of international co-operation to protect and promote human rights") was afterwards issued.²⁰⁵ Mr Kilowan had been given the opportunity to insert a statement that MTN had opened an office with a view to pursuing the 3rd GSM licence opportunity and possible privatization opportunities. His account of this gathering in his first BIT statement begins: "Both MTN and Mr Ghorbanoghli's ability to rub shoulders with and influence the highest ranking Iranian and South African officials is captured in the Joint Communiqué of the 8th JBC".²⁰⁶

213. There is also the question of the terms upon which Mr Kilowan has provided his evidence to Turkcell. In the course of cross-examination, he denied that he was being paid more than for his time and travel expenses. We have no evidence to the contrary. But we think it inherently improbable. Why would Mr Kilowan, if one takes his story at face value, betray his friends Mr

²⁰⁵ Joint Communiqué of the 8th Joint Bilateral Commission between the Islamic Republic of Iran and the Republic of South Africa held in Tehran from 14 to 15 December 2004.

²⁰⁶ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraph 41.

Ghorbanoghli and Ambassador Saloojee, and on closer examination, fabricate such transparent fictions? Since leaving MTN, Mr Kilowan has been attempting to promote various money-making schemes. According to his deposition, he wrote to MTN on 4 January 2010 offering, in return for a fee of US\$40 million (15% to be paid upfront), to secure repayment of MTN's Irancell loans.²⁰⁷ He personally was to receive 10% and an anonymous associate was to distribute the rest. MTN did not accept the offer, which appears to have been either an advance fee fraud of the kind familiar to anyone receiving spam e-mails from Nigeria, or else an invitation to fund some form of corruption. We think it likely that Mr Kilowan is being paid (actually or contingently) by Turkcell.

²⁰⁷ Mr Kilowan's Deposition Transcript, day 3, pages 895-898.

Chapter 5

Defence

214. In this Chapter we shall consider each allegation in the complaint about MTN's promises to procure defence equipment for Iran from South Africa or to influence the South African government's policy on the supply of defence equipment to Iran or to give Iran access to South African ministers.

Military radios

215. The complaint has the following allegations in relation to MTN facilitating the purchase of military radios:

69. [I]n early 2004 MTN learned that Sairan was seeking opportunities to procure certain military equipment from South Africa, a purchase that had previously been blocked by the South African Conventional Arms Control Committee. MTN promptly arranged a meeting in March 2004 with the Vice President of Sairan, Mr. A. Vafaei, to discuss how MTN could assist in procuring the defense items. Mr. Vafaei expressed specific interest in purchasing radio encryption devices manufactured in South Africa. MTN expressed an ability to facilitate that purchase. ...

72. In March or April 2004, the Iranians decided to test MTN's ability to deliver on its promises of defense products and nuclear votes. Sairan's Vice President, Mr. Vafaei, requested that MTN arrange a meeting with the South African Ministry of Defense and Denel (Pty) Ltd., the largest manufacturer of defense equipment in South Africa. As is described below, MTN arranged the meetings and worked to arrange Iran's purchase of military radios and encryption technologies that the South African Conventional Arms Control Committee had previously refused to sell to Iran.²⁰⁸

216. In our general discussion of Mr Kilowan's credibility, we have reproduced the evidence in his BIT statement and deposition about his discussion of military

²⁰⁸ Appendix 2, the complaint, paragraphs 69 and 72.

radios with Mr Vafaei.²⁰⁹ This evidence is inaccurate in a number of respects. First, such discussions could not have happened on his first visit in March or even May because it is clear from Mr Kilowan's reports that he did not meet Mr Vafaei until his fourth visit to Iran on 3 or 4 July 2004.²¹⁰ Secondly, Mr Kilowan's meeting with Mr Vafaei was not a result of a referral by Dr Mahmoudzadeh because he did not meet Dr Mahmoudzadeh until September 2004.²¹¹ Thirdly, as his fourth report makes clear, Mr Kilowan did not go to see Mr Vafaei to discuss how MTN could assist in procuring defence items but rather to find out what he could about Sairan's intentions in relation to the GSM2 licence and any future such opportunities.²¹²

217. Mr Vafaei, in his BIT statement, says that he recalls that at some meeting with MTN, he mentioned that ICI was involved in a contractual dispute with a South African private company over a military radio which had been purchased some years earlier but which had not been delivered because a licence had been refused by the South African government. He asked whether MTN could help but it was "not apparent to [him] that MTN felt it could help" and nothing came of his request. He dealt with the problem himself. Mr Vafaei's account seems likely to be true because Mr Kilowan's reports record nothing of Mr Vafaei's request and Mr Kilowan does not himself suggest that MTN did anything about it.²¹³ Mr Kilowan refers to a later conversation in which he alleges that Mr Vafaei said that they got the radios "from the Australians."²¹⁴ That may also be an invention, but it does suggest that Mr Vafaei is right in saying that nothing came of his raising the matter with MTN. The allegation that MTN "worked to arrange Iran's purchase of military radios and encryption technologies" therefore seems to us to be somewhat overstated.

²⁰⁹ Paragraphs 167-170 above.

²¹⁰ See paragraph 78 above.

²¹¹ See paragraph 85 above.

²¹² Paragraph 78 above.

²¹³ Witness Statement of Mr Vafaei, 9 October 2012, BIT proceedings, paragraph 12.

²¹⁴ Mr Kilowan's Deposition Transcript, day 2, pages 592-3.

Heads Up Chips

218. The next allegation concerns equipment for aircraft pilots:

73. [I]n June or July 2004, Hamad Aref, son of the then-presiding Vice President of Iran, Mohammad Reza Aref, invited MTN to a meeting near the Office of the President. Mr. Aref informed MTN that Iran was developing its defense force, and it wished to procure pilot display computer chips manufactured in Western Cape Province, South Africa. Mr. Aref asked whether MTN could assist in procuring the chips, and upon information and belief MTN agreed to do so.²¹⁵

219. Mr Aref was indeed the son of the then Vice-President of Iran, but he and MTN's consortium partner Mr Pischevar were managing partners of a technology investment and incubation company, Darya.²¹⁶ Mr Pischevar was, as we have seen, not only one of MTN's consortium partners but also engaged in private and undisclosed dealings with Mr Kilowan.²¹⁷ There is nothing to suggest either that the alleged request was passed on to anyone in the MTN management or that it came from the government of Iran rather than being a private speculation by Darya. Mr Kilowan does not say that anything came of this request and MTN has no record of it.

UAVs

183. After receiving the License, MTN continued to work on fulfilling its defense cooperation deal and continued to engage in discussions with Sairan about delivering military equipment. During 2005 and 2006, the Iranians specifically asked MTN to assist in procuring Unmanned Aerial Vehicles, or UAVs. Calling upon Ms. Charnley's relationship with Denel, MTN explored options and prospects for the Iranians. MTN's files contain at least one report detailing Irene Charnley's work with Denel and its Massachusetts-based subsidiary, Kentron, which produces a Seeker UAV for "long term surveillance and patrol." It also describes the features and details of UAVs from two other manufacturers that MTN was investigating on behalf

²¹⁵ Appendix 2, the complaint, paragraph 73.

²¹⁶ See paragraph 38 above.

²¹⁷ Paragraphs 207-208 above.

*of Sairan.*²¹⁸

220. The report mentioned in this paragraph, which is exhibited to the complaint and produced as an exhibit to Mr Kilowan's deposition, does not say that it was written for Mrs Charnley or that she was in any way involved.²¹⁹ It was written on 16 October 2006, well after the licence had been granted to the Irancell consortium. It described a meeting at Centurion, near Pretoria, to discuss what in the line of UAVs was available in South Africa. These were listed as including an unmanned aircraft called the Vulture, made by ATE in Midrand, near Johannesburg. There is no trace of the document in the files of MTN and it does not form part of the file structure which Mr Kilowan said he used for MTN. We think it is more likely to have been a private inquiry which Mr Kilowan was making on behalf of Mr Aref or Mr Pischevar.

The Fish

221. Mr Kilowan's evidence is that from the moment he set foot in Iran (which he originally said had been in March 2004 but later accepted was in May 2004) he was involved in negotiations with Sairan, particularly with Dr Mahmoudzadeh, as to how MTN could use its influence with the South African government to facilitate the supply of restricted military equipment to Iran in return for being given the GSM2 licence. During this period he says that he was passing on Dr Mahmoudzadeh's requests to Mrs Charnley, who was communicating them to Minister Lekota. The result of this negotiation, in which Mr Kilowan and Mrs Charnley acted as intermediaries between the Iranian and South African Ministries of Defence, was that Minister Lekota came to Tehran in August 2004 ready to agree to provide the Iranians with a list of equipment which was given the code name "the Fish".
222. We have said in our discussion of Mr Kilowan's general credibility that the story of his communications with Dr Mahmoudzadeh before Minister Lekota's visit to Tehran is entirely invented.²²⁰ At that time he had not even met Dr

²¹⁸ Appendix 2, the complaint, paragraph 183.

²¹⁹ Meeting Report re: UAV, 16 October 2006, Exhibit N to the complaint.

²²⁰ Paragraph 181-188 above.

Mahmoudzadeh. We now proceed to consider the specific allegations in the complaint about the supply of arms.

223. First, it is said that the South African government was previously unwilling to supply Iran with equipment prohibited under international or United States restrictions.

*90. As noted above, Sairan on behalf of the Defense Ministry was specifically looking to procure military equipment that contained restricted U.S. systems or components and that otherwise could not lawfully be sold to Iran. Sairan's ongoing negotiations with the South African government had been frustrated by the South African government's refusal to undertake weapons sales due to U.S. restrictions.*²²¹

224. We do not know whether Sairan found it frustrating or not (Dr Mahmoudzadeh says that he had no great interest in making purchases from South Africa)²²² but we have no reason to doubt the statement that South Africa would have been unwilling to breach international rules on the sale of arms. We commissioned a report from Professor Richard Calland of Cape Town University²²³ on South Africa's policy towards Iran in relation to nuclear development and arms trading. He notes that supervision over trading in conventional arms is exercised by the National Conventional Arms Control Committee ("NCACC") established in 2002.²²⁴ It is required by statute to ensure compliance with the annual reporting requirements of the United Nations Register of Conventional Arms and make reports to Parliament which give particulars of the arms and importing states. Professor Calland says:

"South African foreign policy on arms sales during the relevant period was based on the principle of non-proliferation and was directed towards seeking to persuade other nations to adopt an arms procurement approach that was based on defence not offence. The commitment to this

²²¹ Appendix 2, the complaint, paragraph 90.

²²² Witness statement of Dr Mahmoudzadeh, BIT proceedings, paragraph 14-15.

²²³ Associate Professor in Public Law at the University of Cape Town, specialising in South African democracy and governance.

²²⁴ The National Conventional Arms Control Committee Act 2002.

principle ran deep within South Africa's policy-making apparatus – a point that was emphasized to me heavily by all the sources with whom I engaged on the topic in preparing this report.

In this context, it is difficult to imagine that South Africa would have engaged in arms sales that either sought to evade the oversight and transparency scheme that had been established (as former Defence Minister Lekota asserted to me, the weaponry that Turkcell claimed was promised would have been impossible to hide from international observers) or which ran contrary to this pivotal policy principle.”²²⁵

225. The complaint then goes on to say that MTN was able to influence members of the South African government to depart from this policy in order to advance its commercial interests:

*91. MTN knew that it could reach beyond traditional diplomatic exchanges using its high-level political connections in South Africa. As part of the scheme, MTN indicated to Sairan, through Dr. Mahmoudzadeh, that it could overcome some of the weapons sales barriers Sairan had been facing.*²²⁶

226. In our discussion of Mr Kilowan's credibility in Chapter 4, we have said that this view of the power of private influence is quite unrealistic and the stock-in-trade of conspiracy theorists.²²⁷ No one could seriously have thought that Mrs Charnley could influence world historical events in this way.

*92. In mid-2004, responding to Dr. Mahmoudzadeh's request, MTN organized and paid for South African Minister of Defense Lekota to make a weekend trip to Iran. MTN executives, Mr. Nhleko and Ms. Charnley, accompanied Minister Lekota during the entirety of his trip. MTN funded the trip.*²²⁸

227. There is no evidence that Dr Mahmoudzadeh asked MTN to organize Minister Lekota's trip. It is agreed that there was a long-standing invitation for him to

²²⁵ Appendix 6, Professor Calland's report, 3 August 2012, paragraphs 55-56.

²²⁶ Appendix 2, the complaint, paragraph 91.

²²⁷ Paragraph 212 above.

²²⁸ Appendix 2, the complaint, paragraph 92.

visit and Mrs Charnley says that when she met him in late July or early August she told him it would be helpful to MTN if he was able to accept. But that is as far as it goes. In his deposition evidence Mr Kilowan withdrew the claim that MTN had funded the trip and said he did not know.²²⁹ The KPMG report on the accounts of MTN says that it reveals the gift of an Ericsson mobile telephone to the Minister but no funding of the visit or the dinner at his hotel which Mrs Charnley and Mr Nhleko attended.²³⁰ It is common for government ministers on official visits to be accompanied by businessmen hoping to make contacts. Mrs Charnley had sought and obtained permission from the South African Defence Department for Mr Nhleko and herself to join the delegation.

228. During Minister Lekota's visit, he gave a dinner at his hotel which was attended by his Iranian opposite number, Admiral Shamkhani and a number of others including Mr Nhleko and Mrs Charnley. There is no suggestion or evidence that there was any other occasion upon which the MTN executives were in the same room as the Iranian Defence Minister. The complaint says of this dinner:

*93. Ms. Charnley, Mr. Nhleko, Minister Lekota, and Ambassador Saloojee met with members from the Iranian Ministry of Defense, including the Minister of Defense Ali Shamkhani. Together they promised the Minister of Defense that South Africa would deliver "heaven, earth, and the fish," meaning whatever military equipment he desired. The entire trip was organized and coordinated by MTN so that they could corruptly induce the Iranian government to eliminate Turkcell from its rightfully won License and replace it as the owner of that GSM opportunity.*²³¹

229. In his first BIT statement, Mr Kilowan says that the meeting between Minister Lekota and Admiral Shamkhani was "prearranged by MTN".²³² This simply cannot be true. Minister Lekota was on an official visit. He was obviously going to meet his Iranian opposite number. He did not need MTN to arrange

²²⁹ Mr Kilowan's Deposition Transcript, day 1, page 108.

²³⁰ Appendix 5, KPMG Report dated 2 August 2012, paragraph 5.5.2.

²³¹ Appendix 2, the complaint, paragraph 93.

²³² Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraph 32.

for this to happen. As in the complaint, Mr Kilowan says (wrongly) that the cost of the visit was borne by MTN. But he says nothing about any promises about heaven, earth, fish, or indeed about any form of defence equipment.

230. During his deposition, Mr Kilowan was asked whether MTN “paid for any portion of Minister Lekota’s trip”. He answered that he did not know “because I don’t know what financial arrangements were made.”²³³ We think that is likely to be true, but the contrast with the clear assertion in Mr Kilowan’s BIT statement that “the cost was borne by MTN”²³⁴ is characteristic of Mr Kilowan’s freedom with the facts.

231. The deposition is also a retraction from the allegation in the complaint that Minister Lekota promised “whatever equipment [Admiral Shamkhani] desired”. Now Minister Lekota is said to have –

“indicated that they will put together a joint committee that will sign an MOU, that will spell out all the defense related items on which South Africa and Iran would cooperate with each other.”²³⁵

232. That does not seem to us in the least bit improbable. On 17 September 2004 Minister Lekota wrote a thank you letter to Admiral Shamkhani, in which he said:

“Your Excellency, I would also like to refer to the issue of the reciprocal technical team exchanges that were decided upon during our meeting. I would encourage that this initiative be expedited in order for us to identify areas of cooperation.”²³⁶

233. After the 8th Joint Bilateral Commission meeting in December 2004, the two governments made a public statement:

“Iran and South Africa are currently engaged in a process of identifying areas of possible defence co-operation in the

²³³ Mr Kilowan’s Deposition Transcript, day 1, page 108.

²³⁴ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraph 32.

²³⁵ Mr Kilowan’s Deposition Transcript, day 1, page 110.

²³⁶ Letter from Minister Lekota to Admiral Shamkhani, 17 September 2004.

context of the Iran-South African Joint Bilateral Commission. These could include:

- Technology
- Training
- Procurement

This process should culminate in a MOU on defence co-operation to be signed on a suitable date in the future. In the meantime, both sides will endeavor to do whatever is possible to facilitate the formalization of defence co-operation.”²³⁷

234. There is nothing here, or in Mr Kilowan’s deposition evidence, which suggests that Minister Lekota promised Admiral Shamkhani anything in particular.

*94. “The Fish” became the code term used between MTN and the Iranian Ministry of Defense to mean the military equipment MTN promised it would deliver to Iran.*²³⁸

235. There is no evidence that MTN promised to deliver any military equipment to Iran and Mr Kilowan’s deposition does not anywhere say that it did. As for “the Fish”, it looks as if the use of this expression was confined to Mr Kilowan, who has a fondness for code names and nicknames. Both Dr Mahmoudzadeh²³⁹ and Mrs Charnley say that they know of no discussions which referred to it. It must be remembered that Mr Kilowan was not present in Iran during Minister Lekota’s visit.

236. Mr Kilowan says in his deposition that sometime “in late 2004 or early 2005”²⁴⁰, Ambassador Saloojee showed him a draft MOU from the Iranian Ministry of Defence, bearing the Ministry’s logo, which contained a lengthy shopping list of defence equipment. An extended version of this list appears in the complaint:

²³⁷ Joint Communiqué of the 8th Joint Bilateral Commission between the Islamic Republic of Iran and the Republic of South Africa held in Tehran from 14 to 15 December 2004, paragraph 1-9-1.

²³⁸ Appendix 2, the complaint, paragraph 94.

²³⁹ Witness Statement of Dr Mahmoudzadeh, 8 October 2012, BIT proceedings, paragraph 20.

²⁴⁰ Mr Kilowan’s Deposition Transcript, day 3, page 744.

95. *After Minister Lekota departed Iran, Dr. Mahmoudzadeh drafted a list of specific items which constituted “The Fish”. The Fish included:*
- A. *Rooivalk helicopters (based on the U.S. Apache helicopter), developed by Denel (Pty) Ltd.,*
 - B. *frequency hopping military radios enabled to send encrypted messages,*
 - C. *sniper rifles,*
 - D. *G5 howitzers, i.e., South African-developed long-range 155mm projectiles that included U.S. component parts,*
 - E. *canons,*
 - F. *armored personnel and landmine proof carriers developed in South Africa by Reutech,*
 - G. *coastal radar systems technology developed by a division of Reutech,*
 - H. *air pilot display computer chips,*
 - I. *a missile development company located off the Ivory Coast, and*
 - J. *other defense technology with U.S. systems or components.*²⁴¹

237. Ambassador Saloojee, perhaps not surprisingly, says nothing about this incident, which would have involved his disclosure of fairly sensitive diplomatic correspondence. There is nothing to corroborate Mr Kilowan’s statement that he was shown such a draft and we think the whole incident is likely to be another of his inventions. However, even if the Iranians did ask for all these items, there is nothing in Mr Kilowan’s evidence to suggest that there was ever the slightest chance of the South Africans supplying them and there is no evidence to show that they did.

238. The next paragraph in the complaint takes one back to July 2004, before Minister Lekota’s visit:

²⁴¹ Appendix 2, the complaint, paragraph 95.

96. *In July 2004, Ms. Charnley met with Ambassador Saloojee in his office. She told him that MTN had the access within the South African Ministry of Defense necessary to facilitate delivery of these items to the Iranian government. Ambassador Saloojee relayed the message to his Iranian counterparts that MTN could provide The Fish directly to the Iranian government.*²⁴²

239. The antecedent of “these” in the second sentence is presumably the list in paragraph 95 of the complaint. But that list is said to have been drawn up by Dr Mahmoudzadeh after Minister Lekota’s departure, so it is puzzling to find Mrs Charnley offering to provide these items before he arrived. Mr Kilowan was not present when Mrs Charnley saw Ambassador Saloojee in July 2004 and we think this conversation is another fiction.

240. The next paragraph of the complaint also refers to events alleged to have happened when Mr Kilowan was not there:

97. *Ambassador Saloojee also had dinner in July 2004 with Dr. Mahmoudzadeh, Iranian Minister of Defense Ali Shamkhani, and MTN representatives Ms. Charnley and Mr. Nhleko. At that and other dinner parties, they discussed how MTN would facilitate Iran’s purchase of The Fish.*²⁴³

241. There is no evidence for this round of dinner parties in July 2004. Mr Nhleko and Mrs Charnley were in Iran during the period 19-23 July 2004 and met a number of people to discuss telecommunications opportunities.²⁴⁴ But there is no corroboration for Mr Kilowan’s assertion that they talked about defence equipment.

242. By the next paragraph of the complaint, the draft which Mr Kilowan says he saw in Ambassador Saloojee’s office in late 2004 or early 2005 has become a finalized, confidential memorandum of understanding agreed between Minister Lekota and the Iranian government:

²⁴² Appendix 2, the complaint, paragraph 96.

²⁴³ *Ibid.*, paragraph 97.

²⁴⁴ She met Mr Pischevar, Dr Fardis, Mr Mokhber and Mr Dezfouli.

98. *The list of desired items was finalized by the Iranians in a confidential August 2004 Memorandum of Understanding between Minister Lekota and the Iranian government. Dr. Mahmoudzadeh sent that Memorandum of Understanding to Ambassador Saloojee at the South African Embassy in Iran. Ambassador Saloojee showed a copy of the Memorandum of Understanding to MTN at the Embassy, and MTN was directly aware of the Agreement and its obligations to facilitate the delivery of the weapons listed.*²⁴⁵

243. Again, there is nothing to support this allegation in Mr Kilowan's evidence, which says clearly that no memorandum of understanding on defence matters had been signed by the time he left Iran at the end of 2007.²⁴⁶

244. The next allegation concerns the Rooivalk helicopters:

99. *The most desired item on the list was the Rooivalk helicopter. MTN assured Dr. Mahmoudzadeh that it could access the helicopters, which were produced by Denel (Pty) Ltd., a South African defense equipment manufacturer with which Ms. Charnley boasted influential connections. Earlier official discussions between the South African and Iranian governments regarding procurement of the Rooivalk helicopters had failed because the South African Conventional Arms Control Committee had rejected sale of the helicopters to Iran. MTN promised it could deliver the helicopters in return for the License won by Turkcell.*

100. *Several months later, on November 16, 2004, Ms. Charnley personally sent a letter via facsimile on behalf of MTN Group to be delivered to Dr. Mahmoudzadeh, copying Ambassador Saloojee, to "facilitate a meeting between Denel (Pty) Ltd and the IHRSC [sic] [the Iran Helicopter Support and Renewal Co.]" ...*

101. *The facsimile also confirmed that Ms. Charnley was "in a meeting with the CEO of Denel, Mr. Victor Moche" to arrange discussions between Denel and the IHSRC. The IHSRC is the Iranian helicopter manufacturing company that would receive helicopters and/or helicopter technology*

²⁴⁵ Appendix 2, the complaint, paragraph 98.

²⁴⁶ Mr Kilowan's Deposition Transcript, day 1, page 120.

*from Denel to produce helicopters with U.S. Apache technology in Iran.*²⁴⁷

245. The evidence in support of these allegations is a fax dated 16 November 2004 sent to Dr Mahmoudzadeh by MTN and signed on behalf of Mrs Charnley by Mr Nyoka, a member of her team. It said:

“I am writing this letter to facilitate a meeting between Denel (Pty) Ltd and the IHRSC. Denel (Pty) Ltd is a government owned enterprise which manufactures helicopters and is a leader in the field of aviation. I was in a meeting with the CEO of Denel, Mr Victor Moche, who advised me that efforts to set a meeting between Denel and the IHRSC are not taking off because of a failure in facsimile transmission.

I will greatly appreciate if you would pass on the attached correspondence to Eng. R. Riahi (D.M.D. for Comm. Affairs) in the IHRSC and make arrangements for the meeting, as requested.

I trust you will be a great assistance and look forward to hearing from you soon.”²⁴⁸

246. Attached to the fax was a letter from Eng. Riahi to “Mr Victor Moshe” saying that he had heard from Ambassador Saloojee that Denel (Pty) Ltd (“Denel”) “as a major aviation industry in South Africa have all potential to produce parts and helicopter itself”. Eng. Riahi asked for details about the company and said it “will be appreciated to receive your delegation to discuss in detail regarding the fields that two companies can have cooperation”.²⁴⁹ In reply, Col. Ramfolo, Regional Marketing Director for the Middle East at Denel, sent a fax on 10 November 2004 saying that Denel was honoured to have received the request for co-operation and that it looked forward to sending a delegation to Tehran. He suggested any date after Eid but before 15 December 2004.²⁵⁰ There was no answer, hence Mr Moche’s request to Mrs Charnley to arrange to have the correspondence forwarded through her contacts in Iran. Dr

²⁴⁷ Appendix 2, the complaint, paragraphs 99-101.

²⁴⁸ Fax from Mrs Charnley to Dr Mahmoudzadeh, 16 November 2004.

²⁴⁹ Letter from Eng. Riahi to Mr Moche, undated.

²⁵⁰ Fax from Col. Ramfolo to Eng. Riahi, 10 November 2004.

Mahmoudzadeh says that IHSRC actually had no connection with Sairan and was a subsidiary of another company, but one hopes that his secretary forwarded the correspondence all the same.²⁵¹

247. This correspondence shows that the allegation in the complaint that Mrs Charnley was arranging for Denel to supply the Iranians with “helicopters and/or helicopter technology from Denel to produce helicopters with U.S. Apache technology in Iran” is a distortion of the truth. There is nothing to suggest that the meeting with Mr Moche was “to arrange discussions between Denel and the IHSRC”. Mrs Charnley knew Mr Moche because he had been the head of Regulatory Affairs of Telkom SA.²⁵² The meeting appears to have been quite unrelated and Mr Moche took advantage of Mrs Charnley having made contacts in Iran to ask her to act as a messenger for him. Nor does the correspondence evidence any intention to supply helicopters, whether “with US Apache technology” or otherwise. The contemplated co-operation had obviously not got off the ground.

After the Fish

248. The next allegation concerns the Letter Agreement between MTN, Sairan and the Bonyad signed on 18 September 2005. It will be recalled from the narrative in Chapter 3²⁵³ that such Letter Agreement contained the following clause 8:

“The cooperation between MTN and Iranian shareholders should be in the line of defensive, security and political cooperation. MTN shall fully support cooperation regarding the aforementioned issues in South Africa.”²⁵⁴

249. This, it is alleged, was a coded reference to promises made by MTN to secure the supply of defence equipment and nuclear cooperation. The generality of the language makes it unpromising material for such a construction. The

²⁵¹ Witness Statement of Dr Mahmoudzadeh, 8 October 2012, BIT proceedings, paragraph 24.

²⁵² Witness Statement of Mrs Charnley, 23 October 2012, BIT proceedings, paragraph 51.

²⁵³ Paragraph 130 above.

²⁵⁴ Letter Agreement between local shareholders of Irancell consortium and MTN, 18 September 2005, exhibit 17 to Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings.

MTN delegation who negotiated the agreement say they regarded it as a vague reassurance put in to help Sairan and the Bonyad fend off any attack on the ground that South Africa was a political risk. The new partners were sensitive on this issue after their experience of the attempts in some quarters to portray Turkcell as a threat to Iranian security. Dr Mahmoudzadeh says much the same in his BIT statement:

“When signing this letter agreement we all had in mind the national security issues that had arisen since 2004, and had led to intense criticisms of the project in the media and in parliament. I wanted to have this commitment from MTN in order to be able to answer any similar criticism of MTN which might arise.”²⁵⁵

250. We see no reason not to believe Dr Mahmoudzadeh on this point, especially as it is corroborated by the documentary evidence of Mr Kilowan himself. On 24 March 2007, the United Nations Security Council, including South Africa, voted unanimously for sanctions against Iran. Iran had sent a diplomatic mission to South Africa before the vote but it nevertheless voted with the others. This was a traumatic event in Iranian-South African relations. Feelings in Tehran ran high. Ambassador Saloojee must have had an uncomfortable time. Mr Ghorbanoghli wrote an article in the *Mail and Guardian*, which ended: “Mr Mbeki, this is no way to treat a friend.”²⁵⁶ On the day after the resolution, Mr Kilowan sent a memo to Mr Nhleko. He said:

“You will...recall that during the negotiations in September 2005 Dr Mahmoudzadeh insisted on you signing that 1 page letter in which the two parties committed themselves to mutual co-operation on political and defence matters. It now transpires that he used that letter to indicate that MTN would support SAIRAN in its negotiations with the South African government for defence matters.

Obviously that was not MTN’s understanding but it was certainly the way in which it was sold to the establishment

²⁵⁵ Witness Statement of Dr Mahmoudzadeh, 8 October 2012, BIT proceedings, paragraph 46.

²⁵⁶ Appendix 6, Professor Calland’s report, 3 August 2012, paragraph 89.

in Iran.”²⁵⁷

251. We doubt whether Dr Mahmoudzadeh was using the Letter Agreement in the way Mr Kilowan describes, but the important part is the last sentence, which is omitted in the quotation from this document in the complaint.
252. Finally, there is an undated memorandum which Mr Kilowan says he wrote in May 2007 and which is Exhibit 8 to his deposition. It reads as an early version of the evidence he is now giving and we have serious doubts as to its authenticity. It is dramatically headed ‘Top Secret’:

“In a recent meeting with our ambassador the continued issue of the defence cooperation was discussed in detail. This is a summary of the meeting:

1. He agrees that a commitment was given by the Government of SA through IC from our Minister of Defence. It is not clear what the exact nature and extent of the commitment was because the message was conveyed in a very cryptic fashion i.e. the ambassador was only told by IC that our MOD has agreed to give them the “Fish”. This word was developed during a secret off-the record discussion between the ambassador and officials for the local foreign ministry and defence ministry around the entry of MTN into the second operator.
2. Of course this initial indication of preparedness around defence cooperation was strengthened with the follow-up visit by our MOD and you were present when mutual commitments were made.
3. During the visit of the parliamentarians to SA last year our MOD again committed the Government of SA to the establishment of technical working committees to investigate the nature and extent of possible cooperation.
4. The ambassador agrees that this matter must be finalised and is now going to do the following:
 - a. Ask for a meeting with the MOD of Iran and get him to indicate what they are looking for in the context of current geo-

²⁵⁷ Memorandum from Mr Kilowan to Mr Nhleko, 25 March 2007, page 3.

political developments. He will ask that they reduce their request to writing.

- b. He and I will then develop a memorandum with clear deliverables that IC will have to take to our MOD (because she is the one who initially obtained his commitment) and get him to commit in writing to at least establish these permanent joint technical committees. The logic here is that IC must explain to our MOD that he is the one who gave her the indication which she transferred to our ambassador; that his failure to follow through on his promise is causing continued embarrassment to our Government and is also placing a lot of strain on MTN. In this process we should get a clearer indication whether the “fish” that was promised to the Iranians is the same “fish” that our MOD promised to IC.
- c. At the same time the ambassador will ask for a meeting with our President and Aziz to explain them in detail that the failure of the Government of SA to make good on its promises has the potential to undermine SA’s reputation as a country that can be trusted as an honest broker. He is due to be in SA on 24 June. When we are in SA for the Board meeting perhaps we can discuss more detail but I think it is imperative that IC keeps up the pressure on our MOD because between the two of them they have forged this linkage that is going to be impossible to break except through a positive response in some form or the other from our Government.”²⁵⁸

253. Mr Nhleko says he has never seen this document and Ambassador Saloojee denies having said the things attributed to him. There is a note of hysteria: Mrs Charnley “must” do various things at a time when, according to Mr Kilowan’s evidence as to when he wrote the memo, she had left MTN.²⁵⁹ The document suggests that the Ambassador and Mr Kilowan will put together a

²⁵⁸ ‘Top Secret’ Memorandum prepared by Mr Kilowan, 16 May 2006, exhibit 8 to Mr Kilowan’s deposition.

²⁵⁹ Mrs Charnley left MTN in March 2007.

memorandum to define the elusive Fish and impress on the President that his country's reputation is at stake. We think this is fantasy and the document is probably a recent invention.

Conclusion

254. In our opinion Mr Kilowan's story that MTN promised to use its influence with the South African government to procure illicit arms for Iran in exchange for being given the GSM2 licence is untrue. The highwater mark of Mrs Charnley's influence in defence matters was to ask Minister Lekota to do her a favour by accepting a standing invitation to make an official visit to Iran. MTN also facilitated meetings, passed on messages (such as the Denel fax) and entertained visiting officials. All this was in the ordinary way of lobbying and did not involve any secrecy or corruption. We are satisfied that MTN had no influence at all over the South African government's policy in the supply of defence equipment and neither Mrs Charnley nor Mr Nhleko pretended that they had. Furthermore, there is no evidence that South Africa supplied any arms to Iran.

Chapter 6

Nuclear Policy

255. In this Chapter we shall consider each allegation in the complaint about MTN's promises to influence South African policy at the IAEA or to give Iranian officials access to the President of South Africa or his ministers, in exchange for being substituted for Turkcell in the Irancell consortium.

Late 2004: Dinner in Tehran

256. Paragraph 139 of the complaint alleges:

139. In late 2004, Ambassador Minty made an official visit to Iran. Upon information and belief, during that visit, he had dinner with Ambassador Saloojee and MTN representatives where they discussed MTN's hopes of securing the License. At that dinner, MTN confirmed the importance of the IAEA referral to the Iranian government and solidified its plan to trade the IAEA vote for the GSM License. There was no reason for MTN, a telecommunications company, to be discussing IAEA votes with Ambassador Minty other than as part of the corruption conspiracy.²⁶⁰

257. For MTN to have "confirmed the importance of the IAEA referral to the Iranian government" to a man who had been South Africa's representative on the IAEA since 1995 seems somewhat superfluous, since all the world knew it.

258. The only evidence that such a dinner took place is in Mr Kilowan's deposition. But all he says is:

"I remember that Abdul [Minty] came to Iran at one stage during that time, and we had dinner, I had dinner with him. Irene had dinner with him at the ambassador's residence. Again, you know, we discussed the nuclear issue openly

²⁶⁰ Appendix 2, the complaint, paragraph 139.

and the problems that the South African government has with it.”²⁶¹

259. One imagines that “the nuclear issue” was discussed at many Tehran dinner parties. Ambassador Minty says he does recall being in Iran at some point in 2004. During this visit he attended a buffet style dinner. Representatives from some South African companies were there, including one from MTN. He cannot remember who it was. On that occasion, there was no discussion about nuclear issues. As for Mrs Charnley, he says he has never met her and she says she has never met him. We think there is nothing in this allegation.

July 2004: Dr Rowhani’s Visit to South Africa

260. Paragraphs 140-144 of the complaint allege:

140. To further the corruption, on or about July 25, 2005, MTN organized and funded a visit to South Africa by the National Security Advisor and Iranian nuclear negotiation chief, Hassan Rowhani. Advisor Rowhani was sent by and reported directly to the Supreme Leader of Iran. He sought a meeting with South African President Thabo Mbeki. Again, MTN, a publicly traded commercial telecommunications company, had no business interest in Iranian nuclear issues other than its efforts to engage in bribery and trading in influence of Iranian officials to eliminate Turkcell and replace it as the winner of the GSM licence.

141. Initially, MTN attempted to arrange a meeting between Advisor Rowhani and President Mbeki, but the South African President’s office would not schedule the meeting. In response, MTN convinced Advisor Rowhani to travel to South Africa to meet with Ambassador Saloojee, Defense Minister Lekota, and Ms. Charnley.

142. While MTN worked to arrange Advisor Rowhani’s visit, it called upon its South African political connections to convince President Mbeki to meet with Advisor Rowhani. President Mbeki again refused to meet with Advisor Rowhani in any official capacity, but later agreed to meet “unofficially” because of his relationships with Ms. Charnley and Ambassador Saloojee.

²⁶¹ Mr Kilowan’s Deposition Transcript, day 1, pages 138-139.

143. *MTN orchestrated a pretext for President Mbeki to meet Advisor Rowhani while President Mbeki was at his residence in Cape Town. That pretext was an extravagant dinner with the Premier of Western Cape Province. MTN paid for Advisor Rowhani to stay at a hotel in Cape Town, sponsored the large dinner party, and covered all travel logistics, including Ambassador Saloojee's visit to South Africa to accompany Advisor Rowhani.*

144. *President Mbeki met at his home with Advisor Rowhani. Ms. Charnley was present for the meeting. Consistent with MTN's promises, the President assured Advisor Rowhani that the South African government would support Iran at the IAEA.*²⁶²

261. These allegations are not supported by anything in Mr Kilowan's BIT statements or deposition evidence. Dr Rowhani did visit South Africa in the last week of July 2005 and met President Mbeki, but Mrs Charnley was almost certainly out of the country²⁶³ and KPMG investigations have found no trace in MTN's accounts of any payments which might be related to the visit. There is nothing to suggest that MTN was in any way involved. That visit was prior to an important vote at the IAEA on 24 September 2005, when the IAEA Board of Governors of the IAEA was to consider whether Iran was in non-compliance with the nuclear non-proliferation treaty. On that occasion the resolution was adopted by 22 votes to 1, with 12 abstentions, including South Africa.
262. The draftsman of the complaint may be confusing the June 2005 visit by Dr Rowhani with another which he made between 27 and 30 September 2004.²⁶⁴ Dr Rowhani was accompanied by a nine-member delegation, including the Iranian ambassador to South Africa, three members of their embassy in Pretoria and Ms Linda Jaquet from the South African foreign office, together with three Iranian bodyguards.

²⁶² Appendix 2, the complaint, paragraphs 140-144.

²⁶³ Appendix 5, KPMG Report, paragraph 5.8.1.2.

²⁶⁴ See paragraph 91.

263. Mr Kilowan's deposition evidence presumably relates to the September 2004 visit:

“Q Did MTN arrange that trip?

A Yes. We arranged that with the South African ambassador in Iran, Ambassador Saloojee.

Q Why was MTN involved in arranging Rowhani's trip to South Africa?

A Well, because that was part of our attempts to show the Iranians that we could arrange access to our state president in particular. Because, remember, Mr. Rowhani is not at the same level as a state president. And normally presidents only receive presidents. So we had to convince President Mbeki to receive Mr. Rowhani at an official level in South Africa.

And so Irene and Ambassador Saloojee did a lot of that preparatory work to get the president to see him. And finally the agreement was that the president would see him very short, very briefly at his official residence in Cape Town.

Q Okay. Did Rowhani want to -- were you ever aware of attempts by MTN to arrange a meeting at the president's office in Pretoria?

A Yes. That was -- in -- during these discussions to arrange the meeting, of course, for Rowhani, the first prize [*sic*: prize?] would have been to be meeting in the official offices of the president.

The president, as far as I was made aware, was not prepared to do that.

Q Did MTN try and arrange that meeting in the official office?

A Yes, we did. ...

Q Why did MTN try to have Iran's nuclear negotiator have an official meeting at the presidential offices?

A This was part of the -- of the -- of the broader project. We delivered our Minister of Defense in 2004 on a nuclear issue. We now are delivering our president in terms of the -- on a nuclear -- the nuclear issues.

Q And you were mentioning a moment ago President Mbeki's office declined to -- did the President Mbeki's office decline to have a meeting with Mr. Rowhani at the official offices of the president?

A That is what I was told, yes.

Q Okay. So what did MTN do next?

A Well, they continued -- Irene continued to -- to meet with, again, with the minister in the office of the president, of President Thabo Mbeki with the minister -- the Foreign Affairs Minister of South Africa at that time, Minister Nkosa Dlamini-Zuma. And at the same time Ambassador Saloojee was also talking to -- to the same parties from -- from the embassy in Iran.

Q Did anybody ask Saloojee to have those conversations?

A Well, Irene asked him to have this conversation, yes.

Q Okay. And when you say or testified a moment ago about the nuclear issue, what was the nuclear issue?

A Well, at that time the -- the -- during the presidential elections in Iran, obviously President Ahmadinejad and also the other candidates, they made a big issue of the fact that President Khatami's administration had suspended the nuclear enrichment program. So the nuclear issue became an election issue, and also they were -- they were beginning -- the Iranians were beginning to become uncomfortable with the fact that the P5 Plus One was not forthcoming with their proposals for the -- on a nuclear -- so it was -- it was in the air, so to speak.

And -- and the Iranians were trying to make sure that they had all the support they could get.

Q And MTN was working with the Iranians to assist on the development of the Iranian nuclear expansion?

A No, no, no. We were not -- were not working on that. I mean, we were simply making sure that they got in front of our president.

Q Okay. On the nuclear issues?

A On the nuclear issues, right.

Q So MTN was trying to facilitate discussions between the

governments to advance Iran's nuclear issues?

A Yes. To support them, yes.

Q Okay. And the project that you referred to earlier, was that to have -- around which these discussions were happening, was that project to replace Turkcell and the second GSM license?

A That's correct.

Q Okay. Now, you mentioned that Mbeki would not meet with Rowhani at the official offices?

A That's correct.

Q Did Mbeki's office later agree to meet Rowhani somewhere else?

A They did, yes.

Q And where was that?

A That was in Cape Town at the president's official residence.

Q Okay. And how did -- did MTN play any role in arranging for Rowhani to get to Cape Town?

A Yes. We -- we made the arrangement -- we made the hotel booking in Cape Town. We paid for that. I'm not sure whether we paid for the flight tickets, but we definitely paid for the hotel because I signed the both at the end of that visit, and we -- you know, took care of everything in Cape Town.

Q Did -- was Rowhani alone or was he travelling with a delegate?

A No. He was with the delegation from Iran, and then there were two officials from the Iranian embassy in South Africa also in Cape Town with us.

Q Was there any entertainment other than just the meeting?

A No. We just -- we just arranged a big dinner for the entire delegation, about 20 people. And when we went down for the dinner in the evening, Mr. Rowhani and his entourage disappeared into the Sea Point area of Cape Town, and we only saw them again the next morning.

Q What is the Sea Point area of Cape Town?

A It's an area where there's lots of entertainment.

Q Okay. Bars and --

A Bars and --

Q -- clubs?

A Clubs, and all sorts of things, yes.

Q And did Rowhani ask MTN to pay for their expenses that night?

A No. We didn't -- no, they didn't ask us to pay for that. If there was any payment to be made, they would have asked me because I was in charge of that particular leg of the visit.

Q Okay. Did you check with anybody at the MTN Group about this trip?

A In terms of what?

Q An authorization to sign --

A No, no, I didn't check with -- after the event, I didn't check with anyone because we were -- from MTN's side, it was Irene Charnley's secretary, Debbie, and somebody from the company's secretarial office, Avanti Parboosing. I mentioned the name yesterday. The three of us were there from the MTN side, and we are empowered to sign for the -- you know, for anything.

Q Who empowered you?

A Irene.

...

Q But you -- did you report to Mr. Nhleko every day?

A Yes. That's right, yes.

Q Okay. And what did you report to him about the trip?

A Basically, that they are happy that everything is going according to plan, that they are seeing -- they are seeing the president in the afternoon, and then we are having -- we had the lunch with Mr. Ibrahim Rasool, who was the

premier of the Western Cape at the time. So I would just --
guys are happy.”²⁶⁵

264. The thrust of this evidence is that, in return for being allowed to supplant Turkcell as licensee, MTN arranged for Dr Rowhani to have an audience with President Mbeki which he would not otherwise have been able to get. This is impossible to accept. Dr Rowhani had no difficulty in arranging a meeting with President Mbeki in July 2005 through ordinary diplomatic channels.
265. The whole story about how “presidents only receive presidents” and how, after much persuasion by Mrs Charnley and Ambassador Saloojee on her behalf, Mr Mbeki was persuaded, not to give Dr Rowhani the “first prize” of seeing him in his office, but to see him privately in his residence, is an invention. The 2004 meeting would naturally have been arranged by the South African foreign office, principally through Ambassador Minty.
266. Professor Calland²⁶⁶ has provided us with some background to these exchanges on nuclear policy. We summarise his opinion as follows:
- (a) During the apartheid period, Iran had no diplomatic relations with South Africa but had close ties with the ANC, which was then an unlawful organization.²⁶⁷
 - (b) After the election of President Mandela, diplomatic relations were established and economic links developed. Iran was the first country with which South Africa established a joint economic commission. It was a very important source of oil and government policy was to encourage trade with Iran and investment there by South African companies.²⁶⁸
 - (c) President Mbeki adopted a consistent and principled policy on nuclear development. Professor Calland quotes an article by Professor Chris Landsberg:

“[he] consistently challenged both the so-called ‘nuclear have’ states – the US, France, Britain, Russia and China – and the ‘nuclear have-not’ states, to live up to their commitments

²⁶⁵ Kilowan’s Deposition Transcript, day 2, pages 317-325.

²⁶⁶ See paragraph 224 above.

²⁶⁷ Appendix 6, Professor Calland’s report, 3 August 2012, paragraph 14.

²⁶⁸ *Ibid.*, paragraph 15.

contained in the 1969 Nuclear Non-Proliferation Treaty (NPT)... [He adopted] strong positions against those states that acquired nuclear weapons outside of the NPT regime, including Israel, Pakistan, India and North Korea and, while [he] defended Iran's right to acquire nuclear technology for civilian purposes, [he] did insist that Tehran respect the authority of the...IAEA)".²⁶⁹

- (d) President Mbeki was the "dominant individual throughout 2002-2007...Such was the dominance of Mbeki in foreign policy-making...even Cabinet would not have played an especially hands-on role in international relations during the relevant period".²⁷⁰
- (e) Abdul Minty had strong influence over the South African government's willingness to give Iran the benefit of the doubt regarding Iran's development of nuclear technology for peaceful purposes. "As a committed multilateralist...he was 'chip off the Mbeki block' in terms of his attitudes to international relations, and, therefore, a trusted lieutenant."²⁷¹
- (f) Defence Minister Lekota "was not a 'detail' person...There can be little doubt that on matters as sensitive as relations with Iran, Lekota would have been guided by the Presidency".²⁷²
- (g) "Within the period under review, South Africa maintained a consistent position at the IAEA. It strongly believed that the issues pertaining to Iran's nuclear programme could be resolved through diplomacy. It also believed that the IAEA should be given more time to continue dialogue with Iran."²⁷³
- (h) Professor Calland concludes: "One of the noteworthy features about the diplomatic cables from the US mission in South Africa which are now available (due to the wikileaks) is the lack of concern expressed ... about the South African government position viz a viz Iran. There is recognition of South Africa's non-hostile disposition towards the Iranians but also an appreciation of its background and context."²⁷⁴

267. It seems to us that prior to the vote about whether Iran was in breach of the nuclear non-proliferation treaty at the IAEA, in which South Africa and others in the non-aligned movement chose to abstain, it would have been entirely

²⁶⁹ *Ibid.*, paragraph 31.

²⁷⁰ *Ibid.*, paragraphs 38-39.

²⁷¹ *Ibid.*, paragraph 44.

²⁷² *Ibid.*, paragraph 47.

²⁷³ *Ibid.*, paragraph 84.

²⁷⁴ *Ibid.*, paragraph 100.

natural for Dr Rowhani to come to see President Mbeki. His visit must have been arranged through normal diplomatic channels and, apart from Mr Kilowan's assertions, there is nothing to show that his meeting President Mbeki had anything to do with MTN.

268. The KPMG examination of the MTN's books and accounts reveals no evidence of MTN sponsoring or making any financial contributions in relation to the June 2005 meeting.²⁷⁵ The KPMG examination does reveal that MTN sponsored the visit of the Iranian delegation to Cape Town in September 2004. Before doing so, it obtained the permission of the South African Department of Foreign Affairs and the Iranian Embassy. It arranged a dinner for the delegation and others and (on this point the evidence of Mr Kilowan is corroborated by that of Mrs Charnley) the delegation did not turn up. Whether the meal which they missed could have been described as "extravagant" we cannot say. We have not seen the menu and presumably it would have been tactless to serve wine. On the following day MTN arranged a lunch for the delegation at the "On the Rocks" fish restaurant at Bloubergstrand, near Cape Town.²⁷⁶ The Prime Minister of the Western Cape may well have been another guest. Neither meal could be described as a "pretext" for a meeting with President Mbeki, who did not attend either. On the contrary, the visit of the Iranian delegation for a meeting with President Mbeki was treated by MTN as an opportunity to do some lobbying of officials, openly and with the consent of the governments of both countries, of the kind commonly done by companies wanting to do business in foreign countries.

269. Paragraphs 145-154 of the complaint allege:

145. On September 24, 2005, the IAEA Board of Governors found that Iran was not in compliance with its Nuclear NPT obligations. South Africa abstained from the vote of the IAEA Board of Governors declaring Iran in non-compliance with the NPT. The Board passed a resolution to require Iran to "answer crucial IAEA

²⁷⁵ Appendix 5, KPMG Report, paragraph 5.8.2.3.

²⁷⁶ The restaurant has a spectacular view of Table Mountain. It is fairly informal and a popular main dish (kingklip) currently costs R125 (US\$14.50).

questions and to make key scientists available for interviews. It also called on the Islamic Republic to suspend uranium enrichment.”

146. The IAEA scheduled a discussion and vote by the Board of Governors on referral of Iran to the Security Council to take place on November 24, 2005, four days after the date MTN was due to receive the GSM License from the Iranian government.

147. On November 20, 2005, the date that the License was scheduled to be issued to MTN, Dr. Masoum Fardis of the Ministry of Information and Communications Technology showed the MTN Iran office manager a letter on letterhead of the Iranian Ministry of Foreign Affairs advising that the License would be held until South Africa abstained or voted in Iran's favor during the November 24, 2005 Board of Governors meeting at the IAEA.

148. Immediately upon learning this information the office manager contacted Ambassador Saloojee. He emphasized to Ambassador Saloojee that the outcome of South Africa's vote at the IAEA was directly connected to MTN's receipt of the License. In response, the MTN office manager asked Ambassador Saloojee to contact South African Ambassador to the IAEA Abdul Minty, who was at the time in Vienna.

149. MTN further discussed the situation with Minister Ghorbanoghli, who informed them that a South African vote against Iran at the IAEA would cause major problems for MTN. Minister Ghorbanoghli also informed MTN that concerns ran high within the Iranian government that South Africa would not pull through, in which case MTN would not receive the License. Minister Ghorbanoghli emphasized that Ms. Charnley must speak with President Mbeki to receive assurances of South African support.

150. Ms. Charnley and Mr. Nhleko were distraught at the news that the License was at risk. As of November 20, 2005, MTN had invested €300 million in the license fee and spent another €150 million in capital and payments of Sairan and the Bonyad's shares of the project.

151. Ms. Charnley immediately began contacting her friends in the South African government, including President Mbeki. She insisted that South Africa must at a minimum abstain from any vote to refer Iran to the Security Council for MTN to receive the License.

152. *On November 24, 2005, the IAEA Board of Governors met to address whether to refer Iran to the Security Council. South African negotiator Abdul Samad Minty addressed the IAEA Board of Governors regarding the implementation of non-proliferation safeguards in Iran and declared:*

“South Africa together with a substantial number of Board Members believes that the resolution [of September 24, 2005] was not the correct course of action to follow. . . . South Africa continues to believe that the correct course of action remains for the Board to allow for more time that would enable the Agency to continue with its process to clarify certain issues pertaining to the Islamic Republic of Iran’s peaceful nuclear program.”

153. *As MTN had promised Iranian officials, South Africa abstained from the decision. As a result, the needed votes were not cast in favor of an immediate referral, and the IAEA extended Iran’s time to show compliance with the NPT.*

154. *Three days later, on November 27, 2005, the Iranians released the GSM License previously won by Turkcell to MTN.²⁷⁷*

270. Paragraph 145 is substantially correct. On 24 September 2005, South Africa and 11 other members of the non-aligned movement abstained from voting on a resolution to hold Iran in breach of the non-proliferation treaty.²⁷⁸ Paragraph 146 is wrong: no vote was scheduled for that meeting. We have dealt with paragraphs 147-151 in our general discussion of Mr Kilowan’s credibility.²⁷⁹ We consider that they are entirely fictitious. We would only add that the allegation in paragraph 149 is not supported by anything in Mr Kilowan’s deposition evidence or BIT statements. The meeting referred to in paragraph 152 was not to consider whether to refer Iran to the Security Council but Mr Minty did say what is attributed to him in that paragraph. It was an expression of long-standing South African policy and had nothing to do with MTN. There was no vote as is alleged in paragraph 153. The licence mentioned in

²⁷⁷ Appendix 2, the complaint, paragraphs 145-154.

²⁷⁸ However, as the resolution was carried by 22 votes to 1, these abstentions made no difference: compare paragraph 153 of the complaint.

²⁷⁹ Paragraphs 149-156 above.

paragraph 154 was granted to Irancell on 27 November 2005 after the licence fee had cleared in the account of MCIT, with effect from 21 November 2005.

Conclusion

271. In our opinion, the allegation that MTN agreed to influence South African policy on Iran's nuclear programme, or arranged for Iran to have access to the South African President and ministers, is entirely unsubstantiated. The two main episodes recounted in detail by Mr Kilowan (obtaining an audience with President Mbeki for Dr Rowhani and ensuring a favourable vote at the IAEA on 24 November 2005) are fictions which even the most cursory reality check would have exposed.

Chapter 7

Loans

272. The loan allegations arise out of the arrangements agreed between MTN and IEDC about the funding of the €300 million upfront licence fee which Irancell had to pay MCIT for the licence and the US\$88 million or so which IEDC had to pay for its shares in the company. MTN lent Irancell the money to pay for the licence. It also provided IEDC with the money to pay for its shares, but did so by lending the money to Irancell, which lent it to IEDC. That gave MTN the greater security of a claim against the company which actually held the licence. These arrangements were effected by the three loan agreements which are mentioned in Chapter 3.²⁸⁰

273. The relevant allegations in the complaint are:

156. ...MTN agreed to pay IEDC's \$88 million capital share of MTN-Irancell, knowing that this payment was both commercially unreasonable and an improper payment. Along with the capitalization payments, the IEDC partners (the Bonyad and Sairan) also demanded that MTN pay their share of the \$300 million license fee. MTN again agreed to do so.

157. Between January and November 2005, the IEDC partners on the one hand and MTN on the other worked out an arrangement to capitalize MTN-Irancell using exclusively MTN funding and to pay for the IEDC share of the license fee using MTN funding. The Iranian partners were clear that they were not willing to pay any "interest" on, or put up security for, a "loan." MTN Group management, and specifically Irene Charnley, presented the proposed arrangement to MTN, noting that the improper payments of the Iranian shares would be required if MTN were to secure the License.

158. MTN's Chief Financial Officer, Rob Nisbet, was shocked at the proposal, and he refused to permit the deal to proceed on such improper and unsecured terms. Mr. Nisbet insisted that a formal loan agreement be negotiated

²⁸⁰ Paragraph 137 above.

and entered into between the parties. Indeed, upon information and belief, Mr. Nisbet threatened to resign from MTN unless formal loan documents were created.

159. As a result of these discussions within MTN, on November 15, 2005, MTN Group directed its subsidiary, MTN International (Mauritius) Ltd., to enter into sham “loan” agreements with IEDC and the MTN-Irancell entity, Sherkate Khadamate Ertebati-E-Irancell (the Irancell Telecommunications Services Company (“MTN-Irancell”)), formed in August 2005 by Dr. Mahmoudzadeh and Mr. Dezfouli. For the IEDC capitalization costs, the parties agreed that MTN would (1) “loan” U.S. \$88.7 million to MTN-Irancell, which in turn would “loan” the same funds to IEDC to provide the Iranian partners with their portion of the initial capitalization requirement who would in turn “loan” the funds back to MTN-Irancell for the capitalization costs; and (2) “loan” MTN-Irancell U.S. \$351.9 million for a period of four years at an interest rate of LIBOR plus four percent to finance the initial License fee.

160. Mr. Nisbet continued to voice severe opposition to the arrangements – upon information and belief because he recognized them as being shams that functioned in the same manner as the original IEDC proposal he had vehemently opposed. He informed MTN’s executive team that the “loans” put MTN at huge risk due to its favoring of the Iranian partners and inability to enforce repayment. Despite the CFO’s opposition, MTN executives forced through the sham “loan agreements” and financed the entire MTN-Irancell transaction. Upon information and belief, Phuthuma Nhleko issued Mr. Nisbet a formal written warning for opposing the financial terms, especially in front of the Iranian partners, and instructed him to move forward with the transaction.

161. MTN ultimately made the “loans” through a series of complex “round trip” agreements described above used to shift the funds around between IEDC, MTN-Irancell, and MTN. MTN recorded these loans on the books of the MTN Group and included them in its public financial statements. The terms of the loans were used only to place the loans on MTN’s books in a manner that hid the fact that the monies were paid as bribes and not true loans.

162. As of the date of this Complaint, neither of the purported loans have been repaid in any part. Indeed, as initially reported by MTN Group in its public financial

statements, the IEDC “loans” were originally subject to full repayment in December 2008, and the MTN-Irancell capitalization and License “loans,” plus capitalized interest, were subject to scheduled repayment between May 2008 and August 2009. By the time that the loans were due, MTN-Irancell was highly profitable, having produced approximately \$118 million of profit in 2007 and \$234 million of profit in 2008. Yet, notwithstanding the enormous profit achieved by IEDC through its 51% ownership of the business, IEDC – consistent with its original intent and with the “sham” nature of the agreement – did not repay the loans. Instead, MTN simply voluntarily extended the repayment period for another three years. This rescheduling was reflected in Note 13 to the 2010 MTN Financial Statements, which showed repayment of three loans due in 2011 and another in 2014, as well as shifting of the debt between MTN-Irancell and IEDC.

163. Three of the rescheduled loans were due to be repaid in 2011. Between 2008 and 2011, the MTN-Irancell business continued to be hugely profitable, generating \$516 million in profit in 2009, \$583 million in 2010, and upon information and belief at least \$503 million in 2011. Yet, notwithstanding the hundreds of millions of dollars of profit that IEDC has reaped from MTN-Irancell operations, the loans remain unpaid consistent with both MTN and IEDC’s understanding and expectations in 2005. To address the receivable on its corporate financial statements, upon information and belief, in March 2011 as one of his last acts as CEO, Mr. Nhleko once again “extended” the terms of the IEDC sham “loans” for several more years.

164. MTN has always understood that the Iranian partners would not repay the capitalization and License “loans.” It has taken no action to enforcement repayment, and instead continued to voluntarily “extend” action. MTN’s reflection of the sham loans on its corporate financial statements is untrue – MTN has always known, and knows today, that the payments it made to the IEDC to fund the partners’ share of Irancell was an improper inducement to have the Iranians provide MTN, rather than Turkcell, the License.²⁸¹

²⁸¹ Appendix 2, the complaint, paragraphs 156-164.

274. Before we consider whether there is any truth in these allegations, we must say that in principle we find them puzzling. Turkcell are in essence saying that to offer a higher price than they would have offered is corruption. MTN and the two Iranian institutions were negotiating the terms upon which MTN would join the Irancell consortium. Each side wanted the best deal it could extract from the other. But supposing it were all true. What if MTN had simply given IEDC the money to pay for its shares and given Irancell the money to pay for the licence? That may have been foolish, but how can it be a matter for complaint by Turkcell? Likewise, the complaint says MTN misrepresented the true nature of the loans in its annual statements. We shall explain why we do not think this true. But suppose it were true. It would certainly be a matter for complaint by MTN shareholders. But how can it be a wrong against Turkcell?
275. The only way, as it seems to us, in which the terms upon which MTN entered the Irancell consortium can have any relevance to a claim by Turkcell is if they were an inducement to IEDC to break its agreement with Turkcell in their shareholder agreement of 4 September 2004. If MTN intended to induce IEDC to break its contract and did so, it could incur secondary liability. But the Tribunal in the ICC arbitration has found (correctly, if we may respectfully say so) that IEDC did not break its contract. The contract and any ancillary obligations of IEDC had come to an end when Turkcell failed to meet the 4 September 2005 deadline. IEDC was free to bargain with MTN for whatever terms it could get. And MTN was free to offer whatever terms it thought necessary to join the consortium.
276. That said, we now consider the detailed allegations in the complaint. The scheme of the loans is, on the face of it, perfectly simple. Mr Kilowan's evidence of the way they were structured is this:

“...first of all, the capitalization, it's supposed to be pro rata shareholding. Local partners could not bring their pro rata shares. MTN was going to lend that to the local shareholders. But in terms of the Iranian legislation, we were not allowed to lend money to our partners in order to -- for them to capitalize the company.

So the solution was that we would lend the money to Irancell, and then Irancell would then on lend that money to the local shareholders, and the local shareholders would then put it into the capital of the company. That was the one loan.

The other one was the 300 million euro for the license fee. That became a shareholder loan to the company, because the license was the asset of the company. And but, again, the partners were supposed to be lending pro rata into -- into that 300 million. They didn't have it, so, again, we created a roundabout way of them being able to put in their part of the shareholder loan. That was the basic structure of the loan agreements.”²⁸²

277. This seems to us a relatively straightforward description, save for one or two matters which Mr Kilowan has misunderstood. The first is why MTN lent the share subscription money to Irancell rather than to IEDC. We have not been told of any Iranian legislation which prohibits one shareholder from lending another shareholder the money to pay for his shares, or any reason of policy why there should be such a prohibition.

278. The real reason why MTN preferred to lend to the company was that it provided better security than IEDC. On 26 September 2005, Mr Nisbet sent a memo to Mr Nhleko:

“As yet we do not know whether the subscription for the share capital would be advanced to the Company as a loan which will in turn be onwardly lent to the Iranian shareholders or whether it will be a loan directly from MTNI to the Iranian shareholders. The former would be our preferred position as we believe the latter will not be practical from a security point of view and this requires discussion with Caylor, Bank Melli and the Iranian Shareholders.”²⁸³

279. Perhaps Mr Kilowan had in mind the former South African rule which prohibited a company from providing financial assistance for the purchase of its own shares. That rule, derived from English law, was very much relaxed

²⁸² Mr Kilowan's Deposition Transcript, day 1, pages 253-4.

²⁸³ Memorandum from Mr Nisbet to Mr Nhleko, Mrs Charnley and others, 26 September 2005, paragraph 4.6.

by amendments made to the South African Companies Act in 1999 and was largely abolished by the Companies Act 71 of 2008. Ironically, in view of Mr Kilowan's accusations of impropriety, the Black Economic Empowerment programme, of which MTN is itself a product, was a principal reason for the relaxation of the rule in 1999. Black purchasers often had to borrow the money to buy their shares and lenders preferred to have the security of a debt owed by the company rather than by the shareholder personally. At any rate, we understand that there is no such prohibition in the law of Iran and MTN were clearly told the same. They would have been unlikely to advance US\$88 million on what they knew to be an irrecoverable loan. And the loan has in fact been repaid.

280. As for the second loan, nothing could have been more straightforward. Irancell needed the money to pay for the licence and borrowed from MTN on commercial terms, just as it might have borrowed from a bank.

281. Paragraph 157 of the complaint is wrong in virtually every particular. So far from the Iranian partners not being willing to pay interest, they agreed to Irancell paying interest at 4% over LIBOR, which gave MTN a margin on the rate at which it was able to borrow in the market. So far from the Iranian partners not being willing to provide security, IEDC guaranteed repayment of the share purchase loans by Irancell and pledged their shares in Irancell as security. All this is plain enough on the face of the loan agreements executed on 15 November 2005.

282. Then there is the question of how the loans were recorded in the financial statements of MTN. In his deposition evidence, Mr Kilowan was asked about this:

“Q Has MTNI ever revealed, to your knowledge, that IEDC was the intended real borrower of the money?

A To who? On the books it is simply a loan to Irancell.”²⁸⁴

²⁸⁴ Mr Kilowan's Deposition Transcript, day 1, page 257.

283. It might have been better, instead of asking Mr Kilowan, simply to look at the financial statements. In the statements for the year ended 31 December 2010, which would have been the latest available (and similarly in earlier statements), the following note would have been found:

“13. LOANS AND OTHER NON-CURRENT RECEIVABLES

Loan to Iran Electronic Development Company* **R422m**

Loan to Irancell Telecommunication Company Services...
* **R3 316m**

The loans to Iran Electronic Development Company and to Irancell Telecommunication Services Company comprises the following four loans:

Loan 1: USD64 million (December 2009: USD62 million) attracting interest at LIBOR + 4% per annum (effective rate of 6%) (December 2009: effective rate of 8,48%) which will be capitalised against the loan. **The loan has been advanced from Irancell Telecommunication Company Services to Iran Electronic Development Company.**

Loan 2: USD194 million (December 2009: USD248 million) will attract interest at LIBOR + 4% per annum (effective rate of 7%) (December 2009: effective rate of 8,4%) which will be capitalised against the loan...

The remaining shareholder of MTN Irancell has provided its shares in the company as security for the above loans. The recoverability of the loan was assessed at reporting date and was not found to be impaired.”²⁸⁵ (emphasis added)

284. The words which we have set in bold type clearly disclose that although the loan was made to Irancell, it was lent on to IEDC.
285. Although the complaint refers to the loans with plentiful use of scare quotes and makes much use of the word sham, we find it hard to understand the reason. These were loans which MTN thought were commercially justified.

²⁸⁵ MTN Integrated Business Report for the year ended 31 December 2010, Notes to the Group financial statements, page 162.

There was nothing unlawful about them and the ICC Tribunal has decided that IEDC was free to deal with MTN as it pleased. Mr Kilowan's reports from Iran in 2007, the year before the loans fell due for repayment, do not in any way suggest a secret understanding that they would never be repaid. For example, on 31 May 2007 Mr Kilowan wrote to Mr Nhleko:

“The second issue relates to the repayment of the loans that are due in March 2008. They originally planned on using their share of the profits of MTN Irancell at the end of the 2007/2008 financial year to repay the loan. Hence the request that we give them 6 months from the end of March 2008 to repay because they reckoned it would take that long to declare the dividends.”²⁸⁶

286. Mr Kilowan then goes on to discuss the problems which are likely to arise because Irancell appeared likely to show a loss at the end of the 2007/2008 financial year and there would be no dividend. In the event, as of October 2011, the whole of the loan advanced to enable IEDC to pay for its share capital had been repaid. About US\$130 million of interest on the loan to Irancell to pay the licence fee was paid by February 2010 but its maturity date has since been extended to December 2014. All this seems to us to be the result of ordinary commercial decisions in changing circumstances.
287. Mr Nisbet denies the histrionics attributed to him in paragraphs 158 and 160 of the complaint and there is no written warning from Mr Nhleko on his personnel file. He was of the view that MTN should have held out for a higher rate of interest on its loans, but such differences of opinion within a negotiating team are by no means unusual.
288. Finally, there is a paragraph in the complaint that hints at the possibility that MTN directly bribed Dr Mahmoudzadeh:

125. Dr. Mahmoudzadeh had a personal interest in Sairan's success, and he received direct financial benefits from the proposed MTN-Irancell partnership, with all expenses paid by MTN. Recognizing Dr. Mahmoudzadeh's interest in Sairan, MTN agreed to pay all the up-front costs

²⁸⁶ Memorandum from Mr Kilowan to Mr Nhleko, 31 May 2007, page 3.

*and promised large future revenue shares to Sairan and the Bonyad in exchange for Dr. Mahmoudzadeh's assistance. This too was an extraordinary commitment, and was so far beyond reasonable commercial arrangements that constituted a bribe payment.*²⁸⁷

289. We do not find it easy to say what this paragraph means. If it is intended to suggest that MTN made some personal payment to Dr Mahmoudzadeh on the side, we can find nothing to support it, even in the evidence of Mr Kilowan. On the other hand, if it means that Dr Mahmoudzadeh, as President of Sairan, regarded the terms offered by MTN as favourable, we cannot understand how that can be called a bribe. No deal would ever be done unless both sides regarded the terms as favourable.
290. All in all, we think that the allegations of impropriety concerning the loans are misconceived.

²⁸⁷ Appendix 2, the complaint, paragraph 125.

Chapter 8

Ghorbanoghli

291. Only two facts are clear about the alleged payment to Mr Ghorbanoghli: first, that on 4 April 2007 MTN Management Services Company (Pty) Ltd paid US\$400,000 into the account of Mr Mousa Hosseinzadeh (“Mr Hosseinzadeh”) of Dubai and secondly, that it was paid on the basis of an invoice issued in the name of Aristo Oil International Ltd and apparently countersigned by Mr Nhleko. Everything else is disputed: whether Mr Nhleko’s signature is genuine, whom the payment was intended for, who actually received it and whether it was authorised by either Mrs Charnley or Mr Nhleko. We shall indicate in the course of this Chapter the improbabilities and inconsistencies in some versions of the story, but on a number of points the evidence does not permit of any confident findings.

Background

292. Mr Ghorbanoghli was, from April 1999 until December 2003, Iranian ambassador to the Republic of South Africa. When Mr Kilowan first visited Iran in early May 2004, Mr Ghorbanoghli had a home posting as head of the Africa desk in the Iranian Foreign Office with the rank of Deputy Secretary. As we have seen in Chapter 3,²⁸⁸ Mr Ghorbanoghli received a brief mention in Mr Kilowan’s report of his first visit. His initial welcome to the MTN delegation was, as one would expect from a diplomat who had spent some years in South Africa, warm; possibly even a little effusive.

293. As we have said in Chapter 4, Mr Kilowan’s evidence is that he had been given particular instructions by Mrs Charnley to call upon Mr Ghorbanoghli, because he had earlier advised her that MTN should set up an office in Tehran and she had identified him as a useful ally. We have said why we do not believe this evidence.²⁸⁹ Mr Ghorbanoghli attended the party which Mr

²⁸⁸ Paragraph 64 above.

²⁸⁹ Paragraphs 163-166 above.

Kilowan gave in April 2005 to celebrate the opening of the MTN office and was photographed there. Mr Kilowan would also write to him when a visa was required. But Mr Ghorbanoghli makes no further appearance in Mr Kilowan's reports before the grant of the licence in November 2005.

The offer of the bribe

294. Mr Kilowan describes the offer of a bribe to Mr Ghorbanoghli in his BIT statement:

“Mr Ghorbanoghli had been playing his part in assisting MTN by way of separate but equally helpful initiatives to those being deployed by Mr Mahmoudzadeh and Mr Mokhber. He had proved to be a reliable source of inside information, and was well plugged into the decision making processes relating to the second licence.

In recognition of his ability to assist MTN, Mrs Charnley travelled to Iran and met with him at his office in May 2005. They later met at my home in Tehran. I recall that Mr Ghorbanoghli arrived in an official car. Mrs Charnley put MTN's position to him firmly. The company was determined to get the second licence. MTN was extremely grateful for everything that he had done, and it would show its appreciation in an “appropriate manner”. MTN was looking for him to continue to exert his influence and to keep mobilising political support for MTN to take over the second licence. Mr Ghorbanoghli gave the clear impression that he was in touch with key people involved in the ongoing Irancell project, and that he would continue to do his best to assist MTN in achieving its objective. Mrs Charnley told Mr Ghorbanoghli that I would continue to be his local point of reference, and that MTN would see that he would be looked after. It was clear to me the Mr Ghorbanoghli knew exactly what Mrs Charnley was alluding to. He knew that money would be coming his way at the end of the line.”²⁹⁰

295. The incident is described in more detail in the deposition:

“Q Do you recall whether Irene Charnley visited Tehran in May 2005?

A Yes, she did.

²⁹⁰ Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraphs 55-56.

Q What do you recall happened during that visit?

A Well, we visited Dr. Mahmoudzadeh. We visited the Ambassador. We visited Mr. Ghorbanoghli. We visited Mr. Mokhber. Because at that stage, the legislation around – the legislation around the shareholding in the mobile operator license -- in the mobile operator license, the shareholding in that, and the processes that was beginning to be finalized.

And we had been talking to Dr. Mahmoudzadeh to say, okay, how do they -- how will they shape this legislation.

It is also during this time that we, as I said, we had a meeting with Mr. Ghorbanoghli in his office. And then Irene invited him to dinner, in the evening, late in the evening on that date. He wasn't very keen to go out to a public place for dinner with us as a government official. So we finally agreed that he would come to my house where I was staying in Tehran at the time. He came. We had a discussion. Irene, you know, was very appreciative of the work he had been doing in assisting us on the political side.

And she said to him “look, we are now entering a very delicate phase. We would really appreciate all your assistance that you can give us. And, of course, when we get the license we will be very happy to thank you in the appropriate way for your assistance.” And he said, “okay, that is fine. That is good. I will continue to do my best, as I have done in the past.” And then he left. That was the end of the meeting.

Q When Ms. Charnley said to Mr. Ghorbanoghli “we will thank you in the appropriate way,” did you have an understanding of what that meant?

A Yes.

Q What did it mean?

A It means that we would pay him some money at some point in time in the future.

Q From your observations of Mr. Ghorbanoghli, what did you understand he heard when she said that?

A. Well, he heard – whatever he heard on that night, you know, we didn't discuss that. But subsequently to that meeting, he made it very clear to me what he understood Irene to be saying.

Q. What is that?

A. And that is that he would get some monetary compensation when he get the license.”²⁹¹

296. There are several improbabilities about this conversation. First, it is remarkable that Mr Ghorbanoghli, who was not keen to go to a public place with representatives of MTN, had himself driven to the home of the MTN local representative in his official car, presumably driven by his official driver. As we shall see, Mr Ghorbanoghli appears soon afterwards to have got over his inhibitions about being seen in public with MTN representatives because, according to Mr Kilowan, they frequently dined together at a number of restaurants.

297. Secondly, the conversation is placed in May 2005, when Mr Kilowan says the “legislation around the shareholding in the mobile operator licence...was beginning to be finalized” and they had been talking to Dr Mahmoudzadeh about “how they will shape this legislation.” Mrs Charnley told Mr Ghorbanoghli at the dinner that “we are now entering a very delicate phase” and his assistance would be appreciated. In fact the Irancell Act had been passed by Parliament in February 2005 and all that was awaited was the confirmation by the Guardian Council that it was constitutional. There was no question of Dr Mahmoudzadeh, Mr Ghorbanoghli or anyone else “shaping” it in May 2005. In any case, it had a perfectly simple shape: it said that foreign shareholding was to be limited to 49% and Turkcell was in negotiation with its Iranian partners as to how that was to be achieved.

298. Thirdly, Mr Kilowan does not explain why, if MTN had already done a deal with Sairan and the Bonyad to oust Turkcell from the Irancell consortium, Mrs Charnley should think it necessary to offer a substantial sum of money to Mr Ghorbanoghli, a Foreign Office official who was much further from the decision-making process than Dr Mahmoudzadeh or Mr Mokhber.

²⁹¹ Mr Kilowan’s Deposition Transcript, day 1, pages 165-167.

299. Fourthly, Mrs Charnley had in 2002 been a member of Mr Justice Mervyn King's Committee on Corporate Governance, which had published a code of "effective ethical leadership". Listed South African companies are required to comply with the code, or to explain any non-compliance. So Mr Kilowan might have been expected to show some surprise that Mrs Charnley should have travelled to Iran for the express purpose of offering a bribe to a senior Iranian civil servant. And, as we have seen in Chapter 4, he said that he was surprised and adds the touch that he was concerned that the secret police might be listening in. But then he says in cross-examination that Mrs Charnley had given him advance notice of her intention to offer the bribe and he had accepted this as a loyal subordinate, without any warning about the secret police. We have said that this episode is one of the reasons why we have been careful about accepting Mr Kilowan's uncorroborated evidence about anything.²⁹²

300. Mr Ghorbanoghli recalls having been with Mrs Charnley at Mr Kilowan's house at some time during 2005, though he cannot remember exactly when or whether it was for dinner. Mr Ghorbanoghli has indicated that Mrs Charnley offered to "help him out" in return for his assistance to MTN but that he did not understand this to be an offer of money. All he got was a SIM card for either his own use or for his son. We think it improbable that Mrs Charnley said anything which could be construed as an offer of money. Mr Ghorbanoghli may have been a useful source of information about how things worked in Iran but, as we shall explain in the next section, he was not in a position to do anything to influence the actual decision on the award of the GSM2 licence.

Why bribe Mr Ghorbanoghli?

301. Why should Mrs Charnley have felt such gratitude to Mr Ghorbanoghli in May 2005 that she thought it necessary to offer him money in vague and unquantified terms which Mr Kilowan says that he subsequently bargained down to US\$400,000? Mr Kilowan says in his BIT statement that Mr

²⁹² Paragraphs 200-202 above.

Ghorbanoghli “had proved to be a reliable source of inside information, and was well plugged into the decision making processes relating to the second licence.”²⁹³ Mr Kilowan was asked about these matters in cross-examination. In relation to what information had Mr Ghorbanoghli supplied, Mr Kilowan thought of an example:

“He was giving us information on, for example, one occasion, he told me that Minister Motakki [the then Foreign Minister] used to be the ambassador -- the Iranian ambassador in Turkey.”²⁹⁴

302. That was undoubtedly true, but could hardly be called inside information. It is available on Wikipedia.²⁹⁵ Mr Kilowan could not think of anything else:

“Q Did Mr Ghorbanoghli give you any other information that you can testify about specifically today?

A About what?

Q About MTN being included in the second GSM license process.

A Well, he was just reporting to me about his activities in support of us getting into the license but he didn’t give me any information, you know, that were confidential to the Iranian government et cetera, to the Iranian government.”²⁹⁶

303. The answers to questions about Mr Ghorbanoghli’s role as “well plugged into the decision-making processes” were equally vacuous:

“Q Now, you said that Mr Ghorbanoghli was doing political diplomatic work...

A For MTN, yes.

Q What did that entail?

²⁹³ Witness Statement of Mr Kilowan, 13 March 2012, paragraph 55.

²⁹⁴ Mr Kilowan’s Deposition Transcript, day 3, page 676.

²⁹⁵ Available at: en.wikipedia.org/wiki/Manouchehr_Mottaki

²⁹⁶ Mr Kilowan’s Deposition Transcript, day 3, page 692.

A That entailed talking to the Minister of Foreign Affairs of Iran, talking to government officials in other ministries, talking to the presidency, talking to the House of the Supreme Leader...

Q [Y]ou mentioned other government officials that Mr Ghorbanoghli met with.

A Yes.

Q Who were they?

A I don't know. He told me he's meeting with them. I believed him.

Q Did he identify any particular government officials that he met with?

A No.

Q You say he interacted with the presidency.

A Yes.

Q What did you mean by the presidency?

A Which is the -- the administration of the presidency.

Q Is that the president himself, Khatami or Ahmadinejad, or is that the people who work for him?

A I don't know. He just said "I'm interacting with the presidency" so it's possible.

Q He didn't tell you specific individuals that he interacted with?

A No, he didn't...

Q What is the House of the Supreme Leader?

A It's what we call the Office of the Supreme Leader.

Q Has Mr Ghorbanoghli been in there?

A I don't know.

Q What did Mr Ghorbanoghli tell you about his discussions with Minister Motakki? I know you already mentioned his history in Turkey, so you don't need to go through that again. But was there anything else he told you about?

A No".²⁹⁷

²⁹⁷ Mr Kilowan's Deposition Transcript, day 3, page 675-685.

304. We said in Chapter 4 that we would offer a conjecture about why Mr Kilowan had invented the story that Mr Ghorbanoghli had given Mrs Charnley advice about how to lay the ground for the third licence before anyone knew who had won the second.²⁹⁸ Without this background of Mr Ghorbanoghli's early intimacy with Mrs Charnley, Mr Kilowan must have thought it would be very difficult to explain why in May 2005 Mrs Charnley should have thought it appropriate to offer him a bribe.

Mr Hosseinzadeh

305. Some time in 2005 or 2006, Mr Kilowan met an Iranian businessman based in Dubai called Mr Hosseinzadeh. Mr Ghorbanoghli says that he introduced them "some time after June 2005" because Mr Kilowan had said that he was looking for business opportunities and Mr Ghorbanoghli thought Mr Hosseinzadeh, an old friend who had become a successful businessman, would be a good contact.²⁹⁹ He had a business in Dubai called Aristo Oil International Services Ltd ("Aristo"). Ambassador Saloojee, who saw a lot of Mr Kilowan in his last two years in Tehran, says that Mr Kilowan and Mr Hosseinzadeh were engaged in business ventures together.

306. In November/December 2006 Mr Kilowan devised a project to which he gave the code name of "Distant Thunder". Its purpose was, he said in a memorandum to Mr Nhleko, to "place measures outside of the normal business processes which will protect its investment irrespective of the way in which the political and social elements develop." The proposed activities were divided into three categories which he called White, Grey and Black. The White activities were largely educational. The Grey activities involved the engagement of "political, legal and media consultants to assist in the peculiarly Iranian context". The identity of these consultants were so far as possible to be kept secret ("known by not more than 3 people") and the US\$300,000 a year budget for their fees was to be "directly under the Chief Representative", i.e. Mr Kilowan, "with no additional admin support

²⁹⁸ Paragraph 166 above.

²⁹⁹ Witness Statement of Mr Ghorbanoghli, 24 October 2012, BIT proceedings, paragraphs 34-35.

required.” The Black activities involved secret intelligence gathering within the Iranian government, with a budget of US\$200,000, likewise under the exclusive control of Mr Kilowan.³⁰⁰

307. Mr Nhleko, to whom this proposal was addressed, did not accept it. But Mr Kilowan appears to some extent to have anticipated the adoption of the Grey scheme or something like it. In his proposal, he said that the cost of the Grey scheme was already included in the budget he had put forward for 2007. At about the same time, he created, on 8 and 10 December 2006 respectively, two draft consultancy agreements. In each case the consultant was to be paid US\$5,000 a month. In one the consultant was to provide:

“ongoing consulting and advisory services on

- (a) the continuing developing political and economic situation in the Islamic Republic of Iran
- (b) provide guidance on appropriate role players to consult with and arrange relevant meetings to ensure positive outcomes for MTNI’s investment in Iran and
- (c) generally provide early warnings on potentially negative actions by groups or individuals regarding MTNI’s invest and suggest and assist with appropriate mitigating actions.”³⁰¹

308. These services are very like those Mr Kilowan was proposing in his Grey activities. In the other draft, the services are unspecified. In each case, the consultant was named as Aristo, the company of which Mr Hosseinzadeh is a director. Mr Kilowan has said in his deposition that the first he heard of Aristo was when Mr Ghorbanoghli gave him its name and bank details on a piece of paper with a view to it being used as a channel through which MTN could pay him. But we do not believe this. We think that by this time Mr Kilowan had developed an independent business relationship with Mr Hosseinzadeh and Aristo. If Distant Thunder had been accepted and Mr Kilowan had been left in sole charge of an MTN slush fund, the draft

³⁰⁰ Memorandum re Project Distant Thunder: Proposal and Budget, December 2006.

³⁰¹ Draft agreement for the provision of consulting services between MTNI and Aristo.

consultancy agreements could have been used as means for siphoning off money into Aristo for the benefit of Mr Kilowan or Mr Hosseinzadeh or both of them.

The consultancy agreement with Aristo

309. In his first BIT statement, Mr Kilowan gives evidence of what happened after MTN obtained the licence. Why did they not pay Mr Ghorbanoghli at once? That was what Mr Kilowan says Mr Ghorbanoghli was promised by Mrs Charnley:

“After MTN was awarded the second licence, Mr Ghorbanoghli was looking to MTN to deliver on its promise to pay him. I was charged with attending to this. MTN needed to disguise the nature of the payment. For that reason MTN was not prepared to make the payment to an individual nominated by Mr Ghorbanoghli. Instead MTN agreed to structure the payment as one for consultancy services rendered to MTN in the context of obtaining the second licence. Mrs Charnley delayed the whole payment process until the end of 2006 because she wanted to retain the assistance from Mr Ghorbanoghli during the period following the grant of the second licence while the mobile network was being set up, and feared that he would not provide it once he was paid...

By December 2006 we felt obliged not to delay any longer. The amount agreed to pay Mr Ghorbanoghli was US\$ 400,000. The bogus consultancy agreement was entered into between MTN and Aristo Oil International Services Limited Liability Company (“Aristo”). Aristo was a Dubai company owned by Mr Ghorbanoghli’s friend and colleague, Mousa Abolfazl Hosseinzadeh. Aristo never provided any real services under its consultancy agreement and was never expected to do so. It was nothing more than a conduit for payment to Mr Ghorbanoghli. Mr Hosseinzadeh was to ensure that the payment reached Mr Ghorbanoghli. I signed the agreement as a witness on behalf of MTN and Mr Hosseinzadeh on behalf of Aristo. Mrs Charnley signed on behalf of MTN.

The consultancy agreement and payment to Mr Ghorbanoghli were ultimately authorised by Mr Nhleko in an internal memorandum to Mrs Charnley on the following terms deliberately designed to obscure the true position in relation to the payment: *“With reference to the process in*

terms of which MIN International (Mauritius) Limited acquired a 49% equity interest in Irancell, you are authorised to finalise all agreements with the consultants that assisted the Company during the run up to and actual negotiating period, and to effect the necessary payments.”
In the event, Aristo presented MTN with an invoice on 3 April 2007 for US\$400,000 which was paid shortly afterwards.”³⁰²

310. Mr Kilowan provides more detail in his deposition as to how the sum of US\$400,000 was agreed after Mrs Charnley’s original offer of an unspecified amount. He says that in November 2006, Mr Ghorbanoghli went to South Africa and met Mr Kilowan outside the MTN offices. They finalised the consultancy agreement which Mr Kilowan had drafted and settled on a payment of US\$400,000. Mr Kilowan appears to have been given plenary power to negotiate the amount and says that Mr Ghorbanoghli wanted more but that he bargained him down to US\$400,000. However, Mrs Charnley delayed signing the agreement, so Mr Kilowan said to Mr Ghorbanoghli:

“You get Mr Hosseinzadeh, who was the MD of Aristo, you get him to sign it. I will initial it as witness for MTN, and then I will send that to Irene. Because this might then make her more comfortable that they have signed the agreement already.

And indeed, that had the desired effect because Irene said “okay, I will sign it, but I will not give them a copy of this agreement”. And that’s what she did. She didn’t give them a copy.”³⁰³

311. In his second BIT statement, Mr Kilowan says that the reason why Mrs Charnley would not give Mr Ghorbanoghli a copy of the signed agreement was because “she was worried he would use it as leverage to ask for more money later.”³⁰⁴

312. We find much of this evidence fanciful. First, if MTN had agreed to pay a bribe to Mr Ghorbanoghli why should it not have been willing to pay the

³⁰² Witness Statement of Mr Kilowan, 13 March 2012, BIT proceedings, paragraphs 79-82.

³⁰³ Mr Kilowan’s Deposition Transcript, day 2, page 361.

³⁰⁴ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 103.

money to an individual nominated by Mr Ghorbanoghli? Whom were they trying to deceive? One could understand that Mr Ghorbanoghli, if he was receiving a bribe, might not want it paid into his bank account. However, if the payment was being made through some other person or company as a conduit to Mr Ghorbanoghli, what was the need for a consultancy agreement? Mr Ghorbanoghli would not want to keep it for his income tax return. Why not just pay the money to the intermediary? On the other hand, if the purpose was to deceive MTN, then a consultancy agreement is understandable. As part of a scheme like Distant Thunder, it could be passed off to senior management as a payment to someone chosen by Mr Kilowan for services received and in a way that would get through the internal MTN finance procedures. When Mr Kilowan says in paragraph 82 of his first BIT witness statement that the internal memorandum was “deliberately designed to obscure the true position”, for whom was it designed to obscure the true position? Was it Mr Nhleko, who would think he was authorising the payment of consultants? Mr Kilowan says that he himself drafted the memo and put it before Mr Nhleko to sign.

313. Secondly, the statement is unconvincing in attempting to explain why the question of a payment to Mr Ghorbanoghli, which is said to have been promised in May 2005 and to have been payable when the licence was granted in November 2005, was not raised by Mr Kilowan until the end of 2006, when it appeared that his Distant Thunder slush fund scheme was gaining no traction with Mr Nhleko. Mrs Charnley, he says, feared that Mr Ghorbanoghli would not continue to assist MTN if he had been paid. It should be noted that no particular sum had been promised. The US\$400,000 is said to have been the result of bargaining between Mr Kilowan and Mr Ghorbanoghli at the end of 2006. If Mrs Charnley wanted to retain Mr Ghorbanoghli’s goodwill, it does not seem to us that the best way of going about it was to break her promise to pay him something when MTN received the licence. She could always have paid part of what she had in mind and promised to pay some more for later services. If she was going to delay until the end of 2006, why not 2007 or 2008? MTN was going to be in Iran for a long time. In our opinion there had

been no promise in May 2005 and Mr Kilowan has invented it in an attempt to lend plausibility to a money-raising scheme which he devised in late 2006.

314. Thirdly, why should Mrs Charnley have been “more comfortable” in signing a bogus consultancy agreement because it had already been signed by Mr Hosseinzadeh? That seems entirely irrational.
315. Fourthly, why should Mrs Charnley having, according to Mr Kilowan, agreed the sum which Mr Ghorbanoghli was to be paid then think that Mr Ghorbanoghli would use the signed agreement with Aristo as “leverage” to get more money? Like much of Mr Kilowan’s evidence, this seems to us to have been made up on the spur of the moment.

Payment of the US\$400,000 to Mr Hosseinzadeh

316. There is no fully executed consultancy agreement with Aristo in the papers of MTN and no copy signed on behalf of MTN has been produced by Turkcell or Mr Kilowan. Annexed to the complaint is a version appearing to be signed by Mr Hosseinzadeh, with Mr Kilowan’s signature as witness. This copy comes from Mr Kilowan’s computer and was scanned by him on 29 January 2007. We have seen Mr Kilowan’s evidence that Mrs Charnley, having signed the agreement, then unaccountably kept it. She denies this.
317. Notwithstanding that Mrs Charnley committed MTN to payment by signing the consultancy agreement, Mr Kilowan says that Mrs Charnley refused to authorise payment without the written approval of Mr Nhleko:

“Then she said to me “look, I know Phuthma. Phuthma [*sic*] was always part of these discussions, but I know him. If ever this thing backfires, he is going to be the first one to deny it, that he authorised this. So I want you to get an authorization from him to me that I can do this”.

So I drafted a memorandum for Phuthma’s [*sic*] signature in which I then said, he gives Irene permission to finalize the contracts with the consultants and the payments. I took it - - I walked to his office, I took -- gave it to him. I said “Irene wants you to sign it.” He read it, and he signed it,

gave it back to me. So I gave it to Irene. So on that basis
Irene was then happy to proceed.”³⁰⁵

318. This is the memorandum which Mr Kilowan quotes in paragraph 82 of his first BIT statement and which he says was “deliberately designed to obscure the true position in relation to the payment”. It is a puzzling document, not least because although it is dated 11 December 2006, the metadata of the file indicate that it was created on 18 October 2011. Mr Nhleko does not have any specific recollection of the memorandum but says that Mrs Charnley had authority to employ consultants for Iran and, if he had read it, he would have understood consultants to mean consultants, not recipients of a bribe. Mr Kilowan says in his second BIT statement that “apart from the need to create a fictitious structure to conceal the payment to Mr Ghorbanoghli”, there was no reason why in December 2006 MTN should be paying consultants who helped them in obtaining the licence more than a year earlier.³⁰⁶ We agree that Mr Nhleko might have been more suspicious. But we can also understand that, if he read it, he might have taken it at face value.
319. It is not altogether clear to us what Mr Kilowan means when he says that when she received the memo of 11 December 2006, signed by Mr Nhleko, Mrs Charnley was “happy to proceed”. It is agreed that she never signed any authorisation for payment to Mr Hosseinzadeh, Aristo or Mr Ghorbanoghli. She is alleged to have signed the consultancy agreement and kept it, but that is said to have been before the 11 December 2006 memo, after feeling more comfortable because Mr Hosseinzadeh had signed.³⁰⁷
320. Matters are made more obscure by Mr Kilowan’s production of a “confidential memorandum”, the computer file for which was created on 30 January 2007, the day after Mr Kilowan scanned the signed copy (signed by

³⁰⁵ Mr Kilowan’s Deposition Transcript, day 2, page 362.

³⁰⁶ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 105.

³⁰⁷ See paragraph 310 above. We note that in Mr Kilowan’s Second Witness Statement in the BIT arbitration (at paragraph 103), the story changed from the version given during his deposition, with him now alleging that Mrs Charnley signed the consultancy agreement after receiving the 11 December 2006 memo.

Mr Hosseinzadeh and himself, that is) of the Aristo contract. It said in part (we shall refer to the rest later).³⁰⁸

“Irene,

I have e-mailed you the agreement for Long J and the money should be paid into the following bank account:

MOUSA ABOLFAZL HOSSEINZADEH
COMMERCIAL BANK OF DUBAI
MAIN BRANCH – DUBAI
ACCOUNT NUMBER: 1000546125
CHEQUE ACCOUNT”.³⁰⁹

321. Mrs Charnley does not recall receiving this memo and it may be that Mr Kilowan had second thoughts about sending it. “Long J” or “Long John” was the nickname Mr Kilowan used for Mr Ghorbanoghli. However, it is strange that Mr Kilowan should have e-mailed the agreement (presumably the consultancy agreement) at the end of January 2007 when Mrs Charnley is alleged to have signed and kept it in December 2006. The e-mail to Mrs Charnley has not been produced.
322. Mr Kilowan says that Mrs Charnley refused to pay without an invoice. So Mr Kilowan says that a month later he produced an invoice (“Invoice 1”) addressed to “MTN Management Services (Pty) Ltd” and dated “2007-03-02”. This was the cost centre for the Chief Executive Officer. Mr Kilowan had a little difficulty in explaining why he should be sending an invoice on behalf of Aristo, the company of which he had previously never heard and which was a conduit nominated by Mr Ghorbanoghli. Why could not Aristo send its own invoices? But he sought to give an explanation in his deposition:

“A There was a bit of back and forth about the invoice because Irene wanted it in a specific form. Mr Hosseinzadeh didn’t really understand what she wanted. So, in the end, I helped him put together the invoice, the format of the invoice, because she wanted the address of the office in Dubai, et cetera, et cetera to appear on the

³⁰⁸ Paragraph 349, below.

³⁰⁹ Memorandum from Mr Kilowan to Mrs Charnley, 30 January 2007.

invoice because this original invoice was just a document that didn't really – – wouldn't really pass through the MTN financial system.

So this was the final invoice that was then generated. He sent it to me. I then e-mailed it to Irene in South Africa.

Q And did Irene approve of this invoice?

A She approved of the contents of the invoice but she asked that Phuthma authorize the payment from his cost centre and not from her cost centre.

Q And did Phuthma authorize the payment from his cost center?

A He did so, he did, yeah.

Q Okay. Did you actually show Phuthma a copy of this invoice?

A No. Irene gave this to Phuthma [*sic*].”³¹⁰

323. Again this is puzzling. The payment would have been an expense of the Iran business. Why should Mrs Charnley, if she approved of the invoice, require it to be paid from Mr Nhleko's cost centre? And when Mr Kilowan says that “Irene gave [the invoice] to Phuthma”, he has forgotten that only 8 transcript pages earlier he said the opposite:

“And then in the beginning of 2007, the invoice was generated, and again she said, ‘I'm not signing this invoice for payment. Take it to Phuthma. So I took it to Phuthma. Phuthma [*sic*] authorised it for payment, and then I took it to the finance department to do the transfer.”³¹¹

324. In cross-examination, Mr Kilowan had more to say about Invoice 1:

“Q Now, did you prepare that invoice?

A I – – I helped Mr Hosseinzadeh to format it ... after Irene said that she wanted it in a specific format...

Q Did you create that document on your computer?

³¹⁰ Mr Kilowan's Deposition Transcript, day 2, page 370.

³¹¹ Mr Kilowan's Deposition Transcript, day 2, page 362.

A Well, I received it from him and I then reformatted it, as I would, so that would have been the date that I -- that I reformatted it.

Q When you say you received it, in what form did you receive it?

A He sent me a Word doc in e-mail form. And I then, because Irene wanted the -- the address on the top and the registration number, because, the original one just said Aristo. So Irene wanted that, and then the original one had, I think it had MTN Management Services or MTN International, because the contract was with MTNI. So I -- I think I format -- reformatted, redid that, yeah.

Q You changed the --

A I changed --

Q -- I to -- to MTN Management Services?

A Yeah. That's what I can recall. ...

Q Do you have the e-mail that was sent with the original document?

A No. Unfortunately not.”³¹²

325. What the contemporary documents show is that an invoice dated “MARCH 1, 2007” and addressed to “MTN Management Services (Pty) Ltd, (“Invoice 2”) apparently signed by Mr Hosseinzadeh and countersigned by Mr Nhleko, was sent to MTN’s finance department in Johannesburg. MTN Management Services (“MANCO”) was Mr Nhleko’s cost centre. The invoice was headed Aristo Oil International Services L.L.C, gave the company’s registration number and requested payment into the account of Mr Hosseinzadeh. The date on which it entered the system is unclear, but it had not been paid by Tuesday 3 April 2007.

326. At 4:10 pm on 3 April 2007 Mr Kilowan sent an e-mail to Mr Rubysen Rambocus of MTNI (“Mr Rambocus”), which was Mrs Charnley’s cost centre, attaching a new invoice dated “2 March 2007”, addressed to MTN

³¹² Mr Kilowan’s Deposition Transcript, day 3, pages 704-706.

International (Mauritius) Limited (“Invoice 3”). The name and number of Aristo at the head of the invoice were precisely the same as on Invoice 2. Invoice 3 also requested payment into the account of Mr Hosseinzadeh. The e-mail was copied to Ms Bronwyn De Villiers (“Ms De Villiers”), Mr Nhleko’s personal assistant, and to Mrs Charnley, who by then had left MTN. It read:

“Hi Rubysen

Could you please transfer on an urgent basis the amount in the attached invoice to the account number on the Invoice from the MTN Iran Branch Cost Centre.

By copy of this e-mail I confirm that the payment has been authorised by Mr P Nhleko and Mrs Charnley.

The signed copy of the invoice will be e-mailed to you by Ms Bronwyn De Villiers.

Please forward a copy of the SWIFT transmission receipt to me as soon as it is available.

Kind regards.

Chris Kilowan.”³¹³

327. At 4:12 pm Ms De Villiers, having received a copy of Mr Kilowan’s e-mail, replied to him, Mr Rambocus and Mr Nazir Patel (“Mr Patel”) of the MTN finance department:

“Hi All

The signed invoice has been handed to Nazir for process.

Thanks

Regards

Bronwyn de Villiers.”³¹⁴

³¹³ E-mail from Mr Kilowan to Mr Rambocus, 3 April 2007.

³¹⁴ E-mail from Ms De Villiers to Mr Kilowan, Mr Rambocus and Mr Patel, 3 April 2007.

328. This presumably refers to Invoice 2. At 4:20 pm Mr Kilowan replied to Ms De Villiers indicating that he no longer wished to wait for Mr Patel to process the invoice:

“Hi Bronwyn

Could you please do me a favour and get the invoice back from Nazir because it will take forever if Finance has to do that.

By agreement with PFN and IC it was decided that it would be quicker if it gets paid directly from Mauritius from the MTN Iran cost centre.

This has become quite critical and I am trying to save us from possible negative consequences.

Thanks and kind regards

Chris.”³¹⁵

329. Why was Mr Kilowan wanting to withdraw Invoice 2? In his evidence, he said that Mrs Charnley had insisted it be paid from Mr Nhleko’s cost centre. Now he is saying that they have agreed that payment should be from Mauritius because it would be quicker. There is no evidence that Mrs Charnley and Mr Nhleko agreed this. Mr Kilowan makes no mention of their changes of plan and we think it highly unlikely, especially since Mrs Charnley had left MTN at the end of March. There is a note of desperation in this e-mail and it is difficult to think of why Mr Kilowan should have been so anxious to secure instant payment to Mr Ghorbanoghli, who had, according to his evidence, been kept waiting for 18 months or so. Furthermore, in his second BIT statement, Mr Kilowan says that in February 2012 Mr Ghorbanoghli told him that the money was still in his account in Dubai and that he was thinking about what to do with it.³¹⁶ We have no definite answer to this question: one possibility is that Mr Kilowan and/or Mr Hosseinzadeh urgently needed the money. Another is that Mr Kilowan was anxious that someone from the

³¹⁵ E-mail from Mr Kilowan to Ms De Villiers, 3 April 2007.

³¹⁶ Second Witness Statement of Mr Kilowan, 7 December 2012, BIT proceedings, paragraph 101.

finance department might want to check the transaction with Mr Nhleko and wanted the invoice sent to Mauritius before this could happen.

330. At 4:28 pm Ms De Villiers replied: “Ok, will do.”³¹⁷
331. Nothing more seems to have happened that Tuesday and the following morning at 9:29 am, Mr Rambocus sent an e-mail to Mr Patel and Ms De Villiers:

“Dear Nazir/Bronwym

Please send to me a copy of the signed invoice for our records and we will make payment asap.

Rgds

Rubysen Rambocus.”³¹⁸

332. At 9:38 am Ms De Villiers passed on this request to Mr Victor Makgoba in the Johannesburg accounts department, but he replied at 12:14 pm saying “We are effecting the transfer from here and it is at an advance stage” [*sic*].³¹⁹ Mr Rambocus replied saying “I suggest you inform Chris that you are making the payment”³²⁰ and Mr Patel replied “I notified Chris yesterday.”³²¹ In the event, therefore, it was Invoice 2 which was paid by MANCO.
333. Mr Kilowan attached Invoice 3 to his BIT statement as the one which was paid, but this is wrong. His confusion is not surprising because he created a number of invoices or draft invoices at the time. For example, the invoice which he identified in his deposition (Invoice 1) is also not the one which was paid: it is dated “2007-03-02” whereas the one purporting to be signed by Mr Nhleko (Invoice 2) is dated “March 1, 2007” and bears Mr Hosseinzadeh’s stamp and signature. There is also a draft invoice (Invoice 4) on Mr Kilowan’s memory stick (which was produced by Turkcell in the United

³¹⁷ E-mail from Ms De Villiers to Mr Kilowan, 3 April 2007.

³¹⁸ E-mail from Mr Rambocus to Mr Patel and Ms De Villiers, 4 April 2007.

³¹⁹ E-mail from Mr Makgoba to Ms De Villiers, Mr Patel and Mr Rambocus, 4 April 2007.

³²⁰ E-mail from Mr Rambocus to Mr Makgoba, Ms De Villiers and Mr Patel, 4 April 2007.

³²¹ E-mail from Mr Patel to Mr Rambocus, Ms De Villiers and Mr Makgoba, 4 April 2007.

States proceedings) addressed, like Invoice 3, to MTNI but dated “2007-04-03” whereas Invoice 2 is dated “2 March 2007”.

334. The contemporary records therefore show that there is no truth in Mr Kilowan’s evidence that the format of the invoice was changed because Mrs Charnley “wanted the address of the office in Dubai, et cetera, et cetera to appear on the invoice” or “wanted the – the address on the top and the registration number, because, the original one just said Aristo”.³²² In these respects, all four invoices we have mentioned are exactly the same. Mr Kilowan first submitted an invoice to MANCO, then thought he could obtain faster payment (or possibly less scrutiny) by applying it to MTNI, but in the event payment was made by MANCO.
335. Mr Nhleko has no recollection of having signed Invoice 2 and does not think he would have done so. He says that an invoice to pay \$400,000 for consultancy services would only have been approved if supported by an agreement approved by the legal department. The invoice would then have to be checked by the finance department before being submitted to the CEO. He therefore sent the photocopy invoice and examples of his genuine signature to a handwriting expert, Ms Lourika Buckley of Johannesburg, who has written a report concluding that –

“In view of the dissimilarities in individual writing characteristics and the primary indicators of forgery, it is my professional opinion that the Questioned signature was not produced by the writer that made the Known to be Genuine signatures, P. Nhleko.”³²³

336. We have independently commissioned Dr Audrey Giles, a handwriting expert in London, to examine the signature on the invoice. She has given a more guarded opinion, principally because of the difficulty to reaching firm conclusions on the basis of a photocopy rather than the original document:

³²² Mr Kilowan’s Deposition Transcript, day 3, pages 704-706.

³²³ Appendix 4, Report of Ms Buckley, page 4.

“The differences, the apparent lack of fluency in the questioned signature [1] and the unusual amount of pen lifts observed are indications that the questioned signature [1] is not genuine.

However, the evidence regarding the signature [1] is difficult to assess, particularly in the absence of the original Invoice [1] and taking into account the wide range of variation seen in Mr Nhleko’s signature. Nevertheless, the evidence supporting the view that this signature [1] is not genuine, albeit weak, is positive.

Accordingly on the basis of the evidence before me I have concluded that there is more support for the view that signature on the copy Invoice dated 1st March 2007 [1] is a simulation than there is support for the view that this is a genuine but unusual signature of Mr Nhleko. This support, however, is limited.”³²⁴

337. We do not think that it would be right to conclude, simply on the basis of the evidence of the handwriting experts, that the signature is forged. However, when one considers the very unusual and suspicious surrounding circumstances – the urgency with which Mr Kilowan wanted to withdraw the invoice and have it sent to Mauritius, the various invoices which he drafted on behalf of a company with which he claimed he had nothing to do, the patently false explanation he has given for the submission of successive invoices, the absence of any supporting documents in the records of MTN to justify payment of the invoice, the possibility of forgery is strengthened. In the end, however, it is not something on which we can make a definitive finding.

How did it happen?

338. We think it very unlikely that Mr Nhleko would consciously have approved the invoice. For one thing, it really had nothing to do with him. Mrs Charnley had been running the Iran operation and it would have been for her to sort these matters out before she left MTN. So there are two possibilities. One is that Mr Nhleko somehow unwittingly signed and the other is that his signature was forged.

³²⁴ Appppendix 7, Report of Dr Giles, page 10.

339. Mr Kilowan’s story (or one of his stories) as to how the invoice got to the accounts department is that he took it there:

“And then in the beginning of 2007, the invoice was generated, and again she said, ‘I’m not signing this invoice for payment. Take it to Phuthma. So I took it to Phuthuma. Phuthuma authorised it for payment, and then I took it to the finance department to do the transfer.’”³²⁵

340. This story leaves out the subsequent attempt to withdraw the invoice. However, assuming that he took the invoice, the evidence we have received was that unless there was something to arouse suspicion, the accounts department would have paid merely on the strength of Mr Nhleko’s signature. Mr Patel, who was Head of Executive Group Finance at the time, has indicated that “processing a payment based on an invoice alone was routine at that time”. But he would have expected Mr Nhleko to have checked whether there was a consultancy agreement to support the rendering of the invoice. Mr Nhleko, he said, was fastidious on consultancy arrangements. Mr Nhleko, on the other hand, says that he could not be expected to check the underlying documents for every invoice which he signed. He expected the finance department to have done so.

341. Whether the signature was genuine or not, we think this evidence reveals something of a weakness in the system as it operated at that time. We quite agree that the Chief Executive could not be expected always to check the documentation, but the invoice, when it went to the finance department, ought to have carried the signature of someone who had. Otherwise it was possible for someone to put an invoice before Mr Nhleko, and for him to sign it, without any checks having been done.

Conclusion

342. As we said at the beginning of this Chapter, we have not found it easy to resolve the contradictions in the evidence. We are satisfied that Mrs Charnley neither promised money to Mr Ghorbanoghli in May 2005 nor authorised the

³²⁵ Mr Kilowan’s Deposition Transcript, day 2, page 362.

payment to Mr Hosseinzadeh in 2007. We think it highly improbable that Mr Nhleko understood the 11 December 2006 memo to be authorising a payment of US\$400,000 to Mr Ghorbanoghli. We think it equally improbable that he authorised the payment to Mr Hosseinzadeh. We cannot say whether or not Mr Ghorbanoghli received any of the money. He may have done, or it may just have been a scam by Mr Kilowan and Mr Hosseinzadeh for their own benefit.³²⁶ We have written to Aristo, which we understand is a substantial business in Dubai, asking for their assistance in determining what happened to the US\$400,000 but we have received no reply. We understand that Mr Hosseinzadeh has indicated to IRI that Aristo provided consultancy services in respect of a number of matters in Iran for the benefit of MTN (i.e. such as in relation to the opening of the MTN office in Iran) at the instruction of Mr Kilowan. Mr Hosseinzadeh also indicated that Aristo provided services in relation to projects other than the GSM2 licence. This is a version which no one else has suggested but which tends to support the view that the money did not go to Mr Ghorbanoghli.

343. We must add that even if Mr Kilowan's evidence were right in every particular, and we have made it clear that we do not think it is, the alleged payment to Mr Ghorbanoghli could hardly be described as what is commonly understood as a bribe. He was not being paid to do anything in particular, since it is agreed that the decision-makers were MCIT, Sairan and the Bonyad, and he, as a Foreign Office official, was far from the decision-making process. Mr Kilowan says that he did not supply any confidential information and there is nothing in the whole story to suggest that anyone, at any stage, gave MTN confidential information of any kind.³²⁷ There were from time to time rumours aplenty from the likes of Mr Sarraf and Mr Pischevar, but, as Mr Kilowan put it, precious few facts. On Mr Kilowan's evidence, therefore, Mr Ghorbanoghli was being rewarded, after the event, for having done no more than one would expect someone in his position to do. That would have

³²⁶ Mr Hosseinzadeh has indicated that the Aristo Invoice was paid into his personal bank account because Aristo was his personal company. This explanation is false because Aristo is owned by Mr Hosseinzadeh and two other individuals.

³²⁷ See Mr Kilowan's Deposition Transcript, day 3, pages 692-693.

been ill-advised on both sides and contrary to the rules about how public servants should behave but, on the particular facts of this case, not what would ordinarily be called corruption.

Chapter 9

Saloojee

Summary

344. Mr Kilowan's deposition evidence is that in early July 2005 he, together with Mr Nhleko and Mrs Charnley, dined with Ambassador Saloojee at his house.³²⁸ There Mrs Charnley expressed her gratitude to the Ambassador for his hard work on behalf of MTN and offered him an unspecified amount of money if MTN obtained the licence. The complaint says "the atmosphere was jovial during dinner because MTN was increasingly edging closer to its prized Licence". The Ambassador refused, saying that he had only been doing his job. However, at the beginning of 2007, Mr Ghorbanoghli told him about the money he would be receiving from MTN and so Ambassador Saloojee decided that he should also ask for money. He told Mr Kilowan that he wanted to buy a house in South Africa and that he would need R1,400,000. Mr Kilowan put this to Mrs Charnley, who said "Yeah, no problem. How much is it?". They converted R1,400,000 into US Dollars and it came to \$200,000. Mrs Charnley consulted Mr Nhleko and they both agreed to give this sum to the Ambassador. Then there was delay in payment and so, because the Ambassador had contracted to buy the house and needed the money for completion, Mr Kilowan personally advanced him R1,400,000 on the understanding that he would be repaid when the money from MTN came through. But MTN did not pay, which has since been a source of considerable grievance to Mr Kilowan.

The offer

345. There is an immediate problem about the date of the dinner at the Ambassador's house when Mr Kilowan alleges that Mrs Charnley first offered

³²⁸ Mr Kilowan's Deposition Transcript, day 1, pages 201-202, and day 2, pages 387-394. The allegation that a bribe was offered or paid to Ambassador Saloojee bribe does not feature in Mr Kilowan's BIT statement.

Ambassador Saloojee money. In his deposition, counsel for Turkcell asked Mr Kilowan about the date of the dinner:

“Q Let me take you back a month for a moment to June of 2005. You described these meetings at Sairan and IEI. When the MTN delegation was in Tehran, did any members of the delegation have the opportunity to meet with Ambassador Saloojee?”³²⁹

346. It is clear from the question that counsel for Turkcell had in front of him a statement by Mr Kilowan saying that it happened in June 2005, when the MTN delegation had been in Tehran to sign the memoranda of understanding with Sairan and the Bonyad. Such a dinner would certainly have been a moment of celebration at which Mrs Charnley may well have expressed her gratitude to the Ambassador. At first, Mr Kilowan responded as expected, but then veered away. He said:

“A I mean, we had dinner at his house. The Friday night, because the next morning, Saturday morning, they – no, we didn’t, because we were at Bonyad. I don’t know. I can’t recall where we – they came from the airport, went to Bonyad, went to Sairan back to Bonyad. No, we didn’t meet at that time with him.”³³⁰

347. Mr Kilowan must suddenly have realised that having dinner with the Ambassador on the Friday night was inconsistent with the account he had earlier given of the negotiation of the memoranda of understanding, which he said had taken up the whole of the Friday evening.³³¹ We think that Mr Kilowan was actually wrong about negotiating late into the Friday night, which he had recounted in dramatic terms, and there may well have been a dinner at the Ambassador’s house. But Mr Kilowan was obliged in the interests of consistency to put it somewhere else. He chose July, when Mrs Charnley and Mr Nhleko were next back in Iran.

³²⁹ Mr Kilowan’s Deposition Transcript, day 1, page 201.

³³⁰ *Ibid.*

³³¹ See Mr Kilowan’s Deposition Transcript, day 1, pages 183-186.

348. The difficulty about this date is that while the signing of the memoranda of understanding created a burst of optimism in MTN which might well have occasioned a celebratory dinner, by the end of June everything had turned to dust and ashes. The memoranda of understanding were conditional upon there being no deal with Turkcell, which was at that stage refusing to accept the terms of the Irancell Act requiring Iranian control of the Irancell company. However, within hours of the memoranda being signed, Turkcell wrote to MCIT saying that they were willing to accept the Act. It returned to the negotiating table and the prospect that MTN would receive the GSM2 licence looked slim. On 4 July 2005 Mr Kilowan sent a confidential (“For Your Eyes Only”) message to Mr Nhleko:

“SAIRAN and the Bonyad essentially used us to place them in a stronger negotiating position versus Turkcell. When Turkcell was shown the signed letter they very quickly changed their stance.”³³²

349. Of course it was always possible that negotiations with Turkcell might break down, in which case the memoranda of understanding would take effect. But in July and August 2005 MTN was not optimistic. They were not months for celebratory dinners.

The request for money

350. Then we come to Mr Kilowan’s account of the Ambassador’s request for money and MTN’s response:

“Q Now let’s talk about Ambassador Saloojee. Was there a point in time where Ambassador Saloojee approached MTN about payment?

A Yes. This was in the beginning. Again, what happened was that while we were toward the end of 2007 to 2006 [*sic*], beginning 2007, while we were finalizing Ambassador Ghorbanoghli’s contract and the payments, Ambassador Ghorbanoghli went to Ambassador Saloojee, and he told him that I am going to get this money from MTN. Ambassador Saloojee then -- when I had dinner with him that day or the next day, he said that

³³² ‘For Your Eyes Only! Urgent Update’ memorandum.

Ambassador Ghorbanoghli came to his house the previous night and told him this. And then Ambassador Saloojee said, "Look, I'm thinking of, at the end of my posting in Iran, of not taking another posting. So I want to" -- because his posting was going to end, I think, early in 2008.

"I want to buy a house in Pretoria, and I want to send my wife and daughters to South Africa so that they can -- they can return at the beginning of the school term," which is in January, "so that they don't miss anything in terms of their schooling. Can you ask Irene -- they have offered me something last year, and I said no, but can you ask Irene to -- whether they would be prepared to give me money to buy the house."

And I communicated that to Irene, and Irene said to me, "Yeah, no problem. How much is it?" And we converted the 1.4, 1.2 million [rand] to dollars, and it came to about \$200,000.

So Irene said, "Yes, okay, finalize the contract with him, and let's organize for the payment to be made."

Unfortunately, Irene then left at the end of March 2007, but I continued to have this discussion with Ambassador Saloojee. He then said to me in April 2 -- "Look, I need that money now because we've found a house, we've found everything. Can you help me?"

I said, "Look, there is a bit of overlap between Irene leaving and Phuthuma taking over fully in Iran. Let me talk to Irene."

And I spoke to Irene, I said, "Look, can you make a plan?" So I said to Ambassador Saloojee, "I can give you the money on the condition that you pay me back the money when MTN pays you."

And we agreed on that. We shook hands on it. I transferred the money for him in April 2007, and he bought the house.

Q Okay. Did Mr. Nhleko know about these discussions?

A Yes, because -- well, again, Irene told me that she told Phuthuma about these discussions, and I had no reason to doubt that she actually discussed it with Phuthuma.

Q Did Irene authorize you to reach an agreement with Ambassador Saloojee?

A Yes, she did.

Q What did Irene tell you --

A She told me --

Q -- in response to Ambassador Saloojee's request?

A She told me to do the same consulting agreement that I did for Ambassador Ghorbanoghli and just change the amount from 400,000 to 200,000.

Q Did she tell you to do it through Aristo Oil?

A No. It was directly with Ambassador Saloojee.

Q Okay. Was such an agreement entered into?

A No. We never signed that agreement.

Q Do you know why not?

A Because Irene then left, so by the time it was finished, I gave it to her, I send it to her, she didn't sign it while she was still at MTN. By the time she left, I had made the payment, and I -- on the basis that she told me she had given this to Phuthuma, I assumed that Phuthuma would finalize it and would sign it."³³³

351. Thus, according to this account, at the end of 2006 or beginning of 2007, when a contract for Mr Ghorbanoghli has been finalised, Ambassador Saloojee asks for money to buy a house. The sum is agreed by Mrs Charnley before she leaves MTN; she tells Mr Kilowan to use the same form of consultancy agreement as they used for Mr Ghorbanoghli, substituting Ambassador Saloojee for Aristo and US\$200,000 for US\$400,000; Mr Kilowan drafts it and gives it to Mrs Charnley, but she does not sign it before leaving MTN and says she had given it to Mr Nhleko. By the time she leaves, Mr Kilowan has made the loan to the Ambassador.

³³³ Mr Kilowan's Deposition Transcript, day 2, pages 387-391.

352. An immediate difficulty about this account is the memorandum of 30 January 2007, from which we have already quoted one passage in connection with Mr Ghorbanoghli.³³⁴ It went on to say:

“While finalising this matter I kept on thinking that we are paying the consultants this money and they have done significantly less than our other friend in the country. In fact the consultants will do nothing more for us while we will continuously be tapping our friend for information and advice.

As you are well aware we are getting high quality information and the support provided has been excellent. In fact, he has assisted way and beyond his duty to us.

You are also aware that he knows we are paying the consultants some money.

While I know that we never even suggested that we would pay our friend some money, I was wondering whether we could not out of our own volition offer to make some monetary contribution to express our gratitude. I would like to discuss this with you when I am in SA. He will also be in SA at the time and if there is agreement all round then you could have a discussion with him at the time.”³³⁵

353. The “other friend” is clearly Ambassador Saloojee. That must be what Mr Kilowan told Patton Boggs when they were drafting the complaint, because paragraph 174 of the complaint says so. But they must have seen the need to explain away the statement that “we never even suggested that we would pay our friend some money.” So paragraph 174 says, “the memorandum was deliberately drafted to misstate that MTN never suggested paying Ambassador Saloojee any money.” By the time he came to his deposition, Mr Kilowan must have realised that this was a pretty feeble explanation for the statement in a “Confidential Memorandum” and decided to produce a better one. The “other friend” was now Dr Riahi, another civil servant whom Mr Kilowan had been paying out of MTN money³³⁶ and with whom he probably also had an

³³⁴ See paragraph 320 above.

³³⁵ ‘Confidential memorandum’ from Mr Kilowan to Mrs Charnley, 30 January 2007.

³³⁶ There is no evidence of MTN having any knowledge that Mr Kilowan was paying money to Dr Riahi. Mr Kilowan has stated in his deposition that the payment to Dr Riahi was made under an

undisclosed business relationship.³³⁷ Counsel for Turkcell then made several attempts to get Mr Kilowan back on the rails:

“Q And MTN had Dr. Riahi on a payment retainer for his assistance?

A That’s right. Under the name of his brother. ...

Q Okay. Look at the next paragraph. It says, “As you are well aware, we are getting high quality information and the support provided has been excellent.”

A Yes, I see that.

Q Where was that information coming from?

A From Dr. Riahi.

Q Okay. And the next sentence says, “In fact, he has assisted way and beyond his duty to us.” Who was the “he”?

A Dr. Riahi.

Q Okay. And what was the – – his duty to us? What did you mean by that phrase?

A His duty to us was basically to provide information, to provide access to people that we needed to talk to in the rollout phase of this in 2006. ...

Q Moving down the memo, the paragraph that says “While I know that we never even suggested that we would pay our friends some money”, who is our friend is ‘our friend’ in that sentence?”³³⁸

354. At that point Mr Kilowan saw the problem which counsel for Turkcell had probably seen rather earlier, namely, the insurmountable obstacle to “our friend” being Dr Riahi, who he had just said had been on the payroll since late

agreement in the name of his brother, Mahabadi Riahi (see Mr Kilowan’s Deposition Transcript, day 2, pages 378-379). In accordance with our terms of reference, as no allegation has been made by Turkcell in the complaint about any payments to Dr Riahi, this is not a matter that we have considered. However, we suggest that MTN may want to look into this issue more closely.

³³⁷ BR Visa issue document, headed ‘Dr Behyar Riahi’.

³³⁸ Mr Kilowan’s Deposition Transcript, day 2, page 378-381.

2005 or early 2006. Mr Kilowan momentarily shied away from the jump. The transcript records his first attempt at an answer:

“A That’s -- that friend is the ambassador...”³³⁹

355. Mr Kilowan must then have realised that would not do either, because he had said that by the end of January 2006 MTN had agreed to pay Ambassador Saloojee a bribe. He had forgotten the explanation in the complaint that the Confidential Memorandum had been a deliberate lie. So he chose what must have seemed to him the lesser of two contradictions:

“A... no. This is still Dr Riahi.”³⁴⁰

356. He went on to explain that although Dr Riahi had been paid a retainer, what he now wanted was more: a lump sum, such as he had heard Mr Ghorbanoghli and Ambassador Saloojee were getting. Of course this does not in the least explain how Mr Kilowan could have said of Dr Riahi that it had never been suggested that he should be paid any money, but that was the best Mr Kilowan could do in the circumstances.

The money unpaid

357. Months went by and no payment was made to Ambassador Saloojee. Mr Kilowan was then asked in his deposition whether he had done anything to find out from Mr Nhleko what was happening since Mrs Charnley had left at the end of March:

“Q Once Irene left when -- did you ever raise this with Phuthuma directly?

A No. I raised it with him in, I think about June, May or June when he came to Iran, and Ambassador Saloojee thanked him for, you know, the help that MTN gave him because that was consistent with his understanding that this is something that MTN is going to give him, and he will then give it back to me.

Q Whose understanding? I’m sorry.

³³⁹ *Ibid.*, page 381-382.

³⁴⁰ *Ibid.*, page 382.

A Ambassador Saloojee's understanding. So after that Phuthuma asked me what is it that he thanked me about? I said, "Well, you remember that we agreed that we are going to pay him some money, and I made that payment already."

Q What did Phuthuma say to you?

A Phuthuma said, "Well, you know, Irene should not have given you permission to do it, and" -- but, he said, "Okay. It's done now. Let's do a contract for him." And that contract I'd been following up with him on a regular basis to say, "Okay. You need to sign this thing." He had it with him. I said, "You need to sign it," and he delayed signing the contract.

Q Did he tell you -- did Phuthuma tell you why he was delaying?

A His view was that we should wait until the end of 2007 to see what sort of assistance Ambassador Saloojee would continue to give us. So it was the same approach that we took with Ambassador Ghorbanoghli to say, "We won't finalize it in the middle of the year. We will finalize it at the end of the year," to see what assistance he had actually rendered throughout the year so that we pay for value that we received from Ambassador Saloojee.

Q And did Phuthuma tell you that?

A Yeah, he told me that. Yeah...

Q Okay. And when you say that -- you testified a moment ago that you made the payment to Saloojee. Did you make it on behalf of MTN?

A That was my understanding.

Q And what did you expect was going to happen next?

A That we would finalize the contract with Ambassador Saloojee, we will pay him the 200,000 U.S. dollars, and he would repay my money.³⁴¹

358. This evidence is incoherent. Mr Nhleko is said to have agreed in January to give the Ambassador \$200,000. This is a transaction he would be likely to remember. Mrs Charnley gave him the consultancy agreement to sign. Mr

³⁴¹ Mr Kilowan's Deposition Transcript, day 2, page 391-393.

Kilowan followed this up with him “on a regular basis,” urging him to sign it. However, he did not do so, saying that nothing should be paid until 2008 so that they could see how the Ambassador performed during 2007. Meanwhile, however, in April 2007 Mr Kilowan advanced the \$200,000 to the Ambassador “on behalf of MTN”. In May or June Mr Nhleko went to Tehran, apparently with the consultancy agreement in his briefcase (“he had it with him”). However, when tactfully thanked by the Ambassador for his promise of the money, Mr Nhleko had no idea of what he was being thanked for. Mr Kilowan reminds him that they had agreed to give the Ambassador some money and that he, Mr Kilowan, has already paid it. His response is to say that Mrs Charnley should not have given permission for the payment (presumably because it would have been unlawful) but, as it had been done, “let’s do a contract for him”. This suggests that he is unaware that he has the contract and all that is awaited is his long-delayed signature.

359. In re-examination, Mr Kilowan produced the document which he said was the draft agreement he had prepared for Ambassador Saloojee.³⁴² However, the name of the consultant is blank, the dates of commencement and termination of the consultancy are blank, it provides for a monthly retainer as well as lump sum payments and the latter are stage payments starting with MTN obtaining the licence and ending at the end of 2008. The document plainly has nothing to do with giving Ambassador Saloojee (or anyone else) a lump sum to buy a house. It appears to have been a general purpose draft, prepared for anyone Mr Kilowan might wish to employ as a consultant. In any event, the file was created on 26 October 2006, well before the time when Mr Kilowan says the Ambassador first asked for money.³⁴³
360. Mr Kilowan seems (not unreasonably) to have thought that the provisions for staged payments until the end of 2008 in a contract to fund Ambassador

³⁴² Draft agreement for the provision of consulting services between MTN International (Mauritius) Limited and the consultant, exhibit 84 to Mr Kilowan’s deposition, referenced in Mr Kilowan’s Deposition Transcript, day 2, page 990.

³⁴³ See paragraphs 350-351 above.

Saloojee's house purchase in 2007 needed some explanation. He had one ready:

"A ... when you look at page 72, then it goes on that the payment schedule would go beyond 2007 to 2008.

And so I think this is the agreement, the draft agreement that we did for Ambassador Saloojee, because Phuthuma's view was that we should not give him the money at the end of 2007. We should wait until he's completed his term, which was going to be in 2008."³⁴⁴

361. But this is patently an untruthful explanation. First, it does not explain why an agreed lump sum payment of US\$200,000 should be paid in four stages, two of which had already passed when the contract was alleged to have been drafted. Secondly, it does not explain why, if the agreement was for staged payments, nothing had been paid at the time when Mr Kilowan and Mr Nhleko had their conversation after leaving the Ambassador's house in May/June 2007. Thirdly, Mr Kilowan had forgotten that, in his account of that conversation, he had said that the reason why Mr Nhleko was delaying making any payment at all was because he thought payment should be made at the end of 2007, when MTN had been able to assess how much the Ambassador had helped them during that year. Now he was saying that payment should not be made until the end of 2008. Fourthly, Mr Kilowan had said Mr Nhleko had wanted to wait until the end of the Ambassador's term, which would (according to Mr Kilowan) be "early in 2008", not at the end of that year.

362. There can be no doubt that in April 2007 Mr Kilowan lent Ambassador Saloojee R1,400,000 to buy a house. There are documents which record that sum of money being withdrawn from Mr Kilowan's personal account and confirmation from the Ambassador's attorneys that the same amount had been received in their trust account. Ambassador Saloojee agrees that he borrowed the money but says that it was a private arrangement and that he repaid half in cash almost immediately and the rest on demand a year later. We are not concerned to inquire into the state of accounts between Mr Kilowan and the

³⁴⁴ Mr Kilowan's Deposition Transcript, day 3, page 990.

Ambassador. The question is whether there is any truth in Mr Kilowan's claim that he lent the money on the strength of an assurance that, directly or indirectly, he would be repaid by MTN.

363. In his deposition, Mr Kilowan says that in 2008 he went to see Mrs Charnley:

“A When I was in South Africa I went to see her and, you know, she was very upset about the fact that Phuthuma had not yet given my money back, because she was aware of this transaction. So she said she will talk to Phuthuma and tell him he must pay my money.... So she said she will talk to Phuthuma about this and try to convince him that he should pay my money....

In subsequent meetings and visits to South Africa, we would discuss this. And at one point she said to me, “Look, it is not fair that you should have paid this money on behalf of MTN and all of us benefited from the Iran license. But you're the only one who had to pay from your pocket to keep the people happy. And I will give you half of that money.” And but she never gave me half of that money. So I didn't receive payment from her also.

Q In your discussions with Irene, did she ever suggest to you that you did not have MTN's authorization to make the payment to Ambassador Saloojee?

A No, she never suggested that.

Q ... [Y]ou had specific authority from Irene Charnley to make the payment to Saloojee?

A That's correct. Yes.”³⁴⁵

364. The Committee reviewed an e-mail exchange between Mrs Charnley and Mr Kilowan in 2008, which begins with an e-mail from Mr Kilowan dated 31 July 2008 with the subject 'Request for Help'.

“Hi Irene...

[M]y business is developing quite rapidly and I now need some short-term capital to take my three biggest projects to the operational stage. Given the current negative sentiment towards Iran I am not having much luck in raising funds. ...

³⁴⁵ Mr Kilowan's Deposition Transcript, day 2, page 408.

I decided to approach you to pursue the discussion we had some time ago around the R1.8 million I have advanced to our friend here to purchase his house. You indicated during that discussion that you are prepared to make a 50% contribution once the Alpine Trust unwinds. I was wondering if you could start making that contribution now in monthly instalments of R 90,000 a month. ...

I would appreciate your assistance and am sorry to bother you.”³⁴⁶

365. On 5 August 2008 Mrs Charnley replied:

“Dear Chris,

Thanks for the feedback. I will not be in a position to contribute anything at this moment due to other major commitments I have embarked upon, my apologies. When I mentioned assistance in contributing 50%, it was on the understanding that it is R1m and not the R.1.8m you are referring to, and it was really goodwill on my side and at a time that is convenient to me. Unfortunately, I will now not be able to assist.”³⁴⁷

366. Mr Kilowan answered the same day:

“Dear Irene

Thanks for at least coming back to me.

I understand.”³⁴⁸

367. It is interesting that Mrs Charnley thought the figure first quoted to her was R1 million, the figure in these proceedings is R1.4 million and the figure afterwards given to Mrs Charnley was R1.8 million. But that is a detail. More important, as it seems to us, is that if Mrs Charnley had given Mr Kilowan assurances as to his authority to pay the Ambassador \$200,000 and these had been subsequently dishonoured by MTN, leaving Mr Kilowan embarrassed because of the Ambassador’s inability to repay him, one might expect some hint of these matters to appear in Mr Kilowan’s letter. But there is nothing.

³⁴⁶ E-mail from Mr Kilowan to Mrs Charnley, 31 July 2008.

³⁴⁷ E-mail from Mrs Charnley to Mr Kilowan, 5 August 2008.

³⁴⁸ E-mail from Mr Kilowan to Mrs Charnley, 5 August 2008.

Mrs Charnley says that Mr Kilowan had told her that, as a personal favour to Ambassador Saloojee, he had advanced him about R1,200,000 to buy a house. She thought this was a generous gesture and said that when she received money from a sale of shares at the end of 2008, she might take over half the loan. But then she seems to have thought better of it. On the evidence of the e-mail exchange, this seems to us a far more plausible explanation than Mr Kilowan's.

368. Mr Kilowan did however pursue the matter with MTN, even though he acknowledged “no legal basis” to recover the money from MTN.³⁴⁹ He wrote to Mr Nhleko claiming that he had made the loan to Ambassador Saloojee on the understanding that he would be repaid out of money provided by MTN.³⁵⁰ We do not know what he said to the Ambassador. He may well have told him that Mrs Charnley or Mr Nhleko or both had agreed to pay him US\$200,000. On one occasion the Ambassador himself went to see Mr Nhleko about the matter. There is a conflict of evidence about what was said. Ambassador Saloojee says that he borrowed from Mr Kilowan to pay for the house because of the difficulty of remitting money from Iran. He claims to have had no knowledge at the time of any alleged payment to Mr Ghorbanoghli. Mr Kilowan then suggested that he approach MTN but he declined to do so. He repaid \$100,000 in April 2007 and the remaining \$100,000 in January 2008. That was the end of the transaction. Ambassador Saloojee explains that he went to see Mr Nhleko, not on his own behalf but on behalf of Mr Kilowan, who was in dire need of money. Mr Nhleko, on the other hand, says that the Ambassador was following up the claim that \$200,000 had been promised to him. We do not think we need to pursue these discrepancies.
369. As a result of the Ambassador's call and Mr Kilowan's hassling, Mr Nhleko asked Mr Shauket Fakie, MTN's Chief Business Risk Officer and former South African Auditor General, to investigate Mr Kilowan's claim that MTN had promised US\$200,000 to Ambassador Saloojee. He spoke to Mr Kilowan

³⁴⁹ Memorandum, 11 February 2010.

³⁵⁰ Memorandum 30 July 2008.

and examined such documents as he was able to produce. He advised Mr Nhleko that the claim be rejected. The documents were equivocal and self-serving and Mr Fakie thought it suspicious that Mr Kilowan made the payment out of his own pocket in 2007 but did not raise the matter with MTN until two years later. We agree with Mr Fakie's judgment, which we think is supported by the e-mail correspondence with Mrs Charnley to which we have referred.³⁵¹ It is also supported by the memorandum of 30 January 2007 which we have discussed above.³⁵² We think that Mr Kilowan was telling the truth when he first told Patton Boggs that the "other friend" was Ambassador Saloojee. His later evidence that it was Dr Riahi makes no sense, because on his own evidence Dr Riahi's services had been paid for. And we do not accept the lame explanation in the complaint that it was a deliberate falsehood. In our view the memorandum shows quite clearly that, as of end of January 2007, Ambassador Saloojee had neither asked for nor been promised any money

Conclusion

370. In our opinion there is no credible evidence that MTN promised Ambassador Saloojee any money. Mr Kilowan's account of the offer by Mrs Charnley and the request eighteen months later are equally implausible. There is no documentary or other support for Mr Kilowan's evidence, apart from self-serving documents which he wrote in his last year with MTN. We have said that our general view of his credibility is such that we would not be inclined to accept anything he said without corroboration. Accordingly, we reject this allegation.

³⁵¹ Paragraphs 364-366 above.

³⁵² Paragraph 352 above.

Appendix 1

Independent Special Committee Charter

Appendix 2

**The complaint of Turkcell filed in the US District Court for the District of
Columbia, dated 28 March 2012**

Appendix 3

Part A: Witnesses who provided evidence directly to the Committee

Part B: Witnesses who provided evidence through legal advisors

Appendix 4

Report of Ms Buckley, dated 28 August 2012

Appendix 5

**KPMG report provided to the Hoffmann Committee,
dated 2 August 2012**

Appendix 6

**South Africa's Policy towards Iran and its Nuclear Development Programme
and in relation to Arms Trading between the Two Countries:
Report to the Hoffmann Committee of Professor Richard Calland,
dated 3 August 2012**

Appendix 7

Report of Dr Audrey Giles, dated 19 December 2012

Appendix 8

Report on Evidence Collection

Appendix 9

Letter from Lord Hoffmann to Mr Kilowan, 3 December 2012

Appendix 10

Dramatis Personae