ARMS PROCUREMENT COMMISSION

Transparency, Accountability and the Rule of Law

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CHAIRPERSON: Good morning everybody. Advocate Cane, what is [indistinct]?

ADV CANE: Thank you, Commissioner. The, this morning, my learned friend, Unterhalter, would like to address you and he tells me, for some four and a half minutes. Although, I will not him strictly to that, of course, as a matter of mutuality, I would really concede to his request to begin.

CHAIRPERSON: Okay. He said four and a half, four and a half minutes.

ADV CANE: That is what he said, Commissioner.

CHAIRPERSON: Thank you. Advocate Unterhalter.

ADV UNTERHALTER: Chair, it is David Unterhalter. I appear for Ferrostaal, on the instructions of Webber Wentzel. A submission was made to the Commission on the 24th of March 2015 and unless the Commission would wish it otherwise.

We would not repeat the contents of what is contained in that submission. We would simply draw attention, however to the contents of paragraph 3 of that submission, which set out, sets out the involvement of Ferrostaal in the strategic defence procurement package and in particular, the securing of its commitments, under the National Industrial Participation programme.

All of that is captured in paragraph 3 of the memorandum and unless, Chair, you wish us to read that into that into the record, we would simply reference that, for the purposes of what we wish to say. Chair, with that,

with that reference, we would simply want to address one central question and do so briefly, unless there are questions from you.

That is, simply to reflect upon the fact that you have already made rulings on two occasions, concerning the two reports, to which we have said that legal professional privilege attaches. Those rulings were made on the 2nd of September and the 6th of October 2014, in which you found that indeed, privilege was maintained in respect of those reports, which were secured from legal advisors, to Ferrostaal.

We would, in the first place, simply submit that those ruling should stand and there is no reason why you should deviate from them, in respect of the status of those reports and how they should be treated in evidence, before this Commission. All that we would seek to add to that is that in support of the rulings that have been made.

Notwithstanding certain efforts that have been made, by way of submission before you, to suggest that those reports do not retain their status as privileged and should be treated on any other basis, we would only add these short submissions. The essential principal, upon which it has been contended that privilege has been lost, is reliance on a now super ceded authority in Andreson's case.

That case no longer holds in our law, because by way of high authority, that case has been relegated to a status, where it no longer applies. In particular, we have referenced, in the memorandum that under our law, following from a number of cases, but particularly the Sasol 3 case, the Bergorchy decision and more recently in the Constitutional Court.

The position, concerning privilege is that it is a right. It is not a rule of law, simply an evidential rule and consequently, we stand by that right and have done so consistently, in respect of these reports, secured for the purposes of gaining legal advice. There has been no waiver, we contend, in respect of this matter.

Although it is the case that there has been elicit leaking of these reports, that does not alter their status as privilege and does not in any way, constitute or waiver. In the October ruling that you gave, concerning this matter, you made it plain that, to treat this document, as anything but privilege, would simply be to sanction elicit activity, in respect of the leaking of reports, by elicit means.

With respect, we think that that is the absolute correct principal. Privilege is a right. It is not easily lost and certainly, is not lost, by reason of activities, which are not lawful on the face of things. Therefore, we would submit that the status of these reports must be maintained and that your ruling should be retained.

We would only advance one further authority, which we think, you might find helpful and that is a decision in the Constitutional court, in the matter of Masetla. It is the Independent Newspaper's case versus the President of the Republic of South Africa.

It concerned an important matter that the natural citation is 2008 (ZACC) 6 and we will hand a copy to you, for your assistance. But, in particular, at paragraph 72, the court had to consider the following proposition. Whether documents that had been, that were classified documents, lost their status as classified documents, simply because

they had been leaked to the press.

The Constitutional Court confirmed the position that those documents did not loose their status simply because they had been leaked by elicit means. Their classification stood and the protection, attaching to those documents stood, as classified.

We would submit, by parity of reasoning, in this instance, privilege, which is a right enjoyed by my client, Ferrostaal, that right is maintained. It has not been waived. The protection, attaching to those documents does not, in any way diminish, simply by reason of the fact that certain parties have come into possession of those documents and have sought to use them, outside of the scope of the ordinary protections that apply.

We would therefore ask that the rulings, already made, by you, should be maintained. There is no warrant to depart from them. Those are, in essence, our submissions. If there are any matters that we can assist further with, we would be happy to do so. But, I think, I have made my four and a half minute limit.

CHAIRPERSON: Thanks a lot. I do not want to hear you, on any other point. I have not written the citation of the case that you referred us to. If you can give us the copy thereof, then I would really appreciate that.

ADV UNTERHALTER: We shall do so and we thank you for your assistance.

CHAIRPERSON: Thank you. Thank you for your submissions. Thank you. You are excused then. Advocate Cane?

ADV CANE: Thank you and good morning, Commissioners. The

outline of what I intend doing this morning, is to give you an overview of some of the aspects that have been raised, by the evidence leaders and mentioned in the other written submissions before you, with which the department would take issue.

I will mention them all together, because my response to them, it often, to do it individually, would mean duplication. In other words, the points run into each other on many occasions. Before I begin addressing what we seek to deal with and give you an outline of the response, there are a couple of errors that we have noticed, in our heads of argument that we will want to correct, to ensure that those are all in order.

So, perhaps I may begin with that matter, which is really a housekeeping one, by asking you please, to locate the Department of Defence's submission. It is not my intention to traverse the submission at all, during this oral address.

It is quite clear to me that the Commissioners have already read it. May I begin then, by asking you to turn up page 86, paragraph 173? That is page 86, paragraph 173. The paragraph reads:

"Dr Young alleged that when final Cabinet approval was sought on 3 May 1995, the Cabinet refused to give such approval, final approval to the contract, despite all the formal requirements having been fulfilled for doing so, during the formal and comprehensive acquisition process."

Now, Commissioners, there is a sentence that seems to have gone missing from the submission, handed up, if I could read that to you, because the message is present. The next paragraph, paragraph 174,

stating that the allegation is false, does not make sense. What I would ask you to insert, if you would, is this sentence.

"He attributed this to a political intention, to only award the contract to the Germans and to bribery by the Germans, when they lost by the normal competitive process."

COMMISSIONER MUSI: Can you repeat?

ADV CANE: And the …[intervene]

CHAIRPERSON: Advocate Cane, can you just repeat that slowly, so that we can make a note of that now.

ADV CANE: Yes.

"He attributed this to a political intention, to only award the contract to the Germans and to bribery by the Germans, when they lost by the normal competitive process."

Commissioners, the reference to Dr Young's statement is to paragraphs 293 and then 295 to 297. Thank you. You will, if you turn out those references to Dr Young's statement, see that the sentence that you have kindly inserted is really just a summary of those paragraphs.

The heads then, read on correctly that this allegation is false and you will notice that we then deal with that question of why Cabinet stopped the process at that stage, in order to permit the defence review to take place. The next correction appears on page 119 and it is paragraph 241.

Now, Commissioners, if I may take you towards the end of the paragraph, there is a line beginning:

"Information, he persisted in his contentions that C Square I Square

had been nominated."

It is the fourth line from the bottom. It then reads on:

"For the SMS subcontract."

That is where the error occurs. It is:

"For the IPMS simulator."

And Commissioners, that footnote, footnote 467 should read:

"See paragraph 218, above."

The last correction is at page 247. The learned Commissioners will notice that in footnote 567, the clause from the Corvette umbrella agreement has been set out. At the end of that quotation, it refers to:

"Armscor and the South African government may summarily cancel the agreement and claim damages from the cancellation, or claim an amount equal to five percent."

That five percent is incorrect. It should be 10 percent and if you, if the learned Commissioners are inclined to do so, the note, at the foot of that page, dealing with the Hawks and Gripens is to the effect that the cancellation clauses are much the same. In relation to the Hawks and Gripens, the penalty is five percent and that is where I made an error.

So, the Hawks and Gripens is five percent, but with the Corvettes, it was 10 percent. I just would not like that inaccuracy to be replicated, due to my error.

CHAIRPERSON: Now, I am sorry, and I see on the footnote here, you are referring us to the statement of Ms Tauda. These copies of the, this agreement, are they attached to Ms Tauda's statement?

ADV CANE: Yes. Then, Commissioners, she had an extract from the,

from the relevant umbrella agreements. That is why the references to page 73 to 74 of annexures to her statement.

CHAIRPERSON: Okay. Thank you.

ADV CANE: Thank you, Commissioners. Those are then the housekeeping matters that would ensure that the heads of argument are in order. Commissioners, I am now going to pick up on some of the aspects that have troubled the DoD, that arise from the other written submissions and just outline them and proceed to deal with those main themes.

Let me begin with the written submissions of my learned friends Sibeko SC and Sello. There I wish to pick up what they say in paragraphs 56 and 60 of their written submissions. Paragraph 59 is dealing with the policy 4/147. They make the point that it was not approved by the Council of Defence and slightly in support of that, Mr Steyn's statement.

They then go in, in paragraph 60, to allege that that policy provided for a multi-tier approach in the evaluation of the offers. But, that the first, second and third or the evaluation processes, did not materialise, for the proper implementation of the policy.

They have a foot read note there, footnote 33, which just says, see transcript. So, I was unable to get any guidance, as to what evidence they relied on. But, I do want to deal with that issue of policy 4/147. It is a matter, which my learned friend, Ms Ramagaga, also picked up on, yesterday.

I refer, in particular, to pages 46 and 47 of Ms Ramagaga, my learned

friends, Mphaga SC and Zondi's written submissions, they quote from 4/147, in particular, these three orders, that are set out in the document. I agree entirely with the issue they then identify, in paragraph 116, which is that the criticism of the above policy is that there was interference with the Armscor process.

Further that Armscor was divested of its acquisition powers, as a result of the three order institutions that were put in place, to carry out the functions that had, all along, been discharged by Armscor exclusively. The cause of the complaint is that the DoD director 4/147, had the effect of implementing the process that fell outside the existing Armscor and DoD directives.

That is the theme, which you would have noticed, is not dealt with in our heads and I would deal with it this morning. It is also a matter, which Dr Young picked up on, in his written submissions, if I am not mistaken, also the Institute for Accountability of Southern Africa and Mr Terry Crawford-Browne.

The next aspect, which I pick up, on the written submissions, is from the Institute's written submissions. There, in paragraph 32, the submission is made and it is a submission from my learned friend Paul Hoffman SC and Chris Shone that civil litigation will most probably focus on the invalidity of the four procurements of arms on three different grounds.

Firstly, unconstitutionality, for want of compliance with the provisions of Section 217 (1) of the Constitution, read with the PFMA. We would certainly deal with the constitutionality of the process. Secondly, they

raise an issue, pertaining to financing and borrowing, which is not within the DoD's domain. I will not be dealing with it, for that reason.

Thirdly, they say that the SDPP was irrational and that it did not comply with the principal of the rule of law. In other words, they are focussing on rationality and rationale, as a basis for the whole thing being invalid. That is a theme, which I will deal with, if I may.

In paragraph 38, of that same submission, this very broad and disturbing statement is made:

"The conclusion is inescapable that the type of arms South Africa does not need, were bought with expensively, perhaps not affordably, borrowed funds, to deter enemies, South Africa does not have and defence against attacks, which have not materialised and are unlikely to do so, within the useful life, of the arms in question."

Now, that opinion is one, which is sweeping, it has a tune to it. It has been repeated many times. It is certainly something, which I would want to deal with very comprehensively this morning. The way I intend to deal with it, is to, if I may, take you back to the white paper, the defence review and MODAC.

Indicate exactly what it is that was contemplated, right from the outset and that was approved by Parliament and indicating what it was that Mr Steyn understood, he was doing, as recorded in the minutes. Indicate how important this concept of the core force is and what it means and indicate that is the only way that the Constitutional mandate can be discharged.

The last aspect from the Institute's heads is to be found in paragraphs

42 and 43. There they say that there is cogency in the hearsay in the hearsay that they are urging this Commission not only have regard to, but to give weight to.

They say there is cogency in the hearsay, because it is of a very consistent kind. It is duplicated in seven books and multiple articles, written on the topic of malfeasance in the arms deals. Then, they go on to say that there is no suggestion of collusion, on the part of the authors of the books, on the contrary, most of then are in competition with one another.

Well, learned Commissioners, that is something which we can take apart. The evidence before this Commission is quite contrary to that submission. The reason why it is so important is because at the end of the day, if we are dealing with repetitive, self-repeating by baseless hearsay, then of course, you should not accord weight to it.

It should be labelled and called exactly that. Because if it is only that, it is deeply destructive and harmful to the DoD and its Constitutional function, within this democracy. They refer to the book, for instance of Raenette Taljaard, who wrote Up In Arms and they suggested it is far fetched to suggest that these authors have collaborated or colluded in the books they have authored.

They say that is a member of the IEC, a former member, Taljaards credibility is beyond reproach. I do not and will not take issue with her credibility. But, I will take issue with the manner in which she published statements, in relation to which she had no proper basis for doing so.

Learned Commissioners, then it remains at the end, of dealing with all

of that, for me to deal with Dr Young's submissions. In that regard, his written submissions were largely just a summarised rehash of his statement. So, because those type of allegations have been in circulation for so many years, they were very comprehensively covered in both Admiral Kamerman's written witness statement in his evidence.

But, then, summarised in the department's heads of arguments, topic by topic, which enables me to take you to Dr Young's submissions and simply cross reference to the relevant parts of the department's heads of argument. I will only deal with the substance of a few of his contentions, because otherwise, I do fear that I may keep you too long.

There are a couple of new things that he has raised, such as his reliance on Liola Velovsky, as the alleged author of the German investigation or German reports. I certainly want to deal with that, in fact, that it does not enhance, in fact, it detracts from his position. Much to our surprise, he again harped on the question of him being mistreated, in relation to the loss of the IPMS simulator contract.

I would like to indicate just how misguided and dishonest that alleged grievance is. Learned Commissioners, then to begin with, the defence review and MODAC and in this regard, I am aware that you are both thoroughly acquainted with the document. So, I will simply point out some of the aspects, which helped me to deal with this attack on legality and Constitutionality.

And in due course, indicate that the role that [indistinct] played and the role that Armscor played in the process were entirely in accordance with these policy documents, which we are both, the white paper and

the defence review, both as you know, were adopted by Parliament. The first important reference in that regard is to be found at page 1 of the white paper of defence.

I am referring to the third paragraph on page 1, under the heading introduction. It reads:

"The Constitution also establishes a framework for democratic civil military relations. In terms of this framework, the defence force is non partisan. It is subject to the control and oversight of the duly elected and appointed civilian authority and it is obliged to perform its functions, in accordance with law."

I emphasize there, this new concept of civilian oversight and authority. Because that is something with which Armscor never had to cope, prior to 1994. It seems to me, from their written submissions that when they talk of a deviation from process, they are talking about the changes between what they used to be able to do, without this democratic civilian oversight, in the days of the embargos, when they had to procure arms, without necessary comply with, certainly not with the Constitution and perhaps even, not with international law.

On page 2 of the white paper, we read that it is, the white paper will provide the basis for a defence review, which will elaborate on this framework, in considerable detail and that the final product will be presented to Parliament. So, we are seeing here, the seeds of a new beginning, a different era and an entirely different value system.

That is taken up on page 3, where the challenge is described as being the rationalisation of the SANDF and the containment of military

spending, without under manning the country's core defence capability, in short or long term. I emphasize again that core defence capability, which is derived directly from the Constitutional mandate and the necessity, notwithstanding budgetary constraints, to ensure that a core force is acquired and maintained.

The last reference in the white paper is to chapter 4, where the role and functions of the SANDF are considered and set out. Of course, we know that, it would begin at the starting point, which is the defence of, the protection of the sovereignty and territorial integrity of the country.

But, what I seek to draw attention to is that the size, design, structure and budget of the SANDF will be determined, mainly by its primary function. However, provision will have to be made for the special requirements of internal deployment and international peace support operations.

The rest of the chapter then goes on to consider how to achieve that. Very importantly, at page 17 of the white paper, the question of deterrence is highlighted. Deterrence requires the existence of a defence capability, which is sufficiently credible to inhibit potential aggressors.

Although South Africa is not confronted by any foreseeable external military threat, this capability cannot be turned on and off, like a tap. It is therefore necessary, to maintain a core defence capability. Learned Commissioners, when we consider the utilisation of the equipment and the fact that it is not used to full capacity all the time, one can never overlook the fact that deterrence requires the existence of a core force

and that, without its existence, we do not have the capacity to defence and protect, because that capacity cannot simply be turned on and off, like a tap.

I then ask you to please consider the defence review. Again, I would just highlight some of the main themes, which informed the SDPP acquisition, right at the outset. This is in documentary form, what the intention was. In chapter 1, there, reference is made to the white paper and the momentous political and strategic development, which had occurred on a national, regional and international level, which necessitated this entirely new approach.

You are well aware of these developments, Commissioners, and I do not need to spell them out, although, there is some description of what they were, in the defence review. But, perhaps an important one, appears at paragraph 4, on page 1, which is the mention of the fact that after two and half decades of isolation, South Africa had been welcomed back into the international community.

In paragraph 5, we read that it is in the light of these developments and the integration of the former statutory, amongst statutory forces. The challenge of transformation is substantial and complex. The paper is going to go on to address how we transformed. What was in existence, at that point and what needed to be created, for the future, in the new Constitutional era.

The review then encompasses the size, roles and structure of the SANDF and states that it is going to, it is going to specifically address the implications of the core force approach. So, when we read of the

core force, it is not just simply three of this, four of that and 24 of that. It is a philosophy that undermines or underpins the SDPP and why it is that it was considered that that philosophy would result in the Constitutional mandate, being fulfilled.

Commissioners, I am moving to page 4 of the defence review. I pick up at paragraph 19, the size structure and weaponry of the SANDF will be based, not only on the considerations outlined above, but also on budgetary restraints, defence plan and can therefore, be described as needs driven and cost constrained.

Budget constraints will make it necessary to prioritise and stagger major weapons procurement programmes. The defence review then states that the defence acquisition management processes and structures are to be outlined in chapter 13.

These attempts to bring the acquisition of defence [indistinct] equipment in line with the demand for accountable and transparent governance. Also gives expression to the strategic technologies and equipment required, by the SANDF.

What we see here, is an acknowledgement that the current acquisition process is not in line with what is required for accountable and transparent governance. Nor is it in line with civilian oversight. We also see right from the outset, the recognition that this defence approach is to be needs driven and cost constrained.

Clearly, the new democracy had very important other concerns. But, the core force approach was the philosophy, which allowed it, with a minimum of expense at that point, to acquire a force, which could be

enhanced at a quicker rate, to deployment status, than a threat eventuates. That was the concern that without it, you did not have to use it fully all the time, for capability.

But, without it, you would, as a nation, have the capability to respond to a threat in time. Chapter 3 is the chapter, dealing with self defence and the peace time force. Even that heading indicates to you, the thinking of the time. We are acquiring a peace time force.

But, it is necessary, because of the Constitutional mandate. In paragraph 3, it is stated that:

"In identifying and designing the capabilities of the peace time force, a range of considerations have to be taken into account."

They are all listed there, which were indicated then, the rationality of this approach and how carefully considered it was.

I point out, in paragraph 5, again the reference to the need to have a core defence capability. The other aspects, which are highlighted is the need to promote regional security, through defence co-operation, within the SADAC framework and to promote international security, through participation and peace operations and military co-operation, in support of foreign policy.

So, when you come to consider utilisation and the broad criticism, directed by the Institute and duplicated in Mr Crawford-Browne's submissions that this equipment was not being utilised. We did not need it and there is no existence of a threat, anywhere in sight, you will have regard to this carefully thought through policy, adopted by Parliament, which would not leave the nation defenceless, in the event

of a threat developing and would ensure that we could enter the international community and play a meaningful role, within it.

It is in chapter 3 that [indistinct] the core force approach and the philosophy of that approach is then set out. You will find at page 11 of the defence review, some of the key features I wish to emphasize. I refer to paragraph 8.5, which says the following:

"Defence capabilities and expertise that are lost, take longer to re-establish, than the period in which a military threat can emerge. A credible conventional deterrence is a proven way of preventing aggression. It is prudent, a prudent means of preventing the hardships and loss of life, associated with armed conflict."

And so, when the Commissioners are faced with the criticism of pacifists that this core force is entirely unnecessary, which is the position, being urged on you. You will have regard to the thinking of the defence review, which accepts and its Parliamentary endorsement that deterrence in itself, is a very good value, because it does prevent the hardships and loss of life, associated with armed conflict.

We are all fully aware that how plagued our continent is, with armed conflict and what a dreadful toll it takes on those populations. We have opted, by way of our Constitution and these values, to try and ensure that our nation is not vulnerable to that kind of havoc. We would hope that it is not our civilian population that is by, in large, finds itself in a position of being refugees in other states, living in most appalling conditions. In paragraph 9 of the defence review, we read that:

"It is for these reasons, the SANDF must have an affordable and

sustainable force structure, appropriate to its peace time role and capable of expanding timorously to meet future defence contingencies."

That is beautifully encapsulated. Commissioners, I draw your attention also, to pages 46 and 47 of the defence review, where the core force options are set out. You will recall those pages, because it is, they are the pages, where we have options one, two, three and four, as to what design could constitute to core force.

Again, it indicates the extent to which this thinking was taken and sought to be implemented. Option one, you will recall, is the option that was recommended, because we could not justify greater financial resources, at that point in time, in order to acquire option four.

But, option one constituted the acceptable growth core. Option three, which noticeably had substantially less fighter aircraft, than option one, was considered unacceptable. Why? Because it left strategic gaps and risks that should be unacceptable to the government.

It was well below the minimum growth core, for any future expansion. So, what we see is what we can acquire, with a minimum amount of finance, at this point, to ensure that the Constitutional mandate can be fulfilled, that we can turn on a capability, quicker than the threat develops.

Importantly, within that, it stresses that it must be a balanced force. You heard that repeatedly, from the DoD witnesses. Balance includes such incredibly capable and sophisticated technology, as is found in the Gripen aircraft. Even if it is only deployed for peace keeping or support functions, at this point and the example given, is the Central African,

sorry, what is the name of this state, which, [indistinct] thank you, the Central African Republic.

There are others. They are not outlined, because they are currently others. But, the one, historically, in which the Gripens were actually used, for this kind of backup capability, to give us a balanced force and to give us the authority required, to make a real difference, with the deployment for the purposes of the Central African Republic mission.

You will notice that option three, which is considered completely unacceptable, is the option that dispenses with submarines and Corvettes and leaves the Navy solely with strike craft. You will recall that that is what they had, at the time that this review was being carried out.

That was the un-expert view of a Mr Terry Crawford-Browne that the Navy should be left in a position of strike craft and that the acquisition of the submarines and Corvettes was wholly unjustified. Commissioners, the defence review went on, to consider the acquisition management process.

We find that in chapter 13 of the defence review. I pick it up at paragraph 32 of that chapter. It is dealing with the role of the MOD and the DoD headquarters. Pagagraph 32 reads as follows:

"The ultimate political authority and responsibility for the acquisition function rests with the Minister of Defence. The Minister of Defence is responsible for the defence function of government and is accountable to the President, the Cabinet and Parliament for the management and execution of this function."

Right at the outset, then, it is not Armscor that is ultimately responsible. It is not Armscor that is going to make these very significant national decisions. It is taken to the highest level, the Minister of Defence and his Cabinet.

So, when I hear suggestions in this Commission, that other than the technocratic type of evaluation process that occurred at the third level, the rest was all a deviation and not in accordance with Section 217 of the Constitution, I am afraid, I disagree in the sharpest terms. The new Constitutional order required that Cabinet and the Minister of Defence and the President were entrusted with the executive function of implementing policy and national legislation.

Decisions of Parliament had to be executed by the Cabinet. When we see 217 requiring transparency, I say absolutely. So, does Section 85 require the National Executive to play its Constitutional role. The two are perfectly balanced. There is no, no reasonable suggestion I submit that simply because Cabinet plays its role, we no longer have a transparent acquisition process.

Quite the contrary, we all know that the President, the Minister and the Cabinet are subject to the rule of law. That in an appropriate case the [indistinct] review is perfectly competent and that the whole process therefore, is subject to the constitutionally enshrined concepts of accountability and transparency.

The Department of Defence and the Minister of Defence would not accept, for one moment, that this role was not a proper one. Commissioners, you know well that the levels, through which the

process had to travel, was set out in this early document and duplicated again, in MODAC. When I refer to those levels, I am referring to the AASB, the AAC, the Cabinet, subcommittee and all the way up to the Minister.

So, I do not read to you paragraph 42 of the defence review, where it was spelt out, in plain terms. I merely remind you that this is what Parliament endorsed. We also see that the technical review teams are to include Armscor, the South African National Defence Force. So, a new era, where there has to be co-operation between the two is born.

Paragraph 49 is important. You will find it at page 127 of the defence review and may I read that to you?

"The Department of Defence transformation programmes may make further recommendations to the DoD for the adjustment or changing of the present acquisition approval process, as indicted in the MODAC studies."

I skip a few lines and carry on that the existing processes, if I may be allowed to summarise are recognised as needing revision. It is recognised that the relevant Armscor Acts, for instance, will need to be reviewed and reflect the new functions of authority, as outlined in these processes.

We see that theme repeated, more than once. We pick it up in MODAC again that some sort of review, an ongoing review of existing process needs to take place, to ensure that in the new democratic era, with a new civilian oversight and Cabinet in control and the Minister of Defence, the appropriate policies are enforced and adopted and

appropriate processes are put in place. I draw to your attention paragraph 56 on page 128, which makes the point that:

"Adjudication of tenders will not necessarily be based on the lowest price, but on value for money and industrial development goals."

It goes on to list a whole host of factors that must play a role in this acquisition, life cycle costs, DoD requirements, local industrial development goals, social responsibility, economic empowerment of previously disadvantaged persons and subcontracting, are all to be taken into account. It names the Secretary of Defence, as being in an oversight role.

It goes on to speak of the importance of the offset and counter trade requirements, at page 129. We are told that there will be an oversight function, in relation to all these things, exercised by the joint standing committee of defence. What you have before you, is a very carefully considered strategy, to ensure that the new Constitutional mandate is put into place, which is adopted by Parliament.

We then, to pick it up in MODAC, please bear with me one moment. I just need to locate my copy. Thank you, Commissioners. Right in the introduction, we get the recognition that we have an establishment of a civilian defence secretariat, in 1994. In consequence, it became clear that the management policies and structure of the acquisition function in the DoD will have to be reviewed.

And so, when you read that everything that was different, from what existed, as of 1994 and had been done before, everything different was a deviation and somehow, negatively implies that something went awry,

I say to you it is exactly what was authorised by Parliament and exactly what was anticipated. I that regard, I should say that I agree entirely with Ms Ramagaga's submission that she made yesterday, in relation to the explicability of the deviations that Armscor has drawn your attention to, in the light of this new Constitutional dispensation.

In the executive summary of MODAC, at page 7 of the document, we have set out the roles of the Minister of Defence, the National Defence Force, the Defence Secretariat and Armscor. We see that ultimate political authority is vested in the Minister.

We see that the defence force is to determine what armaments it requires, which is exactly what it did, in relation to the SDPP's. We see that the Defence Secretariat is to ensure that these activities are executed, within national objectives, policies and constraints. We see that Armscor is to play a role in programme management and contracting, which is exactly what it did.

We have again, set out the levels of authority and what level of authority the SDP required. Again, I refer you simply to the hierarchical structure of the AAC, the AASB, the AACB and the project teams. That was all fully anticipated and endorsed.

What we see at page 12, paragraph 2.4, sorry, I will begin at 2.1. There is again, the recognition that the Constitution requires a National Defence Force and one that is balanced, modern and technologically advanced. In paragraph 2.4, it reads:

"The new Constitution requires the establishment of transparency and accountability by civilian control, of the NDF (the National Defence

Force) resulting in certain traditional NDF and Armscor functions to be transferred to a Defence Secretariat."

Again, I emphasize this, because it is a new era. We get set out the defence family and who plays what role within it, which I have already mentioned, but it is repeated once again. As if it were not already clear enough.

Again, we are told that the three role players of the Department of Defence, the Defence Secretariat and Armscor are to be considered a partnership. They are now to work together. I do not see the language of one being more dominant than the other and of Armscor, having to approve everything.

I see the language of partnership. We see the role of the Minister of Defence again, outlined, as being the ultimate political authority. There is an excellent reference, if I may refer to it at this point, at paragraph 40 of MODAC, were the authority of the Minister is described as such:

"The Minister of Defence has the final authority on all acquisition matters and has the right to refer decision on acquisition programmes to Cabinet level."

So, again, I ask rhetorically, how could the SDPP have been done, in any other way? At page 14 of MODAC, paragraph 3.1.2, we have an exposition of policy. I submit, it is an extremely important one. It is simply captured, because in my view, it lists the kinds of matters, with which Cabinet had to concern itself.

These were not matters of technocrats, assessing the technical capability of one item of equipment against another and seeing whether

it would do the job of measuring rands and cents and trying to do the calculations, of which was cheaper. These are considerations in the nation's interests at the most senior level. This was the first order evaluation criteria and I read it to you:

"Since the acquisition process consumes national resources, the process must take into account the national objectives of job creation, wealth generation, trade balance, counter trade, technology development and industrial establishment. These objectives are often in conflict with acquisition at loans to costs and therefore must be prioritised, by acquisition management."

At page 15 of MODAC, you will find paragraph 3.1.4 of particular interest, as I did, I assume, because this new method of making the main contractor ultimately responsible for the entire piece of equipment, is found in MODAC. It states:

"Contracting with a single source of supply, who has the responsibility of system integration, provides a single point of recourse, in the event of unsatisfactory performance, this results in contracting at the highest possible, system hierarchical level."

A difficult language, before one has heard all the evidence before the Commission and one then realises, but of course, of course we must have the GFC ultimately responsible for the entire ship. Of course, we must have the contracting model that was implemented.

Of course, it is a radical change from the past. It may need that some less important players, although they provide in a local product, are not as important in the bigger picture, as achieving the single source of

supplier with ultimate responsibility. But, it makes good sense, from a policy point of view and it is clearly in the national interests.

Under policy, on the same page, we again pick up on a theme of revision of existing policy. It reads:

"At present, policy regarding acquisition management is governed by separate documentation, issued by both the NDF and Armscor. These documents are to be updated and approved, for issuing, by the MOD, as MOD policy, where found necessary."

So, of course, the Ministry of Defence must adopt 4/147, to implement the defence review and to implement MODAC. Of course, it deviates from the existing Armscor policy. How else are we going to have the radical transformation, which Parliament has endorsed?

I draw your attention to page 25 of the MODAC document, which again, sets out the hierarchy, which is exactly the hierarchy, which played its role in the SDPP's. One finds it again, at page 38, usefully set out, in very clear terms. I emphasize it, because of the level of perplexity I experienced, at hearing repeated suggestions that the process that was used, to acquire the SDPP was somehow a deviation, with all the negative connotations that that involves.

Perhaps then, this is a convenient point, to move onto that policy directive 4/147. In this regard, I should remind the Commissioners of what Mr Shaik's evidence was. You will find it at transcript pages 8719 to 8721. He said that in August 1997, there had been a tussle for control, between the Secretariat of Defence and the Department of Defence.

At that time, the Chief of Staff Logistics, Lieutenant General Du Preez and the Secretary of Defence, Mr Steyn, then jointly gave a directive, that created the inter departmental working group, to include acquisitions, in other words, to include the acquisition function. Mr Shaik's understanding was that this document was signed by these two very senior officials and was clearly binding.

It is certainly not the question of lower down the ranks. Most importantly, it was implemented and it was never rescinded. You will recall that on that document, 4/147, Mr Steyn had appended his signature, together with the words that this policy document had been approved by the Council of Defence.

But, when he gave evidence, he did not suggest that, at the time he wrote those words, he did not believe they were true. Quite the contrary, he said he bona fide, at the time, he believed they were true. How else would such a senior man have written such a thing?

But, he advanced a complex theory, to undermine the legality of the process. I pause at this moment, to mention that Mr Steyn came to this witness, to this Commission, as a witness, who was hostile to the Department of Defence. It appeared, through his evidence that his vehement opposition to the acquisition of the Hawk had been overridden by the Minister of Defence.

That there had been a bruising contest between the two, it is captured in the minutes. His views were fully taken into account. They were, in the end, rejected. He resigned. It was only thereafter, that he sought to discredit the very process, that he had authorised, that he had

implemented and that he had participated in, without objection, as Secretary of Defence.

The Commission will not find a single written document, in which Mr Steyn questions the legality or rescinds any policy document, to which he has appended his signature. You will recall, importantly, it was not only 4/147. It was also the subsequent directive, setting out the inter departmental committee, to which I shall come in a minute.

What Mr Steyn did, is he advanced a theory that 4/147 was to deal with foreign initiated proposals and that soon after 8th of August 1997, that was the date of the Council of Defence minute, sorry, meeting, in which 4/147 had been considered. Soon after that, the Minister had reverted back, apparently, to the pre-sets of MODAC and had instructed tenders to be issued, so that 4/147, by the VAT Act was super ceded.

He toned down the language from his statement of being super ceded, to a position of reverting back to MODAC, in his oral evidence. He said that later, when that minute of the Council of Defence meeting of 8 August was considered, the Minister qualified the policy as a draft policy that should be studied further.

So, he says that that also, that indication by the Minister that the policy document should be studied further that that also, apparently, according to Mr Steyn, meant that policy 4/147 reverted back to draft status and was super ceded by MODAC. Now, what gave the lie to all of that is that, once the government to government letters have been issued, Mr Steyn himself, issued a management directive on 28 October 1997, in which he, expressly implemented policy 4/147, side by side with

MODAC.

You will recall that those were two policy documents, referred to at the outset of this management directive. When confronted with this, he was driven to the absurd position that the words in that management directive will be regulated by the policy guidelines of reference c, which was clearly a reference to 4/147. He conceded that.

He said that that meant that 4/147 fell away. Now, one only has to look at the document again, to know that it just cannot be accepted. If I may, I could give you the reference in the documents, appended to Mr Steyn's statement. You will find it at page 166. The reference in the transcript, where this is traversed is from page 6602 to 6609.

Mr Steyn had to concede, under cross-examination that there was no withdrawal of 4/147. Instead, under his authority and with the intention that it should govern the SDPP's, he issued that management directive to the defence community that on its own terms, made both 4/147 and MODAC applicable to the SDPP's.

So, on my submission, is that Mr Steyn's attack is found in his statement on 4/147 was completely undone and dismantled, during cross-examination. More than that, the Commissioners will recall Mr Griesel's evidence on 4/147 and how carefully and painstakingly, you spent weeks, understanding the process, which was significant.

Because of course, if there is a process in place and it is robust one and it is implemented the day of return, it reduces the capacity of any one individual, even if, and I do not concede this, but even if, they have benefitted themselves unlawfully, to actually influence what equipment

was acquired. Mr Griesel dealt with 4/147 at some length. But, the pertinent references are transcript 1870.

There he told you that this was done specifically, at the onset of the SDPP's, in order to govern these government to government defence equipment offers. He said the aim was to provide the Ministry of Defence policy guidelines and management procedures, for dealing with these foreign initiated international government to government offers.

He said it outlined an acquisition strategy to incorporate firstly, the equipment offers and that it pertained specifically, to the SDPP's. Bear in mind that Mr Griesel was an Armscor man. So, what he says makes, is of particular significance, you will find at page 1871, line 20. He says:

"This document basically, authorises some of the deviations from our standard process, where this directive indicates a three-tier evaluation and three-tier value system that could exist, for the evaluation of the SDPP's."

And he goes on to describe the first order, being one exercised at strategic level, of which, of course, he had no knowledge, being an Armscor employee, at the level he was. The second order he described as bridging the gap, between the elements of the offer and the separate acquisition projects, on the go.

We know, that is exactly what the second order did. It took the evaluation results of each project team for each equipment type, across the teams, the finance, the VIP and the military value teams and across the equipment, to present a combined, consolidation of that process to the higher level.

Then he says the third order value system, was populated by project teams. They must develop the third order value system, he said, for each individual element of the offer. He describes this as a technical evaluation, including the NIP, DIP, financing and military value processes.

That is exactly the implementation of 4/147, that Mr Griesel described and that you have heard ample evidence on, in this Commission. So, with respect, I adopt the wording of my learned friend, Ms Ramagaga, in paragraph 109 of her written submissions, which she presented, presented on Tuesday. She said that:

"Traditional procurement processes followed, prior to the SDP, were not informed by a Constitutional framework, but were used as a means, to circumvent the UN resolutions and in our view, could not have met the post-Apartheid Constitutional requirements of a transparent, competitive and cost effective tender process."

Those are the elements of Section 217 of the Constitution and to that, I would add, the elements of Section 85 of our Constitution, which entrusts the executive authority to the President and the other members of the Cabinet and prescribes that it is that body that is to implement policy and implement national legislation. If you would bear with me one minute, I just want to check that I have covered everything on this topic.

Commissioners, there is a set of minutes of the Council of Defence, 31 October 1997. Again, you will find that in Mr Pierre Steyn's documents at page 177. I draw it to your attention, because whilst dealing with Mr Steyn, I must draw your attention to paragraph 5.5.15 of

the minute. Where in dealing with the SDPP's and these are early days, in which understandings are only just beginning to emerge of the dramatic nature of the change in the acquisition process.

It is the very Secretary of Defence, who draws the attention of, attention of the council to a most important factor. That is that the third order evaluation, the technical process that has been outlined to them, is in a sense, a decision support mechanism.

He recognises and it is minuted, that this is a bigger issue, than simply a technical evaluation. The politicians have the final say, when selecting the best offer. So, he understood right at the outset of the SDPP's that this was a broader political decision, with national strategic interests at play.

That, whilst the technical processes were an important and essential element of the entire process and we see that understanding again, when they discuss the introduction of the three-tier system for the Air Force, that the trainer is then to be introduced into the SDPP's and the discussion, as it must go through the whole process. Why? Because there is General Hechter, because understand Mr Steyn.

Once it has gone through the technical process, you have a proper basis, upon which to make the best decision. You then bring policy to bear, as outline in the defence review and MODAC and high political level, what is in the best national interest, taking into account the string of factors I read, including industrial participation, transformation, strategic interests, alignment with important international players.

You bring that to bear at the senior level. So, Mr Steyn understood,

from the outset that that was exactly what was required. The Minister of, Deputy Minister of Defence picking up on this debate, then sums it up and we find his summary at page 180 of the documents, attached to Mr Steyn's statement, paragraph 5.5.18. Let, allow me to read it to you:

"The Deputy Minister summed up, by saying that what had been presented was a tool for officials to use, during the evaluation phase. Thereafter the findings go to the Ministers involved, for their consideration and recommendation to government."

We find that sentiment replicated again, in the discussion, pertaining to we must do the evaluation rounds, in order to present to the decision makers, the best basis for them, to make a considered decision. So, far from undermining the third tiers' process, I would say to you, it was a robust one. It was implemented. It was exactly what these documents required and that Cabinet's role was exactly what our Constitutional democracy required.

COMMISSIONER MUSI: Do I understand the situation correctly that the first order evaluation or evaluation, relates to this consideration of the report of the technical teams, by the Ministerial Committee, for purpose of decision making?

ADV CANE: Sorry, Commissioners. I just want to locate the correct page, in the policy document 1/147. That seems to me to be correct, that what is anticipated is the first order, is the implementation of the policy decisions, by the Cabinet and the President and the Minister, once they have the entire third order and second order evaluations presented to them.

COMMISSIONER MUSI: And the second order evaluation does that entail the moderation? Or what does it entail, the second order evaluation?

ADV CANE: Commissioner Musi, I would submit to you, based on the description in 1/147 and the way it was implemented, by Mr Steyn in his policy directive that the second order consisted of that inter departmental committee. It was first called a management committee and then, we read in Admiral Howell's statement that it really came to the core of SOFCOM.

What we read in 1/147 is that it was the embracing of inter departmental sanction, where the appointed project teams results would come together. It speaks of a bridging of the gap, between the different teams and between the different levels, so that it is not as you ask me, a place where decisions or input is made.

It is a bridging of the gap, a consolidating committee and a passing to higher levels. The next level, to which they would pass that input, would be the AASB. One could say that the AASB is also bridging the gap between second and the first order. That is not altogether clear to me.

But, what we do know is that the role of the AASB was specifically mandated and described in MODAC. In some cases, for smaller projects, was in fact, decisive. But, in the larger projects, the way I understand the evidence, is under Mr Steyn, this board then considered the results, the consolidated results from all the project teams and made the decision, as to which equipment it would recommend to the AAC or Council of Defence. It seemed to go by two names.

The concrete example of that is in relation to the Hawk, because we have studied those minutes. There you see, the AASB ultimately come into the view that the Aermacchi was to be preferred. But, it gave the information to the AAC that them, as the higher body, took the decision that it was the Hawk that was to be recommended.

So, each level played its role. But, to go back to your question, Commissioner Musi, I read the second order as constituting that management committee in which Admiral Howell participated and then, became known as SOFCOM, under the chairmanship of Mr Shaik and Mr Esterhuyse.

Having that oversight function of ensuring that the results from each evaluation team for each item of equipment were properly and accurately captured and then presented, in a form that indicated total scoring for each equipment item. You will recall they were represented in tables, so that the higher decision making bodies could then assess first, second and third place, under each separate evaluation and the overall result. Have I perhaps addressed your question?

COMMISSIONER MUSI: I think so, thanks.

ADV CANE: With your leave, Commissioners, I intend now to traverse the very minutes, which we started touching on, which would indicate how the Council of Defence and the Ministers Committee came to a decision, in relation to the Hawk.

What policy considerations were at play and why it is I say that the documents profoundly and unequivocally indicate that the very process, anticipated by the defence review and MODAC were implemented. I am

ready to proceed with it now. But, I am just wondering, whether you would want to take the tea adjournment now or later.

CHAIRPERSON: Advocate Cane, I think, you can go ahead and finish that point. We will take the tea adjournment, after you have finished that point.

ADV CANE: Thank you, Commissioner Seriti. Attached to Mr Steyn's statements, were the various minutes that were relevant to this decision making process. So, the documents that I am now going to refer to are all to be found, attached to Mr Steyn's statement, in his bundle.

The first one appears at page 187. It is a Council of Defence meeting, of February 1998. In this minute, at page 190, paragraph 5.4.16, we read that the Minister, in the context of discussing the issue of how the process is to work:

"The Minister says that the final decision will not be taken by the Secretary for Defence and his counterpart in the Department of Finance."

Because Mr Steyn had raised the question of how these packages were going to be financed and was insisting on some sort pre-prepared and approved financial plan. Now, as laudable as that may have been, and it accords with caution, it was not the approach that the Minister endorsed. Because he was saying in no uncertain terms that the decision was to be a political one.

He states it is to be taken by higher authority. In regard to the raising of funds, he makes it clear that this is something, which government will resolve. This is a classic, the tail will not wag the dog. One asks, is it

indicative of something awry, because Mr Steyn will say so and he did?

My submission is far from it. To allow any other process than that the Minister and his Cabinet keep ultimate control of this major project, which involves strategic alliances, would not be a proper fulfilment of Section 85 of the Constitution. The Minister then stressed that government had a strategy. It was very much a business strategy, we read.

That is why there was so much emphasis on the business plan. Now, bear in mind, this is new. People do not understand it. But, as the minutes progress, we read more and more that the idea is, for the country not only to land up with a core force, but to benefit from sort of strategic input into our economy.

We see that encapsulated in, at page 192 of this minute, where Mr Erwin gets his input and is saying that these, there are going to be spin off effects, consequent upon these acquisitions. What he is intending, is that there will be a massive input into the economy. The secretary of defence again warns against landing up with a huge debt, with defence to pay off.

The Minister intervenes, once again, to emphasize that the government commitment to this package, involves it raising the funding and it ensuring that this is for the long term strategic benefit of our economy and industry. Now, I emphasize those concepts, because they have become second nature to us.

We assume, with the benefit of hindsight that these are basic concepts that everybody understood them, from the outset. But, far

from it, they were new. This was something new that was being done in this country. It was not available to the previous government for obvious reasons.

So, this was unchartered territory. It was very important that those, entrusted with the government, could retain control of it and then show, it was properly implemented. We move on then, to a Council of Defence minute in March, the very next month and I am dealing, obviously, in 1998. We find it at page 205 of Mr Steyn's bundle.

This is the minute where the two-tier, three-tier fighting trainer system debate was held. General Hechter attended the meeting, as you know, and so did Colonel Bayne, to emphasize the fact that the Air Force would not be able to make do with the two-tier system, without an ordinate risk and that, having received the RFI's, they were firmly of the view that a LIFT programme was required, notwithstanding this added expense.

The politicians accepted the recommendations of these very high ranking Air Force officials. But, importantly, I wish to draw your attention to the fact also, that at page 207, paragraph 5.8.7 Colonel Bayne is giving a more general overview of the Air Force's position. He describes the Alpha as:

"A modern, multi mission, fully operational aircraft, to form the backbone of the national air defence network. It would act as a credible air deterrent and contribute to the national projection of stability, through air power."

Now, I pick that up, at this point, because it is in the chronology. But, I

also draw your attention to General Bayne's evidence. I shall find the reference and give it to you, where he makes it absolutely clear that in his view a core force could not be constituted without the Gripen, more accurately the Alpha. He did not stipulate for the Gripen.

That accords with the defence review and the recognition in the core force structure that a substantial number of fighter aircrafts were required. A [indistinct] may confuse us and do not quite tally. But, I submit that is because at that stage, there were two different kinds of fighters itemised in the core force design, totalling 48 fighter aircraft.

But, that was before the LIFT programme was contemplated as a necessary part of the SDPP. So, this new development of the LIFT programme necessitated a reconfiguration from the defence review. What we ended up acquiring were the 26 Gripen and 24 Hawk, if my memory serves me correctly, adding up to the same number of fighter aircraft that had been anticipated in the defence review.

Now, in this very discussion, pertaining to the introduction of the LIFT programme, I want to draw your attention to the Secretary of Defence's role and his understanding at the time. That is encapsulated in the minute at page 208, paragraph 6.8.17. The Secretary of Defence said there were two considerations.

The first is that he supported the introduction of the three-tier system. He said it made sense and he recommended that the council supports the Air Force in that regard. His second point is that the requirement was to a very large extent, influenced by the initiative to secure a broad investment base.

That, he says, is a strategic and political decision. There is a general recognition, he says, of the Minister's initiative. Whether we like it or not, the acquisition process is now heavily influenced by political, economic and other social considerations, from a national strategic point of view.

I say to you that the Minister, the Secretary of Defence, therefore, knew by this stage, very well that political, economic and social considerations would ultimately be the key issue, in determining ultimately what decisions were made. It seems that that understanding was only lost some time later, when he became a critic of the acquisition process and he was outside the system.

The next document is at page 234, the same bundle and we are now in April 1998. It is a combined meeting of the AAC and AASB. I draw it to your attention, because of the comment that the Commissioner made, in closing arguments, I think, on Monday. I think it was Commissioner Seriti, who drew attention to the fact that it was the Air Force itself that had preferred the higher performing aircraft.

It is indeed the case, in paragraph 8 of this minute that we see the project team now presenting the LIFT contenders for the Hawk programme and mentioning that their own criteria weighted towards the higher performance aircraft. Naturally would not any Air Force prefer the higher performance aircraft?

But, they have come to ask, whether they should revise that entire, because perhaps they cannot have that. Perhaps it is too expensive.

That is the very dilemma that they then come to this combined

meeting, at the highest level for. It is at that point, when the Air Force is saying, but can we have the higher performing aircraft, because look how much more expensive they are:

"The Minister of Defence cautions the meeting that a visionary approach should not be excluded, as the decision on the acquisition of a new fighter trainer aircraft would impact on the RSA defence industry's chances to be part of a global defence market, through partnership with major international defence companies, in this case the European companies. With this vision, the most inexpensive option may not, necessarily be the best option.

The Minister requested that DoD acquisition staff to bear this in mind. One asks is that not the kind of Minister of Defence that we needed. Is that not the kind of vision that is exactly what MODAC and the defence review anticipated? Is that not exactly the response that members of the Air Force required to hear?

Consider both, continue, because perhaps you can have the best after all. It will depend on national strategic objectives. Keep going. Far from indicating a corrupt Minister and far from casting these versions that have been attributed to those words visionary approach as being utterly unlawful and not subject to process.

I say to you, they are exactly what our government was required to do and exactly what the process required. We then get to July 1998, which is the special AASB meeting, at page 238 of the same papers. What is important about this minute is firstly, there is a reference to the SOFCOM or second order value system, being the equal ranking of

technical IP and financing, one third each.

COMMISSIONER MUSI: What, what, sorry, could you repeat the date of the meeting, you are talking about now?

ADV CANE: Certainly, Commissioner Musi. We are now on the 8th of July 1998 …[intervene]

COMMISSIONER MUSI: Thank you …[intervene]

ADV CANE: And this is the special AASB meeting. Now, this meeting, as was proper for an AASB meeting, was chaired by Mr Steyn. So, here we have the Secretary of Defence sitting in, on a meeting where the SOFCOM formula is determined, after discussion. It is recognised as entirely rational that those should each play a one third role.

That is picked up in future minutes, where it is explained higher up the chain, to the AAC, as to why that was rational and why it was irrational to keep the financing score, as it a denominator, rather than one third ranking item with IP and technical. I mention it again, because it is Mr Steyn, who raises the so-called illegality of the change of the SOFCOM formula.

Yet, he chaired the minute of 8 July, in which exactly that discussion and decision was made. It is also in that minute that we see there is a discussion, pertaining to the Hawk and the Aermacchi. We see the recordal of the approach, which is to present a ranking, in relation to the costed list, in other words, where cheapest is best, please show is there, what we would be looking at and a solution, where cost is not the deciding factor. So, they are implementing the Minister's vision.

The next minute is of a meeting, only a few days later, on 13 July

1998 and this is the meeting of the special AAC, special in the sense that it is called, to consider the SDPP issues. Again, in that meeting, the explanation for the SOFCOM formula is presented. We see it in paragraph 3 and everybody is on board, including Mr Steyn, who is present, of course, at this meeting.

Again, the LIFT programme options are debated. What we see from the minute is that following the debate, this is all to be presented for higher decision making authority. We then follow that through to a meeting on 16 July 1998. It is at page 277 of the papers. It is a meeting of the AASB and Mr Steyn is again chairing that meeting.

This is where they have a very robust debate on whether to prefer the Hawk or the Aermacchi for the LIFT programme. What we see, are the different positions that encapsulated and we see that the AASB decides to support the recommendation of the Aermacchi, the MB 339 FD. Now, what is important about this also, is that we see that these minutes capture the debate.

There are divergent views. There is a thorough hearing. There is not unanimity. But, is that not part of the process of transparency? Is that not directly in conflict with Mr Steyn's contention that his role, as the Secretary of Defence and as Chair of the AASB was unlawfully [indistinct] and disregarded? Quite the contrary, it went through the right processes and he was playing his full role at each point.

The Council of Defence minute of August, is the next document. So, it is 21 August 1998. The strategic decision is placed squarely before the meeting. Do we choose the MB 339 or the Hawk? The

recommendation of the AASB is the cheaper option, namely the MB 339, squarely placed before the decision makers that the lower order body had determined, or decided on the Aermacchi.

This is where we have the Minister making his enquiries. He asks what the Minister of Trade and Industry's view is. The Minister of Trade and Industry says that the amount of investment coming into the country is of primary importance. It trumps cost, he says.

The business plan was all important. You now know what that business plan is. We have to, he says, from the very beginning we knew we did not have the funds, which is why we have been operating like we are. We are not going through a normal process. We are looking for partnerships, in which the participating countries empower us, through investments and favourable deferred payments, to buy the equipment.

The Minister takes up that discussion and this quite an eye opener. The Minister said, he did not want to leave office one day and be known as the Minister, who plunged the country into debt. He wanted to be known as the Minister, who in very difficult financial times, managed to find means and ways of not only arming the defence force, but also improving our economy.

So, he says it is vital that we keep our options open. Why? So, as to get the best offer for South Africa. Again, I say to you, is that not exactly the level of decision making, which our Constitution endorses? The minute ends with the recordal of the understanding of what the three-tier system involves, what the Hawk can do. Why it is more

expensive.

The Minister says the political decision, should not resolve, revolve around operational aspects of the aircraft. Again, the same warning, you will recall earlier, the same, do not let technical issues determine this. Government must decide if they want to enter the European marked, if so, through which partner.

The defence industries of the world are forming consortiums. If we are not part of one of those consortiums, our aircraft industry will be lost. He said, we must not prejudge, let the politicians decide. This is a decision too big for the AAC, sitting as a debt, with a number of top ranking military officials, the Minister of Defence and the Deputy Minister.

This is the type of decision, which properly and solely, belonged at the highest level. It is that recognition, which then implicates the rule of law. The Minister understands the parameters of this body should do and when it is that the President and his Cabinet should ultimately make the decision.

It is not an easy one. But, he has got his eye on noble motives and rational ones. So, I say to you again, we have every indication of the rule of law at play. We then get to the last document in this series, which is the actual minute of the Inter Ministerial Committee. It is the 31 August 1998 minute. The documents in this regard, commence at page 334.

I remind you that this is the minute, which General Steyn had to get rid of, and so, according to him, either this meeting did not happen at all,

or the minute was a fraud. Of course, that was all dispensed with, through the evidence, the identification of the signatures, the content contemporaneous notes of inter alia, Deputy Minister Kasrils commenting on the minutes.

The confirmation from all involved, who were still alive that this minute indeed, the meeting indeed happened. That the discussion happened, that the consideration of all the issues were debated by the Ministers and that a strategic decision was taken, for the reason recorded in the minutes and also for some others that others individually [indistinct].

Including Minister Kasrils, Deputy Minister Kasrils, who stressed the transformation of Jet to [indistinct] the Hawk, allowing black and female pilots to actually be trained, as there have been the operational capacities. The ultimate decision although, being that the national strategic imperative required a partnership, with BAE in order to prefer the defence aviation sector of this nation.

That then, was the recommendation that went to Cabinet and was ultimately adopted. So, I say to you that there can be no contention that this was irrational. That it did not comply with the rule of law and that it was not entirely proper. Commissioners, may I suggest that the tea adjournment take place, at this point?

CHAIRPERSON: We will adjourn of 15 minutes for tea. Thank you.

(COMMISSION ADJOURNS)

(COMMISSION RESUMES)

CHAIRPERSON: Thank you.

ADV CANE: Thank you, Commissioners. At the outset, I made

reference to the sweeping statement at paragraph 38 of the Institute's submissions, pertaining to the fact, apparently that this country did not need the equipment. There was no need to turn on existent enemies and defend the nation, since there were no enemies.

Now, that logic is found in Mr Crawford-Browne's submission, paragraph 91. As I understand the critics, they are alleging that the underutilisation of equipment, for which there was no rational basis for the acquisition would really mean that it was not a legitimate or lawful acquisition and rather a corrupt one.

That is certainly the inference that may be drawn from the submissions in the Institute's written submission, paragraph 32, 38 and Mr Crawford-Browne's submission, paragraph 91. It is to that, which I now turn. As the Commissioners are well aware, the position, pertaining to the drawing of inferences, or reasoning, by way of inference, was set out in our Appellate division, in the case of R v Blom. The citation is 1939 (AD) 188 at pages 202 to 203.

There His Lordship, Mr Justice Watermeyer set out that where an inference is to be drawn, it must be consistent with all the proven facts. It is simply not proper to draw an inference, unless it is consistent with all the proved facts.

In addition, the proved facts should be such, that they exclude every reasonable inference, save for the one, sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt, as to whether the inference sought to be drawn, is correct. So, applying that to this case, the question is, can you say that the underutilisation or

absence of rationale for the acquisition is such, that one can say there must have been corruption at play, because why else would we have acquired the equipment.

Now, as you are also aware, in the SAFU case and there the citation is 2000 (1) (SA) 1 the Constitutional Court at pages 36 to 37. The court set out, a further ruling on this process of reasoning, by imputation or inference. I refer to paragraph 61 to 64. But, draw your attention in particular, to the principal in paragraph 63, where the learned judge has stated that where an imputation relies on inference to be drawn from other evidence, one has to have canvassed that possible imputation or inference with the witness, to see, whether they can discount it or explain why that inference would not be proper.

Now, credit must be given to the evidence leaders in this case, because they certainly have put these inferences, to the relevant witnesses. The DoD's witnesses were absolutely emphatic, in rebutting any such inference. I give you the example of General Bayne to which I referred earlier, where he said that without a fighter capability, the Air Force would not be able to meet the [indistinct] protection and its defence obligations.

I now have the transcript reference to for that. It is transcript 1118. The proved facts, regarding utilisation of the equipment are really that it is very much a deterrent. It constitutes a core force, without which, the Constitutional mandate cannot be fulfilled, in that, if at any time that a threat should develop, this country will be in a position to respond to it timorously.

It fulfils South Africa's international obligations. It is just not possible to fulfil the Constitutional mandate without that core force. The water from the tap example again. Those proved facts mean that even if there is underutilisation, because of cost constraints, which is exactly what was contemplated, whether the equipments was required, as I read to you, from the defence review.

It nonetheless is the core force and is used, within the budgetary constraints. It really cannot be said that the only reasonable inference is that the acquisition was not rational, because the equipment was underutilised or because we are not facing immediately military threat.

The thinking, in relation to the core force is encapsulated in the defence review. It is entirely rational. It is endorsed by the expert evidence of the various senior military officers that appeared before you. The principal of being driven needs driven and cost constraint, entirely rational. To have every item of equipment operating at full capacity all the time, would be needless waste of resources.

To make that a requirement, it simply means you have completely misunderstood and underestimated the value of the core force. I point you to evidence that the intention from the outset, was always that the use would be needs driven and cost constrained. We see that in the evidence referred to, in our heads of argument. In relation to the Corvettes, it is paragraph 63. In relation to the submarines, it is paragraph 103. In relation to the Hawks and Gripens, it is paragraph 115.

There, the witnesses' evidence that the Hawks and Gripens ratio of

force employment to force preparation were absolutely normal for a peace time Air Force. We have a peace time core force. So, that was the [indistinct] assessed the utilisation. You do not assess it, as if we are actually in war.

So, inclusion on this argument, I submit that when you apply the principals in Blom's case, the inference that the acquisition was not rational is not consistent with the true facts. The true facts do not exclude the reasonable inference that the acquisition was entirely rational, the utilisation entirely, as always intended.

Really, that means that you cannot make the quantum leap from lack of rationality and lack of alleged utilisation into the realm of the corrupt. It is simply not permissible legal reasoning. Commissioners, the other criticism from the institutes and Mr Crawford-Browne's statements pertained to the hearsay evidence, the weight thereof and the fact that it was repeated so consistently in so many publications, would according to them, lend it great deal of credibility and cogency.

It is to that, I now turn to indicate the self-replicating and unreliable nature of the allegations that we have been confronted with. I refer you first, to the evidence of Dr Gavin Woods. Dr Woods' statement, I refer in particular to paragraphs 13 and 64, just to indicate two examples and my point is that the South African government could not claim that the Armsdeal was, is not corrupt. His words were:

"The denial of any possibilities of corruption in the SDP's by the former members of the executive, who have appeared before this Commission is therefore incomprehensible."

And later on, in his statement, when dealing with the way that, at least three of the five prime deals, were according to him, inappropriately influenced and wrongly awarded, he said:

"The likelihood being that such outcomes were contrived in order to accord with predetermined decisions, as to which bidders would be awarded the supplier contracts, this would of course, render the entire process to have been a farce and an appalling exercise in deceit."

There are other examples. But, I need not read more. The point is his language was strong, strident, allegations that corruption and deceit were absolutely at play. There was no [indistinct] of those in, that I actually do not have any knowledge of what I am saying and I cannot produce any evidence for them.

During his cross-examination, He picked up on who it was exactly, that was corrupted and started out with the Cabinet. It ended up as being everyone being exonerated, except for Joe Modise. One of the characteristics of these allegations, which I shall refer to again, is how the Minister that have been deceased seemed to be the appropriate targets.

Now, something rather unexpected happened in this case, because notwithstanding that the Minister is deceased, his wife and daughter came the next day, utterly appalled at what had been reported, as being his testimony. He then backtracked and retreated from that testimony. But, I want to show you, where it had occurred, because it is very characteristic of these kinds of reckless allegations, that really do not have a basis. But, it has done so much damage. At page 8021 of the

transcript he says:

"I have no knowledge of funds having flowed to the Cabinet, especially to the President at the time or the Deputy President. I do have some evidence, regarding monies having flowed to the late Minister of Defence, Joe Modise."

He is then pressed to give some more detail on that and he says, in relation to the President's case and the legal proceedings, concerning the President that he considers those very peripheral to the Armsdeal. That with respect, must be correct, in so far as the other court proceedings, involving BEE transactions, in relation to contracts that clearly would have gone to ADS and in relation to which, the main the identity of the main contractor would play at all.

It must be peripheral. So, there, we are in agreement. But, he carries on saying:

"I never said the late Joe Modise received the money."

Well, let me just read to you what he did say again, because I have it here:

"I do have some evidence, regarding monies having flowed to the late Minister of Defence, Joe Modise."

You see, when the shoe pinches, of course, the record is extremely useful. Then he says, no, it is benefits, shareholdings, favours and you Chair then says:

"So do we understand you to be saying that you never said Mr Joe Modise received any monies as a bribe?

Correct.

Now, are you saying he received benefits?

That is right."

So, we are left with it being watered down to benefits. I take up that exchange then, the next day, when the Minister's wife and daughter appeared and pressed, as they rightfully should have, for further details Ms Modise says:

"What evidence do you have? What can you put there that Modise benefitted?"

And Dr Woods then says:

"I only had references to Mr Modise having received money."

And he refers to a copy of a bank statement, of a considerable sum of money. The bank statement, going into the account of Joe Modise and that is all he knows, he says. But, he says the reporting was inaccurate. Well, I do not know what was inaccurate. So, he again has said that he has got evidence of monitory flows to Joe Modise, backed by a bank account. It seems entirely accurate to me.

So, he is asked to show us the bank statement and what happens, you will recall is he takes us to a newspaper report in his bundle of documents, in which there is a well [indistinct] illegible deposit slip. The deposit slip seems to indicate a name, Modise, on the top of it, with an utterly illegible sum of money.

I could not make out how much it was, into a bank account. It is a very far thing from a bank statement. This deposit slip, published by a newspaper. He has never acquired the original. Ms Modise then takes up the challenge and says:

"I want you to withdraw that statement, because it is defamatory and unsubstantiated."

And Dr Woods' response then is, to be quite confrontational with her that you then take it up and say well, if she is, if you do not have any evidence then should you not withdraw the statement?

Well what statement he now faying some sort of misunderstanding. It is explained to him by Ms Modise the statement that Joe Modise benefited from the arms deal Dr Woods eventually says "well I am not here with any concrete evidence." Ms Modise says "but you have got no evidence then you must withdraw it." He then says "I never claimed to have any concrete evidence'. That is where this exchange ends. Coming with evidence and the outright emphatic acquisition that a minister had received moneys or benefits.

He then goes to benefits and reverts back to money's and he has got an eligible deposit slip published in a newspaper article. He concedes himself that it is not evidence but claims he never had any evidence, also never claimed to have any evidence. That is really the way that his evidence reads on virtually every score. When he was cross-examined on some of the issues, firstly he was asked where he got his information from. This is at page 8024 where I am asking him to name his sources. In fact it is Commissioner Musi, I beg your pardon asking him to indicate the sources of his information. What we are told certainly is one of the important sources is Richard Young and his website.

Apparently Richard Young runs this free service where he distributes all these articles to anyone who puts their hand out for it. So a lot of

what he bases what he says is on the distribution of Richard Young's press article gathering and website information. On that score Commissioners let us not forget, that website we have been told that allegations that are absolutely inappropriate in relation to this Commission has been withdrawn. At the moment they have not been withdrawn, we checked the website whilst that undertaking was been made on Tuesday afternoon and they are still there. To the best of my knowledge they are still there today.

When I confronted Dr Young on the categorical allegations and strong terms in his statement, he says "I have made no accusations of corruption" that is page 8159 and it continues. He is shown what he said in his statement that this corruption is almost irrefutable. That it is a strong statement and what he backs down to is just saying that it is not his allegation that he is alleging corruption. That is really where it ends. Then we go through the five items of equipment and ascertain that he really has no basis to contest that anyone of them would have not been a reasonable and rational acquisition in the circumstances. That indeed in relation to the Gripen and the LUH Program he would have no criticism whatsoever, which is a far cry from the position starting out from his statement.

What I am indicating is the hollowness the lack of substance rather with which the critics have come to this Commission. Let us look at Mr Crawford-Browne for example. Very outspoken critic. No mistaking the categorical nature of his allegations. He is asked upon what he relies on and it seems that is a substantially a draft copy of the JIT Report. In

relation to any sort of questioning pertaining to the evidence of what was required and for what reasons, he repeatedly tells me that I should really be asking Dr Richard Young. That is repeated and adding finite on the matter, what topic he had covered that is then taken up with him.

We see that you should address this type of questioning to Richard Young. It is page 8482 of the record onwards. I will just read some of it to you to give you the flavour.

"So for the technical detail I suggest that you be talking to Richard Young and not myself." I am trying to ascertain what he does know and the basis for his negative aspersions. Again I am told that "I suggest that you speak to Richard Young." Well I say "you are going to have to withdraw that allegations because you cannot sustain it once it is actually examined but he answers, speak to Richard Young." So it continues Mr Chairperson. You take something up with him and he even responds to you 'speak to Dr Young.

I then tell him that I am pressing him for something further to ascertain whether his allegations have any basis. Why he is prepared to rely on hearsay and not the expert evidence of what is actually been presented in this Commission. It continues on the same vein. "I suggest that you put all those questions to Dr Young." I am picking up on the evidence of page 8544 onwards. Again this repeated answer 'I suggest you speak to Dr Richard Young.'

So you will find obviously from Dr Young various complaints about the actual condition of both frigates and the submarines. You then intervene Chair and ask him to answer my questions and he says that it

is not the questions that are the problem, sorry not the questions. It is the answers. It is not the questions and not the answers that are the problem, it is the questions. Again he says "I am relying on Dr Richard Young and his website. I have no personal knowledge of these issues about which you are trying to make me give you answers." Again "you should speak to Dr Richard Young and so it continues.

At the end of the day you cannot examine any substance behind anything that he says or find any reasonable basis for it insofar as the acquisition of the equipment is concerned. The sole basis upon which he is prepared to even make the allegations is dependent on Richard Young's information being correct. Now we have a similar example with Ms Taljaard. An example of her evidence in somewhat emphatic terms is to be found at paragraph 40 of her statement. You will recall that it was deposed too and confirmed under oath.

This is what she says:

"*This is so as the contract themselves left the ability to initiated nullification*."

She is dealing with the question of the contractual validity and corruption issues. She calls is an umbilical link between contractual validity and corruption. Under that heading she says:

"*The contracts left the ability to initiate nullification due to a corruption conviction in the hands of the suppliers. Furthermore provided for the immediate invalidity if acts of revolving door employment occurred with any of the officials involved in the procurement itself, commenced working for as a supplier. This happened in at least one case."*

The observation is that this allegation that the contracts provide for immediate invalidity in the case of revolving door employment is a startling one from a lawyer's prospective because one does firstly wonder what her qualification is to interpret contracts with such profound search mentee*[?]* given that she does not have legal training. In any event the wording of the clauses would attacks any lawyer to arrive at that conclusion. More importantly the factual allegation. That this alleged revolving door employment occurred in at least one case and therefore you should be looking at immediate validity of the entire SDPP.

It is this over-statement and damaging publication of these allegations that I would urge the Commission to deal with. She is then cross-examined or questioned on those allegations. I take it up at the transcript 7771. That is 7-7-7-1 for the record. She reads the relevant cancelation clause. She is then asked or she then says that there was this revolving door employment. It happened in at least one case. The Chairperson asked her then, "or can you refer us to who it was, where the documents, what is this revolving door case that you are talking too?"

She declines to give any further details and she refers to the De Lille Dossier as relating to a member of the navy he was working with the German Frigate Consortium. But she will not name the person. Her statement is then read to her. Faced with that rather unfortunate truth she gets very uncomfortable and she attributes the mistake an editing issue between herself and the evidence leaders. She carries on with

her evidence and after an adjournment to give her the opportunity to sort this out with the evidence leaders. The issue is then taken up again at page 7814 and she says that the issue around Rear Admiral Johnny Kamerman but that she had been informed and apparently shown a document during this adjournment. She says "but I do not want to express a few on this anymore. I actually want to withdraw this entirely." So it ends with her deleting the relevant portion of her statement because she says that she has no personal knowledge of this.

Now again it is an example as was the example from Dr Woods and Crawford-Browne of how categorical statements are made in the public domain that really cause concern. Yet they have no foundation and upon analysis has been shown to utterly empty. She off course is a person I think of some integrity who can recognise her error and at least correct it. That is quite different from Dr Young who notwithstanding having no basis to persist with those allegation has done so even until Tuesday afternoon.

We need only remind ourselves if the evidence of Patricia De Lille and the fact that she declined to answer any question of substance from the basis that she had no personal knowledge. That she had simply taken the De Lille Dossier, put it into the public domain required an investigation. The criticism of her is that she held a position which would require some accountability before doing so. Some testing of at least, at least one source of some reliability if not two. It appears that there was no such inquiry as to the reliability of that dossier at all.

Our heads of argument deals adequately with that. So are faced with

repetitive allegations that seems to be self circulating that are not independently investigation by the people that are prepared to draw conclusions of corruption. In the book authored by Paul Holden and Hennie van Vuuren, *The devil in the Detail* we are told in no uncertain terms right at the outside that in process in collating material for this project we have relied extensively on those who have come before us, in particular Dr Richard Young. He was a vital source of information who generously granted us access to his archive to Arms Deal related material flowing from the botched joint investigation report.

The other individuals that they named is Mr Steyn, Mr Crawford-Browne and surprisingly Admiral Howell for granting him an audience. Again this allegation that they are independent sources and therefore the material should bear more weight than hearsay otherwise would, is one be take strong issue with.

In turning to the actual footnotes or sources for the material published in the Devil in the Detail. What you will find in the chapters dealing with the actual equipment items, particularly chapter 3 and 4, chapter 5 I beg your pardon. Are that for the most part they have relied on the JIT Report and material obtained with the kind permission of Dr Richard Young. So much for independent research and independent sources.

We see one or another example of this kind of maligning of hi ranking officials. An example of Admiral Simpson Anderson. There I would ask you to have particular regard to paragraph 262 of our heads of argument. Commissioners if I may just remind you of the content of that

submission. It is that in the context of dealing this whole circulating and maligning of hi ranking officials were referred at more Simpson and Anderson. The fact that the basis apparently of his corruption is to be found in the German investigations. When Advocate Cooper exactly what the logic was is apparent from that report. Even Dr Young had to concede that these allegations were nothing but speculative. He then retracted and sought to disavow that he personally had made allegations against Admiral Simpson Anderson. He certainly had no other basis upon which to stand his ground. This was exposed.

What we have seen throughout in previous versions of his statements and previous submission and in Constitutional Court papers deposed to under oath. We all, we have this repetitive maligning of Admiral Simpson Browne's apparently playing a corrupt role. He then says that it is or more of the same. You cannot accuse me of more than one outrageous act of defamation because it is all the same defamation. That goes back to the starting point, the chicken and the egg scenario. Are we dealing with Dr Young commencing all of the stuff, feeding it through numerous other sources by way of his website. Feeding it through Mr Crawford-Browne and through Ms De Lille to the Germans. Or are we dealing with the Germans a rouge investigation that is withdrawn, that was unauthorised, fed by Ms De Lille and Mr Crawford-Browne. We know that from the document themselves. Getting back to Dr Young for him to then distribute in our committee as being a basis of this acts of reckless defamation.

One can hardly pin it down, capture it that is the danger of all of this

vilification. None the less, when on decks down one finds no solid source to any of it. Nothing reliable nothing that actually stems from any personal knowledge. On the contrary what you have is people telling you what an outstanding Admiral and Chief of the Navy he was. Whilst I am there I should perhaps deal with this alleged other source for the German document that Dr Young first raised in his heads of argument.

What he did is, he picked up on a series of emails exchanged between one Velovsky and Advocate Downer during August 2008. He found this exchange of email in Colonel du Plooy's files. He says, all right. Now we know what the author was. What he points too is the fact that the documents which we will call RMY, Richard Young Attachment 52 and 53 actually bore her name at the end of the copy that was in Colonel Du Plooy's documents.

Whereas on the documents provided by Dr Young to the Commission that had been erased. We find Liola Velovsky's correspondence with Billy Downer in Colonel Du Plooy's file at pages 2252 to 2254. It is labelled JDP53. I start with the first in the series of emails. Which is an email at first… sorry. It starts off with an email of 15 August from Velovsky. She has been in contact with Billy Downer. She says:

"*Any information aid I could give you would be on a non-official and off the record basis and on my own risk. So far I have not involved anyone else in the department or the prosecution office. I was a member of the police investigation team*."

So we do know that she is member of the police and not a member of the prosecution office. She tells him that they closed the case. What he

should do is seek to get an MLA and good luck with that. Really what you have if she is the author is the knowledge now that she was a person working in the police. That whatever she would give would be on a non-official basis and off the record and at her own risk, ie this is a pilfered document. Exactly what we thought.

Downer then writes back to her and says:

"*Dear Ms Velovsky. We do not have much at the moment we only have press articles. Is there any way that you could sent us unofficially a copy of the request or failing this provide us with sufficient information that would enable to frame our MLA request*."

She then encloses some documents in her reply. She says then that:

"*That is the only the Prosecuting Authority could authorise the MLA not the police. It is not an area of any expertise of hers. (She speaks of) Ms De Lille having once mentioned the payments to the Nelson Mandela Children's Fund and the ANC. The Foundation for Community Development. She says that Ms De Lille mixed up the details but that they found some further documents. She attaches two further Word documents which I wrote in preparation for our MLA to Britain regarding the bribery allegations. Please keep them and the third one confidential. I do not think that they are even part of our official files.*"

That is a startling thing. It does make one realise that Advocate Downer would certainly not himself have attributed the possession of these document to any proper source or lawful means. Dr Young's effort to somehow enhance the status of these German investigations by the use of locating the source in Ms Velovsky is entirely misconceived.

It does him harm. What is does show us is that these were not even officially on file. They were provided by a police person entirely unauthorised on the basis that they would be kept confidential. Solely in order to try and assist him to bring an MLA.

So we are back to where we start. Which is circular maligning allegations against all involved without sufficient investigation, without responsible checking of sources. These allegations have form the basis for so much of what Dr Young says and we see that they are on such a tenuous basis. I need only remind you that the Prosecuting Authorities [indistinct] this kind of investigation and withdrew it. It stated that there was absolutely no basis whatsoever for following up with the persons named in those reports.

Commissioners I would like to turn to Dr Young's submissions at this point and give you the Department's responses to his heads of argument in an abbreviated form. In that I will simply give you references to our heads of argument and only deal with a few of the topics that he again raised. Please do stop me if I can be of better or further assistance to you. I just do not want to belabour the issues for too long. I wonder if I may ask you to turn up his written submission. The easiest way would be to note against the paragraphs and topics he raises where our detailed responses are located.

You will notice at page 11 of his submissions that he deals with the policy document 4147 which we have already traversed this morning. However at the end of that topic, paragraph 73 and 74 he states that the IMS, the decision by the Project Control Board pertaining to the IMS and

it's alleged de-selection was unlawful. He refers to flawed reasoning regarding risk and the risk of driven process. That has been dealt with. That issue of risk in the IMS in paragraph 188 of Defence heads of argument.

I would ask you also to note that the PCB's decision making capacity and the lawfulness of that is traversed in paragraphs 202 to 203. The next topic is the scoring from the Corvette selection. There he deals with the Softcom Formula which I have referred to this morning. I would refer you also to paragraph 156.2 of our heads of argument. In paragraph 79 he says that:

It is a combination of this change of formula plus a serious arithmetic and other errors which leads to the quantum leave into paragraph 80 that there is a bribery agreement, initially here. Now the evidence in this regard is that the results of the third or the evaluations were added together. Mr Shaik had not role in the third order evaluation process. There is no evidence that any manipulation occurred at the Softcom or second order level. You will recall that during the evidence of Mr Steyn we traversed the tables that emanated from Softcom all the way up the hierarchy. Nobody suggested that they did not capture the results of the third order and that they were not accurately conveyed all the way up to Cabinet.

What Mr Young is doing is attributing to Mr Shaik a mathematical genius of repetitive and cumulative and premeditated manipulations in calculations. Then when added all up and combined with the change of formula throughout a predestined result. I submit to you that it is utterly

improbable but over and above that you have the evidence of Captain Reed and Admiral Howell; Mr Griesel; Mr Grobler all of them describing this process. How it was checked and audited. In Mr Grobler's case in fact even stating that he himself checked the full sum of the calculations and formulas particularly pertaining to the submarines.

He was satisfied that they were correctly done. If I may then go to paragraph 84. Dr Young writes there and he is dealing with the shareholding of ADS and the fact that it was taken over by Thomson in mid 99. This in effect nullified the rationale for nomination of ADS as a South African Company to exclusively undertake the integration of the Corvette Combat Suite or supply any of its components systems and sub-systems.

It is actually alarming to read allegations of this nature when they are so contrary to what the person himself said in contemporaneous documents from the time. In this regard I refer you to volume 1 of the cross-examination by Dr Young. Page 212, I would like to take a moment to open it and refer you to some aspects of that. At paragraph 21 Dr Young says in a memorandum capturing a consultation between him and his legal team:

"*That although ADS is a South African Registered Company it is not foreign owned. However we recognise that there is no other single company in South Africa with the requisite experience to take its place.*"

It seems that when Dr Young cannot hold down an allegation of [indistinct] criticism as he is unable to concede when he is wrong. He is unable to engage rationally with the documents and see any other

viewpoint other than his own. He is a dangerous source from that perspective because he lacks judgment and he is reckless in the allegations he makes.

At page 16 of his submissions he is dealing with the information management system. Now there at paragraph 93 we see another mutation, a late blooming version absolutely astonishing for C-Squid-I-Squid Systems never tendered for the IMS Project for the Frigates. It had been nominated. That is not new, the nomination theme is not new. However this suggestion that C-Squid-I-Squid did not tender for various items of equipment extended to the other items of equipment in the SDPP as well. He says that they were pre-selected from September 1997, that date is important because it is on 22 December 1998 that we have the IMS offer, documents from C-Squid-I-Squid. You will locate those offers in the cross-examination bundle, volume 4 at page 785 and 787.

Admiral Kamerman deals with this in paragraph 140.5 of his statement. We deal with it in our heads of argument at paragraphs 182 to 187. There indicate how flawed and analyses are shallow, how narrow mined the contention is that C-Squid-I-Squid was nominated from September 1997 and therefore it's alleged de-selection was unfair. Now in paragraph 94 he is referring to project Suvecs and the development of the IMS and it is again his nomination theme.

What he is saying is, is that the IMS was in effect fully developed, you will find that in the second last line. In effect if is fully developed he says. We know from Admiral Kamerman's evidence, paragraph 35 to 39

of his statement that Suvecs just did not give rights in relation to capital acquisition projects. We know also that this technology demonstrator was not complete. You will please refer to Admiral Kamerman's paragraph 150.10 to 150.13.

We know also that it was not complete from Dr Young's own documents. Again I refer to his cross-examination bundle, volume 4 and I refer to the letter at page 215 which is a letter from him to the managing director of ADS. In paragraphs 1 and 2 he recognises the risk which detaches to his system. He says that:

"*We understand that this would make taking responsibility for the IMS a difficult undertaking for Thomson CSF, unless they had clear visibility into the IMS in terms of performance, completion status and risk factors."*

In paragraph 3 he presents the argument that development items always represent some risk and the only items that have risk at all are those that are probably obsolete his says. Well I do not think anyone bought that one, nonetheless. The concession is there that we are dealing with a development item. Paragraph 3.3 he refers to the development item. Paragraph 3.5:

"*We can only therefore conclude that Thomson ADS's reluctance to select the IMS derives from a culmination of cost-risk factors which are of course very difficult to quantumfy[?]*."

Well he did actually the issue. He understood the cost-risk factors. At page 208 of that bundle in the same letter he is talking about when the various milestones involved in the IMS would be complete. He

suggest that milestone 3 would be complete within a week or two. We know from his next letter, more than a month later that he was projecting even more time just to reach milestone 3.

What he is saying is that regarding responsibility for performance C-Squid-I-Squid Systems are definitely prepared to put our money's where our mouths are regarding IMS. In this respect we are more than willing to discuss matters such as performance guarantees for the IMS. Well I pause there because it is the same person who says that performance guarantees were not raised with him. He was not alive to this issue. What happened is they had an informal discussion at the Naval Headquarters not a meeting. You will recall that is what happened when Mr Lew Swan and Admiral Howell went to meet with him, according to him.

These are matters which has been mentioned informally during the preparation of numerous rounds of Alpha preparation but has never been formally raised between our two companies. He again speaks of the targets for pre-integration readiness. When it may be ready to be reviewed. When there is factory acceptance test and so on can be carried out. The surprising thing all of this is notwithstanding that the Department of Defence has travelled so far to unpack their erroneous and false nature of these nomination type allegations, entitlement type allegations arising from a technology demonstrate in the Suvecs project. Dr Young is unable to engage with that level of reasoning and persists with the same allegation nonetheless.

Commissioners I have just been reading from cross-examination

bundle, volume 1 page 220 to 223. For the record this is traversed with Dr Young by my learned leno*[?]* Mr Cooper in cross-examination at transcript 10317 to 10319. Again there by reading the transcript one comes to the conclusion that Dr Young retains a rigid and obdurate stance.

In relation to the contract architecture he begins that theme at paragraph 96. We see it up to 98. What is surprising about this is it was certainly a large part of his evidence in chief. All culminated after much detail in the bottom line is which that an agreement was reached in relation to the Combat Suite architecture. You will recall that the diagram upon which he was able to confirm with Advocate Cooper that an agreement had been reached was the diagram in cross-examination bundle page 750.

It is the concession that you will find at transcript 10251, line 15. It is important I am afraid to go through this in finicky detail because what it does indicate is notwithstanding that you have actually agreed with Dr Young that a common cause position was reached in relation to architecture. It does not mean that it is the end of the issue. He is unable to let it go. So we find it re-surfacing even in heads of argument.

In paragraph 99 he raises the evidence, the hearsay evidence of one Captain Marias and that has been dealt with in our heads of argument at paragraph 204 to 207. At paragraph 103 he complains that the fact that Thomson knew the price for the IMS is also established in that in a raid on Thomson's offices documents were seized which included the presentation of his company's price. Now of course one would have to

know if that fact meant anything, when it was that Thomson came into possession of that material, I am under correction but I am not aware of the fact that, that was traversed in evidence.

So the issue whether the IMS price was disclosed is based on two things. It is the tenuous and utterly unreliable hearsay evidence of one Captain Marais and then on the seized document. Even if we have a dispute of fact there in relation to the seized document the choice of the IMS was not determined by whether the price in the BAFO presented by C-Squid-I-Squid was cheaper than the Diacerto Databus. There issue here was the risk of taking on a technology demonstrator not yet used in any warship and a main contractor that will bore ultimate liability should it fail refusing to take over the risk of that product. There is nothing irrational about that logic. It is commercial, it did not inure to C-Squid-I-Squid's benefit.

Really in this bigger contractual undertakings where there is to be a main contractor taking risk for the whole lot, as I have pointed out to you was envisaged in the Defence Review and MODAC. These kind of commercial realities are going to come to play. They do not lead to an inference of corruption. That really is the bottom line. Dr Young's topic of risks commences at page 18 and carries on to page 22. If I may give you the references in our heads of argument setting out that really that the state's only viable option became the Detexis Databus. Those would be paragraph 188 to 198.

I submit that the choice was entirely justified, no inference of corruption could arise from C-Squid-I-Squid's loss in this case. To come

to a contrary finding the Commissioners would have to overlook the evidence of Mr Nortje. Admiral Kamerman; Admiral Howell and importantly also Jayendra Naidoo. You will recall that at transcript 6912 to 6914 he was asked to explain a reference in the minutes pertaining to the risk relating to this sub-contract.

He set out eloquently that this had nothing to do with risk of technical failure. That was not the basis with which it should concerned itself. I read from transcript 6912 where the minutes are identified as being those of the sub-committee of Cabinet Ministers of 26 May 1999.

He explains:

"*The negotiating team was seeking the put the full responsibility for the entire ship and the finance package for the entire ship on the shoulders of the Consortium, the German Frigate Consortium. There were strong views. They could not be asked to take the risk of the thing to be integrated with the ship, blindly. The considered this to be a matter of high risk because it was a huge financial obligation on them.*"

So there is nothing here in our comment that had anything to do with technical aspects of competencies of the solution that was being proposed. It was simply that from a financial point of view the prime contractor was being placed with the responsibility to take over all the risk for the package which would allow us to fund it on a slightly better footing and manage the risks of delivery on a better footing."

So we see very important considerations triumphing the narrow technical issues that Dr Young focuses on. The high water mark of his allegations in this regard are to be found at paragraph 114 of his heads

of argument where he says that this choice for the Detexis was a self-serving and opportunistic ploy to replace the IMS and to change the entire Combat Suite architecture to suit that of their own Combat Management System with all the technical and business benefits that, that would bring about.

Well does this not just boil down to a more powerful commercial competitor refusing to let a tiny sub-contractor call the shots. Is that not the real world. Is that not the conclusion that if this made commercial and financial sense to all concerned that it would be entirely rational and logical for the Detexis Databus to be used?

The only act of irrationality in all of this is that after so many years Dr Young is unable to grasp and accept that reality and muddies the waters with allegations and corruption and smearing of even the Chief of the Navy with vicious allegations because of his resentment arising from the loss of this contract. The System Management System is his next topic. That has been deal with in our heads of argument in paragraph 208 to 211.

Essentially to remind you Commissioners the C-Squid-I-Squid offer excluded the costumed furnished equipment and did not take into account ADS's margin. In other words once that 12.05% was added it was in fact not the lowest offer. He deals then with the disclosure of C-Squid-I-Squid's pricing at paragraph 120, that has been covered in our heads of argument. Paragraph 205 to 207.

He then goes on to allegations of corruption pertaining to the Corvette Platform and he deals with the German investigations. You will find our

response on the German investigations at page 128 of our heads of argument. I also refer you to Dr Young's paragraph 129 where he raises the Liola Velovsky author. I have indicated to you that, that in fact aggravates the issues with these documents. It does not enhance their weight.

At paragraph 137 of Dr Young's submission he is dealing with the Totonic Memorandum. The answer that the Department suggest to you in that regard is at paragraphs 265 to 266 of our heads. Paragraph 143 Dr Young refers to the conclusions of the German Investigating Authorities. That is an overstatement to say that they came to conclusions in the light of the fact that the preliminary investigations were withdrawn or closed in January 2008. We have set out the evidence in that regard in paragraph 257 of our heads of argument.

Dr Young then goes on to deal with the Shaik Trial and the Shabir Shaik conviction. In that regard we would want to point out to the Commission that ADS was the only South African Company capable of providing the Combat Suite. It needed a BEE partner and whoever that BEE partner was going to be would not in any way change the fact that ADS was going to provide the Combat Suite.

Similarly the fact that you have a BEE partner may well lead to an income stream and that is entirely independent of who the main contractor will be. That is why I submitted that I agreed with Dr Woods that this particular conviction and trial and issue pertaining to the shareholding in ADS does not affect the identity of the Combat Suite or the identity of the main contractor. It is therefore difficult to see how it

influenced the awarding of the contracts in any way.

We then move on to another topic at paragraph 153. Dr Young proceeds to discuss the price paid for the Corvette Combat Suite and how this interrelated with the missiles and provided some sort of fund from which corruption could be perpetrated. We have dealt with that thoroughly in paragraphs 227 and 228. In fact also 229 of our heads of argument. Dr Young then moved on to BAeSEMA and the ASM Consortium. Our heads of argument traversed this at paragraph 246 to 254.

What is notable is that Dr Young persists with an interpretation of events that cannot be reconciled with the contemporaneous documents. There were minutes of meetings in which he sat and participated. His attempts to explain them away are utterly unconvincing. It is clearly very important to Dr Young that he digs himself out of that hole because it takes a number of pages in his heads, that I submit that the hole is far too deep.

It was from these allegations at paragraph 165… sorry let me start that again very inelegant. Dr Young contributed BAE's withdrawal from the competition and the circumstances under which it withdrew from an allegedly must win opportunity as been indicative of something deeply wrong. He expresses that at paragraph 165 of his argument. It was he who created a theory that there was corruption at the highest level. This is dealt with in our heads of argument, paragraph 251 to 254. You will see that the evidence established is quite clearly that it was based on a misunderstanding that Dr Young really did misunderstanding what home

country meant and to what people were referring.

Yet even when this is indicated to him and shown to him and rational debate held he cannot let go of very serious allegations of corruption at the highest level. There he names some of our most senior government officials. The surface-to-surface missile issue is the next topic in his heads. We deal with it at paragraph 230. I submit there is nothing mysterious in this. The only mysterious thing is that Dr Young cannot understand that the supply terms meant that these missiles were purchased and paid for. The IOPMS Simulator is dealt with in our heads of argument paragraph 216 to 226.

What is alarming about his continuance with allegations that there is something deeply unfair, corrupt or bad in this is that you will recall this was the sub-contract where his manager dealing with this very equipment type met with the GFC personnel in Germany. The reasons for the loss of the contract were explained to Mr Knight. They were recorded in a minute of the meeting that was signed by Knight.

They were brought back to this country and given to Dr Young within a couple of days fully aware of the issues and why they lost the contract. Even here, even in relation to this third sub-contract that he did not win it is apparently suppose to be evidence of corruption of a wrong process. We see again that his complaints are baseless and vindictive. That when he loses he is a bitter and vindictive loser.

CHAIRPERSON: I am sorry Advocate Cane. I remember Dr Young saying that the three bids which he won the process was fair. He then went on and said that the three bids that he lost the process was unfair.

What I am trying to find out is, was it the same team which adjudicated all the six bids or not? I do not quite understand that it can be unfair when it comes to this three in the same people could be fair when it come to the other three. That is why I just wanted to find out whether it is the same team which adjudicated this six bids or not?

ADV CANE: Commissioner [indistinct] thank you for the question. May I remind you that we dealt in our heads of argument with the contractual model. I think that is very helpful in understanding this. By this point when sub-contracts are being awarded we have a main contractor GFC or sorry the SSAC[*?*] Consortium. So every sub contract was a contract they awarded and took full responsibility for.

We also had the joint project team that would have been working with the Consortium in relation to what was acceptable to the Navy. So you have both those teams working in tandem to procure an end result that is acceptable to the client and acceptable to the main contractor. So it is in every case of sub-contracting the same process. My instruction are to confirm that, that is correct in that the level 3 processes with which are dealing was always the same personnel dealing with those issues.

Commissioners I perhaps need another 15 minutes. I wonder whether I should wrap up after the lunch adjournment?

CHAIRPERSON: Okay thank you. We will then adjourn for 40 minutes. Then we will deal with that issue.

COMMISSION ADJOURN

COMMISSION RESUMES

CHAIRPERSON: Thank you.

ADV CANE: Thank you, Commissioners. Commissioners, we then are looking at page 37 and 38 of Dr Young's submissions, dealing with the revolving [indistinct] issue. If I could ask you to make note that Admiral Kamerman's statement traverses whether the person who signed his letter was capable of deputising for the Chief of SANDN. You will find that in paragraphs 104 and 154.4.

Really, the essence of our submissions is that the deputisation by the person who was Admiral Kamerman's superior, the Chief of the Navy, a person to whom he always reported, was acceptable to him, Admiral Kamerman, to the [indistinct], his new employer [indistinct], and acceptable to the South African Navy. In fact, the South African Navy honoured Admiral Kamerman after having left his employ in a public way. It really is surprising that an outsider can make allegations that the Chief of the Navy could not deputise for the Chief of the South Africa National Defence Force in these circumstances.

One wonders why he clings to this with such tenacity. What should also be clear, is that when one is dealing with revolving [indistinct] corruption, it implies that the official involved has favoured the new employer, and so there is some reward of employment at the end of it. That is really cut off at Bonice, if one considers that in both rounds where Admiral Kamerman played a role in the evaluation of the competing Corvettes, his team recommended the Spanish [indistinct]. You will see that that is captured in paragraphs 92 and 96 of Kamerman's statement.

I then proceed to page 39 of the submissions, which deals with the submarines and allegations of corruption in that regard. The important evidence before this Commission, testified to by both Captain Reed and Admiral Howell, was that the GSC submarines were R800 million cheaper than the second placed contender, the Italian Fincantieri. So, even Dr Woods, who was really a critic of this process, gave a reasoned response that in those circumstances you would not ordinarily draw any sort of inference of corruption.

What you have in addition to those extremely powerful facts, you have Captain Reed's evidence, which was in fact that the GSC was the best value, and was clearly the best choice. We see that in paragraphs 42 to 43 of Captain Reed's statement. I also refer you to paragraphs 26 to 29 of Captain Reed's statement, because he deals with a very detailed explanation, how the calculations and scoring were done in regard to the military value leg of the evaluation. Dr Young sees fit to challenge that in paragraph 205.

In addition to Reed's evidence, you have Admiral Howell's evidence, and there I refer you to paragraphs 50.3 and 51 of his statement, where he outlines where it was that the formula to determine military value was employed. Now, that formula you will recall was audited by Mr Grobler, and he personally checked the application of the formula and accepted it. It was also both Admiral Howel and Reed's evidence that when the matter [indistinct] SOFCOM, it was openly declared in their evaluation report, and it was accepted by all present.

There was no lacking of transparency in the way it was done, and you were given absolutely rational reasons for why it was done.

So, at the end of the day we have Dr Young relying on the German investigations, which are inherently unreliable bases for his allegations. And against that, you have a cheaper submarine by R800 million, you have the emphatic evidence of Captain Reed's and Howell that this was the best submarine, GSC was the best submarine available, and you have a proper explanation as to why the formula was used. In those circumstances there are no room for any inference of corruption.

I would then like to go on to paragraph 214, where Dr Young deals with the LUH acquisitions, Light Utility Helicopters, and just remind you that they have the evidence of Colonel Viljoen, to the effect that the Augusta 1, the evaluation rounds, and interestingly Dr Woods and Crawford-Browne accept that this was an aspect of the SDPP's with which they would not take issue. They did see the value in acquiring the LUH's.

Dr Young then proceeds to say that the [indistinct] report requires some further attention. We look at paragraph 218. This is not ventilated fully by him, but nonetheless an issue that is before this Commission, and I would appreciate it if you allow me to make some submissions then on what to make of the JIT report and its weight. I made the obvious point of which you are aware that this Commission an appeal or review in relation to the findings of the JIT report. If either of those scenarios were true, it would be limited to a reconsideration of the same

evidence that was before the JIT, and in a case of a review would be looking at the reasonableness, lawfulness, present [indistinct] or perhaps even malicious findings by the JIT, in order for it to intervene.

The contrary is the position. The Commission is empowered to hear all evidence on the issues pertaining to its Terms of Reference, and it is empowered to investigate the issues before it afresh. That means that in relation to the JIT report, whilst it may indicate some issues that require investigation, any opinions expressed therein are not even persuasive, they are merely an opinion. It may be wrong, or a result of a misdirection or error, they may just be the result of insufficient and different evidence. They may be wrong simply because the Commission comes to a different view of the same facts. That is what this Commission is about.

The JIT report left controversy in its wake and failed to settle the issues, and it is up to this Commission to consider and investigate the matter again, and not to consider the JIT [indistinct] findings as being any higher than another body's opinion. This Commission is therefore at large to reconsider all those matters, with reference to the evidence it has heard, and come to an entirely independent finding of its own.

If I could then ask you to turn to pages 44 and 45, we deals with Admiral Simpson Anderson, and I ask you just to note that we covered that in paragraph 262 of our heads, which I traversed earlier in my address this morning. I do draw your attention then to paragraph 232, concerning the German investigations again. To indicate the lack of responsibleness in these types of submissions, we are told that the only

reason why the German's Investigating and Prosecuting Authorities had terminated their activities by 2008, was that the statute of limitations have come into effect in Germany.

Now, we deal with this in paragraph 260 of our heads, that you will see that statement is not based on evidence. Dr Young has not evidence of these matters. In fact, the documents indicate that the Germans had withdrawn, or put a close to these investigations for entirely different reasons. He concludes at the end of that paragraph that the Germans were more than willing to assist South African investigation and prosecution.

Now, there again, surprising submission, one wonders where it comes from, because what we know from Dr du Plooy's evidence, and also that of General Meiring, is that the South African authorities had substantial difficulty getting that sort of mutual legal assistance going. What we know from the copy of the letter informing one of the accused the investigations had been closed, is that the Investigating Authority distanced itself from that investigation in quite majority terms.

I draw your attention to page 136 of our heads of argument, in particular footnote 531, because that is the reference to Du Plooy's evidence in this regard. I make the point there that there is no record of any German authority, whether officially or unofficially, having responded to the South African investigators, or having provided them with documents. That was indeed one of the difficulties the local investigators faced.

Now, in relation to the actual reasons for withdrawing those investigations, it is paragraph 260, the reference I gave you a moment ago of our heads. What is absolutely clear from the German Authority's letter to the relevant accused person, is that they say these investigations are assumptions, it expresses disapproval of relying on unconfirmed police reports. It recorded that the documents indeed found in the Ferrostaal offices, do not permit the inferences that [indistinct] or afforded to foreign officials. It recorded that it was both impermissible and wrongful to be embarked upon these what had turned excessive investigations under the circumstances. And, it recorded that there was no court whatsoever that would justify the further contacting of the persons listed therein, which would indicate that they are saying there is no bases to even contact the people named in these documents, and start subjecting them to some sort of interrogation.

Indeed, Mr Klaus Wiesermark confirmed that the investigations were closed without any charges being preferred. So, really paragraph 232 of Dr Young's submissions is without a bases, and is not a reflection of the position before the Commission.

I then ask you to turn the page to paragraph 235 and 236. Dr Young raises whether it makes any sense to abandon these German investigations, and ours actually. The point there is that General Meiring and Colonel Du Plooy have given their reasons. They are rational and reasonable, and it really would be very, very difficult to justify a conclusion that at this stage an investigation based on the same documentary records available to those authorities, with the same

logistical difficulties, with the lapse of more time and the further exposure of Dr Young's statements and complaints as being hollow ones, and the exposure of the extent to which others have used their credibility and positions but somewhat carelessly only in reliance of these allegations stemming from the likes of Dr Young, would mean that a further investigation is so unlikely to yield any different results, that it is hardly responsible to recommend it.

I then go on to Dr Young's... [intervene].

CHAIRPERSON: I am sorry, Advocate Cane, just on that point. Assuming we want to recommend a further investigation, in our recommendation who can we say that should further investigate this? We know that [indistinct] investigation has been closed. In UK the investigation has been closed. Germany [indistinct] investigation been closed. Switzerland's investigation has been closed. I am not sure if [indistinct] any other country which is still continuing with this investigation. In the light thereof, if [indistinct] make a recommendation that another body should investigate, which body will that be, because we know locally [indistinct] investigated? We know people like General Meiring was an experienced police officer, and they were coming to the conclusion that it does not make any sense to continue with this investigation, because as at that time, as Colonel du Plooy told it, they could not find any *prima facie* evidence against anyone.

Now, if that is the position, who else can investigate then? [Indistinct] particular if we take into account what we now know.

ADV CANE: Commissioner Seriti, I am pleased to have been phased with that proposition, because it is certainly the department's position that after having conducted this extensive negotiation, this Commission will be in a better position than any other body, certainly in this country, to make the findings that need to be made. You have had the complete overview from beginning to end, from the top to the bottom, and it is hardly imaginable that another body could possibly conduct the length and breadth of the investigation that this Commission has conducted. We know that it has been a substantial investment that such an investigation could be conducted. You have a broad overview of every single aspect of that process.

So, we would urge you to grasp the nettle and make the necessary findings, so that there is some finality. We would certainly urge against the temptation to refer any single aspect to any other body. They simply could never be in as good as a position as you are, as two very senior judicial officers in our courts, to come to the findings that are the best findings that can be made on the available evidence. There is no further evidence that could come to light. There is no reason why a new or fresh [indistinct] should be brought to bear. This should really achieve finality, and we do employ you as the department to ensure that it does that.

CHAIRPERSON: Okay.

ADV CANE: I then turn to Dr Young's attack on the evidence of Admiral Kamerman, which begins at page 47, and runs for several pages. In this regard the allegations largely pertain to the employment of Dr

Young with UEC, and later ADS, and his relationships in the past. Now, the Commission has heard both sides of the story. It is a factual dispute between the two men, but Commissions and judicial officers are obviously often called upon when there are competing factual positions, once they have heard the sides to make a finding.

What you have before you is Dr Young's version that he has long standing warm relationships with others. And, you have Dr Kamerman's contentions that in fact his past is a fractious one, that he is prone to aggressive outburst, and that he offends people with his acerbic tongue. Now, I submit you have more than enough evidence before you to determine whose position is correct, and that you should turn to.

I ask you then turn to page 50, and we see there at paragraphs 245.32 and 245.33 two instances that I have picked out where Admiral Kamerman is accused of giving false evidence. First, apparently it is false that there is no other Naval Combat System Integration capability in South Africa with an ADS. Well, I have already read to you Dr Young's own version on that. Apparently it is false that Young acknowledged that ADS was the only company in South Africa capable of [indistinct] for the Naval Combat System Integration. I have read to you Dr Young's own words in that regard.

So, Admiral Kamerman's evidence is balanced, highly reliable. He went to a great deal of effort to return from Germany in order to assist this team and this Commission as best he could. His evidence was of the highest calibre, an absolute expert in his field. He did not need to deal with all of this, but he chose to do it. I submit and I ask this

Commission to make a finding that he was a reliable and good witness, whose evidence was acceptable to this Commission.

I then refer you to paragraph 251, where another example of Young's misguided accusations comes to the fore. He says what Kamerman failed to tell the APC in this context, was that the report on the [indistinct] database was the first preliminary version, and was followed up by another version some time later. Well, frankly this is absolute rubbish. Kamerman deals squarely and fairly with this, and I need only refer you to paragraph 150.35 of his statement for you to see that he very pertinently dealt with the preliminary version and the later version. He explained exactly to you how that came to be.

You will recall that the preliminary report had to be produced under pressure, within a matter of a few days to advise the project team whether the Diacerto Bus could do the job, to advise them essentially whether they had options or whether they were beholden to Young in an impossible situation, where they would have to cope with an immense premium to the price, which the state could not afford. He therefore commissioned two engineers to give them that preliminary review. They said the job can be done by the Detexis data bus. They then, when they had more time, investigated more fully, and did a more full review of the pros and cons on a technical bases of both systems.

At paragraph 254, Young comes to the conclusion, having noted that both busses could do the job, that because the authors listed certain downsides of the Detexis, it is impossible that the Daecerto data bus could do the job required. In other words, he is calling the two

engineers in question liars, and he is coming to this conclusion by dint of logic that if it is not perfect and there are pros and cons to each system, then how can you say it can do the job. That is the kind of impossible logic that one can pull ones hair out over in dealing with his critic, because he misses the point again and again. In fact, there is no lacking in his intelligence, it is a question of him not being willing to see the point, which was that there was a viable technical option to his IMS. That is as simple as the point was, but he refuses to see it.

On pages 54 and 55, Dr Young criticises Kamerman for having apparently testified before this Commission, on the bases of marketing people being available to him from Detexis and not engineers. Now, you will see in paragraph 265 he quotes something and there is a reference there. I have done my level best to ascertain where this came from. The reference is there, page 6225, are incorrect, that is a reference to General Steyn's evidence. But, even if Kamerman at one point referred to the marketing people from Detexis, I say so what. It is absolutely clear from the context and overall conspectus of his evidence that he said at the point in time he did consult with highly qualified technical people from Detexis, who were able to give him the information he required. So, this is really splitting hairs. But again, it is this attack against Kamerman, which goes on for pages and pages, and it is entirely unjustified.

At paragraph 277 we deal with the legality of the PCB decisions again. There I simply refer you to our heads paragraphs 202 to 203. Then we get on to the 19th August 1999 meeting, and I refer you to

paragraphs 199 to 201 of our heads. In that regard you do not only have a Kamerman versus Young factual dispute. Not that Young was present and could say what meetings took place. But, you have a plethora of witnesses from the Navy who told you that that 19 August meeting was called as a briefing meeting, to educate the decision makers on the point they have reached, the question of whether they could separate items out and the state bear the risk in relation to those Category C items, up to the point in their testing in which items they should be.

It is somewhat surprising then that Young persists with his allegations pertaining to the 19 August meeting, that have been dealt with convincingly and reliably by many witnesses.

In paragraph 282, this is nothing momentous, but it is important to indicate the unreliability of these statements that Young makes, the extent of work that has to be done to unpack them time and time again. Chippy Shaik also testified that he had not attended the meeting. Now, Commissioners, we have checked the evidence and Chippy Shaik did not deal with the PCP meetings of 19 and 24 August in his evidence. Kamerman and Frits Nortje testified that he did do so. Well again, we have checked the evidence. Kamerman makes no mention of Mr Shaik when he lists those who attended on 19 August. He specifically lists them, but he makes no mention of Shaik. Frits Nortje did not deal whether Shaik attended that meeting.

So, again I say, one has to take the allegations made by Dr Young with a measure of caution, because they are unreliable. He

moves on a gain to deal with Chippy Shaik's evidence, but it is largely an issue pertaining to policy document 1147, and I have made my submissions in that regard. At paragraph 294 he moves off that topic onto another topic, which is the conflict of interest topic. There again, I say to you this is an outsider, he knows nothing of what happened at these meetings, and yet he presumes to make far reaching accusations on the bases of his suspicions.

You have before you the evidence of Chippy Shaik, of Admiral Howell, of Admiral Kamerman and Mr Nortje, who all explained what happened at those meetings, how they were dealt with, where the conflict arose and what Mr Shaik did in that regard.

I then skip to paragraph 300 where we have the allegation that Chippy Shaik did not tell this Commission about his dealings in relation to Honings and the $3 million. Well, that is just plainly wrong. I have read the transcripts of Mr Shaik's evidence, and towards the end of it you will find a passage at transcript 8914 to 8915 in which this very issue was pertinently put to him, and he denied any such payment.

Commissioners, that takes me to the point where I can conclude the submissions, because I think I have given you what guidance and assistance I can in relation to Young's submissions. In conclusion I would like to use this opportunity to again emphasise our view, as the Department of Defence, that the inferences that sparked and caused this Commission, had been shown not to be justifiable, that they are perpetual, self replicating cycle of reports that have been disseminated

publically without caution, without restraint, without responsibly determining that they have truth to them.

What one does in perpetuating that kind of mistrust in the public, against what started out in the Defence review as a process in which the public thoroughly participated and bought into and supported, was just the undermining of the constitutionally endorsed prerogative that South Africa is to have in effect of defence force.

Now, in that regard I remind you that Mr Crawford-Browne's evidence when confronted with the reason and his motive for opposing Arms Acquisitions, was quite a startling position, and I think it is worth repeating that this is the position of many of those that seem to oppose the Defence Force and its acquisitions. They take the view that any acquisition whatsoever is actually something evil and undesirable, because they come to the question with a [indistinct]. So, it was Crawford-Browne who quite candidly stated that whatever acquisition was in question at whichever point, he would oppose it for that reason alone. I will locate the reference for that in a moment, unfortunately I cannot lay my hands on it at this moment.

When dealing with criticism of that nature, one has to ask oneself the question well, is that not really the tail wagging the dog? We have a constitutionally endorsed position that was publically supported by way of the Defence review, and adopted by Parliament. If the SDPP's were a legitimate aspect of implementing all of that as they were, then that type of criticism has no place and it certainly should not have the kind of role of repeatedly undermining the senior officials of the Department of

Defence, and the decision makers in these processes over many years, to the point where we are now, with a long, long Commission to ascertain whether any of these reckless and unsubstantiated hear say allegations actually has any merit.

I would implore this Commission to answer the question, were the best decisions made for the right reasons during the SDPP, emphatically, and to say they were. To tell the nation that there were four items that were the cheapest, the best value and in relation to which there could be no contest that those were the best decisions. I would implore you to advise the nation too that in relation to many of the allegations pertaining to the Corvette, they are as from one disgruntled source, who is unable to move on and accept reason as to why he did not get the work he tendered for.

I would also urge you to advise the nation that in relation to the Hawks, where the cheapest acquisition was not procured and an acquisition was made that did not win the evaluation rounds, the only one of its type, that the politicians made the decision in best, what they considered best interest of the country at the time, taking into account a complexity of factors and South Africa's broader interests, that were all fully transparent, carefully documented.

That accordingly, if we as we should are to trust Cabinet and our President and the Minister of Defence with these decisions, that is exactly what they did. They exercised their duty as best they could, on the facts they had at the time, and that even if there were some untoward payments made, for we deal with human nature and the

human beast in all of these things, and we are not naive enough to discount that, that was not the reason for the acquisition.

Thank you for being so patient [indistinct].

CHAIRPERSON: Thank you, Advocate Cane.

COMMISSIONER MUSI: Can I [indistinct]? Can I just peruse one aspect? I understand we are called upon to draw inferences, but inferences are drawn from facts, not so? You do not draw inferences from allegations which cannot be substantiated, do you?

ADV CANE: Commissioner Musi, that is entirely correct.

COMMISSIONER MUSI: So, what do we make of these many allegations, which cannot be substantiated? What do we make of them?

ADV CANE: Since this is a Commission of Inquiry, it would not have the sale marks as before a court of law, where one just rules them to be inadmissible, you admit them, you consider what weight should be attributed to them. Then, doing so, you take into account all the factors that we have listed in our heads as being problematic, the fact that they are self circulating, the fact that they seems just be repetitions of the same things but with no independent source. The fact that so many of them seemed to be drawn on a very speculative police woman's report, sitting in Germany, who had no knowledge of local circumstances and embarked on a speculative endeavour that was not even part of the official files.

One looks to all of these factors and comes to a conclusion that although you have considered the hearsay evidence available, it would be irresponsible to attribute weight to it.

COMMISSIONER MUSI: There is one theory that has done the rounds, and it is a theory, I do not think it is anything better than a theory, that the rational for the acquisition of these equipment is in order to make money, in other words corruption. Not because there was a need for the acquisition. When you look at the picture that has emerged, almost all of the equipment was actually a replacement of equipment that was there before, but were becoming obsolete. Is there any kind of credence that could be given to that type of theory, given the background that most of the equipment was actually a replacement of stuff that had become obsolete?

ADV CANE: Commissioner Musi, the evidence is so overwhelming as to the extent that the South African Defence Force was facing block obsolete, that it is difficult to imagine that there could be any other way to have [indistinct] acquire new equipment. The rational in acquiring the equipment is very well documented in the Defence Review. One would have to postulate a very grand conspiracy involving politicians and the public, meeting together over time to determine how to go forward in a new democratic dispensation, whether we wanted to have a defence force, and if so, to what extent given the national prerogatives also of housing and poverty and [indistinct], and would have to come up with a theory that all of that was indeed a sham, and that South Africa did not reach a consensus that it needed a Defence Force, that the [indistinct] had merit and that it was willing and able to dedicate a portion of its resources in order to acquire the equipment necessary to have a modern, technologically advanced and capable Defence Force. That

thinking is all documented, it all went through a public process. As you know, it was approved by Parliament. So, to start with that theory is a theory that could only have had any credence prior to the constitutional mandate. In other words, at the point where you are having a Hawk versus [indistinct] debate, as to whether we needed a Defence Force in the new democracy at all, that once the [indistinct] have lost that debate, then we are into a different arena and one must accept that you do not have a defence force, unless you get proper equipment. Even if it is a small force, one would be completely irresponsible to expect one's service man to conduct their operations and set to deter, defend and protect without proper equipment.

So, I agree with you, Commissioner Musi, that [indistinct] was one prior to the constitutional mandate being endorsed. And once it was, and we had the Defence Review process determining what it was we needed, how much, how big, how much money, that the rational was plainly encapsulated there. So, whatever corrupt payments may have flown, I have no evidence or personal knowledge of anything. But, assuming human kind [indistinct] and where it gets the opportunity every now and then it enriches itself unjustly and unlawfully, that certainly did not affect the rational that was a far bigger project, far bigger priority that the nation was considering, and [indistinct] decisions in relation to.

COMMISSIONER MUSI: There is just one aspect I am not quite sure about, maybe you can help me. I know that you had the white paper, you had the Defence Review which was approved by Parliament, but there was a suggestion that once Cabinet had decided on the

acquisition themselves, on which amount it would acquire, they should have gone back to Parliament and get authorisation. It appears that that was not done. I am not sure what the position is there.

ADV CANE: Yes, Commissioner Musi, that is an allegation that has been advanced in order to try and indicate that the processes were irregular. In my submission, Section 85 of our Constitution, entrust the National Executive with the implementation of national legislation, and developing and implementing of national policy. Now, once approved by Parliament, one has this theory of the core force approved by Parliament. It is up to the National Executive to implement it, and it is up to the National Executive in so doing to implement national policy. So, the Executive Authority, the Government of this Republic, was entrusted with the Acquisition of Arms. We see that reflected in plain terms in the Defence Review, and we see it reflected in plain terms in MODAC, where that passage captures it very well that ultimately the Minister of Defence is responsible for acquisitions, but that he may refer any decision to Cabinet. Recognising that this was a decision of significance that should properly be made by Cabinet, that is exactly what he did.

COMMISSIONER MUSI: It appears that it is in fact the explanation we got from the Ministerial Committee, those members who testified. Yes, thank you.

CHAIRPERSON: Thank you, Advocate Cane. This marks the end of your participation in this process.

ADV CANE: Yes, it does. Thank you, Commissioners.

CHAIRPERSON: And you. Mr Chowe?

ADV CHOWE: Thanks, Chairperson and Commissioner Musi. The DTI will also give a very short oral submission regarding its involvement. Also, in as far as it has been asked to do so in terms of the Terms of Reference, especially regarding the issue of the National Industrial Participation program, and also on the issue of the creation of jobs out of the SDPP's.

Commissioners, I must state from the onset that there is a bit of a difficulty from my side in that when there is evidence which has been put before a forum like yours, and we use figures and the figures are only from one side, which is from the DTI, and there are no other figures which can actually be brought to contravene or to contradict whatever figures which have been brought by another party, it becomes a bit of a difficulty actually to say whether there is any wrongfulness or unlawfulness or otherwise.

Notwithstanding that, Commissioners, one should maybe start our submission by taking off from what Commissioner Musi has just referred to, where one of our critics, Mr Crawford-Browne says the reasons for the Acquisition of Arms was nothing else but to enrich certain people, individuals, entities and so on. I can clearly remember that in one of his submissions he says the vehicle which was used by these corrupt individuals or fraudsters, if one might say, was actually the National Industrial Participation, because through NIP, he emphasised that this how one would be able to get the benefits.

I know I do not have a brief to argue on whether we needed arms or not, but I remember that what Mr Crawford-Browne advocates for, is a very small force, I think he called it a Coastal Force or Coastal Guard of some sort, which will be adequate for the Republic. But, I do not think I am here to argue that.

Commissioners, it is very clear from the evidence which has been brought before this Commission, that as from the onset of the thoughts for the creation of a core force, as Advocate Cane has already explained to this Commission that at that time already, there is a quote which she has made from the Minister of Trade and Industry at that time, to specifically indicate that there was a need that there should be balance of payments. One is not expected to take all the necessary resources of your country, purchase whatever kind of equipment, I am using the word whatever kind of equipment, Commissioners, because from the evidence which was led by Dr [indistinct] for instance, he indicates that the NIP program was never only intended for the arms industry, but it was actually any kind of purchase with a foreign content of $10 million, and that will be a trigger.

So, there has always been in the minds of those who guard the coffers of the country, to make sure that each and every time there is a purchase with foreign content of $10 million, one has to leverage such procurement. Starting from that, Commissioners, one was faced for instance with a challenge that these particular programs, in terms of NIP's, were they really a fiction of the corrupt, or was it something which is constitutional?

The evidence before this Commission is that these programs and the policies have been cuffed out very carefully, by those who understand the program, and there is even a policy which has been sanctioned by Cabinet, it has been fully sanctioned. And this particular program has been in place, and it has been used even for the SDPP's. Commissioners, you will remember that in the statement for instance of Mr Zimela, he attached the policy. As far back as 1996 this policy has been in place.

Now, one ask oneself the question whether if this policy was in existence at the time, was there any attempt from either of the critics, or any person for that matter, to take up this policy and argue that it is unconstitutional? In my discussions during cross-examination with Mr Terry Crawford-Browne, he clearly indicates he accept that the policy stands, but he says this policy is unconstitutional. But, when he stressed to explain why it is unconstitutional he was unable to do so.

So, Commissioners, there is evidence before this Commission that that policy was constitutional, it was lawful and its usage was proper and to the benefit of the country. Commissioners, it was very clear also what the objectives of these particular NIP's are. We understand that in the beginning, or the policy itself had, as we indicated in page 8 of our short submissions, that the total objectives of NIP itself were close to 8 or so. I can read them in the record, but I am aware that they are already on the documents. But, it was decided, Commissioners, that for the purpose of the SDP's, only three will be of importance, and those were investments, the sales which contains both local and foreign sales.

These were agreed, they were properly discussed with the obligors and they formed the NIP terms as one will remember.

What is also very important, Commissioners, I am aware that it might not be so that the Umbrella Agreements were properly discovered, but out of the reading of these, one has a particular paragraph which relates to the governing law, as to which law will be of governance in as far as the contracts are concerned. It is very clear that the governing law will be the laws of the Republic of South Africa. I am mentioning this, Commissioners, to strengthen the point that it cannot be so that when the contracts are clear that the South African law will be applicable or be the governing law, that one can come and cry foul that you were not supposed to have use this particular policy, or that one. So, it is very clear that from the onset the laws of South Africa will govern these contracts.

If they do govern the contracts, it also goes that they will also govern whatever kind of terms which appear there, including the interpretation thereof, including the implementation. Commissioners, you will also take note that in terms of the agreements, the DTI became the NIP implementation mechanism. I will suggest that this was by default, Commissioners, because when one reads the Umbrella Agreements correctly, they state that if a NIP implementation mechanism is not appointed, then the DTI will automatically become the NIP implementation mechanism. So, I will suggest by default that it became the NIP implementation mechanism.

So, it did, because there is no record of any other NIP implementation mechanism which was appointed. So, in terms of these NIP terms, Commissioners, it is clear that the obligors had very clear offsets which they had to comply to, and there was also a 10% performance guarantee which was imposed, in case these particular obligations do not materialise. I must say, Commissioners, that it is maybe at this stage unnecessary for me to go through the process as to how the particular projects were chosen and put into effect. We know exactly what the process was, that all the participating parties were involved and if a particular project could not work, there was a provision that it could be substituted. This was done in the normal course of the business of the issues of the NIP's.

One other contentious issue, Commissioners, is the issue of the crediting methodology, that according to the NIP terms in the agreement, 1 Dollar, or whatever currency, will be equal to 1 NIP credit. And if I may use the words *That was finish and klaar*. But, it did not seem so, as the evidence led before this Commission, that in fact, and one will pick up this particular point from the evidence of Mr Pillay, who says at that time there was a strong believe that the Minister still holds a residual discretion to entertain whether this credit shall remain as 1:1 or not. There is a big argument about it.

It goes so big, Commissioners, that there are even suggestions that maybe there was not just only a deviation from the contract, but actually a breach of contract, that in as far as handling the NIP credit

methodology, the DTI has actually breached the contract. Therefore the whole system cannot pass the master.

CHAIRPERSON: I am sorry, Mr Chowe, to interrupt you. If you do not mind, can I ask you one question? I think all in all, there were about eight witnesses from DTI who testified. Some of them testified about policy, and some of them testified about the performance of the various obligors, particular Mr Zimela, Mr Zikode and Mr October. If I am not wrong, their evidence was never contradicted by anybody.

As far as the NIP's are concerned, Mr Zimela and Mr Zikode gave us certain figures, relating both to jobs and to investments that were made by the various obligors. According to them, at the end of the day when they did their monitoring, it turned out that all the obligors have carried out their obligations, and in conjunction with ARMSCOR, their DIP divisions, then letters were sent out to the various obligors informing them that they have complied with their obligations, and that the guarantees will be cancelled. Something to that effect. This is the evidence that we have.

Mr Zikode again went further, and gave us evidence relating to for instance things like the total actual investments made by various obligors, total actual investments [indistinct] by the various obligors made into the country. They also dealt with the total sales, both export and local sales. They gave us those figures, we do have those figures.

But, after receiving that evidence there was a submission that we should not believe these figures, we should get an independent audit to try and see whether these figures are right. What is your response to

that? I am not sure what an independent audit is, but it was said that apparently DTI never [indistinct] figures to be audited. Do you want to respond to that, particular to the suggestion that we cannot take a final decision, for us to take a final decision we need to get some independent auditor to come and audit these figures?

Despite the fact that when this evidence was given before us, it was never contested by anybody, except one or two witnesses, who ended up saying that it is reported that on 6 000 jobs materialised. It is reported that only so much investments came into the country. Are you in a position to tell us whether that submission that was made, that we should not believe all the main witnesses who testified on behalf of DTI, but instead get an independent audit? Do you want to comment to that?

ADV CHOWE: Yes. Thanks, Commissioner, for the question. Commissioner, that particular exercise of an audit will take us nowhere. The reason for me saying so, Commissioner, is that when one has regard to the information already before this Commission, and the figures already given before this Commission, they are compiled by using supporting documents, either in the form of bank statement or whatever kind of figures from the obligors and also from the DTI, correspondence which was written. So, if one had to appoint an auditor firm, or whatever kind of auditor to come and audit these figures, he will be obliged to use the very same figures which the witnesses and other officials of the DTI used to compile this information for the Commission.

So, in our view, the DTI's view, is that it will be an unnecessary duplication of work, because Commission will remember that in the

seating of the IPCC for instance, there was full representation of all parties who participated equally, transparently. So, if one had to go and commission another audit, it will not take us any further, because it will use the very same documents, interview the very same people who were before this Commission. So, I will align myself more or less with the answer which Advocate Cane gave when she was asked which other forum really should investigate this. There is no other forum.

CHAIRPERSON: Okay, thanks a lot, you have answered my question.

ADV CHOWE: Commissioners, I would suggest that as I started my submissions, I made it clear that because of the fact that these figures are as they are, no one else has come and said but these figures are wrong in any way, other than just a suggestion that they need to be audited, there is actually no other further evidence which one can say this is really strong evidence, which will lead one to... I do not know whether I should say one cast doubt on the figures, because it might be that the Commission would not work on whether there is doubt or otherwise, but I will suggest that the Commissioners will use a fair scale of balance of probability, as to whether it is probable what the evidence which was led in this Commission.

Adding to the answer which I have given to you, Commissioner, is that the Commission is aware also of the internal audit which was done by the internal auditor of the department. To be fair, Commissioner, is that that particular audit, it is very fair, where it needed to be critical it was critical, and where it needed to give credence to the information given, and it did. Going back to what I said is that they used the very

same documentation. So, there is no other documentation where one will say but these are other documents which one can use. The Cabinet also dealt with this particular document.

Commissioner, other than these concerns which were raised, about the issue of the multipliers which were used, there is very clearly a defined way as to how should one deal with matters where some anomalies arise. The witnesses from the DTI clearly described this to the Commissioners and to this Commission, that they always held the view that there is always a discretion by the minister to allow any other further credits other than 1:1, but for instance up to three or above. These were not just done in a vacuum, Commissioners, they were informed by certain reasons.

The reasons were given, and these were also reflected in the report which was done by the internal audit of the DTI. These were annexed to the statement of Mr Zimela. The report itself was marked ANNEXURE D, and when one looks at page 33 thereof, it is very clear as to why these multipliers were granted. To sum up, without reading these, is that there were certain projects which were not easy to get finance, or to be invested in, and these multipliers which came as package deals, they took crucial investment where it is needed, and to the sector of economy which needed it most. Some of these projects included projects where it would be difficult to guarantee credits. At that time, this is the evidence of the DG of DTI and others, that at that time our country was struggling to get investment in these sectors of the economy, and that is how these package deals were done.

But, in the negotiations of the package deals, or maybe even increased or the use of multipliers, one will have obligors present at the time, because when one for instance looks at the statement of Mr Zimela, he clearly states who were actually participants at the IPCC. It is very clear that the DTI will definitely be there, the Department of Finance, Department of International Relations, Department of Public Enterprises, Department of Defence. These particular departments had representatives in these IPCC meetings.

So, the argument to say the Minister of Trade and Industry could not sanction the use of multipliers without having consulted with his equals in the departments. But, it is very clear that these particular IPCC meetings, they had representatives. So, there was actually no need to go and re-consult. Clear memos were done and the minister will give approval.

So, Commissioners, it is not correct that maybe the minister or the DTI did not have authority to work the multipliers the way they did, and the reasons are very clear. As to whether the benefits materialised, one has to have regard to what Mr Zikode said. I will not be able to repeat the figures, Commissioners, because I will suggest that they are before the Commission and they are on record. What Mr Zikode indicated, he said if one had to take the benefits from NIP as an investment portfolio for a particular company, and you measure them against an aggregate NIP credit, it comes to a total of three, so that is a multiplier of three. It should be in the record, I did not capture it in my notes, but it should be in the record. That, he says, is a very good performance, if one had

regard to the difficulties we had to face at the time, and the difficult economic times.

So, if one has to ask whether these materialised, the question should definitely be yes, they did materialise. There is documentary proof to substantiate that, and the figures are very clear. Even the conversions were given from different currencies. These did materialise. But, one should not say for instance they were in terms of 1:1, some of them might have been higher than that, but reasons have been provided.

With regards to jobs, Advocate Sello was very clear on that issue, and we do agree with her, that it might not be necessary for the Commission to split its head in as far as the issue of jobs was there, because it was never one of the criteria in the NIP.

CHAIRPERSON: Mr Chowe, I do not quite agree with that submission. The Terms of Reference says that we must determine that. I know that as far as DIP is concerned, a question of job creation was not one of the criteria. But, then we know that the witness who testified on behalf of DIP, he said that before they could release the obligors from their obligation, [indistinct] trying to determine how many jobs have been created by each project. He then said that there [indistinct] from about 80% of the local DIP beneficiaries, and that indicated that about [indistinct] and something jobs. That thing we should take into account.

Secondly, from the evidence of Mr Zikode and Mr Zimela, for each project they told us more or less how many jobs were created, and they came up with a total figure. Now, for us to be in a position to

comply with one of our Terms of Reference, we must have those figures, we cannot ignore them. Even if someone at the time when they assessed the contracts, job creation was not one of [indistinct], but then they were being asked in terms of Terms of Reference, to determine whether those jobs [indistinct] alleged to be created, whether they had been created or not. You cannot shy away from that, we must deal with that question.

ADV CHOWE: Thank you, Commissioner. Commissioner Seriti is 100% correct in as far as the issue of jobs is concerned. I might have maybe started that particular submission on a wrong foot, in that if one had to consider the submissions made at the opening of this Commission, around the issue of 65 000 jobs, but that I do not think I need to address now, Commissioners, because it was clear that that was just a projection, which might one way or another also be based on other criteria which had nothing to do with the SDPP's.

Commissioners, we are aware that there are figures which have been stated to the Commission, and I do not think it will be necessary for me to go through them.

CHAIRPERSON: I think you are right. I can still remember [indistinct].

ADV CHOWE: Yes, ANNEXURE F.

CHAIRPERSON: [Indistinct] with ANNEXURE F. That ANNEXURE F contained all the figures. I do not think it is necessary for you to address that.

ADV CHOWE: Yes. My colleague was just giving me the instructions that on the issue of jobs, the Commissioner is indeed correct that we

cannot ignore them at all, because they were created. So, even if it might not be as far as the critics will say 65 000, but we understand the bases from where we argue that these jobs were never a criteria. But, I do agree that there is evidence before this Commission that the jobs were created, and that has to be taken into account.

Commissioners, one other aspect which was mentioned by the witnesses, is that there are discharge letters which were given to all these obligors who have done their jobs and completed them. So, if anyone still has a doubt that maybe there was no materialisation of the NIP's, I do not know how far can we take this story. But, I will suggest that as my colleague, Advocate Lebala talked about the locust, maybe I must repeat the same story. Whether he is dead or alive, it depends on the person who handles it.

But, let me maybe just read into the record the conclusion which the DTI will like to leave this Commission with, except for one other issue maybe. In conclusion, the evidence before the Commission is to the effect that at the time of the SDPP, the NIP policy which was implemented at that time was indeed sanctioned by this government, or by the state, in that in as far as the DTI is concerned, those were constitutional. Further, that the evaluations and [indistinct] which were done and presented before this Commission, were based on documentation and policy.

Maybe I must just quote what the DG at that time said to this Commission, and this is to be found in page 22 of the submissions, reading from the third sentence at the bottom:

"The department at the time when this was no way acceptable, either in South Africa or globally. So, it was a very innovative policy instrument that was introduced, and as I said, this level of benefits is not a perfect instrument, but it was the best tool we had at the time, and I think it achieved that benefit."

Those were the closing of the DG. Maybe to add, just in my mother tongue, Commissioners, but there is this expression which says that [indistinct]. Thank you, Commissioners.

CHAIRPERSON: Mr Chowe, thanks a lot. I think this also marks the end of your participation in this Commission.

ADV CHOWE: Indeed so.

CHAIRPERSON: Thanks a lot for your efforts.

ADV CHOWE: It is appreciated, Commissioner.

CHAIRPERSON: Advocate Moerane?

ADV MOERANE: Chair, I believe that [indistinct] should go last, after everybody else.

CHAIRPERSON: Who else do you think must still come, Advocate Moerane? I thought you were the last one for today.

MR MDUMBE: Chair, BAE and SAAB indicated [indistinct] to participate in this process. We have agreed with them that they will come on Monday, the 29th, which was the date if I am not wrong that was set aside for the evidence leaders to make replies, if any. So, there are still parties who are coming to make closing submissions.

CHAIRPERSON: That I understand, that there are still parties that are coming to make closing submissions. That will only be on Monday. For today, is there any other person except Advocate Moerane?

MR MDUMBE: No, Chair.

CHAIRPERSON: Advocate Moerane, it is your chair. If you are not ready, you think that you might want to come in on Monday, we can certainly accommodate you on Monday, because [indistinct]. I think their submissions are going to be very short.

ADV MOERANE: Chair, I am indebted to the Chair. In fact, I assumed that we were going to be the last, that there were not going to be other parties. We have time constraints, at least I have time constraints. We would really appreciate it if we started on Monday.

CHAIRPERSON: Monday morning, 09:00, Advocate Moerane.

ADV MOERANE: As the Chair pleases.

CHAIRPERSON: Thank you. Then we will adjourn and we will come back on Monday morning at 09:00, and we will start with you.

COMMISSION ADJOURNS