

STATE CAPTURE INQUIRY
PARKTOWN, JOHANNESBURG

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SESSION 1 – 2.

DAY 14.

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Session 1

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PAUL PRETORIUS SC: Good morning DCJ. This morning Chair, Advocate Hofmeyer will lead Mike Brown of Nedbank that will be followed by the expert Dr Kaufmann after the short adjournment. May I just place on record that Alfred Cockrell, Advocate Cockrell is representing Mr Brown here today.

CHAIRPERSON: Okay, thank you.

ADV KATE HOFMEYER: Thank you Chair. Chair, Mr Brown's evidence completes the evidence under Term of Reference 1.7. May I request your Registrar to swear him in?

10 **CHAIRPERSON**: Thank you.

REGISTRAR: Please state your full names for the record?

MR MIKE BROWN: Michael William Thomas Brown.

REGISTRAR: Do you have any objection with taking the prescribed oath?

MR MIKE BROWN: No I don't.

REGISTRAR: Do you consider the oath to be binding on your conscience?

MR MIKE BROWN: Yes I do.

REGISTRAR: Do you swear that the evidence you will give today will be the truth, the whole truth and nothing but the truth. If so, please raise your right hand and say, so help me God.

20 **MR MIKE BROWN**: So help me God.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYER: Mr Brown, you have in front of you a file which we will refer to today as Exhibit H1. If you turn to page 202 in Exhibit H1 you will see a document headed: Statement to the Inquiry into State Capture, and your name appearing beneath that. Can you confirm that that is your statement provided to the Commission?

MR MIKE BROWN: That is correct.

ADV KATE HOFMEYER: And it runs as I have it, to page 206 where a signature appears. Can you confirm that that is your signature?

MR MIKE BROWN: That is my signature.

10 **ADV KATE HOFMEYER:** And can you confirm the contents of that statement as being correct?

MR MIKE BROWN: I can.

ADV KATE HOFMEYER: Thank you, the statement does go over the page to 207 but that is an annexure and I will make reference to that in due course in your evidence. Mr Brown, you also, in matters related to Term of Reference 1.7, depose to an affidavit in the Minister of Finance vs Oakbay matter, is that correct?

MR MIKE BROWN: That is correct.

20 **ADV KATE HOFMEYER:** We explained to the Chair on Monday that we have not included the full text of the affidavits in the bundle but I may well for the purposes of setting the background to your evidence today ask you to provide testimony on some of the aspects traversed in that affidavit. In terms of introductory matters Mr Brown, can you please clarify for the Chair what your position in Nedbank is at the moment?

MR MIKE BROWN: I am the Chief Executive Officer of both Nedbank Group and Nedbank Limited which is the registered banking entity.

ADV KATE HOFMEYER: And for how long have you held that position?

MR MIKE BROWN: I was appointed in 2010.

ADV KATE HOFMEYER: And prior to that where were you?

MR MIKE BROWN: Prior to that I was the Chief Financial Officer and Executive Director from 2004 up to that date, prior to that I have worked for businesses that are now part of the Nedbank Group since 1993 and prior to that I qualified as a Chartered Accountant.

ADV KATE HOFMEYER: And Sir, in terms of professional qualifications, is it simply a Chartered Accountant qualification that you hold?

MR MIKE BROWN: That's correct, I have a B.Com Diploma in Accountancy and a
10 CA(SA).

ADV KATE HOFMEYER: Thank you, so many decades in banking, is that a fair description?

MR MIKE BROWN: 25 Years to be precise and prior to that I actually spent several years auditing banks.

ADV KATE HOFMEYER: Mr Brown, I propose to deal with your evidence really in a chronological order which will require me at times to move around your statement because it was presented thematically but for the purpose of today's evidence, a chronological approach will be taken. And so with that in mind I would like to start with the events in February 2016 because as I have it in your affidavit in the Minister of Finance
20 matter, you indicated there that it was in February 2016 that Nedbank began reviewing its relationship with the Gupta family and associated entities. Can you please tell the Chair about that?

MR MIKE BROWN: Chair, that refers to a specific request that I made to our Chief Risk Officer in February 2016 to escalate reviews of the Gupta-related accounts. At that stage I would have been certain that there were already ongoing reviews taking place within our business units that had the direct relationships with any Gupta entities but at that stage it was clear to me that there was an escalation in negative media activity and reporting around the Gupta family and the related entities and as a consequence of that escalation in media-related activities, I perceived there was an escalation in reputational risk to the bank and asked our Chief Risk Officer to aggregate the work that was already being done so that it could be presented to group Exco to enable us to opine on the reputational and
10 business risks.

ADV KATE HOFMEYER: And then you referred in your affidavit to an event in March 2016 which was a statement by the then Deputy Finance Minister. Of what relevance was that to the work of the bank at the time?

MR MIKE BROWN: So I think that was of particular relevance in the escalation of negative reporting around the Gupta family. In particular what made it of particular importance to us was that it was a statement that was issued on the letterhead of the Ministry of Finance and it contained an allegation from the then Deputy Minister of Finance that members of the Gupta family had offered him the position of the Minister of Finance to replace the then Minister Nene. So for us that was certainly an extremely
20 serious allegation.

ADV KATE HOFMEYER: Mr Brown, you then moved to April of 2016 where certain institutions severed ties with the Gupta associated entities. Can you explain to the Chair the relevance of those events in early April 2016?

MR MIKE BROWN: Certainly Chair. So on the 4th April 2016 there were media reports and indeed reported from the underlying companies confirming that that both KPMG who were the auditors to these companies and SASFIN who at that stage were the sponsoring broker, had terminated their relationships with the Gupta family. I think from Nedbank point of view again these were particularly significant terminations given that we would assume that the auditor of a set of companies is privy to information that Nedbank who were not the main transactional bankers to the Gupta family would not have been privy to and there must have been a reason for them to make their decision and in fact, the then Chief Executive of KPMG was quoted as saying that the association risk was too great for
10 them to continue and while there was no direct quote from the sponsoring broker, I also presume they would have had access to more information than we would have had at that stage.

ADV KATE HOFMEYER: And what did that lead Nedbank to do in relation to the accounts it held for Gupta associated entities?

MR MIKE BROWN: So, in terms of the process that we followed, we constituted a sub-committee of our group Exco. That sub-committee was appropriately represented including myself, our head of risk, our head of legal and compliance, our head of our retail and business banking unit in which these accounts were held, the head of some of the other of our frontline businesses as well as our group legal counsel that sub-committee of
20 our group Exco was mandated to review our ongoing relationships with the Gupta families. That sub-committee actually met on the 6th April and in addition to the media that we have spoken about already during the course of the 6th April, there were also media reports of both FNB and Barclays ABSA having terminated and we concluded that group Exco meeting with the outcome that we believed that the reputational and business risks to Nedbank of continuing with our banking relationships, would be too great and as a

result and in addition to that we also have the contractual right to terminate our banking relationships, the underlying contracts that we enter into with our clients have a notice period. If our clients want to move they can give us notice and move to another bank, we are also entitled to give clients notice. So as a consequence of that group Exco meeting, as a consequence of our review of the reputational and business risks, we concluded that we would give contractual notice on the Gupta accounts that were held by Nedbank.

ADV KATE HOFMEYER: Mr Brown, I would like to ask you to go to page 1 of Exhibit H1 which is the Notice of Motion in the Minister of Finance Application. You will see on page 1 listed as respondents a number of the Gupta-related entities. Could you please clarify
10 for us which entity's accounts were held with Nedbank and were closed by Nedbank with the decision on the 6th April?

MR MIKE BROWN: So, turning to page 1 Mr Chair, the first respondent, Oakbay Investments (Pty) Ltd., termination was given on the 7th April following the meeting on the 6th. The 11th respondent, Island Site Investments One Hundred and Eighty, the 12th respondent, Confident Concept and the 14th respondent, Sahara Computers.

ADV KATE HOFMEYER: Thank you, and how long was the termination period given to those entities?

MR MIKE BROWN: So the termination period was 30 days.

ADV KATE HOFMEYER: Thank you and how was that decision of the bank
20 communicated to the entities?

MR MIKE BROWN: So the decision was communicated in a meeting that was held on the 7th of April. I was not personally in attendance in that meeting, Nedbank was represented by people who dealt directly with these accounts and that meeting was held with a Mr Nath of the Gupta entities. I am advised that Nedbank's decision to terminate

was communicated in that meeting. Mr Nath refused to accept the delivery of our termination letters and we subsequently delivered them by registered post. He also asked that Nedbank didn't make any media statements around the termination. I think perhaps I would just like to add, coming back to your previous question, in addition to the accounts that are listed here, the account of VR Laser Services which is the 10th respondent was closed by Nedbank but that notice was given on the 4th of May so it was not part of that first set of notices.

ADV KATE HOFMEYER: Thank you. Your affidavit in the Minister of Finance matter then referred to the publication of a Government announcement on the 13th April 2016 about
10 the constitution of an inter-ministerial committee to investigate the closure of the Gupta accounts. How did you come to learn of this closure, at least this constitution of the committee?

MR MIKE BROWN: So I came to learn of it through I think, two mechanisms. Firstly, there was an announcement by, I believe, Jeff Radebe in the Presidency that dealt with the constitution of the IMC and then subsequent to that when we were invited to attend the IMC.

ADV KATE HOFMEYER: Thank you and then on the 14th April, your affidavit traversed an engagement with Mr Nazeem Howa who requested an urgent meeting with Nedbank. Can you please tell the Chair about that development?

20 **MR MIKE BROWN:** So having given notice of 30 days for Nedbank to close the accounts, in the intervening notice period it's not unusual for clients to approach the bank to try and have a conversation as to why the account should subsequently not be closed and again I did not attend that meeting but I was advised that we were requested to

reiterate to reconsider our decision which we duly did and concluded that we would not change our decision to close the accounts.

ADV KATE HOFMEYER: Thank you, as I have it from your affidavit where you traverse in the affidavit the events of these meetings which you did not attend, you did provide confirmatory affidavits from those representatives of Nedbank who attended the meeting, is that correct?

MR MIKE BROWN: That is correct.

ADV KATE HOFMEYER: And so your testimony today is based on what they have confirmed about those meetings, is that correct?

10 **MR MIKE BROWN:** That is correct.

ADV KATE HOFMEYER: I would then like to move to page 205 of Exhibit H1. You will see in the second half of that page a heading: The ANC Meeting, and as I have it on the chronology that is the next event that occurs after the meeting with Nazeem Howa on the 14th April. You then refer ... [interrupted]

CHAIRPERSON: I am sorry, I think it is the aircon that is making some noise. I don't know whether without it we are going to feel too hot so maybe if they could see what they can do. I think technicians will see what they can do. If it becomes too hot we might have to restore it. Okay, alright let's, you may continue.

ADV KATE HOFMEYER: Thank you Chair. Mr Brown, at paragraph 8 on page 205 you
20 talk about the 20th April and a request that you received to attend a meeting at Luthuli House. Can you please tell us about that request?

MR MIKE BROWN: Yes, I received and well, my personal assistant was on leave at that stage so the stand-in personal assistant received a request from Enoch Godongwana.

That request didn't have within it the topic of any conversation but it was a request to attend a meeting which was subsequently set up by the secretaries and I attended that meeting on the 20th April.

ADV KATE HOFMEYER: Had you been requested to attend Luthuli House before this request?

MR MIKE BROWN: Yes, I have attended meetings at Luthuli House before so for example, when there was national discourse in South Africa on the nationalisation of mines, given the importance of that to our economy and the safety and soundness of our banking system, I presented on Nedbank's view on that as input into that national
10 discourse.

ADV KATE HOFMEYER: Had you ever been requested to attend a meeting to discuss the closure of Nedbank's accounts with any of its clients at Luthuli House?

MR MIKE BROWN: No, I hadn't.

ADV KATE HOFMEYER: And can you tell us when that meeting was held and who was in attendance?

MR MIKE BROWN: So the meeting was held on the 20th April, the records that I had after the meeting of my notes showed that Gwede Mantashe and Jesse Duarte were in attendance. It is also my recollection that Enoch Godongwana was in attendance however, my notes didn't have that so I am therefore uncertain as to whether he was or
20 wasn't in attendance, he did however set up the meeting.

ADV KATE HOFMEYER: Thank you and what was the purpose of the meeting and what was explained to you would be the purpose when you arrived?

MR MIKE BROWN: So the purpose that was explained to me was to try and gain a better understanding around the circumstances why banks in general close bank accounts. I thought quite deeply beforehand as to whether I should or should not attend the meeting and my conclusion was that in the environment at that stage, there were at least two key narratives or discussion points. One of them was around the specific matters of the closure of the Gupta accounts and I was very clear that I would not be able to talk at all given client confidentiality around the specifics of the closure of the Gupta accounts. However, there was an intersecting and growing narrative around more general statements around the bank's ability to close accounts generally, what is the legislative environment around FATAF and FICA, what impact is this having on investor confidence and did the banks collude in closing the Gupta accounts and I certainly felt that in my capacity as the Chief Executive of Nedbank, it was very important that I addressed that second narrative around closure of accounts in general, the legislative framework, the impact on investor confidence and the fact that Nedbank took its own individual decision to close the Gupta bank accounts. I felt that that was incredibly important for the safety and soundness of the financial system in general and for Nedbank in particular.

ADV KATE HOFMEYER: Were you provided with an agenda for the meeting in advance of it?

MR MIKE BROWN: No.

20 **ADV KATE HOFMEYER:** And in paragraph 9 of your statement you, from the second line, record there that you were advised of concerns that had been raised to the ANC from the general population and businesses around the ability of banks to just close client accounts unilaterally. What did you say in that regard at the meeting?

MR MIKE BROWN: So I explained that in the banking system in South Africa we compete with all of the other banks to try and grow our businesses and actually to open as many accounts as we possibly can so banks certainly are not in the business of closing accounts unilaterally. I then went on to explain the broad framework around the FIC Act in South Africa, I spoke in particular about Guidance Note 3, I then also in that meeting took the attendees through a particular extract from the JP Morgan Chief Executive and Chairman's Report around closure of bank accounts to demonstrate that this is not an unusual activity in a certain set of circumstances.

ADV KATE HOFMEYER: Thank you, you have made reference to the JP Morgan
10 Chairman's Report of 2015. That was an annexure to your affidavit in the Minister of Finance matter but is not part of Exhibit H1 and so I would like to beg leave to hand that in Chair. It will be Exhibit H6 with your leave if I may request your Registrar just to take a copy and also to the witness? Thank you.

CHAIRPERSON: Thank you. Well, while you are looking at that Mr Brown, you said that banks are not in the habit of closing client's accounts unilaterally. Whenever they close accounts, certainly I would imagine based on what I have heard from other witnesses from banks, when they close them in circumstances such as those that prevailed in regard to the particular accounts we are talking about, they do so unilaterally in so far as they don't consult with other banks so they don't collude but also they do so unilaterally to
20 the extent that their decision to close the accounts, is their decision and theirs alone in the sense that it's based on their view and from what I have heard in regard to the other banks, it's not that they will discuss with their client in advance but it looks like they make an assessment of the situation and make a decision but after having made the decision, they don't close the door to the client if the client wishes to discuss the matter but the decision does appear to be unilateral. What would you say to that?

MR MIKE BROWN: Sir, I would say that the decision is a decision of the bank. It is a decision of the bank, as I said earlier, based on our assessment of business and reputational risk as well as our contractual right in our underlying legal documentation and inevitably what happens in circumstances such as this and there are many accounts that we choose to close, in circumstances such as this, we give reasonable notice and it is during that reasonable notice period that the client has the ability to come and talk to the bank about the reasons for closure and there are certainly instances where, for example, we are trying to complete for a high risk customer, something that is called an extended due diligence that we are required to complete and if we are unable to get the
10 required documentation from the client to enable us to properly complete that due diligence, we would give notice. If in that notice period the client delivers the required documentation and that documentation is persuasive in the nature such that the assessment that we had made prior to having that documentation is now no longer correct, we would overturn our decision to close those accounts.

CHAIRPERSON: The only reason I was raising the issue of unilateral with you was that I wasn't sure that you were not contradicting what I thought you intended to say by seeming to run away from unilateral because as I understand it, unilateral means simply that the decision of one party is one side, "uni", unilateral, it's one side, it's not a decision you take jointly with anybody, with the client or with another bank, it's just one side and
20 you take it, as I understand it, on the assessment of the situation as you see it in terms of the reputational risk to the bank but from what I understand, after you have taken the decision, if the client comes forward and wants to try and persuade you to change it, you leave the door open but it seems to me it remains that it is a unilateral decision in that sense, it's yours and yours only as the bank.

MR MIKE BROWN: Chair, that is correct, although that unilateral decision is taken by a broad grouping within the bank.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYER: Mr Brown, just to pick up on an aspect of the Chair's questions. You indicated in the termination notice to the Gupta-related entities that you were closing those accounts because of reputational risk associated with the accounts and then there was the meeting that we referred to previously with Mr Howa on the 3rd May, 2016. Is it your understanding of that meeting that there were not adequate reasons presented by Mr Howa at that meeting to remove the reputational risk that Nedbank regarded as associated with those accounts?

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MR MIKE BROWN: That is correct.

ADV KATE HOFMEYER: And can you tell us what that reputational risk really means for a bank such as Nedbank?

MR MIKE BROWN: So, the reputation of a company or a bank is essentially how that business is perceived by stakeholders in general so how we are perceived by clients, employees, competitors, media, investors, regulators and particularly important for banks would be depositors for the safety and soundness of banks and the system so probably for banks more than most other businesses and there would be some that would also fall into this category and I think here of auditors in particular, reputational risk is extremely important. Our business relies on the trust of members of the general public in the safety and soundness of our bank and the system to enable us to become the custodians of the nation's savings in the form of deposits so if one thinks through reputational risk, it has inherent in it a level of cascading, it could escalate depending how bad it gets. There is you know, inevitably certain pieces of reputational risk that would be business as usual

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and we would deal with that on a normal basis in the bank but there are examples of where reputational risk becomes so great to a particular business that that has a material and in some instances terminal effect on that business to continue to operate and I would point obviously to the public examples around the material impacts reputational risk has had on the likes of KPMG and Mackenzie's and the terminal impact the reputational risk would have had on the likes of Bell Pottinger.

ADV KATE HOFMEYER: Thank you, if I may return to page 206. Chair was there reflection from you, I am trying to anticipate here?

CHAIRPERSON: You are doing well to keep one eye on me. I just want to clarify this.

10 From what you say Mr Brown, it would seem to me that your evidence is consistent with the evidence I have had from one, if not more, of the witnesses who have come here and testified about the role of the banks and decisions they took. Now one of the things they said was that in regard to a specific account holder, you could have or then could have a situation where it considers that it should terminate its relationship with that account holder, not because that account holder has committed any crime or is in breach of any laws of the country but simply because there is a certain perception in the public domain about that account holder. Would that be consistent with your understanding of Nedbank's position as well?

MR MIKE BROWN: So Chair, broadly yes, however I would like to amplify a few issues
20 there. There would certainly be accounts that sit on international sanctions lists that would automatically be closed and in respect of the perceptions, I think certainly we take a lot of time to try and understand where the underlying news flow comes from and therefore as a consequence how reliable that is likely to be. So if I went back to my previous examples, you know there is clearly an enormous amount that gets put out on

social media that would have a lot less, it would have some weight but a lot less weight than for example, a statement coming out of the Ministry of Finance as we saw in March or the resignation of auditors or sponsoring brokers.

CHAIRPERSON: So it would be taking into account of everything you consider relevant to the bank's reputational risk and how much weight you attach to any particular factor would differ from one case to another with the result that maybe in some case, somebody who has not actually breached any laws of the country, you might close the accounts because there nevertheless is some serious reputational risk but in other cases, somebody who has not breached any laws but has some reputational risk to the bank, you might decide on balance not to close their accounts, it would just depend on the view you take of everything, is that right?

MR MIKE BROWN: That's correct. That's why we manage these decision processes through committees at the bank which enables input into that decision from a legal perspective and from a business perspective. Perhaps also important to add is that we would not only consider the reputational risk up to that moment in time when we take that decision, we would also be forward looking in respect of the potential future reputational risk and how that could escalate and in particular in respect of this set of circumstances, Nedbank was not the main transactional bankers to the Gupta entities and it would have been a concern to us that if all of the other banks had closed, the transactional banking facilities with the Gupta entities we could have by default become their main transactional bankers and therefore inherited an escalating level of reputational risk as a consequence of that.

CHAIRPERSON: Thank you.

ADV KATE HOFMEYER: Mr Brown, if we can go to page 206 of Exhibit H1. In the top paragraph on that page you conclude your description of the meeting at Luthuli House with members of the ANC and you reference there the Bredenkamp case. How did that come up in your discussions?

MR MIKE BROWN: So as I said earlier in my discussions I made it very clear that I could not talk about matters related specifically to the Gupta-related accounts but what I felt was important was that I spoke about the legal framework in general around the closure of bank accounts and you know, of particular relevance there is the FIC and the related Guidance Note as well as the Bredenkamp judgment which and I am not a lawyer but
10 which essentially in my understanding said that a bank is, Standard Bank in that case is entitled to close the Bredenkamp accounts as a consequence of the reputational risk that Bredenkamp posed to Standard Bank and in particular what that may mean for its international and other banking relationships.

ADV KATE HOFMEYER: And Mr Brown, can you give us a sense of your impression of that meeting at Luthuli House? Did you understand the meeting to be designed to place pressure on the bank to reopen the Gupta associated accounts?

MR MIKE BROWN: I did not leave that meeting feeling that I was placed under any pressure to reopen the Gupta accounts and in fact the meeting closed with me being thanked for providing information that was helpful in understanding and answering
20 questions that the attendees get.

ADV KATE HOFMEYER: Thank you, if we can then move to page 202 of Exhibit H1? You will see that there is an introductory section on that page and then a heading, Interactions between Nedbank and the IMC. That is I have it the shorthand for the inter-ministerial committee that you referred to previously there were public announcements of

it having been constituted on the 13th April, 2016. And if you can go to paragraph 2 on that page, talk about an event on the 4th May, 2016 where your Executive Personal Assistant received an email from Ms Zarina Kellerman. Please can you tell the Chair about that email?

MR MIKE BROWN: Yes Chair, it was an email that I received that said:

10 *"I write to you on behalf of the IMC set up by Cabinet to look into certain allegations made against certain financial institutions. The IMC consists of the Ministers of Mineral Resources, Finance, Labour and Communications. I have been requested to make contact with Mr, they said, William Thomas Brown but I presume they forgot the Michael or alternatively a suitable alternate with requisite authority and request that he makes himself available for a discussion with the IMC on Thursday, the 5th May from 12.00 to 12.30. There is no set agenda for the discussion but I am advised it is anticipated to be a discussion to gain clarity on the current media reports and public statements made by Nedbank with regards to closing the bank accounts and/or termination of relationships. Should Mr Brown not be available, person teleconference could be accommodated", and then there were some admin around if, you know, the dates could move and finally, "should Mr Brown not be willing to participate, please advise me accordingly so that I may indicate the same to the IMC. I look forward to your response".*

20 **ADV KATE HOFMEYER:** Thank you. I would like to unpack some of the details that you have provided us with there. First of all the Ministers who were identified as constituting the IMC, I would like us just for clarification purposes to identify who the people were who held those Ministerial positions at the time. The Minister of Mineral Resources, who was that?

MR MIKE BROWN: Minister Zwane.

ADV KATE HOFMEYER: The Minister of Finance?

MR MIKE BROWN: Minister Gordhan.

ADV KATE HOFMEYER: The Minister of Labour.

MR MIKE BROWN: Minister Oliphant.

ADV KATE HOFMEYER: And the Minister of Communications?

MR MIKE BROWN: Minister Muthambi.

ADV KATE HOFMEYER: And can you tell me whether you had received requests like this previously to meet with representatives of Government?

MR MIKE BROWN: So I have certainly received requests to meet with representatives of
10 Government, largely representatives of National Treasury around banking and banking
system related matters but I had certainly never received a request to attend an inter-
ministerial committee, in fact I had to try and find out what it actually was.

ADV KATE HOFMEYER: And when you have had those meetings previously, where
have they generally been held?

MR MIKE BROWN: So I have attended meetings with Government in Parliament, I have
attended meetings with Government at the Ministry of Finance in Pretoria or at the
Reserve Bank by memory.

ADV KATE HOFMEYER: Thank you and just for clarification, when you referenced the
Minister of Communications, were you intending to reference Minister Muthambi?

20 **MR MIKE BROWN:** That's correct sorry, my pronunciation was incorrect.

ADV KATE HOFMEYER: Thank you. In terms of the notification that was given to you
about the purpose of the IMC meeting that you were called to attend. At paragraph 2 on

page 202 there is a reference there to the purpose of the discussion being, and I quote here: *"To gain clarity on the current media reports and public statements made by Nedbank with regards to the closing of bank accounts and/or termination of relationships"*. Did you regard that as being a broadly focused purpose for the meeting or specific in its nature?

MR MIKE BROWN: So I think in the first instance I regarded it as being quite a strange statement because I knew at that point in time Nedbank had not made any public statements given client confidentiality around the closure of these accounts but I certainly assumed there would be a conversation around accounts in general. I suppose I knew that in attending any of these meetings, I would not be able to speak about the Gupta
10 accounts specifically so therefore I would only be able to provide general input into that meeting.

ADV KATE HOFMEYER: Where were you told that that meeting would be held?

MR MIKE BROWN: So the meeting was held at the offices of the Minister of Mineral Resources in Pretoria.

ADV KATE HOFMEYER: When you provided us a moment ago with your recollection of where you have met previously with members of Government. As I recall your testimony you referenced Parliament, you referenced the Minister of Finance's offices and you referenced the Reserve Bank. Have you ever previously had occasion to meet at the
20 offices of the Minister of Mineral Resources in relation to banking matters?

MR MIKE BROWN: No, I haven't.

ADV KATE HOFMEYER: And what was your response to the request for the meeting?

MR MIKE BROWN: So similar to the request of the meeting from the ANC, I debated and spoke to colleagues internally about whether I should or should not attend given some of the strange elements that you have recently alluded to and again I concluded that I should attend on the basis that I would not make any statements or references around the Gupta accounts specifically but as an engaged corporate citizen and as a leader in the banking environment, it was important for me to make sure that I could input into these conversations my views around the bank's ability to close accounts, the processes that we follow generally, the legislative process to reference the JP Morgan Report that we spoke about earlier and to very specifically point out that there was no collusion
10 amongst the banks in this process so on balance I felt it was appropriate for me to attend. I also felt it would be disrespectful not to attend but that I would make sure that the conversation was in that second area of the narrative and not the accounts in particular.

ADV KATE HOFMEYER: And did you regard it as strange that the meeting was to be convened at the Minister of Mineral Resources in Pretoria?

MR MIKE BROWN: So I did regard it as strange, however, when I was given up front who the members of the IMC were likely to be, one of those members was the Minister of Finance who I thought would be the natural go to person for matters to do with financial services so I suppose presumed that I assumed he would be in attendance and felt perhaps that was just the most logistically easiest place to get the meeting done on that
20 day.

ADV KATE HOFMEYER: Precisely who attended was of concern to you wasn't it?

MR MIKE BROWN: It was of concern to me.

ADV KATE HOFMEYER: And so what did you do in that regard?

MR MIKE BROWN: So prior to the meeting taking place, my secretary emailed as to who would be in attendance and the first email listed the full, all of the Ministers in the IMC including the Minister of Finance and then if you give me a minute to find it, I think there was then a subsequent email to say that as a consequence of it being an ad hoc meeting, they could not at that stage confirm the exact attendance.

ADV KATE HOFMEYER: Yes, maybe I can give you the reference. If we go to paragraph 3 on page 202, what you say towards the bottom of the page there is that Ms Buckley, your personal assistant, confirmed your attendance in an email to Ms Kellerman on the 5th May and requested her to confirm that the Minister of Mineral Resources, Minister of Finance, Minister of Labour and Minister of Communications would be in attendance and then in the next sentence which is over the page at 203, you record and I quote: "*Ms Kellerman responded advising that she was unable to confirm exactly which Ministers would be in attendance due to it being an,*" and I think this is what you refer to, "*an ad hoc sitting*". I would like to pause there. What did that mean to you?

MR MIKE BROWN: I suppose at that stage it meant to me that this was either an initial sitting, a sitting that had been set up in contemplation of a number of future sittings that would take place and/or a sitting that had been set up at relatively late notice to get a process going. That it wasn't one that had been planned, you know, meticulously in advance.

20 **ADV KATE HOFMEYER**: And then you go on in that sentence to say that Ms Kellerman provided assurance that, and I quote, "*the committee will be appropriately represented.*" What did you understand that to convey to you?

MR MIKE BROWN: Well, so I presumed that any committee set up like this would have within its mandate a quorum and that when I got to the meeting that it would be appropriately quorate in terms of its defining mandate.

ADV KATE HOFMEYER: Thank you and then further down on page 203 at paragraph 4, you talk about the meeting which you attended on the 6th May. Can you please indicate who attended the meeting with you from Nedbank?

MR MIKE BROWN: So from Nedbank I was accompanied by Ms Anna Isaac who is our Chief Legal Counsel and Mr Ciko Thomas who is the Managing Executive in charge of our Retail and Business Banking Operations which is the client facing business within
10 Nedbank the bank that housed the Gupta-related accounts.

ADV KATE HOFMEYER: And who attended on behalf of the IMC?

MR MIKE BROWN: So they, just give me a second and I will give you that?

ADV KATE HOFMEYER: If you would like to look at page 203 of your statement in paragraph 4 there, you indicate from the fourth line who was attending on behalf of the IMC.

MR MIKE BROWN: So page 203?

ADV KATE HOFMEYER: Paragraph 4 and then from the end of the third line.

MR MIKE BROWN: Thank you. So the attendees were Minister Zwane who chaired the meeting, Mrs Kellerman who acted as secretary to the meeting, a Mr Herbert Mkhize who
20 joined the meeting as Minister Oliphant's representative and then two other people who joined the meeting but were not introduced and I assumed that at least one of them was representing the Minister of Communications, Ministers Oliphant and Gordhan were not present neither was the Minister of Communications.

ADV KATE HOFMEYER: Thank you. You then indicated paragraph 4 that you raised a query about the quorate nature of this meeting and you have referred to that previously. Why was that of concern to you?

MR MIKE BROWN: I think it was of particular concern to me because I expected given the nature of the meeting for the Minister of Finance to be present given that it is the Finance Ministry that has over arching, oversight of the financial services sector and banks in particular.

ADV KATE HOFMEYER: And what was the response when you raised that concern?

MR MIKE BROWN: So I was assured by Minister Zwane that the Minister of Finance was
10 aware of the meeting and that we should continue given his previous response that the meeting was quorate.

ADV KATE HOFMEYER: Have you gained any subsequent insight as to whether the Minister of Finance was in fact aware of the meeting and had delegated his authority to Minister Zwane for the purposes of it?

MR MIKE BROWN: So I have no subsequent insight of that other than having read numerous documents and I believe there is a letter that forms part of one of the bundles from the Minister of Finance where he disputes that.

ADV KATE HOFMEYER: Right, if I could just take you to that that is in Exhibit H1 at page 144? That we heard from Mr Sinton who gave evidence on Monday was a letter that
20 was made available by the Minister of Finance in the course of the litigation in the High Court involving the Oakbay companies and the pressure that had been exerted on the Minister of Finance in relation to securing a re-instatement of those accounts for those companies. If you look at this letter, it is headed from the Minister of Finance and over the page it appears to have been signed by him. Of course Minister Gordhan will be giving

evidence to the Commission in due course and no doubt will be asked to confirm these aspects but for present purposes you will see at the bottom of page 144 that, well, let's start above, he bullets 5 points there in relation to the constitution of the inter-ministerial committee. In the second paragraph and I quote he writes, "*as you are aware I was not present at the Cabinet meeting you refer to but I have consulted the Cabinet Secretariat on the matter. The following emerges,*" he says, and if you wouldn't mind reading into the record the five points that he makes in relation to this Cabinet meeting in a letter addressed to Minister Zwane?

MR MIKE BROWN: So the letter says:

10 *"The following emerges:*

1. *The Cabinet meeting was on the 13th April, 2016, not the 16th April, 2016 which was a Saturday.*
2. *No inter-ministerial committee was established.*
3. *Three Ministers were nominated: Finance, Labour and Mineral Resources.*
4. *No one Minister was designated as convenor.*
5. *The Financial Services Sector is not in "already distressed" as your letter indicates and care must be taken not to compromise financial stability."*

ADV KATE HOFMEYER: And then if we could just take a look at the last paragraph on that page. As I read it, Minister Gordhan concludes the letter with the statement, "*in the*
20 *circumstances it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions.*" What do you make of that request from the Minister of Finance in relation to co-ordination with his office for the purposes of engaging with financial institutions?

MR MIKE BROWN: So I would understand that to be the Minister in his capacity as having oversight for the financial services system to prior to having any engagement wanting to ensure that this would be a well thought through pre-planned engagement in the context of the legislation around anti money laundering, etc.

ADV KATE HOFMEYER: Thank you, if we can return to page 203 which is back in your statement.

MR MIKE BROWN: Sorry, just to be clear also. Clearly at the time that I attended the IMC, I was unaware of this letter notwithstanding it pre-dating the IMC.

ADV KATE HOFMEYER: Indeed, thank you for that clarification. Mr Brown, you
10 referenced at the top of page 203 your engagements with Ms Kellerman and her response that she couldn't give you more details about who would be in attendance because she said, quote: "*It was an ad hoc sitting*". When you did convene on the 6th May, was the meeting introduced as merely an ad hoc sitting of the committee?

MR MIKE BROWN: I can't specifically recall whether it was introduced as a sitting or an ad hoc sitting.

ADV KATE HOFMEYER: Thank you, and if you then go down to paragraph 5 on page 203, I am going to jump ahead slightly in the chronology because what your statement does at this paragraph is it actually jumps ahead to what you did after the meeting but I would like to follow its order and then return to what was discussed because we are
20 currently dealing with the theme of who was present at the meeting and so it's appropriate to deal with what you say in paragraph 5. As I have it, you record the steps you took after the meeting to confirm those who were in attendance. Please can you explain that to the Chair?

MR MIKE BROWN: So Chair, as I said earlier in my evidence there were a number of people in the meeting who I was familiar with. There were also two people who were not introduced at the meeting so I felt it appropriate to get a full listing of who was in attendance so I would know who those people were.

ADV KATE HOFMEYER: And if we go to page 207. That is Annexure A to your statement. As I have it that is both your request in the second half of the page will you please read into the record what you requested?

MR MIKE BROWN: So this was requested by my personal assistant and she requested to Zarina Kellerman: *"Please can you email me the full names and titles of Governments*
10 *that attended today's meeting. Thank you."*

ADV KATE HOFMEYER: And then if you look above that, there is the responses I have it from Ms Kellerman on the 9th May and who does she record there as the attendees of the meeting?

MR MIKE BROWN: So Chair, the response says: *"Apologies for the delay, the team consisted of the following: Mrs Faith Muthambi as well as her advisors, Mr Zwanele Manyi and Zandile Nene, Minister Mildred Oliphant as well as her advisors, Mr Herbert Mkhize and DDG Mr Virgil Seafeld, Minister Zwane and his advisor, Advocate Zerina Kellerman who was the Secretariat."*

ADV KATE HOFMEYER: Was that an accurate record of who attended the meeting on
20 the 6th of May with yourself?

MR MICHAEL BROWN: No, it was not.

ADV KATE HOFMEYER: And could you identify the respects in which it was inaccurate?

MR MICHAEL BROWN: I can to the extent that I am aware of that. So, firstly, Minister Muthambi did not attend. Her advisor, Mr Manyi did not attend. I am certain of whether Mr Sandile Nene was or wasn't one of the unidentified attendees that I said earlier. Minister Oliphant did not attend her advisor Mr Mkhize did attend. I am also uncertain whether DDG Seifield was or wasn't the 2nd person from the prior discussion. And then it was correct in the fact that Both Minister Zwane and Advocate Kellerman were there.

ADV KATE HOFMEYER: Thank you, I would like now to move to what was discussed in the meeting. And that is page 203 of your statement, and it commences at the bottom of the page at paragraph 6. Can you take us through in your own words, but table with
10 reference to what is contained in paragraph 6.1 to 6.7 over on page 205? What precisely was discussed at the meetings?

MR MICHAEL BROWN: So, the meeting opened with Minister Zwane advising that the IMC was required to submit a report to cabinet by the 11th of May and therefore, these meetings needed to be held expeditiously. And at the back of that, I read into the reasons for the ad hoc meeting that we spoke about earlier. He also upfront expressed dissatisfaction for some banks that has refused to attend. I did not know at that stage if any banks had or hadn't refused to attend. And stated that it was concerning that banks could undermine government by refusing to attend such meetings and I certainly felt that, that was a veiled threat in terms of the power of the IMC. He said that the meeting was a
20 confidential meeting, and I had the impression that it was being recorded, given that both the Secretariat was taking notes and there was equipment. I don't know whether the equipment was switched on or not from recording point of view. Minister Zwane started by saying that the IMC was constituted by cabinet and it was not there to represent any particular family or company; but rather to resolve the apparent issues of investor confidence and reported potential job losses that had emerged as a result of banks

closing bank accounts, and that those job losses were in thousands. I recall the number he mentioned in the meeting was 16 000. And I certainly upfront in the meeting confirmed that while we were happy to engage on matters broadly around closure of bank accounts and legislation, we will not be engaging at all around any specific matters on the Gupta accounts given banking confidentiality. I then spent a large portion of the meeting going through the regulatory environment, in particular guidance note 3, and I listed a number of issues that existed in guidance note 3, around what banks are required to do in terms of knowing their customers, risk rating their customers into high, medium and low, what are indicators of higher risk customers, and banks reporting obligations under either cash
10 threshold reporting or suspicious transaction reporting. I also specifically spent time going through the J P Morgan report, where J P Morgan disclosed publicly that they had closed 18 000 accounts in the prior period as a consequence of reputational risk, and also, the legal risk they run if they make a mistake.

ADV KATE HOFMEYER: Mr Brown, if I may just take you then to Exhibit H6 which we handed in previously, we handed it in at the point that you referred to having made reference to it at the meeting at Luthuli House but here in your statement, you also record that you made reference to it in the meeting in the IMC. We have marked it Exhibit H6. And if you would please indicate to us the aspect of that report that you shared with the IMC?

20 **MR MICHAEL BROWN:** So Chair, I would have court started on the 2nd page of H6, and if you go about, just about half way down on the page, on the left-hand column, I would have quoted J P Morgan as having said that they during the course of the financial under review, because this is an extract from their public integrated report that they deployed new anti-money laundering systems, which is a monitoring platform across all of their global payment transactions. It's now functioning across the company and utilizes

sophisticated algorithms that are regularly enhanced based on transactional experience. J P Morgan reviews electronically 105 trillion dollars of gross payments each month. And then on average, 55 000 transactions are reviewed by humans after algorithms have identified any single transactions as being suspicious. Following this effort, we stopped doing business with 18 000 customers in 2015. We are also required to file suspicious activity reports. I presume that is the US equivalent of our STR reporting and for J P Morgan last year, they filed 180 000 suspicious activity reports, and they estimate the industry as a whole, files millions each year. *We understand how important this activity is, not just to protect our company, but to help to protect our country from criminals and*

10 *terrorists.* I then would have continued in particular to say, *J P Morgan exited or restricted approximately 500 foreign correspondent banking relationships, and tens of thousands of client relationship to simplify our business and reduce our risk to anti-money laundering or AML. The cost of doing proper AML or KYC, know your customer diligence on a client has increased dramatically, making many of these relationships immediately unprofitable. But we did not exit simply due to profitability we could have maintained unprofitable client relationship to be supportive of countries around the world that are allies of the United States. The real reason we exited was often because of the extraordinary legal risk if we make a mistake in many places, and he is talking about around the world, it's simply impossible to meet the new requirements. And if you make just one mistake, the*

20 *regulatory and legal consequences can be severe and disproportionate.*

I think what's also relevant is, you know, probably one paragraph further down to say, *in all cases we tried, we carefully tried to get the balance right while treating customers fairly.* And I certainly felt that, that was a very well set out framework in what takes place in banks globally and here in South Africa.

ADV KATE HOFMEYER: And is it reflective of what happens in Nedbank?

MR MICHAEL BROWN: Certainly, the number of transactions and amounts are significant smaller given the relative scale. But it is reflective of what happens in industry and in Nedbank.

ADV KATE HOFMEYER: Thank you.

CHAIRPERSON: With regard to those transactions, are you able to give some picture of how small that scale is in regard to Nedbank transactions or accounts which you closed generally speaking in order to deal with reputational risk?

MR MICHAEL BROWN: So, the – I don't have the specific numbers with me, but my recollection is that in the year to June 2016, which was the last date – 2017 – which is the
10 last date at point I can recall, Nedbank would have closed approximately 100 accounts as a consequence of reputational reasons. There would be a significantly larger number of accounts that would have been closed for other reasons like dormancy, etcetera.

CHAIRPERSON: Okay. And I don't know to what extent you may or may not have an idea. Is that close to what you would think some of the major banks also might have, or is quite difficult to say in terms of, how much in South Africa, how much of that happens in South Africa in terms of banks? I see that maybe in the US it is quite large, but are you able to say, you are not able to say?

MR MICHAEL BROWN: Mr Chair, unfortunately I wouldn't have that data from our competitors.

20 **CHAIRPERSON:** Okay, thank you,

ADV KATE HOFMEYER: Thank you Chair. If we then go to paragraph 6.4. on page 204, and just to locate us, you told us previously in your testimony that when the meeting began, Mr Zwane gave you an assurance that the purpose of the meeting was not to

represent any particular family or company, but to talk broadly about issues of investor confidence. Mr Brown, did he hold true to that assurance?

MR MICHAEL BROWN: No, as you see here, there are several questions not only from Minister Zwane, but also from other members of the panel were also posed into the specific circumstances, there were questions around consistency, there were questions around what had been the triggers for closing these accounts -

ADV KATE HOFMEYER: Sorry, when you say these accounts, is this now a focus on the Gupta associated accounts?

MR MICHAEL BROWN: That is correct.

10 **ADV KATE HOFMEYER:** Thank you.

MR MICHAEL BROWN: And a conversation that is recorded here about a Nedbank staff member talking to a client of Nedbank about the Gupta accounts, it's a conversation that I wasn't aware of prior to this meeting but that clearly wasn't in the spirit or in the framing on how this was constituted.

ADV KATE HOFMEYER: And did you learn how they had come to learn about this particular conversation?

MR MICHAEL BROWN: I do not know how.

20 **ADV KATE HOFMEYER:** And how did you respond to the allegation that there was a staff member of Nedbank who had spoken to another financial institution about the closure of the Gupta accounts?

MR MICHAEL BROWN: So, I responded by saying that I was unaware of these allegations, that they were new to me. I then said that the only context that I could think they could have taken place in is a context of Nedbank talking to other financial

institutions with which we have a correspondent banking relationship, and as a result of our normal conversations in us doing our due diligence, and anti-money laundering reviews on those clients of Nedbank, it would be normal to have that conversation. And I said that I would however try and understand from when I went back to Nedbank as to exactly what the underlying conversation was, which I was able to do and I subsequently addressed a letter to the IMC that confirmed that the IMC's allegations to us that the Nedbank employee was inappropriately talking to Nedbank clients about Gupta related matters was in fact, not true.

ADV KATE HOFMEYER: Thank you, and were the accounts of any other families
10 discussed at the meeting?

MR MICHAEL BROWN: No.

ADV KATE HOFMEYER: If we then go over the page to 205, you then reference a paragraph 6.5 what Minister Zwane then said in relation to the Nedbank-Gupta entity relationship. Can you please explain to the Chair what he conveyed to you?

MR MICHAEL BROWN: So, what happened in the meeting is that Minister Zwane referenced that Nedbank were not the main transactional bankers to the various Gupta entities. I do not know where he got that information. But he then went on to suggest that would Nedbank consider stepping in to save jobs and provide an amicable solution given that the relevant family had in the period where we gave notice and held this meeting
20 resigned from those companies.

ADV KATE HOFMEYER: What did you make of that request to you?

MR MICHAEL BROWN: I found it particularly strange.

ADV KATE HOFMEYER: And what was your response to it?

MR MICHAEL BROWN: I reminded Mr Zwane that we were not here to discuss specific client matters.

ADV KATE HOFMEYER: And if we just go back to his suggestion that Nedbank step in to save jobs and provide an amicable solution because family members had resigned from the companies. Would that provide an adequate basis for Nedbank to reinstate the accounts that you had closed?

MR MICHAEL BROWN: Absolutely not.

ADV KATE HOFMEYER: Why not?

MR MICHAEL BROWN: Because our decision for closing the accounts was based on the
10 reputational and business risk associated with those accounts and you know, that reputational and business risk would not have changed or materially not have changed at all as a consequence of resignation of directors. The underlying companies were still in existence and operating.

ADV KATE HOFMEYER: At the end of paragraph 6.5. you deal with question of collusion amongst banks. Please tell us what was discussed in that regard?

MR MICHAEL BROWN: So, my recollection is that there was a conversation around the
seeming timing of all of the banks closing accounts at the same time, and as a consequence of that, was there collusion in the closure of accounts, and I refuted that saying we had not had any conversations with any of the banks around closure of
20 accounts.

ADV KATE HOFMEYER: And then at paragraph 6.6 you talk about how the meeting concluded. Can you tell us about what happened at the conclusion of the meeting?

MR MICHAEL BROWN: So, at the conclusion of the meeting, we were thanked for our attendance, and Minister Zwane commented that he found it surprising that other banks had refused to attend the IMC meeting with government considering that banks received their licences from government.

ADV KATE HOFMEYER: What did you take that to mean?

MR MICHAEL BROWN: I also found it to be a very strange statement. I think it felt like a form of a threat, it is also a technically inaccurate statement because banks do not receive their licences from government they receive their licences from the Reserve Bank which is constitutionally an independent body.

10 **ADV KATE HOFMEYER:** At paragraph 6.7 you reference that it was agreed that Nedbank would be provided with a draft set of minutes for the meeting. Did that occur?

MR MICHAEL BROWN: No, we were not provided with a draft or final set of minutes notwithstanding our request for one after the meeting.

ADV KATE HOFMEYER: And at paragraph 7 and Chair, this will conclude my question for the witness, unless there is why further for you? You talk about your overall impression of this meeting with the Ministers at Minister Zwane's offices. What was that impression?

20 **MR MICHAEL BROWN:** So, I think I left the meeting with the impression that the IMC was focused on 2 key issues. Firstly, to try and determine if there was collusion amongst the banks in the closure of bank accounts and secondly, to determine whether Nedbank would have appetite to step in and become the primary transactional banker for the Gupta group of companies.

ADV KATE HOFMEYER: And just for clarification purposes, at paragraph 6.5 the discussion around the relevant family, can you just clarify for us which family that was?

MR MICHAEL BROWN: The Gupta family.

ADV KATE HOFMEYER: Thank you, those are our questions.

CHAIRPERSON: Thank you. Mr Brown, in that meeting with the IMC you said that there was mention of job losses which were said to be in thousands. As at that time, did you understand those job losses to refer to any specific entity or not? And if your understanding was that they were talking about job losses relating to a particular entity, what entity was that?

10 **MR MICHAEL BROWN:** So, my understanding at the time would be that it was job losses associated with a particular group of entities being the Gupta-related accounts, and that that was an estimate of, if the Gupta's were unable to have banking facilities and therefore as a consequence, these companies closed down, that was an estimate of job losses.

CHAIRPERSON: Now, when you spoke about the meeting that you had with the ANC you made it clear that when you came out of that meeting, you had no feeling that you had been pressured to try and reverse the decision of the bank. The discussion had been in general as I understand it. Excuse me. In regard to the IMC meeting, did you have the same impression?

20 **MR MICHAEL BROWN:** No, I did not.

CHAIRPERSON: And do you want to just articulate again what your impression was as you left the meeting?

MR MICHAEL BROWN: So, I certainly left the meeting with the impression that a good outcome for the IMC would have been for Nedbank to agree to take over the transactional facilities of the Gupta family. Something that we were clearly not prepared to do.

CHAIRPERSON: And the impression you had, was it one that made you feel that there was pressure being placed upon you, or simply that maybe there was an attempt to persuade and no more than that?

MR MICHAEL BROWN: So, again I think this is relatively difficult on a continuum of pressure to persuasion -

10 **CHAIRPERSON**: I appreciate that.

MR MICHAEL BROWN: But I certainly felt that the numerous references in the meeting to the licencing regime was pressure that was being placed on the bank.

CHAIRPERSON: You see because it is conceivable that somebody may come before this Commission and say that the discussion was intended for nothing more than just a general discussion. That's why I am asking you these questions. So, maybe it might be good if you say, if you just mention all the things, officials of the meeting that together may have given you this impression?

MR MICHAEL BROWN: So, I think primarily the conversation was being led by the Chair of the meeting which was Minister Zwane.

20 **CHAIRPERSON**: Okay, maybe my question was not as clear as it should have been. What I would like you to say and you have said part of it is just to say what you would say if somebody said, you are wrong to think some pressure was being placed on you to change the decision. I just want you to say, *I would stand by that statement if that would*

be the position because of A, B, C, D. or if you say, look, it is nothing more than my impression. That's fine. I just want to be able to – I just want you to deal with what I think may well come up later on so that we know whether you feel strongly that, that was the position or it is just an impression. I just want you to be able to deal with that adequately.

MR MICHAEL BROWN: Thank you Chair. So, I would say that what caused me to believe that there was being pressure placed on the bank would have been a combination to the references to the licencing regime. And beneath that, the sub-text around, you know, *be careful, things could happen to your licence if you don't behave in a particular way.* And secondly, the closure of the meeting which effectively was a request
10 for Nedbank to become the primary transactional bankers for the Gupta companies given that other banks had terminated.

CHAIRPERSON: Did you say you didn't attend the meeting with Mr. Howa?

MR MICHAEL BROWN: That's correct, I didn't attend, but officials from the bank did.

CHAIRPERSON: Yes, and I assume they would have given reports to you. Would those reports have revealed that basically and that meeting, the bank was – the bank did give information to Mr Howa that it could not give to third parties to say, this is why we have made this decision, and therefore, they had the opportunity to say that's true, that's not true or whatever?

MR MICHAEL BROWN: So, Mr Chair, my information is that the – first, the meeting with
20 Mr Howa was a very short meeting. The meeting was concluded probably in a matter of minutes. The intention of that meeting was to deliver the notices of termination which contained within them the reasoning for termination being in our opinion, the level of business and reputational risk. And as a consequence therefore, the termination in terms of contractual clauses and that initially Mr Howa didn't want to receive those notices. We

actually had to subsequently deliver them via registered post, and his only request was for the bank not to make any public statements which we hadn't done. So, I don't believe we had the opportunity in that meeting to explain more than that given the very short nature driven by him, not by us.

CHAIRPERSON: Thank you very much.

ADV KATE HOFMEYER: Mr Brown, if I may just clarify there and I fully appreciate that it is difficult for you not having been an attendee at those meetings. But the description that you have just given about the wanting to hand over the termination letter and the resistance to that, as I have it from your affidavit was the meeting that was held Mr Nath
10 originally. Your evidence previously was that, that occurred on the 7th of April, and that it was short in the terms that you have described because he was not willing to take over those letters of termination. As I have it, the Chair's question relates to the subsequent request from Mr Nazeem Howa to meet with the bank. As I have it, that was in the letter of the 14th of April which you received as the bank on the 19th of April. And then the subsequent meeting with Mr Howa took place, let me just get my note here – on the 3rd of May 2016. Can you just assist us there with the nature of the meeting with Mr Howa and what was discussed?

MR MICHAEL BROWN: Thank you, your sequencing is absolutely correct. Apologies, I was answering in respect of the meeting with Mr Nath on the 7th of April. In respect of the
20 meeting with Mr Howa again, it is difficult for me because I didn't attend the meeting, but it is my understanding that that was the meeting were there was a much broader discussion around Nedbank's termination, a conversation around the reasons and an attempt to persuade Nedbank to reverse that prior decision.

ADV KATE HOFMEYER: And as I have it, the outcome is that Nedbank did not retract its prior decision.

MR MICHAEL BROWN: That is correct.

ADV KATE HOFMEYER: Thank you Chair, and the final follow-up just in relation to your questions previously to the witness in relation of the possibility of further evidence before the Commission, my learned leader at the commencement on Monday indicated that notices to implicated persons had been sent out flowing from the statements, those were the statements of Standard Bank and of Nedbank which the legal team viewed as raising implications for persons. So, specifically in relation to Mr Brown's testimony, due notices
10 were sent to Minister Zwane. And at present, there has been no application for cross-examination or any other application from Minister Zwane.

CHAIRPERSON: Okay, thank you very much.

ADV KATE HOFMEYER: Thank you Chair.

CHAIRPERSON: Mr Brown, thank you very much for coming to give your evidence. I will excuse you for now. Should there be a reason for you to be asked to come back, the Commission's legal team will be in touch with you and request you to come back. thank you very much, and you are excused.

MR MICHAEL BROWN: Thank you.

CHAIRPERSON: It looks like this might be the opportune time, Mr. Pretorius, you want to
20 say something?

ADV PAUL PRETORIUS: No, we understand that your preference to use all available time Chair, but in this case we have to set up overhead projection facilities and the witness is not here at present. He was due to arrive in time for 11:30 hearing.

CHAIRPERSON: Yes.

ADV PAUL PRETORIUS: So, may we adjourn until – may we adjourn for 15 minutes then? Just to allow the setup to take place.

CHAIRPERSON: 15 minutes is normally for tea time. Are you sure you – that's enough for setting up?

ADV PAUL PRETORIUS: I am told so, yes.

CHAIRPERSON: Okay, all right, all right. We are at five past eleven now, so let us resume at twenty past eleven.

ADV PRETORIUS: Okay, Chair.

10 **CHAIRPERSON:** We adjourn

COURT CLERK: All rise.

Session 2

CHAIRPERSON: Yes Miss Norman?

ADV THANDI NORMAN SC: Thank you Mr Chairman. This witness is Dr Daniel Kaufmann and I would like the Chairman to have regard to exhibit "G1" which is his joint statement together with Dr Hellman, but I would like, ask the Chairman to swear the witness in?

CHAIRPERSON: I am sorry, you want this bundle to be marked "G1"?

ADV THANDI NORMAN SC: It was marked already exhibit "G1".

CHAIRPERSON: It is just that the one in front of me is not marked or it doesn't appear
10 to be marked.

ADV THANDI NORMAN SC: It doesn't appear to be marked yes.

CHAIRPERSON: Thank you the Registrar can swear the witness in please?

REGISTRAR: Please state your full names for the record?

DR DANIEL KAUFMANN: Daniel Kaufmann.

REGISTRAR: Do you have any objection with taking the prescribed oath?

DR DANIEL KAUFMANN: No.

REGISTRAR: Do you consider the oath to be binding on your conscience?

DR DANIEL KAUFMANN: Yes.

REGISTRAR: Do you swear that the evidence you will give today will be the truth, the
20 whole truth and nothing but the truth? If so, please raise your right hand and say so help
me God.

DR DANIEL KAUFMANN: So help me God, yes.

REGISTRAR: Thank you.

CHAIRMAN: Thank you very much.

ADV THANDI NORMAN SC: Thank you Mr Chairman. Dr Kaufmann is it correct that you together on, with Dr Hellman testified via skype on the 31st of August 2018, to this Commission?

DR DANIEL KAUFMANN: Yes it is correct.

ADV THANDI NORMAN SC: Is it also correct that you are in possession of the transcript of the proceedings of that day?

10 **DR DANIEL KAUFMANN:** Yes.

ADV THANDI NORMAN SC: And have you gone through that transcript? Do you recall that the evidence that is contained in that transcript is evidence that you gave?

DR DANIEL KAUFMANN: Yes.

ADV THANDI NORMAN SC: Thank you. On the last occasion you did indicate to the Chairperson that in response to some of the questions that you would want to elaborate when you come to South Africa?

20 **CHAIRPERSON:** I am sorry before you proceed I thought you would follow up with another question in the light of the fact that at the time when they testified, they were thousands of kilometres away from here, that you would ask him, let me ask him. Do you confirm that the evidence that you gave at the time via the video link is true and correct?

DR DANIEL KAUFMANN: Yes, Mr Chairman I do confirm that.

CHAIRPERSON: Thank you.

ADV THANDI NORMAN SC: Thank you Mr Chairman. On the last occasion then you indicated in response to some of the questions that you would want to elaborate when you come to South Africa and testify. Just one aspect which I would like you to just confirm which I do not recall that you confirmed according to the transcript that you are actually an Economist and a Social Scientist, am I correct?

DR DANIEL KAUFMANN: Yes that is correct.

ADV THANDI NORMAN SC: And having read your statement, having looked at your transcript and having looked at the material that you provided, I decided on my own to come up with a presentation which I would like to show and then you would indicate to me whether you believe or you want to elaborate on some of the things that I have recorded on that presentation? With your leave Mr Chairman may I beg leave to present to you the presentation which is entitled, can we just open it, "The State Capture Phenomenon Where Business Becomes The State". Could we just move on, or maybe even at that point, would that coincide with your understanding of when a State is said to have been captured that that would be those instances where business would become the State itself?

DR DANIEL KAUFMANN: Thanks, Mr Chairman a comment on these, that is a very powerful title for a presentation and that is noted. In terms of the approach and the work which we have done for decades with Professor Hellman who is not here before you today, these would be an extreme manifestation of State Capture when the business become fully the State. That however, should be also noted that State Capture could have other forms and could be coming more in subtle ways.

The way we define it is the ability of certain very powerful influencing group usually from the private sector to shape the rules of the game that basically make the State function or

not. So shaping the institutions, the rules, the policies, the laws and regulations governing the State which could come in various forms, an extreme form is when it becomes the State itself.

ADV THANDI NORMAN SC: Yes thank you, and then the next... (interrupted)

CHAIRPERSON: I am sorry before you proceed. It might be helpful if the witness would just refresh everyone's memory of some important features of the evidence they gave before. I do not know to what extent what you have will reveal that or whether it is just a continuation?

ADV THANDI NORMAN SC: No, in fact I wanted to start with what you are suggesting
10 but the witness preferred that we start this way. We will deal with all of those very, very critical features of his evidence.

CHAIRPERSON: Alright.

ADV THANDI NORMAN SC: Thank you. And then the second slide would, haven taken from various countries, haven taken from various authorities and various publications where we have listed possible persons that may be or entities that may be captured. You see that, second slide? Are you there?

DR DANIEL KAUFMANN: Yes.

ADV THANDI NORMAN SC: Yes in that certain countries it may be the President of that
20 country, in certain countries the Ministers, it may be Officials, it may be Councillors, it may the Judiciary?

DR DANIEL KAUFMANN: That's correct.

ADV THANDI NORMAN SC: Okay, thank you and then on the third slide we deal with intermediaries and enablers, this is something that you did not touch upon in your

evidence when you testified on the last occasion. It was mentioned briefly that there would be many players in the industry, but then what I have identified, what I have identified from your evidence is, these intermediaries, enablers can be many and not easy to identify but the important facilitators of State Capture, some private Accountants, financial and Tax Advisors, International Traders, Lawyers etcetera. So why is it difficult to identify the intermediaries and enablers?

DR DANIEL KAUFMANN: Well the challenge is one of doing the proper in depth diagnosis for each country. If that, if and when that is done and a number of countries have embarked in this process and you are one, it should be possible to identify those
10 intermediaries but by definition because of their nature of State Capture they tend to operate in the shadow and there are many pre-conditions for basically shedding light on that shadow.

I can refer to that later as we go through the transcript and you may have detailed questions in regarding particular cases and how long it may take until all of these is unearthed but with a proper political war resolve and then tactical war and investigative war it is possible to unearth and identify who these enablers are. It is very important to recognise between the captor that those that seek to shape the laws, the regulations and the policies of the State and those that are captured they are very important facilitators and enablers, it is not done just between two parties usually, it is a complex web and
20 doing the proper diagnosis it will vary from country to country but it is possible,

ADV THANDI NORMAN SC: Yes, thank you. And then you have already mentioned the capture which is on the next slide the entity, the person or the firm that would have control over the intermediaries, enablers and may seize public power, influential business people, particular economy conglomerates, military etcetera.

DR DANIEL KAUFMANN: That is indeed the case and in some, certain some countries also the mafia's, drug traders, very powerful illicit economic interest play a role in some others could be some part of the more traditional economic or financial elite so it will vary from certain to certain.

ADV THANDI NORMAN SC: Yes thank you, and then the next slide is these are the potential sectors that you have identified in your report, not all of them but some of them as being the sectors that can be captured being the extractive, the mining sector, the industrial sector, energy, financial, communication and military. Is that correct?

DR DANIEL KAUFMANN: That is correct and that again I want to stress, take this
10 opportunity Mr Chairman to stress the importance of acknowledging the particularities of these challenge in every country and that is one of the reasons I commend your Commission and the work that it is doing but nobody can come from the outside and say, and have a particular template or Bible that says where it all happens.

As the expression goes to use if you allow me a bit of lightness, why do so many robbers are interesting in robbing a bank? It is because that is where the money is. Well it is a useful simplistic approach to start looking at this issue when does a diagnosis within a country it will depend where the most, the sources of major [inaudible 0:11:32] for that elite would be. In some countries it would be the oil sector which is, we focus many countries on that which is subject to capture of the rands, others is the financial sectors,
20 others could be both so it would vary from country to country depending on the particularity of the country.

ADV THANDI NORMAN SC: Yes thank you, and then I have just entitled matters that you have identified as red flags so to speak. So you deal with sponsorships and donations, charities and educational foundations, Trusts mismanaged and unduly

influenced State owned enterprises or through privatisation, illicit political finance, beneficiary ownership, financial benefit to dependants of family members, monopoly over fishing, mining, energy, communication rights, and financial benefits to the members of the Executives from foreign countries. I will take you to some of these later on in your evidence, but is there any particular one that you believe that I have left out from your summaries?

DR DANIEL KAUFMANN: I think this is a comprehensive enough first unless some further details can come out through the details. Later I should stress also that since already it is clear that you are doing very, very important work on that, there may be
10 some features that you have emphasised here which may be particular here which we would not have emphasised and we have not seen it in our previous work, like you mentioned at first sponsorships and donations, you would know best how that works here and whether that is a particular feature. That does not come from our work and the only other comment for now to put it in context that could be quite unique to hear.

On the other hand the challenge of State owned enterprises being utilised as a vehicle for capture and the distortion of basic policies, the use of public funds and so on, that is quite common in this field and it is something that is a major challenge that we are trying to help with in other countries in particularly in the oil sector we have studied that in the context of the organisation I lead but also it is clear in other sectors as well. So that you
20 have mentioned here, it is a challenge it is quite common in many other countries of how State owned enterprises are not, do not operate in the best commercial, financial and economic interest of the country, of the public good but are essentially part of the captured environment for the benefit of the few.

ADV THANDI NORMAN SC: Yes, thank you, and then the next slide we deal with the administrative corruption as you deal with it in your statement and regulatory corruption State Capture, but what, I would not want you to comment on these because the questions that I am going to be asking you later on they relate to the distinction between these concepts which we must, you will have to deal with, but you just summarised your report in so far as those are indicated therein. And then the next slide is the consequences of State Capture, the erosion of the economy, the cost to the entire society, that it may plunge the country into recession, it may affect poor members of society, destroys competition, it affects countries borrowing capacity and it may lead to
10 unemployment and increase to State grant dependency.

But I am going to now with all of that summary then take you so that you can put that summary into context as to when you are talking about State Capture, you have already told us what it means, but we would like you to repeat it now because maybe other people didn't hear it properly when you explained via the video link, that the whole concept, you had coined the terms State Capture together with Dr Hellman, am I correct?

DR DANIEL KAUFMANN: That's correct.

ADV THANDI NORMAN SC: Yes, and then in simple terms what do you mean when you say a State is Captured?

DR DANIEL KAUFMANN: First Mr Chairman, and thanks again for this opportunity and
20 to be in person in here it is my honour and privilege to be before you in person and in your wonderful country but to give credit where credit is due, we did not invent the terms capture and we did not invent or what is in this framework but as it is usually in Academic work, we studied in depth the previous literature as well as reality as we saw it on the

ground as well as we are serious believers in evidence based analysis, evidence based advise and evidence based policy making.

So we did a lot of surveys to collect data about this situation, a lot of credit goes to other writers in the, well in the past but particular one noble prize in the economics George Stigler who wrote first about regulatory capture and he did encompass a sense of very powerful interest being able to influence particular regulations in an economy, so that already had been developed.

What we did is pick up on that but broaden it and I think that is a clarification if you allow me to make it very broadly here because I know that is a legally oriented Commission
 10 which is commendable yet it is very important to understand our concept beyond only the laws, the legal aspects of that. The concept that we developed and we made it very clear is the shaping of the rules of the game in a particular nation by those influential few, usually but not always illicit means to do so and these rules of the game, by these of the game we mean the laws yes included, but not only I mean some countries that mostly express through the implementing regulations and other such regulations, it is the laws, the regulations, the policies, what happens is micro economics policies and so on, there is a lot of discretion in any country within the constitution, and within the existing laws yes yet they can be captured the allocation of public expenditure.

What happens in State owned enterprises? Whether their procurement system is rigged
 20 or not could still be in a context where their constitutions and the laws in the constitutions were not necessarily unduly shaped by that particular capture, capture elite. It could have started very well but it is in the context of these policies and regulations and institutions that are captured that these could happen. So in that sense I want to draw the distinction and the broadening of the term from regulate, the original notion of

regulatory capture or even legal capture, we would very narrowly focus on that to make it broad to also encompass all policies implementing regulations as well as institutions, the key institutions in the State.

ADV THANDI NORMAN SC: Seeing that you have already touched on regulatory capture, could you define for us because this is an aspect that you deal with in paragraph 7 in your statement, you deal with administrative corruption, you deal with regulatory corruption. Could you just define those because there seems to be a very fine line between the two and also to make it easy for one when you are presented with facts at the end of the day to see whether this is indeed regulatory corruption or administrative corruption, could you just deal with those two concepts?

DR DANIEL KAUFMANN: So just a bit of elaborating on that Mr Chair, administrative corruption takes place when there is bribery or related illicit action that basically provide a private gain and a private benefit to one individual in the implementation of a particular regulation or a particular law. If I have accumulated certain sanctions for being drunk, for drunk driving or trying to get rid of parking ticket violations and I pay a bribe or for red tape, to try to get around red tape in my company and so on and facilitate for my own individual benefit without, which is insidious and it should not be happening but that does not necessarily have a major impact throughout society and for the public good to everybody else, that is administrative corruption and that would extinguish, so that is in the implementation of a particular regulation or not.

If instead we are talking about altering and shaping these laws, these regulations, these institutions have it influence it and distort them so that ultimately the benefit is for myself or a small group in the elite and it is usually at the expense of the public good to the rest of society, that is what we are talking about in terms of State Capture and again I want to

make the distinction that is broader than the original notion of regulatory capture which only focus on particular regulation but here we are talking about institutions also and about policies.

ADV THANDI NORMAN SC: And then this regulatory corruption, administrative corruption and State Capture, you associate, when you titled some of the headings they referred to countries that are in transition. Can we find these in countries that are actually stable, that are old that are not in transition at all?

DR DANIEL KAUFMANN: That is another excellent question Mr Chairman and before fully embarking into that just like I gave an example in the case of administrative
10 corruption as like when there is red tape and one tries to get around the red tap in paying a bribe, a very potent example of what happens with State Capture which doesn't necessarily imply that somebody shaped the constitution in a particular way, it is in political financing and the rules, the regulations and the system of party and political finance it is something that evolves over time and enormous amount of abuses take place in many settings in the world to affect particularly those policies and subsequent laws that are passed through Parliament in many countries.

So that is an example of how a system can be influenced, the same can happen with as we said through State owned enterprises and through public expenditure and through other such things which have major impact. So now in terms of the issue of in transition it
20 is essentially to recognise the notion that countries that have been in transition, their institutions are either more influx because they are also in transition, they are evolving, they are being developed and or they start from a rather weak initial stand point.

And for either of those two reasons or for both the vulnerability to being captured in the process, because the institutions are being shaped during those transitions and the laws

and the implanting regulations and the policies, there is a higher probability of being available to capture. It is very important to recognise also how do we interpret transition? Transition is not unique to what we used to call developing countries and I am a proud citizen of a country that was labelled as a developing country was it Chile and now we are a proud emerging economy and part of OECD.

Those transitions also take place in very industrialised and very rich countries, many of us are observing with much concern the transitions beginning to take place, how it has begun and will probably have major impact in the case of Britain and Brexit, that is going to be a major transition where many institutions, rules, laws, regulations would have to be reformulated and are going to traverse.

So that is the first clarification. Transition doesn't mean development, developing country status it is common in emerging economies. We were in transition and in some sense we were just at the end of a very important transition, post military dictatorship in Chile which was in Chile until the late '80's. It took a generation to, for that transition to occur I am not going to label now all the details but it takes a long time. The Soviet system, one is a transition, one is a red curtain falls and in many ways it is still in transition.

I have come here from Ukraine, still a country very much in transition where many of the institutions had been subject to this challenge of capture in one form or another. So it is a higher vulnerability in countries in transition but it is not only. To illustrate, a country that has not been in full-fledged transition with very robust institutions since sometimes the 1900's, after having experienced enormously high and corrosive corruption is the United States itself and it took a very long time for that transition to occur.

After the Civil War historically things did improve, there were hiccups with the mummy hall experience of their political movement out of New York and so on then there was a

recovery and much improvement but nowadays it is a serious concern and given their political changes that some forms however subtle or not subtle of State Capture have returned even in the case of the United States which if there is interest I can elaborate further later but it is to illustrate that that can also happen in countries which are typically not labelled in transitions.

ADV THANDI NORMAN SC: Yes, then you would get a questions from someone from South Africa, where South Africa is, has according to South Africa now as you find it now has its foundational values entrenched in the Constitution which we regard as one of the best Constitutions in the world, now, then someone is going to say when all the laws were
10 promulgated, all of the laws after 1994 at least, they had to be consistent with the values as housed in the Constitution. So you have that situation then in South Africa where we know that everything has to be constitutionally compliant, how then does one associate regulatory corruption with a state such as South Africa as we find it now?

DR DANIEL KAUFMANN: Thanks, an excellent and complex issue again that you are asking and Mr Chairman, the first thing that I would want to clarify is that the assessment of the situation in South Africa is yours, I am not an expert in South Africa so that's of high interest and I am of course very interested in informing myself while I am here on that, so I speak from the experience of other countries. Countries like the United States and some others have very robust also and proud constitutions, there had been
20 amendments because the times evolve and as times evolve there is always a need to refresh the legal framework, reinterpret, have amendments and so on.

Just to illustrate since we just discuss the United States and also to put it very frankly and clearly that this problem of State Capture is not of one type or particular country or economy, it is not an issue for developing countries in particular or so on. The United

States which has had their very robust constitution, very robust and then with its amendments they have had over time, interpretations, because it is common law interpretations, they go to the Supreme Court and what constitutes corruption and bribery? Under the existing laws as of 2 years ago, as of a few years ago, what constitutes bribery and corruption their former Governor, the other time a certain Governor of Virginia was indicted, was prosecuted, indicted and then ended up serving time because of illicit gifts that he had received while in office from a contractor that subsequently got particular contracts. That goes, is appealed, goes up to the Supreme Court, the Supreme Court, the Supreme Court essentially uses that case to redefine and

10 narrow the definition of bribery and corruption by suggesting that was not sufficient there was corruption there had to be a much more direct and totally proven link between the two events.

The gift that was provided on the one hand and then the subsequent decision which is considering the Governments field of overly restrictive and draconian and therefore it would leave many people who are engaged in bribery and corruption with impunity. That as an analyst I am suggesting that but the main point here is to illustrate that the laws are a very important institution in a country at a particular moment but they do evolve even when there is a constitution. So what was illegal up to a year and a half ago in the United States regarding a possible bribery offence now it is legal that goes also to the notion that

20 we have exploring the past that bribery can be or capture, can be done through legal means according to the laws of the moment in that country which doesn't mean that that cannot change.

Conversely and not to be also fair to many robust institutions in the United States, after the Wall Street crisis, following that major debacle which had major worldwide consequences and the Wall Street crisis is a case on capture of the financial rotatory

system by Wall Street and related elite. After that there is a reaction, there's an institutional reaction suggesting the robustness and the resilience of the political and related institutions in the United States, as a result major regulation and legal changes take place in the form of the Dodd-Frank Financial Sector Bill which makes many things that were legal before illegal in terms of the activities in the financial sector.

Again it is a way of suggesting that these laws do evolve over time and different groups may have different type of influences on those laws. Some through legitimate lobbying and part of the competitive political discourse but some they could be on you and could be going the wrong direction. Unfortunately now there is a movement to undo many of
10 those tighter regulations of the financial sector again because of the interest of the financial elite in the United States and the present political environment. Most of it has not yet been undone and it goes to show that the resilience of the institution are important.

But the point here is we are in a dynamic context where the laws the regulations, the policies of every country evolves even in the context of a very robust initial constitution and set of laws.

ADV THANDI NORMAN SC: Yes, thank you. In your statement you deal with the issue of governance witnesses as being some of the causes of State Capture and then could you just elaborate on that and just show briefly why governance deficiencies would cause that or would lead to it?

20 **DR DANIEL KAUFMANN:** In simple terms Mr Chairman, thanks again for a very apt question, in simple terms we are dealing with a complex inter play between the chicken and the egg. First and you showed it in your summary slide very well, when State Capture is present that those actions by the captor are bettered by the intermediary, the

facilitators, the enablers, can have major consequences. Some of those consequences are on the broader governance structures of a country itself.

In some countries expectedly [inaudible 0:34:59] in some countries in Latin America, not the Brazils or the Chile's who has made much progress but in others some many countries, the Former Soviet Union the judicially has been totally captured. So the undermining of the governance, a key governance institutions where it is in rule of law in terms of economic management and policy making and so on takes place as a result of capture and that would be one of the slight additions I would have suggested in your nice framework that you put it, is not only the social economic and other costs you put but the
10 cost in terms of the governance institutions being weakened and undermined and let's not under estimate and call it by its name, the undermining of democratic constitutions. In countries were, that happen in transition, democracies is already dynamic and vibrant but if a very small elite captures a system, in the eyes of the rest of the population there is a major loss of legitimacy of those very democratic institutions.

I mean in Latin America we have had it from time to time, such political influencing in equality that arises, there are talks about military coup again and so on, after having left behind this military dictatorship for a long time and the appetite then of considering well maybe we would not be so bad under military dictatorship if instead the alternative is a completely capture system in the economic and social sets. So I want to stress that
20 linkage.

Of course the other side of the causality direction, the direction from going of weak initial institutions to enabling State Capture to occur is also present and that goes to your previous question why do you focus on countries in transition? When the Soviet Union collapses, in some sense he becomes almost like a blank cheque in terms of all the

institutions that have to start from scratch consistent with political competition and democratic institutions as well as economic competition, what to do with all the State assets that begin to privatise and what happens to them?

So depending how weak those governance structures at the initial point that can also influence the extent to which State Capture occurs, so essentially the directions in both ways. The initial governance strength or weakness or the institutions of the State when the process start is a very important determinant about the vulnerability to State Capture and conversely once State Capture occurs that has very pernicious effect for the development of the governance institutions in the country.

10 **ADV THANDI NORMAN SC**: Yes, from your, I know in one of the answers to one of the questions you made it very clear you are not here to talk about South Africa because you have not looked, you have not researched south Africa?

DR DANIEL KAUFMANN: And because... [interrupted]

ADV THANDI NORMAN SC: Yes.

DR DANIEL KAUFMANN: You know it much better.

ADV THANDI NORMAN SC: Yes thank you, and then can we then just deal with one other issue that you dealt with in your report at page 38 where you now say once a State finds that or once there is what is State Capture in any state, what are the solutions? I had taken you through this in your previous testimony but I would like you to give
20 examples to the Commission because you had undertaken to come back and give examples of some of the countries that were found to be in a situation where there was State Capture and what steps did they take to try and redress that situation?

DR DANIEL KAUFMANN: Sure, I can do that. Now it is very important to recognise how incredibly complex this issue is and that is why it is commendable what you are doing and there are pitfalls in just picking a country and suggesting the whole country is a success. We are in an imperfect world with great leaders, great institutions and lighten countries in many cases but also there are other forces, other institutions so there will be progress in some areas and not in others. There will be two steps forward and one step back even when there is progress.

But of course I cannot help if you allow me to say a few things about the case of my own country in Chile where first it is very important to study and recognise the historical
10 antecedence in every country, the Soviet Union for instance the Soviet system in many ways we studied very, with data and very clearly, there was very significant corruption throughout their system and how their elite in fact basically benefit in a very particular way at the expense of the rest of the population.

So it is very easy sometimes to only focus on what happened a few years ago. In Brazil everyone is focused on what has happened very recently in the case of the car wash scandal and so on but we have this, the understanding and the view of already this has been going on for 20 years and one has to understand the military dictatorship and to see them and how that had a major impact.

In the case of Chile it is a case that historically, there was already, there were already in
20 lighted leaders who in parked the absolute paramount importance of serving, of being public servants and serving with full integrity and doing away from lack of interpreted practises. There was already historical structure, in fact from the first founder of the country Bernardo O'Higgins and who becomes the first leader in the country we are talking about 1812 if you allow me, and one of his first decrees was to order at that time

the presidential house, it is a presidential palace but it is not so much of a palace, the outside walls had to be plastered with all the names of the top officials and the high officials and what were their income and assets.

This is 1812, we are now in almost 2020 how many, in how many countries they still reticence to do some, such basic wall, but that is to illustrate that it is very important to go back to history and then there are many other [inaudible 0:42:27] there are problems, but governance improves and then there are set backs and these are set backs under the dictatorship of Pinochet in the mid '70's to late '80's and eventually was discovered there was a lot of corruption including by the leader [inaudible 0:42:45] and the association with
10 the particulars by the private elite was already a form of capture then and then major reform start to take place.

Two major findings that we have, already with Joel Hellman from our initial war on State Capture from the Soviet Union, which post-Soviet countries we are talking about 27, did better and which ones went the capture way, which ones went the competitive way? And it is a clear distinction and I discussed it briefly last time between the two types, the countries in the Baltics, the Slovenians and others have gone market, have gone completely, so there is nothing predetermined versus countries like Ukraine and Russia [inaudible 0:43:35] and others.

So there are two distinct types. Two major issues has come out very clearly as
20 associated with [inaudible 0:43:46] of capture of lack thereof. One, political contestability, the extent that there is a vibrant competition politically and associated with that civil liberties, the voice of civil society, engagement of civil society, are they there or are they suppressed like in Central Asia unfortunately that is the case there now, the voice of that, so that is one, the political contestability and competition.

The other is economic contestability and competition, to what extent a vibrant medium small scale sector is allowed to operate, enter and operate. Even if there are large enterprises either is there enough competition rather than, in the Former Soviet Union we call them Holy Guard, is there one or two Holy Guards or maybe there are twenty, twenty five and then already competition and suits as well as the next stage medium and small scale.

So the extent of that economic contestability, economic competitions is very important. For that obviously opening the doors to the rest of the world having investors and the presence of global, more global industries also can be very important. Also misbehaving
10 in terms of Governments and corruption but overall the openness and the competition that context is very, very important.

Then one gets into the details those are very large buckets but obviously to the extent to which anti-monopoly regulation in the country effective works is extremely important for such a competition in the economic field. In the political field it is extremely important to which, not only to which this political competition among parties, you know very open legitimate way and total open and voice of civil society but the extent to which there is democracy within party.

In Chile, one of the things that we have to do following some scandals including, regarding public financing and so on, one of the major reforms that were undertaken is
20 opening up the system of electing the leaders within each political parties. So the whole notion of how political parties function and how can they be made more open and democratic which is a significant challenge in my region Latin America is it's a key issue on that.

And then there are obviously major advances that are made including in my country in Chile regarding the whole procurement process that is another institution that tends to be captured. First transparencies is absolutely crucial and putting everything on line and making it contestable and subject to appeal, but also the system how competitive the bidding takes place, it is absolutely key.

And for now, last and lastly and least because it is also a great experience in the case of Chile, meritocracy, the importance of instituting and having us part of the DNA of the institutions in the country that is meritocratic, be it the civil service, their judiciary but very importantly also State owned enterprises, how the board are constituted and the top executive on State owned enterprises and on regulatory agencies.

There is a commission, there is a commission which is totally independent including outsiders from the public sector and Government and other experts that essentially provide three top candidate to the decision making body be it Parliament or the President regarding the top agencies and that politicians, those politicians can only chose after meritocracy.

So now some allowance for the political should be there and the politicians should have been elected to powers shall we say but they have to choose from that trio, that is chosen wat meritocratic suggest. There were so many thousand, tens and tens of thousands of political appointees, whenever Government change hands, political appointees were very low in terms of the totem pole or the secret services. Nowadays that has been capped and it is a very clear and limited amount which are political appointees the rest is all on democratic grounds. So these are types just to suggest that the type of reforms in that direction which are very important.

Last but not least on political campaign finance, there is a major role that the public sector plays in providing public finance which is equal across parties in terms of also access to TV and so to make the system more equal and less amenable to private influence and very, very strict gaps and bands regarding private contributions to political finance. It is just a whole field different areas where one would have to cover but of course it depends on the particular vulnerability and nature of the capture in each country where their homework needs to be done, which institutions are the most amenable to capture?

The wholly show of State owned enterprises and the reform of State owned enterprises the state of the art has advanced significantly in terms of what to do it to improve. The issue is mostly at the stage now it is not so much technical it is political will, it is political will to do it to make them truly independent commercialise. I reject and as an analyst we have done a lot of homework, I reject the notion that the only solution is privatisation.

Privatisation if well done in a particular form makes sense in some cases but not in others. State owned enterprises, if the reforms do take place and then they can perform the role that they should be performing can be efficient. We, recently an assessment was done of over 80 State owned enterprises in all gas and mining around the world and I am very proud to suggest and I didn't have any role in the methodology that Codelco the Chilean mining company came out ahead of even Statoil the Norwegian oil company and others from industrial countries and the State owned enterprises from India from other emerging economies came out, rated and assessed very, very highly so yes it can be done.

ADV THANDI NORMAN SC: Yes thank you. And then maybe you could just as well now that you are dealing with the examples of these countries and then just give us an

example of parent because you asked, you had indicated at page 106 of the transcript that you would elaborate on that, on the position of the Peruvian State?

DR DANIEL KAUFMANN: Well, Peru it is another context that is very dynamic and they made some strides unfortunately less in the potential it could have been. A number one again it is really important in Peru to recognise now the following, yes the President up to about 8 months ago or so, up to recently, President Kuczynski had to leave power, was basically sacked because he was associated with the major corruption and capture scandal that started in Brazil under the car wash scandal, which I can refer the case of Brazil because it is quite interesting in that and I had promised that if there is time an
10 interest but it goes to show first that some of these corruption and State Capture nowadays is transnational in nature and one, it is very important to always look at the role of outsiders in that, both enables in our field which is all gas and mining which is one of the areas I focus on.

There is some commodity traders in the oil business who do not necessarily behave and act in the best interest of the nation where the oil, gas and mining is being purchased as oppose to some now more enlightened transnational and multinational mining companies that are operating at a much higher standard of governance realising that ultimately it pays, it pays for the country, it pays in the long run for them.

So the first is to recognise the international dimension that has become very clear
20 recently in the case of Peru, the President loses his job but this is not a recent phenomenon and again it is really important to go back to history. Many people are focussed on the military regime of President Fujimori who also ended up in prison.

So one can say some institutions do work because there is no impunity and it happen in prison and the system that he had with the Chief of Intelligence Montesinos which was a

different type of capture because is started from that political intelligence elite but then they were in cahoots with the top business elite, some in the top business elite. They also captured the media which is a very important issue here the freedom of the press which is something we can relate to.

Later, but in that context even what happened under the military regime of Fujimori and we are talking about the '80's into the '90's, already had [inaudible 0:53:56] of corruption under the previous administration which was more democratic but with fragile institutions, the President of, President Garcia where the particular relationship with the elite had already begin to take place.

10 So already there was a history since then. In recent times, in recent months because of what has recently happened in terms of this scandal or corruption which was a bit more transnational in nature and because of the nowadays the press is no longer captured like it was before because of the civic space that is provided and the citizens demanding change, there is increasing attention to that by the top political leadership who had begun to enact certain laws and policies to try to move forward and address these issues of corruption and capture but this incipient and there one has to recognise there is a deep historical background that has to be brought into play in understanding these issues of capture. They do not happen overnight and they do not usually just happen under one regime.

20 **ADV THANDI NORMAN SC**: Thank you, and then from that answer one gets the sense that from what you have told us, there is different forms of State Capture, they come in different forms and shapes and one has to look at a particular form that present itself before that particular country at that time.

DR DANIEL KAUFMANN: That is right.

ADV THANDI NORMAN SC: Yes, and then once then a country has found that is has been captured, what is the best way of dealing with it?

DR DANIEL KAUFMANN: I would want to encourage a broader debate and discussion because you know the case of South Africa better what the notion of discovery also means. I assume it is not an overnight epiphany but it is already a process of observing and basically also feeling the consequences of a particular types of mis-governance, corruption that may be taking place already for some time and then it takes the work of a Commission like yours and I know that many Academics here working on it and so on to fully unearth what are the major manifestation, what is really happening and I know there
10 were major reports issued late, or not so late last year by the Prosecutor and so on and that is part of the process one goes on what you, I know in legal terms you have the notion of discovery but it is a process, it is a dynamic process.

Similarly the response to it which is absolutely crucial and I commend you because it, for what you are trying to do and this is such a historical opportunity here in that case, that has to be home grown and it has to draw and we, I am very pleased to have been invited here with also Joel Hellman having testified and we can provide suggestion from the rest of the world but it is more in terms of what they did and they did in response to A, B, C, and D, and you would know best what is applicable or not.

I would start this as a way of thinking about the issue in terms of asking the questions
20 regarding of what are the most vulnerable institutions that had been subject to capture and why and what are the forces behind it. In terms of the forces behind it one has to look and I speak as an Economist in terms, the incentives, what were these incentives for those that were trying successfully or not to capture, why were they there rather than say

no that is not in our interest as was told by Professor Hellman in our joint discussion from a far a few weeks ago.

It is in our human nature that is part of researchers, we know that and we try to influence, influence others and influence decisions that is true everywhere. The questions is how to organise and regulate that influencing so that it is competitive, it is legitimate. The many civil society groups, legitimate groups that want influencing in one form or another to take place and thus inform the Parliament and that is part of the vibrant democratic process.

The problem is when it becomes monopolised by the few that influences and that gets into the very important issues of conflict of interest and Labour Law Regulations. There is
10 a whole bucket there that the country would want to look at, any country in terms of whether it is appropriate to ensure vibrant, competitive influencing. Nobody would, one cannot illuminate influencing it is part and parcel, the same about the regulations and system of political campaign financing because it plays such a key role. That is another issue of public service reform related to meritocracy we just mentioned that, it is another area of focus and something that was much focussing in the case of Chile that has been dealt with.

Then there are the issues around state owned enterprises which you did mention recently and then of course the issues of judiciary. At the end of the day, these progress [indistinct] including absolutely crucial, the freedom of the media as opposed to capture
20 the media which has been a problem in many countries. The freedom of the media coupled with the accountability that civil society leaders in the outside can demand from the public service and government has proven crucial and that is proven why in Chile, parliament, parliament didn't have incentives, the congress and the parliament, the law makers, many of these laws that will be passed on political finance, it is against their

interest, but why they were eventually adopted, they had no choice. There was such a groundswell of support and pressure from civil society mobilising groups that look after what happened and these are the recommendations of the commission. The recommendations of the commission, was either we do it or we are out in the next election and many of these leaders put them on notice. This affects the voting, so that those different type of aspects need to be looked at, but which ones are crucial in the country, but to end, it was absolutely crucial all this can be happening including transparency reforms which are crucial. We have not discussed enough, but if at the end of the day, all this happens, but it is full impunity, then it has very little traction or impact, so how rule of law functions and the absence or existence of impunity is crucial and that is what has made the difference and that's why even with a lot of problems, Brazil is making progress, so they had a major scandal, a major discovery of a system of state capture. It was discovered because the judiciary had been strengthened and they were very courageous investigators and judges went out there and they unearthed a whole web of capture and corruption that involved the whole political elite that the whole personal human risk in much context, but it was because the judiciary had been strengthened.

Associated with that strengthening, was the use, the adoption and use of plea bargaining, plea bargaining as a tool for discovery and unearthing the whole problem in the system and not just with one particular individual captor. Captors is not one individual, it is usually a whole web, it is many, it could be a group of industrialists working together or a group in the financial sector having met in the shadows for a very long time, so it takes one of them to tell the whole story.

There is plea bargaining that is happening. We are witnessing this in another context in the United States right now in the case of [indistinct] but in the case of Brazil, it was

absolutely crucial, so there are all these types of innovations and reforms that different countries are undertaking. I am reticent to say this is one country with a great success. Of course I am very proud of Chile, we still have challenges there, and unfinished business, but it is very important to focus on particular areas where some countries have made enormous progress and the same country may not be making the same progress.

ADV THANDI NORMAN SC: So in those countries where it has been found that there were these transgressions, people were brought to book so to speak and you believe that if that happens at the end of the day, after all the evidence has been led, all the findings are made, that would be a necessary process to be undertaken?

10 **DR DANIEL KAUFMANN:** If I can just have one comment about that. Obviously where in settings where there is complete impunity, there can be enormous progress on the rest, but the country will have a significant challenge. Speaking very frankly, I have been a student on this issue for decades and I like to [indistinct] countries to study that share the same historical and cultural history and so on. Chile and Argentina, Argentina was much richer and much better off than Chile. We have now crossed paths because of governance in the other direction. Chile and Mexico also it's very interesting, because in Chile, rule of law has been very, very important and there have been improvements. There was more reticence of having transparency reforms for a variety of reasons. There was much more anxiety regarding that. The converse in Mexico, will make many
20 transparency reforms while the judicial rule of law is to put it mildly, a huge challenge and that is why Mexico is not making the progress it should in spite of those other reforms. Well Chile have eventually adopted transparency and so on.

At the end of the day, it's not one that will work, so you put it very rightly rule of law versus impunity is very important, it is necessary, but at the same time, it will not be

sufficient on its own. It has to be complemented by the systemic reforms that we are discussing. This is our observation in other countries. Maybe you come to a different conclusion in South Africa, but it has to be what happens with state owned enterprises in any country and what happens with the meritocracy in appointments in the public service, what happens to political campaign finance. All these other areas, if they are far, far behind, then they are going to be a major pull back in not allowing these reforms to progress even if there is no impunity, so it is just not impunity or persecutions alone.

ADV THANDI NORMAN SC: Yes and then you have linked the whole issue of transparency, conflict of interest with beneficiary ownership. Could you just elaborate on that?
10

DR DANIEL KAUFMANN: I am glad you asked about that. It is one example, a potent illustration of the notion that even if the country is not in transition, the whole legal regulatory institutional system in any country because the world evolves so significantly, has to be in transition, has to be very dynamic and evolve with the times. In the old days, there was very little ability for the corrupt to engage in, through technology now and other means in placing the monies abroad. The whole issue of illicit financial flows and so on, has taken particular prominence in our modern era. It was not such an issue 30 years ago and given the magnitude of the [indistinct] related to state capture and the ability of many to appropriate that and put them elsewhere, that has been very important.

20 All of a sudden, speaking about discovery, we get this major worldwide scandal which I am confident you are aware of, which is called the Panama Papers. That provides a major [indistinct] for many who are pushing for a long time to have much more disclosure and much more transparency in who are the real owners of the major corporations, entities activities and also those that are bidding for licences for the [indistinct] of the

country, whether it is mining or in oil and so on, so we have been asking for a long time for disclosure. One of my roles, is also to sit as a member of an international board in the extractive industry, transparency initiative which has more than 50 countries in the hope that maybe someday South Africa would wish to join, but it's helping with the norms regarding full transparency, accountability and governance in the oil, mining and gas sector across the board, so there was the push to try to have much more disclosure regarding who are the real owners that benefit from all these deals which is very important for anti-corruption and for mitigating state capture, there was a lot of resistance.

The Panama Paper scandal happens and the resistance had to be much more muted
10 and there was a big push and therefore, new regulations and requirements. In this case, it's a requirement probably but every country decides whether to adopt it in the law or not as to have full disclosure of who the actual owners are and through that, one ought to be able to see well are they very high officials, higher level politicians that are involved in these commercial oil licences and are they related to the ministry of oil. This is just an example of what is called in international lingo, the PEPT political exposure. This is to illustrate that there are certain innovations regarding laws and regulations that happen over time even in a country irrespective of how robust the original constitution and set of laws are. The same applies to anything related to technology. Obviously with the laws and regulations regarding that, it will have to be adapted to a completely new [indistinct]
20 compared with 50 years ago. So there are all kinds of innovations, but regarding the public disclosure registries in terms of every country having it viz-a-viz the beneficiary owners, both of the company, but also for the licencing's which is where their [indistinct] licencing or natural resources which belonged to the people, so if you are going to issue a licence, one wants to know who is bidding and of course transparency about the contracts and transparency about the payments that are given to government. That is

one of the major progresses that have taken place over the past 10 years. Transparency and beneficiary ownership is evolving still and many countries have not implemented it, but it is one of those.

ADV THANDI NORMAN SC: Yes and you had referred us to the emoluments clause that exists in the United States. Could you just mention that to the Chairperson, which deals with receipt of gifts?

DR DANIEL KAUFMANN: Well there is a particular legal case that is taking place right now in the United States. The emoluments clause it's a clause that comes in the constitution, but the original writers of the constitution of the United States, were talking
10 essentially 250 + years ago, they were [indistinct] have to say that no holder of high office, including the president, shall be allowed to receive any gifts from any foreign entity, particularly for a government, or even officials of the different states of the United States, the government and so on, so there can be no undue influencing from abroad or even from the other states, for both national security but also in terms of property and integrity. There have been many question marks and issues that have arisen under the current leadership and the administration in the United States and one of them, is the undue influencing of commercial business interests that may be tainting the decision making by the top leader for the public good, so as a result, the leadership of one state, the State of Maryland and some former officials of US administration, who happened to
20 be the ethic [indistinct] in charge of ethics of both – in one case a republican administration President Bush and the other case of Obama administration, they are both jointly in this case basically trying to bring to trial, for the president for violating the emoluments clause because a person that supposedly had gone to the allegations had been benefiting from his own investments that he does have in the United States and a particular example is the Trump Hotel in Washington DC which is close to the White

House, is supposedly or allegedly may have received basically foreign guests as well as leaders of particular states and as a result, benefiting from those, so that is a case that is moving through the courts and of course, the last thing is for me to comment on how it may end up. For one, the constitution can be very robust and it can be used also by the legal system of the court to respond when there is an alleged case of miss-governance or corruption or state capture however it is labelled by the law of the particular response. So this is just one illustration that sometimes a constitution can be helpful in this context.

ADV THANDI NORMAN SC: Yes and then maybe just on that issue of transparency, just the example that you gave us the other day of you having invited someone over to
10 your house and the restrictions on what to offer that person and the extent to which you can go as a host to make your guests comfortable?

DR DANIEL KAUFMANN: Well it's a quick anecdote but also I am glad you're asking me this now because it is too easy right now to be totally critical about one country or totally [indistinct] for another, that is why I was also being cautious in my own country Chile, where we still have our challenges. In the case of the United States, there are enormous institutional strengths that should be commended and that is part and parcel of governance in the country. No country in the definitions that I give about governance, the good governance, absence of state capture or corruption, that doesn't exist and therefore that's not the definition absence of corruption, that it should be equated with stellar
20 governance. Good governance is when challenges happen, that they do happen everywhere, is the ability of the system, the institution, it's the rule of law to respond to it and that is what we have done in Chile.

In the United States, for better or for worse, that is happening and there are going to be mid-term elections and so on and where it is very serious in the United States, it's the

rules and regulations and laws around governmental ethics governing public service and just as an illustration, they cannot receive gifts from an outsider. When I was heading the World Bank office in the Ukraine in the early days of transition, there I invited a high level official of one of the agencies of agriculture, who used to be in the World Bank before so I knew him, I invited him for dinner and he said I can accept dinner as long as you promise that it's not going to be a very luxurious dinner because I cannot accept even in kind anything that would exceed the cost of 50 dollars, but it's just to illustrate that in those systems, that is part of the DNA. Even if at a higher level, there may be attempts at capture as we have discussed.

10 **ADV THANDI NORMAN SC**: Yes and then maybe if you could just deal briefly with the cost of state capture to a country. You have dealt with this in your report and you have a section in the slide, if we may just go back to the slide, you have just put up two examples, could you just go back to that?

DR DANIEL KAUFMANN: Okay so you have already summarised it very well at the beginning. In fact, you had shown everybody a slide after that-

ADV THANDI NORMAN SC: That's the slide.

DR DANIEL KAUFMANN: That slide does come from us the rest was your excellent work Ms Norman. That is from our original work, one of the summaries of the data which we did summarise in the earlier hearing that we had with Professor Hellman present. It is
20 also fully explained in the statements. All that I am going to suggest here, is the enormous difference in the height of the two sets of coloured reflect what happens with a dynamism or lack thereof or the whole private sector and also more generally of the economy in countries that manage to avoid state capture versus countries that exhibited state capture. These are among the post-socialist countries in transition, so out of 27

countries it's a ratio of 2 to 1 in terms of the growth of the private sector who are not the captors. The captors that small elite, manages to benefit particularly in a captured setting. That is because they buy essentially that influence, but it is at the expense as we see in the graph, of everybody else and there is much less growth, there is much less investment and there is much less revenue for the company and importantly, which is not in this graph, there is much less protection of property rights for the regular company, the regular firm which is not the captors. The private captors buy their own protection of their property rights and they do well and they do in fact five times better in terms of the extent of protection of property rights than a non-captor firm in countries that have been subject

10 to capture.

The other countries that have managed to avoid capture, they do very well in terms of property rights, so that's one aspect of obviously the cost. If you can go to the next slide, to broaden the discussion, that comes from separate work which takes the whole world data that we have had and we have monitored and we have a set of indicators that we started developing already in the 1990's for 20 years which I call the worldwide governance indicator with my partner in these things, so we can use the data throughout the world about governance, including one of the dimensions is control of corruption which also includes capture, so this is more general.

What happens in countries that over time, have exhibited high corruption versus medium

20 level corruptions versus low corruptions. There is an extreme difference in terms of the levels of wellbeing of the population between those and that gives a sense not only about the cost of corruption, but also about the promise and the potential payoff, we call it dividend of improving governance, controlling state capture, controlling corruption. Just to give one point of data which is part of that research, a country that decides to embark on serious governance institutional reforms to tackle corruption and state capture, in a

realistic manner which doesn't mean no country can go from being the worst in the world even in 5 years to being at the top. The realistic manner is basically traversing about one fifth of what the distance between the worst and the best of the worst which is totally realistic in statistical terms.

So a country that improves realistically, significant reforms but realistic improvement that is associated with an improvement in per capita income for every citizen, if it is distributed by three times, it is a tripling of income per capita. If the country has income per capita of \$10 000 per year today, you can expect in the long term, it takes time to have \$30 000, so that applies to income per capita. That also applies to- we have seen it in the data
 10 and it goes from improving control of corruption to this. It is lessening of inequality, lessening of illiteracy, better education gains and also, very importantly, much better investments. As I said earlier, that is associated with research of others. I am not in that field. It also strengthens national security of the country, the whole issues around migration, national security around corruption and security services and so on is very important and lastly but not least, it's mentioned it also improves the prospects of democratic institutions, so it has a major also very healthy political dimension.

ADV THANDI NORMAN SC: Yes and then you had mentioned in your statement, recession in the case of Brazil, am I correct?

DR DANIEL KAUFMANN: Thank you for the question. That is the flip side of – I just
 20 tried to put it in prospective and very positive terms, what if a country does not, but a country that has been enmeshed with this corruption and indeed, what we show in our research, is that the medium and longer term impact, but nowadays, particularly when a country goes downhill in terms of corruption and state capture, they impact it's not in the long term. The income can be very, very large and it can be of a short term and it's not

only about general wellbeing objectives, it's also about the basic macro-economic financial indicators, but your deficits go up, financial crisis ensues and the rate of growth of GDP, comes to a halt very quickly. Brazil in fact for the first time in an extremely long time after a very robust period of growth entered a recession of which they are now trying to get out. They are just barely back to zero growth after being in the negative territory for a couple of years as a result of what happened.

In Peru and some other countries, because of the trans-national nature of these major state capture events, there has been a major impact not only on GDP, but on the paralysis, the sudden halt and paralysis of infrastructure and investments since much of
10 their captor was associated with construction and infrastructure companies and so on and in some cases, have come to a halt. This shows in real time and concretely on the ground, that this is not just abstract numbers, it is what's happening and that's a major cost for the middle class and for the poor that ultimately takes the brunt of this problem.

At the financial level, one more comment, this has become such a serious concern and issue, that the International Monetary Fund, that in the past, were not very focused on these issues because their limit was short-term financial issues, so corruption, state capture was a bit more foreign to an organisation like that. The World Bank was dealing more with that, but now the IMF has taken significant leadership of that and they have
20 coined a new term for the impact, potential impact of state capture and corruption in a number of countries, they call it macro critical. I mentioned that before given the concern of that and this is an example of that. Brazil was [indistinct] case for these type of organisations and looking at it more internationally, that this can have a major impact for the whole macro economy of a country, which implies major impact for the poor and the middle class.

ADV THANDI NORMAN SC: Yes, so in summary, is the last slide indicating that the sooner that you act on any suspicion or allegations of corruption and state capture the better for a country?

DR DANIEL KAUFMANN: Obviously it is incredibly important as mentioned before, the role of the judiciary and not only that the proper persecutions take place and there is no impunity as a result, but it's very important that it sends such a clear signal to the population also to investors abroad and so on which plays not only an enforcement role but a deterrent role, because the more that there is no impunity and there is a real sanction involved with [indistinct] in this form, the less you are going to have those type of cases in the future. At the end of the day, we are all human, we all make cost benefit calculations, is it worth it or not. Of course, we have our ethics too, but incentives play a key role.

Now there is in the United States again talking about the strengths of the United States, you are not supposed to and by law, you cannot evade taxes. Only about 1% of the tax payers are audited because it's millions and millions of extremely expensive and so on. However, if you are audited and you are found to have evaded, you will go to jail and you do and the politicians and others right now in the Muller case, these are some cases of how they are doing it, so as a result, the extent of tax evasion is not very large in a country like that, so it's not that you need to be auditing everything, but rule of law does work and people know here there is a sanction, one doesn't mess around with that. So just to exemplify that it is very important that a judiciary's function in any place and there is no impunity because it also plays a deterring role. At the same time, as a lead-up from your question, it is absolutely crucial in any country, to also embark and make progress on the complimentary issues and reforms that are absolutely essential, because no signal progress on just one dimension, is going to make the difference alone and that's only for

you to know regarding South Africa in the systemic sense, how much whether issues regarding safeguarding the budget from being looted what needs to be done with state owned enterprises, what needs to be done with political finance campaigns, what needs to be done in other political realms. What I was telling about Chile, you would know best.

It would be my hope, this is such an impressive initiative that you have all undertaken that this also creates a space to discuss not only the issues of prosecutions, but now legal issues that you are discussing, but to have the space of discussing more broadly what is absolutely essential as well in other realms regarding addressing state capture.

ADV THANDI NORMAN SC: Thank you, thank you Mr Chairman.

10 **CHAIRPERSON**: Thank you very much for your evidence. Would it be correct to say in the end, the whole idea behind anyone who might be wishing to capture a state, is to have influence on certain decision making institutions and functionaries within a state so that ultimately, they may have financial or business benefit, or are there other motives or goals?

DR DANIEL KAUFMANN: A very important question Mr Chairman, Mr Deputy Chief Justice, obviously from our experience in other places, the traditional and boring answer, is going to be both. The whole issue of financial motivation it's obviously a very important driver of human nature for reasons that you know better than I do, but that's not the only motivator. We collectively and in different degrees, driven by power, there are many
20 people who accept to serve in public service in positions of leadership with not full integrity and I have met so many in so many countries and that it's not for financial gain, but to have a major influence in policymaker and the power to do so, but for the public good. It's also a very important driver. Many of us, in think tanks, academics, I had an organisation which is an international institution that we also advocate with evidence for

improved governance transparency in natural resources for the benefit of the citizens of the country.

I come from Chile and my colleagues come from all over the world, we want ultimately all the benefits. That drives us and that drives many of you in public service, so the financial motive is not the only thing that obviously drives them. That's the first point, but even if the main driver, particularly by those that want to capture for their own financial benefit, is purely financial and economic, it makes a very big difference if that is in the context of enormous competition in terms of lobbying and political influencing or it's in the context of the political influencing. The extent of that political economic influencing by the few has become monopolised. The moment that it becomes monopolised and the relationship between the few and the elite, in the economic financial elite, with the top political leadership or with the law makers in parliament, it can be extremely damaging and distorted, but as I mentioned at the beginning, the intention to influence, it is part of human nature. Many organisations and groups do and we do it in the voting booth every time that we vote also, which I don't know if that is legitimate, but that's why it's so important to look at the extent to which the whole system of political influencing has been distorted or not via political campaign finance, via the way that the political parties elect and monitor their own leaders and by the issues of conflict interest, lobby laws, all that was discussed, it's what's important. In short, one cannot ban by feared influencing, that is in the human nature, but one can regulate it and ensure that there is a system put in place which is not just through laws, but through institutions and so on, provides more of a level playing field regarding such influencing.

In [indistinct] cases, this exists, a case is obviously the Scandinavian countries, where they do have a social compact among the different, with the whole population of what is legitimate and how to move forward and certain [indistinct] of equality both political,

economic and so on. Canada is a very interesting case that has made significant progress in those, so these models and these systems, it's not at an academic level. They do exist and they have achieved consensus in how to move forward and at a more practical and micro institutional level, if you will allow me to mention exciting initiatives are taking place and innovations in this day and age in many countries. In Chile there was a lot of mutual interest because we had our own after [indistinct] and so on, there is increasing effects and an interest in multi stakeholder type of institutional arrangements to reach consensus about key issues in society, so about improved governance and anti-corruption in natural resources, we have these global initiatives which is extractive industry transparent initiative.

This is where we have to agree among the key representatives of government, of industry, of investors, as well as civil society think tanks and so on and something happens when this is done in such a consensus form. It is my measured sense that in the context of improved governance and corruption, it's really important when these initiatives do embrace and involve also this multi stakeholder nature engaging civil society, the leaders in think tanks as well as the leadership in industry, the enlightened leadership. Every country does have that. We have been witnessing some from the banking system and others. In no country, it's just that this whole group, they are all tainted and so on. There are leaders with integrity and reformists among all stakeholders, just like there are others who have other interests, but it's very interesting and important how this multi stakeholder initiatives can also make progress through the commendable work of your Commission if that could be also perhaps a venue to engage in that discussion and which in some other countries, that has allowed for a broader type of consensus regarding the need to move ahead for this reason.

I am not mentioning or referring at all to the legal aspects of that which you have a very particular mandate and you know best, but from my experience in many other countries, the whole notion of moving forward, whether through one commission or separately, with a multi stakeholder dynamic discussion and debate in trying to arrive at consensus in society with that, it's something that could in the case of Chile we have done it, in the case of anti-corruption recently and so on and there are other such examples.

CHAIRPERSON: Now you mentioned that in your research, you found that in some cases of state capture, what happens is that certain groups want to change the laws and the policies of government, so as to suit their ends. I would imagine that in a case where
10 it's difficult to change laws, in terms of the constitutional and legal system of a particular country, they might want to look at people who have power, people who serve in certain institutions of government, people who occupy certain positions in government and therefore, seek to ensure that it is people that can do what they want them to do. Does that sound consistent with your experience in terms of research?

DR DANIEL KAUFMANN: Yes indeed Mr Chairman, one of the vehicles of capture, in fact rather than the indirect influencing from still saying supposedly on the outside of government through political campaign finance or through other illicit means, bribes themselves and so on. That is one way, but the influencing on who would be in a high position of power and who being in the cabinet is obviously such a form. In some
20 countries, it's no secret. In the post-Soviet era, there was even an informal price tag associated with how much a particular ministry capturing it and putting one's own person would cost and it was interesting to see the differences across ministries which was again related to the question of what are the most vulnerable sectors, where rents can be accrued, whether the country was oil rich, obviously the ministry of oil versus the minister

of agriculture and so on, so the answer is yes unfortunately, that is one of the vehicles, one of the mechanisms by which it can be accomplished.

But let's keep in mind also that yes, some countries go through increasing sophistication, development and so on like many countries here and so on, so over time, the form of corruption and the form of state capture, morphs, changes, so at a particular vulnerable time, in terms of the institutions, they may be placing directly the cabinet ministers. In some cases, some of the oligarch's quote unquote oligarch's become the leader or the state themselves. It has happened too and then over time, governance institutions they evolve, they strengthen, but that doesn't mean that state capture necessarily disappears.

10 It takes a while, but then there other forms which are more subtle through the political finance context and so on, take more prominence.

The ability to adapt and see opportunities, obviously should not only be a major priority for reformists, but unfortunately it's also what the other side is always looking how to adapt to the new policies and so, they are trying to counter those forces of capture.

CHAIRPERSON: You spoke also about state owned enterprises and that they can be a target for state capture and from what you have said, it seems you would be saying to us that talking generally, to the extent that state owned enterprises could be easy targets for state capture, that it would be important to ensure that the legal framework for example for the appointment of boards of those state enterprises, should be strong and
20 transparent maybe, the appointments should be very transparent so that in that way, one minimises the prospects that somebody, one person may just put in all the people that he or she wants to put in if all the power depends on one person to constitute boards of such entities. What would be your comment on that? Is my reading of what you say correct?

DR DANIEL KAUFMANN: Absolutely correct and one of the main concerns in a number of state owned enterprises and we have looked around the world, I would extend it not only about the board is crucial, how the board is appointed, but then I would added to strong and transparent even if it's embedded in the notion you just said of strong, the explicit notion of meritocratic, so that's extremely important, I would expand it also to the chief executives, to the top executives obviously of the state owned enterprises and then the regulations and laws that govern the independence by which they can operate, the clarity of their remit is crucial. Deliberately many of the state owned enterprises, they remit it either unclear even in the box or even if it is in the box, it's not followed and they

10 take over the production and regulatory remit at the same time, when there should be total [indistinct] and should differ in institutions, that is just to illustrate that that is happening in the oil sector or a major state owned enterprise and take both remits on the data that creates all kinds of miss-governance and potential conflict of interest and that there are many such issues that need to be clarified. Transparency also applies to the financial accounts, so that everybody can monitor that, so you are absolutely right, it is like what we were discussing before as to how to tackle state capture more generally. These what you have just mentioned, are referred to in my testimony regarding the appointment of the board is crucial, but not ought to be seen as the silver bullet on its alone. It's necessary, but not sufficient and the rest or the homework will of course

20 depend on the diagnostic of each country and state owned enterprise, but the rest of the homework on this other dimension is very important as well to compliment that initiative regarding the board appointment.

CHAIRPERSON: Well I guess you may or may not say the same thing with regard to the appointment for example of directors general in different government departments. Now in South Africa, directors general I think generally would be appointed I think one of the

witnesses told us by I think the President, I think at a certain stage, it was the President, I don't know if at another stage, it was the Minister or there was consultation between the two, but the director general is like the chief executive officer of the government department and it would seem based on what you have told us, that it may well be that if the appointment of directors general happens in a certain way, that might encourage state capture, but if it is done in a certain way, maybe very transparently and so on, maybe it might not, so I just want you to comment on that or whether you would limit what you said to state owned enterprises in terms of board and their chief executive officers?

DR DANIEL KAUFMANN: That's an excellent question because we have to
10 acknowledge that it becomes more nuanced regarding senior level appointments in government because there is a legitimate political process, there is a reason why a particular leader with a political backing, is elected into power and that is part of the political process. Then, every country differs, there is a legitimate question, the extent to which those appointments and how far down should be of a political nature and from where it's absolutely crucial to safeguard the integrity meritocratic technical integrity of the civil service and that should not be. That is [indistinct] in terms of best practice around the world that should not be touched by the political process. There was a time I studied this issue in particular depth many, many years ago, so this doesn't reflect the current era, but it was a time 20 years ago, when I looked at this issue to say in countries
20 like Bolivia, a small country, government change, 60 000 civil servants and public officials were changed as a result of change. In Japan, at the time, the mandated changes were 18 just the ministers for political reasons and of course, the reality around the world, it is somewhere in between. That is very different than state owned enterprises, that basically has to play a certain role in terms of maintaining and safeguarding the independence and functioning in an efficient and commercial way otherwise it can be an enormous drag to

economy, a social drag on society. If it happens at the end of the day, that's the difference, the last work, its state owned, but it's an enterprise. If it's going to be an enterprise, in this day and age and not be a major drain ultimately on the tax payers that pay for that that is absolutely crucial. But having said that, in terms of director generals and even those decisions that are decided to be political decisions, certain systems allow for that having an integrated degree of meritocracy in it, so at the end, the minister or the leader, basically they want to make a decision which has a political dimension, but okay, I want to see the top five candidates that will come from a meritocratic system and then on the top, I may have a political dimension with that, but at least I am choosing within a

10 [indistinct] of the most very highly qualified people with different dimensions and so on, so there are ways of integrating this with the political reality of any country and the political imperatives, but saying but I still want to get the best possible person, so I will look at that list rather than just having my person [indistinct].

The other question and you raised it with state owned enterprises the more transparent the system, the more that it will encourage – even if the ultimate decision has a political dimension, but it will encourage more credibility and more meritocracies in that ultimate decision made.

CHAIRPERSON: Do you have anything you can say about what you think could be done to protect for example, a director general who is opposed to doing wrong when for

20 example, his or her political master, wants them to do something wrong? Now if the director general concerned, his or her continued employment as director general really depends just on that one person, then there may be a risk of losing the job and therefore, that director general doesn't get protected, but at the same time, one may have to look at what you have said, to say well, maybe directors general fall within a certain category of persons where somebody in political office should be given room to put in whoever they

want in order for them to achieve their goals in government, but I am just wondering how one would balance the two to try and make sure that there is a framework or an environment that encourages directors general to say no to any attempt to get them to do wrong or to say no to state capture without being vulnerable to losing their jobs or being changed from one department to another maybe for no good reason?

DR DANIEL KAUFMANN: Again, Mr Chairman to again backstop the point that I am not an expert in South Africa and I know you are asking in general, but just showing my own ignorance, when you speak about Director General, you are referring within the ministries, not a particular outside agency or something like that.

10 **CHAIRPERSON**: Within the ministry, in our system, a director general is within a ministry, so it would be the president, the deputy president, the minister and then the director general and the Director General is basically the head of the administration of the department, whereas the minister is a political head of the department.

DR DANIEL KAUFMANN: That's clear, in other regions I have worked on, there have been permanent secretaries and there are secretaries in the United States, or vice ministers and so on, I am clear and that makes the answer even more difficult, that in general, obviously a traditional response in this, but it has been full of challenges in the implementation. The visible protection is one of those examples where it is not that difficult to get consensus to adopt it and to put it in the laws and regulations, yet at the
20 end of the day, through loopholes and the waiting implemented, it doesn't necessarily end up fully protecting the whistle blower, even if in paper or in principle, that may be the intention, that person or that functionary who is under pressure, may have serious doubts whether he or she will be indeed fully protected, so the first question is that any country would want to undertake – okay, how is our system a whistle blower protection and not

just what's written in the law? How is it being implemented and do we know for a fact, that it has really truly protected and that would have to imply that there could be no retribution and no sanction and that would be – if there was retribution and sanction, that would be subject to a high penalty for those doings, because again, we get back, that's the second comment to the issue of rule of law and judicial working.

Ultimately and I know where you seem to be going with the question, you would not want that undue pressure from the higher up to the director general to do the wrong thing and that is what we tried to do in Chile many times, to get to the situation where the director general is capable of saying do you know that if I do that, we both may end up in jail? So
10 that's where the issue of penalty and sanction being really there, this is by the way they respond at an international level and I know I am taking the [indistinct] from the director general, but I think the parallel applies.

The response that many in the early days of again United States some kudos in this case, the Foreign Corruption Practices Act, when it begins to be instituted and basically barring foreign bribery from the US at first and then it gets expanded by all SED countries, then when international executives will go to a country, a high official would say we can do this deal, but you have to give me this or that under the table. Their response was that you know that if I do that, I will end up in jail, so that to make sure that there is serious sanction for even that type of pressure and action, would be an important
20 deterrent so that the director general not only has to think do I whistle blow or not, but be able to say look, you know what will happen if we do this?

CHAIRPERSON: Thank you very much, Ms Norman you are done?

ADV THANDI NORMAN SC: Yes thank you Chair.

CHAIRPERSON: Yes is it you or is it Mr Pretorius who will tell me what is envisaged from now on?

ADV THANDI NORMAN SC: Mr Pretorius.

CHAIRPERSON: Okay thank you.

ADV PAUL PRETORIUS SC: Thank you Chair, the application in respect of at least one of the applicants will be heard tomorrow by arrangement at 10:00. We will shortly receive documentation in that respect and thereafter, we will announce the programme for the following week.

CHAIRPERSON: Thank you, thank you very much Dr Kaufmann, you have given us very
10 useful insight and to the issues of state capture and I have no doubt that we will be
enriched by the evidence you have given and there may well be further communication
between the legal team and yourself, thank you very much, you are excused. We will
then adjourn until tomorrow at 10:00. I will then deal with Ms Lynn Brown's application,
that should not take long and then we will announce tomorrow after that application, what
is going to happen for the rest of the week and next week. The proceedings are
adjourned.